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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 grounds² 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*,

seizure is authorized by warrant the test of reasonable grounds to search accedes to the magistrate's finding of probable cause. Nevertheless, the magistrate's sanction is more than a certification that probable cause exists.⁴ The interposition of an independent evaluator between the police and the people is a check on the executive branch of government and springs from the separation of powers between the executive, judiciary, and legislature.⁵ It is not surprising, therefore, that the courts have resisted police encroachment by making the validation of a warrantless search or seizure more onerous than the probable cause test, for obtaining a warrant.

The Supreme Court has treated the distinction between the demands for validation of a search under warrant and a warrantless search in terms of presumption, proof, and preference. There is a presumption that the magistrate had probable cause for issuing a warrant. This presumption rests in part on the deference with which superior tribunals treat findings of fact by inferior judicial officers. Although the Supreme Court has only referred to the standard of review as "substantial deference,"⁶ the Courts of Appeals for the Fifth and Sixth Circuits accept determinations of the magistrate "unless it is shown that the Commissioner's judgment was arbitrarily exercised."⁷ The Second Circuit has held that in close cases "the very fact that the Commissioner found probable cause is itself a substantial factor tending to uphold the validity of the warrant he issued."⁸ Both these tests differ from that applied by appellate courts to the findings of the trial judge on a motion to suppress evidence obtained through an improper search. The conclusions of the trial judge are accepted unless they are found to be "clearly erroneous."⁹ While it is clear that the burden is on a defendant

331 U.S. 145, 152 (1946); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *Boyd v. United States*, 116 U.S. 616, 623 (1886).

4. See *Burt v. Smith*, 203 U.S. 129, 134 (1906).

5. In fact, the fourth amendment is rooted in the struggle between the British Crown and Parliament over the power of the King's Ministers to search and seize independently of the legislative and judicial branches of government. For a history of the amendment and its origins, see *Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Frank v. Maryland*, 359 U.S. 360, 363-66 (1959).

6. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

7. *United States v. Plemmons*, 336 F.2d 731, 733 (6th Cir. 1964). See also *United States v. Haskins*, 345 F.2d 111 (6th Cir. 1965); *United States v. Malugin*, 296 F.2d 741 (6th Cir. 1961); *Castle v. United States*, 287 F.2d 657 (5th Cir. 1961).

8. *United States v. Ramirez*, 279 F.2d 712, 716 (2d Cir. 1960).

9. *United States v. Page*, 302 F.2d 81 (9th Cir. 1962).

who seeks to suppress evidence obtained under a search warrant to show the want of probable cause,¹⁰ the Supreme Court has not been faced with the question of who had the burden of proof where the defendant seeks to suppress the fruits of a warrantless search. In such a case it seems certain¹¹ that the lower court practice of placing the burden on the prosecution¹² would be continued.

The Court in *Johnson v. United States*¹³ warned that "any assumption that evidence sufficient to support . . . a search warrant will support a search without a warrant would reduce the [Fourth] Amendment to a nullity." This distinction in standards of proof may be limited to the factual situation of *Johnson*, a breach of the security of a dwelling. The reasonableness-of-execution test protects dwellings, except possibly in exigent circumstances,¹⁴ from warrantless invasion no matter how conclusive the evidence that a search will be fruitful. This protection is antecedent to the fourth amendment. "An Englishman's home, though a hovel, is his castle, precisely because the law secures freedom from fear of intrusion by the people except under carefully safeguarded authorization by a magistrate."¹⁵ It seems more likely that the distinction in *Johnson* was meant to have a broader application than that merely of a safeguard for an interest already adequately protected by the requirement of reasonableness.

The Court in *United States v. Lefkowitz*¹⁶ stated that "the informed and deliberate determinations of magistrates" are favored "over the hurried action of officers and others who happen to make arrests." There was no explanation of the effects of this preference, but it is possible that they may not be limited to proof and presumption. For example, on a question of whether a search was conducted in a reasonable manner the courts might

10. *Jones v. United States*, 362 U.S. 257, 270 (1960).

11. See *Brinegar v. United States*, 338 U.S. 160 (1949).

12. See, e.g., *Batten v. United States*, 188 F.2d 75, 77 (5th Cir. 1951).

13. 333 U.S. 10, 14 (1948). See also *Aguilar v. Texas*, 378 U.S. 108 (1964).

14. For example, a burning dwelling which the police have reasonable grounds to search might not be protected. Cf. *Ker v. California*, 374 U.S. 23 (1963); *United States v. Hall*, 348 F.2d 837, 841 (2d Cir. 1965).

15. *Harris v. United States*, 331 U.S. 145, 164-65 (1947). For a collection of cases holding that reasonable grounds is not ordinarily sufficient under the reasonableness test to support the search of a home without a warrant see *Ford v. United States*, 352 F.2d 927, 929-33 (D.C. Cir. 1965).

16. 285 U.S. 452, 464 (1932).

be more lenient with policemen who were wise enough to obtain a warrant before they acted.

Warrantless Searches and Seizures

To decide whether it was reasonable to execute a warrantless search the courts must weigh (1) the sufficiency of cause, (2) the value of the interest invaded, and (3) the circumstances surrounding the search. Although it is difficult to isolate these factors, apparently any interest protected by the fourth amendment will, under normal circumstances, prevail over such causes as the odors of fermenting mash¹⁷ and alcohol,¹⁸ the fumes of burning opium,¹⁹ the sound of adding machines at the location of a suspected "numbers game,"²⁰ and the installation of an unusual number of phones at a suspected book-making operation headquarters.²¹

By way of dictum in *United States v. Ventresca*²² the Supreme Court named as interests that may be invaded without warrants, even when there exists reasonable cause, the privacy of a moving object and the security of property under the control of an arrestee.²³ Presumably the Court, even if it classifies all but two fourth amendment interests as inviolate, will still recognize "exceptional circumstances" which override even the more favored interests. This approach deprives the courts of the flexibility inherent in the gradation of interests and forces an undue emphasis on circumstances surrounding the search. The privacy of a person's bedroom is more worthy of protection than the privacy of a house of prostitution. The courts have, in fact, made distinctions between the interests lumped together in *Ventresca*. The security of the home has been spoken of as a

17. *Taylor v. United States*, 286 U.S. 1, 6 (1932).

18. *Trupiano v. United States*, 334 U.S. 699 (1948).

19. *Johnson v. United States*, 333 U.S. 10 (1948).

20. *McDonald v. United States*, 335 U.S. 451 (1949).

21. *United States v. Nicholson*, 303 F.2d 330 (6th Cir. 1962).

22. 380 U.S. 102 (1965).

23. It is interesting to note that the first clause of the fourth amendment protects "*persons*, houses, papers, and effects" from unreasonable searches, whereas the second clause concerning the issuance of warrants refers to "*the place* to be searched, and the *persons* or things to be seized." Unless we are to consider a person as a place, this syntax would seem to leave the search of persons outside the ambit of search warrants. In fact, search warrants have seldom been used for the search of persons; nevertheless, they can be issued (*United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960)), and where the person to be searched is believed to be innocently carrying some instrumentality, fruit, or contraband of another's crime, a search warrant is the only proper way to proceed in the absence of consent.

paramount right.²⁴ It has been urged that the same right extends to a hotel room;²⁵ but "the law does not prohibit every entry, without a warrant, into a hotel room."²⁶ Because of the contract between hotel and guest, circumstances might arise where an inquiry by a house detective who is also a deputy sheriff would be reasonable, while similar circumstances would not justify the invasion of a home. The fourth amendment protects places of business, but the courts are inclined to use a less demanding test of reasonableness.²⁷

The circumstances surrounding the search which should be considered include the danger of violence and the possibility of imminent destruction, removal, or concealment of the property intended for seizure.²⁸ The courts occasionally refer to the feasibility²⁹ of obtaining a warrant as a separate factor. It would seem, however, that feasibility is the broad term which encompasses danger of violence, destruction, removal, and concealment. Cases concerning violence contemporaneous with the police activity have been in the area of arrest. Nevertheless, there is some indication that the probability of violence may affect the reasonableness of a warrantless search.³⁰ It seems unlikely that the courts would hobble a search for a time bomb or a typhoid carrier by insisting upon a warrant. The weight the courts should give to emergency situations is not clear. In *Jones v. United States*, the Supreme Court stated that investigating officers might be able to dispense with a warrant where there was "clearly convincing evidence of the immediate need to search."³¹ The meaning of "immediate need" was clouded by the subsequent case of *Ker v. California*.³² The police in *Ker* had observed the defendant meeting a suspected marijuana peddler. Later

24. See *District of Columbia v. Little*, 339 U.S. 1 (1951); *Smith v. United States*, 254 F.2d 751 (D.C. Cir. 1958).

25. See *Eng Fung Jem v. United States*, 281 F.2d 803 (9th Cir. 1960).

26. *United States v. Jerrers*, 342 U.S. 48, 51 (1951).

27. For example, the courts are less willing to find coercion when the government claims consent to the search. *Davis v. United States*, 328 U.S. 582 (1946).

28. *United States v. Jerrers*, 342 U.S. 48, 52 (1951).

29. In *Trupiano v. United States*, 334 U.S. 699 (1948) the Court suggested that where it is practical to obtain a search warrant there cannot be a valid warrantless search. This decision was limited to the facts of *Trupiano*, where the operation of an illegal still had been under observation for several months before the raid. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

30. See the dissenting opinion of Mr. Justice Jackson in *Brinegar v. United States*, 338 U.S. 160, 183 (1949).

31. 362 U.S. 257, 270 (1960).

32. 374 U.S. 23 (1962).

they realized an informant had previously reported that Ker was selling narcotics in his apartment. A search was made without a warrant and marijuana found. The Court split four to four on whether the conduct of the police violated the fourth amendment. Justice Harlan, in accord with his dissent in *Mapp v. Ohio*,³³ concurred in validating the search but found the fourth amendment inapplicable to the states. The prevailing opinion, by Justice Clark, justified the search by finding time to be "clearly of the essence." Presumably, under the standard applied by Justice Clark, police officers may find immediate need from the ease with which narcotics may be disposed of and the likelihood that they will be removed.³⁴ Even if this interpretation of the Constitution is supported by a majority of the Justices, federal officers might be held to a stricter standard through the Court's supervisory powers.

Another variation of feasibility may have been created in *Frank v. Maryland*.³⁵ Frank was fined twenty dollars for refusing to permit a Baltimore health inspector to enter his home in search of rodents. In the course of upholding the fine, the Court, speaking through Justice Frankfurter, pointed to the "thousands upon thousands" of inspections made under ordinances designed to eliminate health hazards, a strong implication that the decision was influenced by the fact that public health would suffer if inspectors had to spend most of their time in court. Nevertheless, the Constitution contradicts the conditional statement that if an application of the fourth amendment's warrant provisions renders a law unenforceable, this will be a factor in determining whether they will be applied. The feasibility of enforcement factor raised by *Frank* must be limited to the facts of the case. Neglect of public health can lead to consequences analogous to "the danger of violence." As the Court observed in *Carroll v. United States*, "the fourth amendment is to be construed . . . in a manner which will conserve public interests as well as the interests and rights of individual citizens."³⁶

33. 367 U.S. 643 (1961).

34. *Ker* has been invoked by prosecutors as a special rule for contraband crimes where the necessity of proving possession coupled with the ease of destruction makes it difficult to obtain convictions without warrantless searches. This interpretation of *Ker* seems strained unless the investigators know that the suspects have the drugs. See, e.g., Brief of the State, *State v. McIlvanie*, 245 La. 649, 160 So.2d 566 (1964).

35. 359 U.S. 360 (1959).

36. 267 U.S. 132, 149 (1925).

The difficulty of untangling the factors of sufficiency of cause, the value of the interest invaded, and the circumstances surrounding the search is amply illustrated by the "moving vehicle cases." As noted in *Ventresca* the search of a moving vehicle is judged by a special standard. In *Brinegar v. United States*³⁷ the Supreme Court validated a search of an automobile being driven by a suspected liquor-runner on a highway known to be often used by liquor-runners. The investigators' suspicions were based on the driver's reputation and previous police experiences. This decision appeared to be authority for the proposition that a less rigorous standard of reasonable cause would justify the search of a vehicle. If this was the proper interpretation of *Brinegar*, it was overruled by *Rios v. United States*³⁸ and *Henry v. United States*.³⁹ A taxi in a neighborhood known for "narcotics activity" was the subject of a warrantless search in *Rios*. The investigating officers knew that taxicabs were frequently used as "drop zones" by dealers and addicts. When the officers noticed a suspicious-looking person getting into a taxi, they searched it. The Court excluded evidence obtained by such a search. A search for stolen whisky which revealed stolen radios was invalidated in *Henry*. The Government unsuccessfully tried to establish reasonable grounds for the search in the suspicion that Henry was involved in a whisky theft and on his "guilty behavior" when confronted by the agents. These cases seem to restrict those who would search vehicles to the same types of proof that may be used to demonstrate reasonable cause for other classes of warrantless search.

A special dispensation in the case of moving vehicles would seem to rest on the circumstance of mobility. A suspect might easily cross jurisdictional boundaries before the officers could present their case to a magistrate. The earliest case to distinguish the rule for vehicles may have been based in part on an evaluation of the interest protected. The suspected violation involved the transportation of contraband across the Canadian border.⁴⁰ The Court noted that customs seizures are unique in that personal privacy has historically been subjected to the right of governments to control access to their lands.⁴¹ Although the

37. 338 U.S. 160 (1949).

38. 364 U.S. 253 (1960).

39. 361 U.S. 98 (1959).

40. *Carroll v. United States*, 267 U.S. 132 (1925).

41. See also *Boyd v. United States*, 116 U.S. 616 (1886).

Court has applied the rule to facts not associated with smuggling, this consideration may have well assisted in creating the exception.

Searches and Seizures Under Warrant

Investigating officers seeking a search warrant must establish probable cause for the search to the satisfaction of the issuant.⁴² The authority to determine whether there is probable cause may not be delegated to the applicant. Such delegation would, in fact, be the kind of general warrant that precipitated the fourth amendment.

The federal statutes do not define "probable cause" and therefore a great deal of discretion is given the issuing magistrates. Although their determinations are subject to review, higher courts treat them with "substantial deference."⁴³ The limits of the magistrate's discretion are determined by (1) the type of facts which he may consider, (2) the inferences he is permitted to draw from these facts, and (3) the probability that these inferences are true.

The facts which a magistrate may consider need not be evidence which would be admissible at a trial. A search warrant, for example, may be issued on the basis of hearsay. Nevertheless, the Supreme Court has gradually restricted the use of hearsay. In *Draper v. United States*⁴⁴ the Court held that the applicant must provide information as to the reliability of the informer. The Court in *Jones v. United States*⁴⁵ demanded that the issuant be provided with the factual basis for the informant's beliefs. Both the reliability of the informer and the basis for his beliefs relate to the credibility of his information. To allow the applicant to determine the credibility of the information would be an impermissible delegation of authority. Mere conclusions as to reliability such as "reliable information from a credible person" can be given no effect.⁴⁶ It is not certain, however, what effect should be given to "previously reliable informer," "informer of proven reliability," and "informer who has given accurate information in the past." All of these statements could describe informers who have mixed inaccuracy and

42. See FED. R. CRIM. P. 41(b).

43. See note 6 *supra*.

44. 358 U.S. 307 (1959).

45. 362 U.S. 257 (1960).

46. *Aguilar v. Texas*, 378 U.S. 108 (1964).

truth. It would not be surprising if the Court eventually required more specification.

There is no requirement that the identity of the informer be revealed; but anonymity has been effectively jeopardized by the necessity of revealing the factual basis for the informer's belief.⁴⁷ The basis for the informer's belief will presumably be judged by the same standards that the magistrate would use to determine probable cause. There would seem to be no reason, therefore, why hearsay coupled with hearsay might not be considered by the issuant, provided that there was a demonstration of credibility for both sources of information.

It should be noted that the Supreme Court stated by way of dictum in *Grau v. United States* that "a search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury."⁴⁸ As has been seen, this statement did not make the rules of evidence applicable to hearings for the issuance of search warrants.⁴⁹ Nevertheless, the courts might apply the rules selectively. For example, may a search warrant be validly issued on the basis of information obtained through the violation of a privileged communication? The relationships which are protected by privileges could be as adversely affected by disclosures which result in a search as by testimony in court. Such a breach of confidence does not involve direct governmental action, however, and would appear to be beyond the scope of the fourth amendment.⁵⁰

Exclusionary rules derived from the Constitution should be applied to the facts which a magistrate may consider. A search warrant may not be granted on the basis of evidence gained by an invalid search.⁵¹ This prohibition may well have broader effects than the "fruit of the poisonous tree" doctrine set forth by Justice Holmes in *Silverthorne Lumber Co. v. United States*.⁵² *Silverthorne* prevents the indirect use of evidence acquired in

47. *Roviaro v. United States*, 353 U.S. 53 (1957) held that where an informer's testimony might be relevant to the guilt of the accused, his identity must be disclosed. The informer's identity, however, need not be disclosed at the time of application.

48. 287 U.S. 124, 128 (1932).

49. The *Grau* dictum is weakened by the cases the Court cited as authority. Neither *Wagner v. United States*, 284 Fed. 208 (1st Cir. 1922) added the requirement "before a jury." Both decisions were based on other points.

50. *Cf. Burdeau v. McDowell*, 256 U.S. 465 (1921).

51. *McGinnis v. United States*, 227 F.2d 598 (1st Cir. 1955).

52. 251 U.S. 385, 392 (1920).

contravention of the fourth amendment, provided that the connection between the illegal evidence and its use has not become "so attenuated as to dissipate the taint."⁵³ If evidence of a different crime is uncovered by a search under a tainted warrant, the prosecution might argue that the taint is only indirectly connected with the discovery. The purpose of the *Silverthorne* rule is to remove the incentive for violating the fourth amendment. By definition, evidence of unsuspected crime could not motivate a search antecedent to its discovery. Even if the court limited *Silverthorne*, the search warrant would be struck down by the rule which prohibits the magistrate from considering evidence from an invalid search.

Although there are no cases in point, it seems unlikely that a magistrate will be allowed to consider evidence resulting from an unconstitutional arrest. The *Silverthorne* rule has been extended by *Wong Sun v. United States*⁵⁴ to statements made by persons invalidly arrested and searched. There is no apparent reason why arrests should be treated differently from searches in this regard.

There is some doubt whether the fruits of "involuntary" confessions are condemned under the "poisonous tree" doctrine.⁵⁵ Even if the courts eventually hold that such a doctrine is applicable, it should be noted that the interest fostered stems from the fifth, sixth, and fourteenth amendments. The taint might exclude some of the evidence uncovered, but it would not necessarily invalidate the search.

The inferences which magistrates are permitted to make are those "which reasonable men draw from the evidence."⁵⁶ Although it is occasionally said that "an inference on an inference" will not be allowed,⁵⁷ such a statement should be limited to unsupported conclusions offered by the applicant. There would seem to be no justification for depriving the magistrate of the benefit of the applicant's experience and training. Where the applicant provides the magistrate with the facts upon which his conclusions are based and the reasoning behind his conclusions, the issuant should be allowed to infer that an expert's inferences

53. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

54. 371 U.S. 471 (1963).

55. See Comment, 26 LA. L. REV. 666 (1966).

56. *Johnson v. United States*, 333 U.S. 10, 14 (1947).

57. See, e.g., *United States v. Lassoff*, 147 F. Supp. 944 (E.D. Ky. 1957).

tend to be reliable. The "reasonable man" standard does not prohibit the magistrate from drawing expert inferences based on his *own* experiences and training.⁵⁸

The ultimate question considered by the magistrate is whether the inferences from the facts are sufficiently probable to merit the issuance of a warrant. Thus, "probable cause sufficient for the issuance of a search warrant deals with probabilities,"⁵⁹ or, more properly, a judgment of credibility.⁶⁰ The degree of confidence which a magistrate must have in the truth of the inferences has been discussed by the Supreme Court, but has not been set forth in terms of a formula.

The inferences must be more credible than mere,⁶¹ bare,⁶² or even reasoned suspicion.⁶³ This suggests that the magistrate must discriminate between possibility-plus-imagination and probability. The standard of certainty for the issuance of search warrants is not as great as that which would justify conviction or even indictment.⁶⁴ Therefore, the applicant need not satisfy the magistrate beyond a reasonable doubt,⁶⁵ nor even make a *prima facie* case for the search. The nearest the Supreme Court has come to formulating a positive test for the degree of confidence that the issuant must have is "a reasonable belief"⁶⁶ or a "reasonably trustworthy belief."⁶⁷ The use of "reasonable" in this instance, however, probably means no more than that the issuing officers are given a great deal of discretion.

II. LOUISIANA

Article I, section 7, of the Louisiana Constitution provides:

"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 such search or seizure shall be made except upon warrant therefor issued upon*

58. See, *e.g.*, *Irby v. United States*, 246 F.2d 706 (D.C. Cir. 1963); *Conti v. Morgenthau*, 232 F. Supp. 1004 (S.D.N.Y. 1964).

59. *United States v. Plemmons*, 336 F.2d 731, 733 (6th Cir. 1964).

60. See Ayer, *Chance*, in *SCIENTIFIC AMERICAN* 44 (Oct. 1965).

61. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

62. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

63. *Henry v. United States*, 361 U.S. 98 (1960).

64. *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813).

65. *Draper v. United States*, 358 U.S. 307, 311 (1959); *Marderosian v. United States*, 337 F.2d 759 (1st Cir. 1964).

66. *Carroll v. United States*, 267 U.S. 132, 161 (1924).

67. 338 U.S. 160, 175 (1949).

probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (Emphasis added.)

Although this provision continues the division found in the fourth amendment,⁶⁸ there is a clear incorporation of the warrant clause in the reasonable clause. Thus, a literal interpretation of the Louisiana Constitution would preclude *any* search and seizure not under warrant. Nevertheless, the Louisiana Supreme Court treats section 7 of article I as if it were the equivalent of the fourth amendment.⁶⁹

The Louisiana statutory provisions relating to the issuance of search warrants are found throughout the Revised Statutes.⁷⁰ These statutes conform to the pattern established by Federal Rules of Criminal Procedure 41(a), (b), (c) and (d). But a significant difference in the Louisiana Statutes is that Louisiana does not require "positive" information on which to ground probable cause for a night search or seizure.⁷¹ The Louisiana Law Institute has drafted a proposed revision of the Louisiana Code of Criminal Procedure and its title on search warrants is modeled on rule 41; but it continues the current rule on night searches and provides for the seizure of "mere evidence."⁷²

Ker v. California erased any doubts as to the applicability of the fourth amendment to the states.⁷³ The Supreme Court, speaking through Justice Clark in *Mapp v. Ohio*, appeared to base the exclusionary rule on a freedom complementary to, though not dependent upon, the fourth amendment. The Court

68. See p. 802 *supra*.

69. *State v. Aias*, 243 La. 945, 961, 149 So.2d 400, 405 (1963). A literal interpretation would require the court to void LA. R.S. 15:60 (1950), which allows police officers to arrest without obtaining a warrant in some circumstances.

70. LA. R.S. 15:42-44, 26:713, 34:875, 40:972, 40:1570, 47:860, 56:108 (1950).

71. Orfield, *Searches and Seizures in Federal Criminal Cases*, 24 LA. L. REV. 665, 702 (1964).

72. LOUISIANA STATE LAW INSTITUTE, PROPOSED REVISION OF THE CODE OF CRIMINAL PROCEDURE, *Search Warrants*, tit. IV, art. 161 (1966). Although the subject of "mere evidence" is beyond the scope of this paper, it should be noted that the prohibition against its seizure traces back to *Entick v. Carrington*, 19 HOWELL, STATE TRIALS 1029 (1765). See also *Abel v. United States*, 362 U.S. 217 (1960); *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Gouled v. United States*, 255 U.S. 298 (1921). There is an exception to this rule where the search and seizure are incidental to lawful arrest. See *United States v. Alvarado*, 321 F.2d 336 (2d Cir. 1963); *United States v. Mishkin*, 317 F.2d 634 (2d Cir. 1963).

73. 367 U.S. 643 (1960).

in *Ker*, with Justice Clark once more delivering the opinion, held that searches and seizures by state officials must conform to "the 'fundamental criteria' laid down by the fourth amendment and in the opinions of this Court applying that Amendment."⁷⁴ The difficulties facing the states in attempting to comply with this decision are illustrated by the failure of the members of the Court to agree as to the effect of applying the fourth amendment to the facts of *Ker*. After laying to rest the idea that the *Mapp* exclusionary rule might enforce a standard less stringent than the fourth amendment, Justice Clark threw doubt on the applicability of all federal search and seizure jurisprudence to the states. He suggested that the states remain free to formulate rules for the practical administration of criminal justice and that existing state laws were not abolished.⁷⁵ It is submitted that this apparent invitation to stray from the federal jurisprudence does not apply to the cause requirement necessary to support a search. While some of the concepts evolved from the federal cases are, in the words of Justice Traynor, "turbid with the wash of the fourth amendment itself, of statutes specifying the authority of federal officers . . . [and] of the Supreme Court's monitorship,"⁷⁶ the standards of cause set forth in the federal cases will probably be held to be constitutionally compelled. Statutes authorizing federal officers to search track the language in the fourth amendment and there is no indication that the courts are giving the statutory language a different interpretation.⁷⁷ There is also no hint that the federal courts have relied on their supervisory powers to formulate a more exacting standard for cause to search than is required by the Constitution.

The Supreme Court of Louisiana has announced the necessity of strict compliance with the *Mapp* rule.⁷⁸ The United States Supreme Court has reversed and remanded two of the eleven post-*Mapp* Louisiana cases dealing with probable cause

74. 374 U.S. 23, 33 (1962).

75. *Id.* at 31.

76. 63B Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 329.

77. *Cf.* Pacific Railroad Removal Cases, 115 U.S. 1 (1885); *Gold-Washing & Water Co. v. Keys*, 96 U.S. 199 (1877); *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

78. The only post-*Mapp* decision by the Louisiana Supreme Court which ordered evidence suppressed is *State v. Lee*, 247 La. 553, 172 So.2d 678 (1965). The suppression was based on a defect in the warrant.

or reasonableness.⁷⁹ In *State v. McIlwaine*⁸⁰ the Louisiana court refused to invalidate a warrant based upon "information from a reliable source that there [were] narcotics and burglary tools concealed in the premises" to be searched. The United States Supreme Court vacated the judgment and remanded the case⁸¹ for further consideration in light of *Aguilar v. Texas*. On remand,⁸² *Aguilar* was summarized by the Louisiana Court as requiring that the magistrate be informed of some of the underlying circumstances "from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" (Emphasis added.) The use of the disjunctive in linking the elements of the *Aguilar* test appears to be improper as the magistrate must judge the credibility of the informer and the reliability of the information he provides.

The Louisiana Supreme Court, in *State v. Pickens*,⁸³ found that a warrantless search was reasonable where strangers in a small community were driving at a low rate of speed and "looking up" an alley adjacent to the scene of a burglary.⁸⁴ The Court ultimately based its ruling on the grounds that the search was incidental to a lawful arrest,⁸⁵ but it would seem that there was nothing on which to base a lawful arrest until after the search revealed stolen goods. It is submitted that *Pickens* must rest on the "moving vehicle" rule if it is to meet the federal standard. As has been stated, the "moving vehicle" rule does not entitle the investigating officers to base their searches on inferences which would be too tenuous to support a warrant. The rule only allows the officers to make a search without a warrant when

79. One of the cases, *James v. Louisiana*, 382 U.S. 36 (1965), concerns cause to arrest and the scope of search incidental to arrest.

80. 245 La. 649, 160 So.2d 566 (1964).

81. 379 U.S. 10 (1964).

82. 247 La. 747, 174 So.2d 515 (1965). The conviction was again affirmed on the theory that the search was incidental to a lawful arrest.

83. 245 La. 680, 160 So.2d 577 (1964).

84. Furtive gestures, though generally subject to innocent interpretations, may be relevant in establishing reasonable grounds to search or seize; but alone are not sufficient. See *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963); *Paris v. United States*, 321 F.2d 378 (D.C. Cir. 1963); *Espinoza v. United States*, 278 F.2d 802 (5th Cir. 1960). See also *Henry v. United States*, 361 U.S. 98, 103 (1959). Where furtive behavior is induced by improper police conduct it will not be considered. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Miller v. United States*, 338 U.S. 160 (1949).

85. In so holding, the Court apparently committed Louisiana to a broad definition of arrest, for the search in question followed the stopping of the automobile but preceded the policeman's statement of arrest. This may preclude any attempt to avoid *Escobedo*-related problems by narrowing the concept of arrest.

they could have obtained one had a magistrate been available. Although a magistrate might have given weight to the "radar" which experienced policemen acquire, the inferences relied on in *Pickens* seem closer to suspicion than probable cause.

On facts similar to *Draper v. United States*,⁸⁶ the Louisiana court in *State v. Oliver*⁸⁷ upheld a warrant to search the persons of two suspected narcotics possessors. There can be no doubt, in the light of the United States Supreme Court's finding of cause to arrest in *Draper*, that there was cause to search in *Oliver*. This case is noteworthy in that it seems to support the proposition that the search of a person is not an arrest nor does it require an arrest. As it is likely that more cause must be shown to arrest than to search, the implication of *Oliver* may be of significance to law enforcement officers.

The Louisiana Supreme Court is understandably reluctant to free criminals by suppressing relevant evidence. As a result the Court has examined questionable searches for an element of consent which would remove the police activity from the operation of the fourth amendment. Consent must be freely and intelligently given to be effective.⁸⁸ Intelligently in this sense means awareness of the possible consequences and not merely knowledge of the incriminating evidence which might be exposed. Because it seems unlikely that a guilty person would intelligently consent to a search, the federal courts view consent with a "jaundiced eye."⁸⁹ In *State v. Pennington*⁹⁰ the Louisiana Court found that the defendant had consented to a search subsequent to a demand by the police that they be allowed to inspect certain goods. The federal courts might well have reached the same decision because the defendant was a former police officer and was not likely to be intimidated or confused by the presence of officers.

In *State v. Rowan*⁹¹ the court, combining the concepts of consent and abandonment, found that there was no violation of the fourth amendment. Rowan was arrested "on suspicion" of burglary and failure to possess a selective service card. During

86. 358 U.S. 307 (1959).

87. 247 La. 729, 174 So. 2d 509 (1965); see Comment, 26 LA. L. REV. 789, 797 (1966).

88. *State v. Turner*, 177 So. 2d 115, 117 (La. 1965).

89. See, e.g., *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1951).

90. 244 La. 650, 153 So. 2d 876 (1963).

91. 246 La. 24, 163 So. 2d 87 (1964).

the course of his interrogation he stated that he owned a Studebaker automobile. A police officer searched for the automobile for six or seven hours and found a Studebaker parked in a commercial area of the city. The officer "saw no one around to whom the vehicle might belong" and after searching the glove compartment drove it to the police station. A detailed search of the interior disclosed a pistol under the front seat which was subsequently used as evidence in a burglary prosecution. The court found that the evidence was properly admitted, for the search which revealed it was performed in a routine manner as would have been done in any case involving an abandoned automobile. This decision either rests on the premise that Rowan had abandoned the vehicle in such a manner that it was no longer one of his "effects" within the meaning of the fourth amendment, or that there is an implied consent by automobile owners to allow their cars to be searched when they are left in "deserted" areas after dark.

CONCLUSION

Justice Black, commenting on the cases developing the exclusionary rule, has written: "In no other field has the law's uncertainty been more clearly manifested."⁹² Some of the uncertainty may be the product of inconsistent cases, but much more is inherent in the subject matter. The decision of whether to search is so closely tied to the facts of each case that the applicable law is too general to function without a large element of discretion. The belief that it is wiser for this discretion to be wielded by judicial officers than police is responsible for the warrant provisions of the fourth amendment. A few rules have evolved which rigorously define the power to search and seize. Generally, however, the courts have been content to guide the legislators by articulating constitutional policy, rather than by defining the permissible limits of discretion with absolutes. It is submitted that a logical application of the policies to a given case involves a consideration of each of the following elements separately: (1) the value of the interest invaded by the search, (2) the nature of the facts relied upon by the searcher or issuant, (3) the inferences which can be drawn from the properly considered facts, (4) the strength of the inferences, and (5) the circumstances surrounding the search.

Edwin K. Hunter

92. *United States v. Rabinowitz*, 339 U.S. 56, 67 (1950) (dissent).