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THE FOURTH AMENDMENT AND THE LAW OF ARREST*

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A long-standing controversy exists between those who support the traditional requirement of probable cause as grounds for any type of "arrest" and those who would allow "detention" upon grounds less than probable cause. The latter group has generally supported the provisions of the Uniform Arrest Act, which would permit a limited period of detention by the police on grounds less than probable cause. What, though, of the constitutional validity of such detention legislation? Does the Fourth Amendment permit any relaxation of the traditional standard? If possibly so, what standard for detention would be valid? And what standard would be workable? In the following article, Mr. Leagre considers these and related questions, analyzing both the historical material which bears on the problems and the recent developments in federal and state law which relate thereto. The author's conclusions and proposals relate not only to the problem of initial detention, but also to the nature and extent of police activity that might be permitted or required subsequent thereto.—EDITOR.

> "It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. . . . [I]t can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."
>
> Elkins v. United States, 364 U.S. 206, 222 (1960).

I. INTRODUCTION

Two relatively recent cases, *Rios v. United States*[1] and *United States v. Bonanno*,[2] have highlighted a problem which was first squarely raised some 20 years ago by the promulgation of the Uniform Arrest Act by the Interstate Commission on Crime.[3] Section two[4] of the act purports to give authority to peace officers to stop, question, and if necessary, detain for two hours, any person "abroad." Section three[5] of the act gives an officer authority to "frisk" or search such a person. The important element in this proposal, however, is that it purports to allow such activities upon a

* This article is a revision of a paper originally submitted to Professor Paul Freund of the Harvard Law School in the Seminar on Constitutional Litigation.

[1] 364 U.S. 253 (1960).

[2] 180 F.Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

[3] The Act is printed in full in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–47 (1942). It has been adopted in whole or in part in three states: Delaware, New Hampshire, and Rhode Island. Each of these states has enacted §§2 and 3. DEL. CODE ANN. tit. 11, §§1902–1903 (1951); N.H.REV.STAT. ch. 594, §§2–3 (1941); R.I.GEN.LAWS tit. 12, ch. 7, §§1–2 (1941).

[4] "*Section 2. Questioning and Detaining Suspects.*

"(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

"(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

"(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime." Warner, *supra* note 3, at 344.

[5] "*Section 3. Searching for Weapons. Persons Who Have Not Been Arrested.*

"A peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon." *Ibid.*

showing by an officer of a substantially lesser degree of mental conviction than has traditionally been required to sustain an arrest. Although the language used is not significantly different from the traditional formulation,[6] it is clear from the draftmen's comments that the statutory intent is to permit such detention in circumstances where the officer would not be allowed to arrest under traditional law.[7] The existence of such a power to detain as a constitutional matter under the Fourth Amendment,[8] however, was only recently presented in the *Rios* and *Bonanno* cases. Both cases involved interference with the freedom of movement of automobiles and their passengers on grounds substantially less than would have justified either the issuance of a warrant of arrest or an arrest without a warrant.[9] In both cases, the government agreed that the Fourth Amendment required probable cause for a formal arrest, but contended that the actions of the police in the instant cases were neither "formal arrests" nor "seizures" of the person such as would require probable cause. In *Bonanno*, Judge Kaufman in the district court accepted this argument.[10] After holding that no technical arrest took place under New York law,[11] he upheld the validity of the detention under the Fourth Amendment. "While the Fourth Amendment may be construed as encompassing 'seizure' of an individual, it cannot be contended that every detention of an individual is such a seizure."[12] Unfortunately for present purposes, the case was reversed on appeal by the Second Circuit without discussion of the detention issue.[13]

Moreover, in *Rios*, the Supreme Court avoided a square holding on the issue by remanding to the district court for a clarification of the facts. Since *Rios* was a companion case to *Elkins v. United States*,[14] which invalidated the so-called "silver platter" doctrine, the Court felt that further consideration should be given at the trial level to the legality of the officers' conduct.[15] Thus it has been said that the Court ambiguously by-passed the important issue presented.[16] This action, however, when considered in connection with

[6] Section 21(c) and (d) of the American Law Institute's *Code of Criminal Procedure* (official draft 1930) speaks in terms of "reasonable ground to believe." The Uniform Arrest Act's formula is "reasonable ground to suspect." See *supra* note 4. It is interesting to note that in a recent decision involving this section of the Act, the Delaware Supreme Court avoided the constitutional issue by holding that "suspect" and "believe" are equivalents. De Salvatore v. State, 163 A.2d 244 (Del. 1960).

[7] Warner, *supra* note 3, at 317–24.

[8] The Fourth Amendment requires probable cause both for the issuance of a warrant of arrest, Giordenello v. United States, 357 U.S. 480 (1958), and for an arrest without a warrant, Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959).

[9] In *Rios*, two police officers were in a neighborhood with a reputation for narcotics. They saw the defendant come out of a building and get into a waiting taxi. They followed, and when the taxi stopped for a traffic light, they got out and approached it from both sides. There was no actual detention since when the officers identified themselves, the defendant became frightened, dropped his narcotics, and ran.

In *Bonanno*, the officers were aware that what would later be known as the Apalachin meeting was taking place on the estate of Joe Barbara, Sr. They had nothing but the vaguest of suspicions about what was going on, however. They set up a roadblock on the public road leading from the estate and stopped every unfamiliar automobile and identified and interrogated the occupants. Some of the defendants were taken to a nearby police station for further interrogation.

[10] "I believe that the relative dearth of authority in point can be explained by the fact that few litigants have ever seriously contended that it was illegal for an officer to stop and question a person unless he had 'probable cause' for a formal arrest." 180 F. Supp. at 78.

It should be noted, however, that the case can be explained on narrower grounds. The only question actually involved was that of the admissibility of voluntary statements made during the detention. Prior to the recent decision in Wong Sun v. United States, 371 U.S. 471 (1963), such statements were generally held admissible so long as they did not fall within the rule of Mallory v. United States, 354 U.S. 449 (1957).

[11] United States v. Di Re, 332 U.S. 581 (1947), held that the validity of an arrest without warrant made by federal officers is dependent upon the law of the state wherein the arrest takes place. It is doubtful, however, whether state law is applicable to determine *whether* an arrest took place. See Gilliam v. United States, 189 F.2d 321 (6th Cir. 1951); 109 U. PA. L. REV. 262 (1960).

[12] 180 F.Supp. at 78. It is not clear whether Judge Kaufman means that it was not a "seizure" at all or merely that it was not an "unreasonable seizure." Compare City of Miami v. Aronovitz, 114 So.2d 784 (Fla. 1959).

[13] United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). Judge Clark, concurring, did mention that he thought the police action "highly dubious." *Id.* at 420 n.3.

[14] 364 U.S. 206 (1960). State officers in both cases had originally obtained the incriminating evidence.

[15] "For all that appears, this ruling may have been based solely upon the silver platter doctrine." 364 U.S. at 253.

[16] "The court dealt with the issue with traditional ambiguity, returning the case to the trial court to determine when the arrest was made without giving explicit attention at all to the issue of whether a right to stop and question exists apart from arrest and, if it does, within what kinds of limitations." Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 388, 390–91 (1960).

Henry v. United States,[17] decided earlier the same term, at least suggests that some right of detention less than that occasioned by a formal arrest may exist under the Fourth Amendment. In *Henry*, a similar factual situation was involved; officers stopped the defendant's car on grounds substantially less than "probable cause."[18] The detention issue was not argued by the government, however, since a concession had been made in the lower courts that an arrest occurred when the car was stopped. The Court, after noting the government's concession, went on to say: "That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, *for purposes of this case*, was complete."[19] Nevertheless, despite the government's concession and the Court's careful language, *Henry* was read by some as laying down a general rule that such interference with liberty of movement constitutes an arrest.[20] If this interpretation were accurate, however, it would seem that the Court could have disposed of *Rios* by merely citing *Henry*; the Court did not purport to differentiate the cases on the basis of the factual distinction that in *Rios* the taxi was already stopped at a traffic light.[21] Rather the Court seemed to indicate that a brief detention for interrogation would be upheld. "But the government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission."[22] Thus it seems clear that, at the very least, *Rios* stands for the proposition that not every police inquiry and the resulting restriction of movement need be deemed an arrest.

It must be admitted, however, that this is about as far as the opinion in *Rios* can be stretched. The peculiar factual situation involved makes it a very appealing case in which to uphold the officers' conduct.[23] Moreover, the Court's opinion is ambiguous and, at best, touches only the periphery of the problem. Because of recent developments in the law the scope of any right of temporary detention has become of vastly increased significance. This is due both to the application of the exclusionary rule[24] to the states through the due process clause of the Fourteenth Amendment[25] and to the recent decision in *Wong Sun v. United States*,[26] which applied the exclusionary rule to voluntary oral declarations made during the course of an unconstitutional arrest. These cases, taken together, substantially increase the amount of police activity subject to the sanction of exclusion of evidence unconstitutionally obtained and, because of the exclusion of oral declarations, make the ability to convict more frequently dependent upon the legality of an interference with freedom of movement.[27] At this stage in the development of

[17] 361 U.S. 98 (1959).

[18] There was some slight suspicion that the defendants had been involved in the theft of an interstate shipment of whiskey. The officers observed them loading their car, which was parked in an alley, with cartons of unknown contents. The defendants made two such trips; when they finished loading and drove off for the second time, the officers followed and waved the car to a stop. The subsequent search revealed not whiskey, but stolen radios.

[19] 361 U.S. at 103. (Emphasis added.) The dissent had something further to say about the government's concession. "While the government, unnecessarily it seems to me, conceded that the arrest was made at the time the car was stopped, this Court is not bound by the government's mistakes." *Id.* at 104–05.

[20] 109 U. PA. L. REV. 262 (1960).

[21] *Henry* could, however, perhaps be distinguished on its particular facts without adverting to the government's concession. Presumably the officers in *Henry* did not stop the car merely to question its occupants but to ascertain the contents of the cartons. Assuming the existence of a right to stop and question, it does not follow that this right could be used as a subterfuge to search. Where the authority of a highway patrolman to stop and check a driver's license was so misused, it was held that a resulting search was illegal. Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947). *Cf.* Able v. United States, 362 U.S. 217 (1960), where the court indicated that the use of an administrative warrant for the purpose of gathering evidence for a criminal prosecution would be invalid.

Thus, it could be argued that in *Henry*, the purpose to search had to be supported by probable cause at the time the car was stopped. See Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

[22] 364 U.S. at 262.

[23] On remand to the district court, Judge Hall upheld the police action on the grounds that there had been no actual stopping or detaining. United States v. Rios, 192 F. Supp. (S.D. Cal. 1961).

[24] Weeks v. United States, 232 U.S. 383 (1914).

[25] Mapp v. Ohio, 367 U.S. 643 (1961). In view of the very recent decision in Ker v. California, 374 U.S. 23 (1963), it is clear that the specific requirements of the Fourth Amendment will be enforced against the states through the due process clause of the Fourteenth Amendment. The following discussion will thus assume generally that such is the case. For a thorough treatment of this subject prior to *Ker*, see, *e.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practice*, 34 ROCKY MT. L. REV. 150 (1962).

[26] 371 U.S. 471 (1963).

[27] Prior to *Wong Sun* the exclusionary rule had not generally been applied to such oral declarations. See note 33 *infra*.

the law, it is deemed appropriate to attempt a further analysis of the Fourth Amendment and the law of arrest.

II. History and Interpretation of the Fourth Amendment—The Law Relating to Searches and Seizures

In order to make a right of temporary detention meaningful, it must be held to exist on a showing less than that required to justify an arrest.[28] Since probable cause is necessary for a valid arrest,[29] the right to detain is urged to rest upon a somewhat lesser ground; the formulation of the Uniform Arrest Act in this regard is "reasonable ground to suspect."[30] The justification for these lesser grounds rests upon the conclusion that such restraints on the individual are reasonable under all the circumstances and hence constitutional under the first clause of the Fourth Amendment which prohibits only "unreasonable . . . seizures . . . ."[31] What this overlooks, however, is that "unreasonable" in the context of the Fourth Amendment is a term of art; disputes over its meaning have led to bitter differences of opinion within the Court,[32] and the issue is not yet, and may well never be, clearly resolved. Certain basic principles, however, have emerged from the interpretation of the amendment in the multitude of cases involving what is and what is not an "unreasonable" search. Since the application of the amendment to the law of arrest has been infrequently litigated,[33] these cases can provide the only available analogy in determining what is and what is not an "unreasonable" seizure of the person. Before turning to those cases, however, it is appropriate in an area in which the opinions are replete with reliance upon history[34] to briefly reiterate the background and formulation of the Fourth Amendment.

A. *The Formulation of the Fourth Amendment*

The abuses which triggered the demand for a protection against searches and seizures in the United States are well known; they were the use of the general warrant in England and its American counterpart, the writ of assistance, in the Colonies.[35] In England, the general warrant had

[28] Even without relaxation of the requirement of probable cause, such a right might be of significance if it had the effect of avoiding the rule of Mallory v. United States, 354 U.S. 449 (1957), whereby a confession is excluded from federal court which has been obtained after arrest and before arraignment, where arraignment has not been made "without unnecessary delay" as required by Fed. R. Crim. P. 5(a). Arguably, the rule would not apply, since a "detention," rather than an arrest, has been made. On policy grounds, however, it is doubtful that such a distinction would be recognized for purposes of the *Mallory* rule. Moreover, under Wong Sun v. United States, 371 U.S. 471 (1963), such confessions under certain circumstances may now be excluded by virtue of the Fourth Amendment. See text following note 250 *infra*.

[29] Cases cited note 8 *supra*.

[30] See note 4 *supra*.

[31] U.S. Const. amend. IV. The amendment provides in full as follows:

"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."

[32] *E.g.*, "For some years now the field has been muddy, but today the Court makes it a quagmire." Chapman v. United States, 365 U.S. 610, 622 (1961) (Clark, J., dissenting); "We witness indeed an inquest over a substantial part of the Fourth Amendment." Frank v. Maryland, 359 U.S. 360, 374 (1959) (Douglas, J., dissenting); "The divisions in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amendment and the shifting views of members of the court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn." Elkins v. United States, 364 U.S. 209, 238-39 (1960) (Frankfurter, J.).

[33] Search and seizure law has developed so rapidly due to the importance of the application of the exclusionary rule. The reasons for the present failure of similar developments on the arrest side of the Amendment are threefold: (1) An unlawful arrest does not deprive the court of jurisdiction over the person, Ker v. Illinois, 119 U.S. 436, 440 (1886); see Albrecht v. United States, 273 U.S. 1 (1927); (2) prior to the recent decision in Wong Sun v. United States, 371 U.S. 471 (1963), statements made during the course of an unconstitutional arrest, the closest analogy to property unlawfully seized, had not generally been held subject to the exclusionary rule, *e.g.*, United States v. Bonanno, 180 F.Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960); *but see* Neuslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940) (Vinson J., later Chief Justice Vinson); see generally, Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. Ill. L.F. 78; (3) in those cases where the exclusionary rule would apply to property illegally seized during the course of a search incident to an arrest, the legality of the arrest is usually not contested and the issue presented is the reasonable extent of the search, *e.g.*, Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56 (1950); Kremen v. United States, 353 U.S. 346 (1957).

[34] *E.g.*, Frank v. Maryland, 359 U.S. 360 (1959); Abel v. United States, 362 U.S. 217 (1960).

[35] Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361 (1921); see generally Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937).

served a variety of purposes; it had been used in the course of ordinary criminal administration as well as in customs enforcement and the suppression of seditious libel.[36] Although Hale had early written that such warrants were void,[37] the practice persisted until shortly before the American Revolution when a series of cases[38] culminating in the famous decision in *Entick v. Carrington*[39] held them invalid.

Contemporaneously, in the Colonies, the use of the writs of assistance[40] was creating the first of a series of frictions which was to lead directly to revolution. The purpose of the writ was to allow search by customs officers for smuggled goods from the West Indies.[41] Its most objectionable feature, which distinguished it from the English general warrant, was that it was not returnable after execution, but was good as a continuing license during the lifetime of the sovereign.[42] It was, in fact, the expiration of these writs in 1761 after the death of George II which gave James Otis the opportunity for his famous oration against general warrants. Although he lost the case and new writs were issued[43] the importance of his eloquent protest cannot be minimized.[44]

The importance of this history prior to the drafting of the Fourth Amendment lies in its indication that the chief concern in the colonists' minds was probably with the issuance of general warrants. Support for this argument can, in fact, be found from the record of the events immediately preceding the amendment's formulation and adoption by the House of Representatives. The original draft was prepared by James Madison and read as follows:

> "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."[45]

Along with other proposals, it was then referred to a Committee of Eleven[46] who reported it to the full House in the following form:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."[47]

Apparently, the full debate on the provision did not take long. Gerry noticed the mistake in wording and that the phrase "unreasonable searches and seizures" of the original Madison proposal had been left out and moved that the first clause be amended to approximately its present form.[48] The motion passed and a further motion was made by Benson.

> "Mr. Benson objected to the words 'by warrants issuing.' This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read 'and no warrant shall issue.'
>
> The question was put on this motion, and lost by a considerable majority."[49]

Had the amendment passed in this form its scope as a matter of historical intent would be clear; the prohibition of general warrants was the sole concern of the "considerable" majority of the members of the House. The insertion of the protection "against unreasonable searches and

[36] LASSON, *op. cit. supra* note 35, at 37–50.

[37] 2 HALE, PLEAS OF THE CROWN 110–14, 150 (1st am. ed. 1847). "And therefore I do take it, that a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact." *Id.* at 150.

[38] Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 631 (1763); Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489, 19 How St. Tr. 981 (1763); Money v. Leach, 3 Burr. 1692, 97 Eng. Rep. 1050, 19 How St. Tr. 1001 (1765).

[39] 2 Wils K.B. 275, 95 Eng. Rep. 807, 19 How St. Tr. 1029 (1765). This case has been frequently cited in interpretation of the Fourth Amendment. *E.g.*, Boyd v. United States, 116 U.S. 616 (1886); Frank v. Maryland, 359 U.S. 360 (1959).

[40] So named because they commanded all subjects to assist in their execution. LASSON, *op. cit. supra* note 35, at 53–54.

[41] *Id.* at 51–78.

[42] *Id.* at 54.

[43] *Id.* at 62–63.

[44] The effect of his argument on John Adams is well known. Adams later wrote: "Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free." 10 WORKS OF JOHN ADAMS at 248 (1856).

[45] 1 ANNALS OF CONG. 434–35 (1789).

[46] *Id.* at 664–65.

[47] *Id.* at 754.

[48] "Mr. Gerry said he presumed there was a mistake in the wording of this clause; it ought to be 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches' and therefore moved that amendment." *Ibid.*

[49] *Ibid.*

seizures" was interded not to impose additional standards but merely by way of preface to the prohibition of general warrants.

In the next stage in the formulation of the final draft, however, the amendment reached its present form. Mr. Benson, whose proposal to broaden the amendment into two clauses had been rejected, was appointed chairman of a Committee of Three whose duties were to arrange all the proposed amendments. When the committee reported back to the House, the amendment apparently appeared in its present form and was approved without further discussion or comment.[50]

Unfortunately, the records of the amendment's progress through the House is the only source of discussion available, since the Senate sat in secret session during this period.[51] Yet even from the meagre background, it seems clear that the amendment as finally adopted and ratified contemplated something more than a mere prohibition of general warrants. By its division into two clauses the amendment was given a broader scope; the protection against unreasonable searches and seizures was thus intended to have independent substantive content.[52] It remained, however, for the courts to determine the nature of that content.

B. *Defining "Unreasonable"—The Development in the Courts*

Although the history of the amendment may indicate that the first clause was intended to have independent substantive content, it affords no guide in determining the nature of that content. Faced with this problem, what were the alternatives available to the Court? It would seem that there were at least five possible interpretations which the Court could logically have reached.

Possibility Number One. Warrants will issue only according to the specific requirements imposed by the second clause of the amendment. The first clause of the amendment requires that searches conducted pursuant to such a warrant must, in addition, be conducted reasonably. If warrants are not involved, however, the amendment does not apply. The validity of searches without a warrant is subject only to the broader limitations imposed by a requirement of due process of law.[53]

Possibility Number Two. The amendment contains an overriding prohibition of "unreasonableness." All searches, whether with or without warrants, must be instituted and conducted reasonably. In addition, all warrants are subject to the specific requirements of the second clause of the amendment.

Possibility Number Three. All searches must be conducted reasonably. However, there is no such thing as a reasonable search unless authorized by a warrant. "The plain import of this [history] is that searches are 'unreasonable' unless authorized by a warrant, and a warrant hedged about by adequate safeguards. 'Unreasonable' is not to be determined with reference to a particular search and seizure considered in isolation."[54]

Possibility Number Four. The Fourth Amendment imposes an overriding requirement of reasonableness on all searches, whether with or without a warrant. Normally, however, a warrant must be obtained or a good reason shown for the failure to do so or the search ipso facto will be deemed unreasonable. "When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable'

[50] *Id.* at 779.

[51] LASSON, *op. cit. supra* note 35, at 102 n.86. The debates in the state ratifying conventions shed no additional light on the matter. Fraenkel, *supra* note 35, at 365–66.

[52] It seems clear that this was Benson's purpose in altering it, if he was the one who did so. He thought the provision was "good as far as it went" but "it was not sufficient." See note 49 *supra*. Lasson, *op. cit. supra* note 35, at 103.

[53] In view of the purpose of a constitutional prohibition against general searches, such an interpretation would seem untenable. Yet implications of such a view as regarding searches not instituted for the purpose of enforcing the criminal law can be found in Frank v. Maryland, 359 U.S. 360 (1959) (state health inspection). See Note, 11 SYRACUSE L. REV. 94, 97 (1959–1960). "According to the majority, the attempted health inspection is without the amendment. . . ." A similar problem may arise if temporary detentions are not deemed "seizures" within the meaning of the amendment. See United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

Note that this interpretation would make the amendment essentially only a prohibition against general warrants yet would add to its scope by requiring "reasonableness" in the execution of the warrant and not merely in its issuance. See United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949).

[54] Taken *out of context* from the dissenting opinion of Mr. Justice Frankfurter in Harris v. United States, 331 U.S. 145, 161–62 (1947). He goes on to limit the statement as follows: "This means that, with minor and severely confined exceptions, inferentially a part of the amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant." *Id.* at 162.

unless a warrant authorizes it, barring only exceptions justified by absolute necessity."[55]

Possibility Number Five. All searches must be conducted reasonably, but it is a flexible requirement depending on the particular case. "What is a reasonable search is not to be determined by any fixed formula."[56] "It is appropriate to note that the constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches."[57] "The relevant question is not whether it is reasonable to procure a search warrant but whether the search was reasonable."[58]

At least two of the five listed possibilities can be dispensed with in a summary manner. The suggestion in possibility number one that searches without warrants are not subject to the requirements of the amendment has gained no headway with the very doubtful exception of the administrative search cases.[59] Possibility number three seems never to have been seriously suggested; even the most rigorous adherents to the requirement of a warrant have recognized the existence of certain exceptions.[60]

Other standards, suggested throughout the five possibilities, have been observed. Thus, a search warrant will issue only in conformance with the second clause of the amendment. "If a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue."[61] Finally, it is clear that any search, even though valid on grounds of probable cause, must, in addition, be conducted reasonably.[62]

Broadly speaking, however, possibility number two, imposing an overriding requirement of reasonableness, seems to be the one which the Court has adopted. It will be observed that possibilities four and five are really nothing more than alternate interpretations of this overriding requirement of reasonableness; the struggle between these interpretations, however, has been the chief cause of disharmony in the search and seizure area in recent years. The early understanding of the amendment was in accord with possibility number four that a warrant was required to make a search reasonable, subject to narrow exceptions.[63] The first of these exceptions is found in *Carroll v. United States*,[64] which recognized the necessity for dispensing with the requirement of a warrant when moving[65] vehicles were involved. The Court realized that insisting upon the requirement of a warrant in these circumstances would afford ample opportunity for the owner to remove his suspect automobile prior to the time the officers were authorized to search. This exception from the requirement of a warrant was thus grounded on a showing of absolute necessity on the facts of the particular case.

Because of this requirement of necessity the

[55] Mr. Justice Frankfurter, dissenting in United States v. Rabinowitz, 339 U.S. 56, 70 (1950).

[56] United States v. Rabinowitz, 339 U.S. 56, 63 (1950) (Minton, J.).

[57] *Id.* at 65.

[58] *Id.* at 66.

[59] Frank v. Maryland, 359 U.S. 360 (1959); Abel v. United States, 362 U.S. 217 (1960). Even here the better interpretation of these cases is that they merely held that reasonableness is composed of different elements when the object of the search is for purposes other than the enforcement of the criminal law.

For a view that searches without warrants prior to United States v. Rabinowitz, 339 U.S. 56 (1950), were without the scope of the amendment, see Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 678–86 (1961).

[60] See, *e.g.*, notes 54 and 55 *supra*. Leaving aside the question of a search of the person incident to arrest, which may be justifiable as a part of the process of seizure of the person, Harris v. United States, 331 U.S. 145, 196 (1947) (dissenting opinion of Jackson, J.), it does not appear that an absolute requirement of a warrant would be totally indefensible. At any rate, criticism of the exceptions which have developed has not been lacking. *E.g.*, Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 477–80 (1948) (criticizing *Harris*); Black, *A Critique of the Carroll Case*, 29 COLUM. L. REV. 1068 (1929) (criticizing Carroll v. United States, 267 U.S. 132 (1925)).

[61] Frank v. Maryland, 359 U.S. 360, 373 (1959) (opinion of Frankfurter, J.) (holding that a search warrant was not constitutionally required under the circumstances).

[62] See, *e.g.*, United States v. Costner, 153 F.2d 23 (6th Cir. 1940); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949).

[63] *E.g.*, COOLEY, CONSTITUTIONAL LIMITATIONS 424–34 (7th ed. 1903); COOLEY, CONSTITUTIONAL LAW 228–33 (3d ed. 1898).

[64] 267 U.S. 132 (1925). The implication that this right was expressly conditioned on an enabling grant of authority in the National Prohibition Act was negated in Brinegar v. United States, 338 U.S. 160 (1949), where the *Carroll* rule was applied in the absence of such legislation.

[65] In Husty v. United States, 282 U.S. 694 (1931), the *Carroll* doctrine was applied to a parked vehicle which could have been moved at any time. "In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant." *Id.* at 701.

Carroll doctrine was held inapplicable to the search of a house in *Agnello v. United States*.[66] Twenty-three years later, the principle was similarly expressed in *Johnson v. United States*,[67] where the Court held invalid the search of an apartment without a warrant. Later the same term, in dealing with the broad right of search incident to a lawful arrest opened up by *Harris v. United States*,[68] in *Trupiano v. United States*,[69] the Court indicated that a search of this kind would not be upheld if there was prior opportunity to obtain a search warrant. The Fourth Amendment required that "law enforcement agents must secure and use search warrants wherever reasonably practicable."[70] Thus, at this point, the interpretation of the amendment as imposing a strict requirement of a warrant except in cases of necessity seemed well settled. Yet only two years later, in upholding the validity of such a search as incident to a lawful arrest in *United States v. Rabinowitz*, the Court stated that "to the extent that *Trupiano v. United States* . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled."[71]

The final result, however, has been a blending of possibility number four and possibility number five, since two later cases[72] have held that a search of a home cannot be conducted without a warrant; *Rabinowitz* was distinguished on the sole ground that the search there allowed was incident to a lawful arrest. Thus, where no arrest is involved, a warrant is constitutionally required except in cases where a strong showing of necessity is made. If such an arrest takes place, however, a search incident to that arrest is permissible absent any showing of lack of opportunity to secure a warrant. The validity of this distinction, turning solely on the existence of an arrest, is understandably difficult for some members of the Court to accept.[73]

Whether *Trupiano* or *Rabinowitz* is followed, however, a further question of reasonableness arises in those cases in which it is determined that a search warrant is not constitutionally required. Under *Rabinowitz*, this question arises immediately since there is no requirement of necessity imposed. Under *Trupiano*, however, this question arises only if the Court first determines that a satisfactory excuse for failing to secure a warrant has been given. Assuming this first step is satisfactorily passed the remaining issue under either rule is the same—whether the search is valid as tested by additional elements of reasonableness.[74]

This second step of the test of reasonableness is of primary interest in the present connection. What criteria would the Court utilize in determining whether a warrantless search was reasonable within the meaning of the first clause of the amendment? For a court which emphasized the necessity

[66] 269 U.S. 20 (1925). "While the question has never been directly decided by this court, it has always been assumed, that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." *Id.* at 32.

[67] 333 U.S. 10 (1948). "The point of the Fourth Amendment . . . is not that it denies law enforcement the support of usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* at 13–14.

[68] 331 U.S. 145 (1947). *Harris* authorized a broad right to search the premises where an arrest took place as a search incident to the arrest.

[69] 334 U.S. 699 (1948).

[70] *Id.* at 705.

[71] 339 U.S. 56, 66 (1950).

[72] Jones v. United States, 357 U.S. 493 (1958); Chapman v. United States, 365 U.S. 610 (1961).

[73] In Chapman v. United States, 365 U.S. 610 (1961), Mr. Justice Frankfurter concurred and Mr. Justice Clark dissented. Both interpreted the majority's opinion as *contra* to *Rabinowitz*.

Mr. Justice Frankfurter stated: "The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth. . . . The reasoning by which the Court reaches its result would be warranted were *Trupiano* . . . still law. . . . Since the *Rabinowitz* case expresses the prevailing view, the decision in this case runs counter to it." *Id.* at 618.

The issue has been further complicated by Ker v. California, 374 U.S. 23 (1963), which authorized a search of an apartment incident to an arrest therein, but avoided relying upon *Rabinowitz*. "The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest . . . but we need not rest the validity of the search here on *Rabinowitz*, since . . . time clearly was of the essence. . . . Thus the facts bear no resemblance to those in *Trupiano v. United States* . . . where federal agents for three weeks had been in possession of knowledge sufficient to secure a search warrant." *Id.* at 41–42.

[74] An attempt has been made to find an absolute equation between reasonableness and the existence of a warrant in the *Trupiano* rule. "A valid warrant was a *sine qua non* of the reasonableness of a search. Thus vehicle search and search incident to arrest were exceptions not only to the warrant requirement. *They were exceptions to the amendment itself.*" Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 683 (1961).

This position seems to result from a reading of *Trupiano* as *always* requiring a warrant and a disregard of the decision in Carroll v. United States, 267 U.S. 132, 147 (1925): "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable."

of securing a warrant wherever practicable, the answer was plain. "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant. . . ."[75] The implication of this statement cannot be mistaken; in order for a search to be reasonable within the first clause of the amendment, it must comply with the requirements of a search conducted pursuant to a warrant insofar as they are applicable. In support of this formulation, the motor vehicle search cases imposed a strict requirement of probable cause to believe that particular objects subject to seizure were concealed within the automobile involved.[76] *Marron v. United States*[77] is not to the contrary. There, officers armed with a valid search warrant obtained entrance to a speakeasy and arrested the proprietor. During the course of their search for items *particularly described* in the warrant, they uncovered other incriminating matter[78] not specified in the warrant. Their seizure and subsequent use in evidence was upheld. Although the Court used unfortunately broad language,[79] the decision authorized nothing more than use of the arrest as sanction for the seizure of an article found during the course of a valid search under a warrant.[80] This interpretation was clarified and the doctrine of equivalence between the first and second clauses of the amendment strengthened by the later cases of *Go-Bart Importing Co. v. United States*[81] and *United States v. Lefkowitz*,[82] which condemned general exploratory searches incident to arrest and clearly indicated that the reasonableness clause of the Fourth Amendment could not be used to authorize a search for which a warrant would not have validly issued.[83]

At this point then, a reading of equivalence into the relationship between the first and second clauses of the Fourth Amendment would seem to be constitutionally required. The only searches without a warrant which had been upheld were those of a motor vehicle where probable cause was required[84] and search of a person incident to a lawful arrest.[85] The attempted use of an arrest to authorize a general search of the premises, although broadly supported by dicta, had been struck down in its only actual tests.[86]

Moreover, search of the person incident to an arrest is broadly justifiable on grounds of probable cause.[87] Since probable cause is a constitutional requirement for a valid arrest,[88] a search of the person incident to such an arrest may reasonably be justified in two ways. Such a limited search may be considered part of the process of arrest, or probable cause for the arrest may, in itself, be probable cause to believe that articles subject to seizure are in the arrested person's possession. Each of these suggested rationales is both broader and narrower in implications than the other.

The rationale that such a search is really subsumed within the concept of arrest was suggested by Mr. Justice Jackson, dissenting in *Harris v. United States*. "Of course, a warrant to take a per-

[75] United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

[76] Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (931); Carroll v. United States, 267 U.S. 132 (1925). "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." Carroll v. United States, *supra* at 155–56.

[77] 275 U.S. 192 (1927).

[78] The objects seized were books and ledgers which the Court characterized as "part of the outfit or equipment actually used to commit the offense." *Id.* at 199. Books and papers of mere evidentiary value are not a proper subject of search and seizure under any circumstances, however reasonable. Gouled v. United States, 255 U.S. 298 (1921).

[79] "The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." 275 U.S. at 198–99.

[80] "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for." Abel v. United States, 362 U.S. 217, 238 (1960).

It should be noted, however, that the mere fact that the object was lawfully *discovered* may not be enough. The Court, in *Marron*, seemingly rejected the suggestion that things so found were subject to seizure solely on the authority of the warrant itself. See United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957). *But see* Davis v. United States, 328 U.S. 582 (1946); Zap v. United States, 328 U.S. 624 (1946).

[81] 282 U.S. 344 (1931).

[82] 285 U.S. 452 (1932).

[83] See note 75 *supra* and accompanying text.

[84] Cases cited note 76 *supra*.

[85] In Agnello v. United States, 269 U.S. 20 (1925), the Court reversed the conviction as to Agnello because of property unlawfully taken from his home in his absence. The conviction of the other defendants, however, based on a search of their persons and a seizure of articles in plain view as incident to an arrest, was affirmed.

[86] See notes 81 and 82 *supra* and accompanying text.

[87] In Agnello v. United States, 269 U.S. 20 (1925), there was clearly probable cause since the officers had watched the sale of narcotics through a window.

[88] Cases cited note 8 *supra*.

son into custody is authority for taking into custody all that is found upon his person or in his hands."[89] Under this formulation it would seem to follow automatically that a right to search the person exists in all cases regardless of the nature of the offense.[90] To this extent the power may seem unnecessarily broad, yet its necessity is readily apparent. It is granted in order to properly effectuate the arrest; the purpose is to protect the arresting officer. Even in the case of a minor violation it does not seem unreasonable to allow the officer to protect himself against a reasonable possibility that the person arrested is, in fact, a man of more violent disposition.

Basing the right of the search on the theory that there exists probable cause to believe that articles subject to seizure are in the person's possession narrows the right of the search to the extent that the nature of the crime for which the arrest takes place becomes relevant. Thus, it would seem that, under this rationale, arrests for offenses of a nature which would not in themselves indicate the possession of a weapon or where fruits or instrumentalities are not involved, such as an arrest for a traffic violation, would not be sufficient to authorize even a search of the person.[91] The broadness of this rationale becomes apparent, however, when its implications in extending the area of permissible search are considered. If the search is allowed only for the purposes of effectuating the arrest it may extend only to the person and those things within his immediate physical control. If, however, the rationale is that probable cause exists to believe that articles subject to seizure are in his possession, no such automatic limitation exists and extension of the search to the premises becomes permissible.[92]

Only in this manner can the searches in *Harris v. United States*[93] and *United States v. Rabinowitz*[94] be justified. In both cases the search extended over the entire premises in which the arrest took place,[95] and no question of necessity for protection or to prevent escape was involved. Because of the broad scope of the search in these cases, they have been read as authorizing general exploratory searches,[96] which would not be allowed if the requirement of a warrant were imposed. As might be expected, the Court was urged to declare the searches in both cases invalid on the authority of *Go-Bart Importing Co. v. United States*[97] and *United States v. Lefkowitz*.[98] In *Rabinowitz*, the Court said, however, that they were distinguishable. "Those cases condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant. In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here."[99] It is submitted that insofar as *Go-Bart* and *Lefkowitz* rest on the prohibition of a general exploratory search[100] they were appropriately distinguished from both *Harris* and *Rabinowitz*. In eliciting a requirement of equivalence between the first and second clauses of the amendment, the basic test must be whether at the time the search

[89] 331 U.S. 145, 196 (1947).

[90] There would be no question about the presence of probable cause. Going further, however, if the search is clearly unnecessary on the facts of the particular case, it might be held "unreasonable" under all the circumstances.

[91] *Cf.* Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953); Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347; 18 CALIF. L. REV. 673 (1930).

[92] This is not to say, however, that a line cannot be drawn. Mr. Justice Frankfurter, dissenting in *Rabinowitz*, recognized the right to search the person as springing from two purposes: first, to protect the officer, and second, to prevent the destruction of evidence by the arrestee. 339 U.S. at 72.

Such a line, however, is not relevant to an underlying rationale of probable cause. *Compare* Miller v. United States, 357 U.S. 301 (1958).

[93] 331 U.S. 145 (1946).

[94] 339 U.S. 56 (1950).

[95] In *Harris*, the defendant was arrested in his four-room apartment which was then subjected to a five-hour search. The basis of the conviction was false draft cards found in a sealed envelope in a bureau drawer.

In *Rabinowitz*, the arrest took place in the defendant's one-room office. The desk, safe, and file cabinets were then searched.

[96] *E.g.*, Mr. Justice Murphy dissenting in *Harris*: "This decision converts a warrant for arrest into a general search warrant lacking all the constitutional safeguards. . . ." 331 U.S. at 183.

[97] 282 U.S. 344 (1931).

[98] 285 U.S. 452 (1932).

[99] 339 U.S. at 62.

[100] It is extremely difficult to determine the precise grounds of these cases. *Lefkowitz*, although regularly cited as a holding against exploratory searches, seems more concerned with enforcing the prohibition of Gouled v. United States, 255 U.S. 298 (1921), that papers of mere evidentiary value are never the subject of a valid search and seizure.

Go-Bart seems more directly to challenge the exploratory nature of the search. Yet the Court alluded to the opportunity to get a warrant and the failure to do so as a ground for the decision. Furthermore, the conduct of the officers may have been considered "unreasonable" under all of the circumstances. The officers, (a) told the defendants they had a search warrant when they did not, and (b) arrested the defendants under color of what was, in fact, an invalid warrant of arrest. (The Court purported to consider the arrests as having been lawfully made without a warrant for purposes of determining the legality of the search.)

began the officers could have obtained a valid search warrant with the information they then possessed.[101] It seems clear that warrants would have issued for the search of both the apartment in *Harris* and the office in *Rabinowitz* had the officers applied for them. In *Harris*, the defendant was arrested for check forgery and the search was for instrumentalities of that crime. Since warrants for the search of his office and car had, in fact, issued on allegations of the crime and his control over these places,[102] the conclusion seems inescapable that a warrant would similarly have issued for the search of the apartment. Similar facts existed in *Rabinowitz*, where the arrest was for possession and sale of postage stamps bearing forged overprints. Throughout the opinion the Court emphasized the strength of the evidence that the stamps would probably be found in the defendant's office,[103] and Mr. Justice Frankfurter in his dissent clearly implies that a search warrant would have lawfully issued.[104]

Thus it would seem accurate to say that the Court, in judging the reasonableness of a search without a warrant under the first clause of the Fourth Amendment, has impliedly held that an indispensable element of that reasonableness is conformance, so far as applicable, with the specific requirements imposed upon the issuance of a warrant under the second clause.[105] In addition, all searches, whether made with or without a warrant, must be *conducted* reasonably in the sense of reasonableness under all the circumstances of the particular case. To conclude thus from the abundance of cases construing the amendment in cases of illegal searches, however, is but to pose the problem; the applicability of this settled doctrine to the law of arrest is yet to be considered.

III. Arrests With and Without a Warrant

There has been little discussion concerning the applicability of the standards imposed by the Fourth Amendment to the law of arrest.[106] The present absence of judicial development comparable to that in the search cases obviously creates difficulties both in terms of analysis and of predictability. Other difficulties arise from the expression of the amendment's protection in terms of "seizure" rather than arrest. This, too, the courts have left completely untouched. Despite the seeming use of "seizure" primarily as an aspect of a preceding search,[107] however, several cases have held that the amendment's requirement of probable cause applies both to the issuance of a warrant of arrest[108] and to an arrest without a war-

[101] This is not, of course, the only aspect of equivalence involved. Quite apart from the question of probable cause, all searches must be conducted reasonably. See United States v. Costner, 153 F.2d 23 (6th Cir. 1940). It would seem arguable that searches conducted without the prior sanction of a magistrate should be required to conform to even higher standards in this regard. See United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[102] Record, pp. 28–32.

[103] "There was probable cause to believe that respondent was conducting his business illegally. The search was for stamps overprinted illegally which were thought upon the most reliable information to be in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully." 339 U.S. at 62–63.

[104] The entire emphasis of his opinion is on the failure to obtain a warrant. Although he never actually says that probable cause for the search existed, the following language strongly suggests it. "The arrest and search were made on February 16, 1943. On February 1, there was strong evidence that respondent had in his possession large numbers of stamps bearing forged overprints. . . ." Thus, the government had at least seven, and more accurately fifteen, days in which to procure a search warrant. 331 U.S. at 85.

[105] Arguably, this may also be true of the cases sustaining administrative action without the requirement of a judicial warrant. In Abel v. United States, 362 U.S. 217 (1960), the administrative arrest and search were under the authority of a warrant issued by a higher official. "It is to be remembered that an I.N.S. officer may not arrest and search on his own. Application for a warrant must be made to an independent responsible officer, the District Director of the I.N.S., to whom a prima facie case of deportability must be shown." *Id.* at 236, 237. In Frank v. Maryland, 359 U.S. 360 (1959), the observation of a pile of "rodent feces mixed with straw and trash and debris to approximately half a ton" on the outside of the house clearly gave probable cause for an inspection of the interior. But see Ohio *ex rel.* Eaton v. Price, *prob. juris. noted*, 360 U.S. 264 (1959), *aff'd mem. by an equally divided court*, 364 U.S. 263 (1960) (separate opinion of Frankfurter, Clark, Whittaker and Harlan, JJ., in 360 U.S. 264, applying the principle of Frank v. Maryland in the absence of probable cause).

[106] The reasons for the present dearth of authority are discussed in note 33 *supra*. A substantial increase in judicial consideration of this problem will very probably result from the decision in Wong Sun v. United States, 371 U.S. 471 (1963), which applied the exclusionary rule to oral declarations made during the course of an unconstitutional arrest.

[107] See United States v. Eighteen Cases of Tuna Fish 5 F.2d 979 (W.D. Va. 1925). "The bald letter of the amendment suggests that it was intended to apply only to warrants which direct both search and seizure. But at least as to warrants for the arrest of persons charged with crime there seems no room for doubt that the amendment applies."

[108] *E.g.*, Giordenello v. United States, 357 U.S. 480 (1958); McGrain v. Daugherty, 273 U.S. 135 (1927); Albrecht v. United States, 273 U.S. 1 (1927); West v.

rant.[109] Most of the cases which have held that the Fourth Amendment requires probable cause for an arrest without a warrant seem to assume equivalence between the first and second clauses without really discussing the issue.[110] It would seem, however, that by analogy to the development of the reasonableness clause in the search cases, such holdings are clearly sound.[111] Yet it must be admitted that, even in cases involving the enforcement of the criminal law, there are significant differences in emphasis between the law of search and seizure and the law of arrest. With the exception of searches incident to a valid arrest, the Court has strictly required issuance of a search warrant whenever practicable. It is interesting to note that the extensive searches authorized in both *Harris*[112] and *Rabinowitz*[113] were incident to an arrest made under a warrant of arrest. Prior to the recent decision in *Ker v. California*,[114] which authorized a similarly extensive search incident to an arrest made without a warrant, there had been some feeling that the decisions in *Harris* and *Rabinowitz* may have turned upon the existence of a warrant of arrest.[115] After *Ker*, the doctrine is, of course, not so limited. However, there are intimations that a showing that it was impracticable to obtain a warrant may be required to justify such searches based upon arrests without warrants.[116] Little discussion of a comparable protection for the security of the person against arrests without warrant has been found. In *Draper v. United States*,[117] for example, the Court upheld an arrest without warrant for a narcotics violation in the absence of any showing that it was impracticable to obtain one.[118] Indeed, lower courts have affirmatively held that an arrest may be made without a warrant even though abundant opportunity existed for its issuance. "If an arresting officer has reasonable grounds to believe that a person has violated the narcotic laws, he may defer the arrest for a day, a week, two weeks, or perhaps longer."[119] Such holdings may be based on a misconception of the common law rules which permitted arrests without warrant only for breaches of the peace and felonies.[120] Most of the discussion of the right to arrest without warrant has centered

Cabell, 153 U.S. 78 (1894); Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806).

[109] *E.g.*, Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959); Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948).

[110] However, in Wong Sun v. United States, 371 U.S. 471 (1963), the Court stated that it should be at least as difficult for a police officer to act without a warrant as it was for him to obtain the warrant in the first instance. "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.* at 479.

[111] Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 39 (1957). "If the search and seizure cases are determinative of the question, therefore, it seems almost certain that a congressional enactment of the Uniform Arrest Act would be found unconstitutional under the Fourth Amendment."

[112] 331 U.S. 145 (1947).

[113] 339 U.S. 56 (1950).

[114] 374 U.S. 23 (1963).

[115] Abel v. United States, 362 U.S. 217, 249 (1960) (dissenting opinion of Brennan, J.). "It thus could be held that sufficient protection was given the individual without the execution of a second warrant for the search." Lower courts have not, however, so limited the doctrine. *E.g.*, Smith v. United States, 254 F.2d 751 (D.C. Cir.), *cert. denied*, 357 U.S. 937 (1958); Bartlett v. United States, 232 F.2d 135 (5th Cir. 1956).

Searches of the person are, of course, allowed whether the arrest is with or without a warrant. *E.g.*, Draper v. United States, 358 U.S. 307 (1959); Agnello v. United States, 269 U.S. 20 (1925).

[116] See note 73 *supra*.

[117] 358 U.S. 307 (1959).

[118] In his dissent in *Draper*, however, Mr. Justice Douglas intimated that such a limitation may exist. "The rule which permits arrest for felonies, as distinguished from misdemeanors, if there are reasonable grounds for believing a crime has been or is being committed . . . grew out of the need to protect the public safety by making prompt arrests. . . . Yet, apart from those cases where the crime is committed in the presence of the officer, arrests without warrants, like searches without warrants, are the exception, not the rule in our society." 358 U.S. at 315–16. In his separate opinion in Wong Sun v. United States, 371 U.S. 471, 479 (1963), Mr. Justice Douglas clarified his earlier statement by concurring solely on the ground that "nothing the Court holds is inconsistent with my belief that there having been time to get a warrant, probable cause alone could not have justified the arrest . . . without a warrant." The majority opinion, while not specifically alluding to the question, is consistent with this position. "The arrest warrant procedure serves to insure that the deliberate impartial judgment of a judicial officer will be interposed between the citizen and the police. . . ." *Id.* at 481–82. See also Smith v. United States, 254 F.2d 751, 759 (D.C. Cir.), *cert. denied*, 357 U.S. 937 (1958) (dissenting opinion of Bazelon, J.).

[119] Dailey v. United States, 261 F.2d 870, 872 (5th Cir.), *cert. denied*, 359 U.S. 969 (1959) (arrest deferred two weeks). A similar holding was made sub silentio in Smith v. United States, 254 F.2d 751 (D.C. Cir.), *cert. denied*, 357 U.S. 937 (1958). See also Mills v. United States, 196 F.2d 600 (D.C. Cir.), *cert. denied*, 344 U.S. 826 (1952) (semble).

[120] The common law rules are well summarized in 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883).

around the highly involved distinctions in these categories,[121] and it seems to have been assumed that no obligation to obtain a warrant exists[122] if the arrest is for a felony.[123] It does not necessarily follow, however, that this is the case; the mere grant of authority to arrest for certain crimes does not automatically indicate that opportunity to obtain a warrant is irrelevant.[124] Early common law authority would seem to indicate that an arrest warrant was to be procured unless the delay would afford opportunity for the suspected felon to escape.[125]

At any rate, it would not seem necessary to impose this requirement as a matter of Fourth Amendment philosophy whatever the state of the common law. Such a requirement, as in the search cases, could only exist through a negative implication from the second clause of the amendment, and the policy reasons underlying it there are not necessarily applicable to the same extent in the law of arrest. The justification for requiring a warrant for the search of a house has both historical and practical bases. Most of the legal discussion of the amendment has emphasized the privacy of the home as most inviolable.[126] "At the very core [of the Fourth Amendment] . . . stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[127] This historical emphasis upon the sanctity of the home is not present in the normal process of arrest.[128] Moreover, the element of mobility, relied upon to justify dispensation with the requirement of a warrant in the automobile search cases,[129] is continually present in connection with the normal arrest. Clearly, if the commission of the felony is substantially contemporaneous with the arrest, necessity in the traditional sense exists. Not only is there no public policy in allowing felons to go free while the officer is securing a warrant, there is also no justification for a requirement which may result in his ultimate escape. It can hardly be denied, however, that reasonable police practice may indicate the desirability of postponing an arrest in particular situations. Often, it will be far from clear whether adequate grounds for an arrest exist; in other cases postponing the arrest of an individual may be necessary in order to apprehend other members of a criminal organization. Yet such delay may itself create a necessity for prompt action at a particular time. To the extent that this delay is recognized as a proper element of police discretion it is apparent that arrests without warrant in such cases should be allowed. Beyond this it is difficult in principle to justify cases where grounds for arrest clearly existed at an earlier time and there was no element of potential escape present.[130] The difficulties presented in determining whether such was the case, however, should counsel restraint in concluding that an officer acted unreasonably in failing to procure a warrant although it may later appear that ample opportunity existed for its issuance.[131]

To recognize that the Fourth Amendment does not require a warrant of arrest whenever practicable, however, is not to indicate the lack of equivalence between the requirements for an arrest with or without a warrant. Although a strong insistence upon the issuance of a warrant lends itself more readily to a requirement of equivalence,

[121] Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924).

[122] MACHEN, ARREST §§15, 21 (1950).

[123] An arrest without warrant for a breach of the peace had to be made immediately or on fresh pursuit. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 247 (1940).

[124] For discussion of a related problem in the search cases, see note 74 *supra* and accompanying text.

[125] In discussing the power of private persons to arrest for a felony, Hale stated that "it is best to complain to a justice of peace, and have his warrant . . . but such the case may be, that the delay that must arise necessarily by these solemnities, may give the felon opportunity to escape; and therefore in this case A. without any other authority than what the law gives him, may arrest or apprehend the felon. . . ." 2 HALE, PLEAS OF THE CROWN 76 (1st am. ed. 1847). Hawkins later stated that it was difficult to find any greater power in a constable to arrest for felonies than in a private person. 2 HAWKINS, PLEAS OF THE CROWN 129 (8th ed. 1824).

[126] Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 365 (1921). "It is, therefore, apparent that the Fourth Amendment did but embody a principle of English liberty . . . that finds another expression in the maxim 'every man's home is his castle'."

[127] Silverman v. United States, 365 U.S. 505, 511 (1961).

[128] To the extent that an arrest without warrant is used to authorize an extensive search of a home, however, these considerations would not seem applicable and some requirement of necessity should be imposed. *Compare* Ker v. California, 374 U.S. 23 (1963), *with* Wong Sun v. United States, 371 U.S. 471 (1963).

[129] See note 65 *supra*.

[130] See cases cited note 119 *supra*.

[131] It would seem to follow a fortiori that the right to arrest without warrant for lesser offences than felonies and breaches of the peace is constitutionally permissible. Foote, *Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 17–18 (1957). *But see* Wilgus, *Arrest Without Warrant*, 22 MICH. L. REV. 541, 550 (1924). Such legislation for minor thefts is drastically needed. See Note, *Shoplifting and the Law of Arrest: The Merchant's Dilemma*, 62 YALE L.J. 788 (1953).

it is not a necessary prerequisite as the cases authorizing search incident to an arrest make clear.[132] At any rate, in the few arrest cases to reach it, the Court has clearly held that reasonableness for an arrest without warrant requires the same degree of probable cause as is necessary for the issuance of a warrant.[133] Thus in *Henry v. United States*,[134] in construing the statutory grant of authority allowing FBI agents to arrest without warrant when they have "reasonable grounds to believe,"[135] the Court said: "The statute states the constitutional standard for it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except 'upon probable cause. . . . ' "[136] Two other cases fortify this requirement of equivalence and further illustrate the extent of interrelationship between the search and arrest cases. In *Draper v. United States*[137] the Court held that probable cause for an arrest without warrant could be based on information of a hearsay nature. The decision was interpreted by Mr. Justice Douglas, dissenting, as "lowering the standard when an arrest is made without a warrant and allowing the officers more leeway than we grant the magistrate."[138] In *Jones v. United States*, the Court clarified the situation by holding that hearsay could be the basis for a *search* warrant on the authority of *Draper*. "If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant."[139] Most recently, the Court in *Wong Sun v. United States*[140] clearly held that an arrest without a warrant could be justified only if the information upon which the officers acted would have been sufficient to justify the issuance of an arrest warrant.

Thus it is clear from both the search and arrest cases that the Fourth Amendment applies the standard of probable cause to determine the validity of an arrest made without a warrant. In the face of these decisions, attempts to authorize arrests on lesser grounds would seem to be assured of invalidity. Yet the right to "arrest" and the right to "detain" are not necessarily synonymous; just as "unreasonable" in the Fourth Amendment is a word of art due to its equivalence with the requirements for the issuance of a warrant, so also is the term "arrest."

IV. The Right of Temporary Detention

A. *The Basis for the Distinction Between "Arrest" and "Detention"*

A doctrine of equivalence between the first and second clauses of the amendment is necessarily based upon a fundamental notion that an officer should not be allowed to act without a warrant in situations where a warrant would not validly issue. Where the nature of the activity is not encompassed within the situations to which a warrant is applicable, however, as in the administrative search cases,[141] the reason for the rule fails and with it the rule. The right of temporary detention must rest on similar grounds; it must be established that it is different in kind from those situations to which a warrant is applicable and that, hence, no requirement of probable cause is to be implied. Certain kinds of official detention clearly satisfy this test. Thus it is not difficult to recognize that detention of an insane person or of a lost child or the enforcement of quarantine measures do not require a showing of probable cause; in such a context, the concept of probable cause in

[132] See text accompanying note 93 *supra*.

[133] There exists a strong likelihood, however, that probable cause in the traditional sense will not be required for an administrative arrest. See Abel v. United States, 362 U.S. 217 (1960) (validity of arrest not specifically decided due to concession in the lower courts).

[134] 361 U.S. 98 (1959).

[135] 18 U.S.C. §3052 (1958).

[136] 361 U.S. at 100.

[137] 358 U.S. 307 (1959).

[138] *Id.* at 325.

[139] 362 U.S. 257, 270 (1960). It should be noted that the use of hearsay as the basis for a search or an arrest, when considered in conjunction with the governmental privilege not to disclose the identity of an informer, may create significant problems. In *Jones*, the Court, with some qualifications, authorized the use of such information to establish probable cause for the issuance of a search warrant. To the extent that nondisclosure of identity is allowed, it is apparent that there is a possibility that the alleged hearsay information may exist only in the officer's mind. This possibility becomes substantially more dangerous if such information is subsequently used to justify a search or an arrest previously made *without* a warrant. Assuming the validity of the informer's privilege, it would seem questionable whether such information from a privileged source should be considered in determining the existence of probable cause.

[140] 371 U.S. 471 (1963).

[141] The most logical interpretation of Abel v. United States, 362 U.S. 217 (1960), and especially Frank v. Maryland, 359 U.S. 360 (1959), is that the searches there upheld are different in kind from searches for which a warrant, and hence probable cause, is required. Reasonableness in a distinguishable context takes on a different meaning. *Cf.* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (probable cause not required for the issuance of a subpoena duces tecum).

the traditional sense is not applicable. Other examples in the same general category include the right to detain a witness at the scene of a crime or a material witness who may not remain available to testify[142] and the authority of a police officer to stop an automobile for the purpose of inspecting the operator's license.[143] Whether some or all of these restraints on liberty should be allowed is a question which can only be answered by a weighing of relative values; that they are different from an arrest for a crime cannot be denied.

Such examples, however, do not substantiate the existence of a similar right of detention for the purposes of enforcement of the criminal law. If the line is to be drawn at an invasion of privacy "which has as its design the securing of information . . . which may be used to effect a further deprivation of life or liberty or property,"[144] it would seem difficult to consider detention of a suspect as differing from an arrest to the degree that constitutional differentiation is warranted. Yet the distinction may be implied from the amendment itself. The Fourth Amendment does not in terms refer to "arrest";[145] it does, however, in its second clause impose the traditional qualifications of an arrest upon the issuance of a warrant.[146] Thus the argument can be made that the warrant referred to is the traditional warrant of arrest although "arrest" itself is not specifically mentioned.[147] If this is accepted, then whatever equivalence that exists between the first and second clauses of the amendment should be limited to "arrests" even though other "seizures" may be utilized as a preliminary step in the enforcement of the criminal law. Thus, "reasonable" as a word of art requiring the existence of probable cause is applicable to arrests without warrants, but does not apply to those seizures which fall short of constituting an arrest.[148]

Obviously, such an argument requires the existence of a valid distinction between "arrests" and other "seizures" of the person in the context of the criminal law. Although there is some authority that any deprivation of liberty of movement is an arrest,[149] the generally accepted definition[150] at common law is "the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime."[151] The key words in this definition are, of course, those in the qualifying phrase "in order to be forthcoming to answer an alleged or suspected crime," and it must be admitted that the meaning of this phrase is far from clear. Its ambiguity can be resolved narrowly by interpreting it merely to exclude those situations not involving the enforcement of the criminal law, such as the detention of the insane.[152] Yet it cannot be denied that a broader meaning has some-

[142] 2 ALEXANDER, ARREST 2029–2037 (1949); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 258–59 (1940).

[143] *E.g.*, City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959). Of course, such authority cannot be used as a subterfuge for an invalid purpose. Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947).

[144] Frank v. Maryland, 359 U.S. 360, 365 (1959).

[145] "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*. U.S. CONST. amend. IV. (Emphasis added.)

[146] 2 HAWKINS, PLEAS OF THE CROWN 134 (8th ed. 1824). "[A] justice of peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty."

Hale had earlier indicated the requirement of an oath. 2 HALE, PLEAS OF THE CROWN 110 (1st am. ed. 1847). "But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest."

[147] Brief for United States, p. 30, Rios v. United States, 364 U.S. 253 (1960). "Similarly, we think, the 'warrant' required by the Fourth Amendment to be supported by probable cause was the traditional warrant of arrest. . . ."

[148] "[H]ence that provision carries no implication that probable cause is required for limited detentions for inquiry that are less than a common law arrest." *Ibid.*

[149] *E.g.*, United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957); 1 ALEXANDER, ARREST 353-61 (1949). *But see, e.g.*, Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 522 (1949). "[A]lthough the word 'Arrest' is derived from origins which mean 'to stop', and it is used in that sense for some other purposes, the mere act of stopping a man does not constitute an arrest as a matter of law."

[150] A.L.I. CODE OF CRIMINAL PROCEDURE §18 (Official Draft 1930); see RESTATEMENT, TORTS §112 (1934); 109 U. PA. L. REV. 262 (1960).

[151] 4 BLACKSTONE, COMMENTARIES *289, p. 1679 (1897 ed.).

[152] Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 403 (1960). "The most reasonable interpretation of this language would be that it merely distinguishes a restraint the purpose of which is related to the enforcement of the criminal law from the seizure of a lost child in order to return it to its parents, the enforcement of quarantine measures, or the detention of a mentally ill person who requires care and treatment."

times been given it, at least insofar as "apprehending or restraining" is defined as a temporary interference with liberty of movement.[153] The latter interpretation, to the extent that it distinguishes between those seizures which can appropriately be termed "arrests" and those which can more appropriately be considered as "detentions," is necessarily adopted by those arguing for the right to detain on lesser grounds of belief. It is fortified by a reliance on the English common law, which purported to recognize such a distinction under certain circumstances. Both the Government[154] and the draftsmen of the Uniform Arrest Act[155] rely heavily upon this common law distinction. Such reliance would appear necessary for the purpose of interpreting the amendment; if the framers are to be deemed to have distinguished between an "arrest" and a "detention," it seems essential that such a distinction contemporaneously existed.[156] For this reason it is appropriate at this point to consider the authorities relied upon in some detail.

B. *The Source of the Distinction—The English Authorities*

Two propositions are sought to be elicited from the early English common law: first, that a power existed to "detain" on grounds less than probable cause; and second, that the one detaining was not required to proceed after the "detention" in the same manner as was required after an "arrest." A distinction must be drawn between "arrests" and "detentions"; it is not enough merely to find that a person could be arrested in the traditional sense on grounds less than probable cause, because to that extent the common law is repealed by the Fourth Amendment. The failure to recognize this distinction has led some to argue that the arrest of an *actual felon* should be lawful per se[157] because some authority for it existed at common law.[158] This seems clearly unsound in view of the specific constitutional requirement of probable cause.[159]

There are a number of difficulties in determining whether such a distinction between "arrests" and "detentions" existed at common law. First of all, the authorities chiefly[160] relied upon, Hale[161] and Hawkins,[162] do not so neatly categorize the matter; they tend to refer to everything as an "arrest." This should not, however, foreclose the issue; as mentioned before, the distinction rests rather in the totality of the process. The second problem involved in interpreting these writings is the free and easy use made of the term "suspicious." At various points in their discussion of the law of arrest, both writers seemingly use "suspicion," "probable cause for suspicion," and "just suspicion" interchangeably. The use of "suspicion" rather than "belief" is not in itself important; modern writers continue to refer to the authority to arrest as based on "reasonable suspicion" as a synonym for "reasonable belief."[163] The difficulty

[153] Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 522 (1949). "A man who has merely been approached by an officer and questioned has been 'accosted' but not arrested; and stopping for questioning may be quite proper when an arrest would not be authorized." It should be noted that in those cases authorizing the search of a moving motor vehicle without warrant, *e.g.*, Carroll v. United States, 267 U.S. 132 (1925), there was necessarily a detention although there was not an arrest.

[154] Brief for United States, p. 26, Rios v. United States, 364 U.S. 253 (1960); Brief for United States, p. 138, United States v. Bufalino, 285 F.2d 408 (2d Cir.), *reversing on other grounds*, United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960).

[155] Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318 (1942).

[156] Cases such as Johnson v. United States, 333 U.S. 10 (1948), and United States v. Di Re, 332 U.S. 581 (1947), which hold that in the absence of a federal statute state law governs the validity of an arrest without warrant, should not be confused. Such rulings merely require additional conformance with the law of the state wherein the arrest takes place; they do not, however, justify a lowering of the minimum constitutional standards. Ker v. California, 374 U.S. 23 (1963); West v. Cabell, 153 U.S. 78 (1894); Burks v. United States, 287 F.2d 117 (9th Cir. 1961); Marsh v. United States, 29 F.2d 172 (1928), *cert. denied*, 279 U.S. 84 (1929). Thus the existence of a provision such as the Uniform Arrest Act could have no effect upon the constitutional requirements imposed by the Fourth Amendment. See 36 NOTRE DAME LAW. 432 (1960—1961); 109 U. PA. L. REV. 262 (1960). *But see* United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

[157] *E.g.*, Bruce & Rosmarin, *The Gunman and His Gun*, 24 J. CRIM. L. & C. 521 (1933—1934); Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749 (1933); Section 6(2) of the Uniform Arrest Act in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 345 (1942); Comment, 3 U.C.L.A.L. REV. 55 (1955–1956). Existing statutes in several states and §21(b) of the American Law Institute's Code of Criminal Procedure (official draft 1930) are literally capable of such a reading. No case, however, has so held. Note, 24 TENN. L. REV. 258 (1956).

[158] 2 HALE, PLEAS OF THE CROWN 78 (1st am. ed. 1947). See Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 571 (1949).

[159] If this were not true in the area of search and seizure, the exclusionary rule would be inapplicable in all cases except where papers of merely evidentiary value were involved under the rule of Gouled v. United States, 255 U.S. 298 (1921). See, *e.g.*, United States v. Di Re, 332 U.S. 581 (1947).

[160] See also 4 BLACKSTONE, COMMENTARIES *292, pp. 1683, 1684 (1897 ed.).

[161] HALE, PLEAS OF THE CROWN (1st am. ed. 1847).

[162] HAWKINS, PLEAS OF THE CROWN (8th ed. 1824).

[163] *E.g.*, Perkins, *The Law of Arrest*, 25 IOWA L.

lies rather in the implications to be drawn from the absence of a prefix like "just," "probable," or "reasonable." Thus Hale, in discussing the powers of constables, states:

> "The constable may arrest suspicious night-walkers by the statute of 5E.3 cap. 14. and men that ride armed in fair or markets or elsewhere. Stat., 2E.3, cap. 3. de Northampton.
>
> "And it appears by the books before-mentioned, that in cases of arrests of this or the like nature, the constable may execute his office upon information and request of others, that suspect and charge the offenders, nay tho it be but with suspicion thereof."[164]

Taken out of context, this statement implies that a lesser ground of suspicion is sufficient authority for an arrest under certain circumstances. Yet it is clear that Hale was not attempting to draw any such distinction; the context in which the statement was made was that of a discussion of those situations in which it was appropriate for the officer to act without first obtaining a warrant.[165] He begins this discussion by saying.

> "By the original and inherent power in the constable he may for breach of the peace and some misdemeanors, less than felony, imprison a person."[166]

He then goes on to consider those situations less than felonies, of which a "suspicious night-walker" is one, in which such an arrest was authorized.

The other area in which reference is made to "night-walkers" is in the discussion of the powers of watchmen. There were three kinds of watchmen, and Hale discusses them in order. The first kind are those specially appointed to keep watch in all towns during the night. Of them Hale says:

> "Their power is to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be delivered to the sheriff, viz. to the common gaol, there to remain until they be in due manner delivered. . . ."[167]

Since this watch extended only between Ascension day and Michaelmas, the constable was given the power to keep another watch in order to carry out his functions, one of which was, of course, to arrest those who went armed and night-walkers.[168] The third kind of watch was similar to the second but appointed by justices of the peace rather than constables. This watch had the same power as the other two.[169] Here, again, Hale states:

> "And such a watchman may apprehend night-walkers and commit them to custody till the morning, and also felons and persons suspected of felony."[170]

The ambiguity of the passages in relation to the degree of suspicion is especially apparent at this point. Here, Hale refers only to "night-walkers," without even bothering to designate them as "suspicious." A possible interpretation of this would be that "night-walkers" were subject to arrest whether or not probable cause or even mere suspicion existed. Yet in discussing the watch kept by the constables, he also refers to "persons suspicious either by night or day."[171] Furthermore, reading the passage in light of his general discussion of the powers of peace officers, it would appear that a "night-walker" was, *ex hypothesi*, a "suspicious night-walker." In referring to the powers of all peace officers in an earlier passage, Hale had said:

> "And hence it is, that these officers, that are thus intrusted, may without any other warrant but from themselves arrest felons, and those that are probably suspected of felonies . . . nay for breach of the peace or just suspicion thereof, as *nightwalkers*, persons unduly armed . . . ."[172]

It must be admitted however, that this is not entirely clear as to watchmen. If a watchman is to free those whom no suspicion "be touching" in the morning, then it would seem that suspicion was not necessary for the arrest during the night.

The case of the "suspicious night-walker" was also given consideration by Hawkins in discussing

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REV. 201 (1940). See De Salvatore v. State, 163 A.2d 244 (Del. 1960).

[164] 2 HALE, PLEAS OF THE CROWN 89 (1st am. ed. 1847).

[165] Indeed, in a footnote to the "suspicious night-walker" passage by the editor, the ambiguity is clarified. "But then that suspicion must not be a mere causeless suspicion, but must be founded upon some probable reason; and so it was ruled in the case of the Queen and Tooley. . . . [Chief Justice Holt said] that of late, constables made a practice of taking up people only for walking the streets, but he knew not whence they had the authority." *Id.* at 89, n.(f).

[166] *Id.* at 88.

[167] *Id.* at 96.

[168] See text accompanying note 164 *supra*. In addition to "night-walkers" Hale mentions "persons suspicious either by night or day." The statutory authorization for this is the same as for the power of constables to arrest night-walkers. *Id.* at 96-97.

[169] *Id.* at 97.

[170] *Ibid.*

[171] See note 168 *supra*.

[172] *Id.* at 84-85.

the power of both private citizens[173] and peace officers to arrest without warrant. As to such power in a private person, he first lists six "sufficient causes" upon which to base an arrest for a felony.[174] The implication that reasonable grounds must be shown is more clearly expressed in a later passage as follows:

> "It seems to be certain, that whoever would justify the arrest of an innocent person by reason of any such suspicion, must not only shew that he suspected the party himself, but must also set forth the cause which induced him to have such a suspicion, that it may appear to the court to have been a sufficient ground for his proceeding."[175]

Then on the same page, he moves from the consideration of felonies to lesser offenses and changes the discussion from the degree of suspicion to the nature of the offense.

> "As to the arrest of offenders by private persons of their own authority, permitted by law for inferior offences, it seems clear, that regularly no private person can of his own authority arrest another for a bare breach of the peace after it is over; for if an officer cannot justify such an arrest without a warrant from a magistrate, surely *a fortiori* a private person cannot. Yet it is holden by some, that any private person may lawfully arrest a suspicious night-walker, and detain him till he makes it appear that he is a person of good reputation. Also it hath been adjudged, that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of peace, for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate, would often give them an opportunity of escaping. And from the reason of this case it seems to follow, that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the public, may be justified."[176]

From the full statement it clearly appears that Hawkins was not attempting to distinguish between the necessary degrees of suspicion; like Hale he was merely categorizing those situations in which an arrest not made by authority of a warrant was permissible. Furthermore, the reference to "common notorious cheats" and "offences in like manner scandalous and prejudicial to the public" in the same passage indicates that some just cause of suspicion was considered necessary. Hawkins goes on in the next chapter to consider this situation in relation to the power of watchmen. In beginning the discussion of watchmen, he says:

> "As to the power of watchmen, it is further exacted by the said statute of Winchester, C. 4. 'that if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff and the sheriff may receive him without damage, and shall keep him safely until he be acquitted in due manner. . . . ' "[177]

Again, as in the quotation from Hale, it seems necessarily implied that no suspicion, probable or otherwise, is required for such an arrest by the terms of the statute. Yet Hawkins goes on to say:

> "It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any *suspicious* night-walker, and detain him till he give a good account of himself, as hath been more fully shewn in the precedent chapter, section twenty."[178]

A further indication that the suspicion must be for just cause is supplied in a later passage when he states that this same statute implies the existence of a similar power to arrest in bailiffs.

> "And surely it cannot be doubted but that by force hereof such bailiffs may lawfully arrest and detain any such stranger, being found under *probable circumstances of suspicion*, till he shall give a good account of himself."[179]

Thus it can hardly be said that a clear conclusion can be reached from a consideration of these writings. Early judicial authority is similarly unclear. In *The Queen v. Tooley*[180] the court rejected an argument that the fact that a constable recognized a girl as one he had previously arrested for disorderly conduct gave him sufficient grounds to arrest her in the present case.[181]

[173] Hale does not discuss the power of private persons to arrest night-walkers. *Id.* at 72–84.

[174] 2 HAWKINS, PLEAS OF THE CROWN 118 (8th ed. 1824).

[175] *Id.* at 120.

[176] *Id.* at 120–21.

[177] *Id.* at 128.

[178] *Id.* at 129. (Emphasis added.)

[179] *Id.* at 132. (Emphasis added.)

[180] 2 Ld Raym 1296, 92 Eng. Rep. 349 (KB 1709).

[181] This argument was based on the Statute of Winchester, 1331, 5 Edw. 3, c. 14. This statute authorized a constable to arrest suspicious night-walkers. See text

"[I]t is not a constable's suspecting, that will justify his taking up a person, but it must be just grounds of suspicion. . . . [I]t would be hard, that the liberty of the subject should depend on the will of the constable, and shall his not liking a woman's looks be any cause of suspicion?"[182]

Yet in *Lawrence v. Hedger*,[183] the court upheld a detention in the most typical of what would be now considered a "suspicious circumstances" case. The plaintiff had been walking through the London streets at ten o'clock in the evening when he was stopped by a watchman; upon failure to satisfactorily explain himself he was taken to jail. The next morning he was discharged. The court said that the existence of such a power in watchmen during the night was essential and that there were sufficient grounds in the present case. "And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise."[184]

From the authority considered it would seem at least doubtful whether any lesser degree of suspicion for a detention other than an arrest was clearly recognized at common law. Even if lesser grounds were sufficient to arrest a night-walker, it is clear that at least insofar as constables were concerned, it implied no power to detain other than through the ordinary process of arrest.[185] However, the power of watchmen to detain night-walkers until morning "and if no suspicion be found, he shall go quit" seems necessarily to imply both that a lesser standard than "probable cause" was satisfactory and that taking them before a justice or magistrate was not required. Yet it should be recognized that this conclusion does not inevitably follow. The right to detain a person until he gives a good account of himself or even to commit him overnight can be squared with an arrest based on probable cause. Although the proposition is not universally accepted[186] there is modern authority that an officer may release one who was validly arrested if it becomes apparent that a reasonable mistake has been made.[187] Furthermore, there is authority both at common law[188] and at the present time[189] that the requirement of prompt arraignment does not mean that a magistrate or justice of the peace must be awakened in the middle of the night.

It must be admitted, however, that the power of the watchmen went far beyond these limited privileges. Thus, it would seem highly arguable that, under certain circumstances, a distinction between "arrests" and other forms of "seizure" or "detention" existed at common law. To the extent that this distinction is incorporated into the Fourth Amendment, serious questions are raised as to its proper safeguards and limitations.

C. *The Nature of the Right—A New Definition of "Unreasonable"*

1. *The Initial Apprehension*

One of the strongest arguments against allowing detention on lesser grounds than are required to justify an arrest is the difficulty involved in setting new standards of reasonableness. "If probable cause is no longer to be the test, at least at the initial point of arrest, where is the line to be drawn short of indiscriminate police detentions based on hunch?"[190] Yet probable cause[191] itself is not a magic formula to be automatically applied to the facts of a particular case. Although within the context of the amendment probable cause *must* require a uniform amount of pre-arrest information in every case,[192] implications are not lacking that

accompanying note 164 *supra*. It is very similar to the Statute of Winchester, 1285, 13 Edw. 1, stat. 2, c. 4, which authorized such arrests by watchmen. See text accompanying note 177 *supra*.

[182] 2 Ld. Raym. at 1301, 92 Eng. Rep. at 352. See also note 165 *supra*.

[183] 3 Taunt. 13, 128 Eng. Rep. 6 (C.P. 1810).

[184] 3 Taunt at 15, 128 Eng. Rep. at 7. See also Rex v. Bootie, 2 Burr 864, 97 Eng. Rep. 605 (KB 1759) (dictum).

[185] 2 HALE, PLEAS OF THE CROWN 95 (1st am. ed. 1847). "I come now in the last place to consider what the constable is to do with his prisoner that he hath thus arrested for felony or other causes above-mentioned." He goes on to say that the constable may put him in the stocks if intoxicated or take him to the sheriff or to jail: "But the safest and best way *in all cases*, is to bring them to a justice of peace, and by them the prisoner may be bailed or committed, as the case shall require. . . ." *Ibid.* (Emphasis added.)

[186] See 1 ALEXANDER, ARREST 637–39 (1949).

[187] Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 254 (1940).

[188] Hale recognized that this power to detain existed at night when the justice could not be reached. 2 HALE, PLEAS OF THE CROWN 95, 119 (1st am. ed. 1847).

[189] See Mallory v. United States, 354 U.S. 449 (1957); Perkins, *supra* note 187, at 257–58.

[190] Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., C & P.S. 402, 407 (1960).

[191] The traditional formulation of the law of arrest is reasonable grounds to believe. The Court has equated this with probable cause within the meaning of the Fourth Amendment. Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959).

[192] Probable cause, in other words, must be inter-

this standard has been relaxed in particular circumstances,[193] and the recent decisions raising hearsay information to constitutional respectability[194] indicate that the requisite belief need not be created by information personally obtained through contact with or observation of the person to be arrested.[195] Even assuming the existence of a consistent standard does not, however, aid in the analysis of its content. It is apparent that no precise meanings can be attributed to words such as "suspicion" and "belief" or their counterparts when prefixed with "reasonable" or "probable"; the basis for a distinction can lie only in their relative meanings when subjected to a critical comparison. Only by first realizing that precision of definition cannot be attained is it possible to avoid these ambiguities and approach a satisfactory analysis.

It would seem that two basic elements can be distilled from the concept of probable cause. The Court has said that "in dealing with probable cause . . . we deal with probabilities."[196] This statement may appear to be a truism, but it is important in showing that no belief, however reasonable, is sufficient to satisfy the test if it merely indicates the possibility and not the probability that an individual has committed a crime. To this extent, it seems to embody the specific requirements of particular description imposed by the words of the amendment itself upon the issuance of a warrant[197] and thus expresses the policy against generality at which the amendment was primarily directed.[198] If a showing of probability is required, a general warrant, by hypothesis, can never issue, and mass arrests would be invalid.[199] From this element of probable cause, a relative distinction between the meanings conveyed by the terms "suspicion" and "belief"[200] may be elicited. In such a classification "suspicion" would lie generally in the area of possibility and "belief" in that of probability. Whatever the semantic difficulties and the problems of borderline cases, such a distinction for purposes of analysis seems worthwhile.

On the assumption, then, that one of the elements of probable cause is that of probability as distinguished from possibility, of "belief" as distinguished from "suspicion," the second basic element remains to be considered. In the most quoted definition of probable cause, the Court asserted its existence if the information possessed by the officers was sufficient "to warrant a man of reasonable caution in the belief"[201] that articles subject to search and seizure were involved. It is thus clear that the test of probable cause imposes an objective, rather than a subjective, standard. A mere good faith belief that an individual has committed a crime or that objects subject to seizure are within a house or car will not satisfy the test; it must, in addition, be a *reasonable* belief.[202] In like

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preted to mean probable cause "to believe" that the person to be arrested is guilty of a crime. Such an interpretation is of the essence of a prohibition of general warrants. *But see* Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 680 n.93 (1961). "An alternative interpretation of the probable cause requirement may have been left open to the Court by the wording of the amendment. 'Probable cause' might be interpreted 'probable cause to issue.' Included in the notion would be all the considerations relevant to the proper issuance of the writ."

[193] The basis for the officers' action in the automobile search cases approached the very limit of probable cause, as the court in Brinegar v. United States, 338 U.S. 160 (1949), admits.

[194] Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959). See Brinegar v. United States, *supra* note 193. Of course, hearsay in the sense of second hand information supplied by the applicant, has always been sufficient to create probable cause in the mind of the magistrate issuing the warrant. See Note, *Hearsay Evidence as a Basis for Prosecution, Arrest and Search*, 32 IND. L. J. 332 (1956–1957).

[195] An argument has also been made that these cases indicate a relaxation of the standard of probable cause rather than merely increasing the relevant scope of the officer's inquiry. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 65–70. See note 192 *supra*.

[196] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[197] U.S. CONST. amend. IV. "[A]nd no warrants shall issue, but upon probable cause . . . and *particularly describing* the place to be searched, and the persons or things to be seized." (Emphasis added.)

[198] See text accompanying note 35 *supra*.

[199] Even here, however, a word of caution must be added. It is not clear that "probable" is to be interpreted to mean "more probable than not." If it is clear that either A or B is solely guilty of a crime, does probable cause to arrest either or both exist? For an affirmative answer to this question but couched in nonconstitutional terms, see Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 238 (1940); RESTATEMENT, TORTS §119 (1934). It would seem clear, however, that such an interpretation could not be extended to justify mass arrests. Mallory v. United States, 354 U.S. 449, 456 (1957). *But see* Goldsmith v. United States, 277 F.2d 335 (D.C. Cir.), *cert. denied sub nom.* Carter v. United States, 364 U.S. 863 (1960).

[200] Sections two and four of the Uniform Arrest Act require "reasonable ground to *believe*" to justify an arrest and "reasonable ground to *suspect*" to justify a detention. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–47 (1942).

[201] Carroll v. United States, 267 U.S. 132, 162 (1925).

[202] *E.g.*, Henry v. United States, 361 U.S. 98, 102 (1959). "Probable cause exists if the facts and the cir-

manner, an objective or subjective test can be applied to a "suspicion" or "possibility." To this extent, a relative distinction can be drawn between a "reasonable suspicion" and a "mere suspicion or hunch."

With this analysis as a background, it is thus possible to determine the variations of the standard of probable cause which might serve as lesser grounds for the authorization of a detention. If probable cause under the prior analysis can be defined as a reasonable belief in the probability that a crime has been committed, the possible variations would be as follows:

Possibility Number One—"Good Faith Belief." In order for a detention to be valid, the condition of the officer's mind must be such that he actually believes that the person detained is probably guilty of a crime. It is not necessary that other men would reasonably have reached the same conclusion; it is only required that this particular officer actually so believed. It is necessary, however, for the belief to be as to the probability of guilt of a crime. Normally this will require a corresponding belief that a specific crime has been committed, and thus detention on suspicion of criminality generally is not allowed.

Possibility Number Two—"Reasonable Suspicion." In order for a detention to be valid, the officer must reasonably and in good faith suspect the individual detained of being involved in some form of criminality. A mere good faith suspicion will not suffice; it must be such that a reasonable man would also entertain it. However, it is not necessary for the officer to have a specific crime in mind, or if he does, to believe that the person detained probably committed it. Suspicion in this context means that it must be reasonably possible that the individual has committed some crime.

Possibility Number Three—"Good Faith Suspicion." The test for determining the validity of a detention is whether the officer in good faith suspects an individual of engaging in some form of criminal activity. It is not necessary that the suspicion be one which reasonable men would also have, and the officer is not required to have specific acts of criminality in mind. If he does have some such specific crime in mind, it is not necessary for him to believe that the person detained probably committed it. Suspicion in this context means that the officer must in good faith believe that it is possible that the individual has committed some crime.[203]

It should be noted that each of these possibilities follows the general theory of the concept of probable cause to the extent that an emphasis is placed upon the degree of mental conviction necessary to authorize a detention. In this context, it would seem that possibility number two requiring "reasonable suspicion" is closely analogous to the meaning conveyed by the formulation of the Uniform Arrest Act in terms of "reasonable ground to suspect"[204] and would present the best compromise available short of probable cause. Yet it has been asserted that reasonable grounds to detain, unlike reasonable grounds to arrest, can be found in factors extraneous to the officer's state of mind. Thus, the argument of the government in *Rios v. United States*[205] suggested that the test be "reasonable grounds for inquiry"[206] and formulated it as follows:

> "As to investigation of completed crimes, the seriousness of the offense, the proximity to or remoteness from the scene of the crime, the amount of time which had elapsed, the suspicious circumstances involved, would all have to be weighed. As to suspicion that a crime has been or is about to be committed, all the factors giving rise to suspicion would have to be considered in relation to the nature of the detention."[207]

Such an argument contains much that is to be praised; if the relatively specific requirement of probable cause is to be disregarded and a lesser

cumstances known to the officer warrant a *prudent* man in believing that the offense has been committed." (Emphasis added.)

[203] All three possibilities should be read in light of a general policy against the use of the detention privilege for purposes of harassment. Such police activities, although not unknown in this country, cannot be constitutionally sanctioned. For a discussion of a particular example of police harassment of "known criminals" in Philadelphia, see Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 34–36 (1957). See also Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

[204] See note 200 *supra*.

[205] 364 U.S. 253 (1960). The argument in *Rios* is substantially identical to that in United States v. Bufalino, 285 F.2d 408 (2d Cir.), *reversing on other grounds* United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960).

[206] Brief for United States, p. 12. See Mr. Justice Burton, concurring in Brinegar v. United States, 338 U.S. 160, 179 (1949). "Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation."

[207] Brief for United States, p. 25.

degree of belief submitted in its place, then other factors should be taken into consideration to further safeguard individual rights. To that extent, the factors listed are representative of those interests to be balanced in determining reasonableness under all the circumstances. The test, however, presents some significant problems. It is apparent that it would contribute to an officer's uncertainty and make "unreasonable" turn even more on the *ad hoc* reaction of a particular court.[208] Moreover, the use of additional factors in determining reasonableness is a double-edged sword; depending upon the seriousness of the crime, a greater or lesser degree of suspicion is required. Presumably the use of such a sliding scale would uphold detentions where the public interest was very high even though no suspicion existed.[209] The basic source for this "sliding scale" theory in the area of enforcement of the criminal law is found in an often quoted statement by Mr. Justice Jackson that "judicial exceptions to the Fourth Amendment . . . should depend somewhat upon the gravity of the offense."[210] It is clear from the context, however, that the statement was made in relation to a hypothetical emergency situation.[211] Whatever the justification for dispensing with individual liberties in situations where grave emergencies are involved,[212] it does not necessarily follow that events occurring in the day-to-day enforcement of the law should be classified within a continuum of more or less serious injuries to the public interest. Such a test would seem difficult enough for a court, with adequate opportunity for detached reflection, to apply; it becomes doubly so, and hence more dangerous to individual liberties, when it is remembered that the initial decision will generally be made by a policeman whose primary goal is to ferret out crime.[213]

Thus it is clear that consideration of the seriousness of the crime involved as a factor in determining reasonableness presents grave difficulties. Recognition of these difficulties should temper enthusiasm with caution; it does not indicate, however, that such a test would be so flexible as to be unworkable. A balancing of interests approach is not necessarily unique to the problem of temporary detention; it has been employed in other areas of the Fourth Amendment itself. Although *Frank v. Maryland*[214] specifically turned on the absence of criminal law enforcement, it is an important precedent in the area of temporary detention for two reasons. It illustrates the willingness of the Court to recognize that the traditional protections of the Fourth Amendment may be flexibly interpreted when faced with a high degree of public interest,[215]

[208] It seems questionable whether such a balancing test would be acceptable to those who advocate the extension of police discretion. See, *e.g.*, Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169, 170–71 (1955). "Constitutions forbid 'unreasonable' searches and seizures, but they do not themselves define what is unreasonable; that is left to judicial opinion. Hence, judges have been able to translate their personal notions of improper conduct into plausible constitutional restrictions by the simple epithetical process of characterizing what they disapprove of as 'unreasonable' and then declaring it forbidden by the Constitution."

[209] The Government's argument in Rios v. United States, 364 U.S. 253 (1960), also asserts the right to question in situations where suspicion was not present. "Thus persons present at the scene of a murder could legitimately be detained for a short time for questioning about what they had seen . . . whether or not there was basis for suspicion that any of them had any part in the crime." Brief for United States, p. 25. It is not clear, however, whether the right to detain witnesses should be identically applied to the right to detain suspects. See text accompanying notes 142–144 *supra*.

[210] Brinegar v. United States, 338 U.S. 160, 183 (1949) (dissenting opinion).

[211] The full quotation is as follows:

"But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." *Ibid.*

It should be noted, moreover, that this illustration by Mr. Justice Jackson was used to emphasize the pettiness of the case before him, in which he would *not* uphold the search.

[212] See Korematsu v. United States, 323 U.S. 214 (1944); *cf.* United States v. Caltex, 344 U.S. 149 (1952).

[213] "We must remember, too, that freedom from unreasonable search differs from some of the other rights of the constitution in that there is no way the innocent citizen can invoke advance protection." Brinegar v. United States, 338 U.S. 160 (1949) (dissenting opinion of Jackson, J.). There are, however, occasional exceptions. In Wirin v. Horrall, 85 Cal. App. 2d 497, 193 P.2d 470 (1948), the court held that an action would lie to prevent the expenditure of public funds by restraining Los Angeles police officers from conducting unconstitutional blockages (stopping and searching both automobiles and pedestrians).

[214] 359 U.S. 360 (1959).

[215] Even the dissent indicated a willingness to dilute the specific requirement of probable cause, although it would require the showing to be made to a magistrate. "Experience may show the need for periodic

and it shows that the Court considers itself capable of weighing various factors and balancing interests in order to conclude whether a governmental invasion of privacy was or was not reasonable. The only distinction between this and the right of temporary detention is the element of criminal procedure; a greater risk is involved when the restraint is a preliminary step in the process which may ultimately lead to trial and conviction. Admittedly the danger to the security of the individual is greater under such circumstances. Yet it is not contended that this increased risk is to be treated as irrevelant; its consideration is necessarily inherent in the nature of the balancing test involved. Experience in other areas of the law shows that the element of risk can be weighed along with the value of the interests protected and the social need for the conduct pursued.[216]

Furthermore, it need not follow that such flexible standards will indefinitely necessitate an *ad hoc* process of decision. By a process of judicial inclusion and exclusion, specific limits could emerge in a relatively short period of time while providing an opportunity in the interim to ascertain their practical effects upon law enforcement methods and procedures. The development of specific standards from broad principles is especially appropriate for the process of constitutional interpretation and, in fact, has been utilized in determining the applicability of Fourth Amendment standards in other areas. On the question of health inspections, for example, at least four members of the Court have expressed the opinion that no prior information about the existence of specific unsanitary conditions is required.[217] Still another instance of the crystallization of Fourth Amendment standards in the absence of probable cause can be found in the so-called "constructive search" cases involving the validity of subpoenas duces tecum. The spirit of the early cases was to test their validity in the same manner as that of a search,[218] while recent decisions show a recognition of the complexity of business regulation and authorize such subpoenas when reasonable grounds for investigation exist.[219] Moreover, the present trend is to regard the demands as presumptively "reasonable" and to enforce them in the absence of a clear showing to the contrary.[220] It would seem that certain recurring instances of temporary detention could ultimately be specifically classified in like manner.[221]

The final factor to be considered in determining the validity of a detention under the first clause of the Fourth Amendment is the degree of inconvenience caused to the individual. Although this factor is of primary importance in determining the permissible nature and extent of a detention, it may also have limited applicability to the validity of the initial apprehension itself. The first distinction which may be sought is that between the stopping of a pedestrian and the stopping of a moving motor vehicle.[222] Much reliance has been placed[223] upon statements by the Supreme Court that travelers on the highway are entitled to unre-

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inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. *The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought.*" 359 U.S. at 383. (Emphasis added.)

[216] The standards set for a determination of negligence in the law of torts seem to serve as an appropriate analogy for the present problem. See PROSSER, TORTS §30 at 123 (2d ed. 1955). "It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued."

[217] See separate opinion of Justices Clark, Frankfurter, Harlan, and Whittaker in Ohio *ex rel.* Eaton v. Price, 360 U.S. 264 (1959) (noting probable jurisdiction). The judgment was later affirmed per curiam by an equally divided Court in 364 U.S. 263 (1960). This opinion as to the need for a specific showing seems to be shared by the other members of the Court. See note 215 *supra*. *But see* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (dissenting opinion) (semble).

[218] *E.g.*, Hale v. Henkel, 201 U.S. 43 (1906); Boyd v. United States, 116 U.S. 616 (1886).

[219] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); *cf.* Shapiro v. United States, 335 U.S. 1 (1948).

[220] GELLHORN & BYSE, ADMINISTRATIVE LAW 581 (4th ed. 1960). "The defenses that the subpoena is unduly vague or unreasonably oppressive, or that it seeks irrelevant data are often advanced. In such a case, the typical judicial opinion discusses the facts relied upon to justify the defense, states that in this case the defense is not sufficiently meritorious, and concludes that an enforcement order should be issued."

[221] Compare the suggestions in Ploscowe, *A Modern Law of Arrest*, 39 MINN. L. REV. 473 (1955), that certain situations should be conclusively presumed to constitute probable cause.

[222] A further distinction as to motor vehicles at rest would seem unwarranted in this context. The degree of interference with liberty of movement is substantially identical to that caused to a pedestrian.

[223] Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 38-39 (1957); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 407-08 (1960).

stricted freedom of movement.[224] These statements, however, were directed to the validity of searches for which probable cause was required. To impart them into a discussion concerning the validity of temporary detention is to assume the very issue to be decided.[225] From the standpoint of inconvenience to the individual, however, the two situations would appear to be substantially identical; the only difference being that when an automobile is stopped the existence of an actual restraint is more apparent. The Supreme Court has never heard a case where it was asserted that the mere stopping of a pedestrian constituted an arrest; for obvious reasons the officer will normally take great pains to avoid any indication that the individual is under an actual restraint.[226] When an automobile is stopped, however, the situation is not ambiguous; it is untenable to assert that no actual restraint has been imposed. Thus, assuming the existence of an actual interference with liberty of movement in both cases, a per se distinction between a moving vehicle and a pedestrian would appear to be invalid. This is not to say, however, that the initial apprehension of those in a moving motor vehicle may not present distinctive problems. Because of the element of speed and road conditions, it would clearly require a higher degree of suspicion and public interest to justify an apprehension, such as by forcing a car off the road,[227] which created a serious risk of physical or emotional injury to the occupants.[228] This is equally true, of course, even in the presence of probable cause; the *method* of arrest or apprehension must always be reasonable.[229]

The inconvenience caused to the individual by merely interfering with his forward progress, either in a car or on foot, would normally seem minor enough to be countenanced in light of the public interests involved. A final factor representing potential injury to the individual, however, remains to be considered. Just as an arrest may cause damage to a person's reputation,[230] the same may be true of a mere stopping under certain circumstances. Again the problem of the automobile seems to stand conspicuously apart from the situation of the pedestrian. Because the existence of the restraint will often not be apparent when a pedestrian is stopped, the corresponding danger to his reputation is diminished. The automobile presents another unique situation due to the fact that its very nature invites application of the modern counterpart of the general warrant, the roadblock. It has been argued that the significance of such generality in apprehension lies in the limited suspicion directed toward any given individual. To that extent the potential injury to reputation is substantially avoided.[231] Yet, whatever the effect such considerations should have in emergency situations[232] and those involving enforcement of traffic codes,[233] they would seem of extremely doubtful validity as applied to routine enforcement of the criminal law. Reliance upon such a rationale is contrary to the fundamental policy of the Fourth Amendment; nothing can be imagined which would cast less suspicion upon any particular person than the continued use of general warrants. With this reservation, however, the element of a moving motor vehicle should be considered in determining the reasonableness of the initial apprehension.

[224] Carroll v. United States, 267 U.S. 132, 153–54 (1925). "[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is [probable cause]." See also Brinegar v. United States, 338 U.S. 160, 177 (1949).

[225] The right to stop and search should not be confused with the right merely to stop. Although the Court's language in the cases cited in note 224 *supra* is broad enough to foreclose the detention question, different issues are involved. See cases cited note 143 *supra*.

[226] For an analysis of the distinction between a "command" and a "request" in this area, see Williams, *Police Detention and Arrest Privileges Under Foreign Law—England*, 51 J. CRIM. L., C. & P.S. 413 (1960).

[227] This method was upheld in Brinegar v. United States, 338 U.S. 160 (1949).

[228] The government's argument in Rios v. United States, 364 U.S. 253 (1960), recognized the distinction between moving automobiles and pedestrians for this limited purpose. "[T]hat same basis might not be sufficient to justify forcing a moving vehicle to the curb with a police car, or at a further extreme, shooting at the tires of a vehicle to force it to stop." Brief for United States, p. 24.

[229] See note 62 *supra* and accompanying text.

[230] See generally Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 90 (1962).

[231] Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 701 (1961). "A road block and search of all passing cars for fleeing robbers implies only limited suspicion of any given driver; a house-to-house search for a notorious criminal thought to be in the neighborhood may be equally innocuous from this standpoint. What the innocent citizen has most reason to fear is being singled out as the object of official suspicion."

[232] See, *e.g.*, note 211 *supra*.

[233] A road block was upheld under these circumstances in City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959).

2. The Nature and Extent of the Detention

There are a limited number of judicial decisions upholding the right of a police officer to stop a pedestrian for the purpose of making inquiry.[234] Other cases have held that a similar right exists to stop an automobile.[235] Most of the cases which have been cited for this proposition, however, involved factual situations in which the individual was not in the process of movement when inquiry was made.[236] Moreover, even those cases which authorize an actual interference with movement by an initial stopping do not stand for the proposition that any further restraint can be imposed. With the exception of *United States v. Bonanno*,[237] subsequent events gave rise to probable cause, and the issue was thus avoided. Frequently, the courts made clear that in the absence of these events no right to detain would have existed.[238] Furthermore, in other cases where an actual restraint was imposed, the courts have held that an arrest was thereby consummated.[239]

Thus, presently existing judicial authority for the right actually to restrain on grounds less than probable cause is significantly scarce. Yet, although the right merely to stop is not without importance,[240] it is apparent that some right to detain should also exist under certain circumstances. It would seem, for example, that under normal circumstances, only minor inconvenience would be caused to the individual by requiring him to remain while the officer made further inquiries; as the detention became more pronounced, a correspondingly higher degree of public interest and suspicion would be necessary in order to justify it.[241] Furthermore, a failure to respond to the officer's questions should be considered as a basis for such justification.[242] Thus it might be reasonable in some situations to hold the suspect until his story could be checked and his identity verified.

Inquiry on the street and detention for identification, however, should be sharply distinguished from detention at the police station for purposes of interrogation. At this point, still another factor should be added to the list of those considered in determining reasonableness under all the circum-

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[234] Ellis v. United States, 264 F.2d 372 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959); Green v. United States, 259 F.2d 180 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 917 (1959); State v. Gulczynski, 32 Del. 120, 120 Atl. 88 (1922); Johnson v. State, 118 Tex. Crim. 293, 42 S.W.2d 421 (1931); Pena v. State, 111 Tex. Crim. 218, 12 S.W.2d 1015 (1929); State v. Zupon, 155 Wash. 80, 283 Pac. 671 (1929); *but see* United States v. Sipes, 132 F. Supp. 537 (E.D. Tenn. 1955) (semble).

[235] United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960); McCarthy v. United States, 264 F.2d 473 (8th Cir. 1959); Smith v. United States, 264 F.2d 469 (8th Cir. 1959); Bell v. United States, 254 F.2d 82 (D.C. Cir.), *cert. denied*, 358 U.S. 885 (1958); Fowler v. United States, 239 F.2d 93 (10th Cir. 1956) (semble); Gilliam v. United States, 189 F.2d 321 (6th Cir. 1951); Brinegar v. United States, 165 F.2d 512 (10th Cir. 1947), *aff'd on other grounds*, 338 U.S. 160 (1949). *But see* Henry v. United States, 361 U.S. 98 (1959). (See text accompanying note 20 *supra*.)

[236] *E.g.*, Lee v. United States, 221 F.2d 29 (D.C. Cir. 1954); Poulas v. United States, 95 F.2d 412 (9th Cir. 1938); Weathersbee v. United States, 62 F.2d 822 (5th Cir. 1933); United States v. Rios, 192 F. Supp. 888 (S.D. Cal. 1961); Campbell v. Commonwealth, 203 Ky. 151, 261 S.W. 1107 (1924).

[237] 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). See also Kavanagh v. Stenhouse, 174 A.2d 560 (R.I. 1961) (upholding the constitutionality of section two of the Uniform Arrest Act.)

[238] *E.g.*, Green v. United States, 259 F.2d 180, 181 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 917 (1959). "He could have refused to halt. The officers would have had no right, whatever, then and there without more, either to seize him or to search him."

[239] United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957); Price v. United States, 119 A.2d 718 (D.C. Mun. App. 1956). *But see* Kavanagh v. Stenhouse, 174 A.2d 560 (R.I. 1961).

[240] Brief for United States, p. 17, Rios v. United States, 364 U.S. 253 (1960). "The unexpected appearance of a police officer before a person who has 60 grams of heroin in his pocket may have a drastic impact upon his sense of well-being and cause him to take some self-betraying action. And the hope that his official appearance would have that effect was, in fact, the very reason given by Officer Beckmann for making his appearance. . . ."

[241] The extent of the detention is, of course, one of the factors to be considered in determining reasonableness under all the circumstances. See text accompanying note 207 *supra*.

[242] See Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908). A number of cases have implied, however, that no adverse inference can be drawn from a failure to answer. *E.g.*, Poulas v. United States, 95 F.2d 412 (9th Cir. 1938). See United States v. Di Re, 332 U.S. 581, 594–95 (1947). The issue has been characterized as whether the privilege against self-incrimination applies to police questioning. Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 386, 391 (1960). For discussion of the privilege in this context, see McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L., C. & P.S. 138, 151 n.56 (1960). Yet, even it if does apply to exclude police testimony at trial, it does not necessarily follow that a failure to answer cannot be utilized in determining probable cause. See Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949) (evidence need not be legally competent in order to constitute probable cause).

stances. "In the Anglo-American law, there is no regular provision for police examination of a person suspected of crime."[243] The absence of such a provision is implicit in the requirements of the common law; whether an arrest is made with or without a warrant, the duty of the officer is to promptly take the arrested person before a magistrate.[244] The practical basis for this rule is apparent; "ours is the accusatorial as opposed to the inquisitional system."[245] Opportunity for prolonged police interrogation presents the most dangerous threat to that system.[246] In the federal courts, the codification of the common law doctrine respecting prompt arraignment[247] has been enforced by a rule excluding from evidence the products of an unlawful detention prior to a hearing before a magistrate.[248] This rule itself is not based upon the constitution; it is the product of the Supreme Court's supervisory power over the administration of federal criminal justice and hence inapplicable to the states.[249]

However, since the decision in *Wong Sun v. United States*,[250] a constitutional principle requiring the exclusion of evidence under certain circumstances may also be applicable in this area. Although the question was not directly involved in *Wong Sun*, it would seem that a violation of the right to prompt arraignment, being a fundamental part of the arrest process, would also be a violation of the Fourth Amendment, and evidence which is the product thereof should be inadmissible upon constitutional grounds. In any event, it seems clear that the underlying substantive right which is here involved is grounded in the constitution. Its observance is indispensable to a cluster of basic rights including the right to bail and the right to habeas corpus.[251] Furthermore, as indicated above, it bears an intimate relationship to the requirement of the Fourth Amendment of reasonable seizures. "What real meaning is left in the Fourth Amendment's guaranty against arbitrary arrest if the arrestee is unable to reach a judicial officer within a reasonable time to determine whether or not his arrest was arbitrary?"[252]

Without an arrest the rule of law based upon the Supreme Court's supervisory power becomes theoretically inapplicable; since, by hypothesis, a detention involves a situation where the purpose to take a person before a magistrate does not exist, this important safeguard is evaded.[253] This would not be true, however, as to an exclusionary rule based upon the Fourth Amendment. The policy against secret interrogation would seem to be an overwhelming factor in the determination of reasonableness under all the circumstances.[254] Moreover, it must be clear that such a result would not be permitted even under a rule based solely upon the Supreme Court's supervisory power. Otherwise, the exclusionary rule could be avoided by detaining for interrogation in all cases, thereby postponing the arrest and requirement of prompt arraignment until the evidence sought had

[243] Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954).

[244] MACHEN, ARREST §48 (1950); VORHEES, ARREST §§96, 204 (1915); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 253–61 (1940).

[245] Watts v. Indiana, 338 U.S. 49, 54 (1949).

[246] Leibowitz, *Safeguards in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 86, 87 (1957). "In the period between the moment of arrest and the arraignment arises the only opportunity for wrongdoing on the part of the police. It is during that period only that the defendant is usually kept incommunicado, deprived of the right of consulting family or friends. When abusive methods are used by the police during that period, the only witnesses are other police. During the period a suspect is at the mercy of his captors. To assume that the third degree no longer exists in some cases is to shut our eyes to reality."

[247] FED. R. CRIM. P. 5(a).

[248] Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943).

[249] *E.g.*, Stein v. New York, 346 U.S. 156 (1953). It seems doubtful whether the federal rule will be carried along in the wake of Mapp v. Ohio, 367 U.S. 643 (1961), which characterized it as a rule of evidence. See Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150, 162 (1962).

[250] 371 U.S. 471 (1963).

[251] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 21–33 (1958).

[252] Letter from Yale Kamisar to Thomas C. Hennings, Jr., *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 769 (1958).

[253] In United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960), this issue was presented since the majority of the questioning took place in a nearby police station. In its brief on appeal the government argued that no requirement of prompt arraignment was involved "because the officers did not consider the persons whom they detained for questioning to be under arrest, and so had no intention of taking them before a magistrate at all. . . ." Brief for United States, pp. 155–56.

[254] Section two of the Uniform Arrest Act in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–347 (1942), authorizes a detention period of two hours. Cases interpreting that provision seem to read it as authorizing interrogation. See Cannon v. State, 168 A.2d 108 (Del. 1961); De Salvatore v. State, 163 A.2d 244 (Del. 1960); Wilson v. State, 49 Del. 37, 109 A.2d 381 (1954), *cert. denied*, 348 U.S. 983 (1955).

been obtained. Such a result would be clearly untenable.

3. *Search Incident to a Detention*

Section three of the Uniform Arrest Act provides that an officer may search any person detained "whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon."[255] Despite the semantic sleight of hand with "reasonable ground to believe,"[256] this provision is clearly intended to authorize a search on lesser grounds than probable cause.[257] When the Court heretofore has spoken of a search incident to an arrest, it has, of course, referred to an arrest based upon probable cause. Yet it seems unrealistic to expect an officer to refrain from "frisking"[258] when his personal security hangs in the balance.[259] Thus, as a practical matter, the need for such authority seems apparent. Subject to the criteria of reasonableness under all the circumstances, it should be allowed concurrently with the right of temporary detention.

Theoretical justification for the doctrine within the scope of the Fourth Amendment may be found in an analogy to the analysis of the right to search incident to a valid arrest. In discussing this right two possible rationales were suggested. That relied upon to authorize a broad search of the premises was based upon the theory that probable cause for the arrest also provided probable cause for the search.[260] Obviously, such a rationale lends no support for a search incident to detention, whether of the person or of his immediate surroundings. The alternate justification, however, that the right to search a person is subsumed within the concept of arrest,[261] provides an important analogy in circumstances where probable cause does not exist. The essential rationale, that the right to take an individual into custody includes the right also to take into custody all that is found upon his person, can be equally applied to the right to temporarily detain. Since even a limited search involves a more drastic interference with the privacy of the individual, a correspondingly higher degree of suspicion and public interest is necessary to make it reasonable under all the circumstances; probable cause, however, is not required.

Although it is readily apparent that situations may sometimes demand the use of a "frisking" technique, this interference with the person of the individual should not become a matter of routine. The purpose of the privilege is not to obtain evidence of guilt; it is for the protection of the officer involved.[262] Judicial authority is scant, but that which does exist indicates that at least this limitation should be set.[263] It is totally a different thing to authorize a superficial "patting" to determine the presence of a weapon than to allow a thorough inspection of all that the person has in his possession.[264]

V. Conclusion

The thesis of this paper is that a more flexible compromise than today exists between the right of privacy and legitimate police desires can be reached within the framework of the Fourth Amendment. The standard of "probable cause" does not seem to have satisfactorily done its job. The result has been a hodgepodge of "vagrancy" statutes which often do little more than to make "being suspicious" a crime[265] and widespread

[255] Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 343–47 (1942).

[256] This formulation of "reasonable ground to believe" virtually emasculates it since when questioning a suspicious person, the officer would, by hypothesis, be in danger *if* the person possessed a dangerous weapon.

[257] See generally text accompanying notes 87–105 *supra*.

[258] The terms "frisking" or "patting down" are found in a large number of the cases and legal writings. Basically they connote a very limited search over the exterior of the person detained in order to ascertain the presence of any suspicious "bulges" which would result from the concealment of a weapon.

[259] Perkins, *The Tennessee Law of Arrest*, 2 Vand. L. Rev. 509, 618 (1949). "As pointed out previously, a 'frisk' should be recognized as entirely lawful, even without arrest, whenever this is a reasonable safety precaution." See also Comment, *Some Proposals for Modernizing the Law of Arrest*, 39 Calif. L. Rev. 96 (1951).

[260] See text accompanying note 92 *supra*.

[261] See text accompanying note 89 *supra*.

[262] Presumably, anything uncovered would not be subject to the exclusionary rule if the search were in good faith limited to the search for a weapon. See note 80 *supra*.

[263] *Compare* Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908), *with* People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955). See Ellis v. United States, 264 F.2d 372 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959); Lee v. United States, 221 F.2d 29 (D.C. Cir. 1954); United States v. Sipes, 132 F. Supp. 537 (E.D. Tenn. 1955); People v. Henneman, 367 Ill. 151, 10 N.E.2d 649 (1937).

[264] See People v. Simon, *supra* note 263.

[265] See, *e.g.*, Foote, *Vagrancy—Type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956); Note, *Use of Vagrancy-Type Laws for the Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950).

evasion of the law.[266] It would be far better to face the issue squarely and set up a system of intelligent safeguards which protect the security of the individual and, at the same time, do not unduly restrict the police in the performance of their duties.

Conceptually, this flexibility can be justified within the Fourth Amendment by the detention-arrest distinction and a reliance upon the broad provision contained in the amendment's first clause. A test of reasonableness under all the circumstances may be the only solution to the present problem which can honestly be said to fulfill the policy of the constitutional provision.[267]

The sole objection to such a test must necessarily lie in its vagueness. Doubtless, this would present some difficulty in initial application. Yet there is no reason to suspect that the Court would be incapable of eliciting fundamental standards through a process of judicial inclusion and exclusion. Thus it would seem difficult to conclude that the vice of vagueness is a sufficient reason for discarding a formulation of reasonableness under all the circumstances; a certain amount of such vagueness is rather of the essence of a constitutional principle.

[266] See, *e.g.*, Tresolini, Taylor & Barnett, *Arrest Without a Warrant: Extent and Social Implications*, 46 J. CRIM, L., C. & P.S. 187 (1955); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952); Yankivich, *The Lawless Enforcement of the Law*, 9 So. CAL. L. REV. 14 (1935).

[267] Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63.