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Aspects of Police Search and Seizure Without Warrant in England and the United States

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ASPECTS OF POLICE SEARCH AND SEIZURE WITHOUT WARRANT IN ENGLAND AND THE UNITED STATES

R. THOMAS FARRAR*

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I. INTRODUCTION

A. *Definitional Considerations*

Police search is a form of governmental information gathering. The acquisition of intelligence is vital to the police function of detecting and preventing crime, and the process involves such diverse activities as electronic surveillance and wiretapping, the use of informants or data volunteered by citizens, the scientific analysis of evidence, and the practice of visual observation by patrolling officers. A suitable definition of "search" is impossible save by reference to synonyms,[1] and just when a "surveillance" becomes a "search" or a "search " becomes an "analysis" is often a question of degree depending upon the focus and objectives of the information seeker.[2] Likewise, it may be difficult to determine the point at which a police officer

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1. *See, e.g.,* 79 C.J.S. *Searches and Seizures* § 1 (1952). It has been said that "[w]hether the government's activity is considered a 'search' depends upon whether the individual's reasonable expectations of privacy are disturbed." Davis v. United States, 413 F.2d 1226, 1232 (5th Cir. 1969); United States v. Ryles, 291 F. Supp. 492 (D. Del. 1968). *See also* United States v. On Lee, 193 F.2d 306, 313 (2d Cir. 1951) (Frank, J., dissenting); Minnick v. State, 3 Md. App. 652, 241 A.2d 153 (Md. Spec. App. 1968). Whether a particular information-gathering activity constitutes a "search" is of more than academic importance; it may determine whatever sanctions are to be applied to it. *E.g.,* Wyman v. James, 400 U.S. 309 (1971).

2. *See* 36 BROOKLYN L. REV. 440, 444-45 (1970); 43 N.Y.U.L. REV. 968, 974 (1968).

oversteps the line between a "surveillance," which he has a duty to perform, and a "search," where his actions are governed by various legal criteria.

Police seizure presents similar difficulties since it basically involves police conduct calculated to bring the subject of the seizure within the custody and control of the law. Police "seize" human beings, as well as animate and inanimate objects. Much like a search, a seizure will often involve questions of degree, and it may be a difficult question to determine precisely the point at which a "detention for questioning" becomes an "arrest."[3]

B. *The Relationship Between and Significance of Search and Seizure*

Police search and seizure are interrelated activities. The arrest of a person and the seizure of a thing are parallel activities which may or may not be incident to a search. A complicating factor is the judicial warrant system, which requires prior judicial approval for certain types of police searches and seizures. The warrant system is superimposed over the entire range of governmental searches and seizures of persons or things. The body of Anglo-American law relating to police search and seizure is concerned primarily with sorting out the circumstances in which police may search or seize without first obtaining a warrant.[4] This body of law is of crucial importance to a free society, because police search and seizure involves conduct which infringes on civil liberty. There is an inherent conflict between the power of police to search and seize and the right of citizens to live in privacy, free of unwanted governmental intrusion. At the same time, police powers of search and seizure are necessary to efficient law enforcement without which the citizen is subject to criminal acts which are equally inimical to his liberty.

C. *Basic Similarities Between English and American Law*

The law of search and seizure in England and the United States is substantially similar. The basic principles of both legal systems generally correspond due to their common heritage, as do the functions and activities of the police within the criminal justice framework. There

3. The distinction between an arrest and a lesser form of detention is an old one. *See* Comment, *Stop and Frisk: An Historical Answer to a Modern Problem,* 58 J. CRIM. L.C. & P.S. 532, 534-35 (1967). There is some judicial recognition of a limited police power to stop individuals in the course of investigation. *See* 21 VAND. L. REV. 1109, 1112 (1968). The power is, however, limited, and wholesale detention to obtain fingerprints is precluded by the fourth amendment, Davis v. Mississippi, 394 U.S. 721 (1969), although obtaining information about physical characteristics may be otherwise appropriate. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

4. Most appellate court cases deal with police searches and seizures which are conducted without a warrant (or with an invalid warrant) or beyond the provisions of or inconsistently with a warrant, since with a valid warrant police may search in a reasonable manner pursuant to its terms. Legal issues rarely arise where warrants have been validly issued.

are differences, of course, but it is important to keep these within the perspective of an overall similarity. Many of the differences are caused by differing English and American assumptions as to whether police will themselves abide by legal norms or whether maximum judicial control of the police is required. In England, great stress is placed upon police self-restraint. "The police are expected to act reasonably; and so long as they do so, the accused is . . . unlikely to insist upon his right to immunity from search."[5] Americans, on the other hand, distrust their police and tend to seek greater judicial control of their activities, as is reflected in decisions stressing judicial disfavour of warrantless searches.[6]

Part of the explanation for the differing English and American assumptions regarding control of the police lies in the initial and continuing concern of British police with their public image,[7] and the express constitutional provision for a warrant in the United States. An explanation can also be found in each country's historical experience with its police. Since the basic principles of both legal systems generally correspond, it may be that with an adjustment in British attitudes towards their police[8] and with an anticipated de-emphasis of restrictions upon the police by the present United States Supreme Court, the law of the two countries will grow even closer in this area.

D. *Scope and Foundations of the Article*

Given the likelihood of change in the law of search and seizure in the United States and the possibility of such change in England, a comparative study of the two systems may be helpful in illuminating desirable directions of change. The comparison which this article will

5. P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 64 (1958) [hereinafter cited as DEVLIN].

6. *See* Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition,* 1969 SUP. CT. REV. 155, 155-56 [hereinafter cited as Kitch]. These statements are general in nature and, of course, there are exceptions. It should be added that while the English trust their police, they have been unwilling to extend to them a great deal more power than they now possess. *See, e.g.,* Thomas, *The Law of Search and Seizure,* 1967 CRIM. L. REV. Eng. 3, 16-17 [hereinafter cited as Thomas]; *See also* D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 99-100 (1967) [hereinafter cited as KARLEN].

7. *See* T.A. CRITCHLEY, A HISTORY OF THE POLICE IN ENGLAND AND WALES 1900-1966 52-53, 291 (1967) [hereinafter cited as CRITCHLEY].

8. "As the English police–now forced by organized criminal gangs accustomed to using modern tools and methods—adopt appropriate counter-organization, the traditional view of the police as a somewhat specialized collection of ordinary citizens becomes anachronistic." KARLEN, *supra* note 6, at 14. Police tend to evolve unlawful practices to combat crime under the influence of public pressure and rising crime rates. *See* Barrett, *Police Practices and Law—From Arrest to Release or Charge,* 50 CALIF. L.REV. 11, 14 (1962); Warner, *Modern Trends in the American Law of Arrest,* 21 CAN. B. REV. 192, 195-96 (1943). Certain British police search and seizure practices are beginning to attract attention. *See* Zander, *Within the Grasp of the Law,* The Guardian (London), March 17, 1972, at 12 [hereinafter referred to as Zander]. Some control of the police possibly could result, particularly if abuses toward growing minorities develop. "Doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised." Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1, 20 (1964) [hereinafter cited as Packer].

undertake deals primarily with the question of warrantless police search, together with related seizure of chattels and the interception of communications. Although the principles of probable cause and reliability of evidence will be discussed initially, the questions of whether and under what circumstances warrants are required arise more frequently with regard to the principle of particularity—the problem of defining the circumstances and purposes for which searches and seizures may be made. A discussion of those questions requires an examination of the entire process of police search and seizure, during which it will be necessary to mention peripherally such subjects as arrest, searches pursuant to a warrant, and searches not ordinarily conducted by the police, in order to present a complete conceptual scheme.

For the most part the discussion will be based on the law of search and seizure in America as developed by the United States Supreme Court, supplemented by decisions of other courts, and by general theory. There is no uniform body of "American law" of search and seizure because of the federal structure of the United States, in which the courts of the 50 states and of the federal government render opinions which often conflict with those of other courts (and frequently their own.)[9] Since the area of search and seizure in the United States is governed by the fourth amendment,[10] however, the final authority on the subject is federal law as interpreted by the Supreme Court.[11] American law provides the major portion of material for this discussion due to the use of the exclusionary rule in the United States.[12] The issue of the legality of a search is more likely to be litigated in the United States than in England, where the rule is not used except to avoid hardship or injustice to an accused.[13] As a result, there is a vast

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9. *See* D. KARLIN, JUDICIAL ADMINISTRATION: THE AMERICAN EXPERIENCE 1-24 (1970).

10. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

11. *See, e.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Ker v. California, 374 U.S. 23 (1963). Unlike ordinary determinations of reasonableness, the question of the reasonableness of a search or seizure is generally left to judicial decision rather than to a jury. *See* Waite, *Reasonable Search and Research*, 86 U. PA. L. REV. 623, 625 (1938) [hereinafter cited as Waite].

12. The exclusionary rule proscribes the use at trial of any evidence previously obtained by illegal search or seizure. It applies both to federal and state trials. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). The rule also bars the use of derivative evidence, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), unless the government shows that the challenged evidence came from a remote or independent source. Nardone v. United States, 308 U.S. 338 (1939). The rule applies to confessions as well as real evidence. Wong Sun v. United States, 371 U.S. 471 (1963). The illegality of a search cannot always be asserted. One must have standing to contest the search derived from presence on the searched premises, a proprietary or possessory interest in the premises, or through being charged with illegal possession of the seized items. Brown v. United States, 411 U.S. 223 (1973). Existence of the exclusionary rule nonetheless forces the courts to examine carefully and articulate applicable principles of search and seizure law even in such cases.

13. *See* R. v. Palfrey, [1970] 1 W.L.R. 416 (C.A.); Kuruma v. R., [1955] A.C. 197 (P.C.),

disparity in the comprehensiveness and development of the law of the two countries.[14] American courts have been forced by recurrent litigation to articulate a reasonably coherent and consistent body of law, while the English law is ad hoc, "haphazard and ill defined."[15]

II. GENERAL COMMENTARY

A. *Basic Anglo-American Search and Seizure Requirements*

In order to ease the conflict between the interest in individual privacy and the necessity of efficient law enforcement, Anglo-American law has evolved three basic requirements for police search and seizure: particularity, probable cause, and reliability of evidence. The requirement of particularity ensures that police search and seizure may lawfully be conducted only in certain defined circumstances and for designated purposes. The requirement of probable cause applies to that degree of probity which is required of any evidence indicating that such particular circumstances exist. The third requirement reflects the conviction that the evidence used to determine the existence of those circumstances be reasonably reliable.

These three libertarian requirements should in theory apply to all forms of police search and seizure. Such is not the case, however, because these are flexible and dynamic principles and because police search and seizure is a process involving human interactions of infinite variety. As a result, the law of search and seizure becomes far more complex than theory would permit. An explanation for this complexity is found in the individual predilections of different judges that influence the choice of which interest—that of individual freedom or that of

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Elias v. Pasmore, [1934] 2 K.B. 164. Should English courts lose confidence in their assumption that police will use self-restraint, it is yet possible England could adopt the rule as well. *Cf.* DEVLIN, *supra* note 5, at 64-65; Williams, *Search and Seizure: A Comment,* 1967 CRIM. L. REV. (Eng.) 20, 23-24 [hereinafter cited as Williams]. Differences in substantive crimes help explain why American police use search powers more frequently than English police and why there is greater public resistance to such practices. KARLEN, *supra* note 6, at 131-32.

14 "Strong passions and prejudices in the United States have resulted in great intensity of thought about the problem of police power, whereas among English lawyers there seems to be a lack of enthusiasm for rigorous thinking about police power." KARLEN, *supra* note 6, at 100.

15. DEVLIN, *supra* note 5, at 63. "[T]he exclusionary rule has not only made the police more directly subject to the Constitution; it has also taken the Court into the business of police administration." Kitch, *supra* note 6, at 158. In the general area of privacy the British have been taking certain steps toward a comprehensive approach to their laws. In 1970 a Committee on Privacy was appointed

> to consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organizations, or by companies, and to make recommendations.

In July 1972, the committee made its report. COMMITTEE ON PRIVACY, FIRST REPORT, CMND. No. 5012 (1972). The report deals with intrusions by the nongovernmental sector and so necessitates only passing reference here. It is, however, valuable for insight into the British system of law, particularly in its discussion of the contrast between the American and Scottish systems, which emphasize several statutory or constitutional rights, and the English system which relies heavily on the courts to apply general principles of law to widely ranging and differing circumstances. *See* COMMITTEE ON PRIVACY, FIRST REPORT, CMND. No. 5012, ch. 2 (1972).

efficient law enforcement—is to prevail in a particular case.[16] Also, these principles are still developing, and the desirability of their applications to all forms of police search and seizure is only gradually coming to be recognized. Of the three, the principle of probable cause is the best developed and most universally applied, although the reliability of evidence is being required with increasing frequency. The law regarding the definition of the particular circumstances and purposes for which there may be a lawful police search and seizure is only beginning to stabilize. It may yet take some time because it is this area of the law that deals with the question of whether a judicial warrant should be employed.

1. PROBABLE CAUSE

Probably the most universally appreciated and applied of the three major requirements of search and seizure is that of probable cause.[17] The probable cause requirement demands that searches and seizures be based on a certain standard of evidence from which it may be inferred, with a certain degree of probability, that circumstances exist justifying governmental intrusion through a search or seizure.[18] The requirement thus relates to the quantum of evidence and quality of inferences from that evidence which are necessary to justify a search or seizure. This relationship is often expressed in terms of the burden of proof which the government must meet in order to establish the lawfulness of its action. The burden of proof under the probable cause requirement is usually described as a standard of evidence of a degree of probity sufficient to lead a reasonable, discrete and prudent man to the requisite conclusion that a particular search or seizure should be made.[19] It is possible to vary the kind of evidence which may be used to meet the burden,[20] but generally any real or testimonial evidence is permissible as long as it is reasonably factual[21] and gives rise to an

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16. *See* Packer, *supra* note 8; Waite, *supra* note 11, at 628.

17. The term "probable cause" has equivalent phraseology, and particular statutes or jurisdictions may employ terminology such as "reasonable grounds to suspect," "probable suspicion," "probable grounds to believe" or the like. Such phraseology typically has a meaning identical to that of "probable cause," which is the form ordinarily used in the United States because that phrase is used in the fourth amendment. KARLEN, *supra* note 6, at 117. See LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond,* 67 MICH.L. REV. 39, 73 (1968) [hereinafter cited as LaFave].

18. *Cf.* Dallison v. Caffery, [1965] 1 Q.B. 348, 365. For an excellent discussion of probable cause under the Misuse of Drugs Act 1971, see *Current Law Statutes Annotated,* 1971, general note accompanying ch. 38, § 23.

19. *Cf.* Dumbra v. United States, 268 U.S. 435 (1925); Shaaban Bin Hussien v. Chong Fook Kam, [1970] A.C. 942 (P.C. 1969) (Malaysia). *See also* Nakkuda Ali v. Jayaratne, [1951] A.C. 66, 76-77 (P.C. 1950) (Ceylon); LaFave, *supra* note 17, at 73-74.

20. It is only in recent years that hearsay evidence has been deemed permissible. *Compare* Grau v. United States, 287 U.S. 124, 128 (1932) (dictum), *with* Brinegar v. United States, 338 U.S. 160, 174 n.13 (1949). *See also* Jones v. United States, 362 U.S. 257, 269-71 (1960). English courts have permitted reasonably reliable hearsay to be used for more than a century. *See* Lister v. Perryman, L.R. 4 H.L. 521, 530-33 (1870).

21. *Cf.* Whiteley v. Warden, 401 U.S. 560 (1971); Aguilar v. Texas, 378 U.S. 108 (1964).

inference which is reasonably probable.[22] The important thing to note about the probable cause requirement is that it ordinarily applies to all governmental searches and seizures and that generally the burden is greater where the governmental conduct is more intrusive.[23]

The burden of proof required in probable cause inquiries cannot be calculated with exactitude. The evidence must give rise to more than "suspicion" but it need not match the degree of probity required in civil trials.[24] It is important to note that the burden is flexible. It may be increased or reduced in different situations, and to further specific policies. Thus, in order to encourage police to obtain warrants, the United States Supreme Court has declared that closer scrutiny will be made of a police officer's determination of probable cause than that of a magistrate based on the same evidence.[25] The burden of proof may be high where the police activity sought to be justified is a "no-knock" arrest entry,[26] a night-time arrest[27] or a border search of intimate body areas.[28] Conversely, the burden may be lower for protective searches for weapons[29] or English detentions for search,[30] than that for arrest. The burden is placed at a very low level for administra-

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22. *Cf.* Spinelli v. United States, 393 U.S. 410 (1969); *see* Shaaban Bin Hussien v. Chong Fook Kam, [1970] A.C. 942, 949 (P.C. 1969) (Malaysia).

23. *Compare* Chambers v. Maroney, 399 U.S. 42 (1970), *with* Vale v. Louisiana, 399 U.S. 30 (1970).

> [S]earches for evidence of crime will inevitably violate the civil liberties of the innocent as well as the guilty. The proportion of innocent who suffer, to guilty whose crimes are detected, will be a function of the quality of pre-search information required. In setting the standards of probable cause, an assessment must be made of the degree to which innocent men will suffer from mistaken searches.

Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment,* 28 U. CHI. L. REV. 664, 701 (1961).

24. The law requires different degrees of probity for different purposes. The probable cause burden of proof is well below the standard for a finding of guilty used in criminal trials ("beyond reasonable doubt") and below that used in civil trials ("preponderance of the evidence"), but above that which gives rise to suspicion, *i.e.*, evidence consistent with a particular conclusion but insufficient to lead a reasonable man to that inference. "Supicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but cannot prove.' " Shaaban Bin Hussien v. Chong Fook Kam, [1970] A.C. 942, 948 (P.C. 1969) (Malaysia). Probable cause does not require prima facie proof of guilt. *Id.* The burden for probable cause seems to be higher than the standard employed for judicial review of administrative decisions ("substantial evidence") and well above that used in the United States for judicial review of legislative economic regulation ("rational basis"), but it seems well below that used for judicial review of discriminatory legislation. In the United States, because of the impact of a seizure of allegedly obscene materials as a prior restraint on expression violative of the first amendment, in order to seize such materials a constitutionally sufficient judicial warrant is required. Roaden v. Kentucky, 413 U.S. 496 (1973). This requirement does not elevate the necessary degree of proof, but rather places a higher procedural burden on the government.

25. United States v. Ventresca, 380 U.S. 102, 106-07 (1965). At times a police officer's determination alone is perforce insufficient. Roaden v. Kentucky, 413 U.S. 496 (1973).

26. Note, 80 YALE L.J. 139, 156 (1970).

27. Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1970).

28. Note, 78 YALE L.J. 433, 439 n.31 (1969).

29. LaFave, *supra* note 17, at 53-54.

30. Williams, *Statutory Powers of Search and Arrest on the Ground of Unlawful Possession,* 1960 CRIM. L. REV. (Eng.) 598, 606 [hereinafter cited as Williams, *Statutory Powers*]. This police practice has not yet received judicial approval.

tive housing inspections, particularly of business premises.[31] It has also been suggested that the burden may be lowered when the gravity of the crime is great.[32] Although there are numerous instances of "variable probable cause,"[33] there are dangers of misuse of this technique. The wisdom of applying lower standards to the issuance of arrest warrants than to the issuance of search warrants is questionable at best.[34] Both warrants should be based on the same level of evidence since both can result in broad search powers.

2. RELIABILITY OF EVIDENCE

Intimately related to the requirement of probable cause is the requirement that the evidence used be reasonably reliable.[35] When the determination of probable cause to search is being made by a judicial officer pursuant to a warrant procedure (that is, when a magistrate determines the justification for a search before it is instituted as opposed to reviewing the propriety of a police search after it has occurred), reliability is provided for by requiring testimony under oath or affirmation. When hearsay evidence is used, the circumstantial basis underlying any conclusory allegations of fact must be revealed in order to demonstrate a reason for crediting the hearsay.[36] When testimony is based on information supplied by an undisclosed or non-testifying informant, it is generally required that the informant have demonstrated reliability in the past and that there be corroborative evidence from other sources.[37] Similar safeguards are being required with increasing frequency when the determination of probable cause to

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31. Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U.L. REV. 1119, 1120, 1125-26 (1967).

32. *See* L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 119 (1967) [hereinafter cited as TIFFANY]; W.R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 246-50 (1965) [hereinafter cited as LAFAVE]. *Cf.* Brinegar v. United States, 338 U.S. 160, 183 (1949); (Jackson, J., dissenting).

33. See the authorities collected in LAFAVE, *supra* note 17, at 54 n.74.

34. This seems to be the judicial practice, at least in the United States. *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 993 (1965) [hereinafter cited as LaFave & Remington].

35. *See* Lister v. Perryman, L.R. 4 H.L. 521 (1870).

36. Jones v. United States, 362 U.S. 257, 269-71 (1960). It is also said that the reason for this requirement is to enable the magistrate to make an independent conclusion and thus promote the judicial character of the warrant. Giordanello v. United States, 357 U.S. 480 (1958); Nathanson v. United States, 290 U.S. 41 (1932). A magistrate may, however, use his personal knowledge in reaching the decision whether to issue the warrant. Heller v. New York, 413 U.S. 483 (1973).

37. Spinelli v. United States, 393 U.S. 410 (1969); Draper v. United States, 358 U.S. 307 (1959). Much of the judicial disfavor of informants' testimony probably can be traced to the widespread use of rewards in criminal law enforcement. *See* 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 57-155 (1957). Yet the protections afforded by requiring demonstration of past reliability and independent investigative corroboration of informant information are not anachronistic because the temptations presented by payment for information remain. Since the use of compensated informants can be expected to continue, maintenance of the corroboration requirement seems advisable. Corroborative evidence may be supplied by personal knowledge of the police investigator himself. United States v. Harris, 403 U.S. 573 (1971). Additionally, requirements of self-protection may justify a limited search for weapons during the corroboration process itself. Adams v. Williams, 407 U.S. 143 (1972).

search or seize is made by the police. Although police have discretion[38] in making the determination whether an individual should be arrested, they are expected to consider the reliability of evidence upon which they base their determination of probable cause.[39] The corroboration requirement as applied to the police, however, is less strict than that applied to magistrates.[40]

3. PARTICULARITY

The third libertarian requirement of search and seizure, and by far the most complex and unrefined, is that which limits police search and seizure to defined circumstances and particular objectives. The factual circumstances of police search vary depending upon the focus of the information-gathering activity. The police activity may constitute surveillance, an unfocused general search such as a roadblock, a focused search such as that of a room for a specific item of evidence, or an analysis such as a test of the alcohol content of a suspect's blood. The factual circumstances also vary, depending upon whether a seizure of a person or thing precedes or follows the search, and sometimes also upon whether an automobile or electronic device is involved. Analysis of these diverse factual circumstances requires categorization of the circumstances into a relatively organized conceptual framework in order to understand when police search or seizure is permissible. Then it is necessary to inquire whether in the circumstances of a particular search a judicial warrant is required. The general principles that emerge to guide this analysis are that searches and seizures conducted without rational objectives are arbitrary; that the scope of a search is to be limited to action necessary to effect the objective for which it was instituted; and that prior judicial approval through a warrant is to be obtained if possible. Yet there is such an infinite variety of factual circumstances of search and seizure that categorization often becomes a question of degree, and in assessing whether a warrant is to be required in a particular instance, differences in practicability and convenience may obscure a disagreement with the premise that warrants are desirable.

B. *Judicial Warrants*

1. CHARACTERISTICS AND FUNCTIONS

In order to determine whether warrants are required for particular police searches and seizures, it is useful to examine the characteris-

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38. Two hundred years ago police had a duty to arrest for felony at the request of a private citizen. Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780). "[U]nder the present law the police have no special privilege in trusting the allegation of a third person." Williams, *Arrest for Felony at Common Law,* 1954 CRIM. L. REV. (Eng.) 408, 412 [hereinafter cited as Williams, *Arrest for Felony*].

39. *See* Note, *Legal and Social Aspects of Arrest Without a Warrant,* 49 HARV. L. REV. 566, 576-77 (1936); Williams, *supra* note 38, LAFAVE, *supra* note 32, at 265-99 (1965).

40. *See generally,* LaFave, *supra* note 17, at 76-84.

tics and functions of warrants and to differentiate between search and arrest warrants. A warrant in the police context is a written order issued in the name of the state by a judicial officer directing the recipient or class of recipients of the order to search some specified location for particular personal property[41] or to arrest a certain person, and to bring the person or property before the court.[42] The function of the warrant is twofold: to provide a measure of judicial control over police activity before trial, and to provide a measure of protection for police from civil liability for conducting investigations.[43] Of the two functions, the first is by far the more important.

2. HISTORICAL DEVELOPMENT AND PURPOSE

The reasons supporting the warrant's function of providing judicial control over police action lie in the history of the use of warrants, most significantly that of the search warrant, and the historic relationship between the judiciary and the police. Initially search warrants were used to enforce the law with respect to religious and political crimes, as well as for ordinary law enforcement purposes. A great deal is known about the use of warrants for religious and political purposes, particularly about eighteenth century practices. Little is known of the use of common law search warrants to enforce laws against secular, nonpolitical crimes, except that such warrants at first were issued, apart from statutory authority, only to search for stolen property.[44] This history of the growth of the common law search warrant indicates

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41. Warrants may be used for different purposes than searching for property and by governmental officials other than police. For example, warrants may be employed to authorize police wiretapping or electronic surveillance, or to authorize municipal inspectors to search buildings for health hazards. Depending upon the purpose and circumstances, different degrees of specificity may be required. *See* Note, *Police Practices and the Threatened Destruction of Tangible Evidence,* 84 HARV. L. REV. 1465, 1491-92 (1971) [hereinafter cited as Note] .

42. Due to the explicit language of the fourth amendment, American warrants must very specifically identify the object of the search or seizure. English practice is considerably less stringent and English warrants may be unspecific in a manner which would be unconstitutional in the United States. An English warrant *usually*

> will specify the premises which are to be searched. It *may* also mention the thing (or person) which is the object of the search, but the tendency in more modern provisions is to avoid a requirement to specify what objects may be seized. The warrant is thus effectively an authority to enter and search the premises, and the person executing the warrant is empowered to seize items which he reasonably believes to be relevant to the particular offence concerned.

Thomas, *supra* note 6, at 6 (emphasis added). Such discretion is constitutionally impermissible in the United States.

43. Police at one time had protection from civil liability when acting pursuant to the order of a private citizen to arrest a person. Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780). This immunity no longer exists because police have discretion in the matter. See Note, *Legal and Social Aspects of Arrest Without a Warrant,* 49 HARV. L. REV. 566, 576-77 (1936); Williams, *supra* note 38, at 412. They are immune from civil liability for executing warrants. Constables' Protection Act of 1750. Police do not have discretion in executing warrants, and it may even be a criminal offense to refuse to execute a valid warrant. Thus the warrant serves to delimit the sphere of police immunity.

44. *See* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California,* 112 U. PA. L. REV. 499, 503-04 (1964) [hereinafter cited as Blakey]; Wade, *Police Search,* 50 L.Q. REV. 354, 357 (1934) [hereinafter cited as Wade].

that it developed as a means of controlling and instructing constables in criminal investigation, for which justices of the peace were responsible, where the justices themselves, were unable to supervise the investigation directly. The warrant appears to have developed as a written order to a subordinate for the purpose of giving instructions and guidance on occasions where the more educated superior was absent or unable to give personal direction.[45]

The United States Supreme Court has maintained in numerous cases over the past few decades that the purpose of the warrant was to interpose a neutral magistrate between zealous investigators and the citizenry. This reasoning has been carried to its logical limits in a case which held that the warrant-issuing authority must be a judicial officer unconnected with the investigation of the crime to which the warrant relates.[46] This theory as to the purpose of a warrant is an historical myth, since until the mid-nineteenth century justices of the peace combined judicial and criminal investigatory responsibilities.[47] It was not until the creation of a separate police organization in the nineteenth century that it was possible to separate the combined criminal investigatory and judicial powers which the justices exercised during the period in which they developed the common law search warrant. With the rise of a separate police organization there was a concomitant increase in police training and ability, with a corresponding decrease in the original educative and instructive purpose of the warrant. This led to the anomaly of trained police regarding warrants as an inconvenient hindrance to their efficient functioning while warrants were expanding police authority to deal with an increasingly wider range of crimes beyond simple theft.

3. VALUE

Although the interposition of neutrality was not originally a purpose of the warrant, the magistrate's detached influence can provide a salutary reason for retention of the warrant system.The warrant system has survived as one manifestation of the need for some form of judicial control over police activity. This need stems from the intimate

45. Travel in medieval England was hazardous and difficult even within the relatively small jurisdictions of the justices. Thus the warrant provided a means of limiting the necessity of such travel by the justices by giving instructions to the constable. The warrant incidentally served as evidence of authority beyond that of the symbolic staff or baton.

46. Coolidge v. New Hampshire, 403 U.S. 443 (1971); *See* LaFave & Remington, *supra* note 34, at 991. Under certain circumstances even a court clerk may qualify. Shadwick v. City of Tampa, 407 U.S. 345 (1972). *See generally* Annot., 32 L. Ed. 2d 970 (1972). English practice is quite different, in that senior police officers are empowered by some statutes to issue authorizations to search. *See* J.D. DEVLIN, POLICE PROCEDURE, ADMINISTRATION AND ORGANIZATION 340-41 (1966) [hereinafter cited as DEVLIN, *Police Procedure*]. Police officers are similarly empowered to issue search authorizations in Australia. *See* Pearce, *Judicial Review of Search Warrants and the Maxwell Newton Case,* 44 AUS. L.J. 467, 467-68 (1970) [hereinafter cited as Pearce].

47. Analysis of this theory is treated in more detail in Appendix A.

relationship between the police who today investigate and prosecute crime[48] and the judiciary who ultimately control the trial and sentencing of violators. Judges have found that control of the fairness of a trial requires some supervision over police conduct beforehand, and the warrant today is an aid to that control.[49] A parallel can thus be drawn between the warrant and judicial instructions regarding interrogation by the police.[50]

While the warrant affords invaluable theoretical protection against unlawful searches, in practice it often provides no such protection. In many instances the issuance of a warrant is a routine, pro forma process.[51] Perhaps because of its adversary nature, there appears to be much more rigorous examination of warrants in hearings to suppress their fruits than at the time of issuance itself; moreover, sometimes judges quash warrants they themselves issued earlier.[52] Perhaps judges tend toward less than desirable participation in warrant issuance decisions because they view the process as a ministerial administrative task. At least to American police, judges often seem more concerned with excluding evidence than preventing unlawful searches.[53] Certainly the warrant requires added, sometimes apparently unnecessary work for both police and judges. If issued perfunctorily, the warrant may even provide less protection than that of responsible and restrained law enforcement techniques employed by conscientious police concerned with conducting valid searches.[54] Yet the warrant's inherent value seems to outweigh its practical deficiencies.

4. ARREST AND SEARCH WARRANTS

In the context of police search and seizure, there are two kinds of warrants: the arrest warrant and the search warrant.[55] Both warrants serve to provide prior judicial approval of police activity, although in

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48. English police assume a more important role in actual prosecution of crime than their American counterparts. *See* KARLEN *supra* Note 6, at 19-29.

49. Requiring a warrant serves to eliminate the factor of hindsight operating to validate unlawful but successful searches, as well as to remove excitement or prejudice from the decision of whether a search should be made. See note, *supra* note 41, at 1469.

50. In England, control is effected through the Judges' Rules. *See* G. ABRAHAMS, POLICE QUESTIONING AND THE JUDGES' RULES (1964). In the United States control has been through judicial decisions culminating in Miranda v. Arizona, 384 U.S. 436 (1966). *See generally* KARLEN, *supra* note 6, at 121-29.

51. *See* Note, *Permissible Search of Premises Incidental to a Lawful Arrest,* 43 TEMPLE L.Q. 180, 187-88 (1970); *See also* notes 56 and 89 *infra.*

52. LaFave & Remington, *supra* note 34, at 994-95.

53. *Id.*

54. *See* Note, *supra* note 41, at 1471 n. 29; Note, *Limiting the Permissible Scope of Search Incident to an Arrest,* 15 VILL. L. REV. 242, 247 (1969).

55. Absent police complicity in their execution, administrative warrants such as those to inspect for compliance with fire regulations are thus excluded. Warrants authorizing police wiretapping and electronic surveillance are a modified form of search warrant. *Cf.* Katz v. United States, 389 U.S. 347 (1967).

practice the search warrant is far more important to this function.[56] The important difference between the two warrants lies in the different premises, established by evidence of probable cause, which are needed to support the conclusion that a search or arrest warrant should issue. The conclusion that an arrest warrant should issue is based on two premises: 1) that a particular crime has been committed; and 2) that a particular person committed that crime. The lawfulness of the conclusion that a search warrant should issue requires that three premises be satisfactorily established: 1) that a particular crime has been committed; 2) that certain items are connected with that crime; and 3) that those items are presently located in a particular place.[57] "In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location."[58]

This analysis thus discloses that the two types of police warrants differ significantly in one regard: for a search warrant to issue there must be proof that the items sought are presently located in a particular place, while an arrest warrant may be issued regardless of proof of the present location of the fugitive.[59] In fact, arrest warrants are commonly issued when the whereabouts of the subject are unknown. Implicit in the difference between the two warrants is the assumption that the search for persons and the search for things involve different considerations. When it is considered that a search for a person may precede his arrest, it is thus apparent that in relationship to the warrant procedure, the search for a person is not subject to the same prior judicial approval and control as that of a search for things. The reasons that the concept of prior judicial approval is not applied to such searches become more apparent when such matters as searches

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56. Most arrests are made without a warrant. Felony arrest warrants, in the relatively rare circumstances where they are sought, usually are obtained for administrative purposes such as to provide a memorandum of the decision to arrest a fugitive. Even when affidavits supporting the request are sought, judges pay scant attention to them. See note 89 *infra*. For lesser offenses it may be possible to use the citation, a written notice to appear in court at a stated time and place to answer an offense charged in the citation. Although ordinarily employed in traffic violation cases, there is no reason why it cannot be used for other lesser offenses. It saves significant police time and expense and unnecessary citizen indignity.

57. An administrative warrant would be based essentially upon two premises: 1) that there is a given relationship between locations with certain characteristics and likelihood of violation of particular regulations; and 2) that a particular location has those characteristics. *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967). Similarly, a police warrant used to authorize interception of wire communications would essentially be based upon three premises: 1) that a certain offense has been, is being or is about to be committed; 2) that communications regarding that offense are probable; and 3) that those communications probably will occur by use of a particular facility during a certain time.

58. Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

59. Jones v. United States, 362 U.S. 257 (1960).

There appears to be no problem in executing either warrant at night. *See* Gooding v. United States, 416 U.S. 430 (1974).

for persons and arrests of persons are properly viewed within the perspective of the entire process of police search and seizure.

C. *Search Objectives and Focus*

1. CATEGORIES OF POLICE SEARCH ACTIVITY

Conceptually, the process of police search and seizure is primarily a matter of focus. It is the presence or absence of certain objectives and purposes in a particular police information gathering activity that distinguishes permissible police surveillance and searching from impermissible general searches. Ordinary police surveillance is a monitoring of public activity to detect crime, through which the police observe events occurring around them without concentrated regard for events at a particular place or of a particular nature. General searches, however, are characterized by an imbalanced absence of particularity. The police searching activity may be focused upon a particular location but not the commission of a particular offense. Such searches are sometimes referred to as "fishing expeditions." On the other hand, the search may be for a particular object or offender but in an unspecified location as in a search by use of a roadblock or a house to house canvass. Permissible surveillance by the police is observation conducted by the police in the role of ordinary citizen, while searching involves some activity going beyond dutiful curiosity to a more definite and active inquiry. To be sure, the distinction between surveillance and search is often a question of degree which may depend upon some specific, perhaps ludicrous refinements,[60] and the terms themselves are not capable of satisfactorily accurate definition. The broad categories are separable, however, and the law is accustomed to dealing with questions of degree.

Just as the broad categories of surveillance and general search are separable from each other and from the familiar police search of a limited area for a relatively specific object, it is analytically possible to separate this latter category into distinct factual patterns. This further categorization of police search and seizure involves the focus, or the objectives and purposes, of particular searches. It also involves the relationship in time between the search and the seizure or immobilization of the object sought.

2. FOCUSED POLICE SEARCH

Focused police search typically has a definite piece of evidence as its object; when the article is located and its legal custody is effected

60. For example, does permissible surveillance include viewing toilet stalls through vents or pipes in ceilings or from adjacent stalls to detect acts of homosexuality? *See* Smayda v. United States, 352 F.2d 251 (9th Cir. 1965); Britt v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962); Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 551 (1962). The factor separating a surveillance from a search often is whether the police committed a trespass in gathering information. *See* United States v. Strickland, 62 F. Supp. 468 (W.D.S.C. 1945).

through seizure or immobilization, the search ends. For example, police may go to the house of an accused with a warrant to search for three stolen television sets of a particular make and model, find three such sets in the living room, and seize them. At this point, theoretically, the search terminates and the police must go; the warrant has been executed and purpose of the search realized. Police search is a process, however, and more may be involved. It may be that the seized article is subjected to further search or analysis, the object of which is discovery of an item or characteristic which such evidence contains. For example, police may go to the house of the accused with a warrant to search for counterfeit currency. They may find a stack of currency in a drawer in the bedroom, but its seizure does not end the searching activity. The bills or banknotes are then taken by the police to their laboratories where they are subjected to various tests to determine whether they are in fact counterfeit.

This example illustrates that police searching activity may follow as well as precede a seizure of a particular item, and that a search may have as its purpose not merely the seizure of a particular item but additional analysis of the item to obtain further information.[61] This distinction between search and analysis, taking into account as it does the time at which an item is seized or immobilized and the essential purpose of the searching activity, provides a convenient factual reference point from which one can study the search and seizure process. It permits the study of police searches preceding seizure, based upon the object of the search.[62] It also permits the study of circumstances in which analysis follows a seizure, or a seizure is effected without a search, or a seizure or immobilization is effected so that an analysis may be performed. These circumstances include the major categories of police search and seizure activity.[63]

This method of conceptual analysis is helpful in determining what factors influence the determination whether a judicial warrant is required in a particular circumstance. The factors can be classed as 1) those affecting the potentiality that the purpose of the search or seizure will be frustrated (by possible destruction or removal of the object or by resistance to the governmental officer) and 2) those affecting procedural convenience. The first class of factors permit dispensing with obtaining a warrant when this is *necessary* to law enforcement. These

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61. This latter distinction has little significance in the counterfeiting example given, but such subsequent searching activity can involve items to which considerable interest in privacy may attach, as for example a diary. Also, subsequent search may be applied to intimate areas of the human person, in which case the invasion of privacy will be serious.

62. The object of any search can be a human being, an animate object, an inanimate physical object, or an intangible object such as conversation, although police are rarely concerned with searches for animate objects such as wild animals.

63. At times there may also be police involvement in searches of a normally administrative character, such as those to enforce fire prevention, health, immigration and tax laws. *See, e.g.*, Abel v. United States, 362 U.S. 217 (1960).

are relatively apparent and well settled. The latter class operates to permit dispensing with obtaining a warrant because it is *convenient* but not necessary to do so. The operation of this class is by no means always apparent or well settled, because its subtle influence involves the normative and philosophical question whether warrants are desirable.

This method of analysis is also helpful in identifying those individual interests which are most affected by particular search or seizure activity. The search and seizure process generally affects two classes of interests: those in privacy and those in freedom of person or property. As a general statement, the material impact of search is interference with privacy, while the essential effect of seizure is interference with personal liberty or possession of property. Particular search and seizure activity may have a greater effect on one class of interests than the other, although courts may be reluctant to make any such distinction.[64] The type of interest affected matters very little in determining whether warrants are required, the question depending more upon the effect of the factors of necessity and convenience discussed above. There is, however, a tendency in the United States to impose a stricter warrant requirement where privacy of a very intimate nature is involved. Thus greater legal restrictions may attach to a search of a dwelling house than to a search of an open field, or to an intrusive probing of intimate areas of the body[65] than to a frisk of outer garments. This may be due to the nature of the rights involved. Interference with liberty of the person or possession of property is easily translatable into money damages in terms familiar to the law. The seizure of a person is subject to immediate review before a magistrate. Privacy, however, may be lost irretrievably, and calculation of the loss in terms of money may be difficult.

III. SEARCHES FOR HUMAN BEINGS

A. *General Considerations*

A type of police search which, except for recent developments in the United States, has developed virtually free of warrant restrictions is the search for a human being for the purpose of making a criminal arrest.[66] Although an arrest warrant may be necessary in order to

64. *Cf.* Chambers v. Maroney, 399 U.S. 42, 51-52 (1970).

65. In the same vein, police try to avoid impropriety in searches of female prisoners. *See* TIFFANY, *supra* note 32, at 142-43.

66. *See generally,* Note, *The Neglected Fourth Amendment Problem in Arrest Entries,* 23 STAN. L. REV. 995 (1971). This discussion does not include arrest under civil process which, since abolishment of the imprisonment for debt, seems in practice limited to certain cases of contempt. For a civil arrest it was illegal to break into a dwelling. Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1603). Neither does this discussion include arrest of insane persons dangerous to themselves or others. *See, e.g.,* Anderson v. Burrows, 4 Car. & P. 210, 172 Eng. Rep. 674 (1830); Fletcher v. Fletcher, 1 El. & El. 420, 120 Eng. Rep. 967 (1859); Cook v. Highland Hosp., 168 N.C. 250, 84 S.E. 352 (1915). Also excluded are arrests of political criminals.

make the arrest, once the power to arrest arises there are very few restrictions upon where and how the police (and to a degree also private citizens)[67] may search without a search warrant to make the arrest. Generally, a person attempting to make an arrest for a serious crime may without a search warrant search any place at which there is probable cause to believe the person sought is located. Forcible entry to search may be permitted as well. Only in the past few decades in the United States has there begun a movement to limit this power of search by relating it to the judicial warrant requirement. Recent decisions indicate that searches for persons subject to arrest cannot be conducted without an arrest warrant, and possibly a search warrant, unless "exigent circumstances" so require.

B. *Powers of Arrest*

A degree of prior judicial control over arrests for minor crimes exists by virtue of the arrest warrant. Although there is a significant variation between police powers of arrest without a warrant at common law and under statutes in England and the United States, police generally may arrest without a warrant for serious crimes but not for minor ones. Basically, at common law a police officer could arrest upon reasonable suspicion of felony and for misdemeanors involving a breach of the peace committed in the officer's presence.[68] Most American states expanded these powers to permit police arrest for any misdemeanor committed in the officer's presence, whether or not a breach of the peace was involved. In most states also, "felony" was statutorily defined to include crimes for which the punishment includes imprisonment for some period such as a year.[69] England recently abolished the distinction between felony and misdemeanor, providing for summary arrest for "arrestable offences" for which the sentence is fixed by law or for which a first offender could be sentenced to five years' imprisonment (including attempts to commit such offenses).[70] In both countries treason is treated as a major crime for which there may be summary arrest. Both countries also permit civil officers to arrest a deserter from the armed forces,[71] although no such power existed at

67. The arrest powers of police and private citizens are very similar, although arrests by laymen are not common. The major difference is that private persons act at their peril in arresting for crimes not actually committed. *See* Criminal Law Act of 1967, c. 58, § 2; Walters v. W. H. Smith & Son, Ltd., [1914] 1 K. B. 595. *See also* Begley v. Commonwealth, 22 Ky. 1546, 60 S.W. 847 (1901).

68. *See generally* Perkins, *The Law of Arrest,* 25 IOWA L. REV. 201 (1940); Wilgus, *Arrest Without a Warrant,* 22 MICH. L. REV. 541 (1924) [hereinafter cited as Wilgus]; Williams, *supra* note 38.

69. *See* Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General,* 51 J. CRIM. L.C. & P.S. 386, 388-89 (1960) [hereinafter cited as Remington].

70. Criminal Law Act of 1967, c. 58, §§ 1-2. *See* Stephens, *Search and Seizure of Chattels,* 1970 CRIM. L. REV. 74, 76-77 [hereinafter cited as Stephens].

71. 10 U.S.C. § 808 (1956); 33 *Halsbury's Laws of England* § 1442 (3d ed. 1961). England

common law.[72] Thus, both countries statutorily provide for summary arrest for major crimes. Where there is no power of summary arrest, arrest may only be made pursuant to an arrest warrant.

C. *Nonconsensual Search Entry*

Both a summary arrest and one pursuant to a warrant create little difficulty where the person to be arrested is readily available, and the arrest may be effected without any search to locate him. Unfortunately not all arrests are as simple, and it is often necessary to search for the person to be seized. It may be necessary to extend the search to private property such as a dwelling, and to use some degree of force.

1. IN THE UNITED STATES

"The question of the scope of search and seizure once the police are on the premises would appear to be subsidiary to the basic issue of when intrusion is permissible."[73] Surprisingly enough, the question of when police may enter upon a person's premises without judicial approval has not often been litigated. The Supreme Court has not yet authoritatively decided the

> grave constitutional question, namely whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.[74]

It seems clear, however, that in the United States the lawfulness of a forcible search of a dwelling in order to make an arrest requires, as a minimum, that three conditions be reliably fulfilled by evidence amounting to probable cause. There must be sufficient grounds reasonably to believe that a crime has been committed, that the person sought is implicated in the crime, and that the person sought is located in the place to be searched. There are two significant problems in fully applying the judicial warrant requirement to the determination of whether these conditions have been satisfactorily established.

The first problem is whether an arrest warrant is to be required in order forcibly to search a dwelling to make an arrest, even when summary arrest powers exist, where no circumstances make an immediate search and arrest necessary. Requiring a judicial warrant provides for prior judicial determination of the first two conditions—

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permits this latter power to be exercised by private citizens where no constable is available and applies it as well to apprehension of absentees without leave.

72. Kurtz v. Moffitt, 115 U.S. 487 (1885).

73. Coolidge v. New Hampshire, 403 U.S. 443, 475 (1971).

74. Jones v. United States, 357 U.S. 493, 499-500 (1957). *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (question again left open). An indication of how the Supreme Court might decide the question may be gleaned from Gooding v. United States, 416 U.S. 430 (1974), where nocturnal execution of a search warrant was approved.

that the person sought is implicated in a crime which has already been committed.

The second problem is whether some form of search warrant is necessary for such forcible searches where no circumstances exist making an immediate search and arrest necessary. Requiring such a warrant would provide for prior judicial determination of the third condition to the lawfulness of the search—that there are reasonable grounds to believe the person sought is located at the place to be searched.

In recent years American courts have come to grips with the problem of applying the judicial warrant to arrest entries. An arrest warrant is a prerequisite to the lawfulness of forcible police entry into private premises to search for the person to be arrested unless the circumstances require an immediate search and arrest. Recognizing that the fourth amendment applies to arrest entries,[75] the Court of Appeals for the District of Columbia recently held in *Dorman v. United States*[76] that the police cannot without consent or a judicial warrant enter private premises to arrest a suspected felon in the absence of "exigent circumstances."

> Without excluding the possibility of other "exceptions" the court went on to articulate some of the elements relevant in determining whether "exigent circumstances" exist in a particular case: (1) whether a serious offense, particularly a crime of violence, is involved; (2) whether the suspect is reasonably believed to be armed; (3) whether there is a clear showing of probable cause; (4) whether strong reason exists to believe the suspect is in the premises being entered; (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is forcible or peaceful; and (7) whether the entry is at night . . . .[77]

Warrantless arrest entries are also permitted when the entry is made in immediate pursuit of the suspect[78] or as part of the immediate circumstances surrounding a crime recently committed or in the process of being committed.[79] Other cases indicate that the imminent destruction of material evidence may provide sufficient justification.[80] Con-

75. Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

76. 435 F.2d 385 (D.C. Cir. 1970). *Dorman* seems to have been met with approval in the other circuits. *See, e.g.*, United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974); United States v. Shye, 492 F.2d 886 (6th Cir. 1974).

77. Vance v. North Carolina, 432 F.2d 984, 990 (4th Cir. 1970). *See also* United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970), *cert. denied,* 402 U.S. 986 (1971).

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

79. *E.g.*, Washington v. United States, 263 F.2d 742 (D.C. Cir. 1959); Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958), *cert. denied,* 357 U.S. 937 (1958); Ellison v. United States, 206 F.2d 476 (D.C. Cir. 1953); Martin v. United States, 183 F.2d 436 (4th Cir.), *cert. denied,* 340 U.S. 904 (1950). *See also* United States v. Syler, 430 F.2d 68 (7th Cir. 1970).

80. Kleinbart v. United States, 439 F.2d 511 (D.C. Cir. 1970); Smith v. United States, 254 F.2d 751 (D.C. Cir.), *cert. denied,* 357 U.S. 937 (1958); Hailes v. United States, 267 F.2d 363 (D.C. Cir. 1970). *See* Note, *supra* note 41, at 1489.

sent to the entry may be readily implied from the circumstances,[81] as where the entry is made to render aid to a person believed to be in distress.[82]

This area of the law is not well settled. In the first place, the recent developments have been primarily centered around the District of Columbia Circuit, and earlier decisions, even in that circuit, have conflicted with the broad language of *Dorman v. United States.*[83] Also, no case has held that a search warrant may be necessary to search a particular location for a person subject to arrest when there is outstanding a valid warrant for his arrest.[84] While *Dorman* indicates that some form of a search warrant, as well as an arrest warrant, may be necessary,[85] other courts have stated that "the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant."[86] Even an invalid arrest warrant may suffice.[87]

Thus although *Dorman* provides for prior judicial determination of the first two conditions for the lawfulness of arrest entries, the third condition, that the person be located at the place to be searched, may not be subject to prior approval. Indeed, even *Dorman* lists "strong reason to believe that the suspect is in the premises being entered"[88] as an exception justifying entry, thus indicating that an increased police burden to establish the third condition for probable cause may be an acceptable alternative to a judicial search warrant.[89] The solution to

81. Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970).

82. People v. Henning, 96 Cal. Rptr. 294 (Ct. App. 1971).

83. 435 F.2d 385 (D.C. Cir. 1970). *Compare, e.g.,* Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958), *with* Williams v. United States, 273 F.2d 781 (9th Cir. 1959), *cert. denied,* 362 U.S. 951 (1960); Ellison v. United States, 206 F.2d 476 (D.C. Cir. 1953); Martin v. United States, 183 F.2d 436 (4th Cir.), *cert. denied,* 340 U.S. 904 (1950); Love v. United States, 170 F.2d 32 (4th Cir. 1948), *cert. denied,* 336 U.S. 912 (1949).

84. Indeed, Mr. Justice White apparently believes that a warrantless entry for the purpose of arrest is reasonable regardless of the circumstances so long as there is probable cause. *See* Chimel v. California, 395 U.S. 752, 776-80 (1969) (White, J., dissenting).

85. The *Dorman* decision recognized that a search was involved and that there is a general requirement for some form of warrant in order to enter a house without consent to search for a person subject to arrest. 435 F.2d at 388-91. Also, the decision relied heavily upon Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958), which held that "officers without a warrant cannot enter, even without actually breaking, a private dwelling to search for a suspected felon, no permission being given and no circumstances of necessitous haste being present." 262 F.2d at 454. Other decisions have indicated some form of combined warrant may be used. United States v. Free, 437 F.2d 631, 635 n.5 (D.C. Cir. 1970).

86. United States v. McKinney, 379 F.2d 259, 263 (6th Cir. 1967). *See also* Lankford v. Schmidt, 240 F. Supp. 550, 560-61 (D. Md. 1965), *rev'd on other grounds sub nom.* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

87. United States v. Wright, 432 F.2d 1143 (7th Cir. 1970), *cert. denied,* 401 U.S. 966 (1971); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970); Pineda v. Craven, 327 F. Supp. 1062 (N.D. Cal. 1971). *But see* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

88. 435 F.2d at 393.

89. *Cf.* United States v. Ventresca, 380 U.S. 102, 106-107 (1965). Increasing the police burden of probable cause may be a far more satisfactory resolution of this problem.

> Arrest warrants are seldom obtained prior to arrest. Even when a warrant is obtained, the objective of the police usually is not to acquire a judicial evaluation of the grounds for arrest; rather, the warrant is sought as a bookkeeping device or to serve some other administrative function.

LaFave & Remington, *supra* note 34, at 992. *See also* Remington, *supra* note 69, at 388.

the second problem of applying the judicial warrant to police arrest entries therefore may be simply to increase the burden of probable cause for the third condition.

2. IN ENGLAND

English law apparently permits police forcibly to enter a dwelling and to make an arrest whenever the power to make an immediate arrest exists.[90] Thus, a constable may use force to enter private property without a warrant and search to arrest for a felony which he reasonably suspects has been, is being, or is about to be committed.[91] Likewise he may make a forcible entry where a breach of the peace is being committed[92] and even to prevent a breach of the peace from being committed.[93] The constable may also make a forcible entry when he is in fresh pursuit of a prisoner escaping from lawful arrest,[94] and similarly, "if the arrest is being evaded with the connivance of the occupiers or landlords."[95]

A constable may also use force to enter a dwelling house to execute a warrant of arrest.[96] The power permits entry not only of dwellings but of other premises at which the person to be arrested is reasonably believed to be located.[97] The sole limitations upon the power to make a forcible entry to arrest, a power which necessarily includes the power to search the premises for the person to be arrested,[98] seem to be that an officer cannot break the outer door of the

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90. "By statute, the police have power for the purpose of effecting a lawful arrest to enter (by force if need be) and search any place where the person to be arrested is or is reasonably suspected to be." S. A. DESMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 458 (1971) [hereinafter cited as DESMITH], *citing* Criminal Law Act of 1967, c. 58, § 2(6).

91. Davis v. Russell, 5 Bing. 354, 130 Eng. Rep. 1098 (1829); Handcock v. Baker, 2 B. & P. 260, 126 Eng. Rep. 1270 (1800). Entry cannot be made by a private person who merely suspects a felony is about to be committed, and "a private person is not justified in his action if events prove that he was mistaken in his belief that there was a felon in the building, even if his belief was reasonable." DEVLIN, *supra* note 46, at 334.

92. DEVLIN, *supra* note 46, at 334; Waters, *Public Rights of Entry*, 11 CURRENT LEGAL PROBLEMS 132, 137 (1958) [hereinafter cited as Waters].

93. Thomas v. Sawkins, [1935] 2 K.B. 249.

94. Genner v. Sparkes, 1 Salk. 79, 91 Eng. Rep. 74 (1704); Anonymous, Lofft 390, 98 Eng. Rep. 709 (1774). "If it is not immediate pursuit, however, entry may not be made without a warrant of arrest, unless the prisoner is a felon." DEVLIN, *Police Procedure, supra* note 46, at 335. Even an initial breaking of an outer door to "recapture" an "escaped" prisoner who has been touched through an open window is permitted. Anonymous, 7 Mod. 8, 87 Eng. Rep. 1060 (1702); Sandon v. Jervis, El. Bl. & El. 935, 120 Eng. Rep. 758 (1858).

95. Waters, *supra* note 92, at 137. This type of entry could possibly be justified upon some theory of waiver.

96. In addition to arrests for ordinary crimes, the arrest warrant may be for contempt of Parliament, Howard v. Gossett, Car. & M. 380, 174 Eng. Rep. 553 (1842); Burdett v. Colman, 14 East 163, 104 Eng. Rep. 563 (1811), and also for contempt of court, Harvey v. Harvey, 26 Ch. D. 644 (1884).

97. R. v. Smith, 6 Car. & P. 136, 172 Eng. Rep. 1178 (1833). An American authority noted that it does not matter whether the place to be searched is a dwelling house, a public building, a church, a train or automobile, or even a court, but that "it should not be while court is in session." Wilgus, *supra* note 68, at 558.

98. Some power of search is implicitly recognized in the decisions distinguishing between

dwelling house of a person to be arrested under *civil* process,[99] a distinction of little current relevance, and that prior to a forcible entry, notice of authority and purpose should be given and demand for entry should have been refused.[100] Even this latter provision can probably be dispensed with if necessary for the safety of the arresting officer,[101] "or if it is reasonable to think that announcing one's presence before seizing him would cause him to run away from the scene."[102]

D. *Historical Development of Searches for Human Beings*

The historical development of this portion of the law of search, like that of arrest generally, is "long, obsure, and technical."[103] The relative lack of prior judicial control over searches for human beings in order to arrest can be partially ascribed to the early Anglo-Saxon practice of "hue and cry," out of which our modern law of arrest was developed. Under "hue and cry," as soon as the alarm was raised that a crime had been committed, all persons within hearing of the call had the duty of immediately joining in the chase for the criminal. The authority for levying the "hue and cry" gradually shifted, in cases where time permitted, to the constable and justice of the peace, and judicial control over the determination of whether a particular individual should be apprehended was instituted. Out of this grew the practice of issuing arrest warrants.[104]

Gradually the task of apprehending criminals also shifted to government agents, and although private persons still have authority to apprehend criminals, the major responsibility for doing so is that of the police. Because of the necessity for quick action, however, the type of judicial control which magistrates were able to assert over the

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breaking outer and inner doors, and those which discuss whether a search warrant is required. *See, e.g.*, Johnson v. Leigh, 6 Taunt. 246, 128 Eng. Rep. 1029 (1815); Smith v. Shirley, 3 C.B. 142, 136 Eng. Rep. 58 (1846).

99. Kerbey v. Denby, 1 M. & W. 336, 150 Eng. Rep. 463 (1836); Whalley v. Williamson, 7 Car. & P. 294, 173 Eng. Rep. 130 (1836); Cook's Case, Cro. Car. 537, 79 Eng. Rep. 1063 (1639). An inner door may be broken in civil arrest cases only after a demand for admission. Ratcliffe v. Burton, 3 B. & P. 223, 127 Eng. Rep. 123 (1802); Waterhouse v. Saltmarsh, Hob. 263, 80 Eng. Rep. 409 (1619). *But see* Smith v. Butler, Comb. 326, 90 Eng. Rep. 507 (1724). Entry past the outer door may be gained by subterfuge, however, R. v. Backhouse, Lofft 61, 98 Eng. Rep. 533 (1772), so long as it is not violent. Park v. Evans, Hob. 62, 80 Eng. Rep. 211 (1615). *See also* United States v. Syler, 430 F.2d 68 (7th Cir. 1970) (entry by ruse). Apparently the outer door of the premises of third parties may be broken so long as there are reasonable grounds to believe the person to be arrested is hiding there. Johnson v. Leigh, 6 Taunt. 246, 128 Eng. Rep. 1029 (1815). However, as in the case of private persons making an arrest, even a constable may act at his peril if the person is not found. Morrish v. Murrey, 13 M. & W. 52, 153 Eng. Rep. 22 (1844).

100. Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1604). *See also* Ratcliffe v. Burton, 3 B. & P. 223, 127 Eng. Rep. 123 (1802); Launock v. Brown, 2 B. & A. 592, 106 Eng. Rep. 482 (1819).

101. Unannounced entry has been permitted where necessary in the United States. *E.g.*, 18 U.S.C. § 3109 (1969). *See* Ker v. California, 374 U.S. 23 (1963); Blakey, *supra* note 44.

102. DESMITH, *supra* note 90, at 447.

103. Wilgus, *supra* note 68, at 545.

104. See CRITCHLEY, *supra* note 7, at 11-12; J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 190 (1883).

determination whether to arrest is in many instances impossible to assert over the determination whether to search to effect the arrest. The most decisive factor in precluding prior judicial approval appears to be the volitional mobility of the fugitive. This factor poses the possibility of escape where there is delay in capture, and necessitates later judicial review of police action rather than prior judicial approval.

IV. FOCUSED SEARCH FOR TANGIBLE AND INTANGIBLE OBJECTS

A. *General Considerations*

1. DISTINGUISHED FROM SEARCH FOR HUMAN BEINGS

Where the search is for a physical object rather than a human being, there is less likelihood that the search will be frustrated by the volitional mobility of the object of search. Although nonvolitional mobility may affect some searches such as those involving an automobile, the frustration of an attempt to effect legal custody will usually be due to some factor external to the object itself.[105] Generally physical objects are passive and immobile, neutral and submissive. Search for them, therefore, can more readily be subjected to prior judicial approval. Delays involved in obtaining that approval are tolerable so long as external factors do not operate to make frustration of the attempt to effect legal custody likely unless there is an immediate seizure.

2. THE JUDICIAL WARRANT

a. Susceptibility to the Warrant

The process of analyzing physical objects after their seizure is another aspect of police searching activity which is susceptible to direct judicial control through the warrant system. No general rule requiring a warrant governs such searches, however. On the contrary, courts have left this matter almost entirely to police discretion. Part of the reason for this lack of judicial control lies in the slowness of legal theory to recognize analysis following seizure as a separable aspect of the process of police search for which rules must be formulated. Attention to the individual interests primarily affected by search and by analysis following seizure is, however, causing increasing concern about the latter. Legal scholars are realizing that an analysis of seized

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105. Some objects may have self-destructive characteristics which preclude delay in their seizure. The alcoholic content of blood, for example, is reduced by natural body processes over a period of time, and in order for the blood to be of use as evidence in a prosecution for intoxicated driving, samples must be taken quickly. This factor of imminent self destruction is analogous to volitional mobility: independently of external assistance both factors may operate to negate effective seizure unless custody is effected without delay. Analogous necessity attaches to interception of oral communications. Unless there is an immediate, contemporaneous seizure, as by recording, they are lost unless later described and related by a communicant.

property may be conducted so as to make the individual interest in privacy paramount to those interests normally associated with questions of control over objects in one's possession. As a result, current commentaries have begun to inquire when warrants should properly be required for subsequent searches.[106]

b. Anglo-American Practices Generally

The process of search for and analysis of physical objects is that aspect of police searching activity which is most susceptible to direct judicial control through the warrant system. Therefore, control of this type of search has theoretical application to all such searches. The general rule governing searches for physical objects is that a warrant must be obtained prior to searching except in recognized circumstances in which police for some designated reason may conduct an immediate search. Indeed, the assumption most crucial to the theory of a warrant system is that warrants have positive value and should not be dispensed with absent a reason.[107] Undeviating adherence to this rule and its assumption best characterizes the American law of search and seizure as developed by the Supreme Court. The rule that a judicial warrant is required save in exceptional circumstances is a recurrent theme in all American search and seizure decisions, whether the activity involved is that of police or other governmental agents. The contrast between American preoccupation with the judicial warrant and its haphazard use in England constitutes the most striking difference between the two legal systems in regard to search and seizure.

A corollary to the assumption that warrants ordinarily should be required, is that warrants should be dispensed with only to the extent contemplated by the reason for so doing and that the scope of a warrantless search should be defined by the reason which permits its institution. Aside from this limitation, warrantless searches are conducted without explicit guidelines, an undesirable result[108] since the lack of adequate guidelines allows more intensive and extensive searches for reasons of convenience and expediency.

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106. *E.g.*, Batchelder, *Use of Stomach Pump as Unreasonable Search and Seizure*, 41 J. CRIM. L.C. & P.S. 189 (1950) [hereinafter cited as Batchelder]; McIntyre & Chabraja, *The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L.C. & P.S. 18 (1967) [hereinafter cited as McIntyre & Chabraja]; Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1966); Note, *Evidence Forcibly Removed from Body Cavity Admissible in Federal Court*, 58 COLUM. L. REV. 565 (1958).

107. For a brief analysis of the value of prior judicial authorization to search, see Thomas, *supra* note 6, at 6-7. Of course search warrants are not always constitutionally required and may not violate zones of reasonable privacy. *E.g.*, United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973); Couch v. United States, 409 U.S. 322 (1973).

108. As a consequence [of confusion and uncertainty in the law of search and seizure] the police officer is frequently left without power to take necessary and reasonable steps for investigation even of serious offences, and the legality of a course of action is often difficult to ascertain in advance. As in the case of arrest, the obscurity and complexity of the law are as harmful to the freedom of the individual as to efficient investigation, as the citizen is seldom able to know his rights and thus to defend them.

Thomas, *supra* note 6, at 3.

Another corollary to the assumption that warrants should not be dispensed with unnecessarily is that warrants should authorize all searches reasonably necessary to efficient criminal investigation. In the absence of legal authority to search pursuant to a warrant, police intent upon the efficient performance of their criminal investigatory duties may be induced to search without one under the dangerous reasoning that they advance the purpose of the law by breaking it. In this important regard, English warrant provisions are sadly deficient.

Most American states provide for warrants to search for objects connected with crime, such as contraband or fruits and instrumentalities of major crimes, and the trend is to permit warrants to be issued to search for purely evidentiary material.[109] In early English common law, search warrants could be issued only for the discovery and seizure of stolen property,[110] but statutes have widened their use. Unfortunately there are in England more than 60 such statutes which, while similar procedurally, apply to disparate substantive offenses. As a result of this haphazard statutory treatment, "deficiencies and anomalies in the law are numerous. The police have no power, nor can they obtain warrants, to search for the body of a murder victim or to seize a murder weapon or vehicle used in connection with a murder (or in fact many other crimes)."[111] There is a compelling need for simplification and uniformity in the English law,[112] but considerable forces, such as lethargy and parliamentary recalcitrance to providing policemen with search powers which carry considerable political implications, are militating against such a reform.[113] Since the general availability of the warrant encourages conscientious policemen to obtain them, it is to be hoped that some rational statutory reform will eventually take place. This is essential to the successful functioning of a warrant-based system of criminal investigation.

Along these same lines efforts need to be made, both in the United States and in England, to simplify the procedure for obtaining warrants. There is much to be said for considering a system using electronic devices to speed up the application and issuance of warrants, a possibility currently being studied in the United States. The fundamental difficulty with the judicial warrant is its inherent delay.[114] Speeding up the issuance procedure as a solution to the problem seems far preferable to the withdrawal of the warrant-issuing authority from the magistrate in favor of an administrative official, or to the elimination

109. Rule 41 of the Federal Rules of Criminal Procedure does not permit federal search warrants to be issued to search for "mere evidence," but this is not a constitutional restriction binding upon the states. *See* Warden v. Hayden, 387 U.S. 294 (1967); United States v. Lefkowitz, 285 U.S. 452 (1932).

110. Entick v. Carrington, 2 Wils. K.B. 274, 95 Eng. Rep. 807 (1765).

111. Ghani v. Jones, [1970] 1 Q.B. 693, 705 (C.A.); Thomas, *supra* note 6, at 3.

112. Thomas, *supra* note 6, at 3-8.

113. Williams, *supra* note 13.

114. Thomas, *supra* note 6, at 8-9.

of the requirement of specificity, which would render the warrant system almost valueless.

English and American law are very similar in their regulation of the search for and analysis of tangible and intangible objects, and the seizure of objects without a search. Both countries theoretically adhere to the initial presumption that judicial warrants are required before police search is permissible, and both countries make search incident to arrest the major exception to this principle. England, however, is not as dedicated to the judicial warrant concept, and has altogether failed to apply it to the search for intangibles through wiretaps and electronic surveillance.[115] The two countries also have differing rules, primarily based upon statutes, delineating permissible instances of police seizure or immobilization of evidence for the purpose of search or analysis. There may also be differences in the rules regarding the permissibility of police seizures of crime connected objects when they do not involve a search, although there are indications that any differences are minor. The law of the two countries governing the analysis of evidence following seizure also seems to be similar, although generally confused and unsettled. Despite the similarities of the law of the two countries, to an American observer the English law lacks clarity, completeness and direction in comparison with its American counterpart. Some reasons for this will be discussed after a brief comparison of the substantive law of the two countries.

The general rule at common law was that searches were illegal except where authorized by consent[116] or by judicial warrants which were issued only to search for stolen property. While this rule still obtains in both England and United States, adherence to it is far stricter in the United States, largely due to the influence of the fourth amendment. In the United States warrants generally are required whenever circumstances permit, even in cases of administrative search[117] or wiretapping and electronic surveillance.[118] It is also neces-

115. Warrants by the Secretary of State, an executive rather than judicial officer, are used instead.

116. Searches with consent are not discussed in this article. *See*, however, Note, *supra* note 2, at 446-48; Note, *Third Party Consent to Search and Seizure,* 33 U. CHI. L. REV. 797 (1966); Note, *Effective Consent to Search and Seizure,* 113 U. PA. L. REV. 260 (1964). *See also*, Annot., 36 L. Ed. 2d 1143 (1973). For recent cases, *see* United States v. Matlock, 415 U.S. 164 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

117. Camara v. Municipal Ct., 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967). *See* Note, *The Fourth Amendment and Housing Inspections,* 77 YALE L.J. 521 (1968). In order to provide for inspections under federal liquor and gun control legislation administrative inspections without a warrant may be permissible, although not where forcible entry is involved. *Compare* United States v. Biswell, 406 U.S. 311 (1972), *with* Collonade Catering Corp. v. United States, 397 U.S. 72 (1970).

118. Katz v. United States, 389 U.S. 347 (1967). *See* Kitch, *Katz v. United States: The Limits of the Fourth Amendment,* 1968 SUP. CT. REV. 133 [hereinafter cited as Kitch, *Limits*]. Wiretapping and electronic surveillance are now controlled by title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970), as discussed at part IV, B *infra*. For recent cases construing the Act, see United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974); United States v. Kahn, 415 U.S. 143 (1974);

sary that the warrant be issued by a judicial officer.[119] In England the application of the warrant requirement is less rigorous. Many statutes extending powers of entry to administrative officers do not require a warrant.[120] It is even possible for English nonjudicial officers to authorize searches,[121] and the Home Secretary apparently has the power to authorize wiretapping.[122]

B. *Search for and Interception of Communications*

1. LETTER COMMUNICATIONS

In both England and the United States the government has the power to intercept letter and wire communications. In the United States, however, such interception is recognized as a form of search subject to judicial warrant requirements, whereas in England no such judicial control exists. The fourth amendment protection against unreasonable searches and seizures extends to letters and sealed mail in the custody of postal authorities, and thus a judicial warrant is required to open such matter.[123] The protection extends only to first class mail within the country,[124] and there is power to seize illegally mailed matter,[125] but the warrant practice is firmly established. This is in contrast to the English procedure of permitting mail to be examined by warrant authorized by the Secretary of State.[126] In England the interception of written communications is considered a prerogative right of the Crown, or at least a long exercised power in the nature of a royal prerogative power.[127] The suggestion that secretarial warrants should be replaced by judicial warrants has apparently been rejected[128] de-

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United States v. United States Dist. Ct., 407 U.S. 297 (1972); Gelbard v. United States, 408 U.S. 41 (1972).

119. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

120. *See* Waters, *Rights of Entry in Administrative Officers*, 27 U. CHI. L. REV. 79 (1959) [hereinafter cited as Waters, *Rights of Entry*].

121. *See* DEVLIN, *Police Procedure, supra* note 46, at 340-41. Under the Theft Act of 1968, c. 60, § 26(2) a senior police officer may give a constable written authority to search premises of certain types of prior offenders. *See also* Thomas, *supra* note 6, at 9-11.

122. *See* COMMITTEE OF PRIVY COUNCILLORS APPOINTED TO INQUIRE INTO THE INTERCEPTION OF COMMUNICATIONS, FIRST REPORT, CMND. NO. 283 (1957) [hereinafter cited as REPORT].

123. *Ex parte* Jackson, 96 U.S. 727 (1878). For an indication of facts giving rise to probable cause to search mail, see United States v. Van Leeuwen, 397 U.S. 249 (1970).

124. *See, e.g.*, United States v. Peckley, 335 F.2d 86 (6th Cir. 1964); Santana v. United States, 329 F.2d 854 (1st Cir.), *cert. denied*, 377 U.S. 990 (1964); Webster v. United States, 92 F.2d 462 (6th Cir. 1937); United States v. Swede, 326 F. Supp. 533 (S.D.N.Y. 1971); People v. Garcia, 62 Misc. 2d 666, 309 N.Y.S.2d 721 (Allegany County Ct. 1970). Prison officials can intercept even first class mail. People v. Jones, 96 Cal. Rptr. 795, 19 Cal. App. 3d 437 (Ct. App. 1971). *See* Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87 (1971).

125. Public Clearing House v. Coyne, 194 U.S. 497 (1904).

126. Post Office Act of 1953, 162 Eliz. 2, c. 36, § 58. *See also* Post Office Act of 1969, c. 48, § 80.

127. *See* REPORT, *supra* note 122, at ¶¶ 9-52; DESMITH, *supra* note 90, at 121.

128. REPORT, *supra* note 122, at ¶ 86.

spite a rather persuasive analogy of such secretarial warrants to those condemned in *Entick v. Carrington.*[129]

2. WIRE COMMUNICATIONS

The English and American practice regarding interceptions of wire communications parallel those regarding letters. In the United States such interceptions are regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[130] That Act specifies detailed warrant procedures in the form of an application for a listening order for both federal and state wire interceptions, and it contains a statutory exclusionary rule of evidence for illegally obtained communications. England permits wire interception to be conducted pursuant to warrants by the Secretary of State, and it is likely this procedure will continue.[131] While no detailed comparison between the English and American procedures will be attempted, it is interesting to note that the American statutory scheme goes far beyond the English practice in protecting individual liberties. For example, the records required to be kept are more complete, and authorized periods of interception are more limited in the United States, than the record keeping and duration recommended by the Committee of Privy Councillors appointed to study the English practice.[132] Certainly the prospects of weakened administrative control and record keeping offered by the Committee of Privy Councillors as arguments against requiring judicial warrants seem remote in view of the American scheme. Both countries are in agreement, however, that where in the view of a high executive official it is necessary, there is no limitation on executive discretion to order wiretapping as a counter-intelligence measure to protect national security, although the United States statute requires a clear and present danger in order for this exception to operate.[133]

3. EAVESDROPPING AND ELECTRONIC SURVEILLANCE

The United States statute applies the judicial warrant device to all forms of interception of communications, whether examining letters, tapping telephone or telegraph wires, or using electronic devices to eavesdrop. This breadth of application of judicial control is due to the

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129. 2 Wils. K.B. 274, 95 Eng. Rep. 807 (1765). See *id.* at ¶¶ 23-26; H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 35-37 (2d ed. 1967) [hereinafter cited as STREET]. *Entick v. Carrington* "conclusively repudiated" prior practices in the executive branch of government and state necessary as justification for a trespass. Wade, *supra* note 44, at 356.

130. 18 U.S.C. §§ 2510-20 (1970). For recent cases construing the statute, see note 118 *supra*.

131. *See generally* REPORT, *supra* note 122; STREET, *supra* note 129, at 35-41. *See also* KARLEN, *supra* note 6, at 133-34. There is apparently regular interception of overseas cables pursuant to power conferred by the Official Secrets Act of 1920, 10 & 11 Geo. 5, c. 75.

132. *Compare* REPORT, *supra* note 122, at ¶¶ 75, 84, *with* 18 U.S.C. §§ 2519, 2518(5) (1970).

133. 18 U.S.C. § 2511(3) (1970). *See* United States v. United States Dist. Ct., 407 U.S. 297 (1972).

application of the fourth amendment to virtually all communications in which there is a reasonable expectation of privacy. Under *Katz v. United States*,[134] whatever a person seeks to preserve as private, even in areas accessible to the public, is protected by the fourth amendment from unreasonable search and seizure, regardless of whether there is an interference with any property interests. Thus, even a conversation in a public telephone booth is protected from being electronically overheard and recorded by the police. Except for instances involving national security matters, all wiretapping and electronic surveillance, whether public or private, are illegal under section 2511 of the 1968 Omnibus Crime Control Act.[135]

The English position in this regard is obscure. Although eavesdropping was a common law crime and could involve a trespass or even a criminal conspiracy to violate the Wireless Telegraphy Act, 1949, English police apparently use this technique, and modern science has provided them with amazing devices for doing so.

> Little is known about the extent to which police and others eavesdrop by these new methods: for example, by the use of portable radio equipment which can be hidden in a briefcase or even in a person's premises. One thing is plain: such evidence will not be rendered inadmissible merely because the police have to break into private premises in order to conceal the equipment there.[136]

C. *Search Incident to Arrest*

1. JUSTIFICATIONS FOR DISPENSING WITH THE WARRANT

In both England and the United States the power to search incident to arrest is uniformly recognized but variously described. Common law and common sense provide ample precedent for the existence of the power, but the definition of its scope has generated considerable controversy. The American rules regarding the scope of the search have been recently redefined and apparently have stabilized satisfactorily, at least where the search is clearly related to the underlying arrest; but where the relationship is not so clear, neither is the law.

Historically, there are two basic reasons for permitting this type of

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134. 389 U.S. 347 (1967). Cases other than *Katz* have hinged on the expectation of privacy. *E.g.*, Couch v. United States, 409 U.S. 322 (1973) (no fourth or fifth amendment claim can prevail where there is no legitimate expectation of privacy and no semblance of governmental compulsion against the accused's person).

135. 18 U.S.C. § 2511 (1970). There are limits to the advisability of extending warrant procedures to the authorization of interceptions by secret agents and informers. Kitch, *Limits*, *supra* note 118, at 142. Conversations recorded secretly by one of the communicants are usually not unlawful. United States v. White, 401 U.S. 745 (1971); Osborne v. United States, 385 U.S. 323 (1966); Hoffa v. United States, 385 U.S. 293 (1966). The "uninvited third ear" is permissible under 18 U.S.C. § 2511(2)(c) (1970).

136. STREET, *supra* note 129, at 31.

search.[137] The first is based on necessity: the dual needs to protect the arresting officer and others from injury by a weapon, and to deprive the arrestee of potential tools of escape. The search permitted to satisfy these needs primarily affects the process of arrest itself. The second reason is based on opportunity: the arresting officer may have the good fortune to discover evidence of crime. Perhaps as "a surviving incident of the historic role of 'hue and cry' in early Anglo-Saxon law",[138] in such circumstances seizure of the evidence to avoid destruction has been permitted,[139] even though no power existed to search for and seize the evidence pursuant to a warrant. A search which is permitted for this reason, primarily affects not the process of arrest, but subsequent actions such as the prosecution of the arrestee or the return of stolen goods to their owner.

Searches for evidence incident to arrest, even evidence threatened with destruction, are not inspired by the kind of necessity motivating the search for weapons or tools of escape; neither are such searches inherently limited to the immediate time and place of arrest. Consequently, it is possible for such searches to be more protracted and extensive than searches to prevent forcible resistance or escape. As the scope and duration of such searches increases for reasons of police efficiency and convenience, so increase the demands for judicial control through the warrant. Thus it is the arrest-based search for evidence around which controversy has raged, as each expansion of police power had inevitably eroded the influence of the judicial warrant.

2. PREREQUISITES TO LAWFULNESS

a. Arrest

There are two prerequisites to the validity of an arrest-based search. Not surprisingly, first there must be an arrest. The arrest may be with or without a warrant; the power "of search can attach to all offences, not only to arrestable offences, but also non-arrestable offences, when the arrest must be under warrant."[140] In the United States it is absolutely necessary that the arrest be lawful, since evidence obtained as a result of an illegal arrest is per se unlawful and inadmissible under the American exclusionary rule. English courts reject the proposition that such evidence is ipso facto illegal.[141] This is

137. *See* Note, *Searches of the Person Incident to Lawful Arrest,* 69 COLUM. L. REV. 866, 866-69 (1969); Stephens, *supra* note 70, at 79.

138. United States v. Rabinowitz, 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting).

139. The ancient practice was to bind a supposed thief and tie the stolen goods on his back. Justice was swift "if by hue and cry a man was captured when he was still in seisin of his crime—if he was still holding the gory knife or driving away the stolen beasts." 2 F. POLLOCK & F. W. MAITLAND, THE HISTORY OF ENGLISH LAW 577 (1895).

140. Stephens, *supra* note 70, at 78. *See also* Barnett v. Grant, 21 N.Z.L.R. 484 (1902). Even arrest of the wrong person may suffice. *See* Hill v. California, 401 U.S. 797 (1971).

141. R. v. Palfrey, R. v. Sadler, [1970] 1 W.L.R. 416 (C.A.).

unremarkable since English courts do not employ the exclusionary rule. Only in rare instances where there is unfairness or oppression to an accused is illegally seized evidence excluded from a criminal trial.[142]

b. Extrinsic Necessity

The second requirement is that the circumstances surrounding the arrest indicate that a search is necessary because the arrestee may have a weapon or may attempt to escape or because the arrestee may possess destructible evidence. The power to search "does not appear to attach because of the nature of the offence but because of the extrinsic circumstances."[143] In order for the search to be permissible there must be some indication that the reasons for permitting the search in fact exist. This requirement thus functions in much the same way as probable cause in the ordinary search situation. The early English cases were strict in this regard, requiring an affirmative showing that a search was necessary,[144] but it is doubtful that the requirement would be as stringent today.[145] Because of the more frequent use of weapons by criminals in the United States, courts are inclined to give wide leeway to arrest-based searches, and it is likely that more searches upon arrest occur here than in England. Yet even in the United States the requirement that there be some indication of necessity to search has efficacy in certain situations such as traffic and vagrancy arrests.[146] At least in part this requirement helps prevent arrests being made simply as a pretext for search.[147] It may also help prevent the results of a search being used to justify the search itself. The search must be justified at the time when it takes place, regardless of its success.[148]

3. SCOPE AND DURATION

a. Generally

Assuming that an arrest-based search has properly begun, the question of its scope and duration arises. English cases indicate no

142. *See* King v. The Queen, [1969] 1 A.C. 304, 314-19 (P.C.); R. v. Payne, [1963] 1 W.L.R. 637 (C.A.). There must be evidence of unfairness or oppression in order for exclusion of otherwise admissible evidence to be proper. Callis v. Gunn, [1963] 1 Q.B. 495 (D.C.); R. v. Prager, [1972] 1 All E.R. 1114 (C.A.).

143. Stephens, *supra* note 70, at 78, 143. *See also* Wade, *supra* note 44, at 360.

144. *See* Bessell v. Wilson, 118 Eng. Rep. 518 (Q.B. 1853); Leigh v. Cole, 6 Cox Crim. Cas. 329 (1853).

145. English courts seem willing to expand police powers, believing there is more wickedness about these days. *See* Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299, 313, 315 (C.A.).

146. *See, e.g.*, People v. Ricketson, 129 Ill. App. 2d 365, 264 N.E.2d 220 (1970); Note, 78 YALE L.J. 433, 444 (1969); Note, *Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347, 350. Regardless of the nature of the offense, however, police have full power to conduct a complete body search of the arrestee. Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

147. "An arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

148. *Cf.* Leigh, *Recent Developments in the Law of Search and Seizure*, 33 MOD. L. REV. 268, 271 (1970) [hereinafter cited as Leigh].

limits upon such searches except, presumably, the vague standard of "reasonableness" which is ordinarily applied to administrative action. The issue has not been squarely presented because in England search and seizure issues are litigated in the context of private suits for damages or applications for the return of property wrongfully taken.[149] The necessity of deciding whether a particular item was properly seizable has tended to obscure the issue whether the item was properly seized. As a consequence, English police make a practice of conducting searches the scope of which would doubtless be declared illegal were the practice contested.[150] American courts on the other hand have had no dearth of such contests, and have often been presented with issues concerning the scope and duration of searches incident to arrest. Their experience has led to the abandonment of the vague standard of reasonableness under the totality of circumstances in favour of a stricter test.

b. In the United States

The bulk of American cases on the scope of arrest-based searches have been decided since the Supreme Court extended the power of the police to search from the person of the arrestee to the premises where the arrest occurred.[151] Express recognition of a power to search the place of arrest, justified on the same basis as the search of the person of the arrestee for weapons and destructible evidence, first appeared in *Agnello v. United States*[152] in 1925, but within two years the area of permissible search was extended without apparent limitation to "all parts of the premises used for the unlawful venture."[153] This extension was limited without elucidation in later cases,[154] and in *Harris v. United States*[155] the Court upheld, solely on grounds of reasonableness, a four-hour ransacking of a handcuffed arrestee's apartment in the course of which police discovered evidence of a crime other than that for which the arrest was made. After a brief retreat,[156] in *United States v. Rabinowitz* in 1950 the Court abandoned any limitation on

149. See Stephens, *supra* note 70, at 148-50.

150. See STREET, *supra* note 129, at 21-22.

151. For an historical treatment of the cases, see Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474 (1961) [hereinafter cited as Kaplan]; J. W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 87-117 (1966) [hereinafter cited as LANDYNSKI]; Note, *Permissible Search of Premises Incidental to a Lawful Arrest,* 43 TEMPLE L.Q. 180 (1970).

152. 269 U.S. 20 (1925).

153. Marron v. United States, 275 U.S. 192 (1927).

154. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

155. 331 U.S. 145 (1947).

156. In Trupiano v. United States, 334 U.S. 699 (1948), and McDonald v. United States, 335 U.S. 451 (1948), the Court held that the reasonableness of an arrest depends upon the availability of a search warrant. This imported a touch of necessity into the rationale.

the power of police to search incident to an arrest other than "reasonableness" under "the facts and circumstances—the total atmosphere of the case."[157] Under *Rabinowitz* a warrantless search incident to a lawful arrest was permitted to extend to the area considered to be in the "possession" or under the "control" of the person arrested.[158]

The *Rabinowitz* doctrine lasted for 19 years during which increasingly broad and intensive searches became commonplace.[159] The breadth and intensity of arrest-based searches increased because under *Rabinowitz* the scope of search was divorced from the reasons which gave rise to it, and the search was limited only by vague standards of reasonableness and artificial distinctions of "possession" based on the law of property. As a result of the broad *Rabinowitz* power to search incident to arrest, search warrants fell into desuetude.[160] Police typically availed themselves fully of the search opportunities presented by making arrests at places they desired to search, even though delayed arrest in order to make a warrantless search was unlawful.[161] Motivated by glaring examples of police abuses under the constantly increasing scope of arrest-based search, and unable to formulate rational guidelines for limiting such searches under the *Rabinowitz* doctrine, the Supreme Court overruled *Rabinowitz* and related the scope of an arrest-based search to the reason for instituting it. In *Chimel v. California*[162] the Court held that the scope of a search incident to arrest may extend only to the area necessary to prevent the arrestee from seizing a weapon or implement of escape and to prevent concealment or destruction of evidence. Police decried this curtailment of power,[163] and lower courts had some difficulities adjusting to the diminished scope of permissible search,[164] but it appeared hopeful that a satisfactory body

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157. 339 U.S. 56, 66 (1950) [hereinafter referred to as *Rabinowitz*].

158. The *Rabinowitz* reasoning was based on the constitutional interpretative technique of detaching the reasonableness clause [of the fourth amendment] from the warrant requirements and permitting the reasonableness of a search to be determined independently, without reference to the rest of the amendment. Search incidental to arrest was justified as built into the reasonableness clause of the Fourth Amendment rather than as a historical exception to the general need for a search warrant.

LANDYNSKI, *supra* note 151, at 109. *See also* Comment, *supra* note 23, at 684-85, 692.

159. *See* Garfield, *The Expanding Power of Police to Search and Seize,* 40 U. COLO. L. REV. 491 (1968); Kaplan, *supra* note 151; Note, *supra* note 137; Way, *Increasing Scope of Search Incidental to Arrest,* 1959 WASH. U.L.Q. 261 (1959).

160. After *Rabinowitz* more than 90 percent of all searches in judicial decisions were incident to arrest rather than pursuant to a warrant. TIFFANY, *supra* note 32, at 122; Note, *Search and Seizure Since Chimel v. California,* 55 MINN. L. REV. 1011, 1014 (1971) [hereinafter cited as *Search and Seizure*]. "In populous Los Angeles County, for example, only 17 such warrants were issued in all of 1954." Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan,* 43 CALIF. L. REV. 565, 570 (1955). Much of the reason for the growth of arrest based search can be traced to police practices under Prohibition. Comment, *supra* note 23, at 684.

161. *See, e.g.,* McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950); *Search and Seizure, supra* note 160, at 1014.

162. 395 U.S. 752 (1969).

163. *See, e.g.,* Carrington, *Chimel v. California—A Police Response,* 45 NOTRE DAME LAW. 559 (1970).

164. *See, e.g., Search and Seizure, supra* note 160.

of law would develop from *Chimel.*[165] Guidelines for arrest-based searches were at least capable of being explicitly formulated, whereas under *Rabinowitz* there was no rational basis for so doing.

Just a few years later, however, a more conservative Supreme Court has given indications it may be retreating from *Chimel.* In the 1973 companion cases of *Gustafson v. Florida* and *United States v. Robinson*[166] the Court held that *Chimel* did not limit the search of the person of an arrestee. Regardless of whether an arresting officer has reason to fear the existence of a weapon, whether the search could possibly produce evidence relating to the crime or whether police department policies require taking the arrestee into custody and conducting a full scale body search, the search is permissible. Once a lawful custodial arrest is effected, a full search of the person is permissible not only because it constitutes an exception to the warrant requirement of the fourth amendment, but because it is "reasonable" under that amendment; the very fact of the lawful arrest established the authority to search.

Gustafson and *Robinson* did not explicitly affect *Chimel's* limitation upon search of the geographic area of the arrest. However, a major theoretical premise of *Chimel,* that the "reasonable search" requirement of the fourth amendment is an exception to the warrant clause rather than a co-equal standard by which searches are to be judged, has been rejected by a majority of the Court.[167] Hopefully the Court will not return to the haziness of *Rabinowitz* and *Harris* in judging searches of the place of arrest by a "reasonableness" standard. *Chimel* pointed out the "reasons" for area searches; such searches are better judged by those reasons than by their "atmosphere."

c. In England

The English law regarding search incident to arrest and its scope is much like that in the United States under *Rabinowitz.* Search of the area of arrest for evidence of any crime is permitted without clear doctrinal limitations upon its scope. There is an amazing paucity of English cases dealing with search incident to arrest, the leading case being *Elias v. Pasmore* in 1934.[168] That decision went somewhat beyond previous decisions by permitting search of the place of arrest whether or not occupied by the arrestee.[169] Neither *Elias v. Pasmore*

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165. *See* Note, *Criminal Law: The Effect of Chimel v. California on Automobile Search and Seizure,* 23 OKLA. L. REV. 447, 450-51 (1970); Note, *supra* note 54, at 249. The *Chimel* rule applies prospectively only. Hill v. California, 401 U.S. 797 (1971).

166. 414 U.S. 260 (1973), and 414 U.S. 218 (1973), respectively. *Robinson* is noted at 28 U. MIAMI L. REV. 974 (1974).

167. Cardwell v. Lewis, 417 U.S. 583 (1974). See note 158 *supra.*

168. [1934] 2 K.B. 164.

169. *See* Wade, *supra* note 44, at 363. Previous decisions had been factually limited to searches of an arrestee's person or dwelling or objects within his immediate control. *See* Bessell v. Wilson, 118 Eng. Rep. 518 (Q.B. 1853). Leigh v. Cole, 6 Cox Crim. Cas. 329 (1853). *See also* Dillon v. O'Brien, 16 Cox Crim. Cas. 245 (1887); Pringle v. Bremner, 5 MacPh. 55 (H.L.) (1867).

nor subsequent decisions which discuss it[170] have indicated that the scope of the search thus permitted is to be guided by any standard other than reasonableness. It is apparently the undeterred police practice to search exhaustively without a warrant the entire premises at which an arrest occurs, and even an arrestee's home when the arrest occurs elsewhere.[171] While the latter practice is obviously illegal[172] in the United States the former is not, and it is quite likely that extensive searches of the place of arrest would be upheld as reasonable by English courts,[173] just as American courts did under *Rabinowitz*. The extent of litigation of such matters would indicate English lawyers assume so.

D. *Seizure of Objects Incident to Arrest and Otherwise*

1. GENERALLY

While few English cases have been concerned with the scope and duration of search incident to arrest, there is a plethora of decisions regarding seizure of objects in connection with arrest and otherwise. Such decisions unfortunately constitute the bulk of the English cases on search and seizure. This propensity ignores the most important considerations in favor of concentration on the trivial, since the ques-

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170. *E.g.*, Ghani v. Jones, [1970] 1 Q.B. 693; Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299. Decisions since 1934 have not dealt directly with the question of search and seizure incident to arrest.

171. *See* ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE, REPORT, CMD. NO. 3297 (1929); REPORT OF INQUIRY INTO THE ACTION OF THE METROPOLITAN POLICE IN RELATION TO THE CASE OF MR. HERMAN WOOLF, CMD. NO. 2319 (1964); STREET, *supra* note 129, at 21-22; Wade, *supra* note 44, at 362-63. One police manual specifies that an arrestee's "room (and house) should be thoroughly and systematically searched for any incriminating writings, clothes, weapons, etc." C. MORIARTY, POLICE PROCEDURE AND ADMINISTRATION 68 (6th ed. 1955) [hereinafter cited as MORIARTY]. General search of this nature denigrates the specificity requirement of the judicial warrant. Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment,* 28 U. CHI. L. REV. 664, 689 (1961).

172. See STREET, *supra* note 129. *See also* James v. Louisiana, 383 U.S. 36 (1965); Agnello v. United States, 269 U.S. 20 (1925) (search of arrestee's house located several blocks from place of arrest).

173. Some very significant and influential English judges appear to be prosecution oriented. Note the remarks of Lords Denning and Salmon in Chic Fashions (West Wales) Ltd. v. Jones, [1968] 1 Q.B. 299, at 313, 319-20. Also, KARLEN, *supra* note 6, at 221, has remarked:

> The lack of power in the Court of Criminal Appeal to order a new trial creates a temptation to the judges to label an error as harmless whenever they are convinced the defendant is vicious and guilty. That temptation is being successfully resisted at the present time according to qualified observors, although it was not always so in the past and may not always be so in the future.

While these remarks presumably were correct when written, this criticism may now be out of date. A limited power to order a new trial was conferred upon the Court of Criminal Appeal by the Criminal Appeal Act of 1964, c. 43, the Court of Criminal Appeal was superseded by the Court of Appeal, Criminal Division, under the Criminal Appeal Act of 1966, c. 31, and wider powers to order a new trial were conferred upon the Court of Appeal by the 1966 Act. See now Criminal Appeal Act of 1968, c. 19. To the extent that the power to order a new trial is still insufficient, however, the same temptations still remain. That police themselves have a wide view of their powers would appear to be amply indicated simply by their decision to appeal in Ghani v. Jones, [1970] 1 Q.B. 693. Presumably an American prosecutor would confess error on the facts of *Ghani v. Jones.*

tion of search for objects seems immeasurably more important than the question of their seizure. Each question involves different individual interests. The English decisional tendency is due to the procedure by which search and seizure issues are litigated through private suits using ordinary civil remedies rather than in criminal cases from which a body of public law could develop. The result of using the vehicle of ad hoc civil suits to decide search and seizure issues is a directionless morass of decisions which inadequately treat the great public issues involved. The result inexorably is "haphazard and ill-defined."[174]

2. IN THE UNITED STATES

Decided in what is submitted to be a more appropriate context and perspective, American decisions regarding seizure of objects are fairly direct and simple. In general, police may seize virtually any object connected with crime, whether contraband, the fruit or instrumentality of crime, or evidence of crime.[175] There is no constitutional prohibition against seizure of any particular class of objects.[176] The important consideration is the manner in which the objects are discovered and seized. Generally, as long as the seizing officer does so from a lawful location without violating rules governing the search for objects, and so long as there is sufficient cause to connect the items with crime,[177] the seizure is permissible. A seizure is lawful so long as it does not involve essentially trespassory intrusion into a constitutionally sacrosanct area such as a dwelling, a matter intimately related to the question of search and the individual interest in privacy.[178] Police may seize objects in open fields or in plain sight,[179] even if discovered

174. DEVLIN, *supra* note 5, at 53.

175. There is considerable variation from state to state regarding what may be seized either incident to arrest, pursuant to a search warrant or otherwise. For example, in some states "private papers" receive special attention, and "mere evidence" cannot be the subject of a federal search warrant under rule 41 of the Federal Rules of Criminal Procedure. The principle that instrumentalities of crime can be seized owes its existence to the early common law. "In the 13th Century a metaphysical fault was imputed to an inanimate object such as a wagon or a sword which had caused an injury. This fault made the object a deodand which could be seized, condemned, and after purification sold by the Crown." Kaplan, *supra* note 151, at 478. Seizure of crime connected objects could under modern theory be justified as an abuse of the privilege of private property resulting in forfeiture of the privilege.

176. *Cf.* Warden v. Hayden, 387 U.S. 294 (1967).

177. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Note, *Probable Cause to Seize and the Fourth Amendment: An Analysis,* 34 ALBANY L. REV. 658 (1970). *See also* Cardwell v. Lewis, 417 U.S. 583 (1974).

178. *Compare* Gil v. Beto, 440 F.2d 666 (5th Cir. 1971), *with* Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968). *See* United States v. McDaniel, 154 F. Supp. 1 (D.D.C. 1957). It is sometimes said that where there is a seizure without a search, the fourth amendment does not apply, but more accurately such seizures are "reasonable" under the fourth amendment. A further variation of the doctrine was used in a recent case where a state inspector entered corporate property at a point from which the public was not excluded and conducted air quality tests. Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

179. Harris v. United States, 390 U.S. 234 (1968); Hester v. United States, 265 U.S. 57 (1934). For a recent discussion of the "plain view" doctrine, see Coolidge v. New Hampshire, 403 U.S. 443, 465-67 (1971). *See also* Note, *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 237-50 (1971).

by use of a flashlight or a telescope.[180] They may seize evidence of a crime discovered during a search incident to arrest for a different crime,[181] or items discovered during a lawful frisk for weapons where no arrest has yet occurred.[182] They may seize evidence of crime discovered while executing a search warrant,[183] including items not specified in the search warrant which are similar to named items.[184]

3. IN ENGLAND

The law of England regarding police seizure is similar to that of the United States, although the same results have been reached in a more roundabout way.[185] While executing a search warrant police lawfully may seize items mistakenly believed to be included in the warrant,[186] items likely to furnish evidence of the identity of other seized goods as those specified in the warrant,[187] and items not specified in the warrant which constitute material evidence implicating the occupier or an associate in crime.[188] Items discovered in a search incident to arrest may be seized if they are contraband, or material evidence, fruits or instrumentalities of the crime for which the arrest is made,[189] or if they constitute evidence of a crime committed by anyone.[190] While early cases seemed to indicate that there was no right to seize evidence during an investigation,[191] doubts on the matter have recently been dispelled by *Ghani v. Jones*[192] which prescribed a series of rules permitting seizure and detention of material evidence of serious crime.[193] Some cases have indicated seized goods must crim-

180. *Cf.* On Lee v. United States, 343 U.S. 747 (1952); United States v. Lee, 274 U.S. 559 (1927); United States v. Kim, 430 F.2d 58 (9th Cir. 1970). *See* Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A.2d 904 (1970).

181. Harris v. United States, 331 U.S. 145 (1947). *Harris* was not overruled on this point by Chimel v. California, 395 U.S. 752 (1969).

182. Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968).

183. Anglin v. Director, Patuxent Institution, 439 F.2d 1342 (4th Cir. 1971); United States v. Teller, 412 F.2d 374 (7th Cir. 1969); *cf.* Marron v. United States, 275 U.S. 192 (1927); United States v. Old Dominion Warehouse, Inc., 10 F.2d 736 (2d Cir. 1926).

184. *See* Johnson v. United States, 293 F.2d 539 (D.C. Cir. 1961), *cert. denied,* 375 U.S. 888 (1963). It is an unconstitutional evasion of the warrant requirement, however, to seize an object not mentioned in a search warrant although police knew its location and intended to seize it. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

185. *See generally,* Leigh, *supra* note 148; Stephens, *supra* note 70.

186. Price v. Messenger, 126 Eng. Rep. 1213 (C.P. 1800).

187. Crozier v. Cundy, 108 Eng. Rep. 439 (K.B. 1827).

188. Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299, 313. Garfinkel v. Metropolitan Police Comm'r, [1972] CRIM. L. REV. 44; *cf.* Pringle v. Bremner, 5 MacPh. 55 (H.L.) (1867). For an indication of Australian law and the *Chic Fashions* case, see Pearce, *supra* note 46, at 472-75. Such a seizure is unlawful in New Zealand. McFarlane v. Sharp, [1972] N.Z.L.R. 64.

189. Dillion v. O'Brien, 16 Cox Crim. Cas. 245, 249 (1887).

190. Elias v. Pasmore, [1934] 2 K.B. 164, 173.

191. Davis v. Lisle, [1936] 2 K.B. 434; Levine v. O'Keefe, [1930] V.L.R. 70; R. v. Waterfield, [1964] 1 Q.B. 164. *Compare* Davis v. Lisle, *supra, with* United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971).

192. [1970] 1 Q.B. 673. *But see* McFarlane v. Sharp, [1972] N.Z.L.R. 64.

193. *See* Leigh, *supra* note 148, at 277-78. Additional authority for the proposition that

inally implicate their possessor or someone associated with him,[194] but this qualification seems meaningless since the goods may nonetheless be seized over objection if refusal to permit the seizure is "quite unreasonable."[195] Undoubtedly all such refusals will be deemed unreasonable since "honest citizens must help the police and not hinder them in their efforts to track down criminals"[196] and refusal "makes him look like an accessory after the fact, if not before it."[197] Despite the objection that innocent persons should not suffer when police seize their property as evidence of some unrelated person's crime,[198] it is not wholly inequitable that "the right and duty of the police to prosecute offenders prevails over the . . . right of ownership."[199]

E. *OTHER WARRANTLESS POLICE SEARCHES*

1. GENERALLY

Although search incident to an arrest is the major exception to the judicial warrant requirement, there are other instances in which a warrantless search lawfully may be conducted. Under certain circumstances not involving an arrest, persons or vehicles may be stopped or detained in order for a search to be conducted. These stop and search powers are based primarily upon statutes and motivated by considerations of necessity. There is considerable emphasis in the United States upon the requirement of necessity in deciding whether a warrant may be dispensed with in a particular situation, and this undoubtedly is due to the constitutional imperative of the fourth amendment. Some English statutory stop and search provisions go considerably beyond what would be constitutionally permissible in the United States.

2. STOP AND SEARCH IN ENGLAND

One of the best known English statutory stop and search powers is section 66 of the Metropolitan Police Act of 1839. Under this section

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police can detain property necessary for prosecution may be found in Tyler v. London & Swn. Ry. Co., Cab. & E. 285 (Q.B.) (1884), which held that "police constables have the power to take possession of goods for the purposes of a prosecution under a personal warrant of arrest." *Id.* at 286.

194. Ghani v. Jones, [1970] 1 Q.B. 673, 706; Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299, 313.

195. Ghani v. Jones, [1970] 1 Q.B. 673, 709.

> The qualification is also a little disingenuous. If a policeman is on the premises by virtue of a warrant, the circumstances would be rare in which the owner or occupier of the premises could not be regarded as being in some way connected with the offence being investigated. If the policeman merely happens to be on the premises, how is he to determine whether or not the owner or occupier is a person who could not reasonably be believed to be criminally implicated?

Pearce, *supra* note 46, at 474.

196. Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299, 313.

197. Ghani v. Jones, [1970] 1 Q.B. 673, 708.

198. *See* Weir, *Police Power to Seize Suspicious Goods*, 26 CAMB. L.J. 193 (1968).

199. Butler v. Board of Trade, [1971] 1 Ch. 680, 691 (1970).

constables have power to stop and search any vehicle or person reasonably suspected of carrying or possessing stolen or unlawfully obtained property. Although this power is a local act of limited geographical application, similar local acts apply in a significant number of cities and towns potentially affecting millions of persons.[200] Additionally, stop and search powers of national application permit constables to stop and search persons and vehicles reasonably suspected of violating statutes prohibiting poaching, damaging protected birds or their nests or eggs, possession of firearms and possession of dangerous drugs.[201] These statutes apparently confer power on police officers in addition to those already existing through the power to arrest and search arrested persons, since there need not necessarily be probable cause that the person detained and searched had obtained the possessed goods illegally.[202]

These powers apparently constitute the lawful extent of stop and search powers in England. They exceed those constitutionally available to police in the United States, at least to the extent that searches such as those for stolen goods or poached game are permissible in circumstances in which an arrest-based search could not lawfully be conducted. With respect to some of these searches, however, such as certain searches for firearms and searches involving the stopping and searching of vehicles, these powers are roughly paralleled and perhaps even exceeded in the United States.

3. THE PROTECTIVE SEARCH FOR WEAPONS

a. In the United States

Because of the constitutional implications of warrantless searches in the United States, those stop and search powers which have received judicial approval have been the subject of considerable debate, and have been carefully limited to satisfying those demands which call for such power. The frequent use of firearms by criminals in the United States has necessitated some power to conduct warrantless protective searches for weapons in addition to those based upon arrest.[203] The Supreme Court

200. Metropolitan Police Act of 1839, 2 & 3 Vict., c. 47. For a more detailed discussion of local stop and search powers see Thomas, *supra* note 6, at 12-14. See also Williams, *Statutory Powers, supra* note 30.

201. Poaching Prevention Act of 1862, 26 Vict., c. 114; Protection of Birds Act of 1954, 2 & 3 Eliz., c. 30; Firearms Act of 1965, c. 44; Misuse of Drugs Act of 1971, c. 17. Only historical accident can explain why such powers should exist with respect to poached birds and the like but not with respect to other items. Only the same whim seems to explain why such powers exist respecting firearms but not explosives, for which even emergency search requires some written authority. *See* Explosives Act of 1875, 38 Vict., c. 17. For an excellent discussion of search powers under section 23 of the Misuse of Drugs Act of 1971 see the note to that section in *Current Law Statutes Annotated,* 1971.

202. *Cf.* Sargent v. West, [1964] CRIM. L. REV. 412 (Q.B.). This point is discussed more fully in Thomas, *supra* note 6, at 15-17.

203. The frisk for weapons is standard police procedure for dealing with persons who may be armed. Comment, *Police Power to Stop, Frisk and Question Suspicious Persons,* 65 COLUM. L. REV. 848, 851 (1965).

has approved a limited search for weapons not involving an arrest, but only where the circumstances indicate such a search is necessary and only where the scope is closely confined. In *Terry v. Ohio* the Supreme Court held that

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[204]

The scope of the search is limited to a patting of the outer garments of the suspect in order to discover a weapon, and only upon discovery of an object which may be a weapon can the search proceed further.[205] Unfortunately, the frisk for weapons is subject to abuse, as by its use for harassment.[206] The harassment is typically directed at "low visibility" minority groups, and helps contribute to a lack of citizen cooperation from those groups.[207] Despite these drawbacks, however, there is little doubt the practice will continue with or without court approval.[208]

b. In England

The type of search permitted under *Terry v. Ohio* seems to go beyond that permissible in England under the Firearms Act of 1965. Under that English statute, police may search persons or vehicles where they reasonably suspect the possession of firearms in a public place or possession of firearms with intent to commit a serious crime or to resist arrest. The *Terry* rationale is not limited to firearms but can

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204. 392 U.S. 1, 30 (1968).

205. Sibron v. New York, 392 U.S. 40 (1968); *see* Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969). *See also* United States v. Cunningham, 424 F.2d 942 (D.C. Cir. 1970); United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970). *See* LaFave, *supra* note 17, at 88, 91; Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866, 870-71 (1969). Where a policeman has been specifically advised that a suspect is carrying a weapon at a particular location, the police officer may, however, reach for the spot where the gun is thought to be hidden, even though there is insufficient cause to arrest. Adams v. Williams, 407 U.S. 143 (1972). In *Adams* the officer did have sufficient information to justify forcible stop of the suspect.

206. Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 484 (1967) [hereinafter cited as Pilcher].

207. *See* Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 463 (1967).

208.
> There is not the slightest doubt that an officer who believes he may be in danger, based on any conceivable criteria, is going to conduct a frisk. If the officer feels his life is at stake he will protect himself first and the question of admissibility of evidence will have extremely low priority.

Pilcher, *supra* note 206, at 483.

apply whenever possession of any type of weapon is feared. Also, the power of search permitted under the Firearms Act seems to be little more than the ordinary power of search incident to arrest. The Act seems only to make it possible to search before technically placing the suspect under arrest,[209] but does not expressly provide power to search for protective purposes where possession of a weapon is feared but not reasonably suspected. This distinction may be of little consequence since English courts undoubtedly would hold that police may conduct protective searches under *Terry v. Ohio* type circumstances by construing the Firearms Act to that effect or simply on grounds of necessity.[210] Because of the less frequent use of firearms by English criminals, however, such searches are less likely to occur. Regardless, it is difficult to imagine a protective search being litigated in England even if conducted, given the rarity of controversial search and seizure litigation.

4. THE STOPPING AND SEARCHING OF VEHICLES

a. Incident to Arrest

Another type of stop and search power is the power to stop vehicles and search them for contraband or evidence of crime. This type of search is to be distinguished from searches of automobiles incident to arrest. The rules regarding this latter type of search are similar to those regarding searches of premises such as homes, stores, offices and other buildings.[211] If the arrest is invalid, a search sought to be justified as incident to it is also invalid, at least in the United States.[212] Also in the United States, the search must be substantially contemporaneous with the arrest, and limited to its immediate vicinity,[213] the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which

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209. This form of criticism was advanced by Professor Glanville Williams regarding offenses under the Larcency Act, 6 & 7 Geo. 5, c. 50. Williams, *supra* note 30, at 605. Though subsequent cases make the argument inaccurate regarding theft offenses, Thomas, *supra* note 6, at 15-17, it seems relevant to the Firearms Act.

210. Williams, *Police Detention and Arrest Privileges,* 51 J. CRIM. L.C. & P.S. 413, 418 (1960) [hereinafter cited as Williams, *Police Detention*].

211. *See generally* Note, *Automobile Searches and the Fourth Amendment,* 47 CHI-KENT L. REV. 232 (1970); Note, *supra* note 165.

212. Whiteley v. Warden, 401 U.S. 560 (1971); Henry v. United States, 361 U.S. 98 (1959); Gambino v. United States, 275 U.S. 310 (1927). Searches incident to unlawful arrests are not necessarily invalid in England. That is, evidence resulting from such searches is admissible except when unfair or oppressive. R. v. Sadler, [1970] 1 W.L.R. 416, 422 (C.A.). *See* notes 141 and 142 *supra* and accompanying text. Justice Stewart concurring in Gustafson v. Florida, 414 U.S. 260 (1973), pointed out that a persuasive claim can be made that custodial arrest for a minor traffic offense violates fourth and fourteenth amendment rights. This argument places these arrests in their proper context; are they valid at all? Unfortunately that decision is likely to be left to the legislative branch, and thus may never be made.

213. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Preston v. United States, 376 U.S. 364 (1964).

he might gain possession of a weapon or destructible evidence."[214] Presumably, there must be some likelihood of an attempt to seize a weapon to resist arrest or to escape, and the crime must involve some destructible evidence, although the Supreme Court has not ruled directly on this point.[215] Certainly a traffic arrest cannot be used as a pretext to search for evidence of other crimes.[216] In England, presumably, the permissible scope of an arrest-based search of an automobile may be broader than that in the United States as it is for other searches incident to arrest.

b. Based upon Probable Cause

1). In the United States

In the United States police have power to stop and search automobiles and other vehicles in certain circumstances where there is probable cause to believe they contain crime connected objects such as contraband or stolen property.[217] This power derives from *Carroll v. United States,*[218] in which the Supreme Court held that contraband goods being illegally transported in an automobile or other vehicle could be searched for and seized without a warrant, so long as the seizing officer had probable cause to believe the vehicle contained seizable items. A warrant to conduct such searches is not required because of the "exigent circumstances" presented by automobiles which can quickly be moved out of the locality or jurisdiction in which a search warrant must be sought. Typically searches pursuant to this power involve automobiles on the open highway under circumstances in which it is impracticable to obtain a search warrant,[219] but once an automobile is lawfully stopped on the highway and the police have power to make a contemporaneous search under *Carroll,* they have the alternative power to seize the car, take it to the police station and search it there.[220] A warrantless search based on probable cause is not

214. Chimel v. California, 395 U.S. 752, 763 (1969).

215. In Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 220 (1968), the Court assumed, arguendo, that a search of an automobile could be conducted incident to a traffic violation. *See* Note, *supra* note 137, at 872, 878; Note, *Chimel v. California: A Potential Roadblock to Vehicle Searches,* 17 U.C.L.A. L. REV. 626, 647 (1970). As has been noted previously, *Gustavson v. Florida,* 414 U.S. 260 (1973), and *United States v. Robinson,* 414 U.S. 218 (1973), did not change the rule of *Chimel v. California,* 395 U.S. 752 (1969), that search of the geographic area of the arrest must be based upon the likelihood of a weapon or destruction of evidence. Both cases, however, involved traffic offenses.

216. Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968).

217. This exceptional power ordinarily depends upon statutory authority, and therefore the category of seizable items will depend upon statute. Generally the items are limited to contraband and stolen goods, though language in Coolidge v. New Hampshire, 403 U.S. 443 (1971), indicates the possible class of seizable goods may be wider.

218. 267 U.S. 132 (1925).

219. *E.g.,* Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931). *But see* Scher v. United States, 305 U.S. 251 (1938) (automobile followed into garage held within *Carroll* rule).

220. Chambers v. Maroney, 399 U.S. 42 (1970).

automatically permissible because an automobile or other vehicle is involved, however, and some "exigent circumstances" must be present to activate the exception.[221] The protections afforded automobiles are less than those applicable to homes. This is primarily due to the fact that compared to a home, there is a lesser interest in privacy inside an automobile, much of which is open to public view.[222]

2). In England

English law seems to go considerably beyond the *Carroll* rule by permitting police to stop and search automobiles or other vehicles to discover contraband or evidence of any serious crime, without regard to whether "exigent circumstances" make obtaining a warrant impractical.[223] There is express statutory authority for stopping and searching vehicles to discover stolen goods or evidence of poaching, damage to wild birds or possession of firearms or drugs.[224] These statutes apparently do not require any inconvenience or inability to obtain a warrant in order to be operative. Additionally, *Ghani v. Jones*[225] indicates that automobiles may be stopped and searched for the fruits, instrumentalities or material evidence of any serious crime, without regard to the practicality of obtaining a warrant.

The decision in *Ghani v. Jones* was transparently intended to overrule *R. v. Waterfield.*[226] In its haste to correct *Waterfield,* however, the Court of Appeal may have allowed more than was necessary. *Ghani v. Jones* seems to permit any seizure and search of an automobile, and possibly other objects as well, to discover evidence of crime, regardless of whether a warrant authorizing the seizure could be obtained. This assessment of the import of *Ghani v. Jones* is based upon

221. Coolidge v. New Hampshire, 403 U.S. 443 (1971). It is not impracticable to secure a warrant where there is

> no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile.

Id. at 462; *see* United States v. Payne, 429 F.2d 169 (9th Cir. 1970). *But see* Cardwell v. Lewis, 417 U.S. 583 (1974).

222. Szwajdowski, *The Aftermath of Cooper v. California,* 1968 ILL. L.F. 401, 410. This was explicitly recognized in the plurality opinion in *Cardwell v. Lewis,* 417 U.S. 583 (1974).

223. Under the Road Traffic Act of 1960, 8 & 9 Eliz. 2, c. 16, the police have power to stop vehicles to check drivers' licenses or vehicles which are reasonably suspected of being driven without owner consent. *See* Williams, *Police Detention, supra* note 210, at 418.

224. These statutes, Metropolitan Police Act of 1839, 2 & 3 Vict., c. 47, § 66, Poaching Prevention Act of 1862, 25 & 26 Vict. c. 114, Protection of Birds Act of 1954, 2 & 3 Eliz. 2, c. 30, Firearms Act of 1965, c. 44, and Misuse of Drugs Act of 1971, c. 38, were discussed earlier.

225. [1970] 1 Q.B. 693 (C.A.).

226. [1964] 1 Q.B. 164 (C.C.A.). *See* Leigh, *supra* note 148, at 278. In *Waterfield* two constables were instructed by a superior to prevent the removal of an automobile which they were informed had been involved in a serious offense. The owners returned and drove it away by forcing the objecting constables to jump aside. The Court of Criminal Appeal quashed the convictions of the owners for assault, holding that the constables had no power to detain the car.

the following analysis. First, the necessary implication of the decision is that police may seize and retain any material evidence, or the fruits and instrumentalities of any serious crime which is suspected or has been committed. If the possessor of the desired item is implicated in commission of the suspected crime, the police may seize the item without consent. If the possessor is not implicated in the crime, the police apparently may still seize it without consent. This is because "honest citizens must help the police and not hinder them in their efforts to track down criminals,"[227] and "the police should be able to do whatever is necessary and reasonable to preserve the evidence of the crime."[228] Refusal to permit them to do so, even by an innocent victim, is "quite unreasonable," and therefore consent cannot be withheld.[229] Also, refusal of consent to the seizure makes the possessor "look like an accessory after the fact, if not before it."[230] Since he is therefore apparently implicated, his consent need not be obtained anyway.

Second, the power to seize evidence includes the power to seize a vehicle and search it for evidence. The police may seize an automobile which has been used to commit a crime because it is an instrument of that crime, and they may thereafter search it for any evidence, such as fingerprints, which it may contain.[231] Clearly this would cover circumstances in which an automobile is knowingly used to criminally transport contraband or stolen property. These are the circumstances to which the American *Carroll* rule normally is applied. The English policemen's power to seize an automobile might also apply in instances in which material evidence of any crime is being transported, for the automobile could then be considered an instrument of a "conspiracy to pervert the course of justice."[232] Even if there is no power to search or seize an automobile which is reasonably suspected to contain mere evidence, but not stolen goods or contraband, consent to a search and seizure could be requested. Under *Ghani v. Jones,* a refusal to consent implies criminal complicity, or at least unreasonable noncompliance which can be ignored. The *Ghani v. Jones* power of seizure thus seems to apply not merely to a seizure without a search but also to a seizure followed by a search or analysis of the seized item.

Ghani v. Jones has disturbing implications if the foregoing analysis is correct.[233] First, its entire perspective is misplaced. The inquiry should be focused on whether police seizure is reasonable and

227. Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299, 313 (C.A.).
228. Ghani v. Jones, [1970] 1 Q.B. 693, 708.
229. *Id.*
230. *Id.*
231. This example was given in Ghani v. Jones, [1970] 1 Q.B. 693, 708-09.
232. Garfinkle v. Metropolitan Police Comm'r, [1972] CRIM. L. REV. 44, 45.
233. This analysis may be pessimistic. One writer suggests that the right to search is presumably more limited than the right to seize. Leigh, *supra* note 148, at 272. Hopefully this will prove to be the case.

not upon whether refusal to consent is unreasonable. Ordinary citizens have a right to be unreasonable but police do not.

Second, the reasonableness of seizure should bear some relationship to whether a warrant could have been obtained to authorize it.[234] Incredibly, English police have no power to obtain a warrant to search for or seize many crucially important items such as murder weapons or even the bodies of murder victims. This was explicitly recognized in *Ghani v. Jones,*[235] and undoubtedly this defect helped motivate the decision. Federal authorities in the United States, however, have no power to obtain warrants to search for or seize items of only evidentiary value regardless of the crime. Yet this limitation has not led American courts to eliminate consideration of whether a warrant can be obtained to authorize a seizure.[236]

The rationale of *Ghani v. Jones* does not consider whether obtaining a judicial warrant to search or seize would be impractical. The sole reason offered for the rule is "the interest of society at large in finding out wrongdoers and repressing crime."[237] It is difficult to rationalize the decision with a warrant-based system of search and seizure since the judicial warrant apparently has no relevance. Because the power to seize is not limited to instances of necessity, virtually all restrictions on police powers to seize evidence prior to arrest or charge seem to have been eliminated.

Finally, the example of seizing an automobile to search it for evidence indicates that some search powers are included, at least where search or analysis follows seizure. While this may be tolerable in the case of automobiles, if applied to suitcases, diaries and other items involving more significant considerations of personal privacy, the prospects are foreboding. Interference with the individual's interest in the possession of his property through police seizure may not be too much to ask as the price of an ordered society. With few exceptions, substitutes are available. Also, the violation of a right to possession of one's property is easily compensable. However, the damage caused by invasion of private personal interests through search may be irreparable, and the price of order in these cases may be too high.

5. THE SEARCH TO PREVENT DESTRUCTION OR CONCEALMENT OF EVIDENCE

a. In the United States

A further exception to the warrant requirement is that police may conduct a search when the existence of the evidence is threatened, or if

234. The limitations imposed by search warrant statutes are apt to be subverted by *Chic Fashions* as interpreted by *Ghani v. Jones*. Leigh, *supra* note 148, at 272.

235. [1970] 1 Q.B. 693, 705.

236. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

237. [1970] 1 Q.B. 693, 708.

it is being destroyed.[238] Although one of the reasons for permitting search incident to arrest is to prevent the destruction or concealment of evidence, the threat of destruction may itself constitute justification for a warrantless search independent of a contemporaneous arrest. Recently in the United States this exception has been narrowly confined to circumstances in which evidence is actually in the process of destruction, rather than merely threatened with destruction, at least when justification for searching a house is sought.[239] This narrow construction would most likely be applied to searches of persons.[240] It may be possible to impound a dwelling in which it is feared evidence may be destroyed,[241] but there is no decisional authority for this proposition. A warrantless search of an automobile might possibly be justified under this exception where destruction of evidence is not actually in progress,[242] but automobile searches constitute a separate exception to the warrant requirement and are more readily justifiable under their own exception.

A search to prevent destruction of evidence cannot be justified as easily as a search for possible weapons such as in *Terry v. Ohio*. The measure of necessity is less, and the degree of intrusion is greater. No danger to life is involved, and a full fledged search is far more intrusive than a patting of outer garments.

b. In England

English law regarding the search to prevent destruction of evidence exception is difficult to assess. It could be said to be virtually nonexistent under *R. v. Waterfield*[243] in which police action to preserve evidence of a suspected crime was disapproved; but in *Ghani v. Jones*[244] the Court of Appeal criticized *R. v. Waterfield* and indicated that police have extensive power to seize and examine possible evidence. Since the power to seize presumably implies some power to search, and since the rationale of *Ghani v. Jones* was based upon enhancing preservation of criminal evidence, it is likely that a search to prevent destruction or concealment of evidence will be upheld where destruction is threatened but not actually in progress. Even if the English police have an independent power to search to prevent the

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238. *See generally,* Note *supra* note 41.

239. Vale v. Louisiana, 399 U.S. 30, 35 (1970).

240. At least where probable cause exists and a limited intrusion is undertaken to prevent destruction of readily destructible evidence, a search may be permissible. Cupp v. Murphy, 412 U.S. 291 (1973). *But cf.* United States v. Di Re, 332 U.S. 581, 587 (1948).

241. *See* Note, *supra* note 41, at 1474-81; Note, *supra* note 28, at 446-47. There is normally no objection to impounding a dwelling or preventing access to a location when it is the scene of a crime, and it is standard police procedure to do so. *See* MORIARTY, *supra* note 171, at 62-64. There seems to be little reason for not permitting similar impounding of the location of an arrest even though this location is not as directly related to commission of a crime. The object of the impounding—the acquisition and preservation of evidence—is the same.

242. *Cf.* Chambers v. Maroney, 399 U.S. 42, 52 (1970).

243. [1964] 1 Q.B. 164 (C.C.A.).

244. [1970] 1 Q.B. 693 (C.A.).

destruction of evidence, the argument for its existence is not likely to be raised often. Because the scope of English police search incident to arrest is considerably more extensive than that permissible in the United States under *Chimel v. California,*[245] it is likely that police will attempt to justify a warrantless search as incident to arrest rather than pursuant to any other power. Threatened destruction of evidence would thus be used to justify a wide scope of arrest-based search, rather than as an independent justification to search.

6. ADMINISTRATIVE SEARCHES

a. Generally

At times, governmental officials other than the police engage in search activity as a technique for law enforcement. Although not conducted by police, some of these searches involve the enforcement of criminal laws, either directly when the search is to enforce a law having criminal sanctions, or indirectly when police accompany the official conducting the search. Hence these searches fall within the scope of this article. In the United States, all governmental searches and seizures are controlled by the fourth amendment with consequent attention to the judicial warrant requirement, but in England the judicial warrant is not always applied to such searches.

b. Customs Searches

1). In the United States

One category of administrative search with inherently criminal overtones is the border search by customs officials.[246] Pursuant to various statutes and administrative regulations,[247] American customs officials are empowered to detain and search persons, baggage and vehicles travelling across international borders in order to detect violation of customs laws. Persons in direct contact with a border area or reasonably related to it, such as persons working in the border area or engaged in suspicious activity nearby, are subject to such searches as

245. 395 U.S. 752 (1969). The scope of search is probably even wider than the scope of search permitted by Cardwell v. Lewis, 417 U.S. 583 (1974), Gustafson v. Florida, 414 U.S. 260 (1973), and United States v. Robinson, 414 U.S. 218 (1973).

246. *See generally* Comment, *supra* note 106; Note, *At the Border of Reasonableness: Searches by Customs Officials,* 53 CORNELL L. REV. 871 (1968); Note, *Border Searches and the Fourth Amendment,* 77 YALE L. J. 1007 (1968). The recent case of Almeida-Sanchez v. United States, 413 U.S. 266 (1973), has applied ordinary probable cause requirements to searches near a border where there is no probable cause to believe the border has been crossed. In *Almeida-Sanchez,* an automobile was stopped and searched about 25 miles north of the Mexican border by a roving patrol on a road that lies at all points at least 20 miles from the border. There was no reason to believe the individual or the automobile had ever crossed the border, much less that he had committed any offense. Under those circumstances, the search could not be justified under the Court's automobile search decisions or administrative inspection decisions.

247. *E.g.,* 19 U.S.C. §§ 482, 1582 (1970). Statutory authorization of customs searches predates the fourth amendment. Act of July 31, 1789, ch. 5, 1 Stat. 29, 43.

are persons initially entering the country.[248] The search need not be conducted in the immediate geographical vicinity of the border. Depending upon the totality of the surrounding circumstances, border searches may extend over considerable times and distances,[249] and may be conducted at checkpoints a considerable distance from the border.[250]

Under the fourth amendment and in accordance with the general rule regarding administration action, border searches are governed by a standard of reasonableness. Border searches, however, need not be based on the same standards of probable cause which govern ordinary police searches inland. Rather, persons and vehicles crossing an international border may be searched simply upon suspicion caused by signs of nervousness or uneasiness which provoke the curiosity of experienced inspectors.[251] Similarly, trunks and envelopes may be searched upon "reasonable cause to suspect" customs violations.[252]

The greatest problems presented by these lower standards for probable cause arise when border searches become particularly intrusive and intensive. Occasionally customs searches to detect narcotics have involved not merely search of clothing, luggage and vehicles but searches of the human body and orifices, as by requiring the suspect to disrobe,[253] by probing the rectum or vagina,[254] or by administering laxatives or emetics or using stomach pumps.[255] Where border

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248. United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied,* 393 U.S. 1121 (1969). *But see* Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

249. Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (7 hours, 105 miles); United States v. Garcia, 415 F.2d 1141 (9th Cir. 1969) (2 hours, 20 miles); Walker v. United States, 404 F.2d 900 (5th Cir. 1968); Rodriquez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967) (15 hours, 20 miles). *See also* United States v. Hill, 430 F.2d 129 (5th Cir. 1970).

250. Almeida-Sanchez v. United States, 413 U.S. 266 (1973), recognized border searches need not take place at the border but at its functional equivalents as well. *Id.* at 272-73. Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959).

251. *See* Comment, *supra* note 106, at 279. It is the crossing of the border rather than proximity to it that gives rise to the exception, however. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). There must be probable cause to believe the border has been crossed. *Id.*

252. *See* United States v. Van Leeuwen, 397 U.S. 249 (1970); Note, *At the Border of Reasonableness: Searches by Customs Officials,* 53 CORNELL L. REV. 871, 871-75 (1968). *See also* Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

253. *E.g.,* United States v. Johnson, 425 F.2d 630 (9th Cir. 1970) (disrobing held unlawful); Witt v. United States, 287 F.2d 389 (9th Cir. 1961), *cert. denied,* 366 U.S. 950 (1962) (disrobing held lawful).

254. *E.g.,* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (rectal search held unlawful); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (vaginal search held unlawful); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied,* 386 U.S. 945 (1967) (rectal search held lawful); Denton v. United States, 310 F.2d 129 (9th Cir. 1962) (rectal search held lawful); United States v. Cortez, 281 F. Supp. 888 (S.D. Cal. 1968) (vaginal search held lawful).

255. *E.g.,* United States v. Briones, 423 F.2d 742 (5th Cir. 1970) (emetic held lawful); Arciniaga v. United States, 409 F.2d 513 (9th Cir. 1969), *cert. denied,* 397 U.S. 928 (1970) (emetic held lawful); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (stomach pump held lawful); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied,* 359 U.S. 939 (1959) (emetic held lawful).

searches involve such intimate body intrusions the fourth amendment requires that there be a "clear indication" or "plain suggestion" that the search will be fruitful.[256] This standard seems close to the ordinary standard for determining whether there exists probable cause to believe an item is located at the place to be searched. When the search "shocks the conscience" of the court under standards of due process of law suggested in *Rochin v. California*,[257] an intrusive body search may be unlawful, but courts have been chary of using this rationale to invalidate searches.[258]

American courts, aware as they are of the judicial warrant requirement, have been willing to apply it to administrative searches.[259] Despite this awareness, however, courts have not yet applied the fourth amendment to border searches so as to require a warrant to search unless "exigent circumstances" make obtaining one impractical. The decisions have simply held unlawful those searches deemed not based on sufficient "suspicion" or, in the case of particularly intrusive searches, "plain suggestion." No case has yet held a border search unlawful simply because under the circumstances no reason appeared for not obtaining a warrant. Perhaps "at some point in the ascending scale of intensiveness of search a line must be drawn beyond which a customs officer may not go, unless he makes a showing of probable cause before a judicial officer and obtains a search warrant."[260] A court may eventually hold that a search warrant must be obtained, even when the search is based on a "plain suggestion" or the higher standard of probable cause, unless exigent circumstances provide a reason for dispensing with one.[261] That prospect is not likely, however.

2). In England

The law of England regarding border and customs searches seems to be both more and less restrictive of governmental search power than the law of the United States. With regard to goods, vehicles and persons being transported across international boundaries, English law seems more restrictive in requiring reasonable grounds for administrative action. Power to search and seize vehicles and premises under English customs laws, however, apparently are not restricted to proximity of time and place of transport across international borders, but

256. "[T]he permissible intensity of search has been allowed to increase in direct proportion to the degree of cause justifying intrusion." Note, *supra* note 28, at 439 n.31.

257. 342 U.S. 165 (1952).

258. *E.g.*, Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957). Although the due process approach has the advantage of calling attention to the element of pain or danger, Batchelder, *supra* note 106, at 192, it provides little guidance for searches which are not brutal. McIntyre & Chabraja, *supra* note 106, at 22-23.

259. *E.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).

260. Comment, *supra* note 106, at 286.

261. *Cf.* Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

seemingly are applicable to situations which in the United States would be considered ordinary inland police searches. To the extent that search powers under English customs laws do not require strict adherence to the ordinary standards of probable cause to search, they are considerably in excess of what is constitutionally permissible in the United States.

The basic English powers to search and seize under customs laws are set fourth in the Customs and Excise Act of 1952.[262] Under that Act, the category of persons subject to customs search are those who are on board or have landed from any ship or aircraft, or who are entering or about to leave the United Kingdom, or who are within the dock area of a port or at a customs airport. This appears to permit searches of persons to the same geographical extent as under American law since persons at a considerable distance inland can still be considered to be "entering" the country. That is the American rationale for permitting "border searches" many hours and miles away from the boundary. Vehicles and goods being transported across the border are similarly subject to search.[263] With respect to persons and vehicles, however, the power to search can be exercised only when there are "reasonable grounds to suspect" violation of customs laws. In an article discussing this aspect of virtually identical Australian customs laws, Mr. E. J. Cooper has noted:

> Reasonable suspicion is more than honest belief, and the fact that items are subsequently found which add to the suspicion is not sufficient. In an action an officer will be required to give full particulars of his beliefs, and the fact that the accused's demeanour was consistent with that likely to be adopted by those engaged in smuggling is not enough.[264]

This indicates that a higher standard for customs searches of persons and vehicles is required in England than in the United States, where suspicious demeanor is enough. Additionally, a person about to be searched in England may demand to be taken before a justice of the peace, or a superior of the officer concerned, in order to test the reasonableness of the grounds of suspicion.[265] This seems to be a reasonable provision and one which American legislation would do well to include. The English statute also provides that no female shall

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262. Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, § 298 (2). *See also* Immigration Act of 1971, c.77, § 4, sched. 2, which provides for powers to search persons entering the United Kingdom to determine conditions of entry. This Act does not ordinarily apply to local journeys or journeys to the Islands or the Republic of Ireland.

263. Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, §§ 294-95, 297.

264. Cooper, *Search, Seize and Question under Federal Revenue Laws,* 45 AUS. L.J. 342, 354 (1971) [hereinafter cited as Cooper].

265. Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, § 298(1)(b)(i). Since the statute provides for one "or" the other, the section may possibly be satisfied by taking a protesting suspect before a superior administrative officer and denying a right to appear before a justice of the peace. This interpretation would seem almost to subvert the intention of the statutory safeguard since such recourse would undoubtedly be available regardless of the statute.

be searched except by a woman, but this is the general American practice.[266] There is a further important difference, however. "The power to search does not include a power to carry out or order the carrying out of a medical or personal examination nor can a magistrate make such an order."[267] Thus intrusive body searches present no problem in England because they cannot be conducted, at least regarding searches for contraband. Under the Immigration Act of 1971, however, a medical examination can be ordered to determine whether a person may enter the United Kingdom.[268]

In one significant respect the power of search under English customs laws is considerably in excess of what is constitutionally permissible in the United States. Under section 296 of the Customs and Excise Act of 1952, an officer may enter a building or place to search for goods liable to forfeiture or seizure under the customs laws pursuant to a writ of assistance. While the primary function of the writ of assistance today may be "to protect against the award of damages for certain acts during an action for trespass,"[269] it was to protect against such writs that the fourth amendment was passed.[270] This search power would clearly be unconstitutional in the United States.

c. Other Administrative Searches

1). In the United States

Border searches constitute but one example of circumstances in which administrative officers other than police exercise powers of search as a technique of law enforcement. Administrative officials also search in order to enforce a myriad number and variety of statutes. In the United States there is a general warrant requirement for such searches to examine dwellings and other premises for conditions endangering community health, safety or welfare.[271] In *Camara v.*

266. *See* McIntyre & Chabraja, *supra* note 106, at 19 for a description of the ordinary American procedure for searching females. *See also* Immigration Act of 1971, c. 77, sched. 2, part I, 4 (3).

267. Cooper, *supra* note 264, at 355. Under the Immigration Act of 1971, c. 77, § 4 and sched. 2, there is express authority for medical examination by a medical inspector. It is not clear whether this authority could be used to require medical examination of persons smuggling contraband into the country, but presumably it could. The Immigration Act medical examinations are apparently directed at determining whether a person has a right of entry and abode in the United Kingdom, and it may be that some reasonable suspicion of that right must exist before an examination is proper under the Act.

268. See note 265 *supra*.

269. Cooper, *supra* note 264, at 353. *See generally* Parker, *The Extraordinary Power to Search and Seize and the Writ of Assistance,* 1 U. BRIT. COLUM. L. REV. 688 (1962).

270. *See* Landynski, *supra* note 151, at 30-48; N. B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937). *See also* Appendix A *infra*.

271. *See generally,* Note, *Prejudgment Seizure of Chattels in a Replevin Action without an Order by a Judge or of a Court of Competent Jurisdiction is Unconstitutional,* 35 ALBANY L. REV. 370 (1971); Note, *Administrative Inspections and the Fourth Amendment—A Rationale,* 65 COLUM. L. REV. 288 (1965); Note, *supra* note 31, at 1120-26; Note, *supra* note 117.

Municipal Court[272] the Supreme Court held that except in carefully defined classes of cases any administrative search of private property violates the fourth amendment unless it has been authorized by a warrant. Warrantless administrative inspections are permissible in emergency situations such as when there is a "compelling urgency" for a prompt seizure of unwholesome food or tubercular cattle or for compelling smallpox vaccination or a health quarantine.[273] In *See v. Seattle*[274] the Court held the warrant requirement applicable to similar inspections of those portions of nonresidential commercial structures which are not open to the public. Consent to search is ordinarily required[275] although it may be implied from acceptance of a state license.[276] While the requirement may not be applicable simply to nonforcible entry upon land not involving search of some structure or object upon the land,[277] a warrant may be required where the entry violates a reasonable expectation of privacy.[278]

2). In England

The English law governing powers of administrative search and entry is characteristically vague, jumbled and free from any uniform application of the judicial warrant requirement.[279] Pursuant to a mass of ad hoc statutory powers of entry,[280] there are a considerable number of "very extensive and diverse rights over privately owned land which are now possessed by a bewildering number of persons and authorities."[281] A glance at the catalogue of statutory powers[282] and the diverse procedures they entail,[283] indicates reform is desirable if only for the sake of uniformity. Unlike the situation in the United States under *Camara* and *See,* there is no generally applicable judicial warrant requirement save in situations not covered by statute where a search warrant presumably is required.

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272. 387 U.S. 523 (1967).

273. *Id.* at 539.

274. 387 U.S. 541 (1967).

275. United States v. J. B. Kramer Grocery Co., 418 F.2d 987 (8th Cir. 1969).

276. People v. White, 259 Cal. App. 2d 936, 65 Cal. Rptr. 923 (1968). Similarly, a warrantless inspection by a federal treasury agent conducted during business hours of the premises, including places of storage, of a firearms dealer for the purpose of examining records or documents required to be kept and firearms or ammunition stored at the premises, pursuant to the Gun Control Act of 1968 is permissible as a proper enforcement and inspection provision of the Act. United States v. Biswell, 406 U.S. 311 (1972).

277. *See* Camara v. Municipal Court, 387 U.S. 523, 539-40 (1967); *cf.* Hester v. United States, 265 U.S. 57 (1924). Warrantless entry of a state inspector upon corporate property from which the public is not excluded, and, upon observation of smoke, testing for air quality, is permissible. Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

278. *Cf.* Katz v. United States, 389 U.S. 348 (1967). Conversely, a warrant will not be required where invasion of privacy is only "abstract and theoretical." *Id.*

279. *See* Waters, *supra* note 92; Waters, *Rights of Entry, supra* note 120.

280. *See* DEVLIN, *Police Procedure, supra* note 46, at 341-42.

281. Waters, *supra* note 92, at 139.

282. *See* DEVLIN, *Police Procedure, supra* note 46, at 341-42.

283. *See* Waters, *supra* note 92, at 139-148.

3). The value of the judicial warrant

As a matter of policy the advisability of applying the judicial warrant requirement is by no means crystal clear, although to do so is consistent with the operative assumption of American law that warrants are necessary to lawful governmental search. Area wide inspections involve no implication that the persons searched actually violated any law, and due to the self-restraint ordinarily exercised by inspecting agencies, inspections are seldom very intrusive.[284] Also, unlike criminal searches the object in administrative searches is to force compliance with the law. Since deficiencies normally can be hidden only by the desired compliance with the law, generous notice of search is preferable to surprise.[285] Further difficulties with the application of the warrant may stem from the relaxed standards for the necessary showing of probable cause: "the routine issuance of warrants would compromise any effective protection against improper searches and perhaps undermine the existing practice of delaying searches at the request of the individual homeowner."[286] Application of the warrant may even be irrelevant to ordinary inspections, since consent to such searches is nearly universal.[287] Nonetheless, uniformity itself is desirable, and an examination of the powers involved in administrative entry is itself useful.[288] Certainly a warrant-based administrative search system in the long run appears more likely to protect individual rights of privacy than a system with no prior judicial control. "The warrant may constitute a sledge-hammer with which to crack a nut,"[289] but "it is becoming increasingly evident that the right of privacy, which *inter alia* the warrant has always protected, should not go by default for want of legal machinery fashioned to accommodate the new situation."[290]

V. FOCUSED SEARCH OR ANALYSIS FOLLOWING SEIZURE

A. *Generally*

The last major area of police search, and the one least subjected to the judicial warrant in practice, is police search or analysis following seizure. There can be little doubt that analysis or examination of persons and objects after seizure is a form of search which may involve interference with reasonable expectations of privacy. Yet this form of search generally has not been effectively subjected to the judicial

284. Note, *supra* note 117, at 526.

285. Note, *Administrative Inspections and the Fourth Amendment—A Rationale,* 65 COLUM. L. REV. 288, 294 (1965).

286. *Id.* at 291. To avoid this latter problem, the Supreme Court in *Camara* suggested that warrants should be obtained only after consent to search has been refused.

287. Note, *supra* note 117, at 529.

288. Waters, *supra* note 92, at 150.

289. Waters, *Rights of Entry, supra* note 120, at 92.

290. *Id.* at 93.

warrant requirement. There are some indications that judicial warrant control may be imposed to a limited degree. Since developments in this area seem limited to the United States, with no parallel in English law, this discussion will be concerned exclusively with American law.

B. *The "Inventory Search"*

In the United States, a common form of subsequent search is the "inventory search" of a person, his clothing and his personal effects after arrest and before incarceration. Ordinarily police conduct a pre-incarceration search as a matter of routine in order to prevent weapons, implements of escape or contraband from entering the detention facility, as well as to preserve the integrity of the process by providing an inventory of the items taken. Such searches have been uniformly upheld when conducted routinely and "when [they are] not used as a substitute for search without a warrant,"[291] although that is exactly what they are.[292] Inventory searches of virtually any item in police custody are generally upheld whenever the police take possession of the property in order to safeguard it for an arrestee.[293] It has been suggested that some privileged form of "safety deposit box" receptacle should be required to be provided for prisoners to store personal items[294] but the cases clearly indicate this is not necessary.

C. *Search Following Seizure Contemporaneous with Arrest*

Subsequent search or analysis of items seized in the course of an arrest has also generally been permitted in the United States, on the theory that the subsequent search or analysis is also incident to the arrest. Thus objects located at the place of arrest have been permissibly searched incident to the arrest when the search was essentially part of the same transaction.[295] Generally, the cases involving these searches are decided in the context of whether the search was within the scope limitations of search incident to arrest. While such searches may be permissibly extended to a wife or companion's purse which is

291. United States v. Fuller, 277 F. Supp. 97, 99 (D.D.C. 1967).

292. Police have full authority to search an arrestee's person and clothing at the time of a custodial arrest and at the time of arrival at the place of detention. Any clothing or items seized can thereafter be subjected to laboratory analysis. United States v. Edwards, 415 U.S. 800 (1974). *See generally* United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970), cert. denied, 401 U.S. 980 (1971); United States v. Stamps, 430 F.2d 33 (5th Cir. 1970); United States v. Robbins, 424 F.2d 57 (6th Cir. 1970); State v. Dempsey, 22 Ohio St. 2d 219, 259 N.E.2d 745 (1970).

293. *See, e.g.*, United States v. Edwards, 415 U.S. 800 (1974); United States v. Boyd, 436 F.2d 1203 (5th Cir. 1970); United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970).

294. Note, *supra* note 28, at 445.

295. *E.g.*, United States v. Kind, 433 F.2d 339 (4th Cir. 1970) (examination of serial numbers of TV sets in room of arrest); United States v. Molkenbur, 430 F.2d 563 (8th Cir.), *cert. denied,* 400 U.S. 952 (1970) (search of cardboard box in back yard); United States v. Kim, 430 F.2d 58 (9th Cir. 1970) (search of cardboard box sealed with tape in automobile).

reasonably feared to contain a weapon,[296] a person cannot be searched merely because of his presence in a suspect automobile.[297]

Just as items located at the scene of an arrest may properly be searched incident to the arrest, objects being worn or carried by the arrestee may also be searched. Thus an arrestee's purse may be searched,[298] as may a girdle[299] or other clothing being worn by the arrestee.[300] Clothes being worn by the arrestee may also be seized for the purpose of subjecting them to laboratory analyses and tests when the seizure forms an integral part of the process of arrest.[301]

D. *Search Following Seizure not Contemporaneous with Arrest*

Subsequent searches not integrally related to an arrest have also been upheld in the United States. It has been held lawful to seize and search suitcases by presenting to a bailee bus company claim checks taken from an arrestee incident to his arrest.[302] Similarly, it has been held lawful to seize and examine an automobile the keys to which were taken during an inventory search of the suitcase of an arrestee and which, according to a hotel register, belonged to the arrestee.[303] Also, a laboratory analysis of a suit siezed from a cleaning shop to which it had been taken, has been upheld.[304]

The reasoning of these three decisions is interesting. The first case was decided on the theory that the subsequent seizure of the suitcases obtained by presenting the claim checks was a part of the original search at the place of arrest; the arrestee constructively possessed the suitcases at the place of arrest since the claim checks were indicia of ownership, the seizure of which was tantamount to seizure of the suitcases. The court further reasoned that since the "seized" suitcases could have been searched at the place of arrest, the subsequent search was justified since the police had probable cause to believe they contained evidence pertinent to the case. For this latter conclusion the court relied on *Chambers v. Maroney*[305] which held that where police

296. United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971).

297. United States v. Di Re, 332 U.S. 581 (1948); United States *ex rel.* McArthur v. Rundle, 402 F.2d 701 (3d Cir. 1968).

298. United States v. Gonzalez-Perez, 426 F.2d 1283 (5th Cir. 1970).

299. Lemons v. United States, 390 F.2d 346 (9th Cir. 1968).

300. *E.g.*, United States v. Williams, 416 F.2d 4 (5th Cir. 1969). A full search of an arrestee incident to a custodial arrest is permissible. Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

301. United States v. Edwards, 415 U.S. 800 (1974); United States v. Williams, 416 F.2d 4 (5th Cir. 1969); Hancock v. Nelson, 363 F.2d 249 (1st Cir. 1966); Golliher v. United States, 362 F.2d 594 (8th Cir. 1966).

302. State v. Mejia, 257 La. 310, 242 So. 2d 525 (1970). *See also* United States v. Wilson, 163 F. 338 (S.D.N.Y. 1908).

303. United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970).

304. Clarke v. Neil, 427 F.2d 1322 (8th Cir. 1970) (the manager of the cleaning shop apparently consented to the seizure).

305. 399 U.S. 42 (1970).

may lawfully stop and search an automobile, they may also seize it and search it later at the station house. Given probable cause to search, either course is reasonable. There are difficulties with this rationale. *Chimel v. California*[306] clearly rejected the doctrine of constructive possession for arrest-based searches, and it is doubtful the seizure could be justified even under the earlier standards of *United States v. Rabinowitz.*[307] If the seizure cannot be justified, neither can the subsequent search by analogy to *Chambers v. Maroney,* since a subsequent search under *Chambers* is permissible only when the original seizure is lawful.

The quandary of the first case might be eliminated by applying the rationale of the second case, which apparently assumed that the subsequent seizure of the automobile was a part of the inventory search begun at the station house, the automobile having been taken into custody and inventoried in order to safeguard the property of the arrestee.[308] That is, the court, rather than relying upon a theory of constructive possession, could instead consider the search of the suitcase as part of an inventory search begun at the station house, the suitcase merely being obtained from the bus company and inventoried as a means of safeguarding the arrestee's property. Of course it is not entirely clear that any subsequent police search or analysis of lawfully seized property is permissible without a judicial warrant. Though such a search is probably legal, there is some authority to the contrary.[309]

Initially it should be noted that *Schmerber v. California*[310] implicitly assumed that a subsequent analysis of an arrested person may be subject to the judicial warrant requirement, at least where the analysis involves intrusion into the human body. Lower courts, however, seem to regard *Schmerber* as dealing primarily with police brutality and due process of law rather than with police search and the fourth amendment. Police analysis of human beings not involving intrusion into the human body itself, has generally been upheld even though it may be degrading and may involve areas of intimate pri-

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306. 395 U.S. 752 (1969).

307. 339 U.S. 56 (1950). *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

308. The court further reasoned that the only item "seized" from the automobile and later introduced as evidence against the arrestee was the identification number of the vehicle which could have been ascertained anyway under United States v. Johnson, 431 F.2d 441 (5th Cir. 1970) (en banc). *Johnson* held that an automobile owner has no reasonable expectation of privacy for his automobile's registration number.

309. The third case, Clarke v. Neil, 427 F.2d 1322 (8th Cir. 1970), indicated that any warrantless subsequent analysis of seized property is permissible, although the three different opinions in the decision primarily discussed whether there was valid consent to seizure by the bailee. The majority opinion held that a subsequent laboratory analysis is not a search. In United States v. Edwards, 415 U.S. 800 (1974), the Supreme Court seemingly gave blanket approval to subsequent search or analysis of items seized incident to custodial arrest and incarceration. The Court did indicate there may be instances in which the circumstances of the taking may make the search unreasonable, analogizing to Schmerber v. California, 384 U.S. 757 (1966), but it is probably rare that such an exception will apply.

310. 384 U.S. 757 (1966).

vacy.[311] Generally, if the seizure of the person or object is lawful, a subsequent search by examination or analysis is permissible, no matter how intrusive or humilating, save when brutality or some other excess violates due process of law by "shocking the conscience" of the court.[312]

There is at least one case, however, in which a subsequent search has been held unlawful because it was not authorized by a judicial warrant. In *Brett v. United States*[313] an arrestee was searched, incarcerated and given prison garb while his clothing and effects were put in a bag for routine safekeeping. Three days later a police agent inspected the contents of the bag, finding in the watch pocket of the trousers cellophane papers which upon further analysis were found to have traces of heroin. Purporting to focus upon privacy rather than property rights, the court held that the search should have been conducted pursuant to a judicial warrant.

However, *Brett v. United States* may not be overly persuasive authority. The opinion itself had difficulty distinguishing other cases involving search of prisoners' clothes, as pointed out in the dissent by Judge Aldrich. Also, since *Brett,* the Supreme Court has decided *Chambers v. Maroney*[314] which held that, for constitutional purposes, there is no difference between seizing and holding an object which police have probable cause to search, and on the other hand, carrying out an immediate warrantless search. "Given probable cause to search, either course is reasonable under the Fourth Amendment."[315] The *Chambers* rationale has been applied to a suitcase in police custody, [316] and could as well be applied to a prisoner's clothing.[317]

It may be that future cases will further apply the judicial warrant requirement to subsequent searches of seized persons and property. The question is far more likely to occur since *Chimel v. California*[318] restricted the scope of search incident to arrest, as this exception to the warrant requirement was often used prior to *Chimel* to justify subsequent searches.[319] Where there is probable cause to search seized person or property, however, the *Chambers* rationale may permit a warrantless search. This seems reasonable and also the likely course, although the *Chamber* rationale may not be fully applicable to searches in which there are great expectations of privacy.[320]

311. *E.g.,* Cupp v. Murphy, 412 U.S. 291 (1973) (fingernail scrapings); Brent v. White, 398 F.2d 503 (5th Cir. 1968), *cert. denied,* 397 U.S. 1123 (1969) (penis scraping of arrestee held lawful).

312. *Cf.* Rochin v. California, 342 U.S. 165 (1952).

313. 412 F.2d 401 (5th Cir. 1969).

314. 399 U.S. 42 (1970).

315. *Id.* at 52.

316. United States v. Mehciz, 437 F.2d 145 (9th Cir. 1971).

317. United States v. Edwards, 415 U.S. 800 (1974).

318. 395 U.S. 752 (1969).

319. *E.g.,* Abel v. United States, 362 U.S. 217 (1960); United States v. Caruso, 358 F.2d 184 (2d Cir.), *cert. denied,* 384 U.S. 1024 (1966).

320. *But see* United States v. Mehciz, 437 F.2d 145 (9th Cir. 1971).

VI. Conclusion

The foregoing reveals extensive similarities as well as striking differences between the English and American law of search and seizure. A major difference between the two systems lies in the ordinary method of redress for unlawful search or seizure. English reliance upon private lawsuits seems misplaced according to the American experience, in view of the unlikehood of a substantial recovery except in flagrant cases (a mild deterrent at best), and from the standpoint that no cause of action exists adequately to redress invasion of privacy, the individual interest primarily affected by search. Indeed, even though exclusion of evidence is the major sanction against illegal search in the United States, an American plaintiff has better remedies available in a private damage action than his English cousin. It is possible to claim damages for illegal search or seizure as a cause of action in its own right, with recovery possible for humiliation, invasion of privacy and the like.[321]

The primary reliance upon civil suits for damages is itself a factor contributing to differences between the two systems. The effect is to present a distorted legal development of the issues essentially involved in police search and seizure. Public, not private law is involved. Police cannot be treated as ordinary litigants; marshaled behind them are the powers of the state itself. The policeman as a litigant is a shepherd in sheep's clothing who simply cannot be treated as one of the flock. The great public interests involved seem to emerge only superficially in the opinions, and a proper public policy seems obscured by the judicial perspective.

The American approach seems preferable at least to the extent that it results in articulating a rational public law of search and seizure. Unquestionably, the primary reason for the differing English and American approaches lies in the express American constitutional prohibition against unreasonable search and seizure. More rigorous scrutiny of governmental search in the United States can be ascribed to its constitutional implications. The haphazard English treatment of search and seizure issues may well support an argument for adoption of some form of Bill of Rights in England, although such a development appears unlikely.

The course of future developments in the English and American law of search and seizure is difficult to predict. It is doubtful that any sudden changes in English law will occur as a result of judicial activity, and it seems extremely unlikely that English courts will move towards adoption of a stricter exclusionary rule which would in turn stimulate more litigation in this area. Changes in American law are more probable.[322] A quite tenable argument could be advanced that

321. 42 U.S.C.A. § 1983 (1970) (suit against state officials); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (suit against federal officials).

322. Indeed, the United States Supreme Court may begin moving away from rote applica-

the modern American tendency in the direction of strict judicial control of the police is in fact contrary to a general trend over the past two centuries toward permitting greater police discretion. Should the trend of American decisions be altered, movement toward increasing police discretion would not be surprising.

Nonetheless, this article has revealed a greater judicial willingness to advance and expand individual freedoms and civil liberties in the United States, much of which the English judiciary could do well to echo, if not emulate. Recent events have clearly indicated that police discretion is subject to abuse even in England.[323] The judiciary, both English and American, should and necessarily must exert some control over discretionary police powers. A more active role in that regard would be appropriate for English courts, and in keeping with the great English common law traditions which have provided the foundations for Anglo-American law.

VII. APPENDIX: AN HISTORICAL LOOK AT MAGISTERIAL NEUTRALITY AND THE GENERAL WARRANT

The myth of the neutral magistrate is prevalent in American search and seizure cases. It is often stated that the major purpose for instituting the warrant system was to substitute "the more detached, neutral scrutiny,"[324] "objective mind,"[325] and "deliberate, impartial judgment of a judicial officer"[326] for the zeal of "a police officer engaged in the often competitive enterprise of ferreting out crime."[327] This reasoning was carried to its extreme in the recent United States Supreme Court case of *Coolidge v. New Hampshire.*[328] In *Collidge* a warrant was issued in a murder case by the state attorney general, who was then engaged in the investigation of the case and later acted as chief prosecutor at trial. Asserting that neutrality and detachment of warrant-issuing authorities was constitutionally required, the Supreme Court invalidated the warrant.

Such reasoning has been used in support for the retention or expansion of the warrant system, and it has some current validity in

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tion of the sanction of exclusion. See the dissent of Chief Justice Burger in Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

323. Early in the morning of March 15, 1972, police simultaneously searched some 60 homes ostensibly regarding the Aldershot bombing case, pursuant to warrants apparently issued under the Criminal Damage Act. No explosives were reported found, but police nonetheless seized various letters, photographs, passports, diaries and other papers. A further incident occurred in September 1971, when police seized various papers and pamphlets of members of the Prescott and Purdie Defence Group while executing a warrant under the Explosives Act. See Zander, *supra* note 8. See also Letter of Mr. Paul Foot to the Editor, The Times (London), March 16, 1972, at 17.

324. Terry v. Ohio, 392 U.S. 1, 21 (1968).

325. McDonald v. United States, 335 U.S. 451, 455 (1948).

326. Wong Sun v. United States, 371 U.S. 471, 481 (1963).

327. Aguilar v. Texas, 378 U.S. 108, 110 (1964), *citing* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

328. 403 U.S. 443 (1971).

the modern setting of law enforcement. Yet it has no basis in the historical origins of the warrant system, and is only slightly accurate in explaining the search provision in the American Bill of Rights. Far from being a neutral official, the justice of the peace historically combined criminal-investigatory, police-administrative and judicial functions, hardly an amalgamation of powers conducive to neutrality and detachment. It was not until the emergence of the modern police organization *circa* 1829, well after passage of the fourth amendment, that the executive and judicial functions of the magistrate were separated. The present role of the magistrate in the warrant system evolved historically from political processes and not from a quest for a neutral curb on prosecutorial zeal.

The origins of justices of the peace are found in the twelfth century with the Keepers of the Peace, knights charged with a general responsibility to preserve the peace and quell disorder. But the initial development of the justices' duties and responsibilities began in the fourteenth century.[329] At first the justices' main duties were to maintain general tranquility by suppressing riots and disorders, arresting offenders and indicting and trying persons at quarter sessions. Gradually the justices acquired a myriad of additional responsibilities. During the Tudor era in the fourteenth and fifteenth centuries, the justices acquired such additional and disparate administrative duties as conscripting seamen and fixing various prices and wages. As instruments of comprehensive Tudor economic regulation, the justices had

> a considerable range of supervisory and regulative obligations, a little overwhelming in their number, and somewhat bewildering in their variety. It was perhaps just as well in the medley of duties thrust upon them that the justices were not bothered with any fine distinctions between judicial and administrative duties or criminal and civil jurisdictions. The jumbled legislation lumped them all together.[330]

The responsibilities of the justices continued to expand in the seventeenth century. At that time the duties of the justices primarily consisted of holding quarter sessions, exercising summary jurisdiction over minor offenses out of quarter sessions, conducting preliminary examination of persons accused of indictable offenses, issuing arrest warrants to constables, and exercising various governmental powers, particularly in the administration of the poor laws.[331] It was at this time that the justices began to use general search warrants to enforce

329. *See generally* C. A. BEARD, THE OFFICE OF JUSTICE OF THE PEACE (1904); G. R. ELTON, THE TUDOR CONSTITUTION 451-70 (1962); F. T. GILES, THE MAGISTRATES' COURTS (1963); F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 206-09, 231-33, 493-99 (1931) [hereinafter cited as MAITLAND]; F. MILTON, IN SOME AUTHORITY: THE ENGLISH MAGISTRACY (1959); B. OSBORNE, JUSTICES OF THE PEACE 1361-1848 3-63 (1960) [hereinafter cited as OSBORNE].

330. OSBORNE, *supra* note 329, at 12-15.

331. MAITLAND, *supra* note 329, at 232-33.

laws regulating religion, having received the additional duty of "searching of recusants' houses for popish books, which they were directed to burn."[332] This general form of search power had been in use in England since the first half of the fourteenth century, although earlier statutes had not granted such powers to the justices.[333]

The demeanor of the justices at that time, as would be expected of someone wielding combined investigatory and judicial powers with direct responsibility for preservation of order, was not in keeping with the modern American image of a neutral arbiter.[334] In describing the preliminary examination, for example, Maitland notes:

> The object of it is not to hold an impartial inquiry into the guilt or innocence of the prisoner, and to set him free if there is no case against him; the justice of the peace here plays the part rather of a public prosecutor than of a judge.[335]

A blending of powers in the administration of the criminal law characterized the performance of the justices.

> In those times the justices of the peace combined in their persons the functions of magistrate, policeman, and prosecutor. . . . "They raised hue and cry, chased criminals, searched houses, took prisoners. A Justice of the Peace might issue the warrant for arrest, conduct the search himself, effect the capture, examine the accused, and sans witnesses, extract a confession by cajoling as friend and bullying as magistrate, commit him, and finally give damning evidence at trial."[336]

The justices of the peace "were the key figures in a flexible administrative machine and they carried out both special and general commissions, of which the commission of the peace was merely the most regular and the most important."[337] The reason for devolving such broad and significant powers upon the justices is that they were an influential elite to whom such powers could be trusted. "As a group they were wealthy, well educated, ambitious and in reasonable accord with national policy both religious and political."[338] "The qualified lawyers, the members of the House of Commons, and J.P.s in Elizabethan and Stuart England were so closely intertwined that they were essentially different embodiments of a single social entity."[339]

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332. OSBORNE, *supra* note 329, at 7. *See generally* N. B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 28-31 (1937) [hereafter cited as LASSON]. *See also* Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362-63 (1921) [hereinafter cited as Fraenkel].

333. LASSON, *supra* note 332, at 23.

334. *See* P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 3-7 (1960).

335. MAITLAND, *supra* note 329, at 233.

336. LASSON, *supra* note 332, at 36 n.86, *quoting* J. POLLOCK, THE POPISH PLOT (1903).

337. J. H. GLEASON, THE JUSTICES OF THE PEACE IN ENGLAND 1588 TO 1640 96 (1969).

338. *Id.*

339. *Id.* at 122.

"The justices . . . were competent members of the ruling class, and nothing was more natural than that a parliament of landowners . . . should trust them with all manner of duties and governmental powers."[340] But the trust of parliament was in their political and religious conformity and acceptability, not in their neutrality and impartiality toward an accused in the administration of the criminal law.

The seventeenth and eighteenth centuries saw a burgeoning use of general and unrestricted powers of search, primarily extra-legally, by agents of the king, although at times they were aided by acts of Parliament. Eventually the common law formulated limitations which were judicially imposed upon such arbitrary practices, but this was a political phenomenon divorced from any considerations of reforming criminal procedure. The common law was simply used as a tool to limit arbitrary royal power; the vehicle used by dissident factions to avoid suppression. It was successful in view of its libertarian nature and popular appeal, but it was nonetheless a function of the political process. Similarly in America, limitations upon search and seizure were directed against general warrants and writs of assistance used to suppress political dissent and to enforce unpopular tax measures, with the search issue seized upon by anti-Federalist forces during their attempts to defeat adoption of the Constitution. The neutrality of a magistrate vis-a-vis criminal defendants played no part in this process because such neutrality did not exist.

The history of the major growth and subsequent curtailment of general warrants in England revolves initially around the Privy Council and the Courts of Star Chamber and High Commission in the seventeenth century, and it continues with the use of such warrants in the eighteenth century by excise men and secretaries of state.[341] In the seventeenth century unrestricted powers of search were used to enforce the system of prior state censorship over all publications, a system which was used to suppress sedition and religious dissent. The Privy Council used general warrants to discover documentary evidence against those who resisted the duty of "tonnage and poundage." They were also used, in one infamous episode, to search the house of Sir Edward Coke, the great authority on the common law and an influential Crown opponent, for evidence of sedition. Star Chamber enforced strict censorship of all printed matter by providing searchers with general authority to search whenever they saw fit. Even after the abolition of the Courts of Star Chamber and High Commission in 1640, and the expiration of the Licensing Act in 1679, similar methods continued to be used.[342] During the eighteenth century general war-

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340. MAITLAND, *supra* note 329, at 494.

341. *See generally* J. W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20-30 (1966); LASSON, *supra* note 9, at 28-50; F. S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND: 1476-1776 (1952).

342. Searches were conducted following a questionable decision that the common law

rants were commonly used by customs officers in the enforcement of various tax measures. They also came to be used under a practice whereby secretaries of state issued such warrants to search and arrest for seditious libel and similar offenses. But by 1765, crystallization of public opinion and parliamentary displeasure coincided with a series of judicial decisions which outlawed the general warrant.

The rationale for limiting the general search warrant began with common law commentators' discussions of the power of justices of the peace to issue arrest and search warrants. Although Coke denied the existence of any common law power forcibly to enter a dwelling to search, the practice of doing so pursuant to both general and specific warrants issued by justices of the police had gradually developed.[343] Sir Mathew Hale in his *History of the Pleas of the Crown* in 1713 expressed as the law or recommended practice the basic standards which eventually were applied to invalidate the general warrant. Hale stated that the warrant should be based upon sworn testimony constituting "probable cause to suspect" the requisite facts demonstrating a particular crime or the precise location of the objects of search.[344] The concepts advanced by Hale regarding the common law warrant began to have effect during the eighteenth century on legislative grants of the power to search. Excise laws began to omit provisions for writs of assistance, and in 1733 the inclusion of unrestricted search powers in one important excise measure was used by opponents to help defeat it. Similar popular opposition was aroused in 1763 in attempts to defeat a cider tax, as "a consciousness that such authority was arbitrary and inconsiderate of the liberties of the subject began to filter into parliamentary legislation."[345]

In a series of cases from 1763 to 1765 the general warrant was judicially repudiated. The decisions arose out of the practice of secretaries of state to issue general warrants of arrest and search in the prosecution of seditious libel cases. In 1762 John Wilkes anonymously published a pamphlet, the *North Briton, Number 45,* which Lord Halifax, the Secretary of State, deemed seditious. Halifax issued a warrant, general as to the persons to be arrested, the places to be searched and the material to be seized, instructing four messengers to find and seize the publishers of the pamphlet, together with their papers. Arresting 49 people in the process, the messengers eventually located the pamphlet's printer from whom they learned Wilkes was its author. The messengers then arrested Wilkes and, accompanied by an

prohibited uncensored publishing. The judge who delivered the opinion was eventually impeached *inter alia* for issuing general warrants. *See* LASSON, *supra* note 332, at 38.

343. Apparently the practice arose out of issuance of a documentary "hue and cry" to constables. *See* C. K. ALLEN, THE QUEEN'S PEACE 136-38 (1953); T. A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 1900-1966 6-7, 11-12 (1967); 1 J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 190 (1883).

344. *See* LASSON, *supra* note 332, at 34-37.

345. *Id.* at 23.

undersecretary of state, later searched Wilkes' house and seized various of his private papers.

A group of printers arrested by the messengers in the course of their search sued the messengers for false imprisonment,[346] and Wilkes sued the undersecretary of state who had supervised the search.[347] Both suits were successful, as was a third suit by a printer against the messengers. The government appealed the latter case the Court of King's Bench.[348] In the first pair of decisions, Chief Justice Pratt labelled the warrants "worse than the Spanish Inquisition" and "totally subversive" of personal liberty.[349] The appeal in the third case was decided upon a narrow point, but the King's Bench judges took the opportunity in dicta to declare the warrants invalid.

The success of Wilkes and the printers in their suits evidently inspired John Entick, another pamphlet author whose books and papers had been similarly seized six months before the Wilkes episode, to sue the messengers who had seized his papers.[350] Entick was successful and the action was appealed to the Court of Common Pleas where in 1765, "Pratt, now Lord Camden, delivered the opinion of the court, an opinion which has since been denominated a landmark of English liberty by the Supreme Court of the United States."[351] The classic decision was the culmination of the judicial efforts to void the use of general warrants. The House of Commons one year later belatedly declared that general warrants were illegal except as specifically provided for by an act of Parliament.

The American experience with general warrants was more mundane but aroused passions nonetheless. Where the major developments in English law principally concerned political expression, American attention was focused upon the use of writs of assistance by customs officers to prevent the smuggling of goods. Smuggling in contravention of prohibitive import duties and regulations, designed to protect English commerce and industry by restricting colonial trade, was a favorite colonial pastime initially ignored by the authorities. When strict enforcement of the trade laws became necessary to prevent the colonies from trading with countries at war with England, writs of assistance came into frequent use to search for uncustomed or prohibited goods.[352]

346. Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763).

347. Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763).

348. Leach v. Money, 3 Burr. 1742, 19 How. St. Tr. 1001 (K.B. 1765).

349. The general warrant decisions did Pratt's reputation and career no harm. He became one of the most popular men in England and received numerous awards. "Pratt's opinions on the question of the general warrants, moreover, were directly responsible for his subsequent elevation to the peerage in 1765 and to the lord chancellorship in 1766." LASSON, *supra* note 9, at 46. Doubtless Pratt had an inkling of the likely reception to his opinions, but in fairness to him it should be noted that as attorney general in 1760 Pratt delivered a similar opinion to William Pitt, then Secretary of State. Pitt ignored the opinion. *See id.* at 49.

350. Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

351. LASSON, *supra* note 332, at 47, referring to Boyd v. United States, 116 U.S. 616 (1886).

352. *See* Fraenkel, *supra* note 332, at 364.

These writs were virtually unrestricted authority for officials in their absolute discretion to search any location at nearly any time, and once issued they were valid during the lifetime of the reigning monarch and for six months thereafter.

Following the death of George II in 1761, a group of Boston merchants represented by James Otis challenged the legality of issuing writs of assistance to replace those which had expired six months after the King's death. Otis delivered a stirring denunciation of the search practice which was later singled out by John Adams as the first step toward the revolution 15 years later. The merchants were unsuccessful, and after all doubts of the legality of the writs were dispelled by their explicit authorization in 1767 by one of the Townshend Acts, both smuggling and the writs flourished under increasingly restrictive trade laws. Use of the writs was not uniform, and prior to the Townshend Act, few or none were issued in some of the colonies. But by the time of the American Revolution, the opposition to unrestricted search practices was widespread. The opposition was not, however, consistent and universal: the Continental Congress itself authorized the arrest of certain persons and the seizure of their papers "of a political nature."[353] Neither was the issue overriding, as no mention of general warrants or writs of assistance is to be found in the listing of colonial grievances in the Declaration of Independence.

The proceedings leading up to the adoption of the fourth amendment to the United States Constitution demonstrate that the reasons for its prohibition of unreasonable searches and seizures was to preclude use of general warrants and writs of assistance by specifying the requirements of probable cause, oath and particularity for a warrant. The amendment was intended to prevent the distasteful experience of the colonists with arbitrary customs officials. Such debate as occurred was due to the issue that the absence of a bill of rights provided as fuel for anti-Federalist forces in their attempts to prevent ratification of the Constitution. Once the debates over ratification had ended, and the new Congress had convened to draft the proposals which eventually became the Bill of Rights, passions had quieted so markedly that due to neglect the amendment was submitted to the states for ratification in its present form despite the fact that it had been rejected by a considerable majority of the House of Representatives.[354] The rejected form of the amendment attempted to make a change of substance, changing the amendment from one directed solely to specifying the elements of a valid warrant to one

353. LASSON, *supra* note 332, at 76-78.

354. During debates on the amendment the House resolved itself into a committee of the whole. A proposal to change the phraseology of the amendment from a single-clause sentence as it then stood into its present two-clause form was voted down. The committee to arrange the amendments as they were passed (chaired by the individual who had offered the defeated alteration) reported the amendment in the form which had been rejected. Apparently no one in the House noticed the change, and in that form the Senate received and passed it, and the states ratified it. *See* LASSON, *supra* note 332, at 101-03.

with two separate clauses. The first prohibited unreasonable searches generally, and the second was directed to the essentials of a warrant. Yet the change went unnoticed. This history hardly bespeaks an amendment intended to require warrants wherever possible. Unquestionably it provides no support for the assertion that the constitutional warrant requirement was intended to substitute the detached judgment of a magistrate for the chase haste of a policeman.

Even more persuasive of the position that magisterial neutrality in a criminal setting was not part of the purpose of the warrant requirement of the fourth amendment, is the fact that until the nineteenth century a separate police organization did not exist. Justices of the peace exercised considerable power over constables from an early time.[355] Their active participation in adminstration of the criminal law continued far into the nineteenth century and well past the creation of the first regular police forces in 1829.[356]

> The police force was instituted primarily as a preventive body, intended to discourage the commission of crime, rather than to establish the case against the author of a crime after it had been committed, for such functions were, in theory at any rate, regarded as being within the province of the justices. Indeed, for some ten years after the formation of the Metropolitan police, London Magistrates persisted in discharging these functions, and maintained their own staffs of investigating and interrogating officers in opposition, so to speak, to the regular force.[357] To some extent, at least, this English practice [of active criminal investigation by the magistrate] was brought to colonial America. Massachusetts gave investigatory powers to its magistrates, and as late as 1850 the New York Code Commissioners expressed concern over the extent of discretion vested in the magistrate. However, in some American colonies the English practice was not adopted and as Professor Moley reported, "the early development of the county prosecutor as an aggressive agent of law enforcement, and the power and prestige of the sheriff in

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> 355. From early times the justices superceded officers of a merely local origin. Their higher social status marked them out as the constable's natural mentor, and for many years the justice was regarded as the superior, the constable as the inferior, conservator of the peace. Commonly the justice would be the lord of the manor, and he or his steward would preside over the leet court, by which the constable as a principal officer of the manor, was appointed. Thus the constable was the justice's man, 'the lowe and lay minister of the peace', a general factation in carrying out, under the authority of the justice, the affairs of the manor. He became the executive agent of the justice in much the same way that he remained the agent of the manor, or parish . . . .

CRITCHLEY, *supra* note 343, at 9.

356. For example, in the late eighteenth century magistrates actively encouraged use of the then current system of rewards in crime detection, 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 108-09 (1956), imposed fines on neglectful constables, *id.* at 161-63, and had powers relating to organization of constabularies as late as 1857, CRITCHLEY, *supra* note 343, at 98, 117. Stipendiary magistrates were even used as administrators of the first organized police forces. *Id.* at 42-43, 63.

357. Williams, *Questioning by the Police: Some Further Points*, 1960 CRIM. L. REV. 352.

all frontier communities, probably prevented the justice of the peace and the city magistrates from assuming much importance as investigators of crimes and suspected criminals."[358]

While the investigatory duties of the magistrate may not have been fully exported from England to the United States, to some extent they were. Also, there is no doubt but that under the English practice the justices of the peace had significant law enforcement duties which were not relinquished until well after the advent of a separate professional police. The neutrality of the magistrate, then, is a modern invention possible only under the modern framework of law enforcement. Despite the importance attached to magisterial neutrality and impartiality today by the United States Supreme Court, it has no historical support.

358. Barrett, *Police Practices and the Law—From Arrest to Release or Charge,* 50 CALIF. L. REV. 11, 17 (1962), *citing* MOLEY, OUR CRIMINAL COURTS 20 (1930).