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The Effect of the Fourth Amendment on Arrests Without a Warrant

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COMMENTS

THE EFFECT OF THE FOURTH AMENDMENT ON ARRESTS WITHOUT A WARRANT

Under recent decisions of the United States Supreme Court, if an arrest made by either state or federal law enforcement officers does not meet the fourth amendment's requirements of "reasonableness" and "probable cause,"[1] evidence obtained as a result of that arrest will be inadmissible in a state or federal criminal prosecution.

The Court established in *Mapp v. Ohio*[2] that tangible results of an unconstitutional search are inadmissible in state courts. *Mapp* also stated that the exclusionary rule established in *Weeks v. United States*[3] and *Silverthorne Lumber Co. v. United States*[4] prohibiting the use of unconstitutionally obtained evidence in federal courts is a constitutional requirement, and not merely a rule developed by the Supreme Court under its supervisory powers.[5] The decision in *Ker v. California*[6] elaborated on *Mapp* and clearly announced that the fourth amendment, and with it the exclusionary rule, is binding on the states.

Since *Mapp* made the protection of the fourth amendment effective against the states and prohibited the admission in state courts of tangible evidence obtained by an unconstitutional search, the next logical step was the exclusion in state prosecutions of tangible evidence obtained by unconstitutional arrest,

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

2. 367 U.S. 643 (1961).

3. 232 U.S. 383 (1914).

4. 251 U.S. 385 (1920). In that case the Court held that evidence obtained in violation of the fourth amendment not only cannot be admitted in evidence, but also cannot be used for any other purpose. Thus the fourth amendment prohibited the admission of evidence obtained by an unconstitutional search and seizure and also any other information or evidence obtained as a result of the improperly seized evidence.

5. 367 U.S. 643, 649 (1962): "There are in the cases of this Court some passing reference to the Weeks rule as being one of evidence. But the plain and unequivocal language of Weeks—and its later paraphrase in Wolf—to the effect that the Weeks rule is of constitutional origin, remains entirely undisturbed."

6. 367 U.S. 23 (1962).

since the fourth amendment protects against unreasonable arrests as well as unreasonable searches.[7] This step was taken in *Beck v. Ohio*.[8] In that case the Supreme Court held that since the municipal police officers did not have sufficient information to constitute "probable cause" for Beck's arrest at the time it was made,[9] the arrest was invalid under the fourth and fourteenth amendments. Clearing house slips later found on his person were therefore inadmissible as evidence in the Ohio court. For analytical purposes a distinction should be noted between cases in which evidence is held inadmissible because it was obtained through an unconstitutional search which resulted in the arrest of the defendant and cases in which an unconstitutional arrest was accompanied by a search incidental to the arrest, which revealed incriminating evidence. In the former the problem is the validity of the search; in the latter it is the legality of the arrest. If the arrest is valid, the search incidental to the arrest is also valid, assuming that the scope of the search is within the limits allowed for a search incident to arrest.[10] *Mapp v. Ohio* is an example of the first type of case, and *Beck v. Ohio* illustrates the second. This Comment deals with the second type, in which the validity of the arrest determines the validity of the search and the admissibility of the evidence obtained.

The holdings of *Mapp*, *Ker*, and *Beck* directly establish that any tangible evidence obtained through an unconstitutional arrest is inadmissible. *Wong Sun v. United States*[11] seems to suggest that any intangible evidence obtained in this manner will

7. Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958); Albrecht v. United States, 273 U.S. 1 (1927). See also Barrett, *Personal Rights, Property Rights, and The Fourth Amendment*, 1960 SUP. CT. REV. 46.

8. 379 U.S. 89 (1964).

9. It is axiomatic that an arrest is not justified by what a subsequent search discloses. Henry v. United States, 361 U.S. 98 (1959); United States v. DiRe, 332 U.S. 581 (1948); United States v. Como, 340 F.2d 891 (7th Cir. 1965); Pigg v. United States, 337 F.2d 302 (8th Cir. 1964).

10. A consideration of the ambit of a search incidental to a lawful arrest is beyond the scope of this paper. *But see* Preston v. United States, 376 U.S. 364 (1964) and United States v. Rabinowitz, 339 U.S. 56 (1950) for a discussion of this problem. Justice Frankfurter gave a succinct statement of the justification for the search incidental to an arrest in *Rabinowitz*. The purposes of the search are "to protect the arresting officer[,] . . . to deprive the prisoner of potential means of escape . . . and . . . to avoid destruction of evidence by the arrested person." These basic reasons have been restated in many other cases. See, *e.g.*, Abel v. United States, 362 U.S. 217 (1960) and Preston v. United States, 376 U.S. 364 (1964).

11. 371 U.S. 471 (1963). See also note 14 *infra*.

also be excluded.[12] In *Wong Sun* federal narcotics agents arrested petitioner, James Wah Toy, on grounds which did not meet the fourth amendment's requirement of probable cause. Immediately after his arrest, Toy voluntarily made incriminating statements which were used as evidence against him in a prosecution for violation of federal narcotics laws. The Supreme Court held that since Toy's arrest violated his fourth amendment rights, the evidence obtained as a result of that arrest — the incriminating statements — must be excluded. The pertinent language is:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained during or as a direct result of an unlawful invasion. It follows from . . . *Silverman* v. *United States*[13] . . . that the fourth amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'.
>
> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence."

Although *Wong Sun* involved action by federal agents and prosecution in a federal court, the decision is based on the fourth amendment, and it seems to follow from *Mapp* and *Ker* that the standard utilized to determine fourth amendment violations is the same whether appplied to federal or state officers.[14] It is

12. *Mapp* stated that the exclusionary rule of *Weeks* is a constitutional doctrine (see note 5 *supra*), and *Silverthorne* stated that *Weeks* is meaningless unless *all* evidence resulting from a fourth amendment violation is inadmissible, rather than excluding only direct results of an unconstitutional search or seizure. Thus it would seem that *Silverthorne*, as well as *Weeks*, states a constitutional rule of the fourth amendment, rather than a rule enunciated by the Supreme Court in its supervisory powers, and is hence obligatory upon the states. Furthermore, if *Wong Sun* applies to the states, it is submitted that any evidence discovered as a result of oral statements made following an unconstitutional arrest is inadmissible in a state prosecution.

13. 365 U.S. 505 (1961). In that case a unanimous Court held that eavesdropping by law enforcement officers using an electronic listening device which was inserted into a party wall constituted a violation of the petitioners' fourth amendment rights and that conversations thus overheard were therefore inadmissible.

14. 367 U.S. 643, 655 (1962): "We hold that all evidence obtained by searches *and seizures* in violation of the Constitution is, by that same authority, inadmissible in a state court.

"Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." (Emphasis added.)

therefore suggested that the holding of *Wong Sun* would have been the same had the petitioner been arrested by state law enforcement officers and prosecuted in a state court.[15]

If an unconstitutional arrest results in the exclusion of any evidence obtained as a consequence of the arrest, it is apparent that law enforcement officers must ascertain the exact standards for determining the validity of an arrest. There are numerous decisions[16] holding that in the absence of applicable federal statutory law, state law determines the validity of an arrest, even if it is made by federal officers. It must be remembered, however, that the state rules concerning arrests must fulfill the basic requirements of the fourth amendment. The United States Supreme Court decisions dealing with the validity of arrests[17] establish *probable cause* as the primary requirement of the fourth amendment, with little emphasis being given to the fourth amendment's requirement of "reasonableness." It seems that an arrest meets the "reasonableness" requirement only if there is "probable cause" for the arrest at the time it is made.[18]

15. See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 459 (1964), suggesting that *Wong Sun* definitely applies to the states, since the Court remanded Traub v. Connecticut, 374 U.S. 493 (1963), for reconsideration in light of *Wong Sun* after the state court had held admissible a confession obtained after an unconstitutional arrest.

At present, *Wong Sun* represents the furthest limits of fourth amendment protection. It seems logical to suggest, however, that the ambit of the fourth amendment could be expanded to cover the situation in which there is an unconstitutional arrest and nothing more. One of the reasons for applying the exclusionary rule to the states through the fourth amendment is that the rule of exclusion is *necessary* to enforce the rights guaranteed by the fourth amendment, and there must be an effective protection for a right if the right is to be meaningful. If this reasoning is carried to its logical extremes, it could be argued that a person who is merely unlawfully arrested, with no accompanying search, questioning, or anything else, cannot be prosecuted at that time (at least for the crime for which he was arrested), since the fourth amendment clearly protects "the right of the people to be secure in their *persons* . . . against unreasonable . . . *seizures*." (Emphasis added.), and the only really effective method of preventing unlawful arrests is by granting the subject of such an arrest immunity from prosecution. So far, however, the Court has refused to recognize such an immunity. For example, in Frisbie v. Collins, 342 U.S. 519 (1952), the defendant was kidnapped in another state in order to bring him into the jurisdiction of the state court in which he was subsequently tried and convicted. The United States Supreme Court held that this did not deprive the state court of its criminal jurisdiction.

16. Miller v. United States, 357 U.S. 301 (1958); Johnson v. United States, 333 U.S. 10 (1948); United States v. DiRe, 332 U.S. 581 (1948); Ralph v. Pepersack, 335 F.2d 128 (3d Cir. 1964); United States v. Burgos, 269 F.2d 763 (4th Cir. 1959).

17. See, *e.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1947).

18. For instance, in Wong Sun v. United States, 371 U.S. 471, 479 (1962), the United States Supreme Court agreed with the court of appeals' finding that

Since the issue of probable cause is crucial in determining whether an arrest fulfills the requirements of the fourth amendment, an attempt should be made to specify the factors to be considered in deciding whether there is probable cause for an arrest. Although the validity of prosecutions in state courts based on arrests made by state officers has been a fourth amendment problem only since the *Mapp* decision, the Supreme Court had previously dealt with numerous cases involving arrests by federal officers,[19] and since the fourth amendment requirements concerning arrests are now the same for both state and federal officers, the pre-*Mapp* federal cases dealing with probable cause for an arrest are pertinent in determining when a state officer may make an arrest.

The Supreme Court has often stated[20] that probable cause exists only "if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." The question to be considered is whether "prudent men in the shoes of [the] officers would [have enough information] to permit them to believe that petitioner was violating or had violated the law."[21] The Court has noted that, "in dealing with probable cause, . . . we are dealing with probabilities. [These probabilities] are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[22] For this reason, the court has repeatedly held that probable cause for arrest may be established by facts which would be inadmissible as evidence in determining the

"there was neither reasonable grounds nor probable cause for Toy's arrest." Mr. Justice Brennan, speaking for the majority of the Court, then spent six pages discussing the reasons for the finding that there was no probable cause. No further mention was made of the lack of "reasonable grounds."

Most statutes giving officers the authority to make arrests without a warrant condition the validity of the arrest on the existence of "reasonable cause." *E.g.*, LA. R.S. 15:60 (1954); 18 U.S.C. § 3052 (1958). However, the meaning of reasonable cause as used in these statutes has been equated with the "probable cause" of the fourth amendment. See Wong Sun v. United States, *supra*. For a detailed discussion of the distinction between probable cause and reasonableness, see Comment, 26 LA. L. REV. 802 (1966).

19. See, *e.g.*, Wong Sun v. United States, 371 U.S. 471 (1962); Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480 (1958).

20. Henry v. United States, 361 U.S. 98, 102 (1959); Giordenello v. United States, 357 U.S. 480, 486 (1957); United States v. DiRe, 332 U.S. 581, 592 (1948); Director General v. Katsenbaum, 263 U.S. 25, 28 (1923); Stacey v. Emery, 97 U.S. 642, 645 (1878). Of course, after probable cause to believe that an offense has been committed is established, there must also be probable cause to believe that a particular suspect committed it.

21. Brinegar v. United States, 338 U.S. 160, 175 (1948).

22. *Ibid.*

guilt of the defendant.[23] In *Carroll v. United States*[24] the court enunciated the basis for all subsequent definitions of probable cause: "reasonable ground for belief of guilt." In *Brinegar*, Mr. Justice Rutledge, speaking for the majority of the court, determined the problem as one of defining the shadowy line between mere suspicion and probable cause; "that line must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances."[25]

An examination of Supreme Court decisions concerning the existence of probable cause reveals that the court's usual technique is to quote some of the general statements about the nature of probable cause and then, after examining the specific facts of the case, to decide whether probable cause existed for that particular arrest. This method of resolving the issue is no doubt occasioned in part by the very nature of probable cause: it depends on *all* the surrounding circumstances, and is therefore unique in every case. However, it is for this reason difficult to outline the factors which must be considered by law enforcement officers and to determine the quantum of evidence they must possess in order to have probable cause for an arrest. The fact that presently there are no specific guidelines is unfortunate because the questions of what information is to be considered and how much relevant information is necessary are faced by law enforcement officers each time they consider making an arrest. It seems logical that something akin to a mathematical probability based on (1) the degree of certainty that a crime has in fact been committed, and (2) the degree of certainty that the particular suspect committed the crime if a

23. In Jones v. United States, 362 U.S. 257 (1960), hearsay was used to establish probable cause. In Brinegar v. United States, 338 U.S. 160 (1948), the fact that the officer had previously arrested petitioner for the same type of offense was considered pertinent to the existence of probable cause, although the previous arrest was inadmissible as evidence of petitioner's guilt.

24. 267 U.S. 132, 161 (1924).

25. 338 U.S. 160, 176 (1948). Most of the cases do not draw a distinction between probable cause for an arrest and probable cause for a search. However, it was stated in Miller v. Sigler, 343 F.2d 424, 427 (8th Cir. 1965) that "probable cause to search is 'much less' than probable cause to arrest." Although standards set in cases involving probable cause for an arrest are used to determine whether there is probable cause for a search in a later case, and vice versa, it is submitted that a distinction between the two types of probable cause should be formulated, since the rights protected by the fourth amendment are essentially rights of privacy and personal dignity. A person's right of privacy seems to be more severely invaded when he is arrested and taken to a police station for questioning than when his house or automobile is searched. It is therefore suggested that the requirements for probable cause for arrest should be more stringent than those for probable cause for a search.

crime has been committed, would be considered in determining the existence of probable cause in a given situation. Probable cause requires that it be very likely that a crime has been committed and that the suspect has committed it. Even though there is almost entire certainty that a crime has been committed, if there is a small degree of probability that the suspect committed it, there is no probable cause for his arrest, and vice versa. However, when it is all but certain that a crime has been committed, probable cause may be satisfied by a slightly lesser degree of probability that the suspect committed it than otherwise.

In considering the standards announced by the Supreme Court for finding probable cause, it must be remembered that the Court apparently considers the amount of probable cause necessary for an arrest to be a fixed entity regardless of the type of crime.[26] The amount of information the police must possess in order to legally arrest a person for a crime seems to be the same, whether the crime be rape or bigamy. In determining the presence or absence of probable cause, it does not seem to matter whether the person arrested is suspected of stealing an automobile or of stealing an atomic bomb.[27] The only member of the Supreme Court who has ever suggested that the standard of probable cause should vary with the seriousness of the crime was Justice Jackson. Dissenting in *Brinegar v. United States*,[28] he stated that the police should be allowed to search every car in the area where a child has been kidnapped, but such a practice should not be allowed when the crime involved concerns the illegal transportation of whisky. In *McDonald v. United States*[29] he again expressed the view that the gravity of the

26. There is dictum in State v. McIlvaine, 247 La. 747, 174 So. 2d 515 (1965), which suggests that the Louisiana Supreme Court considers the nature of the crime in determining whether an arrest is "reasonable." In that case the court said: "[W]e think it is entirely probable that inferences and conclusions from facts may be made in a narcotics case which may conceivably offend standards of reasonableness in another case. The very nature of narcotics transactions . . . dictate that a different standard should apply." *Id.* at 750, 174 So. 2d at 521.

Justice McCaleb, in a dissenting opinion, argues against applying a less strict standard of reasonableness to narcotics cases than to other types of crimes, saying: "The constitution . . . extends its protection against unreasonable searches to all and I find no basis in law for the formulation of special rules or relaxed standards for determining reasonableness in testing the validity of arrest for particular crimes." *Id.* at 752, 174 So. 2d at 523.

27. For a feasible plan for stealing an atomic bomb, see FLEMING, THUNDERBALL (1961).

28. 338 U.S. 160, 183 (1949).

29. 335 U.S. 451, 459 (1948) (concurring opinion). Although *Brinegar* and *McDonald* dealt with probable cause for a search, Mr. Justice Jackson's reasoning is applicable to probable cause for an arrest.

offense should be considered in determining the legality of the arrest. No majority opinion of the Court, however, has considered such factors as the nature of the crime, the risk of escape, or the risk of further harm in determining whether probable cause existed for an arrest. It is submitted, however, that since probable cause depends on all the circumstances of a case,[30] the Court would consider the nature of the crime as one of the circumstances, and if a case arose in which the exigencies were such that an immediate arrest was imperative, it would probably be held valid, even though the information possessed by the officers at the time would not constitute probable cause for arrest for a lesser crime.

Although it is impossible to formulate a concise rule applicable in any situation to ascertain the existence of probable cause for arrest, a general idea of the type of information needed can be discerned by examining the facts of various Supreme Court cases.

The arrest in *Henry v. United States*[31] was held illegal because the officers did not have probable cause at the time the arrest was made. Officers were investigating a theft of whisky when they saw Henry and a friend loading cartons into a car. The officers had some vague information that one of the men might be connected with "interstate shipments," but they had no way of knowing what the cartons contained. The officers arrested Henry and his friend, and it was later learned that the cartons contained stolen radios. The Supreme Court held the radios inadmissible as evidence in Henry's trial for unlawfully possessing radios stolen from an interstate shipment, because the arrest which resulted in the discovery of the radios was unconstitutional.

Ker v. California[32] further elucidates the Court's concept of probable cause.[33] Officers of the Los Angeles Sheriff's Office had observed Murphy, a known narcotics peddler, sell narcotics at a particular place in Los Angeles. The following night they saw Murphy and Ker go through the same procedure at the

30. See cases cited note 19 *supra*.
31. 361 U.S. 98 (1959).
32. 374 U.S. 23 (1963).
33. It should be noted, however, that the opinion of Mr. Justice Clark was joined by only three other Justices. The concurring opinion of Mr. Justice Harlan and the dissent, written by Justice Brennan, were both based on grounds other than the presence or absence of probable cause for the arrest.

same location. Because of distance and darkness, however, the officers did not actually see any narcotics change hands. When Ker drove away the officers followed him, but Ker made a U-turn and eluded them. The officers had also received information that Ker was selling marijuana which he was "possibly securing from . . . Murphy." The officers then went to Ker's apartment, and in the parking lot they found the automobile which they had been following. After discovering that someone was in Ker's apartment, the officers obtained a pass key, entered the apartment unannounced,[34] and found Ker, his wife, and about two pounds of marijuana.

The Court reasoned that for the marijuana to be admissible as evidence, it must be the product of a search incidental to a lawful arrest, and the arrest must be based on probable cause.[35] The court then stated, "the information within the knowledge of the officers at the time they arrived at the Ker's apartment . . . clearly furnished grounds for a reasonable belief that . . . Ker had committed and was committing the offense of possession of marijuana." In *Draper v. United States*[36] the arrest was based on information supplied by a paid informer named Hereford, who had provided the federal officers on several previous occasions with information which always had been reliable. Hereford told the officers that Draper would arrive in Denver on a certain morning train and that he would be carrying narcotics. Hereford also described in detail Draper's appearance and the clothes he would be wearing. Draper arrived as predicted, and the Supreme Court found that the federal narcotics agents had probable cause to believe that he was carrying narcotics. Justice Douglas dissented, arguing that information provided by an informer, with nothing more, could not provide probable cause for an arrest.

In *Beck v. Ohio*[37] the issue was again the admissibility of evidence resulting from a search incidental to an arrest. The court asserted, "the constitutional validity of the search . . . must depend upon the constitutional validity of the arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had

34. This unannounced entry is the basis for the dissent's argument that the arrest violated the fourth amendment. *Id.* at 46.
35. *Id.* at 34.
36. 358 U.S. 307 (1959).
37. 379 U.S. 89 (1964).

probable cause to make it."[38] The Court held that since the only information known to the arresting officers, according to the trial record, was that Beck had a gambling record and that some information had been given by an unnamed informer, probable cause for Beck's arrest did not exist. *Beck* and *Draper*[39] seem to announce the rule that in order to base probable cause for an arrest on information supplied by an informer, the record must at least show that the arresting officers had some objective basis for believing the informer. In *Draper* the record showed that the informer had proved reliable in the past and that the arresting officers had an opportunity to check the accuracy of some of the information he provided about Draper. In contrast, the record in *Beck* showed neither who the informer was nor what information the officers received.[40]

Since the absence of probable cause at the time an arrest is perfected will result in the exclusion of evidence obtained as a result of the arrest, it is obviously important to ascertain the time at which an arrest occurs.[41] A better example of this importance could not be found than *Rios v. United States*.[42]

In that case, police officers approached a taxicab in which Rios was riding when the cab stopped at a traffic light. One of the officers opened the door of the taxicab, and Rios dropped a package which obviously contained narcotics. However, since it was not clear from the record whether the door was opened before the package was dropped or *vice versa*, the case was remanded to the federal district court to determine the exact sequence of events. The entire case depended on the exact time of the arrest, since it was conceded that the officers did not have probable cause for an arrest at the time they approached the cab. If they arrested Rios before he dropped the narcotics, the

38. *Id.* at 91.

39. See text at note 35 *supra*.

40. 379 U.S. at 94. The effect of the identity of the informer on the existence of probable cause is illustrated by United States v. Pearce, 275 F.2d 318 (7th Cir. 1960), in which a search warrant was issued "on the basis of confidential information, from a source . . . which has proved reliable." The "reliable source" turned out to be an FBI agent who had received the information from another FBI agent who had received it from an informer who had never been used before. It should be noted, however, that this case involved probable cause for a search warrant, and the standards may be different for probable cause for arrest and probable cause for a search. See Comment, 26 LA. L. REV. 802 (1966).

41. For the usual definitions of arrest, see Comment, 100 U. PA. L. REV. 1182, 1186 (1952).

42. 364 U.S. 253 (1960).

narcotics would be inadmissible as evidence since it would be the result of an unconstitutional arrest. However, if Rios dropped the package and it was seen by the officers before they made the arrest, the officers would have had probable cause for arresting Rios and the arrest would be valid under the fourth amendment. Since arrests by either state or federal officers must meet the constitutional standards of the fourth amendment, it is submitted that a definition of what constitutes an arrest and the time the arrest occurs are ultimately questions for the Supreme Court. So far, the Court has avoided the issue of whether it is possible to hold suspects for questioning without actually making an arrest, and no definite rules have been formulated to determine exactly when an arrest takes place.[43]

Mapp and subsequent Supreme Court decisions should theoretically have an immense effect on Louisiana's criminal procedure, since Louisiana did not recognize the exclusionary rule prior to *Mapp*.[44] While the problem of the constitutionality of the arrest had little to do with the conviction of defendants in criminal prosecutions prior to *Mapp*, the Louisiana Supreme Court has found it necessary in recent cases to examine the facts leading up to an arrest to determine whether or not there was probable cause for the arrest.[45] However, there have been no cases since *Mapp* in which the Louisiana Supreme Court has held either tangible or intangible evidence to be inadmissible because of the illegality of the defendant's arrest.

The Louisiana Supreme Court held in *State v. Aias*[46] that there was probable cause for arrest and that a search incidental to the arrest was therefore constitutional. There a physician told the police that the defendant "continually bothered him

43. Under the holdings of People v. Rivera, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964), *cert. denied*, 379 U.S. 978 (1965) and People v. Pugach, 5 N.Y.2d 65, 255 N.Y.S.2d 833, 204 N.E.2d 176 (1964), *cert. denied*, 380 U.S. 936 (1965), police may, under the authority of a New York statute, stop and frisk suspicious people. These detentions do not constitute an arrest, and if the frisking leads the police reasonably to believe that the person has committed or is committing a crime, they may then arrest them and, incidental to the arrest, thoroughly search the suspects. See Comment, 65 COLUM. L. REV. 848 (1965), in which it is suggested that the United States Supreme Court will eventually develop rules governing the power of the police to detain and frisk suspicious persons.

44. State v. Calascione, 243 La. 993, 994, 149 So. 2d 417, 418 (1963).

45. State v. McIlvaine, 247 La. 747, 174 So. 2d 515 (1965); State v. Marchetti, 247 La. 649, 173 So. 2d 531 (1965); State v. Pickens, 245 La. 680, 160 So. 2d 577 (1965); State v. Aias, 243 La. 946, 149 So. 2d 400 (1963); State v. Calascione, 243 La. 993, 149 So. 2d 417 (1963); State v. Cade, 244 La. 534, 153 So. 2d 382 (1963).

46. 243 La. 946, 149 So. 2d 400 (1963).

for paregoric prescriptions."[47] The officers then went to defendant's house where, after they entered onto defendant's property but before they opened the door to his house, they smelled "an odor of paregoric and assumed that it was being cooked or had just been cooked."[48] One of the officers forced open the rear door, arrested the defendant and discovered incriminating evidence in the kitchen. Assuming that none of the defendant's fourth amendment rights were violated until the officers forced open the door of the house, it is submitted that there may be conflict on the probable cause issue between *State v. Aias* and *Johnson v. United States*,[49] where the Supreme Court refused to base a finding of probable cause on what the officers believed to be the smell of burning opium.[50]

In *State v. Marchetti*,[51] the Louisiana Supreme Court again found probable cause for arrest on facts which, it is believed, might not be held a sufficient basis for probable cause by the Supreme Court.[52] Marchetti was arrested because two policemen had been told to be "on the lookout" for a 1960 Pontiac with an Illinois license. The owner of the car, Leonard Flanagan, "was being sought in connection with an investigation being conducted through a prior arrest of said Flanagan." The officers found the parked car, and about fifteen minutes later Marchetti, whom the officers assumed to be Flanagan, approached the car, removed something from the trunk of the car, and put it in his coat pocket. When questioned, Marchetti identified himself and said that he had been paid to remove some clothes from a hotel room and place them in an automobile. Marchetti's story "sounded phony" to the officers, so they took him to the police station for questioning and booked him for vagrancy and investigation of armed robbery. About an hour after he was booked, Marchetti confessed that he had committed a robbery. The Louisiana Supreme Court concluded that "the arresting officers had probable cause for arresting Marchetti." Although it

47. *Id.* at 948, 149 So. 2d at 401.

48. *Ibid.*

49. 333 U.S. 10 (1948). Detectives recognized the smell of burning opium emerging from a hotel room. They entered, arrested the occupant, and searched the room. The United States Supreme Court held that the search could not be considered incidental to a lawful arrest, since there was not probable cause for the arrest. See also Beck v. Ohio, 379 U.S. 89 (1964).

50. See *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Criminal Procedure*, 24 LA. L. REV. 168, 341 (1964).

51. 247 La. 649, 173 So. 2d 531 (1965).

52. Compare this case with Henry v. United States, 361 U.S. 98 (1959).

is difficult to pinpoint the exact time at which Marchetti's arrest occurred, there can be no doubt that he had definitely been placed under arrest when the officers took him to the police station.[53] It is submitted that the officers did not have sufficient information connecting Marchetti with a robbery at that time to constitute probable cause for an arrest for robbery. However, since Marchetti was booked for vagrancy, it could be argued that there was probable cause for arresting him for violating the vagrancy statute, assuming that the statute is constitutional.[54]

In *State v. Pickens*[55] the Louisiana Supreme Court found that there was probable cause for an arrest because police officers who were investigating a burglary which had already been committed saw the defendants, who were "not local boys," driving at a slow speed in an alley behind the burglarized store. When *Pickens* is compared with decisions of the Supreme Court[56] concerning the quantum of information needed to establish probable cause for arrest, it can be inferred that the test of probable cause applied in Louisiana is less severe than that applied in the federal courts.

It is submitted that decisions of the United States Supreme Court concerning arrest will have an increasingly important effect on the admissibility in Louisiana courts of evidence obtained as the result of an arrest. Until recently, most Supreme Court cases under the fourth amendment have dealt with the constitutionality of searches. It is believed, however, that *Wong Sun* and subsequent cases portend an increasing emphasis on the constitutionality of arrests and the inadmissibility of evidence resulting from an unconstitutional arrest. As the constitutional standard is clarified, there will be less room for state courts to apply a standard less strict than that of the federal courts. At present the "prudent man" test for probable cause allows a difference of opinion as to what constitutes sufficient information to ground a reasonable belief that a crime has been committed and that the suspect committed it. This discretion will probably

53. LA. R.S. 15:58 (1950) provides: "[A]rrest is the taking of one person into custody by another." The definition is the same in the proposed revision of the Code of Criminal Procedure, title V, *Arrest*.

54. See *The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Criminal Procedure*, 26 LA. L. REV. 599 (1966).

55. 245 La. 680, 160 So. 2d 577 (1964).

56. *E.g.*, note 30 *supra*.

be removed, however, by future Supreme Court decisions which define the requirements of the fourth amendment more clearly, and the gap between the federal and the Louisiana standards will narrow considerably.

A. L. Wright II

CAUSE TO SEARCH AND SEIZE

Crime investigators often face the problem of whether to search the property or person of a suspect. If a search is improper for want of sufficient cause, then all that it uncovers must be excluded from any subsequent prosecution. Thus a police blunder may not only render a fruitful search futile, but may also cloak the criminal with immunity. Unfortunately, it is impossible to arm the police with a criterion which will unfailingly answer the question: "Are the facts sufficient to support a search or seizure?" This Comment is an attempt to analyze the factors which the courts have weighed in evaluating police responses to this question.

I. THE FEDERAL CASES

The federal powers of search and seizure are limited by the fourth amendment to the United States Constitution.[1] Analytically, this amendment is severable into two clauses. The first requires that all searches and seizures be reasonable and the second prohibits the issuance of search warrants without a showing of probable cause. The test of reasonableness set forth in the first clause is two-fold: (1) there must be reasonable grounds[2] to justify the intrusion and (2) the search or seizure must be executed in a reasonable manner.[3] Where the search or

1. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and Particularly describing the place to be searched, and the persons or things to be seized."

2. The reasonable cause test, implicit in the first clause of the fourth amendment, must be distinguished from the "reasonable grounds" and "reasonable cause" language frequently used in legislation creating police arrest powers. Such language is equivalent to the fourth amendment's requirement that arrests may be made only upon probable cause. See Wong Sun v. United States, 371 U.S. 471, 478 n.6 (1963); Henry v. United States, 361 U.S. 98, 100 (1959).

3. Reasonableness of execution includes such considerations as the intensity, object, area, duration, and violence of the search. See Harris v. United States,