Freedom of the Road: Public Safety v. Private Right

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of the tax consequences of creating powers of appointment and rights of withdrawal. As discussed earlier, discretionary power in the independent trustee to pay principal of the trust to the life tenant may be a practical solution to a decedent's desire that the life tenant be adequately maintained.

The problem of ultimate distribution of assets from the trust may be best disposed of by the life tenant, due to his closeness to the situation. The plan envisioned by the decedent may not be adequate or appropriate for the requirements of the family and events may occur that were not foreseen when the original plan was conceived. For these reasons, the power of appointment and the right of withdrawal add maximum flexibility to the estate plan and will be important parts of the estate plan for protection of family members. The experienced attorney must be cognizant of the tax implications these powers entail when their use is contemplated and the trust agreement is drafted.

Harry Sachrison

FREEDOM OF THE ROAD: PUBLIC SAFETY v. PRIVATE RIGHT

INTRODUCTION

Since the advent of motor vehicles, there have been great changes in our society. The character of crime has been altered drastically, and some of the new methods used to combat it have raised serious problems vis-a-vis the protection of individual liberties, especially the liberty to be free from unreasonable search. An examination of the present state of the law concerning the stopping and searching of vehicles, and its evolution over the last half-century, suggests some general solutions which might be successfully applied. Some would entail changes in our present law, but not in the basic constitutional doctrines. Others would result from the examination, substitution, or rejection of solutions already proposed.

RECENT SOURCES OF THE RIGHT

At common law, a man's property right in his home was sacred and the breach of its security could only be accomplished by careful use of a search warrant, no matter how lowly he stood among the King's subjects.1

1 Sir William Pitt (the Elder) stated in Parliament: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his forces dares not cross the threshold of the ruined tenement!" 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND (1753-65) 1307, cited in Frank v. Maryland, 359 U.S. 360, 378-79 (1959).
The American colonists felt that they deserved the same rights as native Englishmen and were greatly disturbed when Parliament sought to enforce the Acts of Trade by the use of general writs of assistance. There had been a gradual erosion of liberties in England since the changes of the Glorious Revolution of 1688; the abolition of the Court of Star Chamber altered the form, but not the reality, of the continued suppression of personal liberty and breaches of security of the home.

Two hundred years ago, in the classic case of Entick v. Carrington, Lord Camden held a general warrant to seize a man's papers illegal and void warning that the people would not long tolerate such practices. Popular resistance already existed in America, but Parliament, choosing not to recognize it, passed the Townshend Acts, which permitted virtually unlimited and arbitrary search and seizure for violation of the customs sections of His Majesty's Excise.

English legal opinion was quick to declare the nullity of such procedures, but American popular opinion was quick to find a stronger remedy. The states incorporated the rights to privacy and freedom from search and seizure in their new constitutions. It was generally agreed:

[T]hat the people have a right to hold themselves, their houses papers and possessions free from search and seizure and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them ... are contrary to that right and ought not to be granted.

2 An Act for preventing frauds, etc., 13 and 14 Car. II, c. 11, § 4 and 5 (1662); An Act for preventing frauds ... in the Plantation Trade, 7 and 8 Will. III, c. 22, § 6 (1696).


4 2 Wilson's Rep. 275, 19 How. St. Tr. col. 1029, 1074 (1765). Counsel for Plaintiff urged: "A power to issue such a warrant as this is contrary to the genius of the law of England and even if they had found what they searched for, they could not have justified under it. ... [I]t now appears that this enormous trespass ... has been done upon mere surmise. But the verdict says, such warrants have been granted by secretaries of state ever since the Revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end." 19 How. St. Tr. at 1038.

5 An act for granting certain duties, etc., 7 Geo. III, c. 46, § 10 (1767).


7 See Declaration and Resolves of Oct. 14, 1774, 1 Journals of the American Congress 19-22 (1823).

8 See, e.g., Bill of Rights, Va. Const. § 10 (1776); Delaware, Declaration of Rights, § 17 (September 11, 1776); Declaration of Rights, Md. Const. art. XXIII (1776); Declaration of Rights, Vt. Const. art. XI (1777); Bill of Rights, N.H. Const. art. I, § XIX (1784).

Because of the intense anger caused by the persistent violation of this right by the British, it is surprising that the right found no direct expression in either the Declaration of Independence, or the Dickinson draft of the Articles of Confederation. The final draft of the Articles of Confederation did include a freedom of movement clause which offered hope for a later formal recognition of this right. Unfortunately, the right is enumerated neither in the Constitution nor in any of its amendments, although it is clearly "an accepted ideal in this nation," and has been recognized in the courts. Only the protection of privacy was enshrined in the fourth amendment: 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. This was possibly due to the greater interest of the authors in the security of property rather than in the security of persons, due to the liberal common law rules of arrest. Since the adoption of the Bill of Rights in 1791, the right to freedom of movement has been firmly tied to the fourth amendment, as most of the harm done by a violation of the right is due to searches incident to an arrest. Since it is the search which does the harm, the law of arrest has remained generally unchanged, while the search's relation to it has changed drastically. Prior to 1914, the fourth amendment was applied to hold certain searches illegal. Holding the search illegal was of little benefit to the

10 *Journals of the American Congress* supra note 7, at 394–96. However, there is mention of interference with the right of free trade and commerce on the high seas. *Id.* at 395.


12 Art. 4: "...[T]he people of each state shall have free ingress and regress to and from any other state, ..." *2 Journals of the American Congress* 330 (1777); Jensen, supra note 11, at 263. See also *United Nations, Universal Declaration of Human Rights* art. 13, §§ 1 and 2 (1948).


14 The phrase "unreasonable search" was probably taken from "Every subject has a right to be secure from all unreasonable searches. ..." Declaration of Rights, Mass. Const. art. XIV (1780).


16 *Id.* at 47–51.

17 Boyd v. United States, 116 U.S. 616 (1886), where the privilege against self-incrimination in the fifth amendment was used to protect Boyd against the effects of an illegal search.
defendant, however, because "[c]ourts, in the administration of the criminal law, [were] not accustomed to be oversensitive in regard to the sources from which the evidence comes." Then, just a half-century ago, the Supreme Court put teeth into its determination by adopting the "exclusionary rule" in *Weeks v. United States,* and drew from it a rule of evidence for federal proceedings which would suppress evidence gained by an illegal or unreasonable search. This rule was affirmed frequently and finally was applied to the states through the fourteenth amendment in *Mapp v. Ohio.* In *Ker v. California,* the Court held that the states could implement *Mapp* themselves by developing their own working rules governing searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement," subject to the Constitution and the exclusionary rule. It should be noted that the Supreme Court has reserved to itself the jurisdiction to examine claims that the states' rules may not conform to the Court's concept of the exclusionary rule. Therefore, it becomes necessary to study the evolution of the state and federal rules in order to understand the present problems.

**WHY THE AUTOMOBILE IS DIFFERENT**

Automobiles are personal effects under the fourth amendment and thus must be protected against unreasonable searches. Therefore, any difference in the treatment of an auto from the treatment of other personal effects would seem to support this view.

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19 232 U.S. 383 (1914).

20 Id. at 394, 398. This rule was probably first conceived in 1765 by Lord Camden in *Entick v. Carrington,* 19 How. St. Tr. 1029, 1073: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." (Emphasis added.)


22 367 U.S. 643 (1961). All fifty states already had provisions similar, or equal to, the fourth amendment in their state constitutions and many of them had adopted the exclusionary rule on their own. VARON, SEARCHES, SEIZURES AND IMMUNITIES 5 n. 2, 53 et seq. (1961).


25 Robinson v. State, 197 Ind. 144, 140 N.E. 891 (1925). However, many cases seem to treat an auto as a mobile premises. See *infra* notes 29 and 32.
effects or premises must be by way of exception. Justice Frankfurter explained this difference:

What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response. There must be a warrant to permit search barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant, i.e. the justification that dispenses with search warrants when searching the person in his extension, which is his body and that which his body can immediately control, and motor vehicles.26

The basis for making an exception of a vehicle is that it is not fixed in position. The Supreme Court first made the exception in 

Carroll v. United States where Chief Justice Taft found:

[A] necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.27

This "doctrine of necessity" must be applied carefully, as it is an attack on a person's right which would not be tolerated except for the mobility of the object to be searched.28 Therefore, while the exception is granted to make law enforcement practical, the standard of reasonableness still applies, and the failure to conform to it will render the search unlawful.29

The major concern will be whether there is sufficient probable cause to justify the search. As this issue can be strongly disputed, it causes most of the controversy in these cases.30

28 Since the test is mobility and not speed, the exception has been extended to animal drawn vehicles. Compare Taylor v. State, 129 Miss. 815, 93 So. 335 (1922), and Quivers v. Commonwealth, 135 Va. 671, 115 S.E. 564 (1925) with Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
29 Carroll v. United States, supra note 27; Husty v. United States, 282 U.S. 694, 700 (1931); Brinegar v. United States, 338 U.S. 160 (1949); United States v. One 1946 Plymouth Sedan Automobile, 167 F.2d 3, 7 (7th Cir. 1948); Pettit v. State, 207 Ind. 478, 188 N.E. 784 (1934). Accord, United States v. Kancso, 252 F.2d 220, 224 (2d Cir. 1958), where Judge Moore held: "There is a vast difference between entering and searching homes or even hotel rooms which are . . . permanent locations and stopping a car of a person on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear. At least, in balance, protection under the Fourth Amendment outweighs the possible advantage of search without a warrant. In the second situation the pedestrian on the street and the car on the highway will not obligingly preserve their status quo; therefore, law enforcement agencies must act immediately."
30 See Justice McReynolds' dissent in Carroll v. United States, supra note 29, at 163, 170-75.
It has been said that "[r]elaxation of the need to secure a warrant as a prerequisite to searching a moving vehicle stemmed from the impracticality of compelling police to control the vehicle while a warrant is being sought.""\textsuperscript{31} The three criteria for permitting such a search are: (1) the suspect may escape, (2) he may attack the arresting officer, and (3) he may cause the evidence to be removed or destroyed. However, a search is not allowed where it is not impractical to get a warrant because the auto is immobile.\textsuperscript{32} Also, where the suspect has been arrested and, because he is in custody, there is no longer danger of attack, escape or destruction of evidence, the search will be held unreasonable.\textsuperscript{33} These are applications of the standard of reasonableness. By the same standard, it can be found that the \textit{mere} fact of immobility is not sufficient. When a parked auto seemed about to be used for illegal transport and was capable of leaving immediately, unlike the situation where the driver is in custody, a search was held valid.\textsuperscript{3} Before proceeding further, the ways in which a search can be made must be examined.

\section*{WHEN A SEARCH CAN BE MADE}

A lawful search can always be made when a valid search warrant has been issued for an automobile.\textsuperscript{35} Items found during such a search, which are the fruits of a crime other than the one which caused the warrant to be issued, can be seized and used in evidence.\textsuperscript{36} But, where a warrant has been issued on a defective affidavit, it will not affect the admission of evidence where there was sufficient probable cause to stop the auto, arrest the suspect and search the auto incident to that lawful arrest.\textsuperscript{37}

One of the basic elements of a search warrant is probable cause, which must not be induced by bad faith. Where a search warrant is insufficient on its face, the search of a car pursuant to it was held to be unreasonable, since the car was in custody and federal agents had the keys.\textsuperscript{38} Where a

\begin{footnotesize}
\textsuperscript{31} Eng Fung Jem v. United States, 281 F.2d 803, 805 (9th Cir. 1960) (dictum).
\textsuperscript{32} E.g., the auto is within a garage attached of the home of the suspect. Boyd v. State, 206 Miss. 573, 40 So. 303 (1949).
\textsuperscript{33} United States v. Marrese, 336 F.2d 501 (3d Cir. 1964).
\textsuperscript{34} People v. Case, 220 Mich. 379, 190 N.W. 289 (1922); Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922).
\textsuperscript{35} Porter v. United States, 335 F.2d 602 (9th Cir. 1964); United States v. Eisner, 297 F.2d 595 (6th Cir. 1962), \textit{cert. denied}, 369 U.S. 859 (1962).
\textsuperscript{36} \textit{Ibid}.
\textsuperscript{37} Brown v. State, 46 So. 2d 479 (Fla. 1950).
\end{footnotesize}
policeman had an invalid search warrant and testified that he didn't intend to arrest the suspect unless he found contraband, the arrest was held to be incidental to an unlawful search and the evidence suppressed. It is also bad faith for a policeman to stop a car on a pretext and get a search warrant on the basis of a driver's refusal to permit a search, or to make a search illegally and then get a warrant and make a false return on it. Most searches made in bad faith are unreasonable and will be held unlawful.

A lawful search can be made without a warrant if it is incident to a lawful arrest. Professor Orfield states:

One rightfully making an arrest may search the person of the suspected person to discover and seize any articles ... which can be used by the prisoner in effecting an escape or as a means of doing harm to himself or other persons. Such search may be extended also to the immediate surroundings of the person arrested, as a vehicle in which he is found. ... In order for the search to be incidental to an arrest, the grounds for arrest must first be established. Mere questioning of a suspect by an officer in a public place is not a restriction on liberty of movement equal to an arrest. Coupled with restraint of the person and the exercise of control over him, the officer must specifically intend to make an arrest.

While there is a serious question as to whether an arrest occurs at the moment of stopping a car, it is clear that an order to the driver to follow the officer to a Justice of the Peace is an arrest.  

39 Melton v. State, 75 So. 2d 291 (Fla. 1954).
40 Murphy v. State, 194 Tenn. 698, 254 S.E.2d 979 (1953); State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922).
42 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 42-43 (1947). See also Way, Increasing Scope of Search Incidental to Arrest, 1959 Wash. U.L.Q. 261, 279: "Adequate law enforcement in the United States today requires some degree of incidental search and seizure at the time and place of arrest. . . ."
44 Id. at 77.
45 Rios v. United States, 364 U.S. 253 (1960), remanded for a specific finding on the question of when the arrest occurred. See also Commonwealth v. Strickland, 71 Pa. D.&C. 104 (Ct. Common Pleas 1950); Commonwealth v. Bothwell, 94 Pa. L.J. Rep. 451 (1947). In England, too, the law is clear: "The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly. ... Any form of physical restraint is an arrest. ... The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him." DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 82 (1958).
The search incident to an arrest must be reasonable.\(^{40}\) It is limited in its object to items relating to attack, escape or destruction of evidence relating to the crime or to any other crime. When the search is for the fruits and instruments of a felony, seizure of unrelated personal papers is unreasonable.\(^{47}\) Items seized incident to an unlawful arrest may not be used to assist in an unreasonable search under the "fruit of the poison tree" doctrine.\(^{48}\) The search must be incident to the arrest, not vice versa, since the latter would result in an arrest based on the discoveries of an unlawful search.\(^{49}\)

Most important, the arrest must be based on probable cause or reasonable grounds for the search to be lawful.\(^{50}\) Whether reasonable grounds exist is a mixed question of law and fact, and each individual case must be decided on its own facts.\(^{51}\) It does not matter whether the search or the arrest came first. If there is no probable cause, both are illegal.\(^{52}\) However, no matter how reasonable the grounds for arrest, if the suspect has fled the vehicle prior to arrest, a search of it cannot be incident to the suspect's arrest.\(^{53}\) Where the grounds have been presented to a magistrate and an arrest warrant has been issued, a search incident to the arrest is lawful, as the warrant is the highest level of probable cause.\(^{54}\)

\(^{40}\) Rochin v. California, 342 U.S. 165 (1952).

\(^{47}\) United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926); People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923). But see Marron v. United States, 275 U.S. 192 (1927), as to papers which may be fruits and instruments of another crime.


\(^{50}\) The requirement of reasonable grounds relates to the officer's knowledge or belief as to whether a violation has been committed. This is the equivalent of probable cause.

\(^{51}\) People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1941). Boats are treated the same as any other vehicle for this purpose. United States v. Lee, 274 U.S. 559, 562 (1927).

\(^{52}\) Allen v. State, 183 Wis. 323, 197 N.W. 808 (1924).

\(^{53}\) State v. Naturile, 83 N.J. Super. 563, 200 A.2d 617 (1964). Justice Sullivan, dissenting, felt that hot pursuit came under an "exceptional circumstances rule" since inspection of the vehicle might have shown where the suspect was fleeing to and leaving one officer to guard the auto (which was hopelessly stuck in the snow) and sending the other to get a search warrant would permit the defendant to escape. Id. at 580, 200 A.2d at 626–27. But there is really no problem on these particular facts since both telephone and police radios were available. Assistance could have been requested by one partner while the other kept following the fugitive suspect, with little danger since assistance was so close.

\(^{54}\) See, e.g., Albright v. United States, 329 F.2d 70 (10th Cir. 1964); Toliver v. State, 133 Miss. 789, 98 So. 342 (1923). But see State v. Rowley, 197 Iowa 977, 195 N.W. 881 (1923).
REMOTENESS IN TIME AND PLACE

There is a problem as to what is incident to the arrest in terms of time and geographic location. In *Agnello v. United States*, the Supreme Court held that the arrest of a suspect could not justify a search of a place remote from the place of arrest without a search warrant. The question must then be asked, How far is remote? Distances ranging from "next to the front stairs" to a half-block away have been held sufficiently close to be incident to the arrest. But it depends on the jurisdiction and the circumstances. In a recent California case, the police stopped an auto near the scene of a recent robbery and made a suspect, who resembled the description of the robber, get out. It was held that a search of the auto he was standing against was unlawful because the police had no reason to suppose that either a car or a confederate were involved. Also, no formal arrest had been made. Much more convincing is *United States v. Marrese* where a suspect was arrested, on a charge of desertion from the military, in the company of a friend in whose room he was staying. The arrest was made on the ground floor of the rooming house in which they lived. The court carefully considered the basis for a search incident to the arrest and reasoned that, since there was no knowledge of a weapon being used in the desertion, and therefore no evidence which could be destroyed, and since he and the friend were in custody on the ground floor, there was no way they could use the contents of the upstairs room to either escape or attack the officers. Since none of the three criteria which could justify the search existed, the court labelled it a "fishing expedition" and suppressed the seized evidence. This is a well-reasoned approach, requiring officers to justify their acts in light of the purpose of the search, and is better than decisions which rest merely on considerations of distance. However, where the distance does increase beyond the half-block limit imposed in the cases above, there is greater

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56 Slade v. United States, 331 F.2d 596 (5th Cir. 1964) (Per curiam) (jug in weeds by front stairs near front door of house trailer); People v. Daily, 157 Cal. App. 2d 649, 321 P.2d 469 (1958) (car parked fifty or sixty feet away); Ker v. California, *supra* note 23 (car in parking lot below apartment where defendant was arrested); People v. Cicchello, 157 Cal. App. 2d 158, 320 F.2d 528 (1958) (car half-block away from apartment where defendant was arrested); and United States v. Jackson, 149 F. Supp. 937 (D.D.C. 1957), *rev'd on other grounds*, 250 F.2d 772 (D.C. Cir. 1957) (search of apartment defendants had just left which was half-block away from car in which they were arrested).

57 People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658 (1963). This case should carry more weight on the issue of whether an arrest had occurred, to which a search could be incidental, than on the issue of remoteness by distance.

58 336 F.2d 501 (3d Cir. 1964).
likelihood that such cases will be disposed of on the issue of distance alone.\textsuperscript{59}

The second element of remoteness of a search is time. Most jurisdictions agree that where there are reasonable grounds for arresting a person, a reasonable search of his person and the area and vehicle under his control is justified as incident to the arrest, and the search is not unlawful merely because it precedes rather than follows the formal arrest.\textsuperscript{60} The probable cause for arrest must exist before the search, for if the arrest depends upon the prior search alone, both arrest and search are unreasonable.\textsuperscript{61} If the search occurs some length of time prior to or after, the arrest, it will be remote in time and thus held unreasonable.\textsuperscript{62} However, this restriction is for the protection of the arrestee and he can waive his right, if he does so willingly and knowingly.\textsuperscript{63} The same criteria apply as to the necessity for the search as applied above. Thus, if the car is impounded, is no longer capable of being used in an escape, and the evidence is securely locked inside, any later search must be by warrant.\textsuperscript{64} The test of remoteness in time is relative to arrest, but if the search takes place when an unconscious person is taken into custody, it will not be remote merely because a technical arrest could not be made until the person regained consciousness.\textsuperscript{65}

The last category of cases dealing with remoteness covers those situa-

\textsuperscript{59} United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955). Search of defendant's apartment, two blocks away from the place where his car was stopped, was held too remote.


\textsuperscript{61} State v. Collins, 150 Conn. 488, 491-93, 191 A.2d 253, 255 (1963); Gross v. State, 235 Md. 429, 201 A.2d 808 (1964). \textit{But see} People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956), where officers asked two men to step out of a cab for questioning and one of them made a motion as if to hide something. The court held that the furtive motion gave cause to search the cab. But, this doesn't seem to be cause for arrest and it seems as if the arrest was based on the search and should have been held illegal.

\textsuperscript{62} Gross v. State, \textit{supra} note 61 (2 hours prior); United States v. Cain, 332 F.2d 999 (6th Cir. 1964) (3 hours after); State v. Edmondson, 379 S.W.2d 486 (Mo. 1964) (a second and more thorough search four hours after); People v. Burke, 39 Cal. Rptr. 531, 394 P.2d 67 (1964) (eight hours after); Smith v. United States, 335 F.2d 270 (D.C. Cir. 1964) (the morning after an arrest made the previous night).

\textsuperscript{63} See Pettas v. United States, 203 A.2d 170 (D.C. Mun. App. 1964). The officers did not search the car at the time of arrest, only because of the arrestee's request not to be embarrassed before his neighbors. A subsequent search in the arrestee's presence, performed immediately on arrival at the precinct station, was held reasonable and lawful.

\textsuperscript{64} Smith v. United States, \textit{supra} note 62.

tions in which the search is remote from the arrest in both place and time. There formerly were three different views on such searches, depending on a close interpretation of the facts in each particular case: (1) one view held that as long as the arrest was lawful, any subsequent reasonable search would also be lawful;\(^6\) (2) another held that a search must be incident to arrest but made an exception in the case of an auto which had been impounded. The reasoning behind this view was that, since taking an inventory of the auto's contents is for the protection of the arrestee (so that nothing is lost or stolen) and of the police (so that no false charges of theft can be made), any evidence found is admissible, since the search which uncovered it was "lawful."\(^7\) The distinction between an "inventory" and a search is, at best, so minor as to be non-existent. It seems that those courts which adopted it were merely seeking a way to ease police work at the expense of individual rights. However, if an inventory is made as a regular part of the administrative procedure of incarceration, is lawful but the evidence is inadmissible. (3) The last, and best, view holds that any search remote from the arrest is unreasonable where at least one of the three criteria previously discussed was not present.\(^6\)

Finally, the Supreme Court examined the problems concerning remoteness in the important case of *Preston v. United States* and adopted the third view.\(^6\) In that case, three men who had been seated in a parked automobile from 10:00 P.M. until 3:00 A.M. in a business district, were arrested by city police and charged with vagrancy; after giving an unsatisfactory explanation of their activities, and admitting that they were unemployed and had only twenty-five cents among them. Upon their arrest, the three men were searched for weapons and taken to a police station. The auto was towed without search to the station and then to a garage. The glove compartment was then searched and two guns were found. The officers returned to the station and exhibited the guns, stating that the trunk was locked. On instructions, they returned to the car,

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\(^6\) People v. Tabet, 402 Ill. 93, 83 N.E. 2d 3:9 (1949), *cert. denied*, 336 U.S. 970 (1949); Petri v. State, 207 Ind. 478, 188 N.E. 784 (1934) (auto was found several miles from the place of arrest); Patrick v. Commonwealth, 199 Ky. 83, 250 S.W. 507 (1923).


\(^6\) Fahy v. Connecticut, 375 U.S. 85 (1963); United States v. Stoffey, 279 F.2d 924, 928-29 (7th Cir. 1960); People v. Montgares, 336 Ill. 458, 168 N.E. 304 (1929); State v. Jones, 358 Mo. 398, 214 S.W.2d 705 (1948). See also *supra* notes 32, 33 and 47. Illinois was one jurisdiction which was inconsistent when faced with this situation. Compare People v. Montgares, *supra*, with People v. Tabet, *supra* note 66.

\(^6\) 376 U.S. 364 (1964).
entered the trunk, and found the burglarly paraphernalia, which was later introduced against Preston in his federal trial on charges of conspiring to rob a federally insured bank. Justice Black delivered the unanimous opinion of the Court, saying in part:

Common sense dictates, . . . that questions involving searches of motor cars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses.\(^7\)

He reviewed the three criteria saying:

The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant is simply not incident to the arrest.\(^7\)

The Court then reasoned, assuming arguendo the arrest was valid, that since the men were in custody and away from the car in the garage, the "... search was too remote in time or place to have been made as incidental to the arrest ... the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment. ..."\(^7\)

Finally, the Court applied the exclusionary rule and held the evidence obtained to be inadmissible.\(^7\)

\textit{Preston} appears to solve the entire problem of remoteness. It has already been widely applied to provide solutions in similar cases, as those states which have used it consider it binding on them through the \textit{Mapp} case.\(^7\)

In Illinois, two recent cases have applied \textit{Preston} with the exclusionary rule. In \textit{People v. Catavdella},\(^7\) the suspects were arrested for an alleged traffic violation, at which time, several antique pistols and a camera were seen in the back seat of their car. After the car had been taken to the police station, and the three men were in custody, an officer forced open the trunk and found stolen articles which were later admitted at the

\(^7\) Id. at 366 (Emphasis added).
\(^7\) Id. at 367 (Emphasis added).
\(^7\) Id. at 368.
\(^7\) Ibid.


\(^7\) 31 Ill. 2d 382, 202 N.E.2d 1 (1964) (Advance Sheet).
The court, through Justice Klingbel, held that the search at the station was unreasonable and invalid when "tested by the standard set forth in the Preston case," and therefore the trial court erred in admitting the evidence.77 People v. Erickson,78 handed down the same day as Catavella, is almost identical in its factual situation. After a traffic arrest, the arresting officer saw a brown rubberized cord extending a few feet out of the trunk of the car. When the arrestees were in custody, and the car at the station, a police sergeant searched the car and trunk and found the articles put in evidence at the trial.79 Justice Underwood, writing for a unanimous court, held the evidence inadmissible under Preston, reversed the conviction and remanded the case for a new trial.80

Unfortunately, not every court which has applied Preston has done so correctly. In People v. Morgan,81 defendants were arrested on two traffic charges and they and their car were taken to police headquarters. When the defendants emptied their pockets, the police, seeing they had large amounts of currency in their possession, suspected a robbery. The police then searched the car in a nearby police garage, without obtaining a warrant, and found evidence implicating the defendants in a theft. The court held that there had been a "second arrest" at the time the police saw the large amounts of money and that the search of the car was incident to this second arrest. The objections to this reasoning are: (1) there can't be a second arrest if the arrestees had never been set free after the first arrest; (2) the record showed no "second arrest," either formal or informal, and the state never tried to prove one; (3) there is serious doubt whether reasonable grounds even existed to validate the alleged second arrest; and (4) the search was clearly contra the reasoning in Preston and could only be legal if accomplished pursuant to a search warrant. Judge Rabin's dissent pointed out that, even if one agreed there had been a "second arrest," the search wasn't justified, as there was no possibility of escape, destruction of evidence or attack on the police using weapons from the car.82

How far can Preston be extended? In Adams v. United States, the

76 Id. at 385, 202 N.E.2d at 3.
77 Id. at 386-88, 202 N.E.2d at 3-5. Justice Schaeffer, with Justice Underwood concurring, specifically agreed that Preston controlled and the conviction had to be reversed, but they dissented from the majority on the issue of whether to remand or not. Id. at 389, 202 N.E.2d at 5.
78 31 Ill. 2d 230, 201 N.E.2d 422 (1964) (Advance Sheet).
79 Id. at 231-32, 201 N.E.2d at 423.
80 Id. at 235-36, 201 N.E.2d at 425.
82 Id. at ——, 251 N.Y.S.2d at 506-08.
appellant urged that the search incident to arrest be precluded as soon as the suspects are securely in police custody. The court held:

We recognize, of course, the logic in appellant's argument. After his arrest there was no danger from unseen weapons or of evidence disappearing from the locked trunk of the car. The status quo with respect to the trunk could have been maintained until a search warrant was issued, particularly since the car itself was impounded by the police. . . . But as far as we are aware, no court has yet held that a car, including its trunk, may not be searched without warrant at the time and place its occupants are placed under lawful arrest. We are not persuaded that we should be the first court to do so.

While it would be a break with tradition to so hold, the validity of the appellant's argument cannot be denied. Once the dangers to the police are over, and the possibility of escape and destruction of evidence are at an end, all the exceptions which might justify a search without a warrant are eliminated. The car should then simply be impounded in the police lot while a search warrant is sought. This appears to be a very reasonable procedure, for it would require the state to show probable cause to a judicial officer, before getting a warrant to search the car, rather than requiring it only later; when the evidence is sought to be admitted at a trial. It would not be an undue obstacle, as search warrants are quickly issued upon proper affidavit, but it would serve as a safety measure, taken to protect a prisoner who may well be innocent. Some policemen may become overzealous in pursuing their duties and one more safeguard would be well appreciated.

Now to explore the types of apparent violations which face the policeman.

CRIMINAL VIOLATIONS

At common law and in many states today, there are three classes of criminal violation: felony, misdemeanor and traffic violation or offense. Each class of violation gives rise to different rules respecting legal arrests. A person may be arrested if the arresting officer has probable cause to believe he has committed, is committing, or is about to commit a felony, and no special words are needed to validate such an arrest without a warrant. This type of arrest must be based on probable cause, and

83 336 F.2d 752 (D.C. Cir. 1964) (Per curiam).
84 Id. at 753. But also note that strict interpretation of the rule in Preston can lead to decisions which are correct as to law but which are unpopular with the public due to the nature of the crime. See TIME, Feb. 19, 1965, p. 56 cols. 2 and 3.
85 VARON, supra note 22, at 78-83, 89-103 and 194-95.
mere suspicion will not suffice. However, the test of probable cause will be satisfied where the police officer relies on a radio description, *i.e.*, he need not see the crime being committed.

In order for an officer to arrest a person for a misdemeanor, the officer must have positive knowledge of the misdemeanor or see it committed. Some jurisdictions have said that an officer must have probable cause to believe that a misdemeanor is being committed in his presence. Others require that the probable cause arise from something the officer has discovered through use of his senses, so that he is actually aware of something which is probably a misdemeanor. It is now well established that what is seen in a car, under natural light or by use of an artificial light, can be probable cause in an arrest for a misdemeanor or felony, and a search of the car incident to such arrest. The reasoning behind this rule is that there has been no actual search, "for search implies invasion and quest, and that implies some sort of force, actual or constructive."


88 Silver v. State, 110 Tex. Crim. 512, 8 S.W.2d 144 (1928), *rehearing denied*, 9 S.W.2d 358.

89 State v. One Hudson Cabriolet Automobile, *supra* note 41; State v. Wills, 91 W. Va. 659, 114 S.E. 261 (1922).


91 State v. Pluth, 157 Minn. 145, 195 N.W. 789 (1923); State *ex rel.* Sadler v. District Court, *supra* note 90. Then, there is the situation of a merchant who sees goods being shoplifted, sees the thief drive away in a car, and calls the police who radio out a complete description of car and man. When the police saw the man in the same car, two hours later, they were unable to arrest him because no misdemeanor had been committed in their presence. Coakley, *supra* note 13, at 11. The solution to this situation is twofold: (1) Give the store the right to reasonably detain any person who is believed to have committed such an offense [as in ILL. REV. STAT. ch. 38, § 10-3(c) (1963)] or (2) make shoplifting a felony similar to burglary.

92 United States v. Paradise, 334 F.2d 748 (3d Cir. 1964); People v. Exum, *supra* note 51; State v. Griffin, 84 N.J. Super. 508, 202 A.2d 856 (1964); State v. Gianfresco, (Ohio Ct. App., Mahoning County, Oct. 15, 1963) (not reported), *aff'd*, 176 Ohio St. 60 197 N.E.2d 362 (1964) (Per curiam), *cert. denied*, 379 U.S. 932, 33 U.S.L. WEEK 3206 (No. 510) (U.S. Dec. 8, 1964); State v. Williams, 237 S.C. 232, 116 S.E.2d 858 (1960); State v. Quinn, 111 S.C. 174, 97 S.E. 62 (:918); Smith v. State, 155 Tenn. 40, 290 S.W. 4 (1927); State v. Sullivan, 395 P.2d 745 (Wash. 1964). State v. Sullivan is open to question, however. Judge Donworth's dissent points out that in the testimony, the police officer saw a glass ampoule on the car floor but did not realize it was a narcotic, until he picked it up and read the name on it. Judge Donworth felt that seizing the ampoule, before knowing of an offense, was an unreasonable search. *Id.* at 748.

93 State v. Quinn, *supra* note 92, at 180, 97 S.E. at 64. Reaching inside the car door, as in State v. Sullivan, *supra* note 92, was an example of constructive force.
There are some cases which treat this area broadly and speak in terms of a "criminal offense" and not of felony or misdemeanor. Generally, these decisions follow the pattern of misdemeanor cases; most of them turn on whether the crime was committed in the officer's presence. Where no offense was actually seen (mere uncorroborated information and suspicion will not suffice), the arrest and search will be held unlawful. The United States Supreme Court has held that where two persons were arrested in a car for selling contraband ration tickets (in an entrapment situation), a search of the car was justified as incident to the arrest. But the arrest and search of a third occupant of the car was held to be without probable cause, and the Court refused to stretch the Carroll case to cover it. However, there is another line of cases, followed in Illinois, which permits arrest for an "offense" on reasonable grounds or probable cause. The Illinois Code of Criminal Procedure has adopted this position as its new standard for arrest without warrant. It remains to be seen whether the abolition of the common law distinctions (the placing of arrests for misdemeanors on the same level as arrests for felonies) can pass the Supreme Court as a procedural rule under Ker v. California, or whether it is a substantive change and must be weighed under Mapp v. Ohio.

This raises a problem as to what are reasonable grounds for an arrest. Since there is no general rule, each case must depend on its own facts. In Smith v. United States, it was held:

There must, of course, exist a ground and basis for a federal officer to engage in stopping a car on a highway. . . . [a]gents are not free to make general

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94 Pickett v. State, 99 Ga. 12, 23 S.E. 608 (1896); People v. Brooks, 340 Ill. 74, 172 N.E. 29 (1930). Accord, State v. Pluth, supra note 91, where the court held: "Although a person may actually be committing a criminal offense, it is not committed in the presence of an officer . . . if the officer does not know it. And where the officer could not observe or become cognizant of the act constituting the offense by use of his senses it could not be committed in his presence so as to authorize an arrest without warrant." Id. at 151, 195 N.W. at 791. (Emphasis added.) See Draper v. United States, 358 U.S. 307 (1959), as to what constitutes sufficient corroboration of information.


97 Ill. Rev. Stat. ch. 38, § 107-2 (1964), reads in part:

"A peace officer may arrest a person when: . . .

(c) He has reasonable grounds to believe that the person is committing or has committed an offense."

Note that the incipient crime, i.e., "about to commit an offense" is not included. See also Ill. Rev. Stat. ch. 38, § 200-1 et seq (1965).

98 Thompson, supra note 96, at 41.

or capricious interceptions of motorists. Elements must be present, of which
the agents have information or knowledge connected with the car itself, or
with the driver, or with the context given the car and driver by some
special scene or setting, which can reasonably impress, beyond a mere
suspicion, that the motorist is not "going about ordinary affairs" but is
presumably engaged in using the car for [an improper . . . purpose.]

It must also be understood that "[p]robable cause is something more than
mere suspicion and something less than evidence which would justify
conviction." The concurrence of the above two rules delimits the area
of probable cause.

A quick study of the case law relating to the three levels of police
knowledge upon arrest, viz., suspicion, probable cause and positive knowl-
edge, will reveal what is actually held by the courts to be reasonable
grounds for arrest and search. Since probable cause is the standard needed
to justify an arrest, mere suspicion, being less than probable cause, will
not justify an arrest and search. A simple quick movement by a person
in the back seat of a cab, or a person staring from a slowly driven car at
a passing motorcycle patrolman, have been found to raise only general
suspicion, at most, and arrests and searches based on those situations have
been held patently unreasonable. The mere fact that a person enters a
cab in an area of criminal narcotics activity or that a cab passenger has a
criminal reputation will not even create a general suspicion without
something more. Frequently, an initial situation which could arouse
only general suspicion, at most, can, with the addition of a few more
suspicious actions, develop into complete probable cause, even though
the initial situation could have an innocent explanation. While mere

100 264 F.2d 469, 472 (8th Cir. 1959). Accord, McCarthy v. United States, 264 F.2d
473, 475 (8th Cir. 1959). Cf. Arch v. United States, 13 F.2d 382, 384 (5th Cir. 1926);


102 United States v. Myers, 287 Fed. 260 (W.D. Ky. 1923), aff'd, 4 F.2d 1020 (6th Cir.
1925) (Per curiam); Kersey v. State, 58 So. 2d 155 (Fla. 1952); Robinson v. State,
197 Ind. 144, 149 N.E. 891 (1925). But see People v. Case, 220 Mich. 379, 190 N.W.
289 (1922), wherein it was held that police could brush aside the canvas cover of a
truck on mere suspicion or less, on a regular inspection for liquor on the state fair
grounds while making rounds.

103 People v. Stein, 265 Mich. 610, 251 N.W. 788 (1933); People v. Roache, 237
P.2d 422 (1957).

104 Rios v. United States, supra note 45; People v. McGurn, 341 Ill. 632, 173 N.E.
754 (1930).

States v. Sawyer, 297 F.2d 535 (4th Cir. 1962), cert. denied, 370 U.S. 946 (overheard
phone call about a "stash pickup"); People v. Martin, 46 Cal. 2d 106, 293 P.2d 52
(1956) (two men talking in a car in lover's lane); Commonwealth v. One 1955 Buick
presence in an area of criminal activity is not reasonable grounds for arrest, the inability of a person to explain his suspicious actions can create probable cause.106

Probable cause is an elusive standard, depending so closely on the actual facts of the case, that it is possible for different courts to reach different conclusions from the same facts.107 Where the arrestee's actions may be just as consistent with innocence as with guilt, no probable cause will be found.108 But, where probable cause does exist, the failure to get a conviction for the offense suspected will not void a search incident to the arrest, or render inadmissible anything discovered thereby which proves a different offense.109 Beck v. Ohio has recently reaffirmed the principle that mere uncorroborated information that a person would be at a certain place and commit an offense does not rise to the level of probable cause.110 But, reliable detailed information, if corroborated by the officers witnessing the details described, will constitute probable cause for the stopping of a suspect auto and arrest and search of its occupants.111 There is a point beyond which suspicious acts rise to the level of probable cause. Where an action which is only capable of arousing general suspicion is persistently followed, it can attain the level of probable cause.112 Then, too, there is a range in valid probable cause cases, from those with weak facts that are little better than suspicion, to others which have facts so strong they border on positive knowledge.113

106 People v. Faginkrantz, 21 Ill.2d 75, 171 N.E.2d 5 (1960). (defendant was found near a car at 4:30 A.M. and stated he had pulled into the alley in order to defecate but he could not prove ownership of the car.) See also People v. Lewis, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960) (car sped away with lights out as police approached).

107 Compare United States v. One OX-5 American Eagle Airplane, 38 F.2d 106 (W.D. Wash. 1930) (probably cause) with State v. Kinnear, 162 Wash. 214, 298 Pac. 449 (1931) (no probable cause). These two cases are the forfeiture action and criminal appeal which grew out of the single seizure of Kinnear's airplane for illegal transportation of whiskey during Prohibition.


109 379 U.S. 89. But see Draper v. United States, supra note 94.

110 Scher v. United States, 305 U.S. 251 (1938); King v. United States, 1 F.2d 931 (9th Cir. 1924); Combs v. Commonwealth, 271 Ky. 794, 113 S.W.2d 449 (1938). Cf. Draper v. United States, supra note 94.


113 Compare People v. Myles, supra note 87; People v. Brajevich, 174 Cal. App. 2d 438, 344 P.2d 815 (1959); and Hughes v. State, 145 Tenn. 554, 238 S.W. 588 (1922)
Some states have tried to improve or replace this standard with the test of good faith, but the Supreme Court has refused to use this test by itself, on the grounds that it leaves too much to the discretion of the police. Until the Supreme Court passes on more cases involving probable cause and the reasonableness of state procedures, under the doctrines of Ker and Draper, the practitioner must continue to find his authority in the stare decisis of his own jurisdiction. If he attempts to change his jurisdiction's approach, he will have to trudge through a morass of conflicting authority which cannot yet be ignored. His attempt to present consistent authority with facts similar to those of his own case may even be met with contrary authority from the same jurisdictions.

Positive knowledge is a higher standard than probable cause, and a few cases have required this standard in arrests for misdemeanors. Positive knowledge usually exists when the arresting officers have actually seen the contraband to be seized, or have trapped the suspect by offering to purchase some of the contraband and then having him appear as agreed. Where the officer only accosts the suspect in order to question him, and the suspect freely admits he is in possession of contraband, the officer then is held to have positive knowledge which will justify an arrest for possession of contraband.

There are statutory exceptions to the probable cause requirement in the areas of customs, immigration and revenue. The broad power to


116 The best collections of these probable cause cases, with emphasis on the jurisdictions involved, are Varon, supra note 22 and Annot., 89 A.L.R.2d 715, 721-46 (1963). Valuable discussions will also be found in Barrett, supra note 15, and Comment, supra note 13, at 908-12.

117 See supra note 89.

118 Lafazia v. United States, 4 F.2d 817 (1st Cir. 1925); Alshuler v. United States, 3 F.2d 791 (3d Cir. 1925); Reyff v. United States, 2 F.2d 39 (9th Cir. 1924).

119 Daisen v. United States, 4 F.2d 382 (6th Cir. 1925) (motorboat); State v. Gulgczynski, 32 Del. 120, 120 Atl. 88 (1922); Blager v. State, 162 Md. 664, 161 Atl. 1 (1932). But see Epps v. State, supra note 114, where the stopping was held to be an arrest not made in good faith so that the suspect's statement: "Ya got me," was held inadmissible and could not, therefore, be the basis of positive knowledge.

120 Most of the cases on revenue involve ships and vessels. Generally, the cases and statutes give a government official the right to board a vessel within the United States' territorial waters, inspect the manifest, and observe the cargo. If from the inspec-
search, without even unsupported suspicion, random vehicles and persons at points of entry, given to customs and immigration officials is an analog to the power to search vessels.\textsuperscript{121} While no one has ever successfully questioned the right of the government to make this search, a problem arises over the definition of "port of entry".\textsuperscript{122} Prohibition statutes also fell within the exception, when they were in force.\textsuperscript{123}

One of the risks inherent in such statutes is that the law enforcement agencies will seek a friendly forum and the attempt to expand the power allotted to them.\textsuperscript{124} Another risk is that some judge may overlook the cardinal rule that the finding of the object searched for cannot legalize an unreasonable search.\textsuperscript{125} Texas has passed a statute which permits searches without warrant for narcotics in other than private residences.\textsuperscript{126}

\begin{footnotesize}
\textsuperscript{122} The discussion in Comment, \textit{supra} note 13, is excellent. The author shows his desire to limit the broad power as it clearly appears to have been abused in practice. The Fifth Circuit has shown a propensity for extending this power to the "100 mile border" authorized by 8 C.F.R. § 287.1. The Ninth Circuit, following a more enlightened path, has cut the "border" to 60 miles or less on the basis of reasonableness. 51 \textit{CALIF. L. REV.} at 913-14 (1963). Probable cause applies after entry has been completed and searches too far from the border are unreasonable if not based on probable cause or done during hot pursuit. \textit{Id.} at 919-20. See also Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959), \textit{aff'd on later appeal}, 278 F.2d 330 (9th Cir. 1960).
\textsuperscript{123} Husty v. United States, \textit{supra} note 29; Carroll v. United States, \textit{supra} note 27.
\textsuperscript{124} See \textit{supra} note 122, and notes 185 and 192 infra.
\textsuperscript{125} Henry v. United States, \textit{supra} note 108. See, e.g., United States v. Barremen, 278 Fed. 231, 235 (S.D. Cal. 1922), where the court said: "It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justified the search."
\textsuperscript{126} Article 725b, § 15, Tex. Penal Code art. 725b, § 15 (1961), provides in pertinent part: "Officers . . . shall have power and authority, without warrant, to enter and examine any buildings, vessels, cars, conveyances, vehicles or other structures or places, when they have reason to believe and do believe that any or either of same contain narcotic drugs . . . contrary to . . . this Act . . . except when any such building, vessel or other structure is occupied and used as a private residence, in which event a search warrant shall be procured as hereinbelow provided." Quoted in PAULSEN AND KADISH, CRIMINAL LAW AND ITS PROCESSES 753 (1962). The next paragraph of the
\end{footnotesize}
This statute requires no showing of probable cause but uses “reason to believe,” which seems like a throwback to “good faith.” Other states equate this phraseology with probable cause, but that does not appear to be intended here. It appears that the legislators have attempted to render the statute constitutional on its face. However, since the statute does not require probable cause as a test for “reason to believe”, and since this test must be met under Mapp and Ker, it is likely that this statute will be held unconstitutional upon scrutiny by a high court.

This could be accomplished by a revival of the venerable rule of State v. McCann, where a blanket power to enforce a prohibition statute was modified by the court to permit seizure only of that material which could be seized without an unreasonable search such as the Constitution prohibited.\(^\text{(127)}\)

In order to have a lawful search, the stopping of the auto and the search itself must not be unreasonable. The stopping is unreasonable where it is done by shooting at the car or its tires, when the suspects have not used deadly force or committed a forcible felony.\(^\text{(128)}\)

Lastly, a search without probable cause may be held reasonable if the defendant voluntarily consented, with specific knowledge that the evidence may be seized and used against him. It will be held unreasonable if there is no consent.\(^\text{(129)}\) The issues, in such cases, are whether defendant's actions constituted a knowing consent, and whether it was freely given. As in the case involving probable cause, there is equal authority for both sides of each issue. Thus, defendant's silent failure to object to the search statute confers power to stop persons and to open any package they are carrying and determine if it contains narcotics. Contra, People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955).

\(^\text{(127)}\) 59 Me. 383, 385 (1871).

\(^\text{(128)}\) United States v. Costner, 153 F.2d 23 (6th Cir. 1946); United States v. Cotter, 80 F. Supp. 590 (E.D. Va. 1948); United States v. Kaplan, supra note 90, wherein Judge Barrett said: “The enforcement of a law by the impairment of rights may be too costly. The repeal of a wise and good law may be brought about by its harsh and reckless enforcement. Officers, above all others, should observe the law. They should not, as a result of undue enthusiasm or by narrowed vision, wrongfully trespass upon the rights of others. They should not lose a proper sense of relative values of rights and duties. They should not, for instance, jeopardize lives by firing at automobiles in the hope of puncturing tires, when a slight misaim may result in death, even though the automobile might be occupied by a violator of the law. Especially, should this be foreborne when inevitably, at times, mistakes will be made, and a car shot at will be occupied by those who are entirely innocent. It must not be forgotten that the innocent may be apprehensive of attack from others than officers of the law, and may ... conscientiously believe that their only safety is in flight. A fleeing automobile may be in defiance of the law, but a badly aimed shot may be murder.” (Id. at 974.) See also Rochin v. California, supra note 46.

\(^\text{(129)}\) People v. Foreman, 218 Mich. 519, 188 N.W. 375 (1922); Butler v. State, 129 Miss. 778, 93 So. 3 (1922).
has been held to be consent in one case whereas the search was held unlawful and to have no effect in another. The next issue is whether the consent was an acquiescence to the superior power of the police or whether it was freely given. Again, this depends so much on the facts that the differences among viewpoints become extreme. It does not matter what words defendant uses in acquiescing. If they are not freely given, they will not be construed as consent. In State ex rel. Branchaud v. Hedman, the actions of the defendant, who was in a car parked in a razed area of the city, made the officers suspicious. As they went to question him, they saw that his trunk was secured by a hasp and padlock. The officers asked if they could look in the trunk and Branchaud either gave them the keys or opened it himself. The court held that since there was no coercion, Branchaud's actions were voluntary and the search was lawful.

TRAFFIC VIOLATIONS

Except for prohibition offenses, most of the offenses discussed above were felonies, while most traffic violations are misdemeanors. This section will cover moving violations (serious and minor), licensing, and registration violations and violations involving parked and immobile vehicles. No added problems on arrest are presented here as all but one case (noted here) have been discussed above. Arrest warrants are

131 Compare People v. Thomas, — Cal. App. 2d — (Cal. Dist. Ct. App., 2d App. Dist., June 22, 1964) (unreported?), cert. denied, 379 U.S. 867 (1964), 33 U.S.L. WEEK 3216 (No. 531) (U.S., Dec. 15, 1964), where a trial court believed the statement of the four arresting officers that while they were frisking the defendants, the latter freely gave their consent, with the decision in State v. King, 84 N.J. Super. 297, 201 A.2d 758 (1964), wherein defendant was arrested and questioned without intimidation in a squadrol by two officers immediately behind the building in which he lived and the search was struck down on the dual grounds that his acquiescence wasn’t freely given and that the auto was too remote from the place of arrest.
133 130 N.W.2d 628 (Minn. 1964).
135 See, e.g., ILL. REV. STAT. ch. 95½, §§ 3-812(a), 4-106(a), 5-601, 6-401(a) and (b), 8-123, UART § 137, par. 239.11 and par. 239.21, § 4 (1963). A few traffic violations are serious enough to be felonies: ILL. REV. STAT. ch. 95½, § 4-106b; ch. 38, par. 9-3(b) (1963).
136 See supra notes 43, 44 and 45. But cf. Robertson v. State, 184 Tenn. 272, 198 S.W.2d 633 (1947), where it was held that any stopping and detention of an automobile by an officer constituted an arrest.
not much of a problem here because these violations are mostly misdemeanors for which a person is not usually taken into custody.\textsuperscript{137}

Searches of autos incident to arrest for traffic violations present grave problems when judged under the three criteria of a proper search. These problems arise especially from the criterion which justifies search to prevent destruction of the fruits or instruments of the crime.\textsuperscript{138} Except for drunken driving, where the alcohol may be considered an instrument of the crime along with the car,\textsuperscript{139} there are no other instruments for a traffic violation, and the only fruit, if any, may be a small savings of time for the driver. The car will not be impounded in such a case, and time cannot be seized. The courts have made good use of this reasoning, and some of them discuss it specifically.\textsuperscript{140} Search of the person is a different matter, however, as it usually rests on the other two criteria.\textsuperscript{141}

In \textit{Brinegar v. State}, it was recognized that many law abiding persons are guilty of traffic violations because:

There are one-way streets, no-parking zones, zones restricted to parking of particular kinds of vehicles, zones restricted to pedestrian traffic, no-left turn corners, some left turn after stop, some by mere arm signal. In some places a tail light signal is sufficient to indicate a turn or a stop, and other

\textsuperscript{137} See Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961), where defendant committed two minor traffic violations (failure to signal a right turn and having faulty brake and parking lights) and a warrant for his arrest was issued the following day. The warrant was really a subterfuge to permit the officers to search defendant's room for narcotics as an incident to his arrest. Judge Orr held:

"[T]he search must be \textit{incident} to the arrest and not vice versa. . . . It is quite apparent that the attempted arrest of appellant under the traffic warrants falls within this latter evil; the traffic warrant was being used as a mere excuse to search appellant. . . . It is a matter of common knowledge, and it was admitted by one of the arresting officers at the trial, that it is not ordinary police procedure to physically take a person into custody for a minor traffic violation . . . especially when no traffic ticket or citation has theretofore been given." (Id. at 265.) (Emphasis in original.) See \textit{supra} note 54.

\textsuperscript{138} See People v. Gonzales, 356 Mich. 247, 254-55, 97 N.W.2d 16, 20 (1959). Note that only in hit-and-run, collision, and similar cases is the car a true instrument of the crime.

\textsuperscript{139} See Agata, \textit{Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone}, 7 St. Louis U.L.J. 1, 36 (1962).

\textsuperscript{140} \textit{Ibid.} However, the evidence in \textit{Gonzales} was admitted under a special state statute concerning concealed weapons. \textit{Compare} Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938), with State v. Deitz, 136 Wash. 228, 239 Pac. 386 (1925). In \textit{Deitz}, what are the fruits of driving without lights and license plates?

\textsuperscript{141} People v. Thomas, 31 Ill. 2d 212, 201 N.E.2d 413 (1964) (Advance Sheet); Elliott v. State, \textit{supra} note 140. See Lane v. Commonwealth, 386 S.W.2d 743 (Ky. 1964) (Advance Sheet) which held that arrest for a "traffic or other minor violation . . . does not give to the officer absolute right to search the vehicle . . . indiscriminately." But, the court warned: ". . . this opinion should not be construed to mean that a person in custody may not be searched in order to be disarmed, or to prevent escape or the immediate destruction of evidence for which he was detained." (Id. at 745.)
places require an arm signal; there are various lanes in some metropolitan areas, some restricted exclusively to various classifications of traffic, and requiring a genius to get out of after once getting in, without violating the law.\(^{142}\)

This case is but one of many which have not based their decision on the three criteria, but have held as a rule of law that minor traffic offenses alone will not justify a search of the offender's car, and the use of the offense as a pretext for search will be held unreasonable.\(^{148}\) Some of these cases have also held a search of the person to be unreasonable in the absence of a good faith belief that the motorist was armed, dangerous or apparently intended to escape.\(^{144}\) There are some states which merely applied the general rules for arrest and held that searches of person and auto, incident to traffic arrest, are valid.\(^{145}\) However, while neither position is in a clear majority (there being mediate positions held by other states), the trend is clearly toward limiting the power to search.\(^{148}\)

Where a traffic violation is coupled with "other circumstances which may reasonably infer the commission of a more serious crime,"\(^{147}\) or if there can exist a good faith belief that the officer may be in danger or the offender escape, a search of the person and car may be reasonable.\(^{148}\) As Justice House said in \textit{People v. Thomas}:

When, however, the circumstances reasonably indicate that the police may be dealing not with the ordinary traffic violator but with a criminal . . . the police officers were justified in searching defendant and the area under the


\(^{145}\) See cases collected in Simeone, \textit{id.} at 512.

\(^{146}\) Of the nineteen cases in Simeone, \textit{supra} note 144, eight of them were decided before World War II and three of the six states named are included here as ones which have joined and even sparked the trend towards limitation. Cf. Agata, \textit{supra} note 139, at 1.


front seat for their own protection before taking him to the police station for the traffic offenses.\textsuperscript{149}

The next group of violations stems from the power of the government to license drivers and vehicles.\textsuperscript{150} The refusal or inability of a motorist to display a valid driver's license is prima facie evidence that he does not have one, but the charge will be dropped if he can present one in court.\textsuperscript{151} While the police have a right to demand the display of a driver's license, they must exercise the right in good faith.\textsuperscript{152} But, if the request to inspect the license is merely being used as a pretext to search the motorist, then, like the minor traffic offenses above, the arrest or stopping is unlawful, and any subsequent search is illegal.\textsuperscript{153} If the arrest is not a pretext, but a valid arrest for a traffic offense for which a summons may ordinarily issue, the failure of the motorist to display a valid driver's license is usually taken, by both police and courts alike, to raise the situation to one in which the motorist can be taken into custody and a search made.\textsuperscript{154} The offense of allowing an unauthorized driver to operate one's auto seems to be excepted by the courts from this harsher treatment if the owner of the car was present in it and was carrying a valid driver's license.\textsuperscript{155} The apparent difference in treatment seems to be related to

\textsuperscript{149} 31 Ill. 2d 212, 213–14, 201 N.E.2d 413, 414 (1964), wherein the defendant was stopped at 5 A.M. for faulty tail lights, had no license and had just been released from prison. See State v. Quintana, 92 Ariz. 267, 376 P.2d 130 (1962) (defendant stopped for speeding when there was reasonable suspicion that car was stolen); People v. Žeravich, 30 Ill. 2d 275, 195 N.E.2d 612 (1964) (defendant stopped for driving with obstructed vision, reasonably fitted description of suspected turglar); People v. Esposito, 18 Ill. 2d 104, 163 N.E.2d 487 (1959) (defendant stopped due to unilluminated license plate and other occupant of car fled). But cf. United States v. Butler, 156 F.2d 897 (10th Cir. 1946). There is a good collection of cases on what gives reasonable cause in such situations in Annot., 89 A.L.R. 2d 715, 734–46 (1963). See also infra note 180.


\textsuperscript{151} State v. Farren, 140 Ohio St. 473, 45 N.E.2d 413 (1942); Ill. Rev. Stat., ch. 954, § 6-118 (1963). Note, however, that the law does not yet require a driver to carry his license.

\textsuperscript{152} Cornish v. State, 215 Md. 64, 137 A.2d 170 (1957) (officers reasonably believed that defendant's license had been revoked).

\textsuperscript{153} Byrd v. State, 80 So. 2d 694 (Fla. 1955); Kraemer v. State, 60 So. 2d 615 (Fla. 1952); Murphy v. State, 194 Tenn. 698, 254 S.W.2d 979 (1953); Robertson v. State, supra note 156; Cox v. State, 181 Tenn. 344, 181 S.W.2d 338 (1944). See also supra note 143.

\textsuperscript{154} People v. Thomas, supra note 149; People v. Morgan, supra note 81; State v. Griffin, supra note 92; State ex rel. Tessler v. Kubiak, 257 Wis. 159, 42 N.W.2d 496 (1950). Contra, State v. Riggins, supra note 74. The same majority principle applies where a truck driver is unable to produce the registration papers. See United States v. Bumbola, 23 F.2d 696 (N.D.N.Y. 1928); Graham v. State, supra note 132.

\textsuperscript{155} People v. Erickson, supra note 78; State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (1964).
probable cause in general and to the specific likelihood that one bent on a criminal activity would not bother with the formality of a license and also would likelier be driving a stolen car.

The last group of cases concerns parking violations and other searches of immobile vehicles. The development of the law, in these cases, is shown by a complete reversal of position in Illinois from 1950 to 1960. In *People v. Edge*, it was held that an arrest for blocking an alley and driving without a safety sticker would justify an arrest of a person and a search incidental to arrest. This is the early view, presented above, that an arrest for any offense justifies a search. In *People v. Clark*, defendant was arrested for a violation of a municipal parking ordinance and the officer saw a package in Clark's pocket and when he asked about it, he was told that it contained policy slips. Then, in *People v. Watkins*, the court held that a search incident to arrest must be based on the three criteria and without the presence of at least one, an arrest for a minor traffic offense which would ordinarily only result in a "parking ticket" would not raise an inference which would justify a search of the car or person. The court also overruled the *Clark* and *Berry* cases insofar as they were inconsistent with this opinion even though, on the specific facts before them, they held the search of Watkins justified.

The major fault with the *Watkins* case is that the two cases it overruled are justifiable as searches on the grounds of positive knowledge. In *Clark*, the actual search and seizure did not come until the policeman had asked about the bulging pocket and Clark had voluntarily admitted that he had policy slips. Clark's protection would have been to remain silent and then the rule in *Watkins* would apply. In *Berry*, the officer saw the passing of the policy slips as he was walking over to make the traffic arrest and thus had positive knowledge before there was any illegal arrest or search. The same day, the court also handed down its de-

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156 406 Ill. 490, 94 N.E.2d 359 (1950).
157 9 Ill. 2d 400, 137 N.E.2d 820 (1956). See *People v. Berry*, 17 Ill. 2d 247, 161 N.E.2d 315 (1959). When the officer approached defendant to arrest him because he had neither safety sticker nor license plates, he saw another occupant of the car give defendant a package of policy slips and then opened the car door and seized the package while informing the defendant he was under arrest for the traffic and policy violations.
158 19 Ill. 2d 11, 166 N.E.2d 433 (1960), *cert. denied*, 364 U.S. 833. Watkins had been arrested for parking too close to a crosswalk.
160 *But cf.* *State v. Brooks*, 57 Wash. 2d 422, 357 P.2d 735 (1960). Officers could have seen the stolen clothing in the back of the car by shining a flashlight and then the arrest would have been proper. But they had opened the door to check the registration and then saw the contraband and made the arrest on the basis of what they saw. The court's decision to admit the evidence must be strongly questioned as it is really an example of an arrest based on an unlawful search.
cision in *People v. Mayo.*\textsuperscript{161} There, the decision, based on the rule in *Watkins,* was clearly correct. An officer arrested defendant, as he got out of his car, because his wheels were too far from the curb and then the officer searched the car and found policy slips although at no time did anything happen that was unusual or suspicious that could qualify under the three criteria.\textsuperscript{162} This reasoning also considers that if the person had not been just getting into or out of the car, the officer would have just left a summons or a ticket and never formally arrested the motorist. Then, too, if the car were immobile and incapable of being driven away, even though the crime is serious, a search warrant would have been required.\textsuperscript{163}

**ROADBLOCKS**

Roadblocks present severe problems as to reasonable methods of search and balancing of public safety and private right. One text has suggested that there are only three reasonable grounds for using a roadblock: (1) discovering criminals fleeing from the scene of a crime known have been committed, (2) stopping traffic violators fleeing from officers in pursuit, and (3) halting motorists for the purpose of checking driver's license, registration, weight-load, and compliance with the safety provisions of the state's motor vehicle law.\textsuperscript{164} Justice Jackson stated in *Brinegar v. United States:*

Undoubtedly, the automobile presents peculiar problems for enforcement agencies, is frequently a facility for the perpetration of crime and an aid in the escape of criminals. But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect vicious crime. But I should strain to sustain

\textsuperscript{161} 19 Ill. 2d 136, 166 N.E.2d 440 (1960).

\textsuperscript{162} Ibid. See Williams v. Commonwealth, 261 S.W.2d 807 (Ky. 1953), and Jackson v. State, 169 Tex. Crim. 562, 330 S.W.2d 616 (1960), where cars were severely blocking the road with an incoherent or drunken person inside. Here searches on arrest of the person for public drunkenness were deemed reasonable but the Williams conviction was reversed on other grounds.

\textsuperscript{163} See Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923) (car burned after collision); compare State v. One 1921 Carillac Touring Car, 157 Minn. 138, 195 N.W. 778 (1923) (car turned over after collision).

such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.165

The way to achieve the desired result would be to limit the first category to felonies instead of all crimes. It would be better yet to limit it to forcible felonies as it is the peril to life which makes a dangerous crime more heinous. It is here that the public safety is most endangered, especially in the person of the victim. Maryland has imposed a further condition on roadblocks used to catch criminals. It insists that those who conduct roadblocks be given full descriptions of the fleeting felons and that the officers making the actual arrest have a reasonable belief that those stopped are the felons involved.166

Further safeguards for the private person come from the application of the principles of reasonable arrest. Thus, mere suspicion will not serve as grounds for stopping and search.167 In United States v. Bonnano, the police set up a roadblock and cordoned off a large area around a house where there had been a meeting of many known mobsters (the Apalachin Conspiracy).168 The police stopped all cars leaving the area in order to ascertain the identities of the occupants. Because there were so many cars, some persons were taken to the station and were questioned there, but no one was detained over one-half hour. The court, in ruling on the issue of whether there had been any violation of the defendant's rights, held that "simple interrogation" will not amount to an arrest where the delay is insignificant.169

Another type of roadblock is that used to check for drunk drivers or bootlegging. These are more in the nature of general arrests and searches but have been supported by at least one writer on the theory that they are analogous to an auto safety check.170 However, their exploratory nature really renders them unreasonable. Drunken driving is better detected by the erratic route of the car and not an unreasonable, humiliating and lengthy test administered before fellow citizens of a possibly innocent motorist.171 Also, there is much to indicate that the effectiveness of

167 Kersey v. State, supra note 102.
169 Id. at 79–81. However, there is a serious question here as to the use of cordon methods on grounds which amount to no more than suspicion. There is also much contrary authority on the issue of arrest. See supra notes 43, 44 and 45.
170 Comment, supra note 13, at 917 n. 86.
171 Ibid.
such searches is so small that they are really not worth the money which is spent on them.\textsuperscript{172}

Roadblocks for license and equipment checks are no different than other types of license checks discussed above. The important requirement is that they be conducted in good faith. In \textit{Commonwealth v. Mitchell}, after affirming a conviction for driving without a license discovered by means of a roadblock check, the court said:

Let it be emphasized that we are dealing here with systematic and indiscriminate stopping of all motor traffic on the highway for the good faith purpose of making inspections of drivers' licenses. Our decision may not be regarded as sanctioning the stopping of cars for the ostensible or pretended purpose stated when in reality it is actuated by an ulterior motive not related to the licensing requirement, or is done as a pretext or as a subterfuge for circumventing the constitutional provisions against searches of persons and property without a valid warrant. We shall continue to condemn such an act.\textsuperscript{173}

The requirement that drivers be licensed is for the safety of the public as users of the road. The public is already extremely unsafe due to the high number of collisions and other accidents today.\textsuperscript{174} Furthermore, unless the driver is so unsafe as to always drive erratically and recklessly, the offense is only observable at a roadblock or at a check made at the time of some other traffic offense.\textsuperscript{175} The roadblock is useful but it must be closely watched so that it is not extended. It must be subject to the test of good faith and, if and when the faith is broken, it must, and will be curbed.\textsuperscript{176}

\textbf{FRISKING}

As mentioned above, there are three criteria which justify a search incident to arrest. Perhaps, the most important of these is the one based on the safety of the officer. His safety is directly related to that of the public and if he is attacked, the public is greatly endangered. Generally, criminals will refrain from attacking an officer of the law, while they might attack an ordinary citizen so as to perpetrate a robbery, etc. This is partly because of the particular vigor with which the police pursue an attacker of their brother officers and partly because they are aware

\begin{footnotes}
\textsuperscript{172} Foote, \textit{4th Amendment—Obstacle or Necessity in the Law of Arrest, Police Power and Individual Freedom} 29, 33–34 (Sowle ed. 1960, 1962). Of the three operations for which figures are given, the smallest had an effectiveness of 0.25\%, the middle sized one of 1.51\% and the largest (157,000 cars stopped) of 0.63\%. There is also serious question as to how many of these arrests were formal enough to stand up in court.

\textsuperscript{173} 355 S.W.2d 686, 687 (Ky. 1962).

\textsuperscript{174} In Brinegar v. State, \textit{supra} note 142, at 474, Judge Powell observed: “The death rate from motor accidents rivals that of our severest wars.”

\textsuperscript{175} Comment, \textit{supra} note 13, at 915.

\end{footnotes}
that the policeman is able to resist strongly. But such attacks do take place, and even when the offense is only a traffic violation, a deranged motorist may shoot an arresting officer. In order to protect against such occurrences, the "frisk" has come to be widely applied. Its nature was explained by Orfield when he said:

At common law, an officer has no right to search a suspect before arresting him. But this rule antedated criminals with four inch pistols. ... [A] peace officer may search for a dangerous weapon any person whom he has stopped, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If he finds a weapon, he may keep it until the completion of questioning, when he shall either return it or arrest the person. An officer has authority, incident to a lawful arrest, to search the prisoner after the arrest. The justification is the officer's safety, and that seems as applicable to "frisking." 

The rationale behind the frisk is best explained by Judge Bergan in People v. Riviera:

If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty. ...

The frisk is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried.

It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place. ... The sense of exterior touch here involved is not very far different from the sense of sight and hearing—senses upon which police customarily act. ...

From the time the policeman, in the process of frisking defendant, touched the object, inferred by him correctly to be a gun, there was probable cause to arrest defendant and to proceed at once to further invade his clothing and take the gun.

The frisk must still meet the standards of reasonableness and where there is no reason for it, any evidence found will be suppressed. The

178 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 25-26 (1947). This is taken from a discussion of the UNIFORM ARREST ACT, § 3.
COMMENTS

best case on this aspect of the frisk is Barnes v. State.\textsuperscript{181} Barnes was stopped at night for having faulty brakelights and arrested for the violation after it was demonstrated to him. One of the officers told him that they were justified in searching him and his car and he said "Go ahead. I am clean." A search of the car and a frisk of Barnes turned up a small quantity of marijuana and a few cigarette papers. Barnes was taken into custody on a narcotics charge. The court first held that the "consent" to the search was without effect as Barnes was deemed to have reason to believe that he would be searched even if he objected.\textsuperscript{182} The court then said that while frisking was a good and necessary practice, it must be conducted reasonably. The reasonable frisk of Barnes ended when the police were done patting him down in their search for weapons. The court held that since the marijuana was discovered by the later unlawful search, and not the lawful frisk, it must be excluded as evidence.\textsuperscript{183}

SOLUTIONS AND CRITICISMS

More than at any other time in this century, we are warned of the danger of becoming a police state. Well qualified writers agree that the fourth amendment must be more strongly applied to protect the personal interests which are attacked by unlawful arrests and disagree only on whether the amendment is being treated as a second- or a third-class right.\textsuperscript{184} The problem is not entirely new, and not only the police are at fault. Apprehensive legislatures may pass overly cautious laws which are enforced by zealous officers and heard by judges who fail to see their unconstitutionality.\textsuperscript{185}

In its decision to adopt the exclusionary rule, the Supreme Court of California said:

Today one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless

\textsuperscript{181} 25 Wis.2d 116, 130 N.W.2d 264 (1964) (Advanced Sheets).

\textsuperscript{182} Id. at 68-69, 204 N.E.2d at 178, 255 N.Y.S.2d at 836-37.

\textsuperscript{183} Id. at -, 130 N.W.2d at 266-68.

\textsuperscript{184} Barrett, supra note 15, at 70; Way, supra note 42, at 279.

\textsuperscript{185} See Quivers v. Commonwealth, supra note 28 (where a statute was held to authorize the sheriff to enter any vehicle without warrant and conduct a police inspection); and State v. Lutz, 85 W. Va. 330, 101 S.E. 434 (1919) (where an overzealous officer felt he needed no authority to stop any person on the street without cause).
although efficient enforcement of the law to the stamping out of human rights.\textsuperscript{186}

The right of privacy and the presumption of innocence complement each other under our adversary system of law. While both have recently been under attack, they are also being better defended than ever before. In \textit{People v. Martin}, Justice Carter warned:

\"To say the very sight of two men in a parked automobile at night warrants a police investigation reminds one of the Gestapo. Since when has there been a curfew for adults? Since when has it been illegal for two men to converse at night in a parked automobile? Since the deplorable practice of "bugging" has become so prevalent, almost the only place two businessmen, who wish their conversation to remain private, can be safe is in an automobile on a sparsely travelled street or other secluded place. . . . It is a matter of common knowledge that it has been the practice of law enforcement officers of this state to make searches of the persons and property of individuals whenever they saw fit regardless of whether reasonable or any cause existed. . . . The American way of life does not lend itself to such totalitarian practices. There is no place in our body politic for the Gestapo, the storm trooper or the commissar. Ours is a system of ordered liberty which is made more secure by placing a magistrate between the citizens and the overzealous law enforcement officer.\textsuperscript{187}\"

Mere police suspicion must be ineffectual in the face of a perfectly plausible and probable explanation consistent with innocence. The California Supreme Court, in a later case, reaffirmed the presumption of innocence and issued a reminder to the police that this presumption is for the prosecution to rebut by evidence beyond a reasonable doubt.\textsuperscript{188}

\textit{Uniform Arrest Act.}—Individual rights must be safeguarded in the face of these new attacks. Yet the rise in crime must be controlled with stronger statutes which will permit the law to deal sternly with these offenders. Chicago Police Commissioner Orlando Wilson, a strong proponent of the \textit{Uniform Arrest Act} (UAA), believes the act to be such a statute:

\begin{quote}
Law enforcement may be strengthened by legalizing common police practices, already legal in some jurisdictions which would have the effect of facilitating the discovery of criminals and evidence of their guilt and of lessening the exclusion of relevant evidence from their trials. The police should be authorized to question persons whose actions under the circumstances then existing
\end{quote}


\textsuperscript{187} 46 Cal. 2d 106, 109–10, 293 P.2d 52, 53–54 (1956) (dissent). But a car can be "bugged" too, and though it was held to violate defendant's right to counsel, the conversation in \textit{Massiah v. United States} still was not private. 377 U.S. 201 (1964). Modern technology seems to render the right to privacy obsolete in the absence of physical protection against encroachment.

\textsuperscript{188} \textit{People v. Gale}, 46 Cal. 2d 253, 294 P.2d 13 (1956).
are such as to arouse *reasonable suspicion* that the suspect may be seeking an opportunity to commit a crime. A police officer should be privileged to search a suspect for weapons when the officer has reasonable grounds to believe that he is in danger. . . . Should the suspect be *unable or unwilling to explain satisfactorily* the reason for his presence or actions, the officer should be authorized to take him to a police station and *hold him* while the investigation is continued for a period of *two hours*, *without placing him under arrest*. . . . The police should be authorized to *hold an arrested person before bringing him before a magistrate for at least 24 hours*, excluding days when courts are not in session. . . .

Suspects should be denied the right to resist illegal arrest by a person the suspect has reasonable grounds to believe to be a police officer. . . .

These are essentially the provisions of the Uniform Arrest Act. . . .

The reasonable arrest privileges mentioned would facilitate the achievement of objectives in law enforcement desired by all persons except the criminals themselves. The privileges would enable the police to exercise such control over persons in public places to enhance the peace and security of all citizens.

. . .

[T]he inconvenience of two hours of detention short of arrest is experienced only by the *innocent* person who inadvertently or by poor judgment is found in a situation that *arouses police suspicion*. . . .

The two references to suspicion are extremely worrisome to the libertarian. Probable cause must not be discarded in favor of the officer’s mere suspicion! The Supreme Court has said:

The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ within or caprice.

An arbitrary two-hour restriction of freedom of movement is not less than an arrest. No person should be liable to such a detention for merely refusing to indulge one officer’s whim as to the arrestee’s possible guilt.

Wilson urges that *suspicion*, if formalized by an arrest, be sufficient to hold a man for twenty-four hours. There must not be a return to the arbitrary detention of the “small-book system” where a man could be worked on until he broke, or if there were a time limit (as here), be coerced or interrogated more intensely in order to break him more quickly.

While the Supreme Court has clearly struck down such actions,

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190 Brinegar v. United States, 338 U.S. at 176 (1949). A good discussion of why mere suspicion is an impractical standard in the UAA is in Coakley, supra note 13, at 16.

191 See Brooks v. United States, supra note 43. As mere silence means nothing in law, the citizen has always had the right to remain silent.

there are those who refuse to change. Illinois has clearly repudiated the UAA approach.

The only provision of the UAA worth using, in its present form, is the one concerning resistance to arrest. This is a logical approach to a difficult problem. Earlier cases have held that a man has the right to protect himself; however, too often the resisting force was fatal to one party. Death is too high a price to pay for what may well have been a mistake on both sides. The states should ban the use of force in resisting arrest for the safety of the officer and the citizens. But, this must be coupled with a statute requiring an immediate appearance before a magistrate so as to quickly rectify any possible mistake. Only if the individual can be assured of a quick release, will he be willing to permit an arrest which he knows to be unlawful.

If the UAA is eliminated as too harsh upon the suspect, a new solution must be found. The new Illinois Code of Criminal Procedure attempts one in a very good codification of the existing laws. But, it permits an arrest for an offense (which may be less than a felony) which is not committed in the officer's presence by the wording:

A peace officer may arrest a person when: . . . [h]e has reasonable grounds to believe that the person is committing or has committed a crime.

Illinois has adopted the three criteria in its statute on searches without warrant, but split the third criterion into two sections: one on the fruits of the crime and another on the instruments, or tools of it.

The Harvard Act.—Another solution is Harvard’s An Act to Authorize


195 Tillman v. State, 81 Fla. 558, 88 So. 377 (1921); State v. Lutz, supra note 185. In both of these cases, the force was deadly.

196 See ILL. REV. STAT. ch. 38, § 7-7 (1964).


199 ILL. REV. STAT. ch. 38, § 107-2c (1964). This wording completely avoids the problem of defining “vehicles” as in the Harvard Act, infra.

200 ILL. REV. STAT. ch. 38, § 108-1, (c), (d) (1964). The inclusion in § 109-1d of “which may constitute evidence of, an offense” might be unconstitutional under Morisson v. United States, 262 F.2d 449 (D.C. Cir. 1958). (Emphasis added.)
the Search of Vehicles which covers only searches without warrant.\(^{201}\) Section 1A, on search incident to arrest, sets out in good language the same principles which the Illinois legislature aimed at in its new Code of Criminal Procedure. Except for the two small faults noted above, the Code succeeded. This section of the Harvard Act is without such a flaw. It even specifically provides for the situation where there is a discovery of a second crime during the search for the fruits of the first one.\(^{202}\)

However, section 1B of the Harvard Act\(^{203}\) is a dangerous return to the obsolete principles in *Carroll v. United States*, set down some forty years ago.\(^{204}\) This section of the Act would permit the search of any vehicle which was moving, or about to be moved, which the officer has probable cause to believe contained contraband, stolen property, or any articles which could be, have been, or are being used to commit a crime. The grant of power to search is broader than in section 1A and the difference seems to be unjustifiable.\(^{205}\) In the memorandum in support of the act, the authors concentrated too heavily on the fact that the search was prior to arrest in *Carroll*.\(^{206}\) While the authors do admit that this approach has been strongly questioned, their assertion that the principle has been affirmed is erroneous. The cases they cite only affirm the *Carroll* principle of search incident to arrest even though the actual search be prior to the formal arrest. This section would allow the search alone and that has never been approved.\(^{207}\) The probable cause insisted on is the same as would suffice for an arrest. Yet the authors are worried that a formal arrest would inconvenience the citizen while the search would not.\(^{208}\) No police force would let the violator go free and merely seize the contraband. They could simply stop the vehicle, as in Illinois, arrest the driver on probable cause and then make a search incident to the arrest.

The "Stop-and-Frisk" Statute.—New York recently passed an act which legalizes frisking after an officer stops a person "in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony" or certain misdemeanors and may demand that the person identify himself and explain his actions.\(^{209}\) If the officer reasonably suspects he is in danger, he may search for a dangerous weapon and keep it, or any other contraband, until the questioning

\(^{201}\) 1 Harv. J. on Legislation 51 (1964).

\(^{202}\) Ibid. Accord, Marron v. United States, supra note 47, and United States v. Eisner, supra note 35.

\(^{203}\) Supra note 201, at 51–52.

\(^{204}\) 267 U.S. 132, 158–59 (1925).

\(^{205}\) Supra note 201, at 52, and note 97.

\(^{206}\) Supra note 201, at 60.

\(^{207}\) Ibid.

\(^{208}\) Supra note 201, at 63.

is over when he shall "return it, if lawfully possessed, or arrest such person." This "stop-and-frisk" statute has caused great controversy, especially over the same issue of reasonable suspicion on which the UAA has been attacked.

One of the earlier remedies for the citizen suggests a possible modification of the "stop-and-frisk" statute. Unlawfully seized evidence which was contraband could not be replevied because there could be no property right in it. It was thus held both forfeit to the state and admissible as evidence. Under the present day effect of the exclusionary rule, it would be contraband which had been seized and forfeited to the state which was capable neither of replevin nor admission into evidence. The fault with the "stop-and-frisk" statute is that while it imposes on a person's right of free movement for the benefit and safety of the policeman, it then permits the conviction of the stopped person for the possession of something which the policeman had no right to search for, had it not been for the statutes, permitting mere suspicion as a ground for a frisk only to protect the policeman. Thus the statute harms a person's right of privacy for one purpose, and when that purpose has been served, it reverses and tramples the privilege against self-incrimination. There is a way to safeguard the policeman while not impinging on the person's rights, save for the forfeiture of contraband.

A New Standard.—The privilege of frisking can be regulated by a statute which would clearly limit the harm done to individual rights. In *Frank v. Maryland*, the Court upheld a law permitting searches of buildings for violations of the local health laws because the search was made reasonably and its scope was limited to observed violations of the health laws. In *State v. Buxton*, a law permitting the state fire marshall and his deputies to enter any building, property or premises at any reasonable hour for an inspection and investigation as to the origin of a fire, was held not to permit an inspection to obtain incriminating evidence against the property owner without first getting a search warrant.

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210 Id. at § 180-a, par. 2. *Accord, supra* note 178. *Contra*, *infra* note 215.


214 238 Ind. 93, 148 N.E.2d 547 (1958).
These cases are concerned with laws which permitted a search for a special purpose only, under more liberalized standards than would normally prevail. But as soon as any possibility arose that the special purpose was no longer the reason for the search, but a criminal prosecution was fomenting, the special purpose exception was no longer operative and regular criminal process had to be resorted to.

Frisking can be covered by such a special purpose statute. The policeman would be able to frisk a person whom he has reason to suspect may use a dangerous weapon to attack him and escape. This would be limited to frisking only, so that a search, as in Barnes, or as in use in Illinois currently, would be unlawful. Any contraband found would be forfeit, unless the person could prove that he had a right to the possession of it. But it would not be admissible in evidence against the person. This would overturn the special statute in People v. Gonzales which made the illegally seized gun admissible. The frisk could then apply to traffic offense stoppings as well as roadblocks. Thus, if a car were searched at a blockade postduring a cordon to stop a kidnapper, and policy slips were found, the slips could be confiscated, but the person would go free.

In cases like People v. Thomas, the search of the interior of the car would be considered a frisk as it would not have been allowable except for the safety of the officers. This would seem to legalize the present practice of unlawfully stopping a known violator just to take whatever contraband he may have with him, with the full realization that the court will merely exclude the contraband and dismiss the prosecution. If the frisked person sued for false arrest, he would be entitled to a recovery in law, but would probably be unable to get one from the jury because of his reputation. The courts would have to be extra wary and prevent such practices by insisting on a rigid adherence to the requirements that there be a reasonable fear of attack. There would have to be a strong

216 See supra note 138.
217 See supra note 149.
218 It has been asked whether this would permit a sexually deviant policeman to have greater access to possible improper touching of women. This should not really cause any problems. Such an accusation, if proved, would result in immediate dismissal. It is not the practice in Chicago, and most cities to have policewomen accompany patrolmen on their rounds, and it will not be necessary. When a woman has to be searched, in Chicago, the arresting officer will either call for a policewoman or call for assistance in safely taking the suspect into a precinct station to be searched by the matron. This is generally the present practice in such cases and will merely continue. But see, Chicago Tribune, supra note 192, at 26, col. 2.

There is no way to protect against homosexual incidents of this type. However, such occurrences are so rare and so quickly dealt with that they do not merit consideration here. Cf. Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288 (1962), for another aspect of this problem.
administrative control which would act against any officer who persistently broke the standard and frisked indiscriminately and unreasonably.

Justice Douglas, dissenting in *Frank v. Maryland*, referred to the thousands of health inspectors who carry out inspections without incident:

> And in all these instances the number of prosecutions was estimated to average one a year. Submission by the overwhelming majority of the populace indicates there was no peril to the health program. One rebel a year (cf. Whyte, *The Organization Man*) is not too great a price to pay for maintaining our guarantee of civil rights in full vigor.210

But one policeman's life per year (actually more) is too great a price to pay in a single city or state, or in the entire nation. The few "rebels" per year must be stopped before they increase the nation's population of police widows. The policeman must be given some of the protection to which he has long been entitled. The citizen would still have a host of remedies available, under this statute, against violation of his rights.220

**CONCLUSION**

This is a period of increasing crime and of great danger to the public safety and to the individual persons who constitute the public.221 More than ever before, this increase in crime must be combated. Many police forces stand in need of improvement. Citizens must help them so they can be staffed with men who can intelligently interpret and apply the constitutional safeguards which are likely to be overlooked during a period of increased police activity.222


222 J. Edgar Hoover, *supra* note 221, at 6: "The day has long passed when all that a law enforcement officer required was good intentions. Today's officer must be fully informed. . . . [H]e must protect the safety and rights of all parties concerned." See also Judge Barrett's rule in United States v. Kaplan, note 131 *supra*, at 974: "Liberty