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delay and will overburden the courts.[151] But it is doubtful that any solution would be more burdensome than the present confusion, especially since the practical effect on the courts of requiring some further procedural rights as a matter of due process would probably not be great. In light of the fact that a majority of the states already recognize probationer's right to a hearing, notice of the charges against him, counsel, the presentation of evidence and witnesses, cross-examination of those witnesses testifying against him, and appeal,[152] it would not appear that a constitutional recognition of these rights would cause substantial turmoil. Nor would it seem that an extension of similar rights to those who have no knowledge of them[153] or to those who have no means of obtaining them[154] would significantly overburden the probation system. The benefits, on the other hand, would be to make the realities of probation more consistent with its goals and to eliminate much of the error, uncertainty, confusion, and geographic inequity which presently prevails.

[151] *Cf.* Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964).

[152] Notes 75–80, *supra.*

[153] *E.g.*, abolishment of the waiver rule in regard to procedural irregularities at revocation, warnings concerning constitutional or statutory rights, etc.

[154] *E.g.*, the appointment of counsel to indigents, the right to subpoena witnesses, etc. The equal protection clause of the Fourteenth Amendment is particularly significant in gaining these rights. *See* Hoffman v. State, 404 P.2d 644 (Alaska 1965); Perry v. Williard, 427 P.2d 1020 (Ore. 1967).

Conclusion

Discretionary power performs a necessary function in the implementation of probation. The imposition of individualized conditions is probation's peculiar strength. At present, it is largely the experience of the personnel, rather than the framework of the system, that makes probation work. Hopefully the gathering of research and statistical data will enable probation to become a behavioral science, with improved techniques and guidelines for supervision. But at least for now the states and federal government should take a step in this direction by placing and enforcing limitations on the conditions that can be imposed on probationers. In this way some of the abuses and errors of the system can be eliminated.

No mere limitations, however, will justify the place of discretionary power in the factual determinations of a probation revocation proceeding. A fair and just disposition of individuals can only be achieved by eliminating discretionary power and affording appropriate procedural protections to probationers.

THE SUPREME COURT AND THE FOURTH AMENDMENT OCTOBER, 1968, TERM

(Notes prepared by *Leonard Singer*, assisted by *Robert A. Filpi* and *Bradford J. Race*. The opinions expressed therein are not necessarily those of the Journal's Editors.)

"[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected and to that end that all available evidence should be used. It also is desirable 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. . . . We have to choose. . . ." [1]

Alderman v. United States: Standing and Disclosure

The Fourth Amendment to the United States Constitution provides that

> [t]he 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.

Alderman v. United States[2] dealt with electronic surveillance which is subject to the dictates of this Amendment whether or not there is an actual physical intrusion of the premises for the "Constitution protects people—and not simply 'areas' ".[3] This provision is a bar to the "uninvited ear" and allows persons to assume that the words they speak in confidence "will not be broadcast to

[1] Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

[2] 394 U.S. 165 (1969).

[3] Katz v. United States, 389 U.S. 347, 353 (1967).

the whole world".[4] The main thrust of the Amendment is to prevent official overreaching and abuse in investigative activity.[5] The Amendment preserves one's right to privacy by dictating that officials may only act against an individual or his possessions at certain times and after certain procedures. There is no exception even for the most sophisticated and unobtrusive electronic devices.

The problem frequently posed at the trial level is whether any evidence was obtained or derived from the use of overheard conversations that violated the defendant's Constitutionally protected rights. In *Alderman v. United States*,[6] the Court dealt with the procedure to be followed by the District Courts in confronting that issue. The Court, however, first delineated who would be entitled to object to an alleged Fourth Amendment violation. Mr. Justice White, writing for the Court, held that if the "United States overheard conversations of petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations" the petitioner would be entitled to object.[7] Since the occupant's privacy would be violated by the surveillance, it makes no difference for the purposes of standing that he was not a participant in the illegally overheard conversation. Thus,

> for purposes of a hearing to determine whether the Government's evidence is tainted by illegal surveillance, the transcripts or recordings of the overheard conversations of any petitioner or of third persons on his premises must be duly and properly examined in the District Court.[8]

Alderman reaffirms the rule that co-conspirators or co-defendants do not have standing to object to a violation of the Fourth Amendment unless that violation was of their own rights. There is no need to provide for the vicarious assertion of these rights because the victim can and will object if and when it becomes crucial for him to do so.[9] The purpose of the exclusionary rule is to effectively deter illegal police action,[10] and that purpose will in no way be promoted by the allowance of the non-offended to raise objections to searches and seizures of co-defendants. The Court suggested that the proper legislative bodies could extend the exclusionary rule to exclude evidence obtained by an invasion of the privacy of others besides the defendant.

The existing rule that

> . . . unlawful wiretapping or eavesdropping, whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion[11]

does not extend only to those with a possessory interest in the premises; anyone legitimately on the premises has standing.[12] The determinative inquiry is whether the objector had a reasonable expectation of being free from any interference of his privacy and confidence by official agencies.[13] In *Jones v. United States*[14] the defendant had a key to and was frequenting, but rarely staying for long periods of time, at a friend's apartment. He had slept there once; and he had some clothes there; but, he paid no rent. In a ruling based on Rule 41 (e) of the Federal Rules of Criminal Procedure this relation to the property was found to be sufficient to establish standing to object to an illegal search. The *Jones* Court found that

> [n]o just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated.[15]

Similarly in *United States v. Jeffers*,[16] the defendant had a key to a hotel room which he used from time to time. The occupants had never authorized him to store narcotics there, and he had never contributed to the expense of maintaining the room. The Court held that even if the property

[4] *Id.* at 352.
[5] Elkins v. United States, 364 U.S. 206, 217 (1960).
[6] 394 U.S. 165 (1969).
[7] *Id.* at 176.
[8] *Id.*
[9] *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953).
[10] Linkletter v. Walker, 381 U.S. 618, 636–7 (1965).
[11] Alderman v. United States, 394 U.S. 165, 176 (1969).
[12] Mancusi v. Deforte, 392 U.S. 364 (1968).
[13] Katz v. United States, 389 U.S. 347 (1967).
[14] 362 U.S. 257 (1960).
[15] *Id.* at 267. *See*, Parker v. United States, 407 F.2d 540, 542 (9th Cir. 1969).
[16] 342 U.S. 48 (1951).

was contraband subject to seizure and forfeiture, the defendant still had standing to object to the search. The Court refused to engage in any quibbling disputes over the extent of the proprietary interest that one must claim in order to invoke the benefits of the exclusionary rule. If a party has such a relation to certain property that he can expect his conversation and activity there to be in confidence, he has the property interest necessary to raise any violation of the exclusionary rule that may occur thereon.

Mr. Justice Fortas dissenting in *Alderman* could not tolerate illegal government activity being, in effect, authorized under the "legalism" of standing.[17] He found that electronic surveillance "pursuant to a calculated institutional policy and directive" would be "more offensive to a free society than the unlawful search and seizure of tangible material".[18] He would grant standing to object under the Fourth Amendment to "one against whom the search was directed".[19] His argument stresses the role that the exclusionary rule plays in restraining government action. He is impressed with the inequality of the forces which are antagonists in the search and seizure context. Certainly, he concludes, the Government should not be able to deprive a man of his liberty by the use of evidence obtained unlawfully regardless of whose privacy was actually invaded.

Mr. Justice Harlan dissented because the majority's position "permits property owners to assert vicariously the personal rights of others".[20] Only those whose conversations have actually been intercepted have grounds to object to the unreasonable search, he argues. He questioned whether there would be differences drawn between invitees or employees, or between business and personal premises. It seems clear, however, from the Court's use of the *Mancusi-Jones* authorities, that the requisite proprietary interest will be found through an inquiry dealing with foreseeability of electronic surveillance and not with title concepts. Contrary to Mr. Justice Harlan's doubts, those cases also indicate that the necessary interest will not be of a very great degree. "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law".[21] If the man is legitimately on the premises when the objectionable search or seizure takes place, then he has standing.[22]

Alderman next outlines the proper procedure in the District Court for deciding whether the evidence against a defendant was tainted by illegally overheard conversations. The Government must disclose to the defendant any relevant records. The Government is put at its peril either 1) to endanger a life or the national security by disclosing these files, or 2) to not turn over the files and dismiss the prosecution. The Court, in the face of the Government's suggestion that the logs should be first given to the judge for *in camera* inspection to determine if any were arguably relevant, held that "surveillance records as to which any petitioner has standing to object should be turned over to [the defendant] without being screened *in camera* by the trial judge".[23] The task of reviewing all of the involved transcripts would be too great for any trial judge. The adversary system will be the best method through which any specific items of taint could be discovered. The opposing parties will be close to the record and more sensitive to the implications that can be drawn from the record. Since most of the recorded material will already be known by the defendant, disclosure of this large number of records will be of little hazard to others. Furthermore, the lower courts should insure a policy of non-disclosure through the issuance of the appropriate orders to the defendant and his counsel. *Alderman* calls for no other expansion of the discovery rules in the criminal proceeding under the continued close supervision of the trial judge.

Mr. Justice Harlan agreed that at most the *in camera* proceeding would be an inefficient means for discovering the tainted evidence; but he felt that if in appropriate cases the Government's concern for national security interests are "real and not merely colorable" then an *in camera* proceeding would be best.[24] If any arguably relevant passages were found, they alone would be turned over to the defendant. Mr. Justice Fortas agreed with Mr. Justice Harlan that in a case affecting the national security the defendant could peruse "material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states".[25]

[17] Alderman v. United States, 394 U.S. 165, 201 (1969).
[18] *Id.* at 203.
[19] *Id.* at 208.
[20] *Id.* at 194.
[21] Silverman v. United States, 365 U.S. 505, 511 (1961).
[22] *See*, Simmons v. United States, 390 U.S. 377 (1968).
[23] Alderman v. United States, 394 U.S. 165, 182 (1969).
[24] *Id.* at 199.
[25] *Id.* at 209.

In *Taglianetti v. United States* the Court had the opportunity to again rule on the status of the *in camera* proceeding.[26] The defendant had been convicted of willfully attempting to evade income taxes. He asked to examine all conversations to which he was a party. Since there was difficulty in determining whose voices were recorded he asked to study some more of the logs. The District Court inspected the records and turned over to the defendant all the conversations in which it was found that he had participated. The Supreme Court affirmed since total inspection of all records without an *in camera* proceeding is only required where such a proceeding would be an "inadequate means to safeguard a defendant's Fourth Amendment rights".[27] Unlike *Alderman*, the task in *Taglianetti* was not too complex for the trial judge nor was the margin of error too great to disallow reliance on the *in camera* procedure. There were key differences to be found from the *Alderman* situation. The defendant did not ask for all the records to which he could object but only for those logs with conversations in which he had participated. This naturally decreased the raw numbers of the logs and also made the judge's determination an easier one to make. Thus, the efficient administration of justice would not be impaired and all of the defendant's rights would remain enforced. However, the Court does not indicate why turning over the records under a non-disclosure order would not have been more efficient and, under *Alderman*, fairer.

It seems clear that while the Court took another step in strengthing the Constitutional shield around the accused, it may have dulled the sword which carefully guarded the national security. In the final analysis, the issue is one of broad dimensions: can the Government trust the accused with information that may have implications or repercussions beyond the scope of his particular case? The number of cases involving material possibly vital or sensitive to the national security would be small, and an exception here—to allow *in camera* determinations—may slow up judicial process to some extent; but, it would also insure against the possibility of misuse of the records even in face of court orders. In either event, the judge who rules on the motion to suppress would still be thoroughly acquainted with the results of the surveillance.[28]

[26] Taglianetti v. United States, 394 U.S. 316 (1969).
[27] *Id.* at 317.
[28] In Desist v. United States, 394 U.S. 244 (1969), the Court held that the rule of Katz v. United States, 389 U.S. 347 (1967), which rejected the presence or absence of physical intrusion as a criterion for the reasonableness of electronic surveillance under the Fourth Amendment is to be applied only prospectively. Also in this term the Court ruled that evidence violative of Sec. 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C. 605, is admissible in state criminal trials unless it was sought to have been introduced after Lee v. Florida, 392 U.S. 378 (1968). Fuller v. Alaska, 393 U.S. 80 (1968).

Spinelli v. United States: Determining Probable Cause

Spinelli v. United States[29] explicated the analysis to be used by reviewing courts in dealing with the problem of whether or not there was probable cause to issue a warrant. The appropriate principles were recently set out in *Aguilar v. Texas*.[30] That opinion dictates that to find probable cause

> the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [objects of the search or seizure] were where he claimed they were and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable".[31]

Thus, the basis for a finding of probable cause is to be found by careful review of the affiant's allegations as to the nature of the activities from which probable cause was inferred and as to the reliability of the informant. The mere conclusions of an unsubstantiated informant would not be enough for the issuing officer to find probable cause.

In *Spinelli* the report of the anonymous informant was alleged by the government to be corroborated by an FBI investigation. Basically, the affidavit showed a continued and frequent contact by the petitioner with certain areas which the FBI had been informed were the headquarters for a gambling operation. But the Court found the strength of the informant's tip insufficient to establish probable cause, and outlined the analysis necessary for the review of the requirements for probable cause.

First, the informer's tip is measured against the double test of *Aguilar*. If it cannot meet those standards, the other allegations involved should be analyzed. The next question becomes

> [c]an it fairly be said that the tip, even when certain parts of it have been corroborated by

[29] 393 U.S. 410 (1969).
[30] 378 U.S. 108 (1964).
[31] *Id.* at 114.

> independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration?[32]

This seems to be no more than saying that the affidavit taken as a whole must satisfy *Aguilar*. If the tip does not fall within the boundaries set, the magistrate is not to totally discount it. Rather he can weigh it in the final balance along with other support to be found in the affidavit. Of course, if the affidavit still cannot satisfy *Aguilar* then no probable cause should be found by the magistrate and any arrest or seizure based on such warrant must be declared illegal.

The Court intimates that the most crucial point in the examination of the affidavit is the review of the underlying circumstances from which the informant drew his opinion as to the nature of the suspect's activities.[33] It seems clear that while an affidavit need not establish a prima facie case of guilt,[34] it should contain a substantial amount of detail concerning the activities of defendant in order to raise the basis for the Government's action beyond a mere suspicion. It would be helpful for the framing of future affidavits and complaints to list the deficiencies found in the *Spinelli* affidavit:

1) There was no support for the conclusion that the informant was reliable.

It would seem best in this regard to require the listing of specific case names and dispositions of previous successful experience with the informant. Possibly, even the informant's criminal record if relevant to the charge at hand would be helpful to display that he knew proper sources.[35]

2) Failure to allege how the source received his information.

Personal observation by the confidant should be highly detailed and very comprehensive.[36] Certainly, approximate dates and places should be included. If the informant did not receive his information by observation, then he should explain his sources and substantiate their reliability.[37] Although the requirement is unclear, there must at least be sufficient detail so that the issuing officer

> [m]ay know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.[38]

3) Independent police investigations should substantiate the informant's report.

Abnormal or unusual activity observed by officers should be included in the affidavit. The mere use of telephones is not enough in a bookmaking investigation without knowing, for example, that the defendant had five phones in a two-room apartment. Total emphasis should be placed on corroborating and lending greater credibility to the informant's conclusions.[39]

4) Previous criminal activity of the subject.

Although not mentioned specifically in *Spinelli*, prior convictions of the suspect or prior successfully executed search warrants at his home can be of some aid to the magistrate or Commissioner in finding probable cause. In *Jones v. United States*[40] Mr. Justice Frankfurter wrote that the fact

> . . . that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history.[41]

A simple assertion of police suspicion will be of no weight on review while a documented cause for that suspicion will add to the strength of the affidavit.

The *Spinelli* decision is a giant step towards de novo review of every magistrate's conclusions at the appellate level. It must be noted that the warrant in issue has passed the judicial scrutiny of the magistrate, the district court, and the court of appeals. The Court has ruled that preference should be accorded on review to those activities exercised under a warrant.[42] Acting under a warrant is clearly responding to the demands of the Fourth

[32] Spinelli v. United States, 393 U.S. 410, 415 (1969).
[33] *Id.* at 416.
[34] Beck v. Ohio, 379 U.S. 89 (1964).
[35] *See*, United States v. Barnett, 407 F.2d 1114, 1117–8 (6th Cir. 1969); United States v. Kidd, 407 F.2d 1316 (6th Cir. 1969).
[36] *See*, Giordenello v. United States, 357 U.S. 480 (1958).
[37] *See*, Jones v. United States, 362 U.S. 257, 269 (1960).
[38] Spinelli v. United States, 393 U.S. 410, 416 (1969).
[39] *See*, McCreay v. Sigler, 406 F.2d 1264 (8th Cir. 1969); United States v. Rich., 407 F.2d 934, 937 (5th Cir. 1969).
[40] 362 U.S. 257, 271 (1960).
[41] *Id. See*, Rugendorf v. United States, 376 U.S. 528, 532 (1964). *Cf.*, Recznik v. City of Lorain, 393 U.S. 166, 174 (1968) (Black, J., dissenting).
[42] United States v. Ventresca, 380 U.S. 102, 105–7 (1965).

Amendment. The language of *Ventresca*, quoted at some length below, sets forth the problems in the practical sense while *Spinelli* seems to have disregarded these very real considerations:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.
>
> . . . the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner . . . the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.
>
> . . . It is vital that having done so their actions should be sustained under a system of justice responsive both to the need of individual liberty and to the rights of the community.[43]

These reasoned words of Mr. Justice Goldberg were shunned or ignored by the *Spinelli* Court but at the same time the warrant was probably defective under *Aguilar*. The affidavit need not document every fact, but rather "enough information [should] be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process".[44]

Chimel v. California: Search Incident to an Arrest

The Fourth Amendment's guaranty of freedom from unreasonable searches and seizures also was the focus in *Chimel v. California*.[45] Police officers with an arrest warrant waited for the defendant at his house. Upon his arrival they executed the warrant and, over his objection and without a search warrant, searched the entire house. The intensity of the hour-long search varied from room-to-room but the search resulted in the seizure of the fruits of the burglary for which Chimel was subsequently convicted.

Assuming the validity of the arrest, the Court discussed the "basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest".[46] At the outset the author of the opinion, Mr. Justice Stewart, noted that the decisions of the Court in this area have been far from consistent. Essentially the arguments crystallized at two poles of the law. On the one hand, a search incident to a lawful arrest could extend to an area under the "possession" or "control" of the defendant. The second pole was represented by those cases which held that such a search could only include those areas where a defendant might conceal a weapon which would endanger the arresting officers or to areas where the defendant may be able to reach for weapons or destroy evidence.

The major ruling relied upon by those arguing that the search may extend to areas within the control or possession of the defendant is *Harris v. United States*.[47] In *Harris* the defendant was seized in the living room of his four-room apartment on two warrants for his arrest. In the course of the ensuing five-hour search the officers found a sealed envelope with the defendant's name and "personal papers" enscribed on it. The envelope was opened nevertheless and in it was found Selective Service cards which had been altered. The defendant was tried and convicted for concealing and altering Selective Service cards which was a charge wholly unrelated to the original arrest warrants.

The Court upheld the search and the use of the cards in the subsequent trial. The opinion first notes that a search warrant is not required by the terms of the Fourth Amendment. The Court held that a search incident to arrest under appropriate circumstances may extend beyond the person of the one arrested to include the premises under his immediate control.[48] Certainly, the Court argued, the search could extend to an area beyond the room in which the defendant was arrested. A search could not be limited by the fortuity of arresting the defendant in one room instead of another. As long as the officers were not engaging in a general explor-

[43] *Id.* at 108–112.
[44] Jaben v. United States, 381 U.S. 214, 224–5 (1965).
[45] 395 U.S. 752 (1969).
[46] *Id.* at 755–56.
[47] 331 U.S. 145 (1947).
[48] *Id.* at 151.

ation of the premises the search would be allowable. In some cases, the size of the article looked for would have an effect on the scope of the search. The more obvious the item the less extensive and probing the allowable search would be.

Another pillar of the "possession-control" theory was *United States v. Rabinowitz*.[49] In *Rabinowitz* the officer arrested the defendant in his one-room office without a search warrant. In a thorough search of the office for one-and-a-half hours the officers uncovered overwhelming evidence of guilt. Upholding the search, the Court first noted that there was a "longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest".[50] The room under the "immediate and complete control" of the defendant was a proper subject for the search. Even if the officers had time to get a warrant the reasonableness of the search was in no way lessened because they had not obtained one.[51] Thus the law in this view was that the reasonableness demanded by the Fourth Amendment allowed the search of areas generally within the control of the defendant and not only the areas which at the time of arrest were within his reach or his immediate vicinity.

This rationale was followed in *Abel v. United States*[52] where a complete search of an apartment was allowed in an arrest effected through the cooperation of the FBI and the Immigration and Naturalization Service. However, here the Court did allude to the rule that only readily obtainable weapons or destroyable evidence could be seized without a warrant.[53] The rationale was again followed in *Ker v. California*,[54] where the Court reaffirmed the proposition that reasonable searches of considerable scope without a warrant incident to a valid arrest are legal.

Contrary to the views advanced in the *Harris-Rabinowitz* rationale, another pole of authority also existed. In *Go-Bart Importing Co. v. United States*[55] a search of a whole office without a warrant was held to be a "lawless invasion of the premises and a general exploratory search, in the hope that evidence of crime might be found". But there were other abrasive factors at work in that case. The officers had misrepresented that they had a search warrant and they threatened physical violence to those who did not cooperate with the search. The officers also had gone beyond a search of the plainly visible items. Finally, the Court noted that there had been an abundance of time and information available on which to swear out a warrant.

Go-Bart soon became the basis for overturning a conviction based on a warrantless search of a partitioned one-room area.[56] The Court made it clear that searches of premises merely to discover evidence of a crime would not be tolerated. Only searches for specific items which were evidence of the crime or items that could be used to commit a crime could become the object of a warrantless search incident to an arrest.

The third of the trilogy of cases which are considered as limiting the scope of the searches permissible under the Fourth Amendment is *Trupiano v. United States*.[57] The defendant was seized while working over a liquor still which had long been the object of government surveillance. The still also was seized at that time. The Court held this to be an unreasonable search as search warrants should be used "wherever reasonably practicable".[58] Inconvenience of getting a warrant or any slight delay pursuant thereto would be no justification for a warrantless search where the property could not have been easily moved but could have been adequately guarded.[59] The "foreseeability or necessity of the seizure" became the keystones to the reasonableness of the search. But as in *Harris*, the Court strongly emphasized that

> . . . the proximity of the contraband property to the person of [the defendant] at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure.[60]

Thus, while the test was the "apparent need for summary seizure", the actual location or real

[49] 339 U.S. 56 (1950).
[50] *Id.* at 61.
[51] *See*, note 59, *infra*.
[52] 362 U.S. 217 (1960).
[53] *Id.* at 238.
[54] 374 U.S. 23 (1963). In *Ker* the police entered without permission and found one defendant in the living room. The other defendant emerged from the kitchen and the officers saw marijuana in the kitchen. More narcotics were found in the kitchen and in a bedroom. The next day a warrantless search of their car produced more drugs used against the defendants at their trial.
[55] 282 U.S. 344, 358 (1931).
[56] United States v. Lefkowitz, 285 U.S. 452 (1932).
[57] 344 U.S. 699 (1948).
[58] *Id.* at 705.
[59] In Rabinowitz v. United States, 379 U.S. 56, 61 (1950), *Trupiano* was overruled to the extent that it had made the reasonableness of securing a warrant a factor to be considered in determining the reasonableness of the search or seizure.
[60] Trupiano v. United States, 334 U.S. 699, 707 (1948).

control of the defendant over the area was not material.

The Court did try in *James v. Louisiana*[61] to redefine or at least re-explicate the proper scope of warrantless searches. In a *per curiam* opinion the Court said that "a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest". In that case the Court reversed a conviction where after the defendant was arrested two blocks from his home the officers took him to his house, broke in, and conducted a several hour search of it. But, again in *Preston v. United States*[62] the Court mentioned its rule that only the area within which the defendant could obtain weapons or evidence was proper for a search incident to an arrest.

The majority in *Chimel* was convinced that the *Go-Bart-Lefkowitz-Trupiano* pole was correct law. The *Chimel* opinion held that after a valid arrest a search will only be reasonable to the extent of searching the person to remove any weapons that could be used to effect an escape or to remove any evidence that the defendant could conceal or destroy. The area into which an arrestee might reach for a weapon or evidence also is within a reasonable scope for a warrantless search. In all other cases the search may be extended only pursuant to the authority of a warrant. *Rabinowitz* and *Harris* were restricted to their facts and are not to be followed in any way inconsistent with the dictates of *Chimel*. Otherwise, "no consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items".[63]

The Court anticipated a problem by further noting that vehicles may be searched without warrants where securing a warrant would be impractical because the vehicle could easily be moved out of the jurisdiction.[64] A major problem for law enforcement may well arise here in a typical situation where the officers arrest the defendant in his car without a search warrant. If they have the defendant in custody or take the car back to the station with them, the validity of the search of the car at the moment of arrest is a problem. The courts in these cases should take notice of the likelihood that if the defendant's car is left at the scene of arrest one of his cohorts could easily remove it before the search warrant is secured. It will not always be feasible or practical to guard the car until such time as a warrant can be secured. Nor will it always be foreseeable that the arrest will or will not be made in a vehicle. Thus, the agents should be able to search the open and visible sections of the car immediately to seize that evidence or those weapons that were within the grasp of the accused in the car. In this manner then the search would be reasonable in scope in light of the unusual method and circumstances of arrest.

Mr. Justice White forcefully dissented in *Chimel:*

> . . . it would be strange to say that the Fourth Amendment bars the warrantless search, regardless of the circumstances since the invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of the premises.[65]

He felt that the requirement of a search warrant in all cases to be outside the language of the Amendment; it is highly unreasonable to require the police to get a search warrant where there "must always be a strong possibility that confederates of the arrested man will in the meantime remove the item for which the police have probable cause to search".[66] Mr. Justice White would hold that searches should be allowed in certain situations and

> . . . the fact of arrest supplies such an exigent circumstance, since the police had lawfully gained entry to the premises to effect the arrest and since delaying the search to secure a warrant would have involved the risk of not recovering the fruits of the crime.[67]

The major development to be noted from this case is that now the fortuitous circumstance of where a defendant is arrested will play a major role in defining the extent of a proper search.[68] The requirement of a warrant in almost all cases then becomes, as a practical necessity, an absolute. But the Court does not make clear how a search is made any more reasonable by the presence of a warrant.

[61] 382 U.S. 36, 37 (1965).
[62] 376 U.S. 364 (1963).
[63] Chimel v. California, 395 U.S. 752, 766 (1969).
[64] *Id.* at 764 n.9.
[65] *Id.* at 776.
[66] *Id.* at 764.
[67] *Id.* at 774.
[68] *Cf.*, Trupiano v. United States, 334 U.S. 699, 707 (1948); Harris v. United States, 331 U.S. 145, 152 (1947).

If the warrant was for the house the search may then be authorized to extend beyond the scope of what was actually necessary. The real crux of the problem—the seizure of incriminating items unrelated to the arrest—could be avoided in a less restrictive way. In a search incident to a lawful arrest, only those items related to that arrest should be admissible without a warrant. Thus the search would not be a general exploration but rather a proper and reasonable examination for evidence related to a crime for which the arrest—being made on probable cause—was made. This theory would allow the probable cause established by the arrest to allow reasonable search to extend to items involved in the crime of that arrest.[69]

Although similar reasoning has been forcefully rejected by the Court, it does seem that the reasonableness of securing a warrant for the place of arrest should play some role in determining the reasonableness of the ensuing search. In the mobile society of today the criminal may have to be arrested in one of many unanticipated places. Any test should include whether the police could have realized the possibility or probability of executing the arrest in that area.

Davis v. Mississippi: Fingerprint Detention

This term the Court ruled that "detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment".[70] The case arose out of a rape in Meridian, Mississippi on December 2, 1965. With only a sketchy description of the rapist the police for ten days thereafter took over twenty black youths to the police station for questioning and fingerprinting. They were released without further questioning. Others were questioned elsewhere. On December 3, the defendant, who occasionally worked for the victim, was fingerprinted and questioned. In the ensuing days he was questioned at various locations primarily about other possible suspects. He was brought to the hospital room of the victim but never was identified by her. Without probable cause for arrest, he was taken to a prison ninety miles away from his home and kept there overnight. The next day he signed a confession after taking a lie detector test. Returned to the jail in the town of the crime, he was again fingerprinted. The defendant's prints, along with others' prints that had been taken were sent to Washington, D.C. The FBI matched the defendant's prints with those found at the scene of the rape.

The Court noted at the outset that the Fourth Amendment was designed to discourage abusive official action despite the relevancy or trustworthiness of the evidence obtained. Regardless of the stage of the investigation—investigatory or accusatory—the Fourth Amendment must be enforced to prevent the "harrassment and ignominy" of involuntary detention.[71]

But the Court felt it unnecessary to decide whether "the requirements of the Fourth Amendment could be met by narrowly circumscribed procedure for obtaining, during the course of criminal investigation, the fingerprints of an individual for whom there is no probable cause to arrest".[72] It noted certain unique characteristics of fingerprint detention: 1) unlike a search or interrogation there is no probing into the private life or thoughts of the accused; 2) the process need not be repetitive as one set would fulfill all needs; 3) the prints are reliable and effective evidence not subject to abuse of force; and, 4) since there is no danger of the destruction of the evidence, the detention need not be unexpected or inconvenient for the suspect. While these points indicate the practicality of securing a warrant, they do not offer a solution to the problem of demonstrating probable cause.

In this phase, the Court felt *Camera v. Municipal Court*[73] was important. There the Court refused to disallow all administrative searches without warrants of structures for possible building code violations. The major reasons which dissuaded the Court from holding that the Fourth Amendment should be strictly applied in that situation was that the specificity of listing buildings would hamper area-wide inspections which are necessary, for example, in the typical ghetto situation. The area inspection was too valuable for building code enforcement to be set aside by the Court which would be the case if it had required the specificity of a search warrant. Thus, the Court allowed the inspections or searches if there was no objection by the tenant or where citizens have complained of an emergency or, even where other satisfactory reasons were present.

Clearly, in the case of fingerprint detention specificity of the warrant could be no obstacle to

[69] In two cases decided the same day as *Chimel* the Court refused to decide whether or not *Chimel* should be applied retroactively. Von Cleef v. New Jersey, 395 U.S. 814 (1969); Shipley v. California, 395 U.S. 818 (1969).

[70] Davis v. Mississippi, 394 U.S. 721, 727 (1969).

[71] *Id.* at 726.

[72] *Id.*

[73] 387 U.S. 523 (1967).

the requisition of a warrant. The person could easily be identified and the nature of the investigation outlined. The problem is the requirement of probable cause. The Court seems to intimate a lesser standard which avoided unnecessary intrusions or inconveniences could be permissible. But a lesser standard would also be subject to all the dragnet type abuses against which the Fourth Amendment stands as a shield. The probable cause requirement is to prevent the Fourth Amendment guaranty from becoming a "mere form of words".[74] The Fourth Amendment

> cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent.[75]

The key element of the *Davis* case was that the investigation there was not a professional one; it was an abusive, general dragnet based on very few factual leads. To allow this type of activity without the proper intervention and supervision of a judicial officer would be dangerous. Anytime fingerprints were found at the scene of a crime the populace of that general neighborhood would be subject to the rigor and tensions of a police fingerprinting. Inevitably, the case would arise where one person's prints would match those found at the scene of a wholly unrelated crime. Although this evidence would be highly reliable, the question would be whether that evidence was obtained in a reasonable search or seizure or whether that detention for fingerprinting was legal. The freedom to detain persons for fingerprinting without probable cause could lead to the compilation of fingerprinting files which would include prints of nearly the total community. It is not to be doubted that this would be an effective tool for law enforcement, but the issue remains: would it be the result of unconstitutional procedures. In *Davis* the detentions clearly were illegal and official abuse of the method was evident. What future police procedures might fall within the exception—mentioned but not delineated by the *Davis* opinion—of narrowly proscribed procedures for certain circumstances is not easy to foresee from the decision.

Mr. Justice Black dissented in *Davis* and called on the Court to reappraise and limit the scope of the Fourth Amendment as it has developed over the years in order to create a safer environment for the nation's urban population.[76]

[74] Terry v. Ohio, 392 U.S. 1, 13 (1968).
[75] *Id.*
[76] Davis v. Mississippi, 394 U.S. 721, 729 (1969).

BOOK REVIEWS

Edited by
Bernard Cohen

DELINQUENTS AND NONDELINQUENTS IN PERSPECTIVE. By *Sheldon* and *Eleanor Glueck*. Cambridge, Mass.: Harvard University Press, 1968, pp. xx, 268. $8.50

Delinquents and Nondelinquents in Perspective is the first in a new series of follow-up study reports by Sheldon and Eleanor Glueck on the status of 500 delinquent boys who had been committed to a state training school and their matched controls. Whatever else may be said of this latest effort, one can only express admiration for the sheer persistence of the Gluecks in tracking and studying these cohort subjects to age 31. The magnitude of this uniquely successful effort is evident in the number of index cases and controls located and studied (438 delinquents and 442 nondelinquents), during the field investigation phase which began in 1948 and was completed in 1963.

By the same token, however, this volume also reflects the persistence and continued commitment of the Gluecks to a largely non-theoretical, attribute difference, multiple causation perspective. As in much of their previous work, the Gluecks take an eclectic position and remain convinced of