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Recent Developments in the Law of Search and Seizure

By Professor Jerold H. Israel*

This article is designed to provide a survey of recent decisions dealing with several important issues in the area of search and seizure. It is intended primarily as a basic collection of sources. I have, therefore, sought to keep my own commentary at a minimum and the citations to relevant cases at a maximum. Wherever space permits, I have let the courts speak for themselves. In most instances, however, it has been necessary to provide fairly general descriptions of the cases.

In using these materials, two limitations should be kept in mind. First, the collection of cases is not exhaustive. No attempt has been made to cite every case in every jurisdiction dealing with a particular point. I have concentrated on opinions that discuss the issues involved at some length. These opinions should provide an excellent starting point for further research. Second, the cases deal primarily with the federal constitutional aspects of the issues discussed. State constitutions, statutes, and judicial decisions may impose further limitations upon the authority of police officers to make searches and arrests. While the actions of state officers must meet federal constitutional restrictions [see Ker v. California, 374 U.S. 23 (1963)], nothing in the Constitution prevents the states from imposing more severe restrictions of their own.

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I. What Areas Are Protected.

A. Background.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." With a few exceptions, the applications of the amendment to searches of the individual's "person" and his "papers" or personal "effects" is fairly clear. See, e.g., Beck v. Ohio, 379 U.S. 89 (1964); Boyd v. United States, 116 U.S. 616 (1886); Corngold v. United States, 367 F.2d 1 (9th Cir., 1966). The difficulties arise in determining its application to various closed or partially closed structures and the area surrounding these structures. Although the Constitution speaks in terms of searching "houses," that term is not defined in a technical narrow fashion. Consider, for example, Justice Stewart's comments in Lanza v. New York, 370 U.S. 139 (1962), considering a claim that electronic eavesdropping in a jail visiting room violated the Fourth Amendment:¹

But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In

¹ The Court found it unnecessary to finally resolve this issue because petitioner's conviction could be based on charges that were unrelated to the eavesdropping.
prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here [Id. at 143-144].

Although *Lanza* emphasizes the nature of the area involved, a later decision by Justice Stewart warns against placing undue emphasis upon the categorization of a particular area as either totally protected or unprotected. In *Katz v. United States*, reprinted in Chapter 3, the defendant *Katz* was convicted of transmitting wagering information from Los Angeles to Miami. At trial, the government attempted to introduce evidence of the defendant's end of telephone conversations overheard by F.B.I. agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the defendant had placed his calls. The government argued that, even if electronic eavesdropping generally came within the Fourth Amendment, it would not do so here since a public telephone booth was not a constitutionally protected area. Justice Stewart, speaking for the Court, refused to discuss the issue in terms of the constitutional status of the telephone booth:

We decline to accept this formulation of the issue. . . . In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase “constitutionally protected area” . . . .

. . . The parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls . . . .

But this effort to decide whether or not a given “area,” viewed in the abstract, is “constitutionally protected” deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private,
even in an area accessible to the public, may be constitutionally protected. . . .

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world [389 U.S. at 350-352].

Despite its criticism of undue reliance upon the characterization of areas as either "protected" or "unprotected," the Katz opinion does not appear to be rejecting this distinction as irrelevant. Rather, the Court would seem to be saying that the degree to which an area is protected may depend upon the nature of the invasion. Thus, the Fourth Amendment may not protect the individual in the telephone booth from secret observation, while it would protect him from electronic eavesdropping. The continued significance of the particular area involved is emphasized in Justice Harlan's concurring opinion:

I join the opinion of the Court, which I read to hold only . . . that an enclosed telephone booth is an area where, like a house . . . and unlike a field . . . , a person has a constitutionally protected reasonable expectation of privacy . . . .

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My
understanding of the rule that has emerged from prior
decisions is that there is a twofold requirement, first that a
person have exhibited an actual (subjective) expectation of
privacy and, second, that the expectation be one that society
is prepared to recognize as “reasonable.” Thus a man’s home
is, for most purposes, a place where he expects privacy, but
objects, activities, or statements that he exposes to the “plain
view” of outsiders are not “protected” because no intention
to keep them to himself has been exhibited. On the other
hand, conversations in the open would not be protected
against being overheard, for the expectation of privacy
under the circumstances would be unreasonable. . . .

The critical fact in this case is that “[o]ne who occupies
it, [a telephone booth] shuts the door behind him, and pays
the toll that permits him to place a call is surely entitled to
assume” that his conversation is not being intercepted. Ante,
p. 352. The point is not that the booth is “accessible to the
public” at other times, ante, p. 351, but that it is a temporarily
private place whose momentary occupants’ expectations of
freedom from intrusion are recognized as reasonable [389
U.S. at 360-61].

Of course, it should be emphasized that even if an area is
viewed as protected, that does not mean it is immune from search,
but only that any search is subject to the Fourth Amendment
limitations relating to probable cause and the issuance of a
warrant.

B. The Area Surrounding a Dwelling.

Traditionally, Fourth Amendment protection extends only to
such area surrounding a dwelling as comes within the common
law concept of the curtilage. The curtilage is generally defined
as the “dwelling area and that area immediately adjacent thereto,”
but its scope varies with the physical situation:

Whether the place searched is within the curtilage is to be
determined from the facts, including its proximity or annexa-
tion to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family [Care v. United States, 231 F.2d 22, 25 (10th Cir., 1956)].

The Supreme Court early established that an open field some distance from a household is not within the curtilage. In Hester v. United States, 265 U.S. 57 (1924), federal agents were approaching Hester’s house when they saw Henderson, a prospective purchaser of moonshine, “drive near to the house.” They concealed themselves “from fifty to one hundred yards away and saw Hester come out and hand Henderson a bottle.” When the officers then showed themselves Hester threw away a jug and ran; the officers retrieved the jug, a bottle (dropped by Henderson), and also a jar containing moonshine which had apparently been tossed out a window. Mr. Justice Holmes, speaking for the Court, rejected Hester’s claim that the jug, bottle, and jar were obtained in violation of the Fourth Amendment. Holmes noted that even if the officers had trespassed on Hester’s land, the evidence “was not obtained by an illegal search or seizure.”

It is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their “persons, houses, papers and effects” is not extended to the open fields. The distinction between the latter and the house is as old as the common law [265 U.S. 57, 58-59 (1924)].

Although Hester may have settled the status of the open field, determining the status of such structures as garages (attached and unattached), barns, and chicken houses has proved more troublesome. Compare, e.g., People v. Oaks, 251 Mich. 253, 231 N.W. 557 (1930) and Hodges v. United States, 243 F.2d 281 (5th Cir., 1955) with Care v. United States, 231 F.2d 22 (10th Cir., 1956) and Walker v. United States, 225 F.2d 447 (5th Cir., 1955). See also Taylor v. U.S., 286 U.S. 1 (1932) and United States v. Potts, 297 F.2d 68 (6th Cir., 1961).

Recent cases generally have followed the past trend, holding,
e.g., an open field over half a mile from the house, outside the curtilage, and, a garage "located close to rear of the house and fifty to seventy-five feet from the street," within the curtilage. See McDowell v. United States, 383 F.2d 599 (8th Cir., 1967); Commonwealth v. Murphy, 233 N.E.2d 5 (Mass., 1968). Two cases, however, moving in opposite directions, have suggested that the common law concept of the curtilage should no longer be controlling:

(1) People v. Alexander, 61 Cal. Rptr. 814 (Cal. Ct. App., 1967). The Court here admitted into evidence three tin cans of marijuana concealed in the chimney of a barbecue located in the defendant's back yard. The barbecue was described as "within [the] yard, but detached from any structure . . . 5 or 6 feet wide at the base, with a chimney rising 7 or 8 feet." The Court found that the search could not be upheld as incident to a lawful arrest "because there was no legal justification shown for arresting defendant until the marijuana was discovered in his back yard." Nevertheless, the search was sustained on the authority of Hester, supra, and several California cases in which an officer had either seized material lying in a yard or had been standing within the yard when observing defendant's actions within the household. (Compare Section II, infra). After describing these cases in detail, the Court stated:

These cases teach that a search made upon the private property which surrounds a house is not necessarily an unreasonable one. We believe the Willard opinion correctly states the rationale of the earlier decisions when it says "... the degree of privacy which defendant enjoyed in the place involved is an important factor in determining the reasonableness of the search; and that essentially the determination of its reasonableness must depend upon the facts and circumstances of the particular case."

It is defendant's contention that the entire curtilage, the area immediately surrounding the house and habitually used for family purposes, is constitutionally protected against the intrusion of police officers. But that theory cannot be recon-
ciled with the holdings of the six California appellate decisions cited above. In each of those cases the officer came into the curtilage to find the evidence. Although those decisions preclude the adoption of defendant’s theory, none of them can be said to reach the precise question presented here. Assuming it is lawful for an officer to enter the back yard to look through windows or examine the garage or packages left in the bushes, does he cross the constitutional threshold when he thrusts his arm into the chimney of the back yard barbecue?

We begin by observing that, as a proposition of almost universal truth, honest people have no need for privacy in such chimneys. Although a barbecue chimney is a part of residential (as distinguished from business) land use, it is not the kind of place where privacy is usually thought to be important. No one would ever think of storing anything in such a place unless he was hiding contraband of some sort. If it is permissible for the police to enter and inspect a residential back yard at all (and the decisions say it is), the honest householder suffers no additional inconvenience or indignity when the officer thrusts his arm into the soot of the barbecue. A rule which would draw the line there would not protect the privacy of the person, his home, office, papers or effects. It would aid only those who need convenient storage for contraband.

The search of a barbecue chimney is by no means as significant an invasion of the privacy of the home as is going upon the porch to peer through the blinds, or walking around the house to find an undraped window. By the standard developed in these cases, we cannot say that the search here was so unreasonable as to require the exclusion of the marijuana [61 Cal. Rptr. 819].

(2) Wattenburg v. United States, 388 F.2d 853 (9th Cir., 1968). The Court here ruled inadmissible evidence obtained from the search of a stockpile of trees located on the grounds of a motel
in which both defendants resided. One defendant, Wattenburg, also operated the motel. The search had been conducted by the Forest Service pursuant to an invalid warrant and there had been no consent. The Government argued, however, that the search could still be upheld because "it was not made in or about defendants' 'house,' but in an open field." The Court rejected this argument on the following grounds:

The Fourth Amendment protects the right of the people to be secure in their "persons, houses, papers, and effects. . . . against unreasonable searches and seizures." Pointing to this language, Justice Holmes said for the Supreme Court, in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898, that the special protection afforded by the Fourth Amendment "is not extended to the open fields." Justice Holmes added: "The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226." (265 U.S. at 59, 44 S.Ct. at 446).

Ever since this Supreme Court pronouncement in Hester, the "open field" doctrine has been uniformly recognized and applied where, under the facts of a particular case, it was held that the search and seizure had occurred in an open field.

The kinds of warrantless searches which have been upheld under the "open field" doctrine are well illustrated in the cases which the Government calls to our attention. In Hester, supra, the enforcement officers obtained their information that a crime was being committed by concealing themselves at a point from fifty to a hundred yards from the defendant's residence. In United States v. Hassell, 6 Cir., 336 F.2d 684, 685, the search for a still was made about 250 yards from the defendant's house. In Care v. United States, 10 Cir., 231 F.2d 22, 24-25, the search was made in a plum thicket approximately half a mile away from defendant's residence, and in a cave in a plowed field across a road and more than a long city block from the home. In Janney v. United States, 4 Cir., 206 F.2d 601, 602, an enforcement officer obtained the information that a crime was being committed by concealing himself
beside a hog pen on the other side of a wire fence which was about one hundred feet west of the house.

The undisputed evidence in the case before us establishes circumstances differing radically from those present in the foregoing cases. As a Government witness testified, the stockpile of Christmas trees was on the premises known as Hideaway Lodge, the pile being among some standing trees. He further testified the distance between the stockpile and the lodge was from twenty to thirty-five feet, and that the stockpile was about five feet from a parking area used by personnel and patrons of the lodge. This witness characterized the position of the stockpile as "immediately behind" and "immediately adjacent" to the lodge. The trial court commented that the trees were "in Mr. Wattenburg's back yard." As stated above, Wattenburg operated and lived at the Hideaway Lodge, and Owens rented a room there which he sometimes occupied.

The protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto. The differentiation between an immediately adjacent protected area and an unprotected open field has usually been analyzed as a problem of determining the extent of the "curtilage."

Applying here this means of differentiating between a protected area immediately adjacent to a house, and an open field unprotected by the Fourth Amendment, we have no hesitancy in holding that the stockpile of Christmas trees here in question was within the curtilage of Wattenburg's abode at the Hideaway Lodge, and therefore, at least as to him, protected by the Fourth Amendment.

We wish to add, however, that it seems to us, a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent
to his home, is accessible to the public. See *Katz v. United States*, 389 U.S. 237, 88 S.Ct. 507, 19 L.Ed.2d 576, decided December 18, 1967. As the Supreme Court said in *Katz*, "the Fourth Amendment protects people, not places."

The "curtilage" test is predicated upon a common law concept which has no historical relevancy to the Fourth Amendment guaranty. In *Jones v. United States*, 362 U.S. 257, 266, the Supreme Court warned, in connection with another search and seizure problem, that:

[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law.

2. Evidencing a disposition to expand previously held views as to what is entitled to protection under the Fourth Amendment, the Supreme Court in *Camara*, decided on June 5, 1967, invalidated a warrantless administrative inspection of a residence and, in doing so, expressly overruled *Frank v. State of Maryland*, 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877, decided only eight years previously. And in the companion case of *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943, a warrantless administrative inspection of a commercial warehouse was held illegal although it did not involve a search of individuals, a house, papers or effects. The Court said:

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. 387 U.S. at 543, 87 S.Ct. at 1739.

In *Katz v. United States*, 398 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 574, the Fourth Amendment was held to protect individuals from having their telephone conversations within a public telephone booth overheard by Government enforcement officers by means of electronic listening and recording devices attached to the outside of the booth.

The considerations of privacy here envisioned are not predicated upon a general constitutional 'right of privacy,' but upon a right to be free from certain kinds of governmental intrusion. See *Katz v. United States*, supra. It should also be noted, as the Supreme Court said in *Katz*, that the reach of the Fourth Amendment is not limited to the protection of individual privacy against certain kinds of governmental intrusion 'but its protections go further, and often have nothing to do with privacy at all.' [Footnote by the Court]
If the determination of such questions is made to turn upon the degree of privacy a resident is seeking to preserve as shown by the facts of the particular case, rather than upon a resort to the ancient concept of curtilage, attention will be more effectively focused on the basic interest which the Fourth Amendment was designed to protect. As the Supreme Court recently said in *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930:

The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.

Measured by the test we suggest, Wattenburg was, without doubt, protected by the Fourth Amendment from a warrantless search and seizure of the kind described above. In the daytime and in the dark, from 2:35 p.m. to 9:00 p.m. on November 8, 1965, several law enforcement officials meticulously went through the stockpile of trees located in the back yard of his abode and no more than thirty-five feet from the building. It must have been necessary to move most of the trees from one place to another in order to make the kind of examination which the officers carried on. Lights must have been required as the men moved about after dark and there was undoubtedly a certain amount of noise. There can be no doubt that Wattenburg, in placing the stockpile this close to his place of residence, sought to protect it from this kind of governmental intrusion.

The search and seizure was therefore illegal as to Wattenburg. [388 F.2d 856-859]

C. Places Used for Limited and Transient Purposes—E.g., Telephone Booths, Toilets, Lockers and Desks.

The *Katz* decision, quoted *supra*, Section I(A), clearly establishes that places occupied by individuals for rather limited and
transient purposes may be protected by the Fourth Amendment under certain circumstances. As Justice Harlan noted, the area must be one in which the individual has exhibited an actual expectation of privacy and the expectation must be "one that society is prepared to recognize as reasonable" 389 U.S. at 361. Katz held that a person in a telephone booth is protected against eavesdropping, but not necessarily against observation. Recent decisions have held that a public toilet booth is protected against secret observation. See e.g., Brown v. State, 238 A.2d 147 (Md.Ct. App., 1968) and Smayda v. United States, 352 F.2d 251 (9th Cir., 1965).

The California courts, however, apparently draw a distinction between 4-walled public toilets (protected) and the three walled (doorless) toilets (unprotected). Compare Bielicki v. Superior Court, 371 P.2d 288 (Cal. Sup. Ct., 1962) and People v. Young, 29 Cal. Rptr. 492 (Ct. App., 1963).

The application of the Fourth Amendment to areas such as lockers and desks is often complicated by the limited nature of the defendant's interest in that property. In an earlier case, United States v. Blok, 188 F.2d 1019 (D.C. Cir., 1951), the court found unreasonable the police search of a desk assigned for defendant's exclusive use in the federal government office where she was employed. The search was made with the consent of defendant's supervisor and was based on the assertion of a fellow employee that the defendant stole her purse. The Government contended that the defendant had an insufficient interest to object to the search in light of her superior's consent. In rejecting this argument, the Circuit Court made the following comment on the application of the Fourth Amendment to the search of the desk:

We think appellee's exclusive right to use the desk assigned to her made the search of it unreasonable. No doubt a search of it without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use. But as the Municipal Court of Appeals
said, the search that was made was not "an inspection or search by her superiors. It was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed." In the absence of a valid regulation to the contrary, appellee was entitled to, and did, keep private property of a personal sort in her desk. Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the Government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable. Operation of a government agency and enforcement of a criminal law do not amalgamate to give a right of search beyond the scope of either [188 F.2d at 1021].

Two recent cases distinguish Blok on rather interesting grounds: (1) United States v. Donato, 269 F.Supp. 921 (E.D.Pa., 1967). In this case mint security guards conducted a search of all employee lockers looking for firecrackers. Defendant's locker contained a bag of newly minted quarters and he was subsequently prosecuted for embezzlement. Defendant's objection to the search was rejected on the following grounds:

The locker in which the coins were found was the property of the United States Government. It had been assigned to defendant for his exclusive use subject to a valid Government regulation which provides: "No mint lockers in mint institutions shall be considered private lockers." All employee lockers were subject to inspection and were regularly inspected by the Mint security guards for sanitation purposes. The Mint security guards had a master key which opened all the employee lockers. It makes no difference that there was no specific evidence that defendant had personal knowledge of the above regulations of the master key, because he could have acquired no greater right of privacy in the Government owned locker than he was given by the Government. The instant case is analagous to United States v. Grisby, 335 F.2d 652 (4th Cir., 1964) where a search without a warrant was upheld because a military regulation permitted such a search.
on authorization of a commanding officer. In so ruling, the Court considered the importance to the military of maintaining order and discipline. . . . In the present case there is a government regulation which permits the Mint security guards to inspect any and all Mint employee lockers whenever necessary. (The existence of this regulation distinguishes the present case from United States v. Blok . . . .) [269 F. Supp. at 923-24].

(2) People v. Overton, 229 N.E.2d 596 (N.Y. Ct. App., 1967). In this case the court sustained the search of a high school student’s locker. The search was conducted by three detectives who possessed an invalid search warrant. However, the vice-principal, on seeing the warrant, consented to the search. The court distinguished Blok on the following grounds:

It is axiomatic that the protection of the Fourth Amendment is not restricted to dwellings . . . . A depository such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime. United States v. Blok . . . .

There are situations, however, where someone other than the defendant in possession of a depository may consent to what otherwise would have been an illegal search. . . .

The power of [the vice-principal] . . . to give his consent to the search arises out of the distinct relationship between school authorities and students.

The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age
increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

When Overton was assigned his locker, he, like all the other students at Mount Vernon High School, gave the combination to his home room teacher who, in turn, returned it to an office where it was kept on file. The students at Mount Vernon are well aware that the school authorities possess the combinations of their lockers. It appears understood that the lock and the combination are provided in order that each student may have exclusive possession of the locker vis-à-vis other students, but the student does not have such exclusivity over the locker as against the school authorities. In fact, the school issues regulations regarding what may and may not be kept in the lockers and presumably can spot check to insure compliance. The vice-principal testified that he had, on occasion, inspected the lockers of students.

Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When the vice-principal learned of the detectives' suspicion, he was obligated to inspect the locker. This interest, together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers [229 N.E. 2d at 597].

A recent Supreme Court decision indicates that Blok, Donato, and Overton would be viewed as quite different cases if the employer or principal had not consented to the search. In Mancusi v. DeForte, 36 U.S.L.W. 4682, the Court held invalid a search (without a warrant) of various records taken from a union office shared by several employees. The Court's primary concern in the case related to the standing of one of the employees to object to the search. Since his employer, the union,
had not consented to the search, there was no question but that state officials conducting the search had invaded a "protected area." The only issue was whether the defendant had a sufficient interest in that area to complain of the search. The Court held that he did. Justice White, dissenting, suggested that the employee's interest extended only to his desk. It is not clear, however, whether he or the majority would uphold this interest even where the employer consented to the search.

II. What Constitutes a Search—The Limitations of the Plain View Doctrine.

A. Background.

Contrary to an earlier position, courts now generally recognize that "mere observation" without physical entry onto protected premises may amount to a "search." See, e.g., Bielicki v. Superior Court, 371 P.2d 288 (Cal. Sup. Ct., 1962); Smayda v. United States, 352 F.2d 251 (9th Cir., 1965); cf. McDonald v. United States, 335 U.S. 451 (1948). This point is reinforced by the decision in Katz, supra Section I(A), holding that eavesdropping without physical entry constitutes a search.

The "observational search" is brought into issue in various contexts. Quite frequently the actual seizure of contraband follows immediately upon the observation of the evidence through a window in a home or car. If the observation is invalid, then the subsequent seizure is also invalid. Sometimes the observation will furnish the basis for an arrest which then leads to a search. Again, if the observation is unconstitutional, then both the arrest and subsequent search fail. Similarly, unconstitutional observation cannot be used as the basis for obtaining a search warrant. Thus the validity of the officer's initial observation is often the key issue in search and seizure cases. Of course, if the observation does constitute a "search," then it is subject to the usual Fourth Amendment requirements regarding probable cause and the use of a warrant. It is quite clear, however, that not all observations constitute "searches" for Fourth Amendment purposes.
B. The Plain View Doctrine.

It is frequently stated that the observation of persons or property in "plain view" does not constitute a search. See Boyd v. United States, 286 Fed. 930, 931 (4th Cir., 1923); Petteway v. United States, 261 F.2d, 53, 54 (4th Cir., 1958). See United States v. Lee, 274 U.S. 559 (1927). As one court has said, "a search implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view." People v. Marvin, 193 N.E. 202 (Ill. Sup. Ct., 1934). The plain view doctrine clearly applies in the situation in which officers standing upon public property view contraband or illegal activity through a car window. See Boyd v. U.S., supra; Nunex v. United States, 370 F.2d 538 (5th Cir., 1967); Sneed v. State, 423 S.W.2d 857 (Tenn., 1968). The doctrine has also been applied where an officer spots contraband in the course of making a normal entry into a home or business. Thus, where an officer sees narcotics equipment through an open door, having called on the defendant to discuss a possible parole violation, the initial observation will not be viewed as a search and the subsequent arrest will be sustained. See, e.g., People v. Gonzales, 57 Cal. Rptr. 534 (Ct. App., 1967). Officers in the premises on legitimate business are not "guilty of any impropriety in allowing their eyes to wander." Ellison v. United States, 206 F.2d 476, 478 (D.C. Cir., 1953).

The Supreme Court recently reaffirmed the application of the "open view" doctrine to this context in Harris v. U.S., 36 U.S. L. W. 4195 (U.S., March 5, 1968). In that case the petitioner had been arrested on a charge of robbery, and his car, which had been seen leaving the site of the robbery, was impounded. After a cursory search, the car was towed to the precinct station. Local police regulations required that the impounded vehicle be searched thoroughly, all valuables removed from it and a property tag attached to it. The arresting officer, pursuant to the regulation, entered the vehicle and tied a property tag on the steering wheel. As he was closing the open windows, he saw a registration card which lay "face up" on the metal stripping over which the door closed. The card belonged to the robbery victim. The officer
then took the car back to the precinct station where he confronted the defendant with the card. When the defendant disclaimed all knowledge of the card, the officer removed it from the car. He later returned to the car, searched the trunk, rolled up the windows and locked the door. The Court upheld the admissibility of the seized registration card on the following grounds:

The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not. The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker v. California*, 374 U.S. 23, 42-43 (1963); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924) [36 U.S.L.W. at 4196].


A similar approach was taken by the Court last term in *Lewis v. United States*, 385 U.S. 206 (1967). The Court there upheld the admissibility of evidence received by a police undercover agent in the defendant's home. The agent, by misrepresenting his identity, had been invited to the home to purchase narcotics. Defendant claimed that the agent's entry and observations within the home violated the Fourth Amendment. The Court rejected
this claim, noting that the home had been used as a business, and the agent had been invited there by the defendant. While on the premises, the officer certainly could observe what occurred within the household. The Court warned, however, that “this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials.” 385 U.S. at 211.

C. Observation Through the Windows of Residences.

While recent cases continue to accept the application of the plain view doctrine where the officer views items in the normal course of making a legitimate entry into the household, considerable doubt has been raised concerning the practice of peering through windows. Older cases have accepted this practice even when (a) the observations were made from within the curtilage and (b) the officers apparently came upon the property with observation as a prime objective. See People v. Martin, 290 P.2d 855 (Cal. 1955); Polk v. United States, 314 F.2d 837 (9th Cir., 1963). See also the cases cited in People v. Alexander, 61 Cal. Rptr. 814 (Ct. App., 1967). More recent cases have accepted secret observation where the observer was some distance from the house or on the property of another. See Johnson v. State, 234 A.2d 464 (Md., 1967) (use of binoculars in looking through unobstructed window of house 150 feet away did not constitute search and did not taint search warrant based on those observations.) U.S. v. Campbell, 275 F. Supp. 7 (D. Ct., S.C., 1967) (observation of defendant's activities on a porch from a cornfield 50 feet from the house not subject to Fourth Amendment even though officers were trespassers.) However, observation from within the curtilage has been treated as a search, subject to the requirements of the Fourth Amendment. See Texas v. Gonzales, 388 F.2d 145 (5th Cir., 1968); Gonzales v. Beto, 266 F. Supp. 751 (W.D. Tex., 1967); United States v. Calabro, 276 F. Supp. 284 (S.D.N.Y., 1967). But see People v. Hailstock, 283 N.Y.S.2d 492 (N.Y. City Crim. Ct., 1967).
In light of *Katz, supra*, the courts’ emphasis on whether the observation took place from within the curtilage may no longer be appropriate. Rather, the crucial issue may be whether the defendant could reasonably have anticipated that his activities would be observed through the window by other persons in the normal pursuit of their daily activities. This approach is suggested in part by *Texas v. Gonzales, supra*. There four police officers, located in the next house, established an evening surveillance of a house in which defendant was a guest. Their purpose was to ascertain if narcotics were being peddled and they intended to raid the house if their suspicions in this regard were confirmed. Before the raid was made, one of the officers made three trips across the yard to peer through side windows. The officer peered through three separate windows, at one point standing on a drainpipe to gain a better vantage point. On the third trip, he saw three men seated around a table with knives in their hands working with white powder on a plate. At this point, the house was raided and defendant arrested. The Court held that the observations through the window were themselves invalid and therefore could not establish probable cause. In reaching this conclusion, the Court stated:

In determining whether the search is reasonable, courts must strike a balance between this right to privacy and the Government’s need to secure evidence of guilt. Numerous courts have solved the problem of searching residences and outlying buildings by resort to the common-law concept of the “curtilage.” . . . Apparently this concept helps set the Fourth Amendment boundaries which the police cannot invade without probable cause. The district court held that the officer’s conduct in trespassing on the property and peering in the window amounted to an invasion of the curtilage without probable cause to arrest or search. A more relevant issue also considered by the district court enables this Court to avoid the fictional question of where the curtilage begins and ends.

The paramount reason for affirmance in this case is that
the conduct of Officer Gann constituted an illegal search because his three trips to the window were made at a time when he lacked probable cause to think that narcotics were possessed in the home. The State's objection to this conclusion is that since the eye cannot commit the trespass condemned by the Fourth Amendment, Gann's observations cannot constitute a search. This contention is foreclosed by Brock v. United States, 5th Cir. 1955, 223 F.2d 681. There we held that standing on a man's premises and peering in his window constituted a search and in that case violated his "right to be let alone" as guaranteed by the Fourth Amendment. Id. at 685. See Davis v. United States, 9th Cir. 1964, 327 F.2d 301; People of State of California v. Hurst, 9th Cir. 1963, 325 F.2d 891; United States v. Lewis, S.D.N.Y.1964, 227 F.Supp. 483. These decisions conform to the purposes of the right of privacy and correspond to the growth of that right. The landmark decision of Boyd v. United States, 1886, 116 U.S. 616, first articulated the doctrine that the essence of the Fourth Amendment was protection against arbitrary intrusions into the privacies of life. The Supreme Court recently reaffirmed this principle in Warden, Maryland Penitentiary v. Hayden, 1967, 387 U.S. 294, and went on to note that the Court has to an increasing extent discarded fictional property concepts in resolving the issues of privacy and public security. See Barret, Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUPREME COURT REV. 46; Comment, The Mere Evidence Rule: Doctrine or Dogma?, 45 TEXAS L. REV. 526, 554 (1967). Thus the existence of a search does not depend on a trespass under local property law. See Hayden, supra, 87 S.Ct. at 1648. All that is necessary is an "actual intrusion into a constitutionally protected area." Katz v. United States, 1967, 389 U.S. 347, Berger v. State of New York, 1967, 388 U.S. 41, Brock teaches that this "actual intrusion" can be accomplished visually; however, Brock does not hold that officers cannot accomplish their search by looking in windows, but only that they must
have probable cause to think that a crime is being or has been committed before they do so. In this case, the police did not have probable cause to believe that narcotics were present in the Selvera home [388 F.2d at 147-148].

D. Observation Through Vents and Other Openings.

Anticipating *Katz*, several recent cases have held that observation through holes in the wall, vents, and similar openings is clearly invalid irrespective of whether the observer is a trespasser. *See, e.g.*, *State v. Kent*, 432 P.2d 64 (Sup. Ct. of Utah, 1968); *Brown v. State*, 238 A.2d 147 (Md. App., 1968). This is contrary to a position previously taken by other courts, most notably the California Court of Appeals. *See, e.g.*, *People v. Ruiz*, 304 P.2d 175 (Cal. Ct. App., 1956); *People v. Regalado*, 14 Cal. Rptr. 217 (1961). *But see Bielicki v. Superior Court*, 371 P.2d 288 (Cal. Sup. Ct., 1962). Typical of the more recent decisions is *State v. Kent*, *supra*. In that case, a police officer obtained permission from the manager of a motel to use a hidden vantage point from which he could secretly observe the defendant, who was living in one of the motel units. The officer was placed in a position in the attic where, by looking through a ventilator, he could observe the entire bathroom and part of the bedroom of defendant's unit. On the second day of surveillance, the officer saw defendant prepare a "fix." He then radioed fellow officers who entered the unit, arrested the defendant, and seized the narcotics. The state argued that the arrest was justified by the observation and the observation was not subject to Fourth Amendment limits because there was no trespass. It maintained that "from the area occupied by [the officer], observation into the unit occupied was readily available to anyone. The officer did not have to take any affirmative action, such as removing a cover from the vent, but merely observed all that was open to observation." It further argued that "it was possible for someone in the bathroom to readily ascertain that he was being observed." 432 P.2d at 65. The Court found these factors irrelevant:
We feel Officer Patrick's bathroom observations constituted an unlawful invasion of defendant's privacy. We are of the opinion the defendant, in renting the motel unit, obtained the exclusive right to use it, which included the right to privacy. It is true this right may be forfeited by illegal use of the property, but such unlawful utilization must first be established by legal means. . . . The defendant had the right to maintain his place of abode, though it was a room in a motel, as an annulus, free from outside intrusion and observation; a place inviolate where he could repose in security.

It is true there is a difference between a casual or accidental observation and an intentional invasion of property. Intrusion upon private property may constitute trespass, yet not infrequently the gravamen of the harm is the injury to privacy. There is harm in being seen in privacy under unfavorable circumstances.

It is impossible for us to determine whether Officer Lindsey or either of the other officers had sufficient evidence to link the defendant to a series of burglaries. If this were actually the case, then this officer should have secured a search warrant or a warrant for arrest of the defendant based upon the information he had received [432 P. 2d 464].

III. What Constitutes a Search—Searches Not Designed To Uncover Criminal Evidence.

In recent years, the Supreme Court has twice held that different official intrusions upon privacy not directed at obtaining criminal evidence constitute "searches" for Fourth Amendment purposes, but are not subject to the same probable cause standards as the ordinary search in criminal cases:

(1) In Camara v. Municipal Court, 387 U.S. 523 (1967), the defendant was charged with a criminal offense of refusing to permit a warrantless inspection of his residence by a housing inspector. The building manager had informed the inspector that the defendant, a lessee, was using the rear of his leasehold as a personal residence in violation of the city's housing code.
The inspector returned on several occasions, and the defendant refused the inspector access to his apartment without a search warrant. Prosecution was begun and the defendant sought a writ of prohibition to the state criminal court on the ground that the ordinance authorizing warrantless inspections was unconstitutional. The state courts denied the writ on the basis of *Frank v. Maryland*, 359 U.S. 360 (1959). Overruling its decision in *Frank*, the Supreme Court reversed. The Court rejected the notion, expressed in *Frank*, that the Fourth Amendment interests at stake in inspection cases are merely "peripheral." The Court concluded that, except for emergency situations, the Constitution demanded that the inspector, if turned away by the occupant of the premises, obtain a warrant. But the Court went on to suggest that the probable cause needed to justify issuance of a warrant need not meet the same standards applicable to a criminal investigation:

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures. In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all
structures. It is here that the probable cause debate is focused, for the agency’s decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.

... [W]e think that a number of persuasive factors combine to support the reasonableness of code enforcement area inspections. First, such programs have a long history of judicial and public acceptance. See Frank v. Maryland, 359 U.S., at 367-371. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen’s privacy. . . .

Having concluded that the area inspection is a “reasonable” search of private property within the meaning of the Fourth Amendment, it is obvious that “probable cause” to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be 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, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable-cause test from the standard applied in criminal cases would be to authorize a “synthetic search warrant” and thereby to lessen the overall protections of the Fourth Amendment. Frank v. Maryland, 359 U.S., at 373. But we do not agree. The warrant procedure is designed to guarantee
that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Cf. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable-cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy [387 U.S. at 535-39].

In See v. Seattle, 387 U.S. 541, the Court held that the general principles announced in Camara also were applicable to inspection of commercial structures not used as private dwellings. The Court acknowledged that business premises might be inspected in many more situations than private homes, but concluded that the warrant procedure was equally applicable to both.

(2) In Terry v. Ohio, reprinted supra Chapter 1, the Court held that a “pat down for weapons” (i.e., a frisk) constitutes a “search” within the purview of the Fourth Amendment. The Court specifically rejected the notion “that the Fourth Amendment does not come into play at all . . . if the officers stop short of something called a ‘technical arrest’ or a ‘full blown search.’ ” It noted that “it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of the body in an attempt to find weapons is not a ‘search.’ ” The Court rejected, however, petitioner’s argument that such a “search” should be judged by the same probable cause standards as a search incident to an arrest. Instead, it established a separate standard relating to the special objective of the frisk:

There are two weaknesses in [petitioner’s] line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a
search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston v. United States*, 376 U.S. 364, 367 (1964), is also justified on other grounds, ibid., and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reas-
onable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See Camara v. Municipal Court, supra.

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 174–176 (1949); Stacey v. Emery, 97 U.S. 642, 645 (1878) [see Chapter I].

IV. Search by Consent.

A. Background.

Where effective consent is given, a search may be conducted without a warrant and without probable cause. Although there originally was some confusion as to the theoretical basis of the "consent doctrine," it is recognized today as being grounded on the concept of waiver. See, e.g., Stoner v. California, 376 U.S. 483 (1964). Accordingly, the rigid standards normally applicable to the waiver of constitutional rights are also applicable to the
proof of consent. As recently noted by the Sixth Circuit Court of Appeals, "consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred . . . [Moreover,] the Government has the burden of proving that such consent has been given." See Rosenthall v. Henderson, 389 F.2d 514 (6th Cir., 1968). Cf. Johnson v. Zerbst, 304 U.S. 458 (1938). Of course, the application of this standard must rest on a determination of the individual's state of mind including his awareness of his rights, his interpretation of the police request, and his hesitancy, if any, in granting the request. Generally, the courts have determined the voluntariness of a consent on an ad hoc basis, carefully evaluating the facts of each case. See LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 ILL. LAW FORUM 255, 313-317; Note 113 U. PA. L. REV. 260 (analyzing the various factors cited by the courts in determining the validity of a consent). Several recent cases, however, seem to be moving in the direction of imposing certain factual prerequisites for establishing a voluntary consent, similar to the pattern adopted in determining the voluntariness of confessions.

B. The Requirement of a Miranda-Type Warning.

The current decisions are divided as to the extension of the Miranda rationale to the search-consent area. Several courts have held that a warning that the individual need not submit to a search is not a prerequisite to establishing voluntary consent even where the person consenting was in police custody. See State v. Forney, 150 N.W.2d 915 (Neb. Sup. Ct., 1967); People v. Ford, 232 N.E.2d 684 (Ill. Sup. Ct., 1967); State v. Andrus, 199 So.2d 867 (La. Sup. Ct., 1967). These decisions have been based on somewhat different rationales. Consider, e.g.:

(a) State v. McCarty, 427 P.2d 616, 619-620 (Sup. Ct., Kan., 1967):

Our attention is called to the recent case of Miranda v. State of Arizona, 384 U.S. 436. Apparently the defendants
would have us apply a *Miranda* prerequisite for an admissible confession to a valid consent to a search of private quarters. The defendants cite no authority in support of this contention and our limited research has discovered none.

It is our opinion, however, that the defendant's argument is unsound and must be rejected. *Miranda* deals only with the compulsory self-incrimination barred by the Fifth Amendment, not with the unreasonable search and seizure proscribed by the Fourth Amendment. There is an obvious distinction between the purposes to be served by these two historic sections of the Bill of Rights. The Fifth Amendment prohibits the odious practice of compelling a man to convict himself; the Fourth guards the sanctity of his home and possessions as those terms have been judicially interpreted. An indispensable element of compulsory self-incrimination is some degree of compulsion. The essential component of an unreasonable search and seizure is some sort of unreasonableness.

No responsible court has yet said, to our knowledge, that before a valid voluntary consent to a search can be given, the person consenting must first be warned that whatever is discovered through the search may be used as evidence against him. We decline to be the first judicial body to espouse so dubious a theory. . . .


Counsel for the Government apparently is under the impression that the district judge held as a matter of law that it was necessary for the officers to inform Rosenthall prior to his consent that he had the right to withhold consent in the absence of a warrant. We do not think this is the necessary inference from the judge's holding. We read his memorandum opinion as holding only that the Government had failed to sustain the burden of showing that Rosenthall's consent was intelligently given because, as was said in *Johnson*, there was no showing of "an intentional relinquishment or abandonment of a known right or privilege."
It is true that the district judge relies heavily on United States v. Blalock, 255 F.Supp. 268 (E.D. Penn., 1966), which apparently holds that a subject must be informed of his right to refuse before legal consent can be obtained to search without a warrant. It is noted, however, that in Blalock it was also said that there was no evidence to show that Blalock was aware of his Fourth Amendment right. In other words, the Government had failed on the whole case to sustain its burden of proving that consent to search was intelligently given. But regardless of the interpretation which should be placed on Blalock, we adhere to the rule that whether consent is freely or intelligently given is an issue of fact to be decided by the trial judge like any other factual issue. Johnson v. Zerbst, 304 U.S. 458 (1938) ....

The failure to advise the defendant of his right to withhold consent is only one factor to be considered. The failure to so advise might have more weight in one case than in another. To advise a person with experience or training in this field that he has the right to refuse consent would be a waste of words. To fail to so advise another, who by low mentality or inexperience is obviously ignorant of his rights, might in some cases be decisive. Other cases would doubtless fall between these two extremes. . . .

(c) State v. Andrus, supra at 873:

The very request for permission in this case clearly conveyed that a negative response was within the defendant's rights. Crowell Andrus, whose premises were searched, knew that he was believed to have committed cattle theft and that the officers were asking to search for more evidence of the theft when they sought permission to search the premises. . . .

See also People v. Roberts, 55 Cal. Rptr. 62, 71 (Ct. App., 1966) (where the defendant was not in custody):

[W]e are impressed by the argument of the Attorney General that the very request for permission to enter and search imparts advice that a negative response is within the de-
fendant's rights—when, as here, the implied finding is that the inquiries to the effect "may we enter" and "may we search" would be understood by the person questioned to be more than merely rhetorical. . . .

On the other side, the Seventh Circuit Court of Appeals has held that a specific warning of Fourth Amendment rights is necessary—at least where the defendant was in police custody at the time he consented. *United States v. Nickrash*, 367 F.2d 740 (7th Cir., 1966). Two other Federal Court opinions may be viewed as taking a similar position, *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa., 1966) and *United States v. Moderacki*, 280 F. Supp. 633 (D. Del., 1968), although each also seems to suggest that the warning would not be necessary in a case where the Government could show that the defendant otherwise "had full knowledge of his rights." *See id.* at 636, F.n.1. Compare, *Miranda v. Arizona*, 385 U.S. 436, 468 (1966) (refusing to "pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.") The *Nickrash* court did not discuss its reasons for requiring a warning, but relied on *Blalock*. The court there said:

First, the consent must have been "intelligent." Obviously, the requirement of an "intelligent" consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a "known right." *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States ex rel. Mancini v. Rundle*, 337 F.2d 268 (C.A.3, 1964). Certainly, one cannot intelligently surrender that which he does not know he has. Cf. *United States ex rel. Mancini v. Rundle*, supra; *Walker v. Peppersack*, 316 F.2d 119 (C.A.4, 1963). The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, *i.e.*, to prevent the possibility that the ignorant may surrender their rights more readily
than the shrewd. Conceivably, the assent of the defendant may have been "the false bravado of the small-time criminal," Judd, supra, 190 F.2d at 651; or it may have been an untutored submission to authority. Which it was could have been resolved by the officers at the scene. To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation. . . . [255 F. Supp. at 268-69].

Consider also the rationale suggested in State v. Williams, 432 P.2d 679 (Ore. Sup. Ct., 1967):

The principle announced in Escobedo v. State of Illinois . . . as interpreted by us in State v. Neely . . . is applicable not only to interrogations leading up to confessions but is equally applicable to interrogation aimed at obtaining the defendant's consent to search and seizure when he is a focal suspect in the custody of the police. In effect, the request to search is a request that defendant be a witness against himself which he is privileged to refuse under the Fifth Amendment [432 P.2d at 682-683].

One federal court has suggested that even if Fourth Amendment warnings are generally viewed as necessary, a different rule should apply where the defendant was warned of his Miranda rights, submitted to orderly interrogation and subsequently consented to a search. See Gorman v. United States, 380 F.2d 158 (1st Cir., 1967):

Although the analogy with Miranda v. State of Arizona, 384 U.S. 436 (1966), has a surface plausibility, we do not think that the Miranda prescription, formulated to give threshold warnings of Fifth and Sixth Amendment rights at the earliest critical time in a criminal proceeding, must or ought to be mechanistically duplicated when circumstances indicate the advisability of requesting a search. In the first place, advocacy of an automatic second-warning system misunderstands and downgrades the warnings required by Miranda. Their purpose was not to add a perfunctory ritual to
police procedures but to be a set of procedural safeguards "to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it."  384 U.S. at 444. These constitute "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."  Id. at 468. The obligation of the interrogators is not discharged by the adequate and effective appraisal of the accused's rights. "If * * * he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."  Id. at 444-45. While the police interrogators must faithfully carry out Miranda's mandate at the threshold, they may then proceed to elicit responses, however incriminating, without further specific warning. To single out for further warning a request to search premises of an accused is to assume that a different order of risks has not been covered at the threshold. But that things which might be found in a search could be used against an accused seems implicit in the warning of the right to remain silent which, as the Court observed, is calculated to make him "more acutely aware * * * that he is not in the presence of persons acting solely in his interest."  384 U.S. at 469.

Moreover, the rules governing searches are concerned not with the exclusion of unreliable evidence (such as a confession stemming from fear or force) or with the exclusion of self-incriminating statements (whether reliable or not) or with the need to assure a defendant that he may have a lawyer before any further interrogation, but with the maintenance of civilized standards of police practice. The objective of this policy would seem to have been achieved when police have given the basic Miranda warnings, when a defendant subsequently voluntarily submits to an orderly interrogation free from any coerciveness other than that implicit in the fact of arrest and custody, when a straightforward request for permission to search is made, and when an unambiguous and positive response is received.
We therefore see no reason in policy or precedent automatically to borrow a procedure adapted to one set of constitutional rights at one stage of a criminal proceeding and apply it to a quite different right, serving quite different purposes, at another stage. . . . [380 F.2d at 164].

However, the contrary view was taken in *United States v. Moderacki*, *supra* at 636:

While [the Gorman] argument carries some persuasion, I adhere to the result reached in *Nickrash and Blalock*. The key to a voluntary waiver is whether it was done knowingly. An inference that a person has been warned is not one and the same thing as an actual warning. The rule of waiver is not intended so much for the protection of the cool, hardened, criminal as for the slow-witted offender and perhaps, on occasion, the innocent person caught in a web of circumstances who becomes frightened or confused. The former, but not necessarily the latter might suspect that the *Miranda*-type warning is equally applicable to a search.

It is obviously repetitive, and may even seem slightly ridiculous, for an officer, having once given the *Miranda* warning before taking a suspect's statement, to have to repeat relatively the same warning before searching his person. But only in this fashion can it be known beyond doubt that the suspect, in emptying his pockets, has done so with a full knowledge of what he is doing. Lacking an explicit warning as to his rights under the Fourth Amendment, it can never be known with certainty whether a defendant voluntarily waived those rights. Accordingly, the search was unlawful insofar as it rests upon the defendant's waiver of his rights [280 F.Supp. at 636].

C. Consent Subsequent to a Claim of Authority.

Many courts have recognized that an officer's original reliance on a claim of authority is an important factor working against a finding of voluntary consent. See, *e.g.*, *United States v. Kelih*, 272 Fed. 484 (S.D. Ill., 1921); *Rogers v. United States*, 369 F.2d
944 (10th Cir., 1966); *Villano v. United States*, 310 F.2d 680 (10th Cir., 1962). Nevertheless, decisions frequently hold that, despite the officer’s original claim, other circumstances support a finding that the subsequent consent was voluntary. In *State v. Purdy*, 153 N.W.2d 254 (Minn. Sup. Ct., 1967), for example, the Court upheld consent given after the officers had told the defendant that “a search of the entire car was going to be made and, if the key to the trunk could not be found, he would break into the trunk.” The defendant then replied, “You might as well have the key” and opened his lips and projected the key which he had held between his teeth. *Id.* at 257. The Court held that the defendant’s “failure to object to the search . . . [was] evidence of consent.” The opinion also noted that after the officer opened the trunk, the defendant had volunteered that what the officers wanted (narcotics) was in a round brown box. Similarly, in *State v. Hamilton*, 141 S.E.2d 506 (1964), *approved*, 260 F.Supp. 632 (E.D.N.C., 1966), the Court sustained a voluntary consent given after a police officer stated that he lacked a search warrant, but that “he could get one.” The Court emphasized that defendant, who was under arrest, then responded, “There is no need of that, you can search.” *Id.* at 509.

A recent Supreme Court decision, *Bumper v. North Carolina*, 36 U.S.L.W. 4513 (U.S. June 3, 1968) clearly casts doubt on *Purdy* and possibly on *Hamilton* also. The Court there held invalid consent to search given by defendant’s grandmother after the officers involved had told her they possessed a warrant. The officers had visited the grandmother’s home, where defendant lived, prior to the defendant’s arrest. The grandmother met the officers at the door, where one of them announced, “I have a warrant to search your house.” The grandmother responded “go ahead” and opened the door. In the kitchen they found a rifle later introduced as evidence against defendant. At the trial, the prosecutor did not rely on the warrant, but sought to justify the search upon the grandmother’s consent. The Supreme Court quoted the grandmother’s testimony (relied upon by the lower court) at length:
"Four of them came. I was busy about my work, and they walked into the house and one of them walked up and said, 'I have a search warrant to search your house,' and I walked out and told them to come on in. . . . He just come on in and said he had a warrant to search the house, and he didn't read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant. . . .

"He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. . . . I just seen them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn't tell me anything, just picked it up like that. They didn't tell me nothing about my grandson. . . ."

The Court also noted in a footnote that the grandmother had also testified:

"I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all. . . .

"I just give them a free will to look because I felt like the boy wasn't guilty.""
The Court's opinion treated the basic issue somewhat more broadly, perhaps, than might be anticipated from the grandmother's testimony. The opinion stated:

The issue thus presented is whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit lawful coercion. Where there is coercion there cannot be consent.

Note should be taken also of the various lower court opinions cited by the Court in discussing acquiescence to official authority. Footnote 14, for example, included the following citations and quotations:

Orderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution. United States v. Elliot, 210 F. Supp. 357, 360.

One is not held to have consented to the search of his
premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant, rather than an invitation to search. *Bull v. Armstrong*, 48 So. 2d 467, 470 (S. C. Ala.).


Although three justices wrote separately in *Bumper*, only one (Justice Black) disagreed with the Court’s conclusion on the issue of consent.

D. Other Relevant Factors.

Because a person in police custody is more likely to be under pressure to give permission for a search, courts generally have been more demanding in examining allegedly voluntary “in-custody” consents. See *Judd v. United States*, 190 F.2d 649 (D.C. Cir., 1951); *Channel v. United States*, 285 F.2d 217 (9th Cir., 1960). Recent cases have emphasized, however, that the factor of custody does not necessarily preclude a finding of “voluntariness.” See, e.g., *State v. Herring*, 421 P.2d 767 (N. Mex. Sup. Ct., 1967); *People v. Campuzano*, 61 Cal. Rptr. 695 (Ct. App., 1967); *State v. Leavitt*, 237 A.2d 309 (R.I. Sup. Ct., 1967). Typical is the following statement from *Leavitt, supra*:

We are unrestrainedly in accord with the proposition that an accused’s consent to a search is a waiver of the protection guaranteed to him by the constitutions of this state and the United States. Such waiver is never to be presumed. It must be clearly shown to have been freely and knowingly given, uninduced by not only actual but implied duress. [Citing *Judd* and *Channel, supra*.]
Where as here the asserted consent is obtained from one under arrest, custodially secured in a police station with its attendant ambient of officedom, there is present a situation which suggests the probability that the acquiescence was submission to authority rather than an intelligent waiver. See Judd, supra.

Even so, it has never been held that a finding of consent, freely and intelligently given, is precluded as a matter of law when obtained from one under arrest and officially secured. That valid consent was obtained under such circumstances is still a question of fact to be determined by the trial justice in the first instance, although the burden on the state is to establish such consent by clear and convincing evidence [237 A.2d at 318].

Several other factors, besides custody, considered in determining the validity of a consent were recently listed in United States v. Lewis, 274 F. Supp. 184 (S.D.N.Y., 1967):

Among the factors that may be considered in determining the effectiveness and validity of a consent to search are whether at the time when it was given the defendant was under arrest, Judd v. United States, supra; United States v. McCunn, 40 F.2d 295 (S.D.N.Y., 1930); whether he was overpowered by arresting officers, handcuffed, or similarly subject to physical restrictions, e.g., United States v. McCunn, supra; People v. Zazzetta, 27 Ill.2d 302, 189 N.E.2d 260 (1963); whether the keys to the premises searched had already been seized by the police from the defendant, e.g., United States v. Fowler, 17 F.R.D. 499 (D.Calif., 1955); People v. Porter, 37 Misc.2d 73, 236 N.Y.S.2d 162 (Sup. Ct. Queens County, 1962); whether the defendant employed evasive conduct or attempted to mislead the police, Castaneda v. Superior Court, 59 Cal.2d 439, 30 Cal. Rptr. 1, 380 P.2d 641 (1963, per Justice Traynor); and whether he denied guilt or the presence of any incriminatory objects in his premises, e.g., United States v. Gregory, supra; United States v. Kidd,
The presence of some or all of the aforementioned factors is not controlling, since (as the Government concedes) each case "must stand or fall on its own special facts," United States v. Dornblut, 261 F.2d 949, 950-951 (2d Cir.), cert. denied 360 U.S. 912 (1959). These factors, however, are probative indicia on the issue of whether a purported consent is valid and effective. Although the defendant need not express a "positive desire" to have the search conducted in order to render his consent a voluntary waiver, United States v. Thompson, supra, 356 F.2d at p. 220, it must amount to more than mere submission or acquiescence in the nature of resignation to constitute a valid waiver. United States v. Alberti, supra; United States v. Sully, 56 F.Supp. 942 (S.D.N.Y. 1944) [274 F.Supp. at 187-88].

The application of these factors in a specific fact situation is illustrated in the recent case of United States v. Shropshire, 271 F. Supp. 521 (E.D. La., 1967). There a confederate of the defendant was summarily arrested at 4:00 a.m. while leaving a bar. A search disclosed a loaded gun and a key to a motel room. The officers took the confederate to the motel, where, after checking the records, they found the room to have been registered in defendant's name. The officers then tried to open the door with the key, but were unsuccessful because of an inside safety latch. They then knocked on the door. When the defendant asked who was there, his confederate responded, "It's Charlie." The defendant then opened the door and was confronted by the officers. The testimony as to what occurred at that point was in dispute. The officers testified that they identified themselves and asked permission to search the room, noting that the defendant had the right to refuse. The defendant then reportedly said, "Go right ahead, everything is all right." The subsequent search uncovered a number of counterfeit bills. The Court found that the consent was ineffective even under the officer's testimony. It noted:
When police identify themselves as such, search a room and find contraband in it, the occupant's words or signs of acquiescence in the search accompanied by a denial of guilt do not show consent. *Higgins v. United States*, 209 F.2d 819 (1954). This is particularly true when a man is awakened at an early morning hour, opens the door, clad only in his underwear, expecting to see a friend and is confronted by a force of five strange men seeking entry. It is incredible that [the defendant] . . . would have voluntarily consented to a search which he knew would disclose incriminating evidence. His words should be considered an involuntary submission to authority and therefore insufficient to waive a constitutional right [271 F. Supp. 524].

Particularly noteworthy in *Shropshire* is the Court's emphasis on the fact that defendant obviously knew the search would incriminate him. The *Higgins* case cited by the Court placed considerable emphasis on this factor. See 209 F.2d at 820. Other courts have taken note of the other side of the coin—the likelihood that the defendant believed that the search would turn up nothing. See e.g., *United States v. Nickers*, 387 F.2d 703 (4th Cir., 1967) (where the defendant had marked money of which he was probably unaware). Of course, the potentially incriminating nature of the search may also be offset by evidence that the party was attempting to make a clean breast of his guilt when he gave his consent. See *United States v. Mitchell*, 322 U.S. 65 (1944); *United States v. Rivera*, 321 F.2d 704 (2d Cir., 1963).

Various other factors have also been noted as indicating the "true voluntariness" of a consent. Courts have emphasized, in particular, defendant's own initiation of the search, or at least initiation of the investigation leading to the search. See *State v. Kotka*, 152 N.W.2d 445 (Minn. Sup. Ct., 1967); *Gibson v. State*, 423 S.W.2d 330 (Tex., 1968). Emphasis has also been placed upon the defendant's lack of hesitancy in agreeing to the search. See *State v. Leavitt*, 237 A.2d 309 (R.I. Sup. Ct., 1967).
E. The Continuing Effect of a Voluntary Consent.

May a consent, admittedly voluntary when originally given, be used to justify a second search of the same area made several hours after the original search had proved fruitless? Two recent cases suggest potentially conflicting approaches in dealing with this issue. In People v. Nawrocki, 148 N.W.2d 211 (Mich. Ct. App., 1967), the court upheld the search based on the earlier consent. The defendant there had been arrested on Sunday morning while driving his car. Riding with him was a friend wanted on a charge for nonsupport. The arresting officer asked the defendant if he could search the car, and the defendant agreed. The search uncovered no incriminating evidence. The officer then took the defendant to jail and impounded the car. The basis for this action is not discussed in the court opinion, except to suggest that the police might have been acting illegally. At the jail defendant was booked and the jailer took his valuables, including his car keys. Later in the afternoon the arresting officer took the keys from the defendant’s personal effects and again searched the car, finding incriminating evidence that lead to a forgery charge being brought against the defendant. In finding that the consent validated the search, the Court of Appeals simply noted that “according to the testimony, . . . [defendant] freely and intelligently gave permission to search the car any time.”

In State v. Brochu, 237 A.2d 418 (Ma. Sup. Ct., 1967), the Court reached a different conclusion in a factually distinguishable case. There, the defendant had been called to the police station on December 5th shortly after his wife’s death and asked for consent to search his home. At the time, there was some question as to whether the wife's death was accidental or homicide. The officer in charge, however, did inform defendant that “in a case of this nature, everyone is suspect.” The defendant “consented to the authorities searching his home and indeed urged that they do so, indicating his desire that the cause of his wife’s death
be established." Shortly thereafter, the police searched the house and found nothing. Later the same day, the police received damaging testimony that led to defendant's arrest. The next morning, December 6th, they conducted a second search of the house which turned up damaging evidence. The trial court sustained the search on the basis of the consent, which it treated as "remaining valid and viable until specifically revoked or its purpose accomplished." The Maine Supreme Court rejected this position on the following grounds:

The officers entered the defendant's home on the 5th under the protection of his consent. By nightfall, however, the defendant had ceased to be the husband assisting in the solution of his wife's death and had become the man accused of his wife's murder by poison held under arrest for hearing.

When the defendant became the accused, the protective cloak of the Constitution became more closely wrapped about him. For our purposes we need consider only the Federal Constitution. Like principles are applicable under our State Constitution, Article I, Section 5. There is a particularly heavy burden on the State to show consent to a search and seizure without a warrant when the defendant is under arrest. Burke v. United States (CA 1) 328 F.2d 399; Judd v. United States, 89 U.S. App.D.C. 64, 190 F.2d 649.

The consent of December 5 in our view should be measured on the morning of the 6th by the status of the defendant as the accused. There is no evidence whatsoever that the consent of the 5th was ever discussed with the defendant at or after his arrest, or that he was informed of the State's intent to enter and search his home on the 6th on the strength of a continuing consent. We conclude, therefore, that the consent of the defendant had ended by December 6, and accordingly the officers were not protected thereby on the successful search of the 6th [237 A.2d at 421].
V. Consent By a Person Other Than the Defendant.

A. General Background.

Ordinarily, one's personal constitutional rights cannot be waived by another person. In the area of consent searches, however, courts have long recognized that a valid consent given by one co-tenant permits use of the seized evidence against the other. See, e.g., United States v. Heine, 149 F.2d 485 (2d Cir., 1945). This doctrine was originally developed in the context of one spouse consenting to the search of premises for evidence that might incriminate the other. Such consents were sometimes upheld on the theory that the wife was the agent of the husband. See United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y., 1937).

More recent decisions, however, have relied on the theory that any person who has the right to full use of the property obviously can waive his privacy therein, and, if this happens to injure his co-tenant, that is merely the price one pays for sharing the property. As one court put it, "where two persons have equal rights to the use or occupation of premises, either may give consent to a search and the evidence thus disclosed can be used against either." People v. Shambley, 122 N.E.2d 172, 174 (Ill. Sup Ct., 1954).

The Supreme Court has never directly considered this theory in a co-tenancy situation. In Amos v. United States, 255 U.S. 313 (1921), the Court found it unnecessary to consider the issue since the wife's consent there had clearly been coerced. In several later cases the Court held that a landlord could not consent to the search of his tenant's quarters. See Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961). The emphasis in each case, however, was on the limited interest of the owner. Still there was at least some general language in Stoner, supra, that might raise some question concerning the validity of consents by co-tenants:

It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right therefore which only the
petitioner could waive by word or deed, either directly or through an agent. 376 U.S. at 489. Cf. Katz v. United States, 389 U.S. 347, 351 (1967) ("The Fourth Amendment protects people, not places.").

On the other hand, in Bumper v. North Carolina [discussed supra Section IV (C)], the Court did not question the right of the grandmother to permit the search of her home for evidence incriminating her grandson who also lived there. While the Court found the grandmother's consent was involuntary, it did make reference to the effect of her consent in Footnote 11 (36 U.S.L.W., 4515):

[The grandmother] owned both the house and the rifle. The petitioner concedes that her voluntary consent to the search would have been binding upon him. Conversely, there can be no question of the petitioner's standing to challenge the lawfulness of the search. He was the "one against whom the search was directed," Jones v. United States, 362 U.S. 257, 261, and the house searched was his home. The rifle was used by all members of the household and was found in the common part of the house.

B. The Interest Needed to Authorize a Search of Premises.

The courts generally have insisted that consent come from a tenant who is presently occupying the premises. Most cases have involved husbands and wives. Recent decisions have upheld consents given by paramours who actually shared the premises on a continuing basis. See Jenkins v. State, 230 A.2d 262 (Del. Sup. Ct., 1967); United States v. Airdo, 380 F.2d 103 (7th Cir., 1967). It must clearly be shown, however, that the paramour had an "equal right or joint control" over the premises. People v. Rodriguez, 223 N.E.2d 414 (Ill. Ct. App., 1967) (rejecting consent given by a paramour). Cf. State v. Bellows, 432 P.2d 654 (Wash. Sup. Ct., 1967). Of course, the individual also must have the proper capacity within the household. Several recent decisions have rejected consent given by a minor child who lives in the house-

In *Chapman v. United States*, the Supreme Court held that a landlord could not consent to the search of rented premises occupied by a tenant. 365 U.S. 610 (1961). A recent lower court decision, *United States v. Botsch*, 364 F.2d 542 (2nd Cir., 1966), raises a serious question concerning the scope of the *Chapman* ruling. In that case, the defendant Botsch had authorized his lessor Stein to use his key to the premises for the purpose of accepting deliveries. Stein also signed receipts for the deliveries and paid the deliverymen. When Stein learned from the postal inspectors that the deliveries may have been part of a mail fraud scheme, he “unlocked the [leased] shanty and asked the inspectors if they wished to enter in order to examine what was stored there.” The Court distinguished *Chapman* on the following grounds:

We are unpersuaded by our dissenting brother’s reliance on *Chapman v. United States*, 365 U.S. 610 (1961), where the Court invalidated a search made with a landlord’s consent. In *Chapman*, the landlord did not possess a key to the dwelling. In the case before us, Stein not only possessed a key to the shack with Botsch’s knowledge and approval, but Botsch expressly authorized him to use it for the purpose of accepting the deliveries which flowed from the fraudulent scheme. Thus, Stein and Botsch did not occupy a mere landlord-tenant relationship; Stein, having been made an unwitting accomplice by Botsch, had a vital interest in cooperating with the Inspectors so that he could remove any taint of suspicion cast upon him. Indeed, any individual under similar circumstances would have a right to promptly and voluntarily exculpate himself by establishing that his role in the alleged scheme was entirely innocent and passive.

This right to exculpate oneself also decisively distinguishes the November 6 search from those condemned in the so-called “hotel” cases relied upon by our dissenting colleague: *Stoner v. State of California*, 376 U.S. 483 (1964); *United States v.*
Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949). While it is true that in each of these cases, the manager or clerk possessed a key to the hotel rooms, the circumstances did not warrant the conclusion that the key was to be utilized for anything other than to furnish the usual and normal conveniences to the guests such as permitting maids to enter in order to make beds, clean, etc. In none of these cases was the manager or clerk an innocent accomplice in illegal activities and in none of them was the key which he retained unknowingly utilized in furtherance of an illicit scheme.

If this were a simple case of a landlord authorizing a search of his tenant's property and no more, or, to use our dissenting brother's illustration, of a neighbor placing mail or a package inside and consenting to a search of an absent householder's dwelling merely because someone "suspects that a package or letter may have contained evidence of fraud," we would be presented with an entirely different question. But, here, as Judge Dooling found:

Stein was not an inactive landlord, aloof from his tenant's activities and immune from any taint that inhered in them. * * * If the merchandise was being stolen through a confidence trick or obtained by a fraudulent scheme utilizing the mails, Stein was as guilty as his principal Botsch unless he was innocent in mind; his were, objectively, acts that were facilitating a fraud or theft or both. * * *

Because Stein's activities—though innocent—were inextricably intertwined with Botsch's alleged scheme and cast suspicion him, we believe his authorization of the inspection when viewed in its full context rendered the search reasonable. Cf., Marshall v. United States, 352 F.2d 1013 (9th Cir., 1965), cert. denied, 382 U.S. 1010 (1966); United States v. Eldridge, 302 F.2d 463 (4th Cir., 1962); Von Eichelberger v. United States, 252 F.2d 184 (9th Cir., 1958). It would be a harsh doctrine, indeed, that would prevent an innocent pawn from
removing the taint of suspicion which had been cast upon him by a defendant's cunning scheme. Stein's innocence stood or fell on the very merchandise which, only after inquiry and inspection, could exculpate him.

It is urged, moreover, that we should invalidate the November 6 search because the Government failed to establish that it would have been prejudiced by any delay which would have resulted from a formal search warrant application. We recognize the force of this argument; courts should not be niggardly in extending the protection of constitutional rights and there is much to be said for interposing a magistrate between enforcement officers and potential defendants. Nevertheless, in the circumstances presented here, we are not persuaded that the officers' failure to obtain a warrant rendered the search unreasonable. Once Stein, without being urged, coerced or imposed upon, invited the inspection, we believe for the reasons already stated, that Daly and Mailloux were wholly justified in examining the premises [364 F.2d at 547-48].

A dissenting opinion found this reasoning unconvincing:

It has been held that even the consent of one lawfully in possession or occupancy cannot make reasonable a search into another's personal effects. Holzhey v. United States, 223 F.2d 823 (5th Cir., 1955); United States v. Blok, 88 U.S. App.D.C. 326, 188 F.2d 1019 (1951); Reeves v. Warden, 346 F.2d 915 (4th Cir., 1965). . . . These cases recognize that even if one's right to entry is unlimited, consent may be ineffective to make reasonable a search.

Similarly, when the right to entry is limited, the consent is less effective. It has long been held that where one's right to possession or occupancy is as great as another's, consent can be effective. Reszutek v. United States, 147 F.2d 142 (2d Cir., 1945); Stein v. United States, 166 F.2d 851 (9th Cir.), cert. denied 334 U.S. 844 (1948); see the cases collected in Eldridge, supra, 302 F.2d at 465, notes 3-6. In such a case consent is not usually made on behalf of the absent person.
The consenting person has an independent right to permit the search. In other situations, where the consenting person has a lesser right to occupancy or possession, which might not alone permit a search on consent, it has sometimes been held that the absent person has made the consenting party his agent to consent, see Teasley v. United States, 292 F.2d 460 (9th Cir., 1961), or that he accepts the risk of effective consent, Marshall, supra, but such an agency must be clearly shown. Klee v. United States, 53 F.2d 58, 61 (9th Cir., 1931).

Since consent was here given while Stein was not engaged in receiving or paying for shipments, we are not called upon to decide either whether or not Botsch authorized Stein to consent to searches while engaged in such activity, or whether or not Stein's right to enter then would be sufficient to make effective his own consent, for entry, or for search, or for both. When he consented to the entry, and opened the door, he was in no different a position from the hotel clerk in Stoner, the hotel manager in Lustig v. United States, 338 U.S. 74 (1949) and United States v. Jeffers, 342 U.S. 48 (1951), or the landlord in Chapman v. United States, 365 U.S. 610 (1961). I cannot agree that the suspicion which naturally would be cast on Stein compels a different result than these cases. It neither increased his right to occupancy nor created an agency so that Stein could give Botsch's consent. Nor can it be said that Botsch "accepted the risk," as in Marshall, that Stein would let the Inspectors search. That, like the implied agency, is a species of the "unrealistic doctrines of 'apparent authority' " condemned in Stoner. The fact that Stein, like the hotel clerk, at some time could properly enter is no reason to infer either authority to enter on an occasion such as this, or to give Botsch's consent. And it defies reason to conclude that Botsch intended that Stein, out of his unwitting role in the fraud, could effectively consent to a search. If this search was good, any neighbor with whom a key is left so that newspapers, mail or packages may be put inside the door in a householder's absence may authorize a general search.
of the house if anyone suspects that a package or letter may have contained evidence of fraud. I would not so erode the right to be free from unreasonable searches in order to sustain the conviction of this rascal. I would reverse [364 F.2d at 542, at 551 (1966)].

C. Limitations Upon the Scope of the Search Authorized by the Third Party.

Recent decisions have emphasized that even where a co-tenant could authorize a search of the premises generally, this would not include those personal effects of the defendant in which the co-tenant had no interest. Thus People v. Egan, 58 Cal. Rptr. 627 (Cal. App., 1967) held that consent of an owner to search his apartment does not authorize opening and searching a kit bag belonging to the defendant (owner's stepson). The court stressed that the owner had no "right, title or interest in the kit bag," 58 Cal. Rptr. at 630. Cf. Nugent v. Superior Court, 62 Cal. Rptr. 217 (Ct. App., 1967). But cf. United States v. Garret, 371 F.2d 296 (7th Cir., 1966). Courts have divided over the application of this principle to a bedroom occupied solely by the defendant. Several have held that, where the defendant was an "invitee" and not a real "tenant," the owner can consent to the search of the defendant's room. See Weaver v. Lane, 382 F.2d 251 (7th Cir., 1967); Spencer v. People, 429 F.2d 266 (Colo. Sup. Ct., 1967). Cf. United States v. Pasterchik, 267 F. Supp. 44 (Ore., 1966). In People v. Overall, 151 N.W.2d 225 (Mich. Ct. App., 1967), the court ruled that a grandmother who owned the home could not authorize the search of her grandson's room. The opinion did not attempt to distinguish the "invitee" cases, but simply relied on Stoner v. California, supra. Apparently, the grandson in Overall was not a minor, although the court does not stress this point. Other courts have consistently upheld a parent's right to authorize search of a minor's living quarters. See, e.g., Maxwell v. Stephens, 229 F. Supp. 205 (E.D. Ark., 1964); McCray v. State, 202 A.2d 320 (Md. Ct. App., 1964). See also State v. Little, 431 P.2d 810 (Ore. Sup. Ct., 1967) [holding that a mother could
consent to the bodysearch (blood and pubic hair) of a 15 year old child—though it should be noted that the child here did not object].

D. Consent Where One Joint Occupant Objects.

Since the effectiveness of a co-tenant’s consent is premised upon his personal property interest (rather than the waiver of the other’s rights), one might assume that consent would be valid even if the defendant co-tenant were present and objected to the search. However, a recent Maryland decision, Dorsey v. State, 232 A.2d 900 (Md. Ct. App., 1967) reaches a contrary conclusion. Officers there were denied the right to search an apartment by one of the defendants, but received permission from the female occupant, who stated that she paid the rent for the apartment out of her welfare check. [There was some dispute as to the voluntariness and scope of her consent, but the court found the consent invalid without reaching these issues.] The court concluded that defendant, who testified to living in the apartment “off and on,” was a joint occupant of the apartment and that his objection invalidated the consent of the female occupant:

In Nestor v. State, 243 Md. 438, 443, 221 A.2d 364, 367, the court held that one co-tenant may give consent to a search and the evidence there disclosed can be used against the other tenant “whose permission to enter and search the premises had not been elicited.” Hence, in Bellam v. State, 233 Md. 368, 196 A.2d 891, the consent of a wife as a joint occupant of a residence with her husband was held sufficient to bind her husband, who was not present. In McCray v. State, 236 Md. 9, 202 A.2d 320, it was held that the consent of a parent to search a part of his dwelling used by his son who resided there only occasionally, and who was not present at the time of the search, was binding on the son. But, as pointed out in Nestor, 243 Md. at p. 443, 221 A.2d at p. 367, that the consent of one co-tenant may bind the other “does not stem from the implication that a consenting tenant may waive the other’s constitutional rights against trespass and
unreasonable searches and seizures, but rather from the possessory rights of the co-tenant to admit to the jointly controlled premises whomsoever he wishes, including police officers." Unlike Bellam or McCray, Gladden, as the co-occupant in the instant case, was present and expressly objected to the search without a warrant, thus making the factual situation similar to that before the Supreme Court of California in Tompkins v. Superior Court, 59 Cal.2d 65, 27 Cal.Rptr. 889, 378 P.2d 113. In that case, a co-tenant was arrested and gave police authority to search his apartment. The police attempted to search the apartment without a search warrant against the express objection of the arrestee's co-tenant. In holding that the police officers committed a trespass and made an unreasonable search and seizure, the Court said (page 892 of 27 Cal. Rptr., page 116 of 378 P.2d):

Joint occupancy of property, particularly residential property, obviously demands reasonable restrictions on the right of each joint occupant either by himself or through another to exercise full control over the property at all times regardless of the wishes of another joint occupant present on the premises. A joint occupant's right of privacy in his home is not completely at the mercy of another with whom he shares legal possession. . . .

Accordingly, we hold that one joint occupant who is away from the premises may not authorize police officers to enter and search the premises over the objection of another joint occupant who is present at the time, at least where as in this case, no prior warning is given, no emergency exists and the officer fails even to disclose his purpose to the occupant who is present or to inform him that he has the consent of the absent occupant to enter.

See also Lucero v. Donovan, 354 F.2d 16 (9th Cir.), a case in which authority given to search residential premises by one having occupancy privileges therein was held rescinded by the other occupant's expressed protest to entry by the police [232 Md. at 902].
VI. The Need For a Warrant.

A. Background.

The Fourth Amendment is composed of two conjunctive clauses. The first guarantees the right of the people against unreasonable searches, and the second sets forth the conditions under which a warrant may issue (i.e., probable cause, particularly in description of property, etc.). The relationship between these two clauses has been the subject of considerable dispute over the years. Some judges view the clauses as largely separate, treating the use of a warrant as one factor in determining the reasonableness of the search, but not an essential factor. Other judges would read the first clause as necessarily modified by the second. For them, the first clause essentially "incorporates" the warrants clause so that all searches without a warrant are unreasonable—except in those cases where absolute necessity may preclude the officer from obtaining a warrant in advance of the search. The decisions of the Supreme Court over the last twenty years have seemingly moved back and forth from one position to the other. See Able v. United States, 362 U.S. 21, 235 (1959) listing a series of cases which the Court itself recognizes "cannot be satisfactorily reconciled."

Recent decisions indicate that the present Court clearly takes a position that emphasizes the warrant requirement. While the use of a warrant is not viewed as absolutely essential, the Court does treat the warrant requirement as the basic criterion of reasonableness, and searches upheld without a warrant are viewed as based on exceptions to the general rule. This point has been made in several recent cases. Typical is the statement in Katz v. United States, 389 U.S. 347, 356-57 (1967):

This Court has never sustained a search upon the sole grounds that the officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable
cause, *Agnello v. United States*, 269 U.S. 20, 33, for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .” *Wong Sun v. United States*, 371 U.S. 471, 481-82. “Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,” *United States v. Jeffers*, 342 U.S. 48, 51 and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions [389 U.S. at 357].

A similar sentiment was expressed in the recent *Terry* case, where the Court carefully distinguished the issue of stop-and-frisk from that involving “police conduct subject to the warrant clause of the Fourth Amendment.” In particular, the Court noted that it was not retreating from its “holdings that the police must, whenever practicable, obtain advance judicial approval of searches through the warrant procedure . . ., or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.” See Chapter 1. See also *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

Despite the strong language of these cases, it should be remembered that the well-delineated exceptions referred to in *Katz* have not always been construed narrowly. See e.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950), *Harris v. United States*, 331 U.S. 145 (1947). Also, in *Cooper v. California*, 386 U.S. 58 (1967), decided only one term before *Katz* and *Terry*, a majority opinion again emphasized the distinction between the “reasonableness clause” and the “warrants clause,” stating:

> It is no answer to say that the police could have obtained a warrant, for “[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.” *United States v. Rabinowitz*, 339 U.S. 56, 66.”
B. Exceptions to the Warrant Requirement: Search of Moving Vehicles.

In Carrol v. United States, 267 U.S. 132 (1925), prohibition agents, having probable cause to believe that an automobile traveling on the highway was carrying liquor, stopped the car, searched it, and found and seized the liquor. Provisions of the National Prohibition Act, as construed by the Court, authorized warrantless searches of moving vehicles. The Court found this authorization reasonable in light of (1) the historical practice, recognized at the time of the adoption of the Fourth Amendment, of custom searches of vessels on probable cause without a warrant, and (2) the practical problems of law enforcement resulting from the fact that vehicles could easily move on and disappear before a warrant was obtained. In Brinegar v. United States, 338 U.S. 160 (1949), the Court extended Carrol to a warrantless search of a moving vehicle in a situation where no statute authorized the search.

Brinegar and Carrol have been followed by a long line of lower court opinions, including several recent cases. See, e.g., United States v. Freeman, 382 F.2d 272 (6th Cir., 1967); Bailey v. United States, 386 F.2d 1 (5th Cir., 1967). The Supreme Court itself has reemphasized the basic rationale of Carrol and Brinegar by refusing to apply that doctrine to a vehicle that is immobilized. See Preston v. United States, discussed infra Section VII (G).

C. Exceptions to the Warrant Requirement: Response to an Emergency Situation.

Courts have long recognized the right of officers to break into a dwelling in order to protect persons therein and to incidentally seize such contraband as was open to view. See generally Johnson v. United States, 333 U.S. 10, 14-15 (1948) and McDonald v. United States, 335 U.S. 451, 456, recognizing a special "exigencies of the situation" exception. Thus officers who were keeping a house under surveillance were justified in making a warrantless entry when a fire broke out inside the house, and they could properly

In *Warden v. Hayden*, 387 U.S. 294 (1967), the "exigent circumstances" doctrine was applied to a case of "hot pursuit." The relevant facts are succinctly stated in the Court's opinion:

About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of "Holdup," followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found a jacket and trousers of the type the fleeing man was said to have worn in a washing machine. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's
bed, and ammunition for the shotgun was found in a bureau drawer in Hayden’s room. All these items of evidence were introduced against respondent at his trial [387 U.S. at 297-98].

The court below suggested that the search could be sustained as incident to an arrest. The Court majority, however, preferred to rely on the emergency situation that necessitated the entry:

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, “the exigencies of the situation made that course imperative.” *McDonald v. United States*, 335 U.S. 451, 456. The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

We do not rely upon *Harris v. United States*, *supra*, in sustaining the validity of the search. The principal issue in *Harris* was whether the search there could properly be regarded as incident to the lawful arrest since Harris was in custody before the search was made and the evidence seized. Here, the seizures occurred prior to or immediately contemporaneous with Hayden’s arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as
may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some weapons had been found at the time he opened the machine. In these circumstances the inference that he was in fact also looking for weapons is fully justified [387 U.S. 298-300].

The exact scope of the "exigent circumstances" doctrine announced in Hayden is not entirely clear. A recent California decision suggests both its appropriate application and its limitations. In People v. Kampmann, 65 Cal. Rptr. 798 (Ct. App., 1968), two officers entered a house without a warrant in response to neighborhood complaints of screaming and other circumstances that suggested a possible kidnapping. The house was empty when the officers entered. Finding phonograph records on the floor, bottles knocked over, and papers scattered, they decided to search all the rooms and closets to determine whether someone might not have been killed. After finding nothing, one of the officers went to the kitchen to use the telephone. His partner noticed an open coffee can on a table near the phone. It contained hypodermic needles, syringes and marijuana. This discovery was reported to headquarters and more officers were dispatched to make
a further investigation. Meanwhile, the officers managed to find the owner in a local garage, and he explained that the commotion that had disturbed the neighbors was simply a very noisy family dispute. The officers were satisfied with this explanation, but arrested the owner on the narcotics charge. Subsequently, other officers returned to the house and conducted a second, more thorough search without a warrant. The second search produced more marijuana. The court found that the first search was valid under *Warden v. Hayden*, but not the second:

Appellant's first contention is that although the entry originally made by the officers was lawful, as soon as the first can of marijuana was discovered, they should have posted a guard upon it and procured a search warrant before making a seizure. (*Cf. Trupiano v. United States* (1948) 334 U.S. 699, overruled in *United States v. Rabinowitz* (1950) 339 U.S. 56). It is true that such a procedure was followed in *People v. Roberts* (1956) 47 Cal.2d 374, 303 P.2d 721, where police officers entered premises without a warrant when, approaching to investigate a burglary, they heard sounds like moans of distress inside the apartment. While searching for someone in distress they noticed a stolen radio in the kitchen. Rather than seizing the radio immediately they procured a search warrant. The conviction which was founded upon the seized radio was affirmed. However, the *Roberts* case is not a holding that the officers were *required* to obtain a warrant in that situation. Appellant relies upon *United States v. Scott* (D.C. 1957) 149 F.Supp. 837, in which officers lawfully entered a robbery suspect's apartment, saw in plain sight items taken in the robbery, and seized those items without a search warrant. The court held that once the officers found the stolen property there was no urgency requiring an immediate seizure. Thus, since they failed to go and get a search warrant, the seizure was held to be illegal and the evidence produced thereby was inadmissible. A contrary result has been reached by the United States Supreme Court in *Warden Md. Penitentiary v. Hayden* (1967) 387 U.S. 294, in which police officers
pursued a robber into a house and there made an extensive search which produced several items of evidence. The court held that the entry in hot pursuit was lawful, and thereupon sustained the admission of evidence which was discovered in a search reasonably connected with the hot pursuit even though in the circumstances there presented the search was held not to have been incident to the arrest.

Similar results have been reached in several California cases. In both People v. Smith (1966) 63 Cal.2d 779, 48 Cal.Rptr. 382, 409 P.2d 222 and People v. Gilbert (1965) 63 Cal.2d 690, 706, 47 Cal.Rptr. 909, 408 P.2d 365 (vacated on other grounds, 388 U.S. 263) an entry without a warrant was held to have been justified by hot pursuit or other pressing emergency, and evidence seized in the ensuing search was held to be admissible. In neither case was the search incident to an arrest. . . .

Appellant's final contention is that even granting the admissibility of the can of marijuana fortuitously seen by the first two officers the other evidence developed in the course of the later search should have been excluded. The Attorney General contends that the later discoveries were admissible as the incidental by-products of a continuing investigation of the supposed kidnapping, but the record compels a contrary view. According to the uncontradicted testimony of one of the officers, the further search may have begun before Kampmann was brought to the house but it was certainly continued thereafter, when the parents of the "kidnapped" girl had already been interviewed, and appellant had been taken away to jail; there was then no longer any concern with the supposed kidnapping. Clearly this continued searching had only one purpose: the development of evidence for a narcotics prosecution. The sequence of events related in the testimony makes it appear highly likely, if not absolutely certain, that all or a major part of the additional evidence was discovered after concern with the supposed kidnapping had ended. That phase of the search was unlawful and the
evidence developed thereby should have been excluded [65 Cal.Rptr. at 801-802].

D. Exceptions to the Warrant Requirement: The Threatened Destruction of Evidence.

Schmerber v. California, 384 U.S. 757 (1966), recognizes still another “exigent circumstance” that justifies a search without a warrant. In Schmerber the Court upheld the administration of a blood test to a defendant who had been arrested for “drunk driving.” The Court treated the withdrawal of blood (administered by a physician) as a form of search, but concluded that the officer who directed that the test be given acted appropriately even though he had not first obtained a warrant. The Court stressed the general importance of the warrant requirement, especially as it applied to the invasion of the body in search of evidence. Nevertheless, it concluded that: “The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.” Preston v. United States, 376 U.S. 364, 367. It noted that the “percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.” Moreover, in the Schmerber case, time had to be spent after the arrest in first taking the defendant to the hospital and then investigating the scene of the accident. Under such circumstances, “there was no time to seek out a magistrate and secure a warrant,” 384 U.S. at 770-71.

VII. Searches Incident to an Arrest.

A. Background.

Without doubt, the most significant exception to the warrant requirement is the search incident to the arrest. Far more searches are sustained on this basis than upon actual search warrants. Court decisions defining the scope of the permissible search incident to the arrest are not entirely consistent. The
cases of *Harris v. United States*, 331 U.S. 145 (1947) and *United States v. Rabinowitz*, 339 U.S. 56 (1950) have been described by the Court as setting "by far the most permissive limits upon searches incidental to lawful arrests." *Abel v. United States*, 362 U.S. 217, 235 (1960). In *Harris*, five officers possessing arrest warrants entered a four-room apartment and arrested the defendant in the living room. They then undertook a five-hour search of all four rooms, with the object initially of finding canceled checks used in effecting a forgery. During the search they came across various "draft cards" which were later introduced in defendant's trial for violation of the Selective Service laws. The Court in sustaining the search stressed that it was not a "general exploration" but had been aimed at finding specific evidence relating to the charge for which Harris had been arrested (331 U.S. at 153). In *Rabinowitz*, *supra*, the Court upheld the search, incident to defendant's arrest, of desks, file cabinets and other equipment in his one-room office. The officers had obtained an arrest warrant, and obviously entered the office with the intent to conduct a search. (They were accompanied by two stamp experts who would help in identifying various forged overprint stamps possessed by the defendant. The Court acknowledged that the officers had ample time to obtain a search warrant, but found that that factor could not be controlling. They stressed that the premises searched were "under the control of the person arrested."

Recent decisions have suggested a somewhat narrower basis for searches incident to an arrest. For example, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court suggested that the recognition of a warrantless search incident to an arrest rested on two factors:

First, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused . . .; second, once a search of the arrested persons for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth
Amendment's purpose to attempt to confine the search to these objects alone [384 U.S. at 757].

As noted in Section F, infra, such statements have lead some lower courts to suggest the Supreme Court today might not accept searches incident to arrests pushed to the extremes of Harris and Rabinowitz.

B. Factors Determining the Validity of a Search Incident to Lawful Arrest.

Lower courts have stressed various factors in determining the validity of a search incident to an arrest. These include (1) the territorial range of the search; (2) the timing of the search as it relates to the arrest; (3) the scope and intensity of the search; (4) the relation of the search to the grounds for arrest; and (5) the possible reliance on an arrest as a pretext to search. See State v. Chinn, 373 P.2d 392 (Ore. Sup. Ct., 1962); People v. Cruz, 395 P.2d 889 (Cal. Sup. Ct., 1960). Several of these factors have also been stressed in Supreme Court opinions. See, e.g., Agnello v. United States, 269 U.S. 20 (1925); Preston v. United States, 376 U.S. 364 (1964); Cooper v. California, 386 U.S. 58 (1967). Recent cases further develop their significance.

C. Territorial Range of the Search.

In Agnello v. United States, 269 U.S. 20 (1925), the Supreme Court emphasized that the right to search incident to an arrest extends only to "the place" of arrest. The Court held invalid the search of Agnello's house located several blocks from the place of his arrest. The scope of the Agnello ruling has been considered in several recent cases where the defendant was arrested within the immediate vicinity of his residence. In People v. Bennet, 280 N.Y.S.2d 258 (App. Div., 1967), the Court held that a search of defendant's hotel room was not incident to an arrest made in a hotel hallway on the same floor as the room. A similar position was taken in People v. Henry, 423 P.2d 557 (Cal. Sup. Ct., 1967)
(arrest made on sidewalk 10-12 feet from hotel entrance) and 
McIlvaine v. Middlebrooks, 265 F. Supp. 1004 (E.D. La., 1967) 
arrest a half block away from residence). In People v. Marquez, 
66 Cal. Rptr. 615 (Ct. App., 1968), on the other hand, the court 
upheld the search of a storage shed as incidental to an arrest 
made immediately in front of it. The court emphasized that just 
prior to the arrest the officers had seen the defendants carry 
packages resembling marijuana "bricks" into the shed, and the 
object of the search was "to obtain evidence of the very offense 
which the officers reasonably believed was being committed in 
their immediate presence." It concluded that "the fact that the 
arrestee was, at the moment of arrest, outside the four walls of 
the shed, does not, by itself, preclude a search of the shed." [66 
Cal. Rptr. at 620].

D. The Timing of the Search.

It is generally stated that the search must be contemporaneous 
with the arrest. See People v. Cruz, supra. The Supreme Court 
has held that the search of an automobile need not immediately 
follow an arrest, see Cooper v. California, 386 U.S. 58 1967 (dis-

cussed infra Section H.), but that case involved special circum-
stances not applicable to the search of a residence. However, an 
approach similar to that of Cooper has been employed to justify 
a subsequent search (at the jail) of bags carried by the defendant 
1967). Courts have also generally recognized the search and 
seizure of articles of clothing taken from the defendant at the 
time of imprisonment. See State v. Herring, 421 P.2d 767 (N.M. 
Sup. Ct., 1966); Arabia v. State, 421 P.2d 952 (Nev. Sup. Ct., 
1966). See also State v. Dill, 151 N.W.2d 413 (Minn. Sup. Ct., 
1967).

Two recent cases have held that the arrest need not precede 
the search so long as (1) the search and arrest are contemporaneous 
and (2) the officer had probable cause to arrest at the time he made 
Ct., 1967) (search of automobile); People v. Pankin, 143 N.W.2d
806 (Mich. Ct. App., 1966) (search of room). In sustaining this position, the Michigan Court relied heavily on the following discussion from an earlier California case:

[T]he search of defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence . . . or the officer had reasonable cause to believe he had committed a felony . . . . In such circumstances, however, it has been held that it is not significant whether the search precedes or follows the arrest. Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to the arrest is entitled to make a reasonable search of the person arrested, and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent 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. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it [143 N.W.2d at 810-811, quoting People v. Simon, 290 P.2d 531, 533 (Cal. Sup. Ct., 1955) But cf. Warden v. Hayden, 387 U.S. 294, 299 (1967)].

E. The Relation of the Search to the Grounds for Arrest.

The relationship of the search to the arrest has been a point of particular emphasis in the various automobile-search cases discussed infra, Section H. However, recent cases dealing with the searches of persons and residences have also stressed this factor. The courts have insisted that the search incident to an arrest be for evidence relating to the crime for which the arrest was made. The officers cannot arrest for one crime and proceed to search for another. Jack v. United States, 387 F.2d 471 (9th Cir., 1967).
In *Handley v. State*, 430 P.2d 830 (Okla. Cr., 1967), the Court rejected an intensive search of a house which produced narcotics buried in a jar under the house as not incident to a burglary arrest. The Court placed particular emphasis on the fact that two narcotics agents had accompanied sheriff’s deputies in making the burglary arrest. In *People v. Baca*, 62 Cal. Rptr. 182 (Ct. App., 1967), the Court held that the arrest of defendant as a fugitive did not authorize a search of the bathroom since no evidence of the crime (unlawful flight) could have been found there. Again the arrest was made by narcotics agents who discovered heroin in the search. On the other side, in *State v. Bullock*, 431 P.2d 195 (Wash. Sup. Ct., 1967), the court upheld the search of defendant’s apartment as incident to an arrest for assault. In that case, however, the officers were seeking a specific credit card which would have been evidence in the assault case. Of course, once the search was directed at evidence related to the arrest, the officers were entitled to seize contraband (marijuana) found in the course of the search. *See also Harris v. United States*, 331 U.S. 145 (1947).

The relationship between the search and the grounds for the arrest has seemed to cause the courts far less concern where only a search of the person is involved. Thus several cases have upheld complete searches of the person incident to arrest for public intoxication. *See, e.g., Chambler v. State*, 416 S.W.2d 826 (Tex. Sup. Ct., 1967); *Farmer v. State*, 208 So.2d 266 (Fla. Ct. App., 1968); *Lofton v. Warden*, 431 P.2d 981 (Nev. Sup. Ct., 1967).

In *Lofton, supra*, the officers testified that they believed the defendant might have possessed a weapon since he insisted on keeping his left hand in his pocket. (The search produced marijuana.) In *Chambler*, the court also identified the search as one for weapons, although it is not clear whether the officers would have met the standard announced in *Terry v. Ohio, supra* Chapter 1, as justifying a frisk—whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. In *Farmer*, however, the officer opened up a matchbox found in defendant’s possession, an act
which would have been totally unnecessary in a weapons search. The matchbox contained marijuana and the Court held it was properly seized in a search incidental to the arrest. A contrary position is suggested by *State v. Johnson*, 427 P.2d 705 (Wash. Sup. Ct., 1967).

F. Arrests Made as a Pretext to a Search.

Several recent decisions have rejected as unreasonable searches that followed arrests manipulated for the very purpose of making such searches. See, e.g., *Handley v. State*, 430 P.2d 830 (Okla. Cr., 1967); *Niro v. United States*, 388 F.2d 535 (1st Cir., 1968); *United States v. James*, 378 F.2d 88 (6th Cir., 1967); *United States v. Kleefeld*, 275 F. Supp. 761 (S.D.N.Y., 1967). The basic rationale of these cases is well summarized in *Handley*:

We therefore conclude that the proper test of a reasonable search and seizure is based upon the entire factual situation. Was the search close both in time and space to the arrest? Furthermore, was the intensity of the search commensurate both with the crime and what was known of the criminal? Finally, there is the question of the causal relationship between the arrest and the search. In each case, the trial judge must determine whether the officers went to the place to make a lawful arrest, and in making it, looked for evidence lawfully subject to seizure, or whether the officers used a pretended arrest for one offense as a “Trojan Horse” in order to obtain entry, only to prosecute for some greater crime after finding sufficient evidence to justify their belief in greater crime.

The first kind of search is incidental to an arrest and is lawful—the second is a fishing expedition, and is as odious as the general warrant of antiquity [430 P.2d at 834].

Aside from the factors mentioned in *Handley*, the courts have also emphasized the failure to obtain a warrant when one could readily have been had. Thus in *Niro* the court noted:

We cannot accept the government’s contention that this was
not a case "where there was clear evidence of probable cause to make the arrests [substantially] prior to the time they were made." Quite to the contrary, the arresting officer testified as follows.

Q. "Now, you had had all of the information that was available to you with regard to this arrest, and with regard to this search and seizure, on the evening of September 19th had you not?"
A. "Yes, sir."

No contradiction is to be found. Either the officers had had probable cause to make the arrests for over twelve hours (which we believe they did) or they never had it.

In the light of the unexplained neglect to obtain a warrant, this case fits squarely within *Trupiano v. United States*, 1948, 334 U.S. 699. . . .

[Admittedly] . . . two years [after *Trupiano*] the Court decided *United States v. Rabinowitz*, 1950, 339 U.S. 56, [in which it was said that the test] was the reasonableness of the search viewed "under all the circumstances." The Court stated:

"To the extent that *Trupiano v. United States*, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." 339 U.S. at 66. (Emphasis ours.)

While the Court said that the "practicability of procuring a search warrant" was no longer determinative, and that to that extent *Trupiano* was overruled, it did not say that such omission was not a circumstance to be considered. Although it itemized the particular circumstances it found relevant, it did so only in the context of determining whether there
was probable cause, not to explain the departure from Trupiano. Unfortunately, it failed to provide any standard for determining what was overall reasonableness. After nearly twenty years, the lower courts still lack illumination. . . .

The present case does not fit Rabinowitz. It substantially fits Trupiano. Accordingly, the question comes whether Trupiano stands today entirely abandoned. While we cannot speak with certainty, we think it does not. We find it noteworthy that the Court, while not mentioning Trupiano, continues to cite the similar case of McDonald v. United States, with approval. See Katz v. United States, 389 U.S. 347, n. 19; Camara v. Municipal Court, 387 U.S. 523, 529. The Court continues to stress the desirability of obtaining a search warrant when it is reasonably practicable to do so. See, e.g., Katz v. United States, supra. If no penalty will ever attach to a failure to seek a warrant, as distinguished from the officers making their own, correct, determination of probable cause, warrants will never be sought, at least when the search is expected to be accompanied by an arrest.

We think it proper to say that while the failure to obtain a warrant when one could readily have been had is not of necessity fatal to a search or seizure concomitant with an arrest the nature of which had been fully anticipated, it will be fatal unless there are at least some countervailing factors. We need not define such circumstances. In the case at bar we find none. We hold that the government cannot rely upon an expected arrest to seize stolen goods, the presence of which it long had probable cause to know of, simply to avoid the inconvenience of obtaining a search warrant. Cf. United States v. James, 6 Cir., 1967, 378 F.2d 88; United States v. Harris, 6 Cir., 1963, 321 F.2d 739, 741 and cases there collected.

Proceeding without a warrant is not to be justified, as the government suggests here, by the fact that by the time the officers act, dispatch is necessary to avoid flight or injury to person or property. Haste does not become necessary in the present sense if the need for it has been brought about by
deliberate and unreasonable delay. This would allow the exception to swallow the principle [388 F.2d at 538-40].

In *James, supra*, the Court not only emphasized the same point, but cited the agents' employment of an arrest warrant as evidence that a search warrant might have been obtained:

Since the agents had ample time to secure a warrant for her arrest, they obviously had time to secure a search warrant to search her residence, but did not obtain one. The offense for which the arrest warrant was issued took place on June 3, 1963. The arrest was not made until September 26, 1963, on a warrant obtained only one or two days prior thereto. No explanation has been offered as to why the agents waited for more than three and one-half months after the offense had been committed, to obtain the arrest warrant. Appellant James had been living in the searched apartment with Sanders Mallory, Jr., since the middle of 1962. The agents had information that James and Mallory had been using their residence (first Tuxedo Street, then the apartment on Elmhurst Street) as their place of business for the distribution of narcotics, from the latter part of 1961 up until the date of the arrest.

The Government contends, however, that the only reliable information which it had was concerning violations which took place at the apartment on June 3, 1963 and July 9, 1963, and this information was too remote in time from September 26, 1963 to obtain a search warrant. But the fact is that the narcotics agents made no attempt to secure a search warrant. The testimony of Agent Miller was that the question of whether there was sufficient evidence to obtain a search warrant did not arise and he made no determination as to the need for it. District Supervisor Ellis testified that there was no discussion about obtaining a search warrant. . . .

Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an
arrest. It is clear that their primary purpose was to make a
general exploratory search of the apartment, with the hope
of finding narcotics. This search, in our judgment, was un-
reasonable and violated the rights of Appellant James under
the Fourth Amendment to the Constitution. [378 U.S. at
90-91].

Compare United States v. Costello, 381 F.2d 698 (2nd Cir., 1967)
(holding that the failure to obtain a search warrant in addition
to the arrest warrant did not in itself establish a primary motiva-
tion of using the arrest as a basis for a search); Spinell v. United
States, 382 F.2d 871 (8th Cir., 1967) (holding that delayed execu-
tion of the arrest does not necessarily establish that the arrest
was improperly employed to establish a search incident thereto).
See also United States v. Weaver, 384 F.2d 879 (4th Cir., 1967).

G. Search of the Automobile and/or the Person Incident
to a Traffic Arrest.

Recent cases have reaffirmed that violation of a traffic ordinance
does not, in itself, justify a search of the offender’s automobile.
particular concern over the potential use of the traffic arrest as
a pretext to search a car for evidence of other offenses. See
Sedacca v. State, 236 A.2d 309 (Md. Ct. App., 1967); Riddle-
hoover v. State, 198 S.2d 651 (Fla. Ct. App., 1967); Amador
Gonzales v. United States, 391 F.2d 308 (5th Cir., 1968). Search
of an automobile has been upheld, however, where observations
by the police after the traffic stop suggest that the car might be
stolen. Thus a search has been upheld where the driver was
unable to produce a driver’s license, identification or registration
certificate, Taylor v. State, 421 S.W.2d 403 (Tex. Ct. Crim. App.,
1967); where the car had no plates, title certificate was not in
driver’s name and was not signed, and the driver had no license,
People v. Brown, 221 N.E.2d 772 (Ill. Sup. Ct., 1967); where the
defendant “kept getting in front” of the officer so as to keep

Recent cases have divided on the officer’s authority to search the driver’s person incident to a traffic arrest. People v. Marsh, 228 N.E.2d 783 (N.Y. Ct. App., 1967) and State v. Campbell, 235 A.2d 235 (N.J. Sup. Ct., 1967) suggest that, at most, the officer can only make a search for weapons if he fears the driver is armed. Sumrall v. United States, 382 F.2d 651 (10th Cir., 1967) permits a search of the person going far beyond a frisk for weapons.

H. The Search of an Automobile Incident to a Non-Traffic Arrest.

In Preston v. United States, 376 U.S. 364 (1964), the Court struck down the search of an automobile made after the defendants were arrested and jailed. The defendants there were arrested on vagrancy charges while seated in their automobile. The vehicle was subsequently taken into police custody to remove it from the street and was searched shortly thereafter. In finding the search illegal, the Court assumed arguendo that a search might initially have been made at the time of the arrest. It found, however, that the search of the car after the men were taken into custody and the car impounded was an entirely different matter. “At this point,” it noted, “there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime.” The Court concluded that the search was “too remote in time or place to have been made as incidental to the arrest.” 373 U.S. at 368.
In *Cooper v. California*, 386 U.S. 58 (1967), the Court distinguished *Preston* and upheld a search made one week after the arrest. The defendant here had been arrested on a narcotics charge and his car impounded pursuant to a special state law. That law provided that a vehicle involved in the illegal handling of narcotics was to be held as evidence until a forfeiture had been declared or a release ordered. The Court held that this factor strongly contributed to the justification of the subsequent search. It emphasized that, unlike this case, the police custody of the car in *Preston* had been totally unrelated to the vagrancy arrest. It also noted that the search here was "closely related to the reason the defendant was arrested." The Court did not classify the search as incident to the arrest, but simply noted that it was a "reasonable" search even though no warrant was obtained. In particular, it stated that "[i]t would be unreasonable to hold that the police, having to retain the car in their garage for [four months] . . . , had no right, even for their own protection, to search it."

The relationship of *Preston* and *Cooper* is not entirely clear. The Court in *Cooper* clearly sought to distinguish *Preston* but did so on several grounds. A dissenting opinion of four justices suggested that *Cooper* might constitute a sub silentio overruling of *Preston*. On the other hand, the Court's opinion in *Cooper* was written by Justice Black, who also authored the *Preston* opinion.

Many lower court opinions have avoided the difficulty of reconciling *Preston* and *Cooper* by finding that searches made shortly after the arrest, although not in the same place, were sufficiently contemporaneous to meet the requirements of *Preston*. See, e.g., *United States v. Dento*, 382 F.2d 361 (3rd Cir., 1967) (car moved to police station from busy highway and searched there 20 minutes after the arrest); *U.S. ex rel Spero v. McKendrick*, 266 F. Supp. 718 (S.D.N.Y., 1967) (car properly removed to the police station, five minutes away, in order to avoid traffic congestion and question the occupants); *United States ex rel Foose v. Rundle*, 269 F. Supp. 1017 (E.D. Pa., 1967) (search at station, two
blocks and 10 minutes away from point of arrest, not "too remote"); *Terrel v. State*, 239 A.2d 128 (Md. Ct. App., 1968) (car properly removed 3/4 miles to police station where better light would facilitate search). Several cases, in particular, have accepted searches as incident to an arrest where the automobile was first removed to a nearby police station in order to avoid a crowd. *See, e.g., People v. Webb*, 424 P.2d 342 (Cal. Sup. Ct., 1967); *United States v. Evans*, 385 F.2d 824 (7th Cir., 1967); *Morris v. Boles*, 386 F.2d 395 (4th Cir., 1967). Most of these cases also stressed the close relation between the purpose of the search and the crime for which the defendant was arrested. *See, e.g.*, *United States v. Dento*, supra; *State v. Omo*, 428 P.2d 768 (Kans. Sup. Ct., 1967). In fact, where the search was not aimed at finding evidence related to such crime, it has been found invalid even though conducted shortly after the arrest at a nearby police station. *See Barnett v. United States*, 384 F.2d 848 (5th Cir., 1967).

Courts relying on *Cooper* generally have limited its application to the searches of vehicles that were impounded originally as instruments of the crime for which the arrest was made. Under this approach, the entire automobile is viewed as originally "seized" when the police take the defendant into custody. Any subsequent search is considered merely as a reexamination of an item already taken incident to an arrest. *See Weaver v. Lane*, 382 F.2d 251 (7th Cir., 1967) (seizure of car as evidence of child molestation where blood on seat); *State v. McCoy*, 437 P.2d 734 (Ore. Sup. Ct., 1968) (seizure of car as instrument of rape); *State v. Hoy*, 430 P.2d 275 (Kans. Sup. Ct. 1967) (seizure of car allegedly involved in shooting incident). *See also Abrams v. State*, 154 S.E.2d 443 (Ga. Sup. Ct., 1967). Several cases have extended this doctrine to the seizure and search of automobiles not located at the point of arrest. *See United States v. Francolino*, 367 F.2d 1013 (2d Cir., 1967) (alternative ground: car located in driveway next to house in which the arrest was made); *Stewart v. People*, 426 P.2d 545 (Colo. Sup. Ct., 1967) (car located near scene of arrest where defendant was burglarizing a building, but was not
seized until after defendant was searched at the station and key to the car was found); *Lockett v. United States*, 390 F.2d 168 (9th Cir., 1968) (car was seized in San Francisco airport parking lot after defendant's confederate, arrested in Los Angeles, informed police that stolen securities were located in the car). These decisions go beyond *Cooper* in the sense that not even the original seizure of the automobile was incident to the arrest. They apparently rely on the premise that the entire automobile may be seized by the officer without a warrant in much the same fashion as he seizes contraband open to view.

I. The Legality of the Arrest.

Of course a search will be sustained only if incidental to a valid arrest. See *Henry v. United States*, 361 U.S. 98 (1961). Recent decisions suggest two trends in the analysis of the validity of an arrest. First, the validity of arrests for vagrancy have come under attack—especially where there is some suggestion that the arrest was a pretext to search (see Section F, supra). In *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. Ct. App., 1967), the New York Court of Appeals struck down the vagrancy offense as imposing criminal liability on a harmless status. In *Green v. United States*, 386 F.2d 953 (10th Cir., 1967), the Court condemned the improper use of vagrancy as a basis for detaining "suspicious characters." The Court there stated:

We agree with the contentions of appellants . . . that their original arrests as vagrants were not a lawful exercise of police power, that the searches of their persons were not justified as incidents to lawful arrest, and that as a consequence the money order found upon the person of Watkins was improperly admitted in evidence. Although the hour-long surveillance of appellants certainly pointed the finger of suspicion at their individual and concerted activity still neither of the appellants committed an unlawful act observed by the officers that can support a lawful arrest. Under Okla-
homa law a city police officer is a state officer, *City of Lawton v. Harkins*, 34 Okl. 545, 126 P. 727, 42 L.R.A.,N.S., 69, and may arrest without warrant when a public offense is committed in his presence or when a felony has been committed and reasonable cause exists to believe the person arrested has committed it. Title 22, Okl.Stat. § 196. Neither of these statutory authorities is applicable to the arrests of Watkins or James Green. Nor can the existence of an Oklahoma City vagrancy ordinance in use so as to constitute a tool of avoidance or shortcut to the basic requirements of due process in the administration of justice. And this fundamental rule exists regardless of the ultimate determination of the existent suggestion attacking the constitutionality of particular statutes making vagrancy a crime of status. *See Fenster v. Leary*, 20 N.Y.2d 309, 282 N.Y.S.2d 739, 229 N.E.2d 426 (N.Y.Ct.App. July 7, 1967). Vagrancy is a chronic condition rather than a moment of idleness or unemployment and under no acceptable concept was committed by these appellants in the presence of the arresting officers. Indeed, the officers here testified that the first arrests were triggered by suspicion that a "con game" was in progress and thus it follows that the arrest of Watkins and James Green was but a tool of convenience to gain time for investigation and give purported validity to otherwise unlawful searches and seizures. Such use of vagrancy statutes, we think, has been properly criticized. *See generally*, Note, "Use of Vagrancy-type Laws for the Arrest and Detention of Suspicious Persons," 59 Yale L.J. 1351 (1950); Foote, "Vagrancy-type Law and its Administration," 104 U. of Pa. L. Rev. 603 (1956) [386 F.2d at 955-56. *See also* Chief Justice Warren's dissent in *Wainwright v. New Orleans*, decided June 17, 1968.].

The second trend is not as clearly established. Several recent cases suggest that at least some courts are employing a more lenient standard for establishing probable cause. Of course, the determination of probable cause is so closely related to the facts