Volume 58 | Issue 3 Article 2

April 1956

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WEST VIRGINIA LAW REVIEW

Volume 58 April, 1956 Number 3

PENDING PERIL AND THE RIGHT TO SEARCH DWELLINGS*

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1. A VITAL PROBLEM OF CRIMINAL PROCEDURE****

THE law of search and seizure is usually thought of as part of the law of evidence. This is only partially correct. Basically, search and seizure are part of the body of rules constituting

*The technical nature of our topic makes it impossible to give a more descriptive title. To inform the reader of the scope and import of this essay, the following definitions and explanations are offered in advance:

Pending: Imminent rather than remote, as judged by reasonable appearances and information.

Peril: A substantial danger to (a) human life; or (b) the administration of justice, due to the great probability that a dangerous felon might escape apprehension and trial, to the material detriment of the peace of the community.

Pending Peril: The term "clear and present danger" is somewhat analogous, but has purposely not been used here due to the fact that the first and fourteenth amendments to the Federal Constitution have virtually monopolized this phrase. Wood v. State, 77 Okla. Crim. 305, 141 P.2d 309, 313 (1943). Nor would the construction of the word *clear* conform to the definition of *pending* as given above.

Right: We suggest that this paper might well indicate that what is now regarded as a dubious *right* to search, may well be not only a very substantial *right,* but, under certain circumstances, even a *duty.*

Search: For the purpose of this paper the term *search* may be taken to include the subsequent act of seizure, and the precedent act, under certain circumstances, to enter, or to break and enter absent admission upon demand. That, when a right to search under warrant exists, the right to break and enter after denial, or in absence, of admission, exists also, has long been recognized. *E.g.,* 1 WHARTON, CRIMINAL PROCEDURE 87-90 (10th ed., Kerr 1918). Without the precedent right to gain entry, the subsequent rights to search and seize would be meaningless. Hence, to the extent to which a right to search premises exists, be it with or without warrant, the right to gain entry exists likewise. *Ibid.*

Dwellings: Homes presently occupied. We are not concerned with dwellings used partially for business purposes. Nor shall we deal with third parties' dwellings. See State v. Calandros, 86 S.E.2d 242, 245 (W. Va. 1955). Nor are the rules with respect to incompleted, abandoned, or temporarily unoccupied dwellings — see annotation, 33 A.L.R.2d 1430 (1954) — within the scope of this paper. As is well known, the rules as to premises not presently used as dwellings are commonly considered to be less stringent. A further limitation is noted in note 2 *infra.*

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****We wish to express our gratitude to Professor Roy Moreland, of the

the law of criminal procedure, or criminal law enforcement or administration. As such it is treated here. Truly, most frequently the issue of the lawfulness of a search is raised by an objection to the evidence. Thus, the rules of evidence constitute the leader of the pack of watchdogs which guard the sanctity of the person and the home against any undue invasion by law enforcement officers. All other controls, such as disciplinary, civil and criminal remedies against officers, play, unfortunately, only a minor role.

The law of evidence, as understood by federal courts and a minority of state courts, among them the West Virginia courts, exclude evidence obtained by unreasonable searches and seizures. Whatever the merits of this rule,—and no argument has been advanced yet which could lead to a rational conciliation between the two opposing camps—we do not here propose to take a stand on the rule of evidence. Nor do the theories here advanced require either such a stand or even a switch of position. Whether illegally obtained evidence ought to be excluded or not is not dependent on the question: what constitutes an illegal search, or, what constitutes a legal search.

It is the object of this inquiry to provide our prosecutors and law enforcement officers with an ascertainable standard of their duties. No comprehensive statute guides them through the legal labyrinth of rules of search and seizure under an overly general constitutional provision. The standard, as known thus far, is vague and uncertain. Its component parts are widely scattered. The law proceeded, for the most part, like that burlesque exaggeration of the common law which Jeremy Bentham called "Dog Law":

> "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang

University of Kentucky, College of Law, eminent authority in the field of criminal law and procedure, for having made available to us the mimeographed version of a chapter on the law of search and seizure, of Professor Moreland's book on Criminal Procedure, which is in preparation. We were gratified to note that we are in agreement with Professor Moreland on the salutary nature of the constitutional prohibition of unreasonable searches and seizures in dwellings. Like Professor Moreland, we find that dwellings may be searched without warrant only in highly exceptional cases. The group of these exceptional cases constitutes the topic of this paper.

> him for it. What way, then, has any man of coming at this dog-law? Only by watching their proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth."[1]

Bentham's amusing caricature of one of the inherent weaknesses of case law has its particular application to the law of search and seizure. But if society expects adequate protection against harm and violence, it must provide workable standards and adequate and rational rules, so that it's servants, whom it has appointed to provide this protection, know beforehand what to do and what not to do, else frustration and lawlessness will result. May the instant discussion help in furnishing such a guide.

2. A Practical Question—The Inadmissible Corpse

Recently a young unwed mother was being tried in the Circuit Court of Ritchie County, West Virginia, for the crime of manslaughter in connection with the death of her newly born child. When evidence of the post mortem examination of the child's body was offered, the objection was made that the body of the child had been obtained by a search without a warrant, and that under the federal and West Virginia rule evidence so obtained was inadmissible. It appeared that upon being informed by a physician, who had examined the young woman in Wood County, West Virginia, that she had very recently and in secret given birth to a child, the sheriff of Ritchie County had rushed to the paternal home of the young woman, which was her place of residence, but where no one was present but minor children, and had searched for the child which he found under an old phonograph and dead. The search was without a warrant and without valid consent.

Did the sheriff have the right without a warrant to search for the child in order to ascertain if it were still living, for the purpose of taking action to preserve its life? If the sheriff had reason to believe it dead, could he, without a warrant, search for the body? If a warrant were necessary, could it have been obtained?

This case has constituted a lively topic of discussion among the members of the West Virginia bar. We have reason to suspect that the problem is not confined to the case at hand, nor to Ritchie

[1] 5 Works of Jeremy Bentham 235 (Bowring ed. 1838-1843).

County, nor, indeed, to West Virginia. Yet, a preliminary check of the standard treatises revealed a dearth of helpful information on the topic. The law in the books, by inference, seems to be inconsonant with a practical solution. Is, then, this situation one of the instances evidencing the often mentioned divergence between the law in the books and the law in action?

3. Problem Question

To properly circumscribe the exact limitations of the points of law which we propose to discuss, it will be well to phrase two specific questions:

(a) Where a law enforcement officer has been informed by a reputable person about facts which indicate that human life may be in imminent danger at this instant, in a certain dwelling house, and the officer promptly rushes to the dwelling, demands admission, and, there being no response, enters and searches, not primarily to make an arrest, but principally to find and save the endangered person, is such a search lawful?

(b) In exactly the same situation as above, except with further information to the effect that the endangered person is already dead, and that the person responsible for the death is, or is likely to be, in the process of removing the body, in which case the officer searches only for the body, is the search lawful?[2]

4. The Law in the Books

> "The rights of the citizens to be secure in their houses, persons, papers and effects, against *unreasonable* searches and seizures, shall not be violated."[3]

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[2] The fact that a dead body, or, as in the first problem question, a potentially dead body, is the object of the search, indicates another limitation in this paper, namely, the distinction between objects and fruits of the crime on the one hand, and mere evidence of crime, such as a suspect's diary, on the other. We are dealing only with the former category. Whether the distinction between the two categories is justified or not, seems to be no longer subject to debate. Courts have tended to apply stricter rules as to things merely evidencing crime, *e.g.*, letters, documents, books, etc., but lawfully owned and possessed by the person searched. An extension of these stricter rules to objects and fruits of crime must be guarded against. Boyd v. United States, 116 U.S. 616 (1885); United States v. Thomson, United States v. Craig, 113 F.2d 643, 129 A.L.R. 1291 (7th Cir. 1940). The annotation to the latter case, at 129 A.L.R. 1296, is a valuable and informative discussion in point.

[3] W. Va. Const. art. III, § 6, identical with the fourth amendment to the Federal Constitution. Emphasis supplied.

Some writers and lawyers seem to believe that *any* search of a dwelling is unlawful at common law:

> "The poorest man may, in his cottage,
> Bid defiance to all the forces of the Crown.
> It may frail;
> Its roof may shake;
> The winds may blow through it;
> The storm may enter;
> But the King of England may not enter;
> All his forces dare not cross
> the threshold of the ruined tenement."[4]

Unfortunately—or perhaps fortunately—poetry does not help us to solve concrete cases. Nor does it tell us what the law has been and what it presently is.

In West Virginia the phrase "unreasonable searches" seems to have been construed to include "[a]ny search of a person's house without a valid search warrant."[5] But this is, at the most, a statement of the general rule as presently understood. A number of exceptions to the search warrant requirement have long been judicially recognized. Thus, (1) a search of a dwelling without a warrant is lawful where there is consent by a person legally entitled and capable to grant it.[6] (2) Some search of the person and the room of the home wherein he is found is permitted, and virtually required for the safety of our law enforcement officers, as an incident to a lawful arrest, and no special search warrant is required.[7] (3) A search of a dwelling without a warrant is permitted where any of his *senses* inform an officer of the law that a felony is being committed.[8] (4) Finally, a "mobile" home—ship, wagon, trailer (?) — may be searched without a warrant under proper circumstances.[9]

It will be noticed that while the first of these exceptions is based on an absence of insistence on official force, the latter three rest

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[4] From Chatham's Speech on General Warrants, quoted in State v. Littleton, 108 W. Va. 494, 498, 151 S.E. 713 (1930).

[5] State v. Slat, 98 W. Va. 448, 449, 127 S.E. 191 (1925); and *see* State v. Littleton, *supra* note 4; State v. Joseph, 100 W. Va. 213, 218-219, 130 S.E. 451 (1925); State v. Wills, 91 W. Va. 659, 669, 114 S.E. 261 (1922).

[6] State v. Littleton, note 4 *supra*, at 497-498.

[7] State v. Adams, 103 W. Va. 77, 136 S.E. 703, 51 A.L.R. 407 (1927).

[8] State v. Thomas, 105 W. Va. 346, 143 S.E. 88 (1928). A still in operation; odor attracted officers who entered and seized in *D's* absence.

[9] State v. Joseph, note 5 *supra*, at 218-219, citing Agnello v. United States, 269 U.S. 20 (1925).

on what may be termed *pending peril.* An arrested felon is likely to be armed. The officer's life is in danger until he makes sure that the arrestee is unarmed. The life of the officer is a greater interest than the immunity of the arrestee against search and seizure. This weighing of two interests equally protected by the constitution in favor of the right to search—thus, in favor of human life—is as much a matter of common sense—hence, this search is not "unreasonable" in common parlance—, as it is a matter of proper and practical constitutional construction.[10] More than that, by weighing the interests of society, acting through its officer, against the individual's recognized opposing interest in extreme cases, society does nothing but protect itself against disintegration for the ultimate benefit of all its individual members. This, indeed, is the very foundation of society and its laws.[11] The pending peril in the second exception is, thus, a peril to life. It is noteworthy that in order to avert this peril, the arresting officer may search the arrestee's person as well as "the premises under his immediate control."[12]

In the third exception there also is clearly a pending peril, namely one which is directed against the administration of criminal justice itself.[13] The perpetrator whose crime has been detected and who, as is frequently the case, gains knowledge of the detection, would have ample opportunity to remove the evidence of his criminal activity if the officer of the law were to depart from the scene in order to obtain a search warrant. The result would be an impossibility to convict known offenders, whether they illegally distilled intoxicating liquor, traded in narcotics, attempted arson, or perpetrated a murder.

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[10] *Accord,* Marshall v. Commonwealth, 140 Va. 541, 549, 125 S.E. 329 (1924).

[11] See Mueller, *The Problem of Value Judgments as Norms of Law: The Answer of a Positivist,* 7 J. LEGAL ED. 567, 571 (1955).

[12] State v. Adams, note 7 *supra,* at 79-80. The scope of such a search and seizure, sanctioned by the law of this state, goes considerably further than any *pending peril* requires. Yet, nobody would contend that the rule, so stated by Judge Litz of the West Virginia Supreme Court of Appeals, is an unreasonable one.

[13] The phrase *peril against the administration of justice* is a sweeping one. History has taught that it can be subject to much abuse. We advocate no such use of the phrase. As used and understood here in connection with the law of search and seizure, it applies only to the danger of the destruction of tools or fruits of crime which would enable a highly suspected felon to escape a trial which alone can result in an adjudication of guilt. It is to be further noted that the phrase is used in connection with *reasonable* searches and seizures. Its scope, thus, is limited by the reasonableness of the circumstances under which the officer of the law acts. See note [9] supra, under *peril.*

The fourth exception is self-explanatory. Again, the pending peril toward law enforcement is its rationale. Removal of the mobile home out of the jurisdiction would not only be likely but certain, where its owner has reason to believe that the evidence of crime in his home will be seized shortly, *i.e.*, after procurement of a warrant by the detecting officer.

It is at once apparent that our problem question (a), *supra*, involves a case of pending peril toward human life. Indeed, provided the information given to the officer is reliable—of which the officer must, of necessity, be the initial judge[14]—the probability of death absent intervention by the officer here is considerably more urgent and much larger than in cases falling under the second exception to the warrant requirement. Yet, problem question (a) involves no arrest for felony. Thus, it would seem that the officer can not intervene without a warrant, unless some other proposition of law would dispense with the duty to obtain a search warrant.

Similarly, in our problem question (b) the pending peril toward the due enforcement of the criminal laws for the protection of the peace of the community is as large as in cases under exception(s) three (and four) to the warrant requirement. But since none of his *senses*[15] has warned the officer of the commission of a felony, and since the *commission* of the felonious homicide has ended,[16] the suggested case does not fall within the recognized exception, and a search warrant seems necessary.

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[14] To the effect that a peace officer in the execution of his duties is presumed to act in good faith, that in situations requiring immediate action the officer is primarily the judge, and that "[h]is conduct must be weighed in the light of the circumstances under which he acted and not measured by subsequently developed facts," see Barboursville v. Taylor, 115 W. Va. 4, 174 S.E. 485 (1934), and cases cited there. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. [But t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant of search may be dispensed with." Johnson v. United States, 333 U.S. 10, 14-15 (1947).

[15] Strangely enough, the law does not accept the brain power, or reasoning ability (common sense, if you wish), as one of the human senses which may *lawfully* warn a police officer of the present commission of a crime. Where lies the distinction between seeing the commission of a crime and seeing objects, movements, or occurrences from which the commission of a crime can be inferred?

[16] Lip service is being paid to the mandate that the felony must be in progress. In State v. Thomas, note 8 *supra*, the officers smelled the odor of moonshine in the making, entered the building whence the odors came, found a still in operation, and seized it. Nobody but the officers was on the premises.

5. A DILEMMA—*de "maximis" non curat lex*

So far we have assumed that it may be legally possible to obtain search warrants in the cases suggested by our problem questions, even though it would seem to be factually impossible, nay ridiculous, due to the emergency of the situations, to attempt to obtain a warrant under these circumstances. But is it certain that warrants will be issued in our suggested cases of capital offenses?

Under West Virginia statutes search warrants may be issued for such heinous and divers items as intoxicating liquor, fighting cocks, counterfeit coins, books containing obscene language, pornographic prints, branded bottles, a bingo or lottery ticket, and many other articles too numerous to mention.[17] No West Virginia statute authorizes a search warrant for such innocuous items as a destructive bomb, poisonous gas, inflammable or explosive substance, a dead human body, or a child in imminent danger of wrongful death. It would seem to be reasonably safe to say that the common law maxim *de minimis non curat lex* has no application to the statutory law of search and seizure in this state. To the contrary, *de "maximis" non curat lex* would seem to be the rule if the statutorily enumerated items constitute the entire slate of articles subject to search. One line of authority seems to support such a fantastic conclusion:

> "Search warrants were unknown to the common law. Even searching for stolen goods crept into the law by imperceptible practice; and Lord Coke denied its legality. 4 Inst. 176. Judge Cooley says: 'But as search warrants are a species of process exceedingly arbitrary in character . . . the rules of law which pertain to them are of more than ordinary strictness. . . .' Const. Limitations, (7th ed.), 429."[18]

Under rules of extraordinary strict construction are we to believe that search for the enumerated pitiful items is lawful—by statute—

The court held that a felony was presently being committed in the building. How can that be? A present felony in the building needs a present felon right then and there, as a felony can not possibly commit itself. It is suggested that a felony *had* been committed when the felon was present, and that a felony was to be committed again upon the felon's resumption of his illicit labors. But logic had to give way to practicability, and reasonably so. State v. Thomas is sound in result. Unfortunately, no analogy can be drawn to the mere presence of a corpse. By no stretch of the imagination can it be said that the felonious homicide is still being committed as long as the body is present.

[17] The more important of these items are listed in W. VA. CODE c. 62, art. 1, § 18 (Michie 1955).

[18] State v. Moran, 103 W. Va. 753, 757, 138 S.E. 366 (1927), deletions ours.

and that search for much more noxious items is unlawful—absent specific statutory authority?

6. Property Subject to Search

The existence of statutes listing such harmless and innocuous items as proper objects for the issuance of search warrants, and the absence of statutes naming human corpses, time bombs, murder weapons, etc., can lead to only one reasonable inference: the legislature assumed that for heinous and destructive articles searches with or without warrant may be made as a matter of course, by the common law. Since the present statements of the law of search and seizure are usually based on broad *dicta* rendered during the prohibition era, we had to consult pre-prohibition text books and treatises, in order to find out what the common law rule of search and seizure encompassed, particularly at the time of enactment of the various pieces of legislation which comprise our present body of statutory law on the topic. The state of the law *at that time* furnishes the clue to the understanding of these isolated statutes. In so inquiring, we followed the well known maxim that in the interpretation of any statutory or constitutional provision, it is of prime importance to inquire what the state of the law was, and what other contemporaneous circumstances existed, at the time of enactment.[19] A search of the older sources proved rewarding. Mr. Wharton, then the principal authority on criminal procedure, stated:

> "The police power of the state extends to the search for seizure . . . of any and all property which is the subject of crime, or is the means of perpetrating a crime."[20]

In Clark's *Criminal Procedure* the common law rule is described as follows:

> "At common law, in order to recover stolen property, or, it seems, to procure evidence of crime, a magistrate . . . may issue a warrant . . . to make a search for and seize the property described in the warrant. . . . [I]n addition to this there are statutes authorizing search warrants in cases not covered by the common law, such as warrants to search for and seize intoxicating liquors, lottery tickets, gambling apparatus, etc., kept in violation of law."[21]

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[19] State v. Harden, 62 W. Va. 313, 323, 58 S.E.2d 715 (1907); *see* State v. Kees, 92 W. Va. 277, 281, 114 S.E. 617, 27 A.L.R. 681 (1922).

[20] 1 Wharton, Criminal Procedure 91 (10th ed., Kerr 1918), citing, *inter alia*, Fulton v. State, 171 Ala. 572, 54 So. 688 (1911).

[21] Clark, Criminal Procedure 68 (1895).

It is understandable that no text writer at that time could furnish long lists of precedents. Prior to the prohibition era the problem of search and seizure arose rarely. But though the rules stated above may be supported by but few precedents, they have the support of reason, and the name of the common law.

With the knowledge of the common law rule as understood in pre-prohibition times, particularly during the second half of the nineteenth century, it is now easy to explain the apparent discrepancy. By the common law property subject to crime, or used for crime, was also subject to search and seizure. There is no reason to believe that the legislators were ignorant of the rules so stated in the leading text books of the day. When the common law list of crimes was enlarged by new statutory crimes, it was felt that the common law list of property subject to search had to be enlarged accordingly. Thus, as Clark indicated in the quoted excerpt, stop-gap statutes were passed to extend the law of search and seizure to the newly created offenses. This, then, explains our list of statutes making innocuous items, objects of statutory petty offenses, proper items of search and seizure, and the absence of similar statutes covering serious common law crimes.

It is here not disputed that in days long bygone the only property subject to search and seizure may have been stolen property.[22] But certainly by the end of the nineteenth century, and probably long before then, the practice in the trial courts had extended the list of objects to the scope indicated by Wharton and Clark. Even in England, in the face of a number of decisions by courts of highest authority to the contrary, police and trial court practice had long since discarded the larceny limitation.[23] There the proposition that the right to search extends to objects other than the fruits of larceny and offenses mentioned by special statute, has become commonplace.[24]

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[22] Wade, *Police Search*, 50 L.Q. Rev. 354, 357 (1934).

[23] *Id.* at 366, quoting c. IV, §§ 120-121 of the Report of the Royal Commission on Police Powers and Procedure (1929).

[24] Although illegally obtained evidence appears to be admissible under the English rule, one would expect some language in the cases expressive of a limitation to certain articles and crimes, if there were such limitations. But there is practically complete silence on the point in the English cases. The absence of trespass actions against police officers for taking property other than that specified by stop-gap statutes, or stolen property, lends further support to our conclusion. Gen. see Wade, *supra* note 22.

Perhaps it is unfortunate that the proposition became, by necessity, reason, and long continued practice, so firmly embedded in lower court practice that nobody, in recent years, dared any contest on the appellate level. But, as Mr. Justice Frankfurter recently reminded us, "law is not restricted to what is found in Law Reports."[25]

In West Virginia we are, however, fortunate enough to have some judicial indication as to the type of property which is subject to search and seizure. In *State v. Adams* the court dealt with the right to search that part of the dwelling of a defendant in which he was arrested. The court listed the following items as proper objects of search and seizure:

> ". . . evidence inseparably connected with the *corpus delicti* of the crime charged, such as the instrument with which the crime has been committed, articles of evidentiary value connected therewith, the fruits of the crime, dangerous weapons, stolen goods, articles which might enable a prisoner to escape, or evidence to identify the prisoner."[26]

The fact that the search was incidental to arrest, rather than under warrant—a fact which might be regarded as limiting the list of seizable goods strictly to weapons—did not influence the court, and properly so, for the reason that the incriminating property so found in an incidental manner is no less trustworthy than property which was the object of a specific pointive search under warrant. There is no reason, legal or otherwise, which would necessitate different lists of property subject to search and seizure for cases resting inherently on the same principles, even though depending on the vagaries of the situation as to the impetus for the exercise of the right.

The United States Court of Appeals for the Seventh Circuit has properly summarized the rule in *United States v. Thomson*:

> "A valid search may result in the seizure of papers as well as other kinds of property. The test is not the nature of the property seized (papers or liquor for instance), but whether such property was by the accused used in perpetrating a crime."[27]

It follows that in West Virginia, as elsewhere, the proper judi-

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[25] Concurring opinion in Bernhardt v. Polygraph Co. of America, 76 Sup. Ct. 273, 280 (1956).

[26] 103 W. Va. 77, 79-80, 136 S. E. 703, 51 A.L.R. 407 (1927).

[27] 113 F.2d 643, 645 (7th Cir. 1940).

cial officers have the power to issue search warrants for all articles specifically mentioned by statute, as well as for articles which are the objects of common law crimes.[28]

7. Search of a Dwelling Without a Warrant

Having settled that items like dead or dying human beings, time bombs and dangerous weapons are just as much proper objects of search and seizure as fighting cocks and soft drink bottles, we are now faced with the far more difficult question as to the scope of the right to search private dwellings without a warrant. At the outset we have noted that four exceptions to the warrant requirement are being recognized virtually everywhere; and we have seen that these exceptions—apart from the consent exception—rest on a concept which we have called *pending peril.* The question now

[28] Who may issue search warrants in cases of common law crimes?—A collateral West Virginia dilemma. By statute the duty, or power, to issue search warrants falls primarily upon justices of the peace. W. Va. Code c. 62, art. 1, § 13 (Michie 1955). But, as has been amply discussed, the statute fails to mention all common law offenses, save larceny. Since the statute is silent on all other common law felonies, does it follow that only circuit court judges—already overburdened as they are—can issue such warrants? Or do justices have the power? An often repeated slogan seems to deny justices this power. "The powers of a justice are such only as are expressly conferred by statute." 11 Michie's Jurisprudence, Virginia and West Virginia, *Justices* § 8. This statement is a weasel phrase. *Michie's Jurisprudence* is unable to cite any direct authority in support thereof. Indeed, neither the Constitution, nor any statute, contains any such mandate. Cases which have used the phrase rest on premises entirely different from those involved here. *E. g.*, cases like Norfolk & W. Ry. v. Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L.R.A. 414 (1898), deal with powers once possessed by justices, by common law or statute, which were later abolished by the legislature. Such is not the case with respect to the power to issue search warrants. Under W. Va. Const. art. VIII, § 28, justices "shall be conservators of the peace and have such jurisdiction and powers in criminal cases as *may be prescribed* by law." (Emphasis supplied.) While this sentence undeniably encompasses future acts of the legislature, it includes, by being phrased in the subjunctive mood of the present tense, all such powers which at the time *presently* existed, by reason of common law or statute. This provision of the Constitution of 1872 was copied, almost verbatim, from the Constitution of 1863, art. VII, § 9, constituting the first mention of the jurisdiction and power of justices under West Virginia law. There can be no doubt about the meaning of this provision. The same draftsmen who wrote the Constitution of 1863, also wrote the Act of December 7, 1863, which reads: "The common law and statute laws now in force relating to . . . the power . . . of justices . . ., shall continue in force so far as they are not inconsistent with this act." W. Va. Acts 1863, c. 122, § 239. Since no argument can be made that any statute was in force then, or has been enacted since, which is inconsistent with the common law power of justices to issue warrants—subject only to constitutional limitations, State v. Kees, note 22 *supra*—such rights exist in justices of the peace in West Virginia today. That justices had such common law powers is not in dispute. See Hening, New Virginia Justice 524-525 (1810); 2 Hale, Pleas of the Crown 149 (Emlyn ed. 1778).

presents itself: are other exceptions tacitly recognized, or did they exist prior to the enunciation of the present hornbook rule?

As has been indicated, the present rules of our law of search and seizure have been formulated during the era of the prohibition laws relative to intoxicating liquors, with crimes which are not the subject of universal condemnation and were, perhaps, not condemned too bitterly by anyone. As sentiment against the prohibition laws and their interference with the private lives and habits of the citizens was mounting, the courts were found to be increasingly diligent in protecting private property, but particularly the sanctity of the home, against searches and seizures. An emotional attitude, resulting, we assume, from the severe penalties of the prohibition laws, led to more and more safeguards against conviction for violation. During the course of this reaction the courts made many broad general statements which went far beyond the immediate necessities of the cases under discussion. Digest compilers followed suit and undertook to proclaim such dicta to be the law of the land. Thus, a situation was created where not only unreasonable searches were prohibited, but where even many reasonable searches became of questionable legality.

We do agree with such broad general statements to the extent that there are few, if any, cases involving intoxicating liquor, and other instances similar in nature, where there could be any inherent necessity for search without a warrant. If, on the other hand, an officer of the law, having reason to believe that life is in imminent danger, or that a homicide has occurred, and that an early examination of the body is necessary in the investigation of the crime, particularly to preserve the evidence, must obtain a search warrant, where can be found the example of the *reasonable* search which our constitutions allow?

In *State v. Mason* Judge Miller of the West Virginia Supreme Court of Appeals explained: "In any of the cities and towns in this state it is a very simple matter and takes but a few minutes to secure a search warrant when one is needed."[29] We concur with Judge Miller, except for the last four words. When the need for a search warrant arises, the procurement procedure can usually not be reduced to a few minutes. Criminals do not arrange the commission of their offenses according to the office hours of the justices of the peace. Nor are they accommodating, geographically, in the

[29] 103 W. Va. 753, 758, 138 S.E. 366 (1927).

places they select. Nor will they stay all activity directed toward the removal of evidence until the peace officer has returned with a warrant—not even for a few minutes.

It must be asked, was it necessary in pursuit of a reasonable enforcement of the prohibition laws to announce a rule which would preclude *any* search of a dwelling, the four narrow exceptions notwithstanding, no matter what the exigencies of the situation?

According to Cornelius, who wrote in the prohibition era, the law permits of no other exception.[30] A recent writer is in accord,[31] and so are most current texts and encyclopedias.

But such statements are not consonant with the common law rule of pre-Volstead days. Mr. Wharton said:

> "Probable immediate danger of a felony, or breach of the peace, or other grave offense existing, the officer, giving notice of his character, may enter [a dwelling] without a [search] warrant."[32]

Be the reader reminded that this rule has not been drowned in alcohol, nor have the books been burned which evidence the common law. Wharton and his contemporaries relied for this rule on cases from both the law of search and seizure and of arrest. In fact, a century or so ago little distinction seems to have been made between cases of arrest and cases of search and seizure, within the field of criminal procedure.[33] The sanctity of the person seems to have been at a par with the sanctity of the home—which under modern law of arrest certainly is no longer the case—and rules of law and precedents seem to have circulated freely between the two categories of cases. The reason is obvious. Apart from the analogy, the search is merely a preliminary step to the arrest. If the search is successful, arrest will follow necessarily.

This historical fact should lead us to a present-day comparison between the two different spheres, in an effort to gain further insight.

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[30] CORNELIUS, SEARCH AND SEIZURE c. VI (2d ed. 1930).

[31] MACHEN, THE LAW OF SEARCH AND SEIZURE cc. 2 and 3 (1950).

[32] 1 WHARTON, CRIMINAL PROCEDURE 89 (10th ed., Kerr 1918). For authority Wharton crossrefers to his work on (substantive) criminal law. 1 WHARTON, CRIMINAL LAW § 566 (11th ed., Kerr 1912, has been used in our research).

[33] For example, the Bill of Rights, adopted by the Virginia Constitutional Convention on June 27, 1788, and attached to the resolution of June 26, 1788, ratifying the Federal Constitution, in article 14, speaks of "all . . . warrants . . . to search suspected places, or seize any freeman, his papers or property." Such a commingling of arrest and search and seizure is indicative of the unity of thought and theory with which the topics were viewed at that time.

8. The Arrest Analogy

Under the constitutional clause which declares that no person shall be deprived of life, liberty, or property without due process of law,[34] no arrest can ordinarily be made without a warrant. To that general rule, however, many exceptions, arising out of necessity, are recognized by the courts.

"[I]t appears that an arrest without a warrant is lawful,

(1) where a felony has been committed,
(2) where it is being committed,
(3) where it is about to be committed,
(4) when a misdemeanor is committed in the presence of an officer, and,
(5) where a breach of the peace is imminent."[35]

To justify an arrest upon a felony charge without a warrant it is only necessary that the officer have reason to believe (including information) that a felony has been committed.[36] The reasons for the exceptions to the rule requiring a warrant for arrest seem reasonably apparent. They arise from the inherent necessity of the situation. Where the immediate necessity to preserve life, or to prevent infringements upon the liberty of others, is greater than the desirability of protecting the liberty of the individual, the balancing suggested in *Johnson v. United States* occurs,[37] and the arrest without a warrant is permitted. It is noteworthy that these exceptions to the warrant requirement in the law of arrest are again all cases of pending peril to human life, or to the due enforcement of the criminal laws for the preservation of the peace of the community. If there were no better ground on which to base a reasonable search and seizure rule, would it not be compelling analogy to reason in one case exactly as in the other? namely: where there is reason to believe that the immediate necessity to preserve life, or to prevent infringements upon the liberty of others, is greater

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[34] W. Va. Const. art. III, § 10, identical with provisions in the fifth and fourteenth amendment to the Federal Constitution.

[35] Byrd v. Commonwealth, 158 Va. 897, 164 S.E. 400, 402 (1932), and authorities cited there.

[36] State v. McCauley, 130 W. Va. 401, 43 S.E.2d 454 (1947); State v. Spangler, 120 W. Va. 72, 197 S.E. 360 (1938); State v. Lutz, 85 W. Va. 330, 101 S.E. 434 (1919); Allen v. Lopinsky, 81 W. Va. 13, 13, 91 S.E. 369 (1917). For an able discussion see Lugar, *Arrest Without a Warrant in West Virginia* 48 W. Va. L.Q. 207 (1942).

[37] Note 14 *supra*.

than the desirability of protecting the right of one who, according to all reasonable appearances, has offended, and forfeited this right, and has created this infringement upon the right of others, an officer of the law may take emergency measures of a preliminary nature against the putative offender.

But, as has been shown, no reasoning by analogy is needed to provide a proper foundation for a rational search and seizure rule. This has been done a century or more ago, and we merely are called upon to reassert the rule. Before attempting to delineate and to formulate the rule of law, it is important to call attention to one further almost forgotten basic legal concept which had a most important influence on the development of the law of search and seizure, which, indeed, is its *sine qua non.*

9. The Police Duty to Protect Life, Liberty and Property

The power to search for, and to seize, the tools and fruits of crime, is one of the governmental powers, exercised by duly appointed agents, for the common weal and the protection of life, liberty and property of every individual citizen. All too frequently this underlying purpose has been forgotten, and the search and seizure rules are regarded as themselves an infringement of the rights which they are designed to protect. It is necessary to keep the proper relation in mind. This governmental function of which we speak is nothing but the age-old duty of society towards its members. Rarely is it clothed in terms of a rule of law in the category of duty on the part of the state, though in terms of the corresponding right in the individual citizen it is known to all of us in form of the due process clause of the Constitution, both federal and state. Professor Perkins, in his work on the *Elements of Police Science,* called this societal function, or duty, a

> ". . . species of governmental activity which has for one of its chief objects the protection of the lives, limbs, health and comfort of all persons and the protection of all property within the state."[38]

[38] Perkins, Elements of Police Science VII (1942). One of the best known formulations is that of the great codifiers Suarez and Klein, as contained in the Prussian Territorial Code of 1794, pt. II, t. 17, § 10, enacted thirty-five years prior to the establishment of the first police force in the common law world by Sir Robert Peel, London 1829. This section reads: "It is the duty of police to take the necessary and proper measure for the maintenance of public peace, safety and order, and to avert perils threatening the public or its members."

Such, indeed, has been the duty of the state, and the object of its police power, from the days of the ancient Greek *polis* to the twentieth century American city. It is entirely above any question of political organization or doctrine. It is this police power which binds the fire department to rush to a flaming house, to break and enter, to search for the source of the flames and to extinguish them, and, indeed, to seize any evidence of arson on the spot. Yet, nobody has contended that here we are confronted with a question of (unlawful) search and seizure.[39] It is this police duty also which binds the peace officer to protect the life of the citizen,[40] to apprehend his kidnappers, to protect the citizen's property against burglars, and to break doors and enter houses in order to rescue the citizen from the clutches of a homicidal attacker. And again, nobody would be bold enough to assert that the citizen is protected in his home against rescuers.

The rule of law, phrased in terms of search and seizure, as well as arrest, which has emerged from this basic police duty, has become known as the *emergency call "from within" doctrine:* where in an emergency the police is called by an occupant or other person within the dwelling, it has a right, nay a duty, to enter.[41] But it is probably impractical to demand an emergency call "from within" in all cases. Clearly, if the fire department is alarmed by a neighbor, it may nevertheless break the doors of the burning dwelling; and when the call for help is issued by a passer-by who witnessed a homicidal attack within a building through an open picture window, the police must enter.

There is no right and no duty in any system of law which could not become the subject of abuse. It is not our task to determine where the limits lie. But in one respect we can voice certainty: when a police officer obtains certain knowledge of a grave and pending peril inside a dwelling, which permits of no delay, it is his duty to enter, or to break and enter after having been refused admission, to search, to seize, and, when possible, to arrest. Under this rule it can make no difference that the call came from without, that the information obtained may be only highly, but not absolutely,

[39] See Judge Holtzoff's dissenting opinion in District of Columbia v. Little, 178 F.2d 13, 24-25 (D.C. Cir. 1949).

[40] Though the recent New York case of Schuster v. New York, 286 App. Div. 389, 143 N.Y.S.2d 778 (1955), has cast some doubt upon any such duty. See comment 58 W. VA. L. Rev. 305 (1956).

[41] *See* McDonald v. United States, 335 U.S. 451, 454 (1948). For an analogy—search of a dwelling by consent, but without call—see note 6 *supra*.

certain, that the criminal who created the peril is the owner and occupant of the premises, or that he may have quickly escaped through the rear door. As to the nature of the peril we can render only an informed surmise: it certainly exists where human life is in danger certainly when the dwelling itself is in danger (arson, bombing, etc.), and certainly where delay might enable a person suspected of felonious homicide to escape the course of justice, *i.e.*, where the officer's departure from the scene might enable the suspect to dispose of the evidence. We can hardly imagine a non-capital crime which could fall within the pending peril rule. On the other hand, any capital offense, or the attempt to commit such an offense, or any crime likely to result in a capital offense, is subject to the state's emergency police power to enter private dwellings for rescue and relief ancillary to obtaining judicial process.

10. FEDERAL STANDARDS—GOOD FAITH PLUS NECESSITY

These considerations, particularly those resting on the common law of search and seizure, as delimited by the constitutions, but also those based on the police duty of the state, have found some judicial expression, and are phrased in terms of *reasonableness.* The United States Supreme Court has been the leader in the development of this standard, though unfortunately rather general, test. This test rests on the premise that

> ". . . it is only unreasonable searches and seizures which come within the constitutional interdict. The tests of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' Go-Bart Importing Company v. United States, 282 U. S. 344, 357 (1931).
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> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant."[42]

A number of eminent judges have given us further leads. Reasonableness, it appears, consists of two factors: good faith and necessity.

(a) *Good Faith.*

> "The authority [to search] must be confined to narrow limits and *utmost good faith* exacted. . . . The restraint can

[42] Mr. Chief Justice Vinson in Harris v. United States, 331 U.S. 145, 150 (1946). This case involved a search incidental to arrest.

> best be imposed by an inquiry into the *bona fides* of the declared purposes of the search and the trial court is the first and best judge of whether the challenged search was reasonably incident to its permissible purposes."[43]

Frequently the standard of good faith becomes the criterion of distinction between pointed and exploratory searches.[44] For example, in our sample case (a) the officer of the law would appear to be justified to search for an infant body on the premises where the body is reported to be. Such a pointive search would not justify the officer to search all parts and objects of the premises. Clearly, a search of the pockets of all clothing within the premises would become an exploratory search not necessitated by the original purpose of the undertaking. Extension of a pointive search to an exploratory search, however, is merely one of the many possible instances evidencing lack of good faith of the searching officer. More obvious examples of bad faith are easily imaginable.

(b) *Necessity.* Good faith alone will not make the search of a dwelling reasonable, unless the necessity of the situation demands immediate action, rather than procurement of a search warrant. The courts in the various jurisdictions have viewed *necessity* through different glasses. An investigation of the rules in all those of the fifty-two American jurisdictions which may have declared their position is clearly beyond the scope of this paper. Suffice it to repeat that, as stated initially, the West Virginia court has had occasion to recognize three such instances, or distinct groups of cases of necessity, namely cases of arrest, cases of *sensing* a present felony, and cases involving mobile homes. We have seen that the *pending peril* in such situations provides the rationale and explanation of the general term *necessity.*

But the United States Supreme Court has announced repeatedly that cases of necessity, or pending peril, can not be conveniently fitted into ready molds. Federal appellate courts have also indicated that the group of exceptions to the warrant requirement is not closed. In *District of Columbia v. Little* Judge Prettyman speaks of the right to invade a private home in "an immediate major crisis in the

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[43] Harris v. United States, 151 F.2d 837, 840-841, 169 A.L.R. 1413 (10th Cir. 1945). Emphasis supplied. By these standards the Court of Appeals held that the trial court had properly found such good faith (*bona fides*) in the officers. By the same standards the United States Supreme Court affirmed, note 42 *supra.*

[44] *Ibid.*; Maron v. United States, 275 U.S. 192 (1927).

performance of duty [which] affords neither time nor opportunity to apply to a magistrate."[45] In *McDonald v. United States* Mr. Justice Douglas spoke of cases in which officers are "responding to an emergency" or when there are "other compelling reasons" (by the latter, presumably, referring to the already classified three instances).[46] Mr. Justice Jackson conceived of "exceptional circumstances,"[47] and "urgent circumstances."[48] The courts did not leave us in doubt about the nature of such exceptional circumstances. In addition to the already categorized, *i. e.*, adjudicated, three groups of cases, there seems to be a fourth residuary group of cases, comprised of the following elements:

(a) "evidence or contraband [is] threatened with removal or destruction;"[49]

(b) "evidence of [the] existence [of crime] . . . would perish [by reason of] the delay of getting a warrant;"[50]

(c) in an exceptional circumstance, permitting of no delay judges (or commissioners) are not readily available;[51]

(d) officers are responding to an emergency call for help.[52]

So far no court on the appellate level has answered either of the two questions which we posed at the outset. But, in view of all indications given by highest judicial authority, and as outlined above, can there be any doubt about the outcome of any such case?

Conclusion

In this essay we have endeavored to clarify an obscure area of the law of criminal procedure, and to state to the best of our abilities the rules of law of today. Courts necessarily have restricted their statements to the facts at hand, textbook writers have shunned the problem for its obscurity, or have relied on statements from an era which this nation has outgrown. The prohibition is no longer with us, nor the need for "snap judgments" and "straight jacket interpretations."[53] It is safe to leave the standard of haggard mor-

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[45] Note 39 *supra*, at 17.
[46] Note 41 *supra*, at 454.
[47] Johnson v. United States, 333 U.S. 10, 15 (1947).
[48] McDonald v. United States, note 41 *supra*, at 459, concurring opinion.
[49] Johnson v. United States, note 47 *supra*, at 15.
[50] *Ibid.*
[51] Trupiano v. United States, 334 U.S. 699, 703 (1948); and see Steeber v. United States, 198 F.2d 615, 33 A.L.R.2d 1425 (10th Cir. 1952).
[52] McDonald v. United States, note 41 *supra*, at 454-455.
[53] Puttkammer, Administration of Criminal Law 82 (1953).

ality and to return to the standard which the constitutions have delimited. It was a federal court sitting in West Virginia which over a generation ago explained the compatibility of a search and seizure rule which is based on the state's protective police duty with the constitutional mandate against unreasonable searches and seizures:

> "There is, in the [Fourth A]mendment, *no prohibition against search or seizure without a warrant.* Such a prohibition would have been subversive of the common law and fatal to the safety of human life and the repression of crime."[54]

We must protect the citizen in his home against unreasonable searches. "But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable."[55] It should be added that if we would base our rule of law on the assumption that our police administer the law only by abuses, we would render a grave insult to the most faithful and unassuming servants of our society, and would virtually render a testimonial of decadence for the American public life.

Summary of Rules

For the sake of clarity we are offering this summary of the existing law as it appears to us, as it is evidenced by the words of enlightened courts and leading scholars, and as it is consonant with constitutional mandates:

(I) Under the state's office to protect the citizens against criminal or disastrous attacks against life, liberty and property, it is the duty of the police to respond to emergencies, and, upon certain notice of such attacks, indicating a pending peril which permits of no delay, to break and enter (after fruitless demand) the premises in which the danger persists, and to take all necessary steps to guard the threatened citizen or his property. Strictly speaking, these cases lie outside the scope of what has developed into the law of search and seizure, even though search and seizure may be involved incidentally. *Example:* Problem question (a), *supra.*

(II) The constitutional prohibition against unreasonable searches of dwellings implies the permission of reasonable searches

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[54] Baker, J., in United States v. Snyder, 278 Fed. 650 (N.D.W.Va. 1922), reversed on another ground, 285 Fed. 1 (4th Cir. 1922), but not affecting the language of this quote.

[55] Mr. Chief Justice Vinson in Harris v. United States, note 42 *supra,* at 155.

of dwellings. Apart from searches under warrant, as to which we have expressed no opinion here, dwellings may be searched without a warrant in cases of pending peril to human life or the administration of the criminal law. Such searches must be *reasonable. Reasonableness* depends on the concurrence of good faith on the part of the officer conducting the search—responding to the emergency—, and perilous circumstances permitting of no delay for the procurement of a warrant. Such instances are:

(1) Search of the immediate room of a dwelling in which a lawful arrest is being made, and as an incident to such an arrest.

(2) Search of a dwelling in which a felony is being committed, of which the searching officer has gained immediate reliable knowledge through one of his senses, no matter whether, upon entry, the perpetrator is actually apprehended on the premises or not.

(3) Search of a mobile home in cases where any delay would render it impossible to prosecute for crime of which an officer of the law has gained immediate knowledge.

(4) Search of a dwelling by an officer of the law who has gained reliable information that a capital crime (or other serious felony?[56]) has been, or is being, or about to be, committed therein, and when delay would occasion the removal, destruction or disappearance of the evidence of the crime. *Example:* Problem question (b), *supra.*

While we can not predict *what* the courts will be called upon to decide, we do offer a prediction as to *how* they will decide a case in the nature of our two hypothetical cases, when called upon to do so. For the meantime we humbly submit this guide, which rests on common law, common sense, and the constitutions.

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[56] "Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress. . . ." Mr. Justice Jackson in McDonald v. United States, note 41 *supra,* at 459, concurring opinion. The Justice considered further elements to be: the relation between the harm to be abated and the harm incidental to abatement; the absence or presence of violence in the pending peril; and whether the emergency situation consists of a crime which constitutes a "vice, practiced in secrecy and discoverable only by crashing into dwelling houses." *Ibid.* See our concluding remarks in § 9 *supra.*