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If a person wishes to find anything in the house of another, he shall enter naked, or wearing only a short tunic and without a girdle, having first taken an oath by the customary Gods that he expects to find it there; he shall then make his search, and the other shall throw open his house and allow him to search things both sealed and unsealed.

—THE DIALOGUES OF PLATO, *Laws XII*

ILLINOIS SEARCH AND SEIZURE LAW— THE NEW FRONTIER

JAMES R. THOMPSON

SINCE PLATO FORMULATED what is probably the first standard for search without warrant, over 2,000 years ago, the knotty questions of that area of the law governing searches and seizures have vexed judges, lawyers and police officers alike. The trouble lies not with the Constitution—it merely prohibits searches that are unreasonable.¹ What has created the difficulty in nearly half our states since 1914,² and will in all since June 19, 1961,³ is that reasonable men simply cannot agree on what is a reasonable search.⁴ During

¹ “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. ILL. CONST. art. II, § 6 is similar.

² Beginning with the decision in *Weeks v. United States*, 232 U.S. 383 (1914).

³ *Mapp v. Ohio*, 367 U.S. 643 (1961), holds that exclusionary rule “is an essential part of both the Fourth and Fourteenth Amendments.” *Id.* at 657.

⁴ “The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth,” *Chapman v. United States*, 365 U.S. 610, 618 (1961) (concurring opinion); “For some years now, the field (of search and seizure) has been muddy, but today the Court makes it a quagmire.” *Chapman v. United States*, *supra* at 622 (dissenting opinion). “Even as to the substantive rule governing federal searches in violation of the Fourth Amendment, both the Court and individual Justices have wavered considerably. . . . [T]his Court and its members have been . . . inconstant and inconsistent. . . .” *Irvine v. California*, 347 U.S. 128, 134 (1954). No search and seizure case decided by the United States Supreme Court in the past five years has been disposed of by unanimous opinion.

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the past two years, however, the Illinois Supreme Court has embarked on a new course in dealing with cases involving questions of search and seizure. Mechanical application of old rules has been cast aside; the restraints of old formulae used for years to classify and restrict searches without warrant, e.g., search incident to lawful arrest, search with consent, have been loosened. Attention is now focused on the critical issue of whether the facts of a particular case, viewed in the light of a policeman's "responsibility to prevent crime and to catch criminals,"⁵ make a search reasonable or unreasonable.

Nowhere has this new attitude of the Court manifested itself more clearly than in the much debated, controversial and confusing area of search incident to lawful arrest and specifically: The right of the police to search the driver and his automobile following an arrest for a traffic violation. Two cases, handed down by the Illinois Supreme Court on the same day, *People v. Watkins*,⁶ and *People v. Mayo*,⁷ have been praised, defended, analyzed and discussed with much vigor.⁸ Their net holding, that not all arrests for traffic offenses will justify a search of the car and driver, however, is really not as startling as has been assumed. These cases have a history.

As an "incident" of a legal arrest, a policeman has the right to search the person arrested. This is one of the basic rules of search and seizure law, but it originated long before an exclusionary rule had ever been formulated to secure the constitutional guarantee against unreasonable search.

The doctrine is generally traced back to an early decision of the Supreme Court of New Hampshire in *Closson v. Morrison*,⁹ an action of trover against a sheriff by a person whom he had arrested for larceny. The court held that the sheriff was entitled to search the plaintiff because:

A due regard for his own safety on the part of the officer, and also for the public safety, would justify a sufficient search to ascertain if . . . weapons were carried about the person of the prisoner, or were in his possession. . . .¹⁰

⁵ *People v. Watkins*, 19 Ill.2d 11, 19, 166 N.E.2d 433, 437 (1960).

⁶ 19 Ill.2d 11, 166 N.E.2d 433 (1960).

⁷ 19 Ill.2d 136, 166 N.E.2d 440 (1960).

⁸ Comment, 1960 U. ILL. L. F. 440; Bellows, *Developments In Criminal Law 1950-1960*, 10 DE PAUL L. REV. 339, 377-80 (1961); Cleary, *Developments In Evidence 1950-1960*, 10 DE PAUL L. REV. 422, 424-26 (1961); ILL. S. B. A. SECTION ON CRIM. L. NOOSE LETTER vol. 8 No. 2 (1960).

⁹ 47 N.H. 482 (1867).

¹⁰ *Id.* at 484.

And, by the same reasoning, a search to detect money or tools which might facilitate the escape of the prisoner was also approved.

This rule soon found its way into Illinois law and such a search was upheld by the Illinois Supreme Court in *North v. People*.¹¹ A dictum by the Appellate Court in *Stuart v. Harris*¹² extended the rule to include a search for evidence of the crime for which the person was arrested.

Following the adoption of the exclusionary rule by the Illinois Supreme Court in 1923,¹³ the doctrine of search incident to arrest was applied to uphold the admission into evidence of robbery proceeds taken from the defendant at the time of his arrest in *People v. Swift*.¹⁴ *Swift* marked the beginning of a series of cases coming before the Court in which the *facts* involved called for an application of the rule.¹⁵ Because the circumstances of these cases justified a search incident to arrest—either for weapons or for evidence of the crime—the Court did not, in support of its holdings, spell out the specific basis on which such a search could be made, but merely cited the general rule that once a lawful arrest was made, a search incident to that arrest was reasonable and thus outside the constitutional ban.

Then, in *People v. Poncher*,¹⁶ the Supreme Court had occasion to explain and re-affirm the rule of *North*:

What the opinion, [*North*] means to hold, and does hold, is, that if a person is arrested, he may be searched *for weapons and for property in his immediate personal possession which are involved in the crime charged*. In the *North* case, as in many others, since decided, it was held that the officer had the right, upon a lawful arrest, to search the prisoner, as it is incidental to the right to arrest.¹⁷

¹¹ 139 Ill. 81 (1891).

¹² 69 Ill. App. 668 (1897).

¹³ *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923).

¹⁴ 319 Ill. 359, 150 N.E. 263 (1925). *Swift* was the first case to consider the rule in terms of suppressing evidence illegally seized.

¹⁵ *People v. Hord*, 329 Ill. 117, 160 N.E. 135 (1928); *People v. Reid*, 336 Ill. 421, 168 N.E. 344 (1929); *People v. Caruso*, 339 Ill. 258, 171 N.E. 128 (1930); *People v. Preston*, 341 Ill. 407, 173 N.E. 383 (1930); *People v. McGurn*, 341 Ill. 632, 173 N.E. 754 (1930); *People v. DeLuca*, 343 Ill. 269, 175 N.E. 370 (1931); *People v. Kissane*, 347 Ill. 385, 179 N.E. 850 (1932); *People v. Wetherington*, 348 Ill. 310, 180 N.E. 843 (1932); *People v. Roberta*, 352 Ill. 189, 185 N.E. 253 (1933); *People v. Macklin*, 353 Ill. 64, 186 N.E. 531 (1933); *People v. Davies*, 354 Ill. 168, 188 N.E. 337 (1933); *People v. Brown*, 354 Ill. 480, 188 N.E. 529 (1933); *People v. Patterson*, 354 Ill. 313, 188 N.E. 417 (1933); *People v. Ford*, 356 Ill. 572, 191 N.E. 315 (1934).

¹⁶ 358 Ill. 73, 192 N.E. 732 (1934).

¹⁷ *Id.* at 79, 192 N.E. at 734. (Emphasis added.)

After the *Poncher* decision, cases involving the rule of search incident to arrest continued to come before the Court in great numbers. In most the Court merely cited the general rule,¹⁸ in a few, the Court was careful to note that the reasons which justified such a search were applicable to the particular fact situations presented.¹⁹

The net effect of all of this was that the specific reasons which lay back of the doctrine of search incident to arrest were soon buried under the constant repetition of the general rule. Then came the automobile cases.

In *People v. Barg*,²⁰ police officers stopped an automobile being driven at night without headlights, a violation of the uniform traffic law, and consequently a misdemeanor. The car was coming from an area in which a crime had just been committed, and the occupants' description and conduct gave ample reason for searching the driver and car for weapons or loot. The Court held that the traffic violation, plus the attendant suspicious circumstances, justified the search.

In *People v. Edge*,²¹ the defendant was arrested for obstructing a sidewalk with his automobile. A search of his person revealed policy slips. The evidence on the motion to suppress also showed that the arresting officer had arrested the defendant for possession of policy slips just two weeks earlier. The search was upheld as incident to the arrest.

The first uncritical application of the general rule to a traffic offense came in *People v. Clark*.²² There, members of the police gambling detail came upon Rexford Clark after he had parked his car six inches farther from the curb than the city ordinance allowed. Seeing a

¹⁸ *People v. Henneman*, 367 Ill. 151, 10 N.E.2d 649 (1937); *People v. Euctice*, 371 Ill. 159, 20 N.E.2d 83 (1939); *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943); *People v. DeMarios*, 401 Ill. 146, 81 N.E.2d 464 (1948); *People v. DePompeis*, 410 Ill. 587, 102 N.E.2d 813 (1952); *People v. McGowan*, 415 Ill. 375, 114 N.E.2d 407 (1953); *People v. Clark*, 7 Ill.2d 163, 130 N.E.2d 195 (1955); *People v. Kalpak*, 10 Ill.2d 411, 140 N.E.2d 726 (1957); *People v. Faulkner*, 12 Ill.2d 176, 145 N.E.2d 632 (1957); *People v. Boozer*, 12 Ill.2d 184, 145 N.E.2d 619 (1957); *People v. Flowers*, 14 Ill.2d 406, 152 N.E.2d 838 (1958); *People v. LaBostrie*, 14 Ill.2d 617, 153 N.E.2d 570 (1958); *People v. West*, 15 Ill.2d 171, 154 N.E.2d 286 (1958); *People v. McIntyre*, 15 Ill.2d 350, 155 N.E.2d 45 (1959).

¹⁹ *People v. Dubin*, 367 Ill. 229, 10 N.E.2d 809 (1937); *People v. Lind*, 370 Ill. 131, 18 N.E.2d 189 (1938); *People v. Grod*, 385 Ill. 584, 53 N.E.2d 591 (1944); *People v. Tillman*, 1 Ill.2d 525, 116 N.E.2d 344 (1953); *People v. Heidman*, 11 Ill.2d 501, 144 N.E.2d 580 (1957).

²⁰ 384 Ill. 172, 51 N.E.2d 168 (1943).

²¹ 406 Ill. 490, 94 N.E.2d 359 (1950).

²² 9 Ill.2d 400, 137 N.E.2d 820 (1956).

package bulging from Clark's pocket, the officers, after stopping him, inquired as to what it contained, and the defendant replied "policy slips." A search of the car was then made and more policy material was found. The Illinois Supreme Court upheld the search upon two grounds. The defendant, the Court said, was in open possession of policy paraphernalia in the presence of the officers. After arresting him for this offense, a search of his car was justified as an incident of the arrest. The Court also ruled, however, that:

If the defendant in fact violated a municipal parking ordinance in the presence of the officers they had the right to arrest him without a warrant for that offense. . . . Where the arrest is justified, *for whatever cause*, the accompanying search is also justified. . . . So *in this case a search incident to an arrest for a parking violation would be justified.*²³

This alternative holding of the *Clark* case marked the first application of the doctrine of search incident to arrest to a fact situation devoid of any reason for search. There was no evidence of the parking violation to be seized; there was no proof to show that the defendant had a criminal record or had been previously arrested by the officers, or that taking him into custody was contemplated. Consequently, a search for weapons or the means of escape was not justified.

Four years later, the case of *People v. Watkins*²⁴ reached the Illinois Supreme Court. Here the defendant, who was known to the police because they had arrested him on prior occasions, parked his car too close to a crosswalk. When he saw the officers waiting, he fled into a building. A search of his person revealed policy slips, and he was convicted of their possession. By a vote of four justices, the search was upheld on the sole ground that it was incident to the arrest for the parking violation. Three justices concurred, on the ground that the parking violation, plus the attendant suspicious conduct of the defendant, justified the search, but they disapproved of the single ground of the majority.²⁵

While a petition for re-hearing was pending in *Watkins*, the case of *People v. Mayo*²⁶ was argued in the Illinois Supreme Court. The facts in *Mayo* showed only a parking violation; no concurrent violation or suspicious conduct on the part of the defendant was in-

²³ *Id.* at 403-04., 137 N.E.2d at 822. (Emphasis added.) See also, *People v. Berry*, 17 Ill.2d 247, 161 N.E.2d 315 (1959).

²⁴ 19 Ill.2d 11, 166 N.E.2d 433 (1960).

²⁵ Original *Watkins* opinion, later withdrawn by the court.

²⁶ 19 Ill.2d 136, 166 N.E.2d 440 (1960).

volved. A search of the automobile glove compartment revealed policy slips. This was the first case in which the search would have to be sustained, if at all, solely on the ground that it was an incident of the traffic violation arrest. Since the reasons for applying the rule were not present, *i.e.*, no evidence of the parking violation could be seized, and no search for weapons was necessary, the People conceded that the search was unconstitutional. After this concession, a modified opinion in *Watkins*, and an opinion reversing the conviction in *Mayo*, were handed down together at the next term.²⁷

The *Mayo-Watkins* result, and the concession of the People which led to that result, have been criticized by prosecutors and police because they are supposed to have severely cut back the ability of law enforcement officials to strike at criminal offenses, usually of the "possession" variety,²⁸ in accordance with the *Clark* rationale.²⁹ This criticism is unjustified on two counts.

First, because the People clearly recognized the unconstitutional implications of the *Clark* aberration it was their duty to say so and to help return the Court to the proper application of the rule of search incident to arrest.³⁰ Second, *Mayo-Watkins* does not, in fact, limit the power of the police. *Mayo* was the first reported case where suspicious circumstances of one sort or another were not combined with the traffic violation. Since it is most assuredly not the practice of the police to search the person and vehicle of *all* traffic offenders, it must be that they do so only where, in the words of Justice Schaefer, "the circumstances [make] it reasonable for the arresting officers to

²⁷ Prior discussions of these two cases have taken the position that the court's holding in *Watkins* forced the People's concession in *Mayo*. "Because of the position which had been adopted by the court in *Watkins*, the state conceded that the search was illegal. . . ." Comment, 1960 U. ILL. L. F. 440, 442-43. "Although the state conceded the invalidity of the search in the *Mayo* case the standard announced in the *Watkins* case undoubtedly would have been effective without this concession." Bellows, *Developments In Criminal Law 1950-1960*, 10 DE PAUL L. REV. 339, 379. This is erroneous. The original opinion issued by the court in *Watkins* was not withdrawn until after the People had filed their brief in *People v. Mayo*.

²⁸ ILL. REV. STAT. ch. 38, § 192.28-3 (1959) (narcotics); § 413 (policy slips); § 87 (burglar's tools).

²⁹ This was also the concern of Mr. Justice Daily's special concurrence in *Watkins*. See 19 Ill.2d 11, 23-24, 166 N.E.2d 433, 439-40 (1960).

³⁰ "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

assume that they [are] dealing with a situation more serious than a routine parking violation.”³¹ The problem of the police and prosecutors, then, is no more than the task of translating the circumstances which prompted the officer to make the search into evidence on the motion to suppress. It was only at this point that *Mayo* failed,³² and where previous prosecutions have encountered no difficulty.³³

Defense lawyers, on the other hand, have hailed *Mayo* as a bonanza. Theories have been advanced that *no* search of the person or vehicle following an arrest for a traffic violation is valid; that *Mayo*, in fact, overruled *Watkins*. These are clearly erroneous. *Mayo* stands for no more than the simple proposition that under the particular facts of that case the People conceded the invalidity of the search because, in the words of *Watkins*, “when no more is shown than that a car was parked too close to a crosswalk or too far from a curb, the constitution does not permit a policeman to search the driver.”³⁴

The rule to be applied when a search following a traffic offense is made is found only in *Watkins*, where the search was sustained. As that case points out, some traffic offenses, in and of themselves, would justify a search.³⁵ An arrest for drunken driving, or any traffic offense, in which it is contemplated that the officer will take the offender into custody will also justify a search for weapons or the means of escape.

While the opinion in *Watkins* has generally been taken for a new departure in the area of search incident to a lawful arrest, a study of the history of the rule in Illinois shows that *Watkins* merely returned the Court to the same path that it had been traveling for over seventy years with only a sporadic departure in *People v. Clark*. What the commentators have failed to note, however, is that Mr. Justice

³¹ *People v. Watkins*, 19 Ill.2d 11, 19, 166 N.E.2d 433, 437 (1960).

³² “Q. Did you know what you were looking for at the time?

A. Yes, Anything that might have constituted a violation—guns—a knife—policy.

... ..

Q. You didn’t know what you were looking for, is that correct?

A. As I said before, anything that might constitute a violation.

Q. But, you had nothing specific in mind. Is that correct?

A. Nothing specific, no.” Brief for People, pp. 15–16, *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960).

³³ *People v. Barg*, 384 Ill. 172, 51 N.E.2d 168 (1943); *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359 (1950); *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960).

³⁴ *People v. Watkins*, *supra* note 33, at 19, 166 N.E.2d at 437. (Emphasis added.)

³⁵ *People v. Berry*, 17 Ill.2d 247, 161 N.E.2d 315 (1959); *People v. Esposito*, 18 Ill.2d 104, 163 N.E.2d 487 (1960).

Schaefer, in writing for the Court in *People v. Watkins*, set down a new test for search without warrant which may, in time, rank equally with the now familiar rule of search incident to arrest:

The constitution prohibits only unreasonable searches; it permits those that are reasonable. The *critical issue* in each case must be whether the situation that confronted the officer justified the search. . . . Police officers often must act upon a quick appraisal of the data before them, and *the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals.*³⁶

Rules permitting various kinds of search without warrant are familiar enough—the law of search incident to arrest has already been discussed. Many jurisdictions recognize another exception to search without warrant—the right of police officers to stop a moving car when they have probable cause to believe that it contains contraband.³⁷ Or the arrested person may consent to a search.³⁸ The constitution, however, does not set up these exceptions to the search warrant requirement; they are theories carved out by the courts in compliance with the constitutional demand that a search be reasonable.

Nothing in the constitution, however, prohibits a search without warrant based upon probable cause to believe that a crime is being committed, although that doctrine has not heretofore been recognized in Illinois. That is the real significance of the *Watkins* opinion. Not that it strikes down the doctrine of *automatic* search following a traffic violation, but that it recognizes the idea that conditions of law enforcement may confront the police which justify that a search be made in light of “their responsibility to prevent crimes and to catch criminals,” even though it cannot be fitted into the familiar classifications of searches without warrant. The proof of the pudding—*People v. Faginkrantz*.³⁹

Alfred Faginkrantz parked his car in an alley behind a plumbing supply firm in the City of Chicago one morning about 4:30 A.M. He shut the motor and lights off. A police car pulled up, and as

³⁶ 19 Ill.2d 11, 18–19, 166 N.E.2d 433, 436–37 (1960). (Emphasis added.)

³⁷ *Carroll v. United States*, 267 U.S. 132 (1925); *Brinegar v. United States*, 338 U.S. 160 (1949); *People v. Gale*, 46 Cal.2d 253, 294 P.2d 13 (1956). The Illinois Supreme Court was presented with the opportunity to adopt this rule in *People v. Langford*, No. 35868, Sup. Ct. Ill., 1960, but Langford's death after argument caused the case to be dismissed as moot.

³⁸ *People v. Peterson*, 17 Ill.2d 513, 162 N.E.2d 380 (1959); *People v. Fiorito*, 19 Ill.2d 246, 166 N.E.2d 606 (1960).

³⁹ 21 Ill.2d 75, 171 N.E.2d 5 (1960).

Faginkrantz stepped from behind the rear of his automobile the officers stopped to question him because there had been several burglaries and attempted burglaries in the alley. Faginkrantz produced his identification which showed that he lived quite distant from the scene. He also admitted that he had served time in the penitentiary for burglary. Faginkrantz stated that he had stopped in the alley to defecate following a visit to a tavern in the area, but a search by police officers could not substantiate this explanation. When the police said they were taking him to the station for "investigation," Faginkrantz said that they could search his car. Burglar tools were found in the trunk of the automobile.

The case was argued in the Supreme Court on the theory that defendant had consented to the search. The Court held, however, that:

It was obviously impractical for the officers to attempt to obtain a search warrant. The defendant's unlikely explanation of his presence in an alley far from his home at 4:30 A.M., and his inability to produce any indicia or ownership of the car, coupled with his admitted criminal record and the history of burglaries in the alley, *gave the police reasonable cause to believe that he was committing a crime*. What the constitution prohibits is an unreasonable search and seizure, and the circumstances of this case do not establish that the search was unreasonable. The trial court did not err in overruling the motion to suppress. *People v. Watkins*, 19 Ill. 2d 11; *cf. Draper v. United States*, 358 U.S. 307; *Henry v. United States*, 361 U.S. 98.⁴⁰

Careful analysis of this holding will show that it is not simply a restatement of the law of search incident to a valid arrest.

A peace officer may arrest without warrant in Illinois for "a criminal offense committed or attempted in his presence, [or] . . . when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."⁴¹ The facts confronting the officers in *Faginkrantz*, before the finding of the tools, would not justify an arrest under this test. Indeed, the police told Faginkrantz that they were merely taking him to the station for "investigation."⁴² The search cannot be sustained under the rule that moving vehicles may be searched when there is probable cause to believe that they contain contraband. And the doctrine of consent was specifically rejected as a ground of decision.⁴³

The analogical citations of *Draper v. United States*,⁴⁴ and *Henry*

⁴⁰ *Id.* at 78, 171 N.E.2d at 7. (Emphasis added.)

⁴¹ ILL. REV. STAT. ch. 38 § 657 (1959).

⁴² *People v. Faginkrantz*, 21 Ill.2d 75, 77, 171 N.E.2d 5, 7 (1961).

⁴³ *Id.* at 78, 161 N.E.2d at 7.

⁴⁴ 358 U.S. 307 (1959).

*v. United States*⁴⁵ as support for the Court's holding are puzzling. *Draper*, like *Henry*, deals only with the quantum of evidence necessary to justify arrests without warrant under federal statutes containing standards less strict than those necessary to sustain arrests without warrant in Illinois.⁴⁶ A dictum from the dissenting opinion of Mr. Justice Clark in *Henry*, however, has a familiar ring when compared with the *Watkins* rule, as well as the *Faginkrantz* holding, quoted above. He said:

When an investigation proceeds to the point where an agent has reasonable grounds to believe that an offense is being committed in his presence, he is obligated to proceed to make such searches, seizures, and arrests as the circumstances require. It is only by such alertness that crime is discovered, interrupted, prevented, and punished.⁴⁷

The relative positions, in point of time, of "searches, seizures, and arrests" in Mr. Justice Clark's view are significant. For from this dictum, together with the dictum of *Watkins* and the holding of *Faginkrantz*, can be drawn a new rule of search and seizure in Illinois: *when a police officer has reasonable grounds, or "probable cause,"⁴⁸ to believe that a crime is being committed in his presence he may search the person of the suspect, or that which is immediately under his control so as to be considered an extension of the person, to obtain evidence to justify that belief.*⁴⁹ And though a search may be warranted under this constitutional rule where an arrest would not be under the statute, the Court has never said that the Illinois arrest statute rests at the outer constitutional boundary. Clearly it does not.

Assuming that a search incident to arrest is proper in a given case, how far afield may the police go in making the search? Recent decisions of the Illinois Supreme Court indicate that the reasons which lay back of the rule, *e.g.*, the need to search for weapons to prevent escape or for evidence of the crime, not only justify the initiation of the search but may delimit its scope as well.

In approving a search of a defendant's apartment for marked money

⁴⁵ 361 U.S. 98 (1959).

⁴⁶ Compare 26 U.S.C. § 7607 (1954) and 18 U.S.C. § 3052 (1948) with ILL. REV. STAT. ch. 38, § 657 (1959).

⁴⁷ *Henry v. United States*, 361 U.S. 98, 106 (1959) (dissenting opinion).

⁴⁸ The terms are interchangeable, *Draper v. United States*, 358 U.S. 307, 310 n. 3 (1959).

⁴⁹ This implication of *Watkins* was first noted in Comment, 1960 U. ILL. L. F. 440.

following his arrest for sale of narcotics the Court held, in *People v. Hightower*,⁵⁰ that:

The arrest being lawful, the subsequent search of defendant's premises was lawful, particularly when it is considered that entry was by defendant's admission, without force or pretext, and that the money seized was *in plain view* on top of a dresser.⁵¹

If there was any doubt that this language indicated a hesitancy on the part of the Court to approve wide open or prolonged search incident to arrest it was dispelled by *People v. Burnett*,⁵² which followed a month later. Arresting the defendant in the living room of his home for keeping a disorderly house, the police took from his pajama pocket marked money which had earlier been given to two inmates. The police then went to a bedroom closet in the rear of the apartment and, in a locked tin box, found obscene photographs. The Court reversed defendant's conviction for possession of obscene material, holding that the search which extended to the locked box in a closet was not one:

[R]easonably necessary to protect the officers or to prevent defendant's escape. In addition, all the evidence had been gathered which would tend to prove or to connect defendant and the two women with the offense for which they had been arrested.⁵³

And despite the general feeling that the Court is more liberal with the police in sustaining searches and seizures in narcotic cases,⁵⁴ the Court soon decided, in *People v. Alexander*,⁵⁵ that a search made by seven narcotics agents which, ten minutes after the arrest and four feet from where defendant was arrested, disclosed narcotics, was not reasonably incident to the arrest of an unarmed woman in her apartment for the sale of narcotics some two months earlier.

Another area of the law of search without warrant recently revisited by the Court involves the doctrine of consent to search. Like most jurisdictions, Illinois follows the rule that a defendant may consent to the search of his person or home,⁵⁶ thus validating what would

⁵⁰ 20 Ill.2d 361, 169 N.E.2d 787 (1960).

⁵¹ *Id.* at 368, 169 N.E.2d at 787. (Emphasis added.)

⁵² 20 Ill.2d 624, 170 N.E.2d 546 (1960). ⁵³ *Id.* at 626, 170 N.E.2d at 547.

⁵⁴ Cf. Bellows, *Developments In Criminal Law—1950—1960*, 10 DE PAUL L. REV. 339, 380 n. 124 (1961).

⁵⁵ 21 Ill.2d 347, 172 N.E.2d 785 (1961).

⁵⁶ *People v. Fiorito*, 19 Ill.2d 246, 166 N.E.2d 606 (1960).

otherwise be an illegal assertion of authority on the part of the police officers. Quite significantly, however, the burden on the prosecutor to show that the consent was freely and voluntarily given is considerably less in Illinois than in the federal courts.

In *People v. Peterson*,⁵⁷ the defendant testified that, following his arrest for robbery, the police officer told him they were going to his house and, when they arrived, the officer took defendant's keys; unlocked the door to his apartment and searched his closet finding part of the loot. The officer, on the other hand, said that defendant, protesting his innocence at the time of arrest, said "you can go to my house and look," and that he admitted him to the apartment voluntarily. The Court held:

Whether consent has been given in the particular case is a factual matter to be determined in the first instance by the trial court, and where the evidence on the issue is in conflict this court will accept the finding below unless it is clearly unreasonable.⁵⁸

Contrast this with the decision in *Judd v. United States*.⁵⁹ Judd was arrested at 11:00 P.M., and interrogated for several hours in the police station. The police testified that Judd, in answer to police inquiries, denied having any burglar tools or a certain pair of shoes in his home and that as he had nothing to hide, the police could go out to his home. The United States Court of Appeals for the District of Columbia held, under these circumstances, that there had "not been a sufficient showing of true consent, free of duress and coercion,"⁶⁰ noting that the "burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found."⁶¹

Some months following the decision in *Peterson*, the Illinois Supreme Court was again faced with a consent case in which the rationale of *Judd*, and like federal cases, was urged upon the Court. The Court rejected the plea and upheld the consent as freely given although the defendant was, at the time, sitting in the car of Federal

⁵⁷ 17 Ill.2d 513, 162 N.E.2d 380 (1959).

⁵⁸ *Id.* at 514-15, 162 N.E.2d at 381.

⁵⁹ 190 F.2d 649 (D.C. Cir. 1951).

⁶⁰ *Id.* at 652.

⁶¹ *Id.* at 651.

Bureau of Investigation agents who were questioning him about a recent jewel robbery.⁶²

A corollary to the rule that one may consent to an otherwise unlawful search is the doctrine that a wife, with the right of joint occupation or ownership in the premises involved, may consent to a search, and evidence found will be admissible against the husband.⁶³ An early case, *People v. Lind*,⁶⁴ had held, however, that where the wife, at the hearing on the motion to suppress, denies the testimony of the police that she consented to the search, such a denial was a significant factor to be considered in determining whether the consent was voluntary. Faced with this holding, and with recent criticism of the *Peterson* doctrine,⁶⁵ the Illinois Supreme Court heard the case of *People v. Speice*.⁶⁶

In *Speice*, the officers testified that Mrs. Speice invited them into the apartment and led them to the bedroom where her husband had earlier brought in stolen goods. Mrs. Speice testified, however, that the police brought her husband to the apartment in handcuffs and searched the apartment without a warrant. Defendant's testimony was to the same effect. In holding the search valid, the Court rejected the rule of *Lind*—that a conflict of testimony as to consent was a factor in determining whether the consent was freely given—and brought the husband-wife waiver doctrine squarely into line with the *Peterson* rule which vests almost complete discretion in the trial court to determine the issue of voluntariness.⁶⁷

Still another fundamental problem just resolved by the Court concerns the standing of a defendant to raise the question of illegal search

⁶² *People v. Fiorito*, 19 Ill.2d 246, 166 N.E.2d 606 (1960). The defendant urged the court to abandon *Peterson* and follow such decisions as *Judd v. United States*; *United States v. Arrington*, 215 F.2d 630 (7th Cir. 1954); *Catalanotte v. United States*, 208 F.2d 264 (6th Cir. 1953). Brief for Defendant, pp. 33-39.

⁶³ *People v. Shambley*, 4 Ill.2d 38, 122 N.E.2d 172 (1954); *People v. Perroni*, 14 Ill.2d 581, 153 N.E.2d 578 (1958).

⁶⁴ 370 Ill. 131, 18 N.E.2d 189 (1938).

⁶⁵ Bellows, *Developments In Criminal Law 1950-1960*, 10 DE PAUL L. REV. 339 (1961).

⁶⁶ 23 Ill.2d 40, 177 N.E.2d 233 (1961).

⁶⁷ "This [defendant's] argument would have the effect of taking from the trial judge the right to pass upon the credibility of the testimony and would require us to hold that in the event of a conflict in the testimony as to whether consent was given we must decide that the consent was not freely given." *People v. Speice*, *supra* note 65, at 44; 177 N.E.2d at 235.

and seizure. The rule is that a motion to suppress will not lie where the defendant does not claim ownership or demand the return of the property seized.⁶⁸ As the federal courts have recognized, however, a defendant charged with the possession of contraband faces a dilemma. If he admits the possession of narcotics, for example, in a sworn motion to suppress, he admits the offense. If he fails to admit possession, his motion to suppress will not lie.⁶⁹ The Supreme Court resolved the dilemma in *Jones v. United States*⁷⁰ by holding that “[i]n cases where the indictment itself charges possession, the defendant . . . is revealed as a ‘person aggrieved by an unlawful search and seizure’ upon a motion to suppress evidence prior to trial.”⁷¹ The Illinois Supreme Court soon indicated, in *Mayo*, that it would follow this holding.⁷² Professor Edward Cleary, in commenting upon these cases, thought that the Illinois Court there “gave a clear indication of its willingness to re-examine the entire matter of standing.”⁷³ This estimation has proved to be accurate.

In *People v. Kelley*,⁷⁴ the Court was confronted with a standing problem falling between the old rule which generally requires an allegation of ownership and the *Jones-Mayo* rule which obviates the need for an allegation of possession or ownership in a motion to suppress when the charge is possession of contraband. William Kelley and a co-defendant were indicted for armed robbery. The complaining witness could not identify his assailants and the proof against the defendants rested solely upon their recent, exclusive and unexplained possession of the victim’s watch and wallet. Kelley’s motion to suppress explicitly denied ownership or possession of the articles and did not demand their return.

The Court held that the dilemma present in *Jones* did not confront Kelley inasmuch as he was not charged with the possession of the watch and wallet—“The charge in the indictment is armed robbery and the articles allegedly taken in the search *are only evidence* of the defendant’s guilt of that crime.”⁷⁵ The door, opened a crack to de-

⁶⁸ *People v. Perroni*, 14 Ill.2d 581, 153 N.E.2d 578 (1958).

⁶⁹ *Connolly v. Medalie*, 58 F.2d 629 (2d Cir. 1932).

⁷⁰ 362 U.S. 257 (1960).

⁷¹ *Id.* at 264-65.

⁷² 19 Ill.2d 136, 166 N.E.2d 440 (1960).

⁷³ Cleary, *Developments In Evidence 1950-1960*, 10 DE PAUL L. REV. 422, 426 (1961).

⁷⁴ — Ill.2d —, — N.E.2d — (1961).

⁷⁵ *People v. Kelley*, *supra* note 72 at —, — N.E.2d at —. (Emphasis added.)

fendants in *Mayo*, therefore, has been slammed shut by the Court in *Kelley*.

On balance, it is fair to say that the search and seizure rulings handed down by the Illinois Supreme Court in the past two years have contributed to the advancement of effective law enforcement,⁷⁶ and at the same time have reflected the Court's continuing vigilance to see that the citizen's liberty is not unlawfully abridged even where the charge is a repugnant one.⁷⁷ One question remains however. What will be the effect of *Mapp v. Ohio*⁷⁸ on the Illinois Court's rulings which, at first blush, may not square with prior federal decisions in the same area? Now that *Mapp* holds that the exclusionary rule is an integral part of the fourteenth amendment, will the Illinois Supreme Court have to conform its recent decisions on standing, consent, and search without warrant to the more conservative federal law? One commentator has indicated a belief that as to the rule governing standing to suppress evidence, future questions "will in the main be resolved by federal law."⁷⁹ Though the United States Supreme Court was careful to say in *Mapp* that a state's *procedural* rules governing the issue of unlawful search and seizures will be respected,⁸⁰ it is almost certain that the new rule of search without warrant formulated by the *Watkins-Faginkrantz* line of cases, and the more liberal rule of search with consent now employed in Illinois, will be subjected to careful scrutiny by the United States Supreme Court in future cases as *substantive* constitutional doctrines. Thus, the Illinois Supreme Court, having in sight the new frontier, may now find the United States Supreme Court waiting at the pass.

⁷⁶ *People v. Faginkrantz*, 21 Ill.2d 75, 171 N.E.2d 5 (1960).

⁷⁷ *People v. Alexander*, 21 Ill.2d 347, 172 N.E.2d 785 (1961).

⁷⁸ 367 U.S. 643 (1961).

⁷⁹ Allen, *The Exclusionary Rule In The American Law of Search and Seizure*, 52 J. CRIM. L., C. & P.S. 246, 254 (1961).

⁸⁰ *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).