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"SEIZURES" TYPOLOGY: CLASSIFYING DETENTIONS OF THE PERSON TO RESOLVE WARRANT, GROUNDS, AND SEARCH ISSUES

Wayne R. LaFave*

In his Holmes lectures some ten years ago, Professor Anthony Amsterdam recounted "the progress of the apocryphal author of the celebrated treatise called *Jones on Easements*. The first sentence of the first edition began: 'There are fourteen kinds of easements recognized by the law of England.' But the work was well received, and the author labored to produce a second edition, in two volumes, which necessarily began: 'There are thirty-nine kinds of easements.' After the author's death, the treatise was scrupulously updated by his literary scions and now appears in a solid 12-volume sixth edition beginning with the sentence: 'It is impossible to say how many kinds of easements are recognized by the law of England.' ""1 The story served to highlight an important point: that the law of the fourth amendment, like the law of easements, has to deal with a mindboggling variety of situations and can do so meaningfully only if those situations are reduced to finite and perceptible categories.

Just what "edition" the fourth amendment is now in, on the *Jones on Easements* scale, is a matter on which opinions differ. 2 But there is no denying that over the past decade or so the Supreme Court has undertaken a good deal of fourth amendment categorization in responding to three fundamental issues: (1) What grounds, in a quantum-of-evidence sense, are required to justify particular fourth amendment activity? (2) When is a warrant required as a prerequisite to particular fourth amendment activity? and (3) What is the extent of the intrusion which may be undertaken incident to particular fourth amendment activity? An important part of this classification process has had to do with what the fourth amendment refers to as "seizures," 3 especial-

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2. Those who argue for a "good faith" exception to the exclusionary rule claim, in effect, that the fourth amendment has reached the sixth edition, in that the law regarding it is so complex that it cannot be understood by the police. See, e.g., Jensen & Hart, The Good Faith Restatement of the Exclusionary Rule, 73 J. CRIM. L. & CRIMINOLOGY 916, 924-28 (1982).
3. The fourth amendment proscribes "unreasonable . . . seizures" and requires that warrants particularly describe "the persons and things to be seized." U.S. CONST. amend. IV.
ly seizures of the person. At one time all such seizures were treated as virtually indistinguishable; the seemingly all-encompassing term “arrest” was employed to describe any seizure of a person, and under this one-dimensional approach police activity directed at a person was either an arrest or else nothing of fourth amendment significance. To call the activity an arrest generally meant that it could be engaged in without a warrant, that it could be made only if there existed probable cause, and that it permitted a broad incidental search of the person and surroundings.

The situation is now quite different. Not all seizures of the person are called arrests, and those so labelled often must be qualified by some adjective (e.g., “custodial”) or otherwise particularized in order to resolve important fourth amendment issues. As for the quantum of evidence required for a seizure, a distinction is drawn between arrest (requiring full probable cause) and temporary seizure for investigation (requiring something less, often called reasonable suspicion). Additionally, temporary seizures must be distinguished from those police-citizen contacts not at all covered by the fourth amendment and thus needing no justification whatsoever. Distinctions are also made in order to determine when and to what extent police may engage in search activity incident to a seizure. Though a frisk is all that is allowed in connection with certain lesser detentions, if a “custodial arrest” is made the arrestee may be subjected to a full search of his person and surroundings. If he is also “incarcerated” this allows another type of search, typically called an inventory, at the place of incarceration. Lastly, the nature of an intended seizure is relevant to whether the police must have a warrant. An arrest may be made without a warrant except when the arrest can be accomplished only by entry of private premises. Absent “exigent circumstances,” police need a warrant to enter private premises to make an arrest. If a warrant is required, still further characterization of the intended seizure is necessary to determine whether an arrest warrant or search warrant must be obtained.

This seizures typology constitutes a most important part of extant

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4. See, e.g., United States v. Mitchell, 179 F. Supp. 636, (D.D.C. 1959) Long v. Ansell, 69 F.2d 386, 389 (D.C. Cir. 1934), asserting that “the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time.”


fourth amendment doctrine. The precision with which and perspective from which such classifications are drawn is obviously a matter of considerable interest to the police, who must in the first instance resolve these warrant, grounds, and search issues. It is also an appropriate subject of broader concern, as the shape of these categories has a critical bearing upon the effectiveness of our law enforcement processes and the extent of our protected liberty and privacy. The following comments are directed to this seizures typology.

I. GROUNDS FOR SEIZURE: WHAT QUANTUM OF EVIDENCE IS REQUIRED?

Express recognition that some "searches" or "seizures" are constitutionally permissible on grounds falling short of traditional probable cause first occurred in *Camara v. Municipal Court*, holding that a warrant for a housing code enforcement inspection could issue pursuant to "reasonable legislative or administrative standards . . . based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area." The Supreme Court arrived at this result by "balancing the need to search against the invasion which the search entails." The Court later utilized this balancing test in *Terry v. Ohio*, in a different fashion; the Court concluded that a brief investigative seizure of a person and an incidental protective search were permissible on lesser grounds than needed for a full-fledged arrest and complete search of the person incident thereto. For the stop it sufficed that "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot"; for the frisk, the officer must also reasonably conclude "that the persons with whom he is dealing may be armed and presently dangerous."

Because *Terry* recognized a distinct type of detention having its own quantum-of-evidence standard, it becomes necessary to distinguish that activity from other police conduct falling on both sides of it. If the police lacked even grounds for a *Terry* stop they might nonetheless make contact with a suspect, the lawfulness of which would depend upon whether this contact did not amount to a fourth amendment seizure at all. If on the other hand the police merely lacked the grounds to arrest, then it would be necessary to examine the nature and dimensions of the police-citizen contact in order to determine whether it was a lawful *Terry* stop or an illegal arrest. The Court found it unnecessary

14. *Id.* at 538.
15. *Id.* at 537.
17. *Id.* at 30.
to address these points in *Terry*. The detention was exceedingly brief and unaccompanied by movement of the suspects, claim of greater police authority, or other circumstance arguably turning the encounter into a full-fledged arrest. As for the seizure-no seizure distinction, the Court alluded to it by noting it was unclear when the encounter became a seizure, but then rightly concluded this uncertainty need not be resolved in order to hold admissible the gun found on Terry's person. But the Supreme Court and the lower courts have since had to confront these important questions.

A. *When Does An “Encounter” Become a “Seizure”?*

The Supreme Court observed in *Terry* that “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons”; only “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” The Court did not elaborate on this point, and thus it was unclear, for example, whether the mere approach and interrogation by a known police officer was a “show of authority” sufficient to establish a “seizure.” The companion cases of *Sibron v. New York* and *Peters v. New York*, and the subsequent decisions in *Adams v. Williams* and *Brown v. Texas*, were equally unrevealing.

Then came *United States v. Mendenhall*, where federal drug agents approached defendant as she was walking through an airport concourse, stated their office and asked to see her identification and airline ticket, which she produced. Justice Stewart, announcing the judgment of the Court, asserted in a part of his opinion in which only Justice Rehnquist joined that there had been no seizure:

> We conclude that a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening

18. *Id.* at 19 n.16.
19. Justice Harlan, concurring, viewed a “forcible stop” as involving something more than the officers’ “liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away,” *id.* at 32-33, while Justice White concluded that there was “nothing in the Constitution which prevents a policeman from addressing questions to anyone on the street,” *id.* at 34.
presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.24

He added that "the subjective intention of the DEA agent . . . to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."25 Three concurring Justices did not comment on the Stewart standard because they found grounds for a Terry stop, while the four dissenters did not question the Stewart standard, but pointed out he had overlooked "certain objective factors that would tend to support a 'seizure' finding."26

The uncertainty arising from this three-way split was put to rest in Florida v. Royer,27 where the Stewart standard was unconspicuously accepted by a majority of the Court.28 Two detectives identified themselves to a suspect walking down the airport concourse and asked to speak to him and when he agreed, asked for his airline ticket and driver's license and then, without returning them, asked the suspect to accom-

24. Id. at 554-55.
25. Id. at 554 n.6.
26. Id. at 570. They declared:
   Not the least of these factors is the fact that the DEA agents for a time took Ms. Mendenhall's plane ticket and driver's license from her. It is doubtful that any reasonable person about to board a plane would feel free to leave when law enforcement officers have her plane ticket.

Id. at 570 n.3.
28. But because there was no majority opinion in Royer, it is like Mendenhall in the sense that we are not provided with a clear application of the test.
pany them to a nearby room, which he did. The plurality refused to characterize the initial confrontation as a seizure but concluded that when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.

The four dissenters agreed the initial encounter and questioning was no seizure; only Justice Brennan (though apparently using the same test) concluded a seizure had occurred "once an officer . . . identified himself and asked a traveller for identification and his airplane ticket." (Thus a majority found a seizure to have occurred no later than the plurality indicated.)

As for the meaning of the Stewart standard, certainly the first matter deserving attention is his emphatic statement that the uncommunicated intention of the officer is not determinative. Though a few courts had theretofore taken the position that a seizure occurs when an officer decides the suspect would not be allowed to leave, that is not a useful approach. Most officers do not think ahead to such a possibility for the simple reason that suspects being questioned ordinarily do not attempt to leave. Moreover, to hypothesize about what would have happened had the suspect enhanced the suspicion by evasive action is not particularly helpful, for then the situation would have

29. They asserted that
law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions . . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.


30. Id. at 1326.

31. Blackmun, J., said only that a seizure occurred "at some point in his encounter," id. at 1333, while the other three dissenters did not state when they believed the seizure commenced but did assert that "when the detectives first approached and questioned Royer, no seizure occurred." Id. at 1337 n.3.

32. He declared it was "wrong to suggest that a traveler feels free to walk away" in the circumstances he described. Id. at 1331.

33. Id.


changed significantly. And finally, under that approach the results would be suspect, for the matter would "be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd." 37

Nor does the Stewart "reasonable person" standard depend upon the subjective perceptions of the suspect. Again this is as it should be, for any test intended to determine what street encounters are not seizures must be expressed in terms that can be understood and applied by the officer. Asking him to determine whether the suspect feels free to leave, "would require a prescience neither the police nor anyone else possesses." 38 The Stewart standard also does not divide police-citizen encounters into their seizure and nonseizure categories by reliance upon the amorphous concept of consent. Though on occasion it will be so clear the suspect consented to the encounter that any further inquiry into the seizure issue will be obviated, 39 usually the matter of consent will be ambiguous at best. Most suspects do not attempt to leave or otherwise manifest their lack of consent, 40 but it would be a mere fiction to say that they all consented to the confrontation. 41

What does it mean to say that a reasonable person "would have believed that he was not free to leave"? Even before Mendenhall and Royer, lower courts were inclined to put into the nonseizure category instances where an officer merely walked up to a person and questioned him 42 and also those in which the interrogation was accomplished by

36. As noted in United States v. Hall, 421 F.2d 540, (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970): "It is immaterial that if Hall had attempted to bolt, thereby furnishing added evidence of guilt, the agents would doubtless have restrained him."
37. Id. at 544.
38. Id. A given set of circumstances, for example, might operate quite differently upon a person with a "guilty mind" as compared to an "innocent person." United States v. Burrell, 286 A.2d 845, 846 (D.C. 1972). This suggests that the Stewart "reasonable person" test should be taken to mean, as some courts had previously stated the rule, a "reasonable person, innocent of any crime." United States v. Wylie, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978).
39. E.g., People v. Herron, 89 Ill. App. 3d 1048, 412 N.E.2d 1365 (1980), cert. denied, 454 U.S. 1080 (1981) (holding that where person near robbery claimed he had seen person running from scene and accompanied officer back to scene as a witness, trip back in police car was by consent).
40. Pilcher, supra note 35, at 473.
41. As one empirical study concluded,
   it is not meaningful in practice to attempt to distinguish between field interrogation with consent and that which takes place without consent. In high-crime areas, particularly, persons who stop and answer police questions do so for a variety of reasons, including a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three.
42. E.g., United States v. Fry, 622 F.2d 1218 (5th Cir. 1980) (suspect seated in airport); State v. Dupelssis, 391 So. 2d 1116 (La. 1980) (suspect standing on the street).
asking a pedestrian to halt or to change his course to where the officer was located. A common explanation was that in such circumstances the suspect retained his "freedom to walk away." But this reasoning is faulty; as noted in *Illinois Migrant Council v. Pilliod:* "Implicit in the introduction of the [officer] and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer." If the ultimate issue is perceived as being whether a reasonable person "would feel free to walk away," then virtually all police-citizen encounters involve a fourth amendment seizure. A literal reading of the Stewart language adopted in *Royer* would produce that result.

A more plausible interpretation rests upon the proposition that police, without having later to justify their conduct by articulating a certain degree of suspicion, should be allowed "to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe — in some vague way — that they should." If "the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police," then a street encounter does not amount to a fourth amendment seizure merely because of those pressures — that is, merely because the other party to the encounter is known to be a policeman. Rather, the confrontation is a seizure only if the officer adds to those inherent pressures by engaging in con-

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47. *Id.* at 899. On appeal, 540 F.2d 1062 (7th Cir. 1976), the majority asserted that "[b]ecause the district court’s order enjoins defendants from ‘arresting, detaining, stopping and interrogating,’ we do not understand its decision to limit the ability of INS agents to conduct casual conversations," *id.* at 1070 n.10, but the dissent felt the injunction was not sufficiently precise in this respect. On rehearing en banc, the court modified the injunction to prohibit an agent who does not have a belief, based on specific articulable facts, that a person he wishes to interrogate is illegally in the United States, from detaining that person by force, threat of force, or a command based on the agent’s official authority, but not prohibiting the agent from questioning that person, without such detention, concerning his right to be in the United States, if the agent reasonably believes the person to be an alien.
49. As stated in People v. Jordan, 43 Ill. App. 3d 660, 662-63, 357 N.E.2d 159, 162 (1976): The mere knowledge by the person questioned that the person asking the questions is a police officer cannot in itself constitute a factor of threatened force because, were that so, every question put to a person under any circumstances by a self-identified police officer on duty would by that very fact constitute a *Terry* stop.
51. *Id.*
duct significantly beyond that accepted in social intercourse. The critical inquiry is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens. 52

Under this approach, an officer has not made a seizure if, for example, he interrogated "in a conversational manner," "did not order the defendant" to do something or "demand that he" do it, asked questions which "were not overbearing or harassing in nature," did not "make any threats or draw a weapon," 53 or made only such physical contact as is "a normal means of attracting a person's attention." 54 But an encounter is a seizure if the officer engaged in conduct a reasonable man would view as threatening or offensive if engaged in by another private citizen: 55 pursuing a person who has attempted to depart, 56 holding a person's identification papers or other property, 57 blocking the suspect's path, 58 and encircling the suspect by many officers, 59 in addition to more obvious tactics. 60 "Offensive statements," such as "unsupported outright accusations of criminal activity" 61 or suggestions that an innocent person would be willing to relinquish constitutional rights, 62 are not irrelevant. 63

This approach is compatible with the various views expressed in Royer and comes closer than the reasoning typically offered to explain the results reached in most lower courts cases. 64 It strikes an appropriate

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52. Login v. State, 394 So. 2d 183, 189 (Fla. Dist. Ct. App. 1981) ("such common social amenities and pressures do not and cannot in themselves amount to an official restraint on personal liberty").


55. People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975), provides an excellent example because the suspect thought the plainclothes officers were private citizens.


58. United States v. Berry, 670 F.2d 583 (5th Cir. 1982); United States v. Bowles, 625 F.2d 526 (5th Cir. 1980).


61. United States v. Berry, 670 F.2d 583 (5th Cir. 1982).

62. As noted id. at 597, "informing an individual that an innocent person would cooperate with police . . . would, we believe, call seriously into question the voluntariness of consent; the coercive effect of an intimation that failure to respond is an indication of guilt is evident."


64. This approach also explains why vehicle stops are generally viewed as seizures while pedestrian encounters are not, a distinction which might otherwise be criticized on the ground that "it would be anomalous to guarantee the automobile driver greater freedom of movement than that afforded the pedestrian." Illinois Migrant Council v. Pilliod, 398 F. Supp. 882, 898 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir. 1976).
balance; police remain free to seek cooperation from citizens without being called upon to articulate a certain level of suspicion in justification if an encounter proves fruitful, yet the public is protected from any coercion other than that inherent in a police-citizen encounter. Determining in this way when a street encounter is a "seizure" is also consistent with prior fourth amendment doctrine.

B. When Does a "Stop" Become an "Arrest"?

Because the Court in Terry used the Camara balancing test in deciding a brief detention was permissible upon a quantum of suspicion short of that needed for arrest, the conclusion that an arrest "is a wholly different kind of intrusion" than an investigatory stop was essential to the outcome. But because a very limited intrusion had occurred there, the Court in Terry did not elaborate upon just how sharp and substantial this distinction must be. The seizure lasted a matter of minutes where the suspicious activity was observed and involved nothing more than the officer walking up to the suspects, asking their identity, and patting them down. But the lower courts, and the Supreme Court on occasion, have since found it necessary to decide whether arguably more intrusive detentions properly fall into the stop or the arrest category. They have examined situations in which the officer (1) perceived or announced that he was making an arrest, (2) used force or a show of force, (3) moved the suspect to a police facility, (4) moved the suspect to another location in the field, (5) utilized different investigative methods, or (6) held the suspect longer.

1. Detention Perceived or Announced as Arrest by Officer— If a detention otherwise qualifies as a Terry stop, it is not transformed into an arrest, requiring full probable cause, merely because the police

65. Compare the approach in People v. De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976), which identifies four different types of police-citizen encounters and sets out a quantum-of-evidence test for each of them: (1) the "minimal intrusion of approaching to request information . . . is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality"; (2) as for the "common-law right to inquire," which "permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure," it is permissible if there is "a founded suspicion that criminal activity is afoot"; (3) as for a Terry-type "forcible stop and detention," there must be "a reasonable suspicion that a particular person has committed, is committing or is about to commit" an offense; and (4) as for an arrest, there must be "probable cause to believe that person has committed a crime." 40 N.Y.2d at 233, 352 N.E.2d at 571-72, 386 N.Y.S.2d at 384-85. The trouble with this "sliding scale approach" is that it may "produce more slide than scale," which "means in practice . . . that appellate courts defer to trial courts and trial courts defer to the police." Amsterdam, supra note 1, at 394.

66. It squares with the holding in United States v. Dionisio, 410 U.S. 1, 9-10 (1973), that it is "not a 'seizure' in the Fourth Amendment sense" to require persons to be present at a certain time and place, though it "may be inconvenient or burdensome," when the procedures utilized to cause that presence do not involve "demeaning circumstances" and "social stigma."

officer intended to arrest. 68 As the Supreme Court explained in Scott v. United States, 69 "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." This is as it should be. 70 If the degree of intrusion which occurred would be allowed under Terry, then nothing is to be gained (and much would be lost) by having courts inquire into the officer's state of mind to see if another course of action was intended. 71

What then if the officer communicated his perception of the event as an arrest to the suspect, as in People v. Stevens? 72 There the defendant, a visitor at the state penitentiary, argued that because the authorities had characterized her detention in a conference room there as an arrest it had to be justified by probable cause in order to make her incriminating statements admissible. Finding "no cases which hold that the fourth amendment requires an officer to inform a suspect that he is being detained under a 'stop' rather than a conventional 'arrest,'" the court held "that labeling the detention as an arrest does not, per se, require that the arresting official have had probable cause to 'arrest' the defendant with all the consequences that an 'arrest' entails." 73 (Similarly, as other courts have concluded, if an officer tells a suspect that he is under arrest but then conducts only a frisk, a later determination that grounds for arrest were lacking does not render inadmissible the discovered weapon if there were in fact adequate grounds for a stop and frisk. 74) The Stevens result is sound. True, the deten-

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70. For a somewhat different view of Scott, see Burkoff, Bad Faith Searches, 57 N.Y.U. L. REV. 70 (1982).
71. As Justice White once put it, such an expanded exclusionary rule would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan — the attitude of mind — of going further and acting unlawfully. . . . We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions — if not thoughts — entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce grave and fruitless misallocation of judicial resources. Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (dissent).
73. Id. at 405-06, 517 P.2d at 1339.
74. People v. Baker, 12 Cal. App. 3d 826, 90 Cal. Rptr. 508 (1970). It is quite a different matter, however, if the officer made a search in excess of that allowable under Terry and then there is an effort to justify the admission of the evidence discovered on the ground that this same evidence would have been found if only a frisk had occurred. In such a case, there is
tion was arguably more intrusive by its characterization as an arrest; the circumstances became somewhat more coercive, and this needs to be taken into account if a statement thereafter obtained is challenged. But in terms of fourth amendment interests, it is still appropriate to measure the extent of the intrusion by what the officer did rather than what he said.

2. Use and Show of Force—The Supreme Court once was of the view that if police stopped a car because they suspected an occupant of some crime, this constituted an arrest requiring probable cause. That position conflicts with Terry, which has been applied to vehicle stops even when the police utilized their siren and flashing lights. But what if the stop was accomplished in some other manner? In United States v. Strickler, for example, police who saw a car drop a person off at a narcotics delivery point pulled their three squad cars up to the front, rear, and side of the suspect car, pointed guns at the occupants and ordered them to raise their hands. The court of appeals concluded it could not "equate an armed approach to a surrounded vehicle" with the kind of brief stop authorized by Terry and consequently held this action was an arrest. The court reasoned that the restriction of defendant's "'liberty of movement' was complete when he was encircled by police and confronted with official orders made at gunpoint" and that "[n]o significant, new restraint was added when [defendant was] handcuffed . . . and formally pronounced . . . 'under arrest.'"

Though there doubtless are circumstances in which the show of force requires classification of the police conduct as an arrest, there is reason to question the Strickler analysis. It makes no sense to conclude that the officer's conduct must be viewed as an arrest from the outset simply because the restriction of defendant's liberty of movement was then complete and no significant new restraint followed when the police formally made the arrest. An investigatory stop is a complete restriction on liberty of movement for a time, and, if an arrest follows, the early stages of the arrest will not necessarily involve any new restraint:

no escaping the fact that the suspect was subjected to an intrusion in violation of the fourth amendment, and that violation cannot be overlooked merely because hindsight indicates the excessive part of the intrusion would not have been necessary. United States v. Cunningham, 424 F.2d 942 (D.C. Cir. 1970), cert. denied, 399 U.S. 914 (1970).
77. United States v. Vargas, 643 F.2d 296 (5th Cir. 1981); United States v. Adams, 484 F.2d 357 (7th Cir. 1973).
78. 490 F.2d 378 (9th Cir. 1974), cert. denied, 103 S. Ct. 1898 (1983).
79. Id. at 380.
80. Id.
of significance. A stopping for investigation is not a lesser intrusion because the restriction of movement is incomplete, but rather because it is briefer than an arrest, which (as emphasized in *Terry*) ‘‘is inevitably accompanied by future interference with the individual’s freedom of movement, whether or not trial or conviction ultimately follows.’’ Thus an otherwise valid stop does not inevitably escalate to an arrest merely because the suspect’s car was boxed in by police cars, because the police drew weapons, or because reasonable nondeadly force was used to achieve or continue the seizure.

3. **Moving the Suspect to a Police Facility**— Transportation of the suspect to the police station or a similar facility constitutes an arrest requiring probable cause, when it is accompanied by ‘‘burdens substantially like those of arrest,’’ such as ‘‘fingerprinting, photographing and completion of a lengthy arrest form.’’ But even without those burdens, taking the suspect to the station in lieu of conducting the investigation at the scene should ordinarily place the police conduct outside *Terry*, as the Supreme Court concluded in *Dunaway v. New York*:

The application of the Fourth Amendment’s requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an ‘‘arrest’’ under state law. The mere facts that petitioner was not told he was under arrest, was not ‘‘booked,’’ and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, obviously do not make petitioner’s seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any ‘‘exception’’ that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are ‘‘reasonable’’ only if based on probable cause.

Also relevant here is *Florida v. Royer*, where the suspect was moved

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86. An illustration of extraordinary circumstances is provided by *People v. Courtney*, 11 Cal. App. 3d 1185, 1192, 90 Cal. Rptr. 370, 374 (1970), where the police transferred the suspect to the station because an angry crowd had gathered at the scene of the stop, and the court concluded ‘‘there was no Fourth Amendment compulsion on the police to choose between an on-the-spot continuation of their investigation at the probable cost of their own safety, or abandoning the investigation.’’
a mere forty feet to an airport police office, which the plurality concluded transformed the seizure into an illegal arrest invalidating his consent to search his luggage. Because some of the reasons given in Royer for this result are not convincing, 89 it appears that Dunaway had considerable impact here. But the notion seems to be not that every entry onto police "turf" makes the seizure an arrest, but rather that the circumstances of one's presence there may be such that no meaningful distinction can rightly be drawn between that seizure and a formal arrest. 90 So viewed, the Dunaway approach makes good sense and does not call into question those statutes 91 and court decisions 92 permitting at-the-station detention upon less than probable cause in order to conduct certain identification procedures. Those statutes and decisions find support in the never repudiated 93 Davis v. Mississippi 94 dictum "that, because of the unique nature of the fingerprinting process, [at-the-station detentions for the sole purpose of obtaining fingerprints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense.'

4. Moving the Suspect to Another Location— In the pre-Terry era, any police-citizen contact during which the policeman moved the suspect to another place was likely to be characterized as an arrest. 95 After Terry, however, it was generally accepted that some movement in the vicinity of the stop does not convert what would otherwise be a temporary seizure into an arrest. 96 In Dunaway, however, the Court

89. Especially that the police should have utilized a less intrusive investigative technique, see infra text accompanying note 126.
90. As the plurality said of Royer:

He found himself in a small room — a large closet — equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airlines. What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room where the police, unsatisfied with previous explanations, sought to confirm their suspicions.

103 S. Ct. at 1327.


93. For a variety of reasons, most significantly the emphasis in Dunaway upon the notion that "detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the fourth amendment as necessarily to trigger the traditional safeguards against illegal arrest," 442 U.S. 200, 216, that case cannot be read as repudiating the Davis dictum.


96. E.g., United States v. Richards, 500 F.2d 1025 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975); People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1974).
held an arrest had taken place and noted the defendant “was not questioned briefly where he was found.”97 Some courts construed this language to mean that any relocation of the suspect converts the police activity into an arrest.98 But while a detention involving movement of the suspect might be more intrusive,99 and therefore allowed in fewer circumstances than other detentions,100 Dunaway does not hold that any movement of the suspect is an arrest. As noted above, the most critical fact in Dunaway was that the suspect ended up in the interrogation room of a police station, for this is what made his detention “in important respects indistinguishable from a traditional arrest.”101

The more recent Royer case is explainable in much the same way.102 Royer is nonetheless significant here for its suggestion that the propriety of moving a suspect during a Terry stop depends upon its purpose. The plurality asserted that:

there are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area . . . . There is no indication in this

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   The public stigma associated with a detention in a police car is greater than the stigma associated with detention in one’s home. Unlike the home, the police-car type of detention is a public detention. It could occur in open view of friends, neighbors, or business associates. Again, unlike Summers, there was no independent intrusion such as the warrant search which resulted in some stigma. It is certainly more inconvenient, in general, to be detained in a police car than in one’s home. This is certainly more likely if the detention in the car also involves transportation elsewhere.

   The transportation of the defendant, seeking out a potential break-in, as opposed to holding him at the scene, the prosecutor argues, is constitutionally irrelevant. We cannot agree. Even assuming that it might have been proper to detain defendant at the place of the stop, the transportation in this case did not involve a de minimus intrusion. Being told to stand outside a car as opposed to sitting in the car may be a permissible de minimus intrusion, . . . being driven around is not. Not only is the citizen’s travel interrupted, but he is not any longer proceeding along the same route.

   In fact, the citizen’s mobility has been totally usurped and directed elsewhere.

Id. at 552, 331 N.W.2d at 454.
100. In the Bloyd case, id. at 550, 331 N.W.2d at 453, the court concluded transportation “should be dependent upon knowledge that a crime has been committed” and impermissible when the defendant’s conduct was suspicious but “there has not been any report of a crime” recently in the vicinity.
102. See supra note 90.
case that such reasons prompted the officers to transfer the site of the encounter from the concourse to the interrogation room. It appears, rather, that the primary interest of the officers was not in having an extended conversation with Royer but in the contents of his luggage, a matter which the officers did not pursue orally with Royer until after the encounter was relocated in the police room. The record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officer’s attempt to gain his consent to a search of his luggage. 103

The point is a legitimate one, though it might be disputed whether the purpose in Royer made movement there inappropriate. 104

Movement of a suspect during a purported Terry stop usually occurs so that he may be viewed by a crime victim or witness in the vicinity. Illustrative is People v. Harris, 105 where police stopped defendant and his companion because defendant fit the general description of a man who had been seen near the site of a burglary some fifteen minutes earlier; when they gave conflicting explanations of their activities they were handcuffed and transported to the residence in question for possible identification by the occupants. The court held that this movement exceeded the bounds of a permissible Terry stop under the circumstances. The Harris majority acknowledged it could “conceive of factual situations in which it might be quite reasonable to transport a suspect to the crime scene for possible identification,”106 as where the victim or witness was incapacitated. But no such circumstances were present, meaning the police should have utilized such “less intrusive and more reasonable alternatives”107 as escorting the victim or witness to the detention scene for immediate viewing or procuring the suspect’s identification and arranging for a subsequent confrontation.

The Harris limitations are too strict. Putting aside the question of whether a suspect could be expected to honor a promise to appear

104. As the dissent asked:
Would it have been more “reasonable” to interrogate Royer about the contents of his suitcases, and to seek his permission to open the suitcases when they were retrieved in the busy main concourse of the Miami Airport, rather than to find a room off the concourse where the confrontation would surely be less embarrassing to Royer?
Id. at 1340 (Rehnquist, J., dissenting).
106. Id. at 391, 540 P.2d at 636, 124 Cal. Rptr. at 540.
107. Id.
for a subsequent confrontation, such viewing is not as advantageous as an immediate one. A delay of just a few hours not only provides an opportunity for the suspect to change his appearance, but also brings about a sharp drop in the ability of the victim or witness to recall what he observed. Moreover, it is incorrect to assume that the intrusiveness of the suspect’s detention may always be best limited by transporting victims and witnesses to the place of the stop. And in any event, the Harris approach creates the risk that the matter will be resolved by hindsight judgments as to whether the suspect or the witness could have been more speedily transported. The better view, more generally adopted, is that transportation of a suspect a short distance for purposes of identification is permissible when it can be done expeditiously.

5. Investigative Methods Used—Several investigative techniques may be utilized effectively in the course of a Terry stop. Most common is interrogation, either a request for identification, inquiry concerning the suspicious conduct of the person detained, or both. The officer may also conduct a non-search examination of the suspect’s person, car, or effects; or communicate with others in an effort

108. The drastic alteration of a suspect’s appearance between the time of the crime and his appearance in a lineup “is apparently becoming a popular defense tactic.” United States v. Jackson, 476 F.2d 249, 253 (7th Cir. 1973).

109. Because the ability to remember details drops off sharply in the first few hours after an event, a “factor which has a substantial effect upon the reliability of an identification is the amount of time which elapsed between crime and identification.” P. Wall, Eye-Witness Identification in Criminal Cases 127 (1965).

110. As the dissenters in Harris noted:

While victims are being transported, considerations of convenience and safety for the detaining officers will reasonably require the suspect be placed in physical custody, either handcuffed in the back of a police unit or held at the nearest police station. A second available police unit must be located and dispatched to the victim’s residence, then returned to the suspect’s place of detention. Thus, in terms of both manner and length of detention, the degree to which the freedom of a suspect is infringed will equal, if not exceed, that resulting from transporting the suspect to the victim.


114. This may include a request to the suspect that he consent to a search. United States v. Collins, 532 F.2d 79 (8th Cir. 1976), cert. denied, 429 U.S. 836 (1976); People v. Cunningham, 50 A.D.2d 69, 376 N.Y.S.2d 197 (1975).


to verify the explanation tendered,¹¹⁸ confirm the identification, or discover whether a person of that identity is wanted.¹¹⁹ Or, the suspect may be detained while it is determined if an offense has actually occurred in the area by checking nearby premises¹²⁰ or vehicles,¹²¹ locating and examining objects abandoned by the suspect,¹²² or talking with others.¹²³ When it is known an offense recently occurred in the area, the suspect might also be viewed by witnesses to the crime.¹²⁴ The Supreme Court has intimated that none of these investigative methods are inherently objectionable in the context of a Terry stop,¹²⁵ and thus it is fair to say that the mere fact a particular one is utilized does not per se convert a stop into an arrest.

But it may be otherwise if a court later decides the police selected the wrong investigative technique, as in Florida v. Royer.¹²⁶ There police lawfully questioned a suspected drug courier in an airport concourse and required him to accompany the police about forty feet to a small police office, where he consented to a search of his suitcases after they were obtained from the airline and brought there. In concluding the consent obtained at the end of that fifteen minute scenario was the fruit of an illegal arrest, the four-Justice Royer plurality placed great emphasis upon the proposition that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."¹²¹ As they explained,

the State has not touched on the question whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.¹²⁸

¹²⁷. Id. at 1325.
¹²⁸. Id. at 1328-29.
That is, a *Terry* stop can become an arrest (illegal absent probable cause) if it later appears the police could have utilized a less intrusive means of investigation.

Concurring Justice Brennan, unwilling to concede "that the use of trained narcotics dogs constitutes a less intrusive means of conducting a lawful *Terry* stop," 129 demanded even more, declaring that "a lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop." 130 This "least intrusive means" concept thus appears to have the support of a majority of the Court. 131 But the remaining four members of the Court took serious exception to this new principle. In dissent, Justice Rehnquist reasoned that while

the officers might have taken different steps than they did to investigate Royer . . . the same may be said of virtually every investigative encounter that has more than one step to it. The question we must decide is what was *unreasonable* about the steps which *these officers* took with respect to *this* suspect in the Miami Airport on this particular day. 132

A "least intrusive means" inquiry certainly has a place in the *Terry* balancing process. (For example, the Court should have utilized it to invalidate the search in *Michigan v. Long*, 133 instead of adopting the incredible proposition that police may make a protective search of a car during a stop even if responding to a risk they created by not pursuing the obvious alternative of moving the suspect away from the vehicle.) But the dissenters' concern in *Royer* is justified. In that context, unlike *Long*, the question is not whether there will be a certain fourth amendment intrusion but rather how extensive it will be, and where in addition the consideration of alternatives is likely to involve numerous imponderables, a "least intrusive means" inquiry has great potential for mischief. It is particularly likely to result in second-guessing of police decisions on how to proceed during a *Terry* stop.

This is especially true if a court goes about it as does the *Royer* plurality, presuming any possible alternative investigative technique to be more expeditious than the one chosen by the police until the pro-

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129. *Id.* at 1331 n.*. This occurred before the Court later that Term held that use of a drug detection dog against unaccompanied luggage in a public place was not a search. *United States v. Place*, 103 S. Ct. 2637 (1983).

130. 103 S. Ct. 1331 n.*.

131. If there is doubt about this, it is because later the same Term the Court rejected a "least intrusive means" theory in circumstances much more compelling than in *Royer*. See *Michigan v. Long*, 103 S. Ct. 3467 (1983).

132. 103 S. Ct. at 1340.

133. 103 S. Ct. 3469 (1983).
secution proves otherwise. 134 Absent such proof, the plurality appears to have assumed that use of a detection dog would be "more expeditious"; 135 it is said the officers should have detained Royer "for the brief period during which Florida authorities at busy airports seem able to carry out the dog-sniffing procedure," 136 though these dogs are not always readily available. 137 The plurality also implied that seeking consent is not as expeditious. However, a consent might be very promptly obtained or, if not or if there is not time for a search before the suspect's flight departs, he might be allowed to go his way and the investigation continued at his destination. 138

6. Length of Detention— Obviously a detention that starts out as a lawful stop may, if continued too long, turn into an arrest which is illegal unless probable cause has by then developed. But just how long is too long in this context is less than clear. In Terry and Adams v. Williams 139 the period of detention preceding discovery of grounds for arrest was exceedingly short, so these cases shed no light on this question. But in Michigan v. Summers, 140 in the course of indicating that a detention short of arrest permits a variety of more time-consuming investigative techniques, the Court declared that "the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in Terry and Adams."

The Model Code of Pre-Arraignment Procedure provides that an officer may detain "for such period as is reasonably necessary for the accomplishment of the purposes authorized . . . , but in no case for more than twenty minutes." 141 Because such an approach is clearly not feasible in marking the fourth amendment limits upon a non-arrest seizure, 142 there exists no "bright line" dividing stops from arrests in

134. The Royer plurality declared that "[i]t is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." 103 S. Ct. at 1326.
135. Id. at 1328-29.
136. Id. at 1328 n.10.
137. The Court learned this later that Term. In United States v. Place, 103 S. Ct. 2637 (1983), the suspect's luggage was held for 90 minutes so that it could be taken from LaGuardia Airport to Kennedy Airport in New York City to where there was such a dog available.
138. Again, the Court learned this later that Term. In United States v. Place, 103 S. Ct. 2637 (1983), the suspect promptly consented to a search of his bags in Miami but he was allowed to depart instead because his flight was about to leave; the investigation was continued when he arrived in New York.
141. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) (1975).
142. As the Supreme Court said of the ALI approach:
We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities
purely temporal terms. The question must be resolved on the basis of the circumstances of the particular case, as courts have done on the relatively few occasions when the issue has arisen. Doubtless there is some point, however, at which the detention would be so intrusive in terms of its length that no set of circumstances would justify calling it anything but an arrest. It is noteworthy that in *United States v. Place* the Court, though "declin[ing] to adopt any outside time limitation for a permissible Terry stop," asserted it never had upheld and would not in the instant case approve a seizure of the person lasting ninety minutes.

In determining the reasonableness of a particular length of time, courts properly place considerable emphasis upon what is learned in the interim by the police concerning their initial suspicions. Thus, if a person is stopped on suspicion that he has just engaged in criminal activity but the suspect identifies himself satisfactorily and investigation establishes no offense has occurred, there is no basis for further detention. On the other hand, if the suspect's explanation needs to be checked out, and in particular if his explanation is known to be partially false, there is reason to continue the detention somewhat longer. This does not mean that the detention may continue so long as the initial reasonable suspicion persists, for if that were the rule some stops could be continued indefinitely. Rather, as the Supreme Court has emphasized, it must be asked "whether the police are diligently pursuing a means of investigation likely to resolve the matter one way or another very soon." Relevant in this connection is whether the police are inching closer to having probable cause for arrest.

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144. The issue is seldom raised because most stops are very brief. See Pilcher, *supra* note 35, at 470.
Consideration must also be given to whether the suspect’s presence is necessary to facilitate the investigation, though there is quite correctly no per se rule that if the nature of the investigation does not necessitate personal involvement of the suspect he must be released.

II. RIGHT TO SEARCH INCIDENT TO A SEIZURE

When deciding whether a search of an individual or his surroundings was lawful, courts often find it necessary to make a judgment concerning an actual or potential seizure of the person. This occurs when the warrantless search is claimed by the prosecution to draw its legitimacy from the fact it was "incident to" or otherwise related to a seizure which actually or could have preceded it. Not all lawful seizures justify precisely the same kind or degree of incidental search. If upon mere reasonable suspicion an individual is briefly detained for investigation, only a limited pat-down search of the his person and a limited search of the passenger compartment of the vehicle in which he was riding is permissible — in each instance only upon a special showing of further facts justifying such action in the interest of the officer's self-protection. By comparison, a "lawful custodial arrest" automatically carries with it a power to search contemporaneously the arrestee’s person and the passenger area of the car in which he was riding. This arrest need not always have preceded the search. Finally, if the person is to be "incarcerated" following his custodial arrest, this is a basis for a special type of search customarily called an inventory.

A. "Lawful Custodial Arrest"

In United States v. Robinson, an officer arrested defendant for driving a motor vehicle following revocation of his operator’s permit and then subjected his person to a search which uncovered heroin. The court of appeals held for defendant by relying upon the rationale and

152. See United States v. Jennings, 468 F.2d 111 (9th Cir. 1972).
153. When, for example, the suspect's identity is unknown or uncertain, the suspected crime is serious enough to prompt flight if the suspect is freed, or the suspected crime is recent enough that if probable cause soon develops it would be desirable to arrest the suspect and subject him to a search, these are legitimate reasons for continuing custody which must be weighed together with other relevant considerations. Cf. Michigan v. Summers, 452 U.S. 692, 702 (1981) (holding that "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found" is a reason for detaining an occupant of premises where a warrant for contraband is being executed).
rule of *Terry v. Ohio*;\(^{160}\) because the search must be reasonably related in scope to the justification for its initiation and there was no evidence to search for here, only a self-protective frisk of the kind allowed in *Terry* was permissible.\(^{161}\) But the Supreme Court concluded otherwise. Reasoning that a clear-cut search-incident-arrest rule was needed, the Court held “that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a ‘reasonable’ search under that Amendment.”\(^{162}\) In *New York v. Belton*\(^{163}\) the Court similarly adopted another “workable rule,” namely, “that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” The Court in *Belton* also declared that the *Chimel v. California*\(^{164}\) rule, allowing search of the area within an arrestee’s “immediate control,” applied only to “lawful custodial arrests.” Definition of that term is thus critical to application of the *Chimel-Robinson-Belton* search-incident doctrine. But as lower courts noted with chagrin,\(^{165}\) the Supreme Court used that phrase in *Robinson* repeatedly without defining it. The same was true in *Belton*, prompting Justice Stevens to protest that he was “not familiar with any difference between custodial arrests and any other kind of arrest.”\(^{166}\)

*Robinson* quoted a police sergeant’s definition of “a full custody arrest” as the situation where an officer “would arrest a subject and subsequently transport him to a police facility for booking.”\(^{167}\) From this, it might be thought that the adjective “custodial” was intended to cover only the situation in which the arrestee is taken to the station and then incarcerated further there. But *Robinson* has not been given this interpretation; it is applied when the officer exercises his “authority to transport an arrestee to a police facility,” even if once there “the arrestee can avoid pretrial incarceration altogether by posting bond.”\(^{168}\) This is correct, for it squares with the factual pattern in *Robinson*\(^{169}\) and, more importantly, the analysis in that case. In explaining why

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\(^{160}\) 392 U.S. 1 (1968).


\(^{162}\) 414 U.S. at 235.


\(^{167}\) 414 U.S. at 221 n.2.


\(^{169}\) The court of appeals noted that “he was clearly entitled to post either cash or bail bond, and, upon doing so, to be released immediately, without any stationhouse confinement.” United States v. Robinson, 471 F.2d 1082, 1102-03 (D.C. Cir. 1972), rev’d, 414 U.S. 218 (1973).
a *Terry*-type frisk would not suffice in the case of a custodial arrest, the Court declared "that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop." As for why, if that is what the term means, the unadorned word "arrest" was not deemed sufficient, perhaps it is because provisions authorizing police to give the offender a ticket or notice to appear sometimes characterize that process as an at-the-scene release following arrest.

Whether the word "lawful" in the phrase "lawful custodial arrest" means more than that the arrest must be supported by probable cause remains unclear. Some courts have held, in cases involving arrests of witnesses and civil defendants, that the fourth amendment's reasonableness requirement prohibits taking custody when the purpose of that action could be served by some less intrusive means. If the fourth amendment in fact affords such protection to witnesses and civil defendants, it is not fanciful to suggest that persons suspected of relatively minor criminal violations should also be so protected. It thus might be contended that the fourth amendment requires establishment by legislation or police regulation some rational scheme for determining when the criminal process should be invoked by a noncustodial alternative.

The Supreme Court has never squarely addressed the issue of whether such rules are a necessary predicate to a lawful custodial arrest. In *Robinson*, the officer acted pursuant to detailed police regulations requiring him to arrest for certain traffic offenses (including operating a vehicle after revocation of an operator's permit) and merely to issue a traffic violation notice for most others. There was no comparable regulation in the companion case of *Gustafson v. Florida*; the officer

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170. 414 U.S. 218, 234-35.
172. United States v. Ward, 488 F.2d 162, 170 (9th Cir. 1973) (stopping of car "an unreasonable intrusion under the Fourth Amendment," as person only a witness as to prior events and no exigent circumstances and thus agents could have "sought an interview with the appellant at either his home or place of business"); Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971) (relying in part on fourth amendment, court holds material witness may be arrested only if it "may become impractical to secure his presence by subpoena"); State v. Klinker, 85 Wash. 2d 509, 522, 537 P.2d 268, 278 (1975) (use of arrest warrant against defendant in civil filiation proceeding violated fourth amendment where resort could be had to "the summons and complaint procedure which is common to all civil proceedings"); J.E.G. v. C.J.E., 172 Ind. App. 515, 360 N.E.2d 1030 (1977) (following *Klinker*).
was free to arrest or merely ticket for the offense of driving without a license. 175 Though the Court unfortunately 176 declared it did “not find these differences determinative of the constitutional issue,” 177 the matter is not settled. As concurring Justice Stewart pointed out, because the petitioner in *Gustafson* “fully conceded the constitutional validity of his custodial arrest” the Court had no occasion to address the “persuasive claim . . . that the custodial arrest of the petitioner for a minor traffic violation violated his rights under the Fourth and Fourteenth Amendments.” 118

A rather “persuasive claim” *may* be made in favor of a ruling that the Constitution limits the use of custodial arrests for minor offenses. Such a holding would address a current problem of some seriousness: the arbitrariness and inequality which attends unprincipled utilization of the custodial arrest and citation alternatives. 179 It would significantly minimize a major legitimate objection to both *Robinson* and *Belton*: that they create an incentive for police to make custodial arrests for extremely minor crimes whenever, because of a whim or some suspicion, they would like to be able to make a full search of a person or the passenger compartment of the vehicle in which he was riding. Even if a defendant could have evidence obtained in a pretext arrest suppressed, 180 that remedy is inadequate because proof of subterfuge is extremely difficult. 181 Therefore, a need exists for limits upon the power of the police to resort to the custodial arrest alternative.

175. The Court noted:
Smith testified that he wrote about eight to IO traffic citations per week, and that about three or four out of every IO persons he arrested for the offense of driving without a license were taken into custody to the police station. Smith indicated that an offender is more likely to be taken into custody if he does not reside in the city of Eau Gallie.

*Id.* at 265 n.3.

176. It has been said that the Court missed the chance to make “the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued the writs of assistance in 1791.” Amsterdam, *supra* note 1, at 416.

177. 414 U.S. 260, 265.

178. *Id.* at 266-67. Some courts have noted this language and concluded the issue is still open, e.g., *State v. Martin*, 253 N.W.2d 404 (Minn. 1977); *People v. Clyne*, 189 Colo. 412, 541 P.2d 71 (1975), while others act as if the matter was settled by *Robinson* and *Gustafson*, e.g., *Burr v. Gilbert*, 415 F. Supp. 335 (E.D. Wis. 1976); *State v. Lohff*, 87 S.D. 693, 214 N.W.2d 80 (1974).


180. A matter of some uncertainty since the Supreme Court declared in *Scott v. United States*, 436 U.S. 128, 138 (1978), that courts should examine “challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.”

Absent further development of fourth amendment doctrine in this area, defendants often "must look to state law for protection from unreasonable searches."182 State legislation requiring use of the citation or notice to appear alternative for certain minor offenses, usually but not necessarily limited to traffic offenses, is becoming increasingly common.183 When a custodial arrest has been made in violation of such a provision, state courts have consistently ruled evidence obtained in a search incident to that arrest must be suppressed.184 These decisions typically do not say if they are grounded in the fourth amendment — that is, whether they rest upon the conclusion that the "lawful custodial arrest" requirement means the custody must be lawful as a matter of local law, or instead merely involve a non-constitutional exclusionary rule invoked to deter violation of these statutes. Though in somewhat different circumstances it has been held such legislation confers no fourth amendment rights,185 that conclusion might be questioned in the present context. Certainly "[a] paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures,"186 as is clearly reflected in Supreme Court decisions permitting certain searches without probable cause only upon a showing of conformance with an established routine.187 Because a Robinson or Belton search is without probable cause in the sense that it is "piggybacked" onto a lawful arrest without any necessary showing of a probability in the particular case that evidence or weapons will be discovered, such a search is arguably constitutionally invalid whenever incident to an arrest not conforming to an established routine mandated by state law.

B. Arrest, Retroactive Arrest or "Arrestability"

In Robinson the Supreme Court noted the officer has "effected a

183. Various recent law reform efforts have stressed the need for broader use of the citation alternative. See, e.g., 2 ABA STANDARDS FOR CRIMINAL JUSTICE §§ 10-2.2, 10-2.3 (2d ed. 1980); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.2 (1975); UNIFORM R. CRIM. P. 211, 221 (1974).
185. Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133 (4th Cir. 1982) (holding that where arrest was based on probable cause but in violation of state statute requiring use of summons, there was no constitutional violation and thus no basis for recovery in a § 1983 action).
186. Amsterdam, supra note 1, at 417.
187. E.g., South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (holding that for an inventory to be constitutional it must be pursuant to "standard police procedures"); Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (holding that for a housing inspection warrant to issue without probable cause of violation, it must conform to "reasonable legislative or administrative standards").
full custody arrest"188 before he subjected defendant's person to a full search, and in Belton the Court stressed the "search of the respondent's jacket followed immediately" the making of "a lawful custodial arrest."189 Though these cases might be taken to mean that for a search to be justified as a valid search incident to arrest the custodial arrest must have been "effected" first, the Supreme Court has concluded otherwise.

In a companion case to Terry, Peters v. New York,190 an off-duty policeman heard a noise at his door and saw two men tiptoe out of an alcove toward the stairway. He then entered the hallway and slammed the door loudly behind him, precipitating their flight. The officer gave chase and collared one of the men, whom he questioned and then searched, resulting in the discovery of burglar's tools. This man, Peters, was then turned over to previously summoned local police. Though the state court upheld the initial encounter and limited search as a stop-and-frisk,191 the Supreme Court instead treated the discovery of the burglar's tools as a lawful search of a person incident to arrest. Without any suggestion that the officer or Peters perceived (or reasonably should have perceived) the situation as an arrest rather than a detention for investigation, the Court declared "that the arrest had for purposes of constitutional justification already taken place before the search commenced."192 The Court explained that a seizure had occurred and that it was based upon probable cause, at which point the officer "had the authority to search Peters"193 incident to arrest. Justice Harlan, concurring, sought to clarify this point by declaring that the time-of-arrest question in such circumstances is

a false problem. Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."194

188. 414 U.S. 218, 221 (1973).
193. Id.
194. Id. at 77.
Also relevant is *Rawlings v. Kentucky*, 195 where several persons were detained in a house for which a search warrant was about to be executed. When, at police order, petitioner’s companion emptied her purse and revealed controlled substances, petitioner claimed they were his. An officer then searched him and found $4,500 in cash, after which a formal arrest was made. The Supreme Court had no difficulty upholding this search as incident to petitioner’s formal arrest. Once petitioner admitted ownership of the sizeable quantity of drugs found in Cox’s purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. 196

Despite some contrary earlier authority, 197 *Rawlings* makes great sense in circumstances such as were present there. Where the events were fast-moving and it quite clearly appears probable cause to arrest for a rather serious offense existed prior to the search, the search should be upheld without insisting that the arrest in some sense should have preceded the search. Fourth-amendment values would not be served by requiring courts in such circumstances to explore whether the officer had announced or otherwise manifested his intention to arrest before the search or whether before the search occurred he had formed in his own mind an intention to arrest.

*Peters*, however, suggests a broader proposition: that even if it were unmistakably clear the officer at the time of the search did not consider the situation as amounting to a custodial arrest, the search may nonetheless be upheld as a search incident to arrest if a custodial arrest in fact followed and was justified by facts other than those discovered in the search. This would mean that even if the officer told the suspect before the search that he was not under arrest or even if he later testified that his intention before the search had been to make a seizure short of custodial arrest, the search would still be upheld. Whether this is a sound principle is less apparent, though, as Justice Traynor once pointed out, it makes great sense in one particular situation: that in which the pre-existing grounds for arrest will be either confirmed or dissipated by the search. In such circumstances “there is nothing unreasonable in [the officer’s] conduct if he makes the search before instead of after the arrest,” as “if the person searched is inno-

196. Id. at 111.
197. See cases collected in Annot., 89 A.L.R.2d 715 (1963), concluding “that a search of the person without a search warrant is unlawful when it is made prior to an arrest.” Id. at 721.
cent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested." In this kind of case, a police officer is likely to perceive that custodial arrest should be conditioned upon a fruitful search, and surely the admissibility of the evidence ought not be affected by disclosure of this common sense view of the situation.

The broader proposition which may be distilled from Peters might be explained upon a somewhat different basis, starting with the declaration in Scott v. United States: "that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Applying that notion to a case like Peters, it might be said that even if the officer's subjective conclusion was that he then lacked probable cause so that he could pursue only a detention for investigation, the full search then conducted should nonetheless be upheld as incident to a custodial arrest because "the circumstances, viewed objectively," would have permitted a custodial arrest. In other words, Peters should not be entitled to the exclusion of evidence simply because the officer underestimated his legal authority over Peters.

The contrary argument, of course, is that the exclusionary sanction should be brought to bear upon the officer's willingness to violate the Constitution — to make a full search even when the situation was thought to permit only a stop-and-frisk. That is, it might be contended that "the rationale of deterrence of unconstitutional police conduct compels exclusion of the evidence here seized" because "[s]aving the validity of the police action on a court-devised theory of justification would not deter future unconstitutional" full searches incident to Terry stops. But this argument is unconvincing. If we want the suppression hearing in this case to serve as an educational experience for the officer, certainly the point to be made is that, on the evidence he had at the time of the search, he was entitled to make a custodial arrest and full incidental search. Excluding the evidence is a curious way to make that point, and could only afford ammunition to those who seek to narrow or abolish the exclusionary rule.

There are circumstances, however, where this Scott-based argument has less appeal, as does even the narrower proposition in Rawlings. Assume, for example, this variation on Gustafson: an officer lawfully stops a car and learns the driver does not have his license with him, an offense for which the officer is empowered either to arrest or to

ticket. The officer searches the driver and finds marijuana and then declares and records the subsequent custodial arrest as being for marijuana possession and nonpossession of the license. Given that an arrest only for marijuana possession could not be used to justify the antecedent arrest, 201 should addition of the charge regarding the license produce a different result because: (1) under Rawlings it is not “particularly important that the search preceded the arrest”; 202 (2) under Peters, as Justice Harlan put it, “the prosecution must be able to date the arrest as early as it chooses following the development of probable cause”; 203 and (3) under Scott it is enough that “the circumstances, viewed objectively,” 204 would have permitted a custodial arrest even before the search? Almost instinctively one is prompted to answer with an emphatic “no” because permitting police to defer the custody-or-ticket decision until after a search or to reverse a prior ticket decision after a search would have most unfortunate consequences. Without pursuing a general policy — doubtless politically impossible because unacceptable to the public — of using the custodial arrest alternative for virtually all traffic offenses, police could use a traffic violation as an excuse to make a full search of anyone suspected of criminal conduct and then “rehabilitate” any successful search by claiming they had made a custodial arrest for that infraction. To avoid that result, a court might understandably conclude in the hypothetical put above that neither Rawlings, Peters, nor Scott should serve to validate the search. The difficulty here is not the principle in any of those three cases but rather, as noted earlier, the failure of the Supreme Court to adopt an established routine requirement for use of the custodial arrest alternative in minor cases.

If that special situation is put to one side and Peters and Scott are given another look, even a broader general principle is suggested: that a search incident to arrest should require nothing more than “arrestability,” i.e., that the police had grounds to arrest at the time of the search. Such a rule is suggested by Justice Harlan’s comment in Peters that “[i]f the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden,” 205 and might be encompassed within the Scott notion that the search is legal if “the circumstances, viewed objectively,” 206 provide a basis for the action taken. But the Court has declined to hold that a search may be upheld as a search incident to arrest merely because a contemporaneous lawful

201. “It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.” Sibron v. New York, 392 U.S 41, 63 (1968).
202. 448 U.S. 98, 111.
203. 392 U.S. 41, 77 (Harlan, J., concurring).
205. 392 U.S. 41, 77 (Harlan, J., concurring).
custodial arrest could have been made. In *Cupp v. Murphy*, custodial arrest voluntarily appeared at the police station for questioning about the strangulation murder of his wife. During questioning, the police noticed a dark spot on Murphy's finger and, suspecting it might be dried blood and knowing that evidence of strangulation is often found under the nails of the assailant, asked Murphy if they could take scrapings from his fingernails. He refused, but the police proceeded to take them anyway and discovered traces of skin and blood cells and fabric from the victim's nightgown. The police had probable cause for Murphy's arrest at the time they scraped his fingernails, but he was detained only long enough to take the scrapings and was not formally arrested until a month later. Though the search was upheld upon an alternative and more limited ground, the Court in *Murphy* strongly emphasized "that a full Chimel [i.e., incident to arrest] search would [not] have been justified in this case without a formal arrest."

There is no tension between *Murphy* and *Rawlings*, for if no contemporaneous custodial arrest occurred there is no need to excuse the officer for simply getting the cart before the horse or, at least, not making it clear enough that the horse preceded the cart. To the extent that *Peters* is grounded in like considerations, the same may be said of the relationship between that case and *Murphy*. But it is less apparent that *Murphy* can be squared with *Scott* or a *Scott*-grounded interpretation of *Peters*. If a search may be upheld as incident to arrest because a custodial arrest could have been made before the search, then why is it important that the arrest had in fact occurred promptly after the search? Why is it that the police in *Murphy* had a more limited power to search the suspect because they did him the courtesy of allowing him to depart the station?

Though there may not be a completely satisfactory answer, one possible consideration is that so long as a custodial arrest did occur and was based on facts predating the search, there is an "inevitable discovery" flavor to the case. That is, had the officer skipped the search and simply proceeded to make the custodial arrest, there would then have occurred a search bound to uncover exactly the same evidence.

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208. The court of appeals had assumed that there was probable cause for arrest, and this conclusion was accepted by Justice Stewart. White, J., joined the opinion of the Court but did not consider the issue of probable cause "to have been decided here or to be foreclosed on remand." Id., at 297. Douglas, J., dissenting, questioned whether there was probable cause, noting that Murphy was allowed to remain at large for a month thereafter. Id. at 301-04. Brennan, J., dissenting, argued that the Court should have remanded the case for a determination of probable cause. Id. at 305.
209. Namely, that a very limited search was permissible to preserve "highly evanescent evidence" then in a process of destruction. Id. at 296.
210. This is a concept usually viewed as an aspect of the "fruit of the poisonous tree" doctrine. See 3 W. LAFAVE, SEARCH AND SEIZURE § 11.4(a) (1978).
But this reasoning is not especially convincing, for it will often be unclear just what would have happened had the challenged search not occurred when it did. For example, notwithstanding the prior existence of probable cause in *Peters*, it is still a matter of speculation whether the defendant would have been arrested had the burglarly tools not first been found. Yet there still seems to be a difference of sorts between a court making "an objective assessment of an officer's actions," as it is put in *Scott*, and making an assessment based upon actions which did not occur. It is one thing to examine a seizure attended by a search and culminating in a custodial arrest and then conclude that, even if the officer did not intend to make a custodial arrest from the outset, the case may be treated just as if he had. It is quite another for a court, in effect, to supply not only the missing state of mind but also the missing conduct. Absent a contemporaneous custodial arrest, it would seem strange to uphold the search pursuant to a rule which excuses any need for a case-by-case justification precisely because the greater intrusion of custodial arrest has occurred.

This is not to suggest, however, that in any case lacking a contemporaneous custodial arrest only a *Terry* frisk is permissible. Such a rule would put too great a premium upon the fact of a custodial arrest and, more importantly, might encourage resort to custodial arrests solely to provide a basis for a necessary warrantless search which would otherwise be illegal. The need to search for evidence is not inevitably related to the need to take custody of the person thought to have committed the crime, and thus such warrantless searches should not be deemed impermissible simply because there was no contemporaneous custodial arrest. Though some cases have failed to recognize this fundamental point, the better view is that a "warrantless search is proper if the officer had probable cause to believe that a crime had been committed and probable cause to believe that evidence of the crime in question will be found" and that "an immediate, warrantless search is necessary in order to ... prevent the destruction or loss of evidence." 

211. 436 U.S. 128, 137.
212. For example, if there is probable cause a person was intoxicated while driving a car just involved in an accident, the need to take a blood sample exists whether he is arrested or merely hospitalized for his injuries; and thus the better view is that the sample may be taken even in the latter circumstances. See, e.g., State v. Aguirre, 295 N.W.2d 79 (Minn. 1980); State v. Campbell, 615 P.2d 190 (Mont. 1980).
214. People v. Morse, 68 Mich. App. 150, 152-53, 242 N.W.2d 47, 49 (1976), *vacated mem.*, 397 Mich. 866, 245 N.W.2d 544 (1976). This principle is somewhat broader than that cautiously announced in *Murphy*, where great emphasis was placed upon the facts that the suspect was reasonably believed to be in the actual process of destroying "highly evanescent evidence" and that the evidence was preserved by a search which was "very limited" compared to that which could be made incident to a custodial arrest. Though *Murphy* has sometimes been read as if it were limited to cases in which both those circumstances were present, e.g., People v. Evans, 43 N.Y.2d 160, 371 N.E.2d 528, 400 N.Y.S.2d 810 (1977), it should be applied more broadly.
C. "Incarceration"

The Supreme Court held in *Illinois v. Lafayette* \(^{215}\) "that it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."

This rule, which doubtless applies also to the arrested person's car if he had been driving it at the time of arrest,\(^{216}\) is not simply another application of the *Robinson-Belton* search-incident-to-arrest doctrine. Rather, as emphasized in *Lafayette*, the inventory search involves considerations "somewhat different from the factors justifying an immediate search at the time and place of arrest."

Among the government interests served by the inventory process are (1) deterring false claims by incarcerated persons of theft of their property, (2) inhibiting theft or careless handling of such property, and (3) keeping contraband and dangerous instrumentalities out of the jail. It is thus apparent that it is not merely an arrest or even a "custodial arrest" which provides a basis for undertaking an inventory of the arrestee's effects; as *Lafayette* makes abundantly clear, the seizure must involve "incarceration."

For the incarceration to be a lawful seizure, it must of course be grounded in probable cause. This will be the case if the initial arrest was made upon probable cause, except when subsequent events known

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The point is illustrated by *Franklin v. State*, 18 Md. App. 651, 308 A.2d 752 (1973), where, based upon a rape victim's detailed description of the interior of the car in which the offense occurred, a search warrant for defendant's car was issued. After the warrant was served, defendant accompanied the police to the state police barracks. From the record it was unclear whether defendant was then under arrest or had come voluntarily, but he was permitted to leave after the police seized his undershorts and was not formally arrested until a week later. The court quite properly upheld this warrantless seizure although, unlike *Murphy*, the suspect was not in the process of destroying the evidence and more than a very limited search was involved. Though the court stressed that the shorts were seized in order to examine them for "seminal stains, bloodstains or head, body or pubic hairs," characterized as "evidence of a 'highly evanescent' character," *id.* at 668, 308 A.2d at 761, 763, that should not be critical to the outcome. The result in *Franklin* would be just as correct had the shorts been seized solely because they fit the victim's description of the shorts worn by the rapist (which, as it turned out, was their primary evidentiary value). Given the defendant's awareness that police suspicion had focused upon him, he might well have disposed of the undershorts had the police not seized them at the time.

217. The Court in *Lafayette* refers to inventory "incident to booking and jailing the suspect," 103 S. Ct. at 2608, to "an incidental administrative step following arrest and preceding incarceration," *id.*, to the search of an arrestee and his personal effects "prior to being placed in confinement," *id.* at 2609, to "the routine procedure incident to incarcerating and arrested person," *id.* at 2611. Moreover, though in *Lafayette* the defendant had been arrested for disturbing the peace, handcuffed, taken to the police station and there, in the booking room, subjected to the inventory process, the Court cautioned that upon remand "an appropriate inquiry" would be "whether respondent was to have been incarcerated after being booked for disturbing the peace." *Id.* at 2611 n.3.
to the police have dissipated that probable cause. In addition, as many cases indicate, it must appear that the arrestee was afforded a fair opportunity to obtain any stationhouse release to which he was entitled by statute, court rule, or police regulation. With rare exceptions, these decisions do not indicate whether this aspect of the inventory-incident-incarceration rule is required by the fourth amendment or is simply a matter of courts enforcing those statutes, rules, and regulations. In many respects the problem is like that discussed earlier concerning limits under state and local law on taking custody in the first place. It is well to note, however, that the holding in Lafayette requires that the inventory occur "in accordance with established inventory procedures." This requirement, drawn from the earlier vehicle inventory case of South Dakota v. Opperman, serves to ensure that this type of search, for which a case-by-case probable cause showing is unnecessary, is not undertaken arbitrarily. It would thus seem necessary that there be set procedures determining precisely what is to be done with those who are incarcerated and which arrestees are to be incarcerated. Though some discretion on the incarceration issue must be permitted, the police should be expected to justify the choice of incarceration in such circumstances.


220. Just what is a sufficient opportunity is a problem. See Zehrung v. State, 569 P.2d 189, 219 (Alaska 1977) (stating that "when one is arrested and brought to a jail for a minor offense for which bail has already been set in a bail schedule, he should be allowed a reasonable opportunity to attempt to raise bail before being subjected to the remand and booking procedures and the incidental inventory search"); but on rehearing, 573 P.2d 858, 859 (Alaska 1978) (admitting that the state may be correct in saying that this is impractical in smaller communities with no separate holding cells in unsecured area, and that there the search may be proper unless defendant presently has the bail money); State v. Jetty, 176 Mont. 519, 523, 579 P.2d 1228, 1230 (1978) (holding that where officer arrested defendant on warrant for overdue one-dollar parking ticket, defendant's friend said he would follow them to the police station and post bond of $15, but when defendant arrived at the jail he was searched incident to placement in a holding cell, resulting in discovery of drugs; held, "jail officials had no reasonable justification for placing him in a holding cell and subjecting him to a custodial search" where "the officer had knowledge the bail was on its way to the police station" and defendant's "friend did arrive with the bail money, well within the reasonable time defendant was entitled to, to attempt to raise bail").

221. In People v. Dixon, 392 Mich. 691, 707, 222 N.W.2d 749, 756 (separate opinion by Levin, J.) (emphasizing that its decision was not grounded in the fourth amendment).

222. See supra text accompanying note 182.


225. See State v. Langley, 62 Hawaii 79, 611 P.2d 130 (1980) (stating that notwithstanding minor nature of crime for which arrest was made, "the defendant's uncontrollable and disruptive behavior warranted his temporary detention" where intoxicated defendant "displayed lack of self-control, yelling obscenities and creating a disturbance"); State v. Vance, 61 Hawaii 291, 602 P.2d 933 (1979) (holding a preincarceration search proper even though defendant's mother
Even if a lawful incarceration is not forthcoming, the police may still have authority to search the arrestee rather carefully at the station. *Robinson* recognizes a right to search incident to arrest without regard to the probability in the particular case that evidence or weapons will be found, and in *United States v. Edwards* the Court concluded that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." This makes sense as to searches for evidence; the fact the arrestee will not be incarcerated hardly lessens the need for such a search, and to deny the right to conduct a search for that purpose at the station would only prompt the making of a very thorough search at the arrest scene which, as acknowledged in *Lafayette*, could be "embarrassingly intrusive." But when the arrest is for an offense (e.g., speeding) for which there could be no evidence on the arrestee's person or in his effects, so that the only possible justification could be to seek weapons, there is no need to recognize a continuing right to search at the station a person about to be released. The weapons search rationale of *Robinson*, grounded in "the extended exposure which follows the taking of a suspect into custody," has no application in this setting. Moreover, to extend the weapons search branch of *Robinson* into this situation would render virtually meaningless the critical "established inventory procedures" requirement of *Lafayette*.

### III. Need for a Warrant

The Supreme Court has often stated a "preference" for searches pursuant to warrant, and has even "enforced" this preference by

had been present with bail money, because release was discretionary and police decided against release because defendant had been arrested for disturbance at stationhouse and had to be subdued by three officers, and thus temporary incarceration was "necessary to calm him down and to prevent him from immediately reinitigating his harassment").

227. 103 S. Ct. at 2609.
228. In State v. Carner, 28 Wash. App. 439, 444, 624 P.2d 204, 208 (1981), where defendant, age 17, was arrested for speeding and attempting to escape apprehension, and at the station his mother called to pick him up because he was only 17, after which a full search was conducted, the court stated:

The crucial finding is that before Officer Bens conducted the challenged search, the officers had determined that the defendant would not be detained, but released to his mother. At this stage, he had already been frisked at the scene and asked to empty his pockets. There was no danger of weapons, or that he might possess evidence relevant to the crime for which he was arrested. The further danger that the defendant might possess items which would aid in his escape or carry contraband or drugs to his jail mates would exist only if the police intended to detain him. Once the administrative decision was made to release him without further detention, these dangers ceased to exist and gave the police no reasonable basis for a detailed body search.

excluding evidence obtained in the warrantless search of premises,\textsuperscript{231} vehicles,\textsuperscript{232} and effects\textsuperscript{233} when the police could have obtained a search warrant. The Court also has expressed with some frequency a "preference" for arrests based on warrants.\textsuperscript{234} But in \textit{United States v. Watson},\textsuperscript{235} the Court held "that the Fourth Amendment permits a duly authorized law enforcement officer to make a warrantless arrest in a public place even though he had adequate opportunity to procure a warrant after developing probable cause for arrest."\textsuperscript{236} On the basis of information obtained several days earlier, Watson was arrested in a restaurant when he appeared there as predicted. Though the arrest conformed to federal law, Watson prevailed before the court of appeals because no arrest warrant had been obtained. In reversing, the Supreme Court declared that a "strong presumption of constitutionality" was due the statute under which the arrest was made, and then concluded the presumption was not overcome since that statute was consistent with "the Court's prior cases," "the ancient common-law rule," and "the prevailing rule under state constitutions and statutes."\textsuperscript{237}

After \textit{Watson} it was unclear whether a warrant would ordinarily be necessary if the arrest was to be made inside private premises, but in \textit{Payton v. New York}\textsuperscript{238} the Court held "that the Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Noting it was "a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable" while "objects . . . found in a public place may be seized by the police without a warrant," the Court concluded "this distinction has equal force when the seizure of a person is involved."\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{231} E.g., \textit{Vale v. Louisiana}, 399 U.S. 30 (1970).
\item \textsuperscript{233} E.g., \textit{Arkansas v. Sanders}, 442 U.S. 753 (1979).
\item \textsuperscript{234} E.g., \textit{Wong Sun v. United States}, 371 U.S. 471, 479-82 (1963); \textit{Beck v. Ohio}, 379 U.S. 89, 96 (1964). The Court sometimes used even stronger language. In \textit{Terry v. Ohio}, 392 U.S. 1, 20 (1968), the Court referred to a requirement "that the police must whenever practicable, obtain advance judicial approval of searches and seizures," while in \textit{Davis v. Mississippi}, 394 U.S. 721, 728 (1969), the Court alluded to "the general requirement that the authorization of a judicial officer be obtained in advance of detention." But in \textit{Gerstein v. Pugh}, 420 U.S. 103, 113-14 (1975), the Court struck this "practical compromise": while "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest," there must be "a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest."
\item \textsuperscript{235} 423 U.S. 411 (1976).
\item \textsuperscript{236} \textit{Id.} at 427 (Powell, J., concurring).
\item \textsuperscript{237} \textit{Id.} at 416-19.
\item \textsuperscript{238} 445 U.S. 573, 576 (1980).
\item \textsuperscript{239} \textit{Id.} at 586-87 (quoting \textit{Coolidge v. New Hampshire}, 403 U.S. 443, 477 (1971)).
\end{itemize}
This is because "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." The prosecution claimed that a warrantless in­premises arrest was supported by the factors in Watson, but the Court found them less compelling in this context.

As for the kind of warrant needed to make an arrest entry into the suspect's home, it was argued in Payton that only a search warrant "based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake." But the Court held that an arrest warrant would suffice, stating:

If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

The rule is otherwise, the Court later concluded in Steagald v. United States, when police wish to make an arrest entry of the premises of a third party. As explained in Steagald, the protection of this third

240. Id. at 588. The Court reasoned that:

any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their * * * houses * * * shall not be violated." . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Id. at 589-90.

241. The majority emphasized (a) "we have found no direct authority supporting forcible entries into a home to make a routine arrest and the weight of the scholarly opinion is somewhat to the contrary"; (b) 24 states permit warrantless entries, 15 prohibit them and 11 have taken no position, with "a significant decline during the last decade in the number of States permitting warrantless entries for arrest," so that "there is by no means the kind of virtual unanimity on this question that was present in United States v. Watson"; and (c) "no congressional determination that warrantless entries into the home are 'reasonable' has been called to our attention." Id. at 590-601.

242. Id. at 602.

243. Id. at 602-03.

244. 451 U.S. 204 (1981).
party's privacy interests can be achieved only by going the search warrant route, in the course of which the magistrate will pass upon the question of whether there exists probable cause that the person to be arrested is in the third party's premises.

A. Exigent Circumstances

In both Payton and Steagald, the Court acknowledged that these warrant requirements are not absolute. The Court in Payton viewed the two arrests at issue there as "routine arrests in which there was ample time to obtain a warrant," and thus found it unnecessary to elaborate upon what constitutes "the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search."\(^{245}\) Similarly, in Steagald the Court emphasized that the search warrant requirement applied only "in the absence of exigent circumstances,"\(^ {246}\) and noted such circumstances were not present in the instant case because two days had passed from the time the agents obtained information regarding the whereabouts of the person to be arrested.

However, the Supreme Court in Payton discussed with apparent approval the decision in Dorman v. United States,\(^ {247}\) which some years earlier required a warrant for arrest entries absent exigent circumstances and detailed how a court should go about determining in a particular case whether the circumstances were sufficiently exigent. The Court there enumerated these factors: (1) whether "a grave offense is involved, particularly one that is a crime of violence"; (2) whether "the suspect is reasonably believed to be armed"; (3) whether "there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including 'reasonably trustworthy information,' to believe that the suspect committed the crime involved"; (4) whether there is "strong reason to believe that the suspect is in the premises being entered"; (5) whether there exists "a likelihood that the suspect will escape if not swiftly apprehended"; (6) whether "the entry, though not consented, is made peaceably"; and (7) "though it works in more than one direction, . . . whether [the entry] is made at night."\(^ {248}\) This Dorman formula has been widely adopted by both federal\(^ {249}\) and state\(^ {250}\)

\(^{245}.\) 445 U.S. 573, 583 (1980).
\(^{246}.\) 451 U.S. 204, 213.
\(^{247}.\) 435 F.2d 385 (D.C. Cir. 1970).
\(^{248}.\) Id. at 392.
\(^{249}.\) E.g., United States v. Williams, 612 F.2d 735 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980); United States v. Campbell, 581 F.2d 22 (2d Cir. 1978).
courts and consequently, absent attention to this issue by the Supreme Court,251 stands today as the prevailing rule on the limits of the Payton-Steagald warrant requirement.

As an abstract or theoretical matter, the Dorman formula might seem sensible. But because it is intended to govern a police decision which, as the Payton dissenters correctly noted, "must be made quickly in the most trying of circumstances,"252 it must be asked whether it is practical. Several commentators have answered in the negative,253 and their concerns are well-founded. The trouble with the Dorman rule is that it is too sophisticated to be applied correctly with a fair degree of consistency even by well-intentioned police officers.

Illustrative is United States v. Lindsay,254 where two armed and masked men robbed a McDonald's Restaurant and escaped with about $2700 and the manager's car. Shortly thereafter police who heard a radio transmission concerning the robbery and describing the car almost simultaneously saw the car pull into a motel parking lot. The driver was arrested and found to have part of the clearly marked loot on his person, so he was taken to the McDonald's and identified as one of the robbers. An officer who knew him by name returned to the motel and learned he was registered there. At that point, some 45 minutes after the initial radio transmission, a warrantless entry was made into the room and Lindsay, later identified as the other robber, was found therein. The court of appeals, after a careful and elaborate evaluation of "all the circumstances surrounding the entry,"255 was able to conclude that the first, second, and sixth Dorman factors were present, that the third and fourth were not, that the arguments on both sides concerning the fifth factor were "of equal weight,"256 and that the seventh was a washout (as it ordinarily will be, since it "works in more than one direction"257). Even assuming the police could have so resolved each of these seven points while they were outside the motel room, does this tell them a warrantless entry may or may not be made? Lindsay held the warrantless entry unconstitutional, but an officer could not have reached that conclusion with confidence on the basis of Dorman. Lindsay in turn does not afford an officer a basis for deciding a case involving a somewhat different mix of factors.

254. 506 F.2d 166 (D.C. Cir. 1974).
255. Id. at 172.
256. Id.
257. As recognized in Dorman. 435 F.2d 385, 393 (D.C. Cir. 1970).
A better approach would be to distinguish arrests made in the course of an ongoing investigation in the field, as in *Lindsay*, from "planned" arrests. A planned arrest is one made after a criminal investigation has been completed at another location and the police make a deliberate decision to go to a predetermined place, either the suspect's home or some other premises where he is believed to be, in order to take him into custody.\(^{258}\) Courts have understandably been reluctant to accept police claims of exigent circumstances on such facts,\(^{259}\) as it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained. This means that in the planned arrest situation the only exception to the warrant requirement should be the presence of exigent circumstances prior to the time the officers went out into the field to arrest.\(^{260}\) But when the occasion for arrest arises while the police are already out in the field investigating the prior or ongoing conduct which is the basis for the arrest,\(^{261}\) there should be far greater reluctance to fault the police for not having a warrant.\(^{262}\) The presumption then should be in favor of a warrantless arrest, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate, obtains a warrant, and then returns with it.

This conclusion is supported by a significant factor not on the *Dorman* list: concern with preservation of evidence. While an arrest is usually thought of as serving the purpose of gaining custody of the criminal, it often serves the equally (or perhaps more) important function of terminating a criminal enterprise before the evidence thereof is destroyed or disseminated. Thus, totally apart from the question of whether a need to save evidence should justify a warrantless entry to search for that evidence,\(^{263}\) it should be recognized that frequently an immediate


\(^{261}\) This does not mean the probable cause must have just developed, as often probable cause to arrest a particular defendant will exist before the investigation is completed. As stated in *United States v. Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977), "the officers were not bound to seek warrants as soon as they established probable cause."

\(^{262}\) E.g., *Avant v. State*, 405 So. 2d 159 (Ala. Crim. App. 1981) (finding warrantless entry of home proper where done within two hours of sexual abuse of child there); *People v. Johnson*, 30 Cal. 3d 444, 637 P.2d 676, 179 Cal. Rptr. 209 (1981) (finding warrantless entry to arrest within 75 minutes of a shooting lawful); *State v. Gant*, 305 N.W.2d 790 (Minn. 1981) (finding warrantless entry proper when defendant's wallet found at burglary-assault scene, police immediately went to his address and entered to arrest).

\(^{263}\) See 2 W. LAFAVE, SEARCH AND SEIZURE § 6.5 (1978).
arrest entry is needed to ensure that the defendant will be disabled from destroying or distributing evidence.\textsuperscript{264} Once inside, the police may find that evidence in plain view or in a search incident to arrest, and at a minimum will have custody of the defendant while a search warrant is obtained and executed.\textsuperscript{265}

Another reason, also overlooked in Dorman, why officers in the field must often take immediate action even though the person to be arrested could probably be found later and arrested pursuant to a warrant obtained in the meantime, is to minimize the risk that someone will be injured or killed. Sometimes the risk is to a person in the premises to be entered, such as an undercover agent or informant,\textsuperscript{266} a possible hostage,\textsuperscript{267} or an individual the intended arrestee knows has cooperated with the police,\textsuperscript{268} but delay may also increase the risk of harm to persons outside.\textsuperscript{269} Passage of time may allow those inside to resist with greater effectiveness when the police ultimately enter.\textsuperscript{270} And if the police need to stake out premises while a warrant is obtained, curious bystanders may gather in the immediate vicinity where they might be harmed by forcible resistance to the police entry.\textsuperscript{271}

Moreover, if courts allow warrantless entries when the occasion to

\begin{footnotes}
\item 265. The point may be illustrated by a variation on the facts of United States v. Santana, 427 U.S. 38 (1976). The actual facts of Santana were that an undercover officer arranged to buy heroin from McCafferty and waited while she entered Santana's house and obtained the drugs there. McCafferty was then arrested a few blocks away, after which officers approached Santana as she stood in her doorway, announced their office and then pursued her into the residence. The Supreme Court upheld that warrantless entry because the arrest had been attempted in a "public place" and had been followed by legitimate "hot pursuit." But assume now that Ms. Santana had not been in her doorway at the time the police returned. Finding the marked money from the just-completed narcotics purchase in her possession was certainly important to the police in terms of making a solid case against Ms. Santana, and thus it is certainly understandable why the police immediately returned to her house for the purpose of arresting her instead of heading for the magistrate to get either an arrest warrant or a search warrant. Had she not been in the doorway, it would seem that the police should nonetheless make an immediate effort to arrest her while she had the money. Though the chance that the money would be gone later is not substantial enough to justify an immediate full warrantless search of her premises for the money, it is strong enough to justify the lesser intrusion of entry to arrest. Indeed, it might be argued that an immediate warrantless entry and arrest, most likely culminating in a finding of the money on her person, is to be preferred to a later ransacking of her home pursuant to a search warrant in order to find where the money had been concealed in the interim.
\item 266. United States v. Williams, 633 F.2d 742 (8th Cir. 1980); State v. Johnson, 407 So. 2d 673 (La. 1981).
\item 269. United States v. Jones, 635 F.2d 1357 (8th Cir. 1980).
\item 270. United States v. Williams, 612 F.2d 735 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980).
\end{footnotes}
arrest arises while the officers are out in the field, they will avoid the
difficult question of whether it would have been possible for the police
merely to stake out the premises while a warrant was obtained. Some
warrantless entries have been held illegal on the ground that the police
could have kept the premises under surveillance while they got a
warrant,\textsuperscript{272} while others have been upheld because the circumstances
were deemed to be such that surveillance was not feasible.\textsuperscript{273} But the
question of whether a stakeout was feasible is exceedingly complicated
and unlikely to be seen by hindsight in precisely the same way it was
perceived by police on the scene.\textsuperscript{274} There is much to be said, therefore,
in favor of a rule which does not make a judicial resolution of that
question critical to the outcome.

For all of these reasons, it is to be hoped that when the Supreme
Court has occasion to pass upon the question of what constitutes ex­
igent circumstances in the \textit{Payton-Steagald} context, it will not embrace
the \textit{Dorman} formula. In those two cases, characterized by the Court
as involving "routine" arrest and search-for-arrestee situations, the in­
tended arrests were unquestionably of the planned variety and did not
otherwise involve exigent circumstances. It would be fully consistent
with those decisions, therefore, for the Court not to extend the same
preference for warrants to situations in which the occasion to arrest
arose while the police were already out in the field.

\textbf{B. Kind of Warrant}

Because \textit{Payton} requires only an arrest warrant for "entry into a
suspect's home"\textsuperscript{275} to arrest and \textit{Steagald} requires a search warrant\textsuperscript{276}

\textsuperscript{272}. \textit{E.g.}, Commonwealth v. Huffman, 385 Mass. 122, 430 N.E.2d 1190 (1982); State v.
McNeal, 251 S.E.2d 484 (W.Va. 1978).

\textsuperscript{273}. \textit{E.g.}, United States v. Johnson, 660 F.2d 749 (9th Cir. 1981), \textit{cert. denied}, 455 U.S.
912 (1982); United States v. Acevedo, 627 F.2d 68 (7th Cir. 1980), \textit{cert. denied}, 449 U.S. 1021
(1980).

\textsuperscript{274}. As noted in State v. Girard, 276 Or. 511, 515, 555 P.2d 445, 447 (1976):

Defendant argued that the two officers could have "surrounded" the house to avoid
escape while they waited for reinforcements. That involves a large measure of specula­
tion, depending on a variety of factors relating to the feasibility of "surrounding"
the house or otherwise preventing escape, including the size of the house, the number
of exits, the proximity of the house to cover for a person bent on escape, visibility,
etc. In the exigencies of the moment, the officers could not reasonably be expected
to put fine weights in the scale in weighing the chances of securing the house or of
losing their quarry.

\textsuperscript{275}. 445 U.S. 573, 576 (1980).

\textsuperscript{276}. Some language in \textit{Steagald} suggests that when that case applies the police must have
both an arrest warrant and a search warrant, as the Court at one point speaks of the possibility
of the police obtaining a search warrant "when they obtain an arrest warrant." 451 U.S. 204,
222 (1981). But there is no reason why both warrants must be obtained as long as the procedure
utilized required the magistrate to pass on both the probable cause to arrest and the probable
cause to search. This could be accomplished by only a search warrant if the magistrate passed
on the grounds for seizure of the named person just as, in the more typical search warrant situa­
where the arrest entry is of "the home of a third party," there can arise the question of which type of warrant must be obtained in a particular case. Indeed, the *Steagald* dissenters' strongest argument was that the arrest warrant-search warrant distinction would result in "increased uncertainty imposed on police officers in the field" as to which warrant was needed. It is thus appropriate to inquire just how courts ought to go about deciding, when a challenge on this basis is made, whether a police entry to arrest was with the proper kind of warrant.

When raised on a subsequent motion to suppress, this issue should not be resolved on the basis of information available at the time of the hearing showing the premises entered were actually those of an individual other than the person sought to be arrested. This is because the question is whether the officers at the time of entry reasonably believed the place was the residence of the person named in the arrest warrant. But the police are not entitled to jump to conclusions merely because the necessary facts are lacking. In *Steagald*, for example, a confidential informant told federal agents that Lyons, a federal fugitive wanted on drug charges, could be reached during the next 24 hours at a certain Atlanta telephone number, after which the agents obtained the address of that phone from the telephone company and confirmed that Lyons was the subject of a six-month-old arrest warrant. Even without the reference to the 24-hour period which suggested Lyons was only a visitor, it is doubtful that the agents would have had a reasonable belief Lyons resided there. Indeed, even if the informant had asserted Lyons was now residing there, the officer would need some information showing the informant's basis of knowledge with respect to that allegation. (Often there will be better ways of acquiring facts upon which to ground a reasonable belief that a certain place is the residence of the person to be arrested, such as examination of

tion, the magistrate would determine that the item of physical evidence to be seized is "the legitimate object of a search," as the Court put it in *Steagald*. *Id.* at 213. And it could likewise be accomplished by a process that happened to be labelled an arrest warrant if the document also authorized entry of a particular place and indicated that the magistrate had authorized such entry upon a showing of probable cause the named person was there. But because these hybrid search warrants and arrest warrants are out of the ordinary, and thus are attended by some risk that the magistrate will fail to make the additional probable cause determination which they require, obtaining both an arrest warrant and search warrant is the safest (albeit not essential) course of action.

277. 451 U.S. at 221.
278. *Id.* at 231 (Rehnquist, J., dissenting).
279. Which may be seldom, in that courts are inclined not to permit the arrestee (as opposed to the resident, who objected in *Steagald* because evidence incriminating him was found) to question the lack of a search warrant. See, e.g., United States v. Clifford, 664 F.2d 1090 (8th Cir. 1981).
phone books or city directories\(^{281}\) and questioning of neighbors.\(^{282}\)

Assuming no problem in acquiring the relevant facts, there may arise another difficult issue: just what is it which makes a certain location an individual’s place of residence for purposes of the Payton-Steagald distinction? The Steagald dissenters speak to this point:

If a suspect has been living in a particular dwelling for any significant period, say a few days, it can certainly be considered his "home" for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if the suspect concurrently maintains a residence elsewhere as well. In such a case the police could enter the premises with only an arrest warrant.\(^{283}\)

Whether this is the correct view is a most difficult question, one which necessitates examination of just what it is that the search warrant requirement, imposed in Steagald but not in Payton, is intended to protect. Steagald says the arrest warrant did not suffice there because it "did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home,"\(^{284}\) while in Payton an arrest warrant was deemed sufficient because the judicial determination of probable cause to arrest a particular person makes it "constitutionally reasonable to require him to open his doors to the officers of the law."\(^{285}\) But there is a step missing in the analysis; we are never told why it is that a magistrate's judgment is needed on the question of where \(A\) is visiting but not on the question of where \(A\) is more permanently residing. Surely the distinction does not rest solely upon the concern expressed in Steagald, for to the extent that "judicially untested determinations" regarding an intended arrestee's residency turn out to be erroneous, that will also result in invasion of the privacy of a third party.

If the Supreme Court is prepared to tolerate that risk by not requiring a judicial determination of where \(A\) lives but, as the Court put it in Steagald, will not ordinarily allow an intrusion upon a third party's privacy without a judicial determination that \(A\) "might be a guest there," perhaps the unstated additional consideration is that there is a higher risk of judgments of the latter kind being made incorrectly if left to the police. Information received by the police as to an intend-

\(^{281}\) See Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) (stressing the failure of the police to resort to such sources).


\(^{284}\) \textit{Id.} at 213.

ed arrestee’s place of residence usually will be sufficiently straightforward that fourth amendment values would not be significantly enhanced by a requirement that this information be assessed by a magistrate. This is especially true in the many cases where the police set out to arrest A at a certain place which they have determined is his residence by reliance upon presumably accurate records — a phone book, city directory, utility company records, or the like. By comparison, in what Steagald calls the “guest” situation the most likely scenario is that presented there: an informant tells the police that A, most likely known to have vanished from his prior residence, is now located in another specified place. On such facts, there is more reason to introduce a magistrate’s judgment into the process to ensure a more careful assessment of whether there is a reason to consider the informant a reliable person with a sufficient basis of knowledge. This analysis suggests that a search warrant should be required in the case put by the Steagald dissenters as well. If the informant in Steagald had said Lyon had been there “a few days,” this would not have reduced at all the risk either that the informant was not known to be credible or that he lacked a basis for that assertion. Under this view police sometimes would be put to the inconvenience of obtaining a search warrant to seek a person for whom they already had an arrest warrant, but this is not an intolerable burden when exigent circumstances are lacking.

IV. CONCLUSIONS

The Supreme Court’s developing seizures typology has proved to be exceedingly important in resolving critical fourth amendment issues. Determination of how much evidence of criminality is required, whether a warrant is needed, and how extensive an incidental intrusion is permissible in a particular case are each typically made by characterizing the officer’s encounter with the suspect in a certain way. In the main, this process of seizures categorization has provided a meaningful fourth amendment structure for reaching sensible results concerning those three central issues.

But, especially as this seizures typology is further elaborated (never, it is to be hoped, to the point of Jones on Easements), it is essential

286. And it is essentially true when that kind of information is lacking but police pinpoint A’s place of residence by investigation in the area — inquiry of A’s neighbors or discovery of A’s name on a mailbox or door. Even when information about A’s criminal conduct and location is acquired from an informant, the risk may be relatively slight on the matter of residency, as where an informant says he has repeatedly met with A at a certain apartment to buy drugs or stolen goods from him there.

287. See Harbaugh & Faust, supra note 253, at 218 (concluding that a search warrant rather than an arrest warrant should be required “unless the facts clearly demonstrate that the third party premises have become the suspect’s ‘home’ ”).
that these classifications be drawn with the greatest of care. For one thing, the precise dimensions of various categories ought to be determined with close attention to exactly what issue is being resolved by this process of line-drawing. For example, as noted herein,\textsuperscript{288} if the significance of drawing a line between those premises which qualify as the arrestee’s residence and those which do not is that it determines whether the police need a search warrant or an arrest warrant, then surely a major consideration ought to be that of in what circumstances a before-the-fact judicial determination of the arrestee’s present location would be especially meaningful. Similarly, as also previously discussed,\textsuperscript{289} if the characterization of a seizure as a “custodial arrest” must carry with it an inevitable right of the police fully to search the arrestee and the passenger compartment of the vehicle in which he was riding, then some sort of need-for-custody limitation upon this type of seizure becomes important.

Secondly, in the process of drawing lines between various categories of seizures, it is also most desirable to employ concepts that are not artificial and that correspond to circumstances existing in real life. As discussed earlier,\textsuperscript{290} defining the line between a minimal fourth amendment seizure and no seizure at all in terms of whether a reasonable person “would feel free to walk away” is not helpful, for if taken seriously it would sweep into the temporary seizure category virtually all street encounters between a citizen and a known policeman. Courts would doubtless not apply the standard literally, but this would only produce an equally unfortunate result — a constitutional standard which could not be squared with the actual results of the decisions reached by trial and appellate courts.

Thirdly, precisely because seizures categorizations are determinative of several important fourth amendment issues, the critical distinctions ought to be expressed in terms that can be understood and applied by police under the circumstances in which they are called upon to act. This is why, as considered herein,\textsuperscript{291} the Dorman multi-factor balancing test is not a meaningful device for ascertaining when a warrantless entry of premises to arrest should be permitted. Similarly, as also previously discussed,\textsuperscript{292} it is not sensible to transmogrify a brief detention into a full-fledged arrest simply by a hindsight judgment that the police could have utilized a different and somewhat less intrusive investigative technique.

Somewhat related is the fourth point, namely, that these seizures

\textsuperscript{288} See supra text accompanying notes 284-87.
\textsuperscript{289} See supra text accompanying notes 173-87.
\textsuperscript{290} See supra text accompanying notes 42-66.
\textsuperscript{291} See supra text accompanying notes 247-74.
\textsuperscript{292} See supra text accompanying notes 102-38.
categories ought to be expressed in terms which lend themselves to reasonably accurate resolution in the context of a suppression hearing. This is why, as earlier concluded,\textsuperscript{293} it is sensible to draw the seizure-no seizure line with an objective "reasonable person" standard instead of by resort to some rule which would require the court to resolve a swearing contest between the defendant and the police as to what their respective understanding of the situation was at the time. This is why it also makes sense as a general matter, as we have seen,\textsuperscript{294} to classify seizures by focusing upon the actual conduct of the police instead of contemporaneous or after-the-fact statements by police suggesting that they erroneously overestimated or underestimated the extent of their authority.

\textsuperscript{293.} See supra text accompanying notes 23-41.

\textsuperscript{294.} See supra text accompanying notes 68-74 and 198-200.