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THE EXCLUSIONARY RULE IN OPERATION—A COMPARISON OF ILLINOIS, CALIFORNIA AND FEDERAL LAW

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At common law, the admissibility of evidence is not affected by the illegality of the means by which it is obtained.[1] Underlying this rule is the principle that an objection to an offer of proof made upon the trial is limited to questions of competency, relevancy and materiality of the evidence. Under the common law, a court will not concern itself with collateral issues such as the source of the evidence or the manner in which it was obtained.[2] Thus, so far as the common law is concerned, evidence obtained by an unreasonable search and seizure is admissible in a criminal trial, notwithstanding the constitutional guarantees of freedom from unreasonable searches and seizures expressed in the fourth amendment to the federal constitution and in the constitutions of the various states.[3] On its face the common law rule of admitting illegally seized evidence seems to conflict with the constitution. However, the courts have explained away this seeming conflict by stating that constitutional rights are subject to protection by civil and criminal sanctions, and not necessarily by evidentiary rules of exclusion.[4]

In 1885, the Supreme Court, by way of dictum in *Boyd v. United States*,[5] first suggested that perhaps the *admission* of illegally obtained evidence is just as violative of fourth amendment guarantees as are the illegal methods used in obtaining such evidence. This suggestion was generally considered to be an illogical and improper doctrine,[6] although *Boyd* itself was not directly challenged in the Supreme Court for twenty years.

[1] Mc Cormick, Evidence §137 (1954); 8 Wigmore, Evidence §2183 (3d ed. 1940); 20 Am. Jur., Evidence §393 (1939),

[2] Ciano v. State, 105 Ohio St. 229, 137 N.E. 11 (1922); State v. Bond, 12 Idaho, 424, 86 Pac. 43 (1906); Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897); State v. Griswold, 67 Conn. 290, 34 Atl. 1047 (1896).

[3] U.S. Const. amend. IV The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[4] Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897), Shields v. State, 104 Ala. 35, 16 So. 85 (1894).

[5] 116 U.S. 616 (1886). In this case a statute authorized the court to require a defendant to produce his private papers in court. The court held that compulsory production of a man's private papers to establish a criminal charge against him was within the scope of the fourth amendment and thereby unconstitutional.

[6] Van Hook v. Helena, 170 Ark. 1083, 282 S.W. 673 (1926); State v. George, 32 Wyo. 223, 231 Pac. 683 (1924); Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923); Gore v. State, 24 Okla. Crim. 394, 218 Pac. 545 (1923); State v. Andrews, 91 W. Va. 720, 114 S.E. 257 (1922).

In 1914, in the celebrated case of *Weeks v. United States*,[7] the Supreme Court reverted to the approach taken in *Boyd* and for the first time formally stated that the exclusion of illegally obtained evidence in federal courts was implicit in the fourth and fifth amendments. The Court later indicated that the exclusion of such evidence was pursuant to a "judicially created rule of evidence which Congress might negate."[8]

Stimulated by the stern repressive war measures against treason and sedition in the years 1917–1919, and the enactment of the eighteenth amendment and its attendant legislation, the federal exclusionary rule was very strictly enforced and its influence soon spread to many of the states.[9]

Though Dean Wigmore has said the exclusionary rule was based merely on "misguided sentimentality,"[10] the federal courts have justified their stand for the most part on the constitutional-logical-moral ground that courts cannot consistently perform their duty of enforcing the constitution, and at the same time sanction and participate in illegal activity by receiving the fruits of unconstitutional searches and seizures.[11] To do so, it was announced, would deprive the defendant of a fair trial.[12] The rule has also been justified on a much more practical basis, as the only realistic method of avoiding the persistent violation of the fourth and fifth amendments by law enforcement officers.[13]

The question was then raised as to whether or not the exclusionary rule would be applied to criminal cases in the state courts. *Weeks* had said that the fourth amendment did not bind state officers. The Supreme Court then held, in *Wolf v. Colorado*,[14] that (1) unreasonable searches and seizures by state law enforcement officers violate the due process clause of the fourteenth amendment, but (2) states do not have to adopt the exclusionary rule as there are other means by which protection against such conduct can be afforded.[15]

[7] 232 U.S. 383 (1914).

[8] Wolf v. Colorado, 338 U.S. 25, 40 (1949).

[9] 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940). To date, the exclusionary rule has been adopted in 22 states: Alaska, California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming.

The common law rule is followed without qualification in 24 states: Arizona, Arkansas, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont and Virginia.

In Alabama, the common law rule is not applicable where the unlawful search is of a private dwelling for prohibited liquors. ALA. CODE tit. 29, §210 (1940); Green v. State, 79 So.2d 555 (1955). In Maryland, the common law rule applies only to felonies. MD. ANN. CODE art. 35, §5 (1957); Frank v. State, 189 Md. 591, 56 A.2d 810 (1948).

[10] 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940).

[11] Weeks v. United States, 232 U.S. 383, 392 (1914); The duty of giving to it (fourth amendment) force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." See also Justice Holmes' dissent in Olmstead v. United States, 277 U.S. 438, 470 (1928), where he stated that the "Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

[12] Rochin v. California, 342 U.S. 165 (1952).

[13] People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955). Even federal expression of the practical side of the doctrine was expressed by Judge Learned Hand in United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945), where he said that the exclusionary rule is the "only practical way of enforcing the constitutional privilege...." The Supreme Court has not directly expressed this view, but it is not difficult to imply the practical approach in many of their decisions. See: Carroll v. United States, 267 U.S. 132 (1925).

[14] Wolf v. Colorado, 338 U.S. 25 (1949).

[15] A broad exception to this rule is presented when state search and seizure methods "shock the conscience." In such a situation, due process will demand exclusion. A notable example of this exception is Rochin v. California, 342 U.S. 165 (1952). (State police officers broke into the upstairs room of a suspected dope addict, assaulted him, and then pumped his stomach to recover morphine tablets which he had swallowed.)

In Irvine v. California, 347 U.S. 128 (1954), however, where state police officers and a technician entered the defendant's house illegally and installed a concealed microphone in the hall and later moved it to the bedroom and then to a closet, the Court sustained the admissibility of evidence so obtained as not violative of federal law, citing *Wolf v. Colorado*. The Court seems to limit the *Rochin* doctrine to instances of brutality, coercion or violence to the person as apposed to trespasses upon property and invasions of privacy.

Thus, in Breithaupt v. Abram, 352 U.S. 432 (1957), the Supreme Court upheld a state conviction based on the results of an alcoholic blood test performed by medically approved means on an unconscious motor vehicle homicide suspect, as there was no real physical violence. Though the Supreme Court has not yet ruled on the reasonableness of a search inside a suspect's body, a Circuit Court, in Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957), *cert. denied* 356 U.S. 14 (1958), has suggested that if may be permissible in narcotics cases if it meets two standards: the presence of probable cause to believe the defendant has internally concealed narcotics, and the absence of pain and danger in the search. The idea seems to be that where the smuggler so degrades himself as to hide the contraband in such a manner, the law should not be powerless to cope with such tactics.

In King v. United States, 258 F.2nd 754, 755 (5th Cir. 1958), the Fifth Circuit cited *Blackford* in up-

Weeks and *Wolf* standing together seem consistent, except in a situation where a *state* agent makes the illegal search and seizure and such evidence is presented in a *federal* trial. *Weeks* said that the fourth amendment ban on illegal searches did not apply to state action. Thus, after *Weeks*, where a state officer seized evidence illegally, in the absence of any federal co-operation, and handed it over on a "silver platter" to federal authorities, such evidence was normally admissible in a federal prosecution.[16] This practice remained until recently, despite the *Wolf* case which says that an unreasonable search and seizure by a state officer violates the federal constitution because the fourth amendment prohibition is to be read into the fourteenth amendment as a requirement of due process of law.[17]

In a recent case, *Hanna v. United States*,[18] the Court of Appeals for the District of Columbia attempted to iron out this difficulty and concluded that the only rational view is that the *Weeks* and *Wolf* decisions, considered together, make *all* evidence obtained by unconstitutional search and seizure inadmissible in federal courts; and it thus prevented a state officer who seized evidence illegally from presenting such evidence in a federal prosecution.[18a]

As the Supreme Court did not provide a remedy that the states had to adopt, Illinois waited nine years after *Weeks* to adopt the exclusionary rule, pointing out when the rule finally was adopted that the provision of Article II, § 6 of the Illinois Constitution is practically the same as the fourth

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holding a similar search, noting the "sterility which would follow efforts at law enforcement," if they were not to allow such searches.

It is interesting to observe the highly practical approach to this problem taken by these two Circuit Courts, and perhaps the gravity of the social problem presented in narcotics cases demands this result. But, there is perhaps another distinction to be noted, in that both courts cite language in Boyd v. U.S., 116 U.S. 616, 623 (1886);

"The search for and seizure of . . . goods liable to duties and concealed to avoid the payment therof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not."

There is an apparent split however, in the district courts on the internal search question. One court has held that where a defendant, in crossing from Mexico into the United States under the influence of narcotics was properly seized and arrested, and the arresting officers had reason to believe he was concealing narcotics, extraction of a drug container from the defendant's rectum by a doctor under police direction did not "shock the conscience." Application of Woods, 154 F.Supp. 932 (N.D.Cal.), *appeal denied*, 249 F.2d 614 (9th Cir. 1957). *Accord*, United States v. Michel, 158 F.Supp. 34 (S.D. Tex. 1957). Two other district courts have ruled, however, that the use of a stomach pump and an emetic to recover swallowed narcotics is unreasonable. United States v. Willis, 85 F.Supp. 745 (S.D. Cal. 1949); *In re* Guzzardi, 84 F.Supp. 294 (N.D. Tex. 1949).

[16] Lustig v. United States, 338 U.S. 74 (1949); Burdeau v. McDowell, 256 U.S. 465 (1921); Graham v. United States, 257 F.2d 724 (6th Cir. 1958); Grimes v. United States, 234 F.2d 57 (5th Cir. 1956); United States v. Moses, 234 F.2d 124 (7th Cir. 1956); United States v. Haywood, 208 F.2d 156 (7th Cir. 1953); Shelton v. United States, 169 F.2d 665 (D. C. Cir.), *cert. denied*, 335 U.S. 834 (1948); United States v. Diuguid, 146 F.2d 848 (2d Cir.), *cert. denied*, 325 U.S. 857 (1945). But, where a state officer conducts a search on behalf of or in co-operation with federal officers, the evidence is inadmissible in a federal court. Gambino v. United States, 275 U.S. 310 (1927).

[17] 338 U.S. 25 (1949).

[18] 260 F.2d 723 (D.C. Cir. 1958).

[18a] The Supreme Court has granted *certiorari* in a case which presents almost the same issue as *Hanna*: Rios v. United States, 27 U.S. L. WEEK 3293 (U.S April 20, 1959) (No. 40 Misc.) The exclusionary states have followed the practice of admitting illegally seized evidence obtained by federal officers or officers of a sister state. People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935). Recently, however, in a 5–4 decision in Rea v. United States, 350 U.S. 214 (1956), the Supreme Court enjoined a federal officer who had seized evidence illegally from producing such evidence in a state court —the converse of the "silver-platter" situation. The evidence had been previously suppressed in a federal court.

This decision would again seem to be a definite departure from the free reign given to the state courts in the *Wolf* case; however, one must note that the decision here did not turn on any constitutional question, but merely on one concerning the federal courts' supervisory powers over federal law enforcement agencies. The property seized was contraband which Congress had made subject to the orders and decrees of the federal courts having jurisdiction thereof. How far this federal injunction process may go will thus seem to depend upon whether the items seized are or are not in the category of contraband.

It is doubtful that the Court will ever seek to enjoin a state officer from testifying in a state court, even in the case of state-federal co-operation, as this would not only involve an overthrowing of the *Wolf* case, but also an invasion and interference with state agencies in the enforcement of state law. The Court in the *Rea* case is very careful to point up this problem. 350 U.S. at 216.

All states adopting the rule are agreed, however, that the fourth amendment only protects citizens from unlawful *government* interference. Therefore, when a private individual conducts the unreasonable search, the evidence is always admissible unless some government collusion is shown to be involved. Burdeau v. McDowell, 256 U.S. 465 (1921); People v. Tarantine, 45 Cal.2d 590, 290 P.2d 505 (1955); Gindrat v. People, 138 Ill. 103, 27 N.E. 1085 (1891).

amendment of the United States Constitution.[19] The interplay of Article II, § 6 and § 10 (the equivalent of the fifth amendment of the U. S. Constitution), has also been noted as a basis for Illinois' adoption of the rule.[20] Because of the constitutional similarities involved, the Illinois courts have always considered the federal decisions important in this area as applicable guideposts for their own decisions.[21] The two differ in some aspects, however. These distinctions will be considered in the following pages.

California waited forty-one years after *Weeks* to adopt a policy of exclusion in *People v. Cahan*.[22] When this case reached the California Supreme Court, most California text writers and law enforcement officials were of the opinion that California was badly in need of "(1) a re-examination and definition of the rules governing police searches and seizures, and (2) developing more effective remedies governing police searches and seizures".[23] The Supreme Court of California saw this problem too, but rather than re-examine the laws concerning the independent sanctions available to discourage illegal searches as the *Cahan* dissent suggested,[24] it chose to adopt the exclusionary rule. The court's stated purpose for this action was the failure of other remedies to secure a satisfactory measure of compliance with the constitutional provisions.[25] It is difficult to ascertain what, if any, pressures motivated the California Court. In any case, it adopted a version of the federal rule.

To answer the contention that the federal rule had been arbitrary in its application and had introduced needless confusion into the law of criminal procedure, the court stated that they would not be bound by the federal decisions administering the rule, but would develop their own "workable rules" governing searches and seizures and the issuance of warrants.[26] In the development of such rules, the court recognized the need to protect both the "rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."[27] Generally, the California court, in adopting the exclusionary rule, stated an express purpose of deterring illegal methods of law enforcement which trampled underfoot the state equivalent of the fourth amendment. Where there were only minor intrusions of privacy or good faith mistakes on the part of police officers, however, the policy behind the *Cahan* rule requires no judicial interference.

With this brief foundation of the rationale of the rule and its reasons for adoption on the federal level, in Illinois and in California, the material below will attempt to survey and contrast the specific developments which implement the rule in these three jurisdictions. The main areas to be examined are: procedure, search and seizure with a warrant, and search and seizure without a warrant.

Procedure

"Judicial distaste for a substantive rule often finds expression in the creation of procedural restraints upon the invocation of such a rule."[28] Under this reasoning, even though the exclusionary rule was in fact created by the judiciary, such procedural requirements as proper standing and a timely motion to suppress might be interpreted as indications of judicial misgivings about how far the rule should go.

Standing to Suppress. The possibility of such judicial misgivings is readily suggested by the requirement of standing to suppress. The procedural limitation in the administration of the rule merely poses the question: "Does the accused have a sufficient interest in the property seized to have standing to object to its use in evidence?" Generally, in Illinois and the federal system, an accused cannot complain where he expressly disclaims ownership in the seized property.[29] This is true

[19] People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923); ILL. CONST. art. 2, § 6.

[20] People v. Grod, 385 Ill. 584, 53 N.E.2d 591 (1944); A defendant in Illinois must show "not only that the seizure was unlawful, but also that the violation was a personal injury, or as it is usually expressed, that the admission of the evidence would violate his privilege against self-incrimination. *See also*, People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924); ILL. CONST. art. 2, §10.

[21] People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943).

[22] 44 Cal.2d 434, 282 P.2d 905 (1955), a 4–3 decision. The common law rule had been set down in People v. Le Doux, 155 Cal. 535, 102 Pac. 517 (1909), and reenforced in People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922).

[23] Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565 (1955).

[24] 44 Cal.2d at 458, 282 P.2d at 919 (1955).

[25] CALIF. CONST. art. 1, §19 which parallels the fourth amendment of the U.S. Constitution.

[26] The California courts have followed the lead of the federal courts however, in rules applicable to informers. See note 124 *infra*.

[27] 44 Cal.2d at 450 282 P.2d at 915 (1955).

[28] Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952).

[29] Parr v. United States, 255 F.2d 86 (5th Cir. 1958); Lovette v. United States, 230 F.2d 263 (5th Cir.

even where the property seized is contraband which will not be returned to the defendant in any case.[30]

Where the search of a defendant's home is involved, however, a much stricter rule applies. For example, Illinois courts have held that it does not matter whether one claims ownership of the property or not, inasmuch as an unreasonable search of the home is unreasonable *per se*.[31]

The assertion of ownership requirement, though supported by most of the courts, would seem to be artificial, and perhaps unconstitutional at second glance, because of its conflict with the fifth amendment privilege. For example, where the defendant avails himself of his fifth amendment privilege by declining to admit ownership or interest in the seized property, he is forced to choose between his fourth and fifth amendment privilege, necessarily forfeiting one to exercise the other.

The sufficiency of the interest held by the accused in the seized property has also been the subject of much litigation. To be an "aggrieved party" under Section 41(e) of the Federal Rules of Criminal Procedure, one must have some direct relation to the property seized.[32] Possession or right of possession is apparently the crucial factor,[33] inasmuch as an owner or employer may complain even though the property was taken from the possession of another.[34] A lessee, sublessee, tenant by sufferance or licensee has standing, but such person must show that the lease pertained to the exact situs of the search.[35] A guest dwelling on the premises has standing, but a casual or temporary visitor does not.[36] A stockholder of a corporation,[37] or a member of a large

1956); United States v. Eversole, 209 F.2d 766 (7th Cir. 1954); Scoggins v. United States, 202 F.2d 211 (D.C. Cir. 1953); *in Re* Nassetta, 125 F.2d 924 (2d Cir. 1942); People v. Perry, 1 Ill. 2d 482, 116 N.E.2d 360 (1953); People v. Pankey, 349 Ill. App. 303, 110 N.E.2d 683 (1953); People v. De Marios, 401 Ill. 146, 81 N.E.2d 464 (1948).

It is interesting to note that three exclusionary states and some federal circuit courts hold that a defendant who voluntarily testifies and admits possession or ownership of the articles seized can no longer object to their introduction in evidence on the ground that they were obtained illegally. This proposition seems to operate on a theory of waiver; i.e., even though the seizure is improper, if the defendant voluntarily admits every fact that the state is seeking to show by using such illegally seized evidence, such seizure is in fact harmless. U.S. v. Werneche, 138 F.2d 561 (7th Cir. 1943); Edmondson v. United States, 80 F.2d 517 (5th Cir. 1935); McFarland v. United States 11 F.2d 140 (9th Cir. 1926); Burks v. State, 194 Tenn. 675, 254 S.W.2d 970 (1953); Huskey v. State, 156 Tex. Crim. 604, 245 S.W.2d 266 (1952); State v. Smith, 357 Mo. 467, 209 S.W.2d 138 (1948). The approach in these cases would seem to be inconsistent with giving full force and effect to the fourth amendment right to be free from unreasonable search and seizure. It is, however, illustrative of the courts' reluctance to let an obviously guilty party, by his own admission, go free because of a procedural technicality.

Contra, Kroska v. United States, 51 F.2d 330 (8th Cir. 1931).

[30] United States v. Jeffers, 342 U.S. 48 (1951). Some nonexclusionary states hold however, that any evidence seized is contraband and as such is not the proper subject of ownership, and thus even when illegally seized, should be admissibile. State v. Schoppe, 113 Me. 10, 92 Atl. 867 (1915); State v. Pluth, 157 Minn. 145, 195 N.W. 789 (1923); Rosanski v. State, 106 Ohio St. 442, 140 N.E. 370 (1922). This approach seems much more logical than the rather artificial requirement of express disclaimer.

[31] People v. Grod, 385 Ill. 584, 53 N.E.2d 591 (1944). The Illinois court seems to recognize the element of practicality in the searching of a car as distinguished from a dwelling house, and will fail to uphold any searches of a home without a warrant as such warrant may be easily obtained. Assertion of ownership thus becomes an unnecessary secondary fact where a home is involved.

But, in People v. Clark, 7 Ill.2d 163, 130 N.E.2d 195 (1955), a search of a defendant's home was held valid without a warrant so long as it was incident to a valid arrest. This was re-asserted in People v. Boozer, 12 Ill.2d 184, 145 N.E.2d 619 (1957), as long as the search takes place at the time of arrest. People v. Kalpak, 10 Ill.2d 44, 140 N.E.2d 726 (1957).

[32] FED. R. CRIM. P. 41 (e); Shurman v. United States, 219 F.2d 282 (5th Cir. 1955); Gorland v. United States, 197 F.2d 685 (D.C. Cir. 1952); Wyche v. United States, 193 F.2d 703, (D.C. Cir. 1951), *cert. denied*, 342 U.S. 943 (1952).

[33] United States v. Chieppa, 241 F.2d 635 (2d Cir. 1957); People v. Poncher, 358 Ill. 73, 192 N.E. 732 (1934). Mere custody, such as that of an employee, is usually not enough. *But see*, United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), where a desk was assigned to a government employee; and Chicago v. Lord, 7 Ill.2d 379, 130 N.E.2d 504 (1955), where an employee was giving change in an arcade after the owner had left the premises.

See also, Chicago's Last Department Store v. Indiana Alcoholic Beverage Commission, 161 F.Supp. 1 (Ind. 1958), where an Illinois liquor retailer had no standing to complain that his customers' rights were being violated by Indiana police who allegedly used various pretexts for stopping such customers' vehicles and searching them for contraband liquor.

[34] United States v. Jeffers, 342 U.S. 48 (1951).

[35] Safarik v. United States, 62 F.2d 892 (8th Cir. 1933), *rehearing denied*, 63 F.2d 369; Hardwig v. United States, 23 F.2d 922 (6th Cir. 1928). No standing however, will be given to trespassers, Chicoo v. United States, 284 Fed. 434 (4th Cir. 1922).

[36] Gaskins v. United States, 218 F.2d 47 (D.C. Cir. 1955); *in Re* Nassetta, 125 F.2d 924 (2d Cir. 1942).

[37] Lagow v. United States, 159 F.2d 245 (2d Cir. 1946), *cert. denied*, 331 U.S. 858 (1947), (sole stockholder). In this case, the court pointed out that "documents which he (the stockholder) could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained

voluntary association,[38] may not complain. Similarly, one of several defendants has no standing to raise an objection merely because the seized evidence was obtained through an unreasonable search of another defendant's property.[39]

California appears to have rejected the more narrow Illinois and federal approach by granting standing to one who denied ownership of the thing being seized,[40] as well as to a mere temporary guest in residence,[41] and to a casual visitor.[42] By relaxing the procedural requirement of standing, and in reality giving more people a chance to complain, it would seem that California is actually stricter in a way than Illinois and federal courts which rigidly adhere to the procedural aspects of the rule. This is to be expected however, as the use of procedural restraints upon the invocation of the exclusionary rule would not be consistent with the reasons for the rule's adoption by the California court in *Cahan*.

Timely Motion to Suppress. In jurisdictions following the exclusionary rule, a motion to suppress must be timely. However, there seems to be no uniformity as to just what "timely" means. For instance, both Illinois and federal courts hold that one must object before the time of trial.[43] Only the federal courts, however, have made exceptions where the accused is unaware of the illegality of a particular search, as where the illegality appears from the government's own proof, thus allowing the motion to be made for the first time at the trial.[44]

In California, *People v. Berger*,[45] decided on the same day as *Cahan*, set down immediately that a pre-trial motion is necessary, again consistent with the reasons for its adoption of the rule.[46]

Search With A Warrant

"A search implies some exploratory investigation or an invasion and quest, a looking for or seeking out."[47] A search implies a prying into hidden places, which does not include observation of "that which is open and patent, in either sunlight or artificial light . . . ."[48] A search must involve a trespass to person or property.[49]

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from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity."

[38] Haywood v. United States, 268 Fed. 795 (7th Cir. 1920), *cert. denied*, 256 U.S. 689 (1921); Permissible, however, in the case of a partner in a small partnership. *In Re* Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948).

[39] Lusco v. United States, 287 Fed. 69 (2d Cir. 1923); People v. Taylor, 319 Ill. 174, 149 N.E. 797 (1925).

[40] People v. Kitchens, 46 Cal. 2d 260, 294 P.2d 17 (1956); People v. Gale, 46 Cal. 2d 253, 294 P.2d 13 (1956); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

[41] People v. Colonna, 140 Cal. App.2d 705, 295 P.2d 490 (1956).

[42] People v. Silva, 143 Cal. App.2d 162, 295 P.2d 942 (1956).

[43] Williams v. United States, 215 F.2d 695 (9th Cir. 1954); United States v. Wernecke, 138 F.2d 561 (7th Cir.), *cert. denied*, 321 U.S. 771 (1943); Segurola v. United States, 275 U.S. 106 (1927); Chicago v. Lord, 7 Ill. 2d 379, 130 N.E.2d 504 (1955); People v. Davies, 354 Ill. 168, 188 N.E. 337 (1933); People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923). The courts reason that there should be no interruption in the orderly course of a trial to try collateral issues such as the source of evidence sought to be introduced. Failure to enter a motion at the proper time constitutes a waiver of the objection or acts as a retroactive consent to the search. People v. Matthews, 406 Ill. 35, 92 N.E.2d 147 (1950); People v. Brooks, 340 Ill. 74, 172 N.E. 29 (1930).

[44] Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921). While Illinois has not passed on this question directly, there is strong indication of a willingness to follow the exceptions set up by the federal cases. People v. Anderson, 337 Ill. 310, 328, 16 N.E. 243, 250 (1929); "Where it is claimed that evidence against one accused of crime has been obtained by an unlawful search of his house and seizure of his effects, the question of such unlawful search and seizure must be presented to the court before the trial, *if possible*." (Emphasis added). See also, People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932), where the court may in its discretion defer the hearing on the motion until evidence is offered at the trial.

[45] 131 Cal. App. 2d 127, 282 P.2d 509 (1955). In some cases, even where proper objection has been made, the courts have held that the admission of illegally seized evidence did not constitute error so prejudicial as to require reversal. There is no *per se* reversal. People v. Herman, 329 P.2d 989 (Cal. 1958); People v. Valenti, 49 Cal.2d 199, 316 P.2d 633 (1957); People v. Tobin, 143 Cal. App.2d 1, 299 P.2d 353 (1956); People v. Jennings, 142 Cal. App.2d 160, 298 P.2d 56 (1956). This principle is one of the few instances in which the California courts perhaps are not consistent with the spirit of *Cahan* and its avowed deterrence of illegal police tactics. It is, however, invoked sparingly, and would seem to apply only to cases where there was sufficient incriminating evidence against the accused, without that which was illegally seized.

[46] The pre-trial motion, like the requirement of standing to suppress, is procedural restraint, and has nothing to do with the deterrence of illegal police tactics.

[47] People v. Bouchard, 326 P.2d 646 (Cal. 1958). See also, People v. West, 144 Cal. App.2d 214, 300 P.2d 729 (1956); People v. Patterson, 354 Ill. 313, 188 N.E. 417 (1933).

[48] People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943), where the property was found on the seat of a defendant's auto, revealed by the beam of the arresting officer's flashlight.

[49] The fourth amendment protection is not extended to include public corridors. Thus, even if a

Although the fourth amendment does not say that a warrant must be used for all "searches" as defined above, it is not hard to imply this from its words.[50] It was for the legislatures and the courts in their interpretation of the federal amendment and similar state clauses, to announce that a search warrant would not be necessary (1) where incident to a lawful arrest, or (2) where the defendant consented to the search and thereby waived his constitutional protection.

Illinois, California and federal statutes have implemented their constitutional provisions by prescribing detailed regulations governing the issuance and serving of search warrants.[51] Generally, the affidavit seeking the warrant must contain three essential elements. They are: (1) a statement of facts showing probable cause that a crime has been committed; (2) specification of the place to be searched; (3) description of the articles sought with reasonable particularity.[52] A search supported by a warrant can thus still be unreasonable if the warrant is faulty in its issuance or execution. Such a defect may in turn be the basis for suppression of evidence in jurisdictions following the exclusionary rule.

As in arrest with and without a warrant, the existence of reasonable or probable cause to support a search warrant may be contested. Although the concept of probable cause will be fully developed in a later section, one may now note that there might be some difference between the probable cause requirement for a search or arrest warrant and for an arrest without a warrant. Unfortunately there seems to be a tendency among the courts to miss this distinction.

A warrant normally will not issue merely on information and belief.[53] Thus, a law enforcement officer cannot secure a warrant unless he has observed the necessary events himself, or can persuade a witness to swear to the complaint. Needless to say, producing such a witness is often no small task for the police, especially in view of the extensive use made of informers. Inasmuch as the information of an informer is classified as mere hearsay, unless the informer is disclosed or signs the complaint himself,[54] the law enforcement officer is deprived in many cases of the power to make a legal search. In this area, the courts have apparently not recognized the full extent of the problem facing law enforcement officers and agencies as a result of organized crime's widespread growth, and continue to impose stringent requirements upon the issuance of a search warrant.

In addition, the scope or extent of a search pursuant to a valid warrant has usually been limited strictly to the provisions of the warrant. This presents further problems to law enforcement officers, who, in many cases, find it extremely difficult to describe the particular objects sought with sufficient clarity, as well as the places at which they are to be found.[55] California copes

police officer were guilty of a technical trespass in entering an apartment building and eavesdropping from the hallway in front of the defendant's apartment, any information thus obtained would be proper as a basis for arrest or warrant. United States v. Buckner, 164 F.Supp. 836 (D.C. Cir. 1958).

This question frequently arises in regard to scientific listening devices. Thus, a detectaphone or amplifier placed to a wall adjoining the office of a defendant, Goldman v. United States, 316 U.S. 129 (1942); People v. Anderson, 145 Cal. App.2d 247, 302 P.2d 358 (1956); People v. Graff, 144 Cal. App.2d 199, 300 P.2d 837 (1956), and an invitee into the defendant's home carrying a concealed microphone, People v. MacKenzie, 144 Cal. App.2d 98, 300 P.2d 700 (1956), do not constitute trespasses, while an illegal police entry to plant a microphone does. Olmstead v. United States, 277 U.S. 438 (1928). The Supreme Court has allowed information obtained by an agent who had a radio transmitter concealed on his person in On Lee v. United States, 343 U.S. 747 (1952), a 5-4 decision which held that an unreasonable search had not taken place and that fair play had not been violated. Similarly, where at least one party in a telephone conversation consents to being overheard, any evidence obtained against the other party is admissible. Rathbun v. United States, 355 U.S. 107 (1957).

Though wiretapping may or may not be considered as a trepass, it is interesting to note that the Court does not consider it as a search and seizure problem at all, but looks only to the Federal Communications Act §605, 48 STAT. 1103 (1934), 47 U.S.C. §605 (1952), which declares wiretapping illegal. Nardone v. United States, 302 U.S. 379 (1937). See also, Benanti v. United States, 355 U.S. 96 (1957) where evidence obtained by the derivative use of wiretapping was held inadmissible in a federal court even though obtained by state officers.

[50] See note 3, *supra*.

[51] FED. R. CRIM. P. 41 (a-g); CAL. PENAL CODE §§ 1523-42; ILL. REV. STATS. c. 38, §§ 691-99 (1957).

[52] United States v. Hinton, 219 F.2d 324 (7th Cir. 1955).

[53] United States v. Office No. 508 Ricou-Brewster Bldg., 119 F.Supp. 24 (W.D. La. 1954); People v. Elias, 316 Ill. 376, 147 N.E. 472 (1925).

[54] United States v. Blich, 45 F.2d 627 (D.C. Wyo. 1930). The courts have recognized this practical problem in part at least by allowing searches incident to a valid arrest even though there was reasonable time to procure a search warrant. U.S. v. Rabinowitz, 339 U.S. 56 (1950); People v. Dominguez, 144 Cal. App.2d 63, 300 P.2d 194 (1956); People v. Winston, 46 Cal.2d 151, 293 P.2d 40 (1956). Illinois courts impliedly accept this approach. People v. Boozer, 12 Ill. 2d 184, 145 N.E.2d 619 (1957).

[55] The limited scope of search pursuant to a warrant

with this problem somewhat by allowing a lawful seizure where there are goods discovered other than those particularly described in the warrant.[56] The courts reason legalistically that the initial entry being authorized by a warrant, when the goods described are found, an arrest is thereby authorized. This arrest then justifies further search as incident to that lawful arrest.[57]

Generally, however, it would seem that not only is it difficult to procure a warrant, but also it is equally hard to comply with its terms. For these reasons, law enforcement officers try to avoid warrants whenever possible,[58] and try to make their searches incident to a lawful arrest thereby avoiding altogether the necessity of a warrant.

Search Without A Warrant

Consent. A search without a warrant is generally permissible where there is consent to such search. Who may give consent and the factual determination of what constitutes legal consent are frequently litigated issues. Consent to a search amounts to a waiver of the defendant's right to a motion to suppress. Such a waiver goes to all subsequent proceedings.[59]

In Illinois, the privilege to suppress evidence was originally regarded as a personal one, thus limiting legally sufficient consent to the defendant or someone specifically authorized to act for him in the particular matter.[60] Under this view, a wife could not consent for her husband. However in *People v. Shambley*,[61] the court seemed to ignore existing authority on the issue and allowed a wife to give consent in her own right as a joint occupant of the premises. This would apparently not be limited to one's place of residence as the crucial question is whether the wife had equal rights to the use and occupation of the premises. Federal cases are even more liberal in this regard, allowing consent to be given by such third persons as a common law wife,[62] by one who believed she was a wife, but whose marriage was proved to be fraudulent,[63] by a superintendent of a building,[64] by an employer-owner[65] and by one in joint use and possession.[66] California goes still a step further and allows consent where made by a mother at whose home the defendant resided,[67] by one "who stays at the house from time to time,"[68] and by one who mistakenly but in good faith believes he has a right of joint control.[69]

In all jurisdictions the burden of showing that legal consent has been given is placed upon the prosecution. The degree of proof required is that

is to be contrasted to the much broader scope of search which is permissible when the search is made without a warrant but incident to a lawful arrest. *See:* Harris v. U.S., 331 U.S. 145 (1947). See note 117, *infra.*

[56] People v. Daily, 157 Cal. App.2d 649, 321 P.2d 469 (1958); *Ex Parte* Dixon, 41 Cal.2d 256, 264 P.2d 513 (1953). But, People v. Roberts, 47 Cal.2d 379, 303 P.2d 721 (1956), distinguished contraband and property which is merely evidentiary pointing out that the arrest may not be used as a pretext to conduct a general search for incriminating evidence.

[57] People v. Acosta, 142 Cal. App.2d 59, 298 P.2d 29 (1956).

[58] Federal warrant requirements are generally more stringent than those of the states. U.S. v. Kenney, 164 F.Supp. 891 (D.C. 1958), where the search was declared improper when police officers, after receiving information as to the whereabouts and business of the defendant, secured a search warrant for premises known as 2144 8th St. (this address is used also throughout the affidavits upon which the warrant was based), and they then proceeded to 2124 8th St., and only after they had begun their search did they realize that the address of the premises on which they were present was 2124 8th St. and that the premises described in the warrant was 2144 8th St. On the other hand, California allows hearsay as the basis for a warrant in certain instances. People v. Barnett, 156 Cal. App. 2d 900 (1958); People v. Potter, 144 Cal. App.2d 350 (1956). This is another instance where California procedure does not seem to follow the pattern of *Cahan*, as the hearsay principle would seem to open the door to possible devious police methods in obtaining a warrant. *But see,* note 124 *infra.*

[59] People v. Sovetsky, 343 Ill. 583, 175 N.E. 844 (1931).

[60] People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939); People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938).

[61] 4 Ill.2d 38, 122 N.E.2d 172 (1955). Authorization must be for the specific purpose of giving consent to a search and does not arise from a general grant of authority such as a power of attorney.

[62] Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied*, 334 U.S. 844 (1948).

[63] United States v. Walker, 190 F.2d 481 (2d Cir.), *cert. denied*, 342 U.S. 868 (1951).

[64] Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950). *But see,* U.S. -. Maryland Baking Co., 81 F.Supp. 560 (N.D.Ga. 1948), where a foreman was not entitled to give consent for a fellow employee.

[65] Milyoncio v. United States, 53 F.2d 937 (7th Cir. 1931), *cert. denied*, 286 U.S. 551 (1932).

[66] United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954).

[67] People v. Michael, 45 Cal.2d 751, 290 P.2d 852 (1955).

[68] People v. Herman, 329 P.2d 989 (Cal. 1958).

[69] People v. Gorg, 45 Cal.2d 776, 291 P.2d 469 (1955). *But see,* People v. Roberts, 47 Cal.2d 379, 303 P.2d 721 (1956), where police could not justify entry into an apartment on a good faith belief that the manager had authority to consent. See also, People v. Wilson, 145 Cal. App.2d 1, 301 P.2d 974 (1956), where consent granted after a person has been improperly arrested and searched, while he was still in custody and without having been informed of his legal right to refuse permission, was not real or proper consent.

of clear and positive supporting testimony. Further, the absence of duress or coercion must also be affirmatively shown by the prosecution.[70] However, the fact that the defendant was under arrest at the time he consented does not make such consent involuntary.[71] A confession of guilt preceding consent on the other hand, usually has no bearing on the question at all.[72] Generally, whether or not consent has been given is a question of fact to be determined on the weight of the evidence at the trial and on a conflict of testimony, the decision of the trial court should govern.[73]

Consent must be real, and knowingly made with no trickery or subterfuge involved.[74] It may be given in writing,[75] by informal language or conduct,[76] by statute,[77] or by operation of law.[78] Ordinarily one consent will not justify repeated searches, and consent to search for one thing does not permit a general search.[79]

Search Incident To A Lawful Arrest. Search without a warrant is permissible when incident to a lawful arrest,[80] and in some instances may come either before or after the formal arrest.[81] This approach suggests a broad area of exemption from the warrant requirement, and the exception seems almost unlimited in scope; i.e., if the arrest is proper, the search incident to it must also be reasonable. As will be shown later, this is not always the case but in general, the permissible area of incidental search has expanded considerably from its originally narrow grounds of justification, to meet the needs of practicality.[82]

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[70] Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); People v. Jennings, 142 Cal. App. 2d 160, 298 P.2d 56 (1956); People v. Preston, 341 Ill. 407, 173 N.E. 383 (1930).

[71] United States v. Wallace, 160 F. Supp. 859 (D.C. 1958); United States v. Arrington, 215 F.2d 630 (7th Cir. 1954); People v. Lujan, 141 Cal. App.2d 143, 296 P.2d 93 (1956).

[72] Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955); People v. Carswell, 328 P.2d 842 (Cal. 1958). *But see:* United States v. Wallace, 160 F. Supp. 859 (D.C. 1958), which indicates that a confession of guilt preceding consent may show true consent.

[73] People v. Reid, 336 Ill. 421, 168 N.E. 344 (1929).

[74] People v. Roberts, 47 Cal.2d 379, 303 P.2d 721 (1956); People v. Chatman, 322 Ill. App. 699, 54 N.E.2d 631 (1944); People v. Dalpe, 371 Ill. 607, 21 N.E.2d 756 (1939). In People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939), the police rang the doorbell and a person inside said "come in," but the court said it was an unreasonable consent as the officers did not disclose their identity when seeking admission. But, in California, in People v. Mendoza, 145 Cal. App. 2d 279, 302 P.2d 340 (1956), the same response was sufficient as a consent to entry despite the fact that the defendant did not think that the police were outside his door. Also, in People v. Romero, 327 P.2d 205 (Cal. 1958), where police were with the co-defendant who was invited in with no objection, the court allowed the consent as a "passive invitation." This practice could be questioned as inconsistent with the reasons behind *Cahan*. However, the requirement of disclosure of identity seems both artificial and impractical. On the federal level, United States v. O'Brien, 174 F.2d 341 (7th Cir. 1949), allowed consent where an officer obtained keys from the defendant by means of a ruse saying, "If you give the keys, I will say I found them," when the defendant at first did not consent.

[75] People v. Rogers, 8 Ill.2d 279, 133 N.E.2d 16 (1956).

[76] People v. White, 324 P.2d 296 (Cal. 1958), ("Certainly, go ahead . . . I don't live here."); People v. Garnett, 148 Cal. App. 2d 275, 306 P.2d 571 (1957), ("You are the boss"); People v. Burke, 47 Cal. 2d 39, 301 P.2d 241 (1956), ("No, go ahead"); People v. Mathews, 406 Ill. 35, 92 N.E.2d 147 (1950), ("I don't care . . . I have nothing to hide"); People v. Akers, 327 Ill. 137, 158 N.E. 410 (1927), ("I will open it.").

[77] Under the Uniform Motor Vehicle Anti-Theft Act, ILL. REV. STATS. c. 95½, § 85 (1957), one in the auto sales business, as a condition of his license, is deemed to have granted authority to any peace officer to examine his records, motor vehicles or parts and accessories at his place of business at any reasonable time during the day or night. People v. Allen, 407 Ill. 596, 96 N.E.2d 446 (1950), *cert. denied*, 341 U.S. 922 (1951).

[78] Parole officers have the power to consent for their parolees. People v. Denne, 141 Cal. App. 2d 499, 297 P.2d 451 (1956).

[79] People v. Gorg, 45 Cal.2d 776, 291 P.2d 469 (1955); People v. Schmoll, 383 Ill. 280, 48 N.E.2d 933 (1943).

[80] People v. Caruso, 339 Ill. 258, 171 N.E. 128 (1930).

[81] People v. Duroncelay, 48 Cal. 2d 766, 312 P.2d 690 (1957); People v. Sayles, 140 Cal. App. 2d 657, 295 P.2d 579 (1956); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955).

The Federal Courts hold that the arrest must precede the search, but in most of the cases cited for this rule, there were other reasons for holding the search unreasonable, or the statement of the rule was merely dictum. Ranicle v. United States, 34 F.2d 877 (8th Cir. 1929); United States v. Waller, 108 F.Supp. 450 (N.D. Ill. 1952); United States v. McCunn, 40 F.2d 295 (S.D. N.Y. 1930); United States v. Swan, 15 F.2d 598 (S.D. Cal. 1926). In Illinois, there is a somewhat different variation: Where the defendant was detained for a traffic violation, it was held to be immaterial that the defendant was never formally charged or that this charge might later be sustained. People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950).

See also, People v. Clark, 9 Ill.2d 400, 137 N.E.2d 820 (1956).

Extending this a little further, if the defendant is innocent of the crime for which the arrest was made but is later found guilty of some other crime, the evidence is admissible in his prosecution for the later offense. People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 (1939); People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932).

[82] The original justification of a search without a warrant when incident to a lawful arrest recognized that the arresting officer should be entitled to protect himself. The immediate search should also prevent the destruction of incriminating evidence, and deprive

The search problem generally hinges on the legality of the arrest which in turn most always controls the reasonableness of the search and seizure. Where an arrest with a warrant is involved, an arrest might still be declared invalid because of an error in its issuance or execution. In the latter case, the primary search and seizure problem is a relatively limited one, concerning the scope of the warrant. Where there is an arrest without a warrant, however, other problems such as the probable cause requirement arise. For a clear understanding of these problems, the statutory provisions for arrest in each of the three jurisdictions will be considered in terms of their practical consequences.

Illinois

> "An arrest may be made by an officer . . . without a warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it."[83]

Where a criminal offense, amounting to a misdemeanor or felony,[84] is committed or attempted in an officer's presence, there is hardly any ground for contesting an arrest. Therefore, any search incident to such an arrest will be proper in most instances if the methods employed in the search do not shock the conscience or if the search does not unreasonably extend beyond the scope of the arrest.

A curious situation arises, however, in its application to the crime of carrying concealed weapons, inasmuch as the courts have held that an arrest in the officer's presence for this offense cannot be made unless he has had knowledge or information of the commission of a crime communicated to him through his senses.[85] This enables one carrying a concealed weapon to stand squarely in the "presence" of a police officer, clearly committing a crime and yet be immune from arrest. Thus "in the presence of" seems to have been construed to mean "in the view of," leaving open only the alternative grounds of reasonable belief that a crime was being committed. Of course, this would arise only if the concealed weapon creates an unduly large bulge in the person's pocket or shows slightly; in short, only where the one violating the law has blundered. This seeming incongruity has been frequently assailed.[86]

Frequent litigation arises in this area of reasonable grounds for believing that the person arrested has committed a crime. "Reasonable grounds" is not construed to mean absolute proof, but need only be such as would influence the conduct of a prudent and cautious man under the circumstances.[87] There is no overall standard of reasonableness, each case must be decided upon its own facts and circumstances.[88] Mere curiosity or suspicion,[89] bad reputation,[90] or mere physical presence with one who is lawfully arrested,[91] will not in themselves constitute reasonable grounds. A somewhat different view is expressed in *People v. Doody*.[92] In that case reasonable grounds were found to exist when an anonymous telephone message directed the police to look at a certain car. Arrest was justified on the ground that the car might otherwise get away.

The officer must know a particular crime was committed and have reasonable grounds to believe the defendant committed it before making the arrest. Subsequent discovery of a weapon or that a crime was in fact committed by the suspect cannot relate back to, or operate as justification for, an arrest.[93] Although an officer might reasonably

the prisoner of potential means of escape. People v. Brown, 45 Cal.2d 640, 290 P.2d 528 (1955); People v. Heidman, 11 Ill. 2d 501, 144 N.E.2d 580 (1957).

[83] ILL. REV. STAT. c. 38, § 657 (1957).

[84] People v. Clark, 9 Ill. 2d 400, 137 N.E.2d 820 (1956); People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950). Illinois takes a liberal view in this regard for even if the arrest is for a misdemeanor such as a "quasi-criminal" parking violation, an incidental search is justified.

[85] People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932).

[86] BAKER, MANUAL ON THE LAW OF ARREST, SEARCH AND SEIZURE (Rev. ed. 1946); Washington, *Unlawful Search and Seizure In Illinois*, 6 DE PAUL L. REV. 185 (1957).

[87] People v. Boozer, 12 Ill.2d 184, 145 N.E.2d 619 (1957); People v. Derrico, 409 Ill. 453, 100 N.E.2d 607 (1951); People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 (1939); People v. De Geovanni, 326 Ill. 230, 157 N.E. 195 (1927).

[88] People v. Davies, 354 Ill. 168, 188 N.E. 337 (1933).

[89] People v. Gallaway, 7 Ill.2d 527, 131 N.E.2d 474 (1956); People v. De Luca, 343 Ill. 269, 175 N.E. 370 (1931); People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926).

[90] People v. Ford, 356 Ill. 572, 191 N.E. 315 (1934); People v. Humphreys, 353 Ill. 340, 187 N.E. 446 (1933); People v. Macklin, 353 Ill. 64, 186 N.E. 531 (1933).

[91] People v. McGowan, 415 Ill. 375, 114 N.E.2d 407 (1953). If an independent act such as running away is being performed by this person, such act may be sufficient.

[92] 343 Ill. 194, 175 N.E. 436 (1931).

[93] People v. Henneman, 373 Ill. 603, 27 N.E.2d 44 (1940); People v. Ford, 356 Ill. 572, 191 N.E. 315

detain for questioning, he cannot arrest for questioning.[94] There must be an intention to arrest, which is understood by the one arrested, and a physical restraint or restriction of the right of locomotion.[95]

The scope of the search presents other litigable problems; and again the Illinois cases seem contradictory in certain areas. Generally, the right to search usually extends to that which is in the immediate possession and control of the defendants.[96] This originally included only the business premises,[97] and the auto.[98] The search of a dwelling without a warrant was for some time deemed unreasonable as a matter of law.[99] Currently, however, it appears that the dwelling is no longer impregnable to the incidental search, provided the search is made at the time of the arrest.[100] The test may be extended geographically to a situation involving an arrest on the street near the defendant's office,[101] or where he is standing near his auto,[102] but one cannot predict how far the court may choose to extend the permissible area of search in a given case.

Federal

> "The . . . agents of the Federal Bureau of Investigation . . . may . . . make arrests without warrant for felonies cognizable under the law of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest."[103]

This statute is somewhat stricter on its face than Illinois law in that it allows arrest on reasonable grounds only when a felony is involved. Practically, this is of little significance as the FBI is chiefly concerned only with felonious offenses. The statute on its face also seems to limit search without a warrant to cases where securing a warrant would be impractical under the circumstances. In *United States v. Rabinowitz*,[104] however, the Supreme Court held that the legality of a search without a warrant would not turn on the question of whether sufficient time existed to procure a warrant.

Federal law closely approximates Illinois law in most respects. Reasonable cause for arrest exists "where facts and circumstances together with reasonable inferences to be drawn therefrom, are such as would lead a reasonably prudent person to conclude that the law had been violated."[105] While mere suspicion is not enough,[106] probable

(1934); People v. De Luca, 343 Ill. 269, 175 N.E. 370 (1931).

[94] People v. Garwood, 317 Ill. 578, 148 N.E. 259 (1925). See also, Comment, *Police Controls Over Citizen Use of the Public Streets*, 49 J. CRIM L., CRIM. & P.S. 562 (1959).

[95] People v. Clark, 9 Ill. 2d 400, 137 N.E.2d 820 (1956); People v. Mirbelle, 276 Ill. App. 533 (1934); People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926).

[96] People v. Dubin, 367 Ill. 229, 10 N.E.2d 809 (1937); People v. Davies, 354 Ill. 168, 188 N.E. 337 (1933), (This case is usually relied upon by the courts as condoning a limited right to search as incident to an arrest, but the facts indicate there was no search at all).

See also, People v. Poncher, 358 Ill. 73, 192 N.E. 732 (1934), where the court limited the incidental search to personal property which was involved in the crime charged.

[97] People v. Heidman, 11 Ill. 2d 501, 144 N.E.2d 580 (1957); People v. Davies, 354 Ill. 168, 188 N.E. 337 (1933); People v. Roberta, 352 Ill. 189, 185 N.E. 253 (1933).

[98] People v. Barg, 384 Ill. 172, 51 N.E.2d 168 (1943), *cert. denied*, 321 U.S. 798 (1944); People v. Marvin, 358 Ill. 426, 193 N.E. 202 (1934). (This case is sometimes used to support an incidental search of the premises, yet the case involved an auto).

[99] People v. Grod, 385 Ill. 584, 53 N.E.2d 591 (1944).

[100] People v. Boozer, 12 Ill. 2d 184, 145 N.E.2d 619 (1957); People v. Kalpak, 10 Ill. 2d 411, 140 N.E.2d 726 (1957), (search was illegal where defendant was arrested in his home; one hour and a half after taking defendant to the police station, the police returned to defendant's home and conducted a search of the premises; People v. Tillman, 1 Ill. 2d 525, 116 N.E. 2d 344 (1953); People v. McGowan, 415 Ill. 375, 114 N.E.2d 407 (1953).

[101] People v. Dubin, 367 Ill. 229, 10 N.E. 2d 809 (1937). (In this case the police had a valid arrest warrant, and exercised it by arresting the defendant "near" his place of business where the illegal operation that gave rise to his arrest was going on. The police then took the defendant to these premises and searched them without a warrant. The court, in allowing the incidental search, merely stated that the premises were under the defendant's immediate possession and control, and did not distinguish the fact that the defendant was not arrested on the premises at all.)

[102] People v. Barg, 384 Ill. 172, 51 N.E.2d 168 (1943), *cert. denied*, 321 U.S. 798 (1944). (The defendant, in trying to escape from his car which was stopped by the police, fell out of the car onto the road. He was apprehended and searched. The keys to the trunk were found in his pocket, and the car and trunk were thoroughly searched. The court again, in upholding the valid incidental search merely reiterated that the car was in the immediate possession and control of the defendant.)

Both this case and *People v. Dubin*, discussed *supra*, indicate that the so-called spacial test of incidental search is something less than conclusive.

[103] 62 STAT. 817 (1948), 18 U.S.C. § 3052 (1952).

[104] 339 U.S. 56 (1950).

[105] Bruner v. United States, 150 F.2d 865 (10th Cir. 1945); United States v. Hamm, 163 F.Supp. 4 (E.D. Mo. 1958).

[106] Mallory v. United States, 354 U.S. 449 (1957); Shurman v. United States, 219 F.2d 282 (5th Cir.

cause existed where agents observed earlier illegal activities of the person suspected.[107] A major basis for reasonable cause in federal cases results from the use of information from informants, an area as yet undeveloped in Illinois law. Early federal cases indicated that it would be doubtful whether an arrest and search should be upheld where there is no supporting evidence other than reliance on an undisclosed informer.[108] However, the current state of authority appears to hold that reasonable cause will be satisfied where the sole basis was information from the informant; this in spite of the fact such evidence is hearsay and would not be competent upon a trial or generally in support of a warrant.[109] The informant cannot be anonymous or unverified but must be reliable and known to the police.[110] Non-disclosure of the informant's identity will not furnish grounds for reversal or dismissal, or give an insufficient showing of probable cause unless the disclosure of the source is relevant, helpful or material to the defense of the accused, or essential to a fair determination of the cause.[111]

In *Agnello v. United States*,[112] the court said that federal officers may not search a dwelling without a warrant "notwithstanding facts unquestionably showing probable cause." Similarly, in *Jones v. United States*,[113] probable cause for belief that certain articles subject to seizure are in a home cannot of itself justify a search without a warrant where the purpose was merely to search. These cases illustrate the concept that the probable cause requirement in a search without a warrant as incident to a lawful arrest, applies to the arrest and not to the search. Thus, in the *Jones* case, if the police officers had possessed probable cause for an arrest and had entered the house for that purpose, the search incidental to that arrest would have been valid.

There is some conflict among the federal circuits on the question of incidental search of a dwelling as distinguished from some other laws of arrest. Although the Fifth Circuit has held that a search is not automatically rendered invalid by the fact that a dwelling place is subjected to the search,[114] that same circuit distinguished between a dwelling and an outbuilding which was approximately 150 to 180 feet from the nearest residence as not part of or located within the curtilage of the residence.[115] A district court recognized the search of a dwelling only upon limited exceptions turning upon the reasonableness of all the circumstances and not upon the practicability of procuring a warrant.[116]

The Supreme Court allowed the search of a

1955); Rent v. United States, 209 F.2d 893 (5th Cir. 1954); United States v. Plymouth Coupe, 182 F.2d 180 (3rd Cir. 1950).

[107] Brinegar v. United States, 338 U.S. 160 (1949).

[108] Scher v. United States, 305 U.S. 251 (1938).

[109] Grancona v. United States, 257 F.2d 450 (5th Cir. 1958). In this case, informants told police that marijuana was concealed on foundation blocks supporting a store building, and a police officer made a preliminary search in the nature of an inspection to verify the information. The officer located the marijuana, sampled it, put their initials on the bag and returned it. Probable cause existed from this total action.

See also, Draper v. United States, 248 F.2d 295 (10th Cir. 1957), aff'd, 358 U.S. 307 (1959)

[110] United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); United States v. Mazzio, 162 F. Supp. 935 (D.N.J. 1958).

The reliability question is most always decided by the judge at the pre-trial hearing on the motion to suppress. It arises in connection with prosecution efforts to establish reasonable grounds for the arrest on which the legality of the search hinges.

[111] Rovario v. United States, 353 U.S. 53 (1957); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946), *cert. denied*, 330 United States 839 (1947), *reh. denied*, 331 U.S. 863; United States v. Nichols, 78 F. Supp. 483 (W.D. Ark. 1948), *aff'd*, 176 F.2d 431 (8th Cir. 1949).

In Sorrentino v. United States 163 F.2d 627 (9th Cir. 1947), the court pointed out the distinction between the case where the person called an informer is that and nothing more, in which case the defendant would not be entitled to have his identity disclosed, and the case where the informer is the person to whom the defendant is said to have sold and dispersed the contraband described in the indictment. In which latter situation, information as to the informer's identity would certainly be material to the defense. The prosecution has the burden of showing immateriality, which is a question of fact for the trial court. The trial court's determination is reviewable on appeal, but only prejudicial error on their part will warrant reversal.

But see, United States v. Keown, 19 F.Supp. 639 (W.D. Ky. 1937), where there was an insufficient showing of probable cause because the trial court had not required an arresting officer, on cross-examination by the defendant's counsel, to disclose the name of the person who informed him, even though the information was not necessarily material to his defense.

[112] 269 U.S. 20 (1925).

[113] 357 U.S. 493 (1958). See also, Lee v. United States 232 F.2d 354 (D.C. Cir. 1956), which stated that where the purpose of the officers was just to search and when finding contraband then arrest the defendants, the arrest becomes incident to the search and is invalid. Of course, this in turn destroys the validity of arrest.

[114] Drayton v. United States, 205 F.2d 35 (5th Cir. 1953).

[115] Brock v. United States, 256 F.2d 55 (5th Cir. 1958).

[116] United States v. Wallace, 160 F.Supp. 859 (D.C. 1958).

dwelling in *Harris v. United States*,[117] holding in a 5–4 decision that an incidental search might extend to an entire five-room apartment even though the defendant was arrested in the living room. This case may have indicated a new trend in interpreting the "immediate possession and control" test used to limit the scope of an incidental search.[118]

An arrest cannot be made merely for the sake of conducting a roving search.[119] Where it is necessary for an officer to make an arrest at one's home by breaking and entering into the premises, he must adequately identify himself and give notice of his authority.[120]

California

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may without a warrant arrest a person:

1. For a public offense committed or attempted in his presence;
2. When a person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it;
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested;
5. At night when there is reasonable cause to believe that he has committed a felony."[121]

Unlike Illinois, California reasonable cause is restricted to felonies. Another difference lies in the fact that when the arrest takes place at night, it does not have to be shown that a crime has in fact been committed even though the necessity of probable cause as a condition to arrest is still present.

Although there have not been many cases on the subject, under (2) above, an arrest would seem possible without probable cause when a felony has in fact been committed. In *People v. Brown*,[122] the prosecution brought their charge under (2), claiming that since the defendant was in fact guilty of a felony, the incidental search was permissible whether or not reasonable cause for the arrest existed. The court rejected this contention holding that this would amount to justifying an arrest on the basis of the evidence acquired incident to that arrest. However, the court said it was unnecessary to determine whether a requirement of probable cause applied by implication to (2). This action seems to characterize the present status of (2). The courts simply avoid it and look to the other sections. This is another classic example of judicial unwillingness to effectuate what appears to be obvious legislative intent; however, it has never been pointed out by the legislature just what they did have in mind by this provision.

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[117] 133 U.S. 145 (1947). In this case, five federal agents, arrested the accused with a warrant in the living room of an apartment which was in his exclusive possession. Without a search warrant, they searched the entire apartment (living room, bedroom, kitchen and bath) intensively for five hours, for two canceled checks and any other means by which the crimes may have been committed. Beneath some clothes in a bedroom bureau drawer, they discovered a sealed envelope marked "personal papers" of the accused. This was torn open and found to contain several draft cards which were property of the United States, and the possession of which was a federal offense. The court held that the search was reasonable under the circumstances.

[118] United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192 (1927). An incidental search must normally be made at the time of arrest. Johnson v. United States, 333 U.S. 10 (1948). This case shows the current preference of the federal courts for a "time" test rather than a spacial test.

See also, Kremen v. Urited States, 353 U.S. 346 (1957), where the defendants were arrested and the entire house was searched and its entire contents removed some 200 miles away to FBI headquarters for examination. The Court, with two dissents, held that search and seizure was illegal. However, the tenor of the decision seemed to turn not on the scope of the search, but rather on the quantity of the items seized.

[119] Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); United States v. Alberti, 120 F.Supp. 171 (S.D. N.Y 1954).

[120] Miller v. United States, 357 U.S. 301 (1958). Police officers without a warrant, knocked on the door of the defendant's apartment, and upon his inquiry, "Who's there?", replied in a low voice, "Police". The defendant opened the door but quickly tried to close it, whereupon the officers broke in, arrested the defendant and seized some marked bills. The court held that there was no adequate notice of authority, and hence the search was illegal.

Where the police with a search warrant knocked on the door for several minutes and evoked no response, then called out the word "police" and broke in, there was a legal entry. United States v. Freeman, 144 F. Supp. 669 (D.C. 1956). *But*, where there was no response and the officers failed to announce who they were, the entry was illegal. Woods v. United States, 240 F.2d 37 (D.C. Cir.), *cert. denied*, 354 U.S. 926, (1957).

The general concept of notice of authority seems illogical and impractical in law enforcement; however, the federal courts still cling to it.

It would seem that the hope for more practical liberalization in the federal search and seizure area, as evidence by their approach in the *Harris* Case, is fading in the area of notice of authority.

[121] CAL. PENAL CODE § 836.

[122] 45 Cal. 2d 640, 290 P.2d 528 (1956).

Reasonable cause "inclines the mind to believe but leaves some room for doubt."[123] Sufficiency of reasonable cause to arrest in California is perhaps a little less stringent than in Illinois or the federal system. Reasonable cause has been found in the following situations: where the arresting officer had acted on information from one who had previously furnished reliable information;[124] where police acted on information from an anonymous informer with other circumstances tending to support the information;[125] where an officer recognized the defendant previously known to the officer, and the defendant was at the wheel of his auto apparently under the influence of narcotics;[126] where officers recognized the smell of opium;[127] where officers, watching through a window in the defendant's home, saw a racing form, scratch pads and that the defendant was answering the telephone and making notes;[128] where the defendant was in the company of a known offender.[129] Illustrative of a situation which has been found not to support a finding of reasonable cause is the one in which the defendant is parked alone late at night. In that situation the court held that absent other circumstances, such as a furtive movement of some sort,[130] reasonable cause is not supportable.

Unlike Illinois, the offense must justify the search. Thus, where the offenses are minor traffic violations such as an illegal left turn,[131] double parking,[132] blocking a roadway,[133] or defective lights,[134] there is no right of incidental search absent other circumstances which may reasonably infer the commission of a more serious crime. However, the court has allowed a search for marijuana where the arrest was for prostitution, justifying their decision by pointing to a so-called cor-

[123] People v. Trowbridge, 144 Cal. App. 2d 13, 300 P.2d 222 (1958).

[124] People v. Gorg, 157 Cal. App. 2d 515, 321 P.2d 143 (1958); People v. Rixner, 157 Cal. App. 2d 387, 321 P.2d 91 (1958), "informant is in good faith believed to be trustworthy"—This factual discretion question to be left with the trial court; People v. Dewson, 150 Cal. App. 2d 119, 310 P.2d 162 (1958); People v. Hood, 150 Cal. App. 2d 197, 309 P.2d 856 (1958);

Where the reliable information is given to a superior officer, the informer might still be anonymous as to the arresting officer and thus be hearsay upon hearsay. But the courts allow this subordination of authority, and hold this to be a sufficient showing of probable cause if there is sworn testimony that the information upon which the arrest was made, was actually given to any police officer. People v. Harvey, 156 Cal. App. 2d 516, 319 P.2d 689 (1958).

Though reliability usually requires past successful dealings with the informer, three juvenile offenders who all told the same story as to the defendant's possession of marijuana, were considered reliable as they had no reason to fabricate and their information as to the defendant's criminal record was confirmed. People v. Weathers, 328 P.2d 222 (Cal. 1958).

On revealing the informant: People v. Wasco, 153 Cal. App. 2d 485, 314 P.2d 558 (1957), held that nondisclosure was not reversible error, while People v. Johnson, 157 Cal. App. 2d 555, 321 P.2d 35 (1958), said it was not necessary at all. But, in People v. McShann, 330 P.2d 33 (Cal. 1958), where the informer was a material witness on the facts directly relating to the question of guilt, disclosure was required. The problem seem to come to a head on the same day as *McShann*, for in Priestly v. Superior Court, 330 P.2d 33 (Cal. 1958), with three Judges dissenting, the California Supreme Court decided to adopt the federal rule that disclosure is required unless there was sufficient evidence apart from the confidential communications. Chief Justice Traynor said, "We can't let the officer become the sole judge of what is probable cause by letting him establish the lawfulness of the search merely by testifying that he received information from a reliable person whose identity cannot be revealed. Such a holding would destroy the exclusionary rule."

Illinois has at least recognized this problem in People v. Mach, 12 Ill. 2d 151, 145 N.E.2d 609 (1957), where refusal to disclose the identity of an informer who signed the search warrant that provided authority for the seizure of vital evidence against the defendant, was held not to be a denial of the defendant's right to due process or his right to meet the witness face to face, in the absence of any showing that he was deprived of presenting any element of his defense.

[125] People v. Diggs, 326 P.2d 194 (Cal. 1958); Other circumstances in this case were: 1) a reliable informer had given similar information; 2) the anonymous informer was given marked bills by the police, went to the apartment in question, and in a short time returned with three marijuana cigarettes. People v. Sayles, 140 Cal. App. 2d 657, 295 P.2d 579 (1956).

But see, People v. Bates, 330 P.2d 102 (Cal. 1958), where the court says the use of information from an anonymous informer may be justified in the case of a "pressing emergency." (This case followed the *Priestly* case, note 121, *supra.*)

[126] People v. Lujan, 141 Cal. App. 2d 143, 296 P.2d 93 (1956).

[127] People v. Bock Loung Chew, 145 Cal. App. 2d 400, 298 P.2d 118 (1956).

[128] People v. Moore, 140 Cal. App. 2d 870, 295 P.2d 969 (1956).

[129] People v. Hickman, 143 Cal. App. 2d 79, 299 P.2d 389 (1956). However, mere association with a known offender, or being a past offender, are not sufficient in themselves. People v. Gale, 46 Cal. 2d 253, 294 P.2d 13 (1956).

[130] People v. Washington, 330 P.2d 67 (Cal. 1958); People v. Rodriguez, 140 Cal. App. 2d 865, 296 P.2d 38 (1956); People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955).

[131] People v. Molarius, 146 Cal. App. 2d 143, 303 P.2d 350 (1956).

[132] People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956).

[133] People v. Martin, 140 Cal. App. 2d 387, 295 P.2d 33 (1956).

[134] People v. Sanson, 156 Cal. App. 2d 250, 319 P.2d 422 (1957).

relation between the two.[135] Finally, the arresting officer's failure to inform the defendant of the cause of his arrest has no bearing on reasonable cause.[136]

California takes a broad view as to the scope of an incidental search. In *People v. Cicchello*,[137] officers arrested the defendant and searched his car which was half a block away; then returned to his apartment, got the key from him, and searched the apartment. The search was held to be incident to arrest, reasoning that since the officers could have searched the apartment had they arrested the defendant in it or as he was leaving it, they could do so under these circumstances. It would seem that this decision all but does away with the spacial test of "immediate possession and control."

The California statute which permits breaking and entering into a home by an officer if he is refused entrance after notice of his authority,[138] has also been given a somewhat broad interpretation by the California courts unlike the position taken by the Illinois and federal judiciary. They have held that compliance with the statute is not required where compliance would permit the destruction of incriminating evidence.[139]

Generally, no derivative use can be made of evidence illegally seized.[140] Thus, witnesses whose names and addresses are found in an illegal search may not testify,[141] even though they would testify to things antecedent to the arrival of the police.[142] Also oral evidence as to what was found or seen is incompetent against the accused.[143] All evidence illegally seized however, is admissible in federal courts for the purpose of impeaching the defendant's credibility in a later trial even though such evidence had been suppressed in an earlier trial.[144]

Conclusion

A summary of the state of the exclusionary rule in the three jurisdictions under consideration is as follows:

On the federal level, even after forty years with the rule, the courts are constantly forced to consider its application, indicating that they have not been able to arrive at a reasonably clear definition of the rules governing federal police agencies. Inconsistency at the various federal levels is clearly evident. However, federal law has been fairly consistent with the underlying principles behind the rule's adoption, even though its procedural requirements raise some doubt as to whether the federal courts still fully support the rule. Abuses by law enforcement agencies have not been flagrant, nor has there been great hindrance to federal law enforcement. One must remember however, that there is a clear distinction to be drawn between an investigative agency such as the FBI which can appropriate long hours and great man power to the preparation of an action, and a local police force which cannot. The whole problem needs to be reconsidered and brought into new focus, particularly in light of newly developed scientific criminal detection devices, and an ever increasing narcotics problem.[145]

In Illinois, the decisions seem inconsistent and do not serve as guides to either trained attorneys or ordinary officers. *Stare decisis* is attempted by the courts, but concepts are confused and cases are misinterpreted. On the one hand Illinois is lenient

[135] People v. Cahill, 328 P.2d 995 (Cal. 1958). It doesn't matter for what the officer is looking. People v. Harvey, 156 Ca. App. 2d 516, 319 P.2d 689 (1958).

[136] People v. Romero, 156 Cal. App. 2d 48, 318 P.2d 835 (1957); People v. Thomas, 156 Cal. App. 2d 117, 318 P.2d 780 (1957).

[137] People v. Cicchello, 157 Cal. App. 2d 158, 320 P.2d 528 (1958). See also, People v. Daily, 157 Cal. App. 2d 649, 321 P.2d 469 (1958), where the defendant was legally arrested, and the court allowed a search where the officers found a key to a car parked outside some fifty to sixty feet away.

[138] CAL. PENAL CODE § 844

[139] People v. Miller, 328 P.2d 506 (Cal. 1958); People v. Moore, 140 Cal. App. 2d 870, 295 P.2d 969 (1956); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956).

[140] United States v. Krulewitch, 167 F.2d 943 (2d Cir. 1948), *reversed on other grounds*, 336 U.S. 440 (1949); People v. Marvin, 358 Ill. 426, 193 N.E. 202 (1934).

[141] People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1943).

[142] People v. Albea, 2 Ill.2d 317, 118 N.E.2d 277 (1954).

[143] McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955).

[144] Walder v. United States, 347 U.S. 62 (1954). The court stated: "It is one thing to say that the Government cannot make an affirmative use of the evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment."

[145] Research has revealed that most appellate court search and seizure cases arising today involve narcotics violations. See Justice Clark's dissent in Rovario v. United States, 353 U.S. 53, 66 (1957), pointing out the severe narcotics problem.

in not requiring the reason for arrest to be commensurate with the search incident to such arrest and by allowing an anonymous telephone call to satisfy the reasonable cause requirement. On the other hand, Illinois is strict in the defining what constitutes reasonable cause for arrest, in defining the scope of an incidental search, and in regard to the search of a dwelling house. The resultant confusion could be anticipated to be the greatest at the trial level. Yet, the number of search and seizure cases reaching the higher Illinois courts is relatively slight. A thorough re-examination by the courts, or possibly a codification of the rule and its attendant principles by the legislature seems in order.

In California, the more lenient approach can be traced to the reason for the adoption of the rule; namely, to deter illegal police methods. The administration of the rule's procedural aspects indicate very few instances in which the judiciary has avoided the spirit of *Cahan*.[146] In the four years since its adoption in 1955, the California courts have been consistent in their holdings, and the general principles laid down by the Supreme Court under Chief Justice Traynor, have been followed for the most part by the lower appellate judges. California district courts are seldom reversed in search and seizure cases. Though the Code rules and the *Cahan* statements are vague, the "workable rules" set up under them in search and seizure cases since *Cahan* have not on their face unduly hampered law enforcement. Police have been able to reasonably rely on consent of third persons, despite the dangers of "implied" force caused by the mere presence of an officer which brings on a resultant natural fear of self-implication in a crime of some sort. In the area of reasonable cause, police reliance on third party information has not been seriously affected. Yet, the former Attorney General of California, Edmund G. Brown has expressed great disappointment with the rule and has imputed the rise in the crime rate in 1957 to the rule.[147]

From the date of its adoption, the exclusionary rule has been debated about pro and con, with neither faction seeming content with the present status of the rule. From one side comes the cry that while the rule was intended to "require a search warrant issued by a magistrate under numerous safeguards to make a search and seizure,"[148] today's interpretation in modern society seems to reduce this protection. From the opposite corner, a cry that the rule was intended as a shield to the innocent but has become a refuge for the guilty, and has greatly hampered law enforcement officers in their efforts against crime.

If we had no exclusionary rule, strong criminal penalties for violations of the Fourth Amendment might be the answer. Yet, experience has shown that public prosecutors hesitate to bring actions against those upon whose co-operation they must rely for the successful conduct of the affairs of their offices.[149] Michigan has found solace somewhere in the middle, having exempted from the rule, by constitutional amendment, arms and narcotics when seized outside any dwelling house.[150] This approach may be criticized, however, as a form of class legislation which amounts to a casting aside of the exclusionary rule altogether in the areas in which it most frequently arises—firearms and narcotics.

A review of appellate cases gives but a glimpse of the overall problem. The true impact of the rule upon law enforcement is felt at the trial level as evidenced by a recent survey of the Chicago "Racket Court." The survey indicated that the

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[146] One instance is that the police can easily tailor their testimony in the trial court so as to make the reasonable cause requirement sufficient, by saying that they intended only to question, as the court has held in People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956), that if an officer approaches a suspect intending to arrest him but with no reasonable cause to do so, any subsequent search is improper even if there are later independent acts which might justify it.

[147] Letter from Edmund G. Brown, former Attorney General for the State of California, to author, November 28, 1958; on file with the *Journal of Criminal Law, Criminology and Police Science*, Northwestern University School of Law, Chicago, Illinois.

[148] Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court*, 42 KY. L.J. 423 (1953).

[149] Under 60 STAT. 843, 18 U.S.C. § 2236 (1946), providing for criminal prosecutions for illegal searches and seizures, there have been no prosecutions to date; and no Illinois cases have been discovered in the appellate courts where a tort action for damages was even brought.

[150] MICH. CONST. art. 2, § 10:

Person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or seize any person shall issue without describing them or without probable cause, supported by oath or affirmation: Provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction . . . any narcotic drug, or drugs, any firearm, rifle . . . or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state.

The firearms amendment was added in 1936, while narcotics was exempted in 1952.