Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief†

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We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into the law of criminal procedure. . . . In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them. Under these circumstances the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.

—Traynor, J., People v. Cahan, April 27, 1955.¹

INTRODUCTION

After People v. Cahan, the California courts tackled the monumental task of attempting to develop workable rules of search and seizure. Nearly 700 appellate decisions represent their efforts. Most of these were prepared by district courts of appeal.² But a significant number have been written by the supreme court itself. During the first year after Cahan, the supreme court decided twenty-one search and seizure cases. Justice Traynor wrote eighteen of the opinions for the court. In 1960, the court decided five such cases and in 1961, thirteen. The task is obviously not an easy one.

On June 19, 1961, the Supreme Court of the United States rendered its landmark decision in Mapp v. Ohio.³ As a minimum result of that decision all states now have the exclusionary rule. Another possible result, which may be alarming to Californians, is that our courts will no longer be permitted to develop their own rules of search and seizure, at least not without

† Portions of this article were presented in a speech before the Conference of Chief Justices in San Francisco, California, on August 3, 1962.

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² Ten panels of three justices each.
close supervision by the United States Supreme Court. Perhaps many of the efforts of the California courts in the past seven years are destined for the trash heap.

In this article, I explore some of the possible implications of \textit{Mapp}, and develop the thesis that the states should continue to have autonomy to develop their own rules of search and seizure. I also examine some of the efforts of the California courts and legislature, contrasting them, when possible, with federal decisions. As a result of \textit{Mapp}, those states that previously did not have the exclusionary rule find themselves where California courts were seven years ago. They can learn from California experience. But if \textit{Mapp} means that we are to develop a national law of search and seizure, all of the states are faced with the same difficult task, for the federal law is incomplete and the decisions are not always rational or consistent. In my view, the California courts have done a good job. It is hoped that the fruits of their labors will not be wasted.

\section*{I}

\textit{Mapp v. Ohio—what now?}

In the \textit{Cahan} case, the California Supreme Court adopted the exclusionary rule as a device to deter unreasonable searches and seizures. After that decision, evidence obtained by an illegal search and seizure could no longer be received in evidence in a California criminal trial. \textit{Cahan} was premised on \textit{Wolf v. Colorado}. In that case, the United States Supreme Court held that although the guarantee of the fourth amendment applies to the states through the fourteenth amendment, each state could accept or reject the exclusionary rule. Under \textit{Wolf}, the exclusionary rule was not an essential ingredient of the right of privacy, which had been read into the fourth amendment, but merely a means of enforcing that right. Except in extreme cases like \textit{Rochin v. California}, the Court left to the states the problem of deterring unreasonable searches and seizures by state officers.

Accordingly, the California court in \textit{Cahan} thought itself free to adopt the exclusionary rule as a judicially created rule of evidence. Thus, Justice Traynor could rightfully conclude that California courts were free to establish their own workable rules and reject federal precedents if they developed needless refinements and distinctions.

\footnote{Some indication of the task ahead is given by the fact that there are already two columns of state citations of \textit{Mapp} in \textit{Shepard's United States Citations}.}

\footnote{The other major problem of \textit{Mapp}, whether it is necessarily retroactive, will not be considered in this article.}

\footnote{338 U.S. 25 (1949).}

\footnote{342 U.S. 165 (1952) (forcibly pumping stomach to recover swallowed narcotics).}
The reasons why this was difficult were well summarized by my colleague Professor Edward L. Barrett in an article published shortly after Cahan was decided. Professor Barrett pointed to numerous instances where the California law of search and seizure was not clear. He said in part:

As a result of the paucity of methods for testing the legality of searches and seizures, the applicable law is in a vague and ill-defined state. . . . The authorities are almost unbelievably vague. . . . It is only by measurement against standards as yet unarticulated by the California courts that an observer can reach any conclusion as to the extent of illegal police searches and seizures in California.8

Prior to Mapp v. Ohio, observers generally considered that the federal exclusionary rule, like that of California, was a judicially created rule of evidence.9 In Mapp, however, four justices signed an opinion to the effect that the exclusionary rule is an essential part of the fourth and fourteenth amendments. Justice Black, concurring in the judgment, thought the exclusionary rule to be required by the fourth, fifth and fourteenth amendments. Thus, it appears that five justices agree that the exclusionary rule is required by the fourteenth amendment of the United States Constitution. It can no longer be regarded as a judicially declared rule of evidence, a rule that legislatures might negate, for one thing is now crystal clear: there can no longer be any clamoring for legislative overriding of the rule, whether it be in Washington, Sacramento, or elsewhere.

Also clear, at least to one of conservative leaning, is the fact that Mapp is yet another illustration of Supreme Court interference with local criminal procedure. The tenth amendment continues to be squeezed out of existence by the expanding boundaries of due process. The very vagueness of the due process clause gives the Supreme Court arbitrary powers to the extent that its current majority wishes to exercise them. Sometimes the Court is slow to use these powers. During the twelve years between Wolf and Mapp, there were implicit warnings in Rochin, Irvine, and Elkins that the states should do something to furnish remedies for breaches of the right of privacy. Most of those states without the exclusionary rule ignored the warnings and the Supreme Court stepped in with a heavy hand. The hints and suggestions of yesterday became the imperatives of today. Perhaps one element that is left of federalism is time—twelve years between Wolf and Mapp—to react to Supreme Court warnings. Delay by the states may result in Supreme Court pre-emption. Eternal vigilance is the price of what precious little is left of local autonomy.

9 See, e.g., People v. Cahan, 44 Cal. 2d 434, 440, 282 P.2d 905, 908 (1955) and cases cited.
Mapp, therefore, may be the forebear of further interference with local criminal procedure. Professor Broeder lists a number of areas of potential intervention including: admission of wiretap evidence; detention without arraignment (Mallory-McNabb); unlawful arrests; counsel at the police station; counsel for indigents at the preliminary hearing; discovery; jailing of indigents who cannot pay fines; unfair argument by prosecutors; and unfair newspaper publicity. He overlooks another area where the Supreme Court has already sounded a warning, the whole general problem of the inferior courts.

Mapp leaves undecided the question whether the law of search and seizure will now be nationalized, under the supervision of the Supreme Court of the United States. Of course, this question was not before the Court since the Ohio court had ruled that the evidence was admissible even if it was illegally obtained. In addition, the opinion announcing the judgment was signed by only four justices. Even a careful reading of that opinion gives few clues to the ultimate answer to the question. And some of these clues point in opposite directions.

Justice Clark, writing for himself and three other justices, declared: "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." Since there is only one fourth amendment, there seemingly can be only one interpretation: the Supreme Court should logically supervise interpretation of a federal right. Justice Clark also spoke of "extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal." He mentioned "the double standard recognized until today." These statements, as well as several others, seem to imply that uniformity is both necessary and desirable; that federal and state courts and officers have a "mutual obligation to respect the same fundamental criteria in their approaches."

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10 See, e.g., Friebie v. Collins, 342 U.S. 519 (1952) (defendant kidnapped and brought into another state).
12 See Thompson v. Louisville, 362 U.S. 199 (1960). This problem exists even in California where many inferior court judges are lawyers. One municipal judge in a nearby county has been heard telling a person who pleaded not guilty to a Vehicle Code offense that this is "not customary." This same judge recently ruled, in a Vehicle Code trial involving negligence, that the defendant had the burden of proving due care. There were other errors. Defendant noticed appeal only to discover that some of the errors had disappeared in transcription. See also Netherton, Fair Trial in the Traffic Court, 41 Minn. L. Rev. 577 (1957); Note, California Traffic Law Administration, 12 Stan. L. Rev. 388 (1960); Note, The Philadelphia Traffic Court, 109 U. Pa. L. Rev. 848 (1961).
13 367 U.S. at 655.
14 Ibid.
15 Id. at 658.
Justice Clark's reliance on *Elkins v. United States*\(^\text{16}\) may also be an indication that national uniformity is in the wind. *Elkins* was a federal criminal proceeding involving use of evidence seized by state officers. The Supreme Court vacated the conviction and held that since the search would have violated the fourth amendment had it been made by federal officers, the evidence was inadmissible in a federal trial. The Court said:

In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.\(^\text{17}\)

Certainly, the three dissenting justices in *Mapp* find indications of federal uniformity in the decision. Justice Harlan, writing their opinion, declared: "[W]hat the Court is now doing is to impose upon the States not only federal substantive standards of 'search and seizure' but also the basic federal remedy for violation of those standards."\(^\text{18}\)

There is some language in Justice Clark's opinion which may indicate something other than national uniformity. Perhaps the most hopeful sign for the continuing competence of individual states to develop their own rules was his obvious respect for the California Supreme Court and its decision in *Cahan*. He also acknowledged that there can be no fixed formula for determining the reasonableness of searches. He said: "at any rate, 'reasonable[ness] is in the first instance for the [trial court] . . . to determine.'"\(^\text{19}\) He expressly declared that state procedural requirements in the matter of direct and collateral constitutional challenges would be respected.\(^\text{20}\) His statement that the fourth amendment right of privacy is enforceable against the states through the due process clause of the fourteenth amendment, perhaps leaves open the question whether "right of privacy" is synonymous with security against "unreasonable searches and seizures."

Decisions since *Mapp* have done little to clarify the uncertainty. In *Lanza v. New York*, a four to three opinion, Justice Stewart, writing for the majority, made the following remark: "The Fourth Amendment specifically insures the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' by federal officers. We may take it as settled that the Fourteenth Amendment gives to

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\(^\text{16}\) 364 U.S. 206 (1960).
\(^\text{17}\) Id. at 223–24.
\(^\text{18}\) 367 U.S. at 679–80.
\(^\text{19}\) Id. at 653, citing *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950).
\(^\text{20}\) 367 U.S. at 659 n.9.
the people like protection against the conduct of the officials of any State."
Justice Harlan joined the majority opinion, but took pains to write a brief concurring opinion. He stated that he did not understand anything in the court's opinion to suggest either that the fourteenth amendment incorporates the provisions of the fourth, or that the liberty assured by the fourteenth with respect to privacy is necessarily coextensive with the protections afforded by the fourth.

Treatment to date by other courts of the problem of the scope of Mapp has been rather brusque. Some courts seem to assume, without discussion, that the Supreme Court cases involving federal convictions are in point. Others, with similar lack of discussion, hold that they are not so bound, or that whether federal decisions should be followed is a matter for judgment and experience. The Second Circuit has said that it is not clear whether Mapp requires a state to follow federal statutes and rules implementing the fourth amendment. A dissenting judge felt that a state should not be compelled to follow such statutes and rules.

Perhaps the most important state case is a California intermediate appellate decision, People v. Ker. There, officers had what the court deemed reasonable cause to arrest defendant without a warrant for narcotics violations. They procured a key to his apartment from the manager and ascertained that he was home. They used the key and entered quietly so that he would not attempt to destroy evidence. Once inside, they seized a two pound brick of marijuana. Under applicable California decisions the entry and search was legal, and the court so held. Referring to Mapp, it merely said that case did not justify a change in its conclusion. The Supreme Court of California (perhaps unfortunately for adequate consideration of the Mapp problem) denied a hearing. The Supreme Court of the United States has granted certiorari.

Although Mapp has been widely discussed in the law reviews, few commentators have come to grips with the problem of its scope. Most of the thirty or so writers (mostly students) content themselves with reciting the stale history of the exclusionary rule, perhaps restating the arguments pro

25 Bolger v. Cleary, 293 F.2d 368 (2d Cir. 1961).
and con. They either overlook the problem of whether *Mapp* requires national uniformity, or summarily jump to the conclusion that uniformity is or is not required, or recognize the problem and hedge on an answer without appropriate discussion. Those law reviews that give this type of treatment to an important case might well consider establishment of a syndicate which would grind out canned notes and circulate them. Only a small handful of commentators have both recognized the problem and attempted to tackle it.\(^\text{28}\)

Of the arguments made by commentators for nationalizing the law of search and seizure, the best is what perhaps is the basis of Justice Clark's opinion. He seems to suggest that the Constitution requires the sanction of exclusion to enforce the fourth amendment through the fourteenth. If this is so, it is the same fourth amendment that is being enforced in each of the fifty states. The fourth amendment prohibits "unreasonable searches and seizures." It requires "probable cause" before a warrant shall issue. Can a search and seizure on identical facts be unreasonable in one state and reasonable in another? Can there be probable cause to issue a warrant in one state, yet no probable cause on the same facts in another state? Professor Weinstein\(^\text{29}\) has ably answered this argument. He points out that logical imperatives do not necessarily decide cases involving important issues of federalism. There is no reason why there should not be room for states to experiment and develop their own rules as long as they do an adequate job of protecting the right of privacy in the light of local needs. As long as these rules are designed to furnish fair protection to privacy in the light of the state's needs and facilities, why not uphold them? There could be reversals in cases such as *Wolf* and *Rockin* but a state such as California would still be free to develop its own law within broad limits.

Some commentators seize upon uniformity as a kind of fetish or ideal without any awareness of its mythical quality. They fail to realize that there will be no uniformity even if the Supreme Court does take upon itself

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the onerous task of attempting to provide it. As long as we have fifty states and maintain a pretense of federalism there will be individual variations. For example, a Maryland statute requires an applicant for a search warrant to swear to facts indicating probable cause which are within his personal knowledge.\(^3\) In the federal courts, within limits, a search warrant may be issued on the basis of hearsay.\(^3\) Thus, the Maryland standard is more rigorous than the federal. Certainly \textit{Mapp} cannot be taken to mean that a state under its own constitution, at least, cannot have stricter standards. Examples could be compounded to show that uniformity is a myth.

A further complication that makes uniformity illusory is the distinction between an unconstitutional seizure of evidence and a seizure made illegal by a federal statute. Seemingly, \textit{Mapp} prohibits only use of evidence obtained by the former type of search.\(^3\) For example, wiretapping is a violation of a federal statute. Accordingly, evidence obtained by wiretapping is inadmissible in a federal court because of the statute not the Constitution.\(^8\) On the other hand, it has been held that the states are not prohibited from wiretapping,\(^3\) and that a federal court should not, therefore, enjoin state officers from using evidence obtained by wiretapping.\(^3\) There are other possible instances of seizures outlawed by federal statutes, but not, seemingly, by the Constitution.\(^3\) Of course, the Court could easily erase such distinctions by holding that these statutes represent reasonable congressional determinations of minimum fourth amendment requirements. Or it could make its own determinations to the same effect.

Justice Clark in \textit{Mapp} gave some weight to a portion of \textit{Elkins v. United States}, which reads as follows: "The federal courts themselves have operated under the exclusionary rule of \textit{Weeks} for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted."\(^3\) The obvious answer to this is that the operations of local police are often completely different than those of the FBI or other federal police agencies. Anyone who has had experience with federal law enforcement agencies knows that the great majority of federal arrests are made with a warrant.

\(^{30}\) MD. ANN. CODE art. 27, § 551 (1957).
\(^{32}\) Williams v. Ball, 294 F.2d 94 (1961), \textit{cert. denied}, 368 U.S. 990 (1962). Only Mr. Justice Douglas noted his opinion that certiorari should be granted.
\(^{33}\) Nardone v. United States, 302 U.S. 379 (1937); Olmstead v. United States, 277 U.S. 438 (1928).
\(^{34}\) Schwartz v. Texas, 344 U.S. 199 (1952).
\(^{37}\) 364 U.S. at 218.
Even those made without a warrant are usually made after consultation with the prosecutors. Many federal crimes involve extensive and deliberate investigations. Federal officers are usually well trained. Much of their work is done at desks. These conditions should be contrasted with those met by the local peace officers whose level of training varies widely. There are counties in this country with only one or two peace officers. They are faced with the problem of enforcing a great variety of criminal laws ranging from traffic offenses to murders. Many offenses are discovered as a result of chance or emergency calls. Local police officers walk beats or ride prowl cars or motorcycles. Scarcely a month passes in California without a news report of the murder of a police officer attempting to make a traffic or other arrest.

Variations between and within the states justify some difference in application of the fourth amendment. The concept of reasonableness as applied both in tort and criminal law involves a community standard, not a national standard. Why not recognize that a search may be unreasonable if conducted in a metropolitan area which would be reasonable in a cow county, or vice versa? 38

Even the most thoughtful commentators have scarcely alluded to the major problem of attempting to create federal minimum standards for search and seizure. The United States Supreme Court in recent years has averaged about $1\frac{1}{2}$ federal cases a year on search and seizure. If California, with twelve per cent of the nation's population, has close to one hundred reported search and seizure cases a year, the national total after Mapp could be as many as 800 a year. Many of them, perhaps the majority, if California's experience holds true, involve problems of whether, upon particular facts, the arresting officer had reasonable cause to make an arrest. If so, a search incident thereto is legal. Each set of facts is slightly different and the question which arises is whether the trial court properly ruled as a matter of law that there was reasonable cause. 39 In my opinion,

38 We do this under the first amendment made applicable to the states under the fourteenth. Roth v. United States, 354 U.S. 476 (1957) ("impact on the average person in the community").

39 Cf. Rios v. United States, 364 U.S. 253 (1960). The amount of judicial time which may be spent upon such problems, to say nothing of the delay in bringing a case to a conclusion, is fantastic. In Rios, the arrest was made on February 18, 1957. There was some delay during the state court proceedings, after which the case was turned over to the United States attorney for federal prosecution. A preliminary motion to suppress was denied after a hearing. The objection was renewed at the trial and overruled. The defendant was convicted and appealed. His conviction was affirmed by the court of appeals on May 26, 1958. 256 F.2d 173. The Supreme Court vacated judgment on June 27, 1960, sending the case back to the district court for reconsideration of a narrow factual question as to when the arrest had occurred. The district court considered the matter after hearings which lasted five days, and on Feb. 10, 1961, again upheld the search and seizure. 192 F. Supp. 888.
it would be impossible for the Supreme Court to lay down meaningful uniform standards of reasonable cause. Of course it could decide many cases with per curiam opinions, but even that device imposes some limits on the capabilities of the Court.

II

CALIFORNIA AND FEDERAL
SEARCH AND SEIZURE LAW — A CONTRAST

The remainder of this article consists of an examination of California efforts to develop workable rules of search and seizure. The California decisions are compared with applicable federal decisions. The comparison is of assistance in determining whether there can and should be uniformity, and in demonstrating that, in general, California has evolved workable rules.

Right to Investigate

One of the major developments in California since Cahan is a fairly well defined right on the part of peace officers to make reasonable investigations. In People v. Simon,\(^4\) a police officer observed two youths walking in a warehouse district at 10:40 p.m. One, aged 20 years, was carrying a bottle containing an alcoholic beverage, which, since he was a minor, was a misdemeanor in the presence of the officer. Upon the basis only of these facts the officer stopped both and searched the other youth, finding marijuana. The court held the search was illegal. Justice Traynor, writing the opinion, said that the fact that one youth was committing a misdemeanor in the presence of the officer could not give him reasonable cause to arrest and search the other. Nor could the fact that two youths were walking in a warehouse district at night give him reasonable cause to believe that they had committed a felony.

He then stated a carefully phrased dictum, as follows: "There is, of course, nothing unreasonable in an officer’s questioning persons outdoors at night\(^4\) . . . and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest."\(^4\) He opened another door by cautiously saying: "Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person’s clothing to protect himself from an

\(^{40}\) 45 Cal. 2d 645, 290 P.2d 531 (1955).

\(^{41}\) Citing, inter alia, Gliske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908).

\(^{42}\) 45 Cal. 2d at 650, 290 P.2d at 534. From the context it appears that the fact that an officer knew or reasonably believed a felony had recently been committed, coupled with a refusal to answer questions, could give him reasonable cause to make an arrest.
attack with a hidden weapon, certainly a search so intensive as that made here could not be so justified.\footnote{Ibid.}

Shortly thereafter, in \textit{People v. Michael},\footnote{45 Cal. 2d 751, 290 P.2d 852 (1955).} Justice Traynor pointed out that it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes.

The \textit{Simon} dicta became the basis for the development both of a right to reasonable investigation and a right to frisk. In addition, contraband discovered in the course of such investigation can be legally seized. In \textit{People v. Martin},\footnote{46 Cal. 2d 106, 293 P.2d 52 (1956). The companion case, \textit{People v. Blodgett}, 46 Cal. 2d 114, 293 P.2d 57 (1956), is another such case.} policemen patrolling a lover's lane\footnote{47 Surely no one in his right mind will claim that patrolling a lover's lane and occasionally shining a search light into cars is an unwarranted search. As this is being written the Contra Costa County Sheriff is investigating a particularly brutal murder in such a place.} shined their spotlight\footnote{E.g., \textit{People v. Beverly}, 200 A.C.A. 117, 19 Cal. Rptr. 67 (1962); \textit{People v. Anguiano}, 198 A.C.A. 438, 18 Cal. Rptr. 132 (1961); \textit{People v. Washington}, 163 Cal. App. 2d 833, 330 P.2d 67 (1958); \textit{People v. Wiley}, 162 Cal. App. 2d 836, 328 P.2d 823 (1958); \textit{People v. Dewson}, 150 Cal. App. 2d 119, 310 P.2d 162 (1957); \textit{People v. West}, 144 Cal. App. 2d 214, 300 P.2d 729 (1956).} on a parked car pointed in the opposite direction and observed two men sitting in the front seat. They made a U-turn to investigate and the car sped away at a high rate of speed. The officers pursued and stopped the car and observed the interior with a flashlight. Each man had his hand in the middle of the front seat. They were ordered to put their hands in front of them and a small bag was uncovered. They were ordered out of the car, searched for weapons, and the bag, which on examination appeared to contain marijuana, was seized.

The court, again speaking through Justice Traynor, upheld the search. He said that the presence of two men at night in a parked car in a lover's lane was itself reasonable cause for investigation. Their sudden flight left no doubt as to the reasonableness and necessity for an investigation. In the interest of their own safety the officers were justified in searching the men for weapons before questioning them. When the bag was uncovered they had reasonable cause to believe that possession of it was the reason for the flight and to take it from the automobile.

District courts of appeal have applied the principles developed by the supreme court in a vast number of cases.\footnote{I follow Justice Traynor's precedent and use the singular, feeling, however, that the expression should be "lovers' lane."} A number of decisions have upheld search for weapons in connection with an investigative inquiry. This seems sound for, as previously indicated, scarcely a month goes by without some California police officer being murdered in connection with
the stopping of a car. If his right to investigate is going to be meaningful, it should include a right, in appropriate circumstances, to order the occupants out and "frisk" them before asking questions.

One of these decisions is of some interest because it involved a combination of investigative inquiry and the use of drawn guns by the officers. Police officers arrested A, a known addict wanted for burglary, who was standing beside an unoccupied car. He told the officers that there was "hot stuff" and guns in the car. They took A to the station, and returned to the car now occupied by two men. They approached with drawn guns and ordered the occupants out. They found a gun under the front seat and some white powder and a hypodermic needle in the glove compartment. One of the occupants admitted to ownership of the car. They were then placed under arrest. The court said that A's tip plus the fact that he, a known thief, had been near the car justified an investigation. Since the officers had been told there were guns in the car they were justified in approaching as they did and ordering the occupants out. The precautionary search for weapons was also reasonable. Finding the narcotics, they had reasonable cause to make an arrest.

It seems to be assumed without discussion in several cases that minor trespass, not involving entry into a building, may be justified as reasonable investigation. This seems proper since the constitutional protection extends only to "persons, houses, papers, and effects," and even then forbids only "unreasonable searches and seizures." In People v. Martin, officers looked through the rear window of an office building and saw activities which became the basis of a bookmaking arrest. Whether they trespassed to get to the window is not stated. The court, without discussion, broadly stated that looking through a window is not an unreasonable search.

In People v. Foster, an officer had information from an informant that a female was accepting wagers at a certain telephone number, at a specified address, in the rear apartment. The officer entered a carport and searched four fifty gallon drum trash cans near the front wall of the carport. He discovered evidence which, coupled with other information, was held to give him reasonable cause to make an arrest. The search of the trash cans was upheld without discussion of the possible trespass involved.

There is a right to enter a building, even to break in if necessary, in emergency situations, as where someone is believed to be in distress or

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52 Other similar cases include People v. Amado, 167 Cal. App. 2d 345, 334 P.2d 254 (1959) (looking through back door); People v. Hen Chin, 145 Cal. App. 2d 583, 303 P.2d 18 (1956) (looking through window from light well).
where the building is on fire. What happens if the person breaking in sees contraband? In *People v. Roberts*, officers noticed a man standing in front of a display window at 10 p.m. As he drove away in an automobile, they wrote down the license number. The next night the store was burglarized and among the property taken were five table model radios. The car was registered to a woman. When the officers located her residence they interviewed the apartment manager who told them that the woman lived in a specified apartment with a sickly man who didn't work often. They knocked on the door but there was no answer. Hearing moans or groans which sounded like a person in distress, they asked the manager to admit them. Once inside, they looked around for the person who made the sounds but found no one. Noticing a new table model radio, they turned it over and wrote down the serial number. The radio was one of the stolen radios. Upon the basis of these facts they procured a search warrant and seized the radio. The supreme court upheld the search and seizure. As Chief Justice Gibson, writing the opinion, analyzed the situation, the officers had a right to enter if they reasonably believed someone was in distress. The trial court had so found, and he saw no reason to disturb that determination. The officers in this situation could make the kind of a search necessary to determine whether a person was actually in distress. They did not have to blind themselves to the new radio in plain sight. The Chief Justice said: "Under the circumstances, there appears to be no reason in law or common sense why one of the officers could not pick up the radio and examine it for the purpose of dispelling or confirming his suspicions."3

Firemen can enter a building to put out a fire. What else can they do while there? Certainly they need not blind themselves to what they see. Can they take their investigators with them? Their duty includes preventing the fire from rekindling. This would include checking gas and electric installations, safeguarding inflamables, and discovering dangerous conditions. These tasks would seem to justify use of an expert investigator. Suppose it is too dark to see. Can the investigator rummage through the ruins the next day? Entering a building that has been partly or fully destroyed by fire, soon after the fire, is quite different from surreptitiously entering a home to plant an electronic eavesdropping device in a bedroom. The rights of an arson investigator have seldom been discussed in reported cases.5 Perhaps this is because consent is likely to be readily obtainable in such cases.

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53 47 Cal. 2d 374, 303 P.2d 721 (1956).
54 Id. at 380, 303 P.2d at 724.
55 Compare State v. Cohn, 347 S.W.2d 691 (Mo. 1961), with State v. Buxton, 238 Ind. 93, 148 N.E.2d 547 (1958).
The recent case of Bielicki v. Superior Court,\textsuperscript{56} suggests that there may be some limits to trespassory investigation. The owner of a private amusement park, troubled by homosexual activity in the toilet booths, authorized the police to use a pipe through which they could look down on two booths. In the course of one of many such observations, the officers saw two men pass notes through a hole in the partition between the booths and then engage in an act of sodomy. The supreme court granted a writ of prohibition to restrain their trial for sodomy. The court held that the search was unreasonable under the circumstances. There were no reasonable grounds for believing or even suspecting that the defendants were committing any crime. The officers were spying on innocent and guilty alike which made this an exploratory search. The court reaffirmed what it called the settled rule that looking through a window does not constitute a search. It refused to decide whether two intermediate appellate decisions\textsuperscript{57} were correct in holding that looking through a tiny hole in a door, drilled by someone other than the officer, is valid.

It has been argued that among the investigative powers needed by police is a power to detain witnesses or suspects for questioning.\textsuperscript{58} A proposal to allow detention, under limited circumstances, patterned after the Uniform Arrest Act was rejected by the California Legislature in 1957. Perhaps for this reason the California courts seldom discuss the limited detention implicit in stopping people for questioning. The detention involved is certainly minor and justifiable in the interest of effective law enforcement.

An investigative technique which has stimulated some discussion in the cases is the roadblock. People v. Gale,\textsuperscript{59} involved a routine check by sheriff's officers at the Mexican border "to curb the juvenile problem" and "check . . . anything that looked suspicious." Defendant, driving a car that appeared to have been in a recent accident, was stopped. He told the officers that the car had been damaged in an accident a month earlier. Thereupon they searched the car and found narcotics. The supreme court held the search to be unreasonable. Justice Traynor, writing the opinion, said: "[T]he possibility that such cars were being used to further criminal ventures . . . alone cannot justify stopping and searching all automobiles being lawfully used on the highways in the hope that some criminals will be found."\textsuperscript{60}

\textsuperscript{56} 57 A.C. 647, 371 P.2d 288, 21 Cal. Rptr. 552 (1962).
\textsuperscript{59} 46 Cal. 2d 253, 294 P.2d 13 (1956).
\textsuperscript{60} Id. at 256, 294 P.2d at 15.
On the other hand, a limited investigation analogous to a roadblock was upheld in People v. Jiminez. Police officers learned that there was to be a juvenile gang fight at a particular place and period of time, and that some of the juveniles had guns. The officers were instructed to patrol the area and stop "suspicious" juveniles in cars or on foot. Subsequently, another officer informed them that persons armed with chains and baseball bats had been stopped in the neighborhood. They stopped a car containing four young men. One was observed to lean toward the seat in such a way that the officer thought he was reaching for a gun, whereupon all were ordered out of the car. The beam of a flashlight disclosed a plastic vial containing partly smoked cigarettes. The district court of appeal upheld the arrest and search as products of a limited and reasonable roadblock. The ordering of the young men out of the car followed a furtive movement. When the officers saw the carefully preserved cigarettes they could reasonably conclude that they were not ordinary butts, but contraband.

There is no reported California case involving the interesting question of the legality of holiday roadblocks used in some cities. Perhaps they can be justified on the theory of a right to make safety inspections of automobiles. If so, and if, in the course of the inspection, a driver is discovered who is obviously intoxicated his arrest would be legal.

The federal decisions involving problems of the right to investigate are in a state of complete confusion and some of them seem to be unduly restrictive of investigative activity. Thus, it may be that any stopping of a car or detaining of a person by police constitutes an arrest. If without probable cause, a search incident thereto would be illegal. In Henry v. United States, officers, investigating a theft from interstate shipment and having some undisclosed information about the defendant, watched him carry some cartons from his residence and load them into an automobile. They stopped the car, looked into it, and saw cartons with out-of-state addresses on them. One of the occupants said: "Hold it; it is the G's."

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62 Are roadblocks for limited purposes under certain circumstances justifiable interferences with the right of privacy? California agricultural authorities stop all motor vehicles entering the state to ask occupants if they carry specified fruits. The purpose is to control certain types of insect pests. Some vehicles are searched. Weighing stations are maintained along arterial highways during part or all of the day. Every truck must stop and be weighed. The purpose is to prevent vehicles weighing over certain maximums from using the highway. The immigration authorities maintain roadblocks on main highways near the Mexican border and ask questions for the purpose of discovering aliens, in this country illegally. Are these roadblocks legal? Suppose the officers observe contraband. If the roadblock is legal, surely seizure of the contraband is legal.
63 361 U.S. 98 (1959). This decision should be compared with Rios v. United States, 364 U.S. 253 (1960).
The officers took the cartons and occupants to their office, held them two hours until they learned that the cartons contained stolen merchandise, and then placed the occupants under arrest. For some reason, the government conceded that an arrest took place at the time the car was stopped. The court rather ambiguously said: "That is our view on the facts of this particular case." At the time the car was stopped the officers lacked probable cause to make the arrest. Therefore, the court held that the cartons were inadmissible in evidence. Two dissenting justices thought the officers had sufficient basis to stop the car and question the occupants, and that the earlier information, coupled with sighting the cartons and labels, gave them probable cause for arrest and search.

In *United States v. Festa*, officers armed with a search warrant for specified items held in violation of the wagering statutes raided a store. Guards were posted to prevent anyone from leaving before he could be questioned. When one defendant asked to go to the toilet he was escorted by an agent. When he was asked to empty his pockets, he did so, giving evidence which the government sought to use against him at the trial. The court said that the arrest occurred no later than the time when he was escorted to the toilet. There was no reasonable cause to make the arrest since he was not violating the wagering tax statute, a misdemeanor, at the time of his arrest. The arrest was therefore illegal. The evidence was turned over under duress and was therefore illegally obtained.

The ambiguous decision in *Henry* and the *Festa* decision should be contrasted with other cases reaching the opposite and what seems the more proper result. In *United States v. Bonanno*, a number of cars leaving a gathering, which included racketeers from all over the country, were stopped and occupants were asked a few questions. The court did not think the problem was one of whether there had been an arrest or not. Rather, the problem was whether the procedures were of such a character that evidence stemming from them had to be suppressed. The court reasoned that to hold every detention of an individual illegal in the absence of probable cause for an arrest would deal a crippling blow to law enforcement.

Recently the Second Circuit decided the case of *United States v. Vita*. The defendant, upon request, accompanied investigators to their headquarters, where, after being told he was free to go at any time, he was questioned, placed in line-ups, and given a lie detector test. He finally confessed after eight hours. He was then arrested. The defendant argued that

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64 361 U.S. 98, 103 (1959).
he had been illegally detained without the arraignment required by Mallory and that his confession therefore was inadmissible. But the court of appeals upheld the trial judge's ruling that there was no violation of the Mallory rule because his detention was voluntary. However, by way of dictum, the court said that even if he was involuntarily detained for questioning the detention would not be an arrest because it was incident to reasonable investigation.

It is well settled that a search incident to a valid arrest without a warrant is legal. This is a doctrine which has been engrafted upon the fourth amendment. The amendment is concerned with the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and nowhere uses the word "arrest." If every detention or stopping of a person is considered to be an arrest, then any such detention or stopping is illegal under arrest law in the absence of probable cause. For purposes of the exclusionary rule we should forget the technicalities of arrest law and think in terms of reasonableness of the detention. Arguably, stopping a car to ask the occupants a few questions is not a seizure of their persons. Even if it is, the constitutional issue is not whether they were arrested with or without reasonable cause. The constitutional question is whether the seizure of their persons was reasonable. If the courts would emphasize the reasonableness of the search or seizure instead of the technicalities of arrest law, it might be easier to develop workable rules for the guidance of the peace officers.

The federal decisions are not clear as to what sorts of trespass or other entries to premises will make a search unreasonable. An early decision permitted entry upon the open land of another. Recently, in Polk v. United States, officers with good reason to believe that the defendant possessed marked money used in a narcotics transaction went to his residence. He lived on the third floor but his stairway opened off a common porch. They knocked and shouted, "Police. Open the door." Receiving no response, they shined a light through a door and saw a man at the top of the stairs who immediately disappeared. They went through a passageway to the rear of the house, started up the rear stairs, and saw defendant, crouching on the roof, throw a package to an adjacent roof. After they placed him under arrest, a search of the roofs disclosed marked money and heroin. The Ninth Circuit raised the question whether the invasion of the yard and rear stairs was a violation of the fourth amend-

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69 Hester v. United States, 265 U.S. 57 (1924).
70 291 F.2d 230 (9th Cir. 1961).
ment and sent the case back to the district court. The trial judge heard additional evidence to the effect that the door to the yard was ajar, and that the yard was visible through numerous cracks and holes in the fence as well as from upper stories of other buildings. Neighboring children went freely into the yard to play. Garbage was collected from the yard. Under all the circumstances, the district court concluded that the trespass, if any, was justifiable and not an unreasonable invasion of privacy.\textsuperscript{71}

The District of Columbia courts have sometimes gone to ridiculous lengths to hold a search and seizure unreasonable. For example, in \textit{Work v. United States},\textsuperscript{72} officers had information that a girl known to them as a prostitute and addict was using narcotics. They went to the rooming house where she lived and knocked on the door. Receiving no response, they opened the unlocked door and walked a few steps into the common hallway. A girl walked past them, went down the steps, and placed something in the common trash can under the front steps. One officer lifted the lid and found narcotics. The court held that this was an illegal search and seizure apparently because what they found was the fruits of an illegal entry into the common hallway.\textsuperscript{73}

\textbf{Reasonable Cause}

Most searches and seizures are made incident to an arrest without a warrant. As noted earlier, the courts focus on the legality of arrest rather than the reasonableness of the search and seizure. If there is probable or reasonable cause to make the arrest the search is valid provided that it is considered within the proper limits of an incidental search. Thus, in California, a peace officer can make an arrest without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a felony, or a misdemeanor in his presence.\textsuperscript{74} Reasonable cause has been repeatedly defined by the California courts as a state of mind that would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the arrested person is guilty of a crime.\textsuperscript{75} Reasonable cause may exist although there is some

\textsuperscript{71} \textit{United States v. Polk}, 201 F. Supp. 555 (N.D. Cal. 1961) (Zirpoli, J., who has had considerable experience as a defense attorney).

\textsuperscript{72} 243 F.2d 660 (D.C. Cir. 1957).

\textsuperscript{73} One would suppose that the front doors of many rooming houses are left unlocked in Washington, as elsewhere, to permit the easy entry of laundrymen, guests, etc.

\textsuperscript{74} \textit{CAL. PEN. CODE} \S 836. Subdivision 2 on its face would justify an arrest where the arrestee in fact has committed a felony. To so construe it would render \textit{Cahan} meaningless for what the search turned up would justify the arrest. As a result, this subdivision has been written out of the statute books by holding that reasonable cause is required for all arrests. \textit{People v. Brown}, 45 Cal. 2d 640, 290 P.2d 528 (1955).

\textsuperscript{75} \textit{E.g.}, \textit{People v. Kilvington}, 104 Cal. 86, 37 Pac. 799 (1894).
room for doubt. There is no easy formula to determine reasonable cause, because it depends upon all the circumstances in the case. Many factors have been discussed in the cases including: nature of information, character of informant, delay which might enable a guilty person to escape, details of description, time of day, flight, furtive conduct, presence at the scene of the crime, results of consent to search, results of reasonable investigatory search, admissions by the person being questioned, criminal record of the arrested person, criminal record of associates, reputation of the premises, and recent crimes in the neighborhood.

There are many reported cases and they are not always consistent, even between different divisions of the same district court of appeal. The very term “reasonable cause” is conducive to many close and borderline decisions. Consider, for example, People v. Privett. While investigating a burglary an officer saw the defendant in conversation with a known burglar and subsequently ascertained that the defendant also had a burglary record. By tracing defendant’s car the officer was able to find the address of his home which was placed under surveillance. Several evenings later he and six or seven other officers, dressed in rough clothing, saw the defendant looking out the window in their direction. As they proceeded across the lawn, the lights went out. They announced that they were police officers and kicked down the door. The defendant was arrested and a search of the premises uncovered various articles taken in the burglary. Defendant was convicted of burglary and receiving stolen property. The trial court and district court of appeal both thought the arrest and therefore the search and seizure were legal. The supreme court in a 5-2 decision reversed, holding that there was insufficient evidence to constitute reasonable cause to believe a felony had been committed. The court felt that furtive conduct may be an element of reasonable cause, but here there was another reasonable explanation for the defendant’s conduct. Seven or eight roughly dressed men had approached a private home in the nighttime. Under such circumstances the most innocent of persons might extinguish his lights and be sceptical of the announcement that the men were police

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77 See text accompanying note 40 supra.
78 For citations and brief summaries of many cases, see Martin, Probable Cause to Arrest and Admissibility of Evidence (rev. ed. 1960). This is sold by Printing Division, Documents Section, Sacramento 14, California. For a manual intended for use in peace officer training also containing extensive coverage of the problem of reasonable cause, see Sheerry, The Law of Arrest, Search and Seizure (6th rev. ed. 1961), already obsolete and now out of print. I recently completed and sent to the printer a 7th revision which should soon be available from the Bureau of Industrial Education, State Department of Education, Sacramento 14, California.
officers. Eleven judges considered the matter of reasonable cause. Six judges thought the police action was legal; five thought it illegal. Pity the poor peace officer who has to make a snap judgment if judges with ample time to study the facts split six to five.

The federal test of "probable cause," a term which is synonymous with reasonable cause, appears to be the same as the California test. Even if Mapp does foretell a national law of search and seizure, the vagueness of the test coupled with the sheer number of cases will discourage Supreme Court intervention. It seems likely that the Court will hold that reasonableness is in the first instance for the state courts and grant certiorari rarely if ever.

Use of informers has raised problems in the California courts both in connection with reasonable cause to make an arrest and in connection with the exclusionary rule. Information from an informer may of course be relied upon to make a determination that there is reasonable cause to make an arrest. If the informer is reliable his advice may be the sole basis for the arrest. Reliability may be supplied by the identity of the informer. Thus information from other officers, all-points bulletins, or police radio broadcasts may be relied upon. Whether arresting officers may reasonably act upon a complaint or other information from a private citizen depends primarily on the officers' estimate of his credibility. The fact that past tips from the same informer have proved correct tends to establish the reliability of the informer. Even if the informer is not known to be reliable, the receipt of similar information from other sources or personal observation may be sufficient to corroborate the information and establish reasonable cause for an arrest. Generally, information from an anonymous informer must be corroborated in some way. An anonymous informer may, however, become reliable as where his telephone voice is recognized and his past tips have proved correct.

An obvious corollary of the exclusionary rule is that if information from an informer is relied upon to show reasonable cause for making an arrest his identity must be disclosed when legality of the search is in issue. To permit the officer to be the sole judge of reasonable cause would mean

82 Id. at 311–12.
circumvention of the exclusionary rule. The defendant may want to cross-examine the informer, or he may want to present evidence on the issue of the truth of the officer's testimony and the reasonableness of his reliance. Of course, if the officer can develop sufficient evidence to constitute reasonable cause aside from the informer's tip, his identity need not be revealed, at least if he did not participate in or witness the crime.

The federal decisions, both on use of informer's tips as giving reasonable cause to arrest, and revealing identity of informers, seem consistent with those of California. 89

Search Prior to Arrest

Under the California decisions, a legal search may occur prior to a technical arrest if there is reasonable cause to arrest the individual whose person or premises are searched at the time the search is made. 90 The federal decisions apparently require that a technical arrest precede the search. 91 The California rule seems more workable. Any such rule should be designed to fit the needs of policemen often not overly trained or educated and operating on the spur of the moment. For example, assume an officer observes a car driven erratically. He stops it and notices the driver lean over as though to put something under the seat. The driver's voice is slurred and his pupils do not react to light, yet he does not smell of alcohol. The officer orders the driver out of the car. He reaches under the seat and finds narcotics. He then formally places the driver under arrest. He was doing things in rapid succession. Operating under the federal rule the evidence perhaps could not be used. Yet the search seems perfectly reasonable and a justifiable interference with privacy. The average member of the public will seldom be affected by such police activity. A person who is driving erratically cannot object to being stopped and questioned. He may be drunk. He may be suffering a heart attack. He may be slapping a bee. But for the protection of the public a brief detention and questioning is reasonable. If he makes some evasive motion, or his voice is slurred, or his pupils pinpointed, further investigation is justified. He may have committed a crime. Or, perhaps his doctor prescribed some drug and neglected to tell him not to drive. Even so he may be dangerous on the highway. If the officer finds narcotics, the search justifies the arrest. If the driver's explanation satisfies him, the officer may release him or help him safely


home without an arrest. Again the emphasis should be on the reasonableness of the search and seizure rather than upon the technicalities of arrest law.

Search Incident to Arrest Without a Warrant

The California courts have, to a considerable extent, developed principles that control the scope of the search that may be made incident to a valid arrest. The arresting person, whether or not he is a peace officer, can take possession of dangerous weapons and, of course, make the necessary search to find them. He may search the person of the defendant for other objects such as articles used in the commission of the offense. If the search turns up contraband unrelated to the offense for which the arrest is made, the search is legal, and the defendant may be prosecuted for the newly discovered offense. For example, in People v. Evans, the defendant crossed the street against the red light. An officer in a patrol car asked him to come over to the car. He was staggering, smelled of alcohol, and under a flashlight appeared to have bloodshot eyes. Since his I.D. card showed him to be 19, he was arrested as "drunk minor." A search of his person, which produced marijuana, was upheld.

The amount of force that may be used in a search of the person is not too clear, perhaps as a result of the Rochin "shock the conscience" test. Recently it was held to be an illegal search to administer apomorphine by hypodermic needle where the defendant swallowed a condom believed to contain a quarter of an ounce of heroin, a lethal dose. The apomorphine caused nausea, vomiting and regurgitation of the condom which was found to contain five grams of heroin. Certainly some force can be used, for example forcible disrobing to search for blood on clothing, or forcible taking of blood in an approved manner.

What happens if there is reasonable cause to arrest A, and through an honest and reasonable mistake B is arrested and search of his person produces contraband? In People v. Kitchens, there is a Traynor dictum that such a search would be upheld.

The right to search incident to a lawful arrest includes a right to search places and premises under the immediate control of the defendant to find

92 CAL. PEN. CODE §§ 833, 846.
95 Vazquez v. Superior Court, 199 A.C.A. 60, 18 Cal. Rptr. 140 (1962).
98 46 Cal. 2d 260, 294 P.2d 17 (1956).
things connected with the crime. California decisions have carried this principle to the length of permitting a search of a garage, as incident to an arrest in the dwelling,\(^9\) and search of an apartment, garage, and car, as incident to an arrest in the back yard.\(^10^0\)

Arrest on a public street in the vicinity of the defendant's home poses an interesting problem. In one case, the defendant was arrested on a public street ninety-five feet away from his apartment. The officers did not know where he lived at the time of the arrest, but were subsequently told by a bystander. A search of the defendant's apartment was held to be unreasonable.\(^1^0^1\) The decision probably is consistent with another where the defendant was going in and out of his house and making deliveries of narcotics to persons in cars. He was arrested on the street in front of the house. The court found the ensuing search of the house to be a reasonable search incident to the arrest.\(^1^0^2\)

The search must bear some reasonable relationship to the arrest, or it becomes an unlawful exploratory search. For example, in *People v. Mollarius*,\(^1^0^3\) the arrest was for a U-turn in violation of the Vehicle Code. The officer searched the car and discovered narcotics. A narcotics conviction was reversed because the search bore no relation to the traffic violation or vagrancy charge for which the occupants were booked. The search could not be justified as incident to the arrest, and nothing else that happened could give the officers reasonable cause to go through the defendant's car. On the other hand, in *People v. Van Eyk*,\(^1^0^4\) the defendant had been heard to say:

I've got three pads myself. I've got one where my girl friend and I live, in South Pasadena. I've got one for my p.o. officer, with a few rags in there, so when he comes and looks me up, I don't look too prosperous. Then I've got my warehouse where I keep my stuff stashed.

Armed with this and other information they arrested him at his apartment for a narcotics violation. They then made an incidental search for a rent receipt that might indicate a hiding place for narcotics. They found such a receipt in a man's coat in a closet, and from information on the receipt were able to locate a hotel room which defendant had rented. Defendant's

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\(^1^0^0\) People v. Smith, 166 Cal. App. 2d 302, 333 P.2d 208 (1958).
\(^1^0^1\) Hernandez v. Superior Court, 143 Cal. App. 2d 20, 299 P.2d 678 (1956).
\(^1^0^2\) People v. Montes, 146 Cal. App. 2d 530, 303 P.2d 1064 (1956).
\(^1^0^4\) 56 Cal. 2d 471, 364 P.2d 326, 15 Cal. Rptr. 150 (1961).
rent had expired and they searched the room with the permission of the manager, finding contraband. The search and seizure were upheld, seemingly on the grounds that the search of the closet was not an exploratory search because it was based on information which reasonably justified it, and that the manager could consent to search of the apartment since the rent had expired.

*Van Eyk* is perhaps inconsistent with *People v. Schaumloffel*, where officers had reasonable cause to arrest defendant for abortions on *A* and *B*. Believing that he kept a record of his abortions on five by seven inch cards, they went through his files and located such cards, one of which led them to *C* and *D*. Defendant’s conviction for abortions on *C* and *D* was reversed on the ground that the officers had ransacked all of his records including documents confidential as between physician and patient.

The California Supreme Court, shortly after *Cahan*, held that the fact that there is ample time to procure a search warrant will not invalidate a search incident to a lawful arrest. The reasons have been well stated in an opinion by a district court of appeal, as follows:

> The Fourth Amendment does not forbid all searches, but only unreasonable searches. The authors of the Bill of Rights did not suggest or imply that when law enforcing agencies have learned that a person has committed a felony, they must await the convenience of the offender before moving into his lair. They were wrestling with the problems that had arisen from the arbitrary searches by the minions of an arbitrary despot. They had not conceived of the difficulties to be encountered by a generous government in dealing with arbitrary criminals in a complex society with countless avenues whereby to secrete the evidences of their crimes.

The federal law relative to search incident to a lawful arrest without a warrant is very unsettled. The Supreme Court admitted this in *Abel v. United States*, where it said: “The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court.” In this case, however, the defendant had not sought reconsideration of de-

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106 As a result of *Schlaumloffel*, could the information discovered in a search for the cards of *A* and *B* be used to obtain a search warrant? Seemingly, such a search would be legal. If, during such a lawful search, other cards are discovered containing the names of other women and some cryptic symbols similar to those on the cards of *A* and *B*, the officers are not required to blind themselves to what they see.
107 *People v. Whinston*, 46 Cal. 2d 151, 293 P.2d 40 (1956).
110 *Id.* at 235.
cisions like *Rabinowitz* that upheld a rather extensive search, so the court thought it inappropriate to re-examine or attempt to reconcile its earlier decisions. Professor Barrett has summarized the areas of doubt with appropriate citation, so there is no use considering them here in detail. He suggests that the law is confused as to the scope of incidental search in terms of area, intensity, and the type of articles which may be seized. Nor is it clear whether a warrant must be procured when there is time to get one.

The latter problem was an issue in *Chapman v. United States*, where officers, smelling an odor of whiskey mash coming from a house, knocked on a door. Receiving no answer, they opened a window, entered, and found a distillery and 1300 gallons of mash. They seized samples of the mash. The Court held this was an illegal search and seizure. No reason was offered for not obtaining a warrant except “inconvenience to the officers and some slight delay necessary to prepare papers and present evidence to a magistrate.” The events took place on a Sunday.

Here again, the California decisions seem to provide the more workable rules for the guidance of the peace officers who must use them. The constitutional issue should be, and is in California, whether the search and seizure are reasonable. With such a test, some fairly definite rules can be laid down, where with a strict reasonable or probable cause inquiry, adequate guidelines have not been forthcoming. For example, a court can say, as matter of law, that a reasonable search, incident to a lawful arrest in a house or yard or on the adjacent street, includes a search of the entire premises, including the garage and car. The court can also say that it is unreasonable to search a house incident to an arrest that occurs a block or two away, at least in the absence of some emergency.

Likewise, the scope of the search should bear some reasonable relation to the offense for which the arrest is made. An arrest for stealing an automobile does not ordinarily justify search of a house. On the other hand, incident to an arrest for possession of heroin, it seems reasonable to search even desks, closets, and bureau drawers for narcotics and paraphernalia for using them. Of course, arbitrary rules cannot cover all possible circumstances. Thus, search of a house can be justified as incident to an arrest at the house for larceny of a motor vehicle, if the *modus operandi* involves use of forged registration statements. Ransacking the-records of a licensed physician who practises abortion as a sideline perhaps is unreasonable, but

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112 See, e.g., *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief used in course of commission of perverted act on a child is “merely evidentiary”).

it would seem proper in the case of an abortionist who is not a licensed physician. The justifiability of frisking also depends upon surrounding circumstances. Frisking would generally be unjustified where the arrest is for speeding on a freeway in daylight. But the officer who failed to frisk after a speeding arrest on a deserted road would be a fool. In neither case, in the absence of some other factors, would search of the glove compartment or trunk be justified.

I agree that the search warrant should be used much more frequently than at present. Nevertheless, an arbitrary rule that a warrant must be procured if there is time to get one is completely unworkable. Overextensive use of search warrants would put an impossible burden on our already undermanned law enforcement personnel. To illustrate, suppose that officers have an anonymous tip that someone is selling narcotics at a specified address. They have insufficient information to justify either an arrest or a search warrant. Consequently, they watch the house and see known addicts enter and leave. They question one addict who admits making a buy. They may or may not arrest him because their primary interest is in the seller. At this point it would be tactically unsound for the officers to go after a warrant. Someone may have seen them talking to the addict and might warn the seller. The supply of narcotics is dwindling. So they knock on the door and make the arrest. Assuming the rule is that they must now get a warrant before searching the house, an involved process begins. A fellow officer must be left to watch the house (if the arresting officer is fortunate enough to have one with him). The other officer cannot take the defendant to the station alone, so he must wait for assistance. When help arrives, he takes the defendant to the station and books him. Thereafter, he goes to the district attorney's office, and after a short wait, sees a deputy and satisfies him that a warrant should issue. Together they dictate an affidavit (which may have to be lengthy to satisfy existing standards) to a stenographer. She types the affidavit and warrant. After checking them for accuracy, the deputy and peace officer go to the magistrate. After a short wait, since a trial is in progress, the magistrate sees them and satisfies himself that the warrant should issue. The peace officer then goes back to the house to execute the warrant. This process can be completed in two hours.

\footnote{114 Cf. Wood, We Should Make Greater Use of Search Warrants, Cal. Peace Officer, May–June 1962, p. 27.}

\footnote{115 If cases following Mapp hold that local peace officers are required to obtain a search warrant whenever there is time to do so, doubtless the federal government will follow up with some sort of federal aid to help them bear the expense, together with suitable rules and regulations prescribed by some bureaucrat well trained in the operation of Parkinson's Law.}

under ideal conditions. But how often will conditions be ideal? The arrest
may take place many miles away from the nearest deputy district attorney.
It may be at night (most arrests are), during the lunch hour, or over the
weekend. It will often be impossible to find a deputy district attorney other
than during business hours; even if one did, he would still have the problem
of locating a magistrate.\textsuperscript{117}

\textbf{Consent}

California courts have decided some ninety cases involving problems
of consent to search. This problem can arise where the search is made prior
to any arrest and the fruits of the search together with prior information
give reasonable cause to make an arrest. It can also arise after the arrest
where the officers ask for and receive permission to make a search outside
the scope of normal search incident to an arrest. Whether or not consent
was given is a question of fact to be decided by the trial judge, as is the
question of reasonable cause. Even where the defendant is in custody, the
consent must be freely given. The picture presented by the reported cases
is somewhat distorted, for only those cases where consent was found reach
the appellate level. It appears, however, that reversals of a finding of con-
sent are very infrequent. In one of the rare reversals, \textit{People v. Wilson},\textsuperscript{118}
The defendant was arrested for vagrancy without reasonable cause. He was
then searched without his consent. When the officers told him they would
like to search his car, he handed them the key. The court held that the
consent had been coerced, suggesting, in dictum, that the result might have
been different had he been informed of his right to refuse permission.

The courts, in a number of decisions, have developed rules governing
consent by third persons. Thus, someone who jointly occupies defendant's
home, as his wife, mistress, or friend, can consent to search of the home.\textsuperscript{119}
It is doubtful, however, that a child could give valid consent, except in un-
usual circumstances.\textsuperscript{120} Nor could the landlord or manager of an apartment
house, rooming house, or hotel, consent to entry into an apartment or room,
as long as the defendant remained a tenant. However, such a person could
consent to entry into the halls or other common rooms.\textsuperscript{121}

In \textit{People v. Gorg},\textsuperscript{122} the California Supreme Court announced the prin-
ciple that a search made after consent of a third person, whom the officers

\textsuperscript{117} See Weinstein, \textit{Local Responsibility for Improvement of Search and Seizure Practices},
34 Rocky Mt. L. Rev. 150, 177 (1962), for comments of Colorado police chiefs in answer to
a questionnaire as to the effect of \textit{Mapp}.

\textsuperscript{118} 145 Cal. App. 2d 1, 301 P.2d 974 (1956).

\textsuperscript{119} See, e.g., \textit{People v. Terry}, 57 A.C. 581, 370 P.2d 985, 21 Cal. Rptr. 185 (1962); \textit{People


\textsuperscript{121} \textit{People v. Corrao}, 201 A.C.A. 940, 20 Cal Rptr. 492 (1962).

\textsuperscript{122} 45 Cal. 2d 776, 291 P.2d 469 (1955).
in good faith reasonably believe to have authority to consent, is valid, even if he may not actually have such authority. The defendant, a law student, occupied a room with a bath in exchange for gardening. Arresting officers were given permission by the owner to search the entire house. They searched defendant's room and found drying marijuana plants, marijuana seeds, fertilizer, paper used to roll cigarettes, and a heat lamp. There was also a bucket of growing marijuana which the owner had removed from defendant's bathroom. The court upheld the search. In its opinion Justice Traynor said:

[W]hether he was in fact a tenant, servant, or guest, [the owner] believed that he had at least joint control over his quarters and the right to enter them . . . and authorize a search thereof. Under these circumstances the officers were justified in concluding that [the owner] had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly.

Gorg is the type of decision which Mapp makes doubtful. For in Gorg the court reasoned that the purpose of the exclusionary rule is to discourage unreasonable activity by peace officers, not to enforce rights under the law of trespass and landlord and tenant. But Gorg can be justified under the fourth amendment, since clearly, under the facts, the officers made no unreasonable search.

Federal cases involving the problem of consent to search are inconsistent and often very restrictive. The cases involving defendants already in custody are especially restrictive. For example, in Channel v. United States, the defendant was legally arrested for narcotics violations and handcuffed. He said he had no "stuff" in his apartment and the officers were welcome to search. He said he had no key with him but the officers could ask his landlord for one. They searched the apartment and found a package of heroin. The court held this was an illegal search. From his words, said the court, the inference of false bravado was as strong as the inference of consent; therefore, this was not a free and intelligent consent. This decision is as unrealistic as the District of Columbia case where defendant said he had nothing to hide and officers were welcome to go and see for themselves. The court there said that the officers had no right to presume consent, for the words might have been "the false bravado of the small-time criminal."

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123 At another institution on the other side of the Bay, I hasten to add. Boalt students do not raise marijuana. There may have been occasional convictions for contributing to the delinquency of minors.

124 Id. at 783, 291 P.2d at 473.


126 Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951).
The federal cases involving consent of third persons, although not entirely consistent, are substantially in line with those of California. Nevertheless, it appears unlikely that the Supreme Court would follow the precedent of the Gorg case.

**Formalities of Search**

California Penal Code section 841 requires that the person making an arrest inform the defendant of his intention to make the arrest, of the cause, and of his authority. Three exceptions are written into the statute. The formalities may be dispensed with when the person making the arrest has reasonable cause to believe that the defendant is engaged in the commission of or an attempt to commit an offense; when the defendant is being pursued immediately after commission of the offense; and when he is being pursued after an escape. At one time, the first exception was phrased in terms of actual commission of the offense or attempt. The reasonable cause dilution was a part of a general revision of the arrest statutes in 1957.

A fourth exception has been written into the statute by judicial decision. The formalities can be dispensed with where the circumstances are such that the defendant knows he is about to be arrested.

A companion statute, Penal Code section 844, deals with breaking into a house to accomplish an arrest. Three requirements must be met before such a breaking in is permitted. The offense must be a felony; the person making the arrest must be a peace officer; and the officer must demand admittance and explain his purpose. However, the Supreme Court of California has held that section 844 is a codification of the common law. Therefore, it is reasonably interpreted as subject to common law exceptions. Compliance with the formalities of section 844 is not required if the officer’s peril will be increased or the arrest frustrated. For example, if an officer, having grounds to make an arrest for a felony, after knocking on the door, hears running footsteps, he would be justified in breaking in. Another example is *People v. Ramsey*, where the officers had grounds to make an arrest for abortion. They waited until they believed a “victim” was in the house and broke down the door during the commission of the offense. The court held that the entry was lawful, since the officers could

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128 See *Chapman v. United States*, *supra* note 113, where landlord with right to inspect told officers to make search.


130 People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956).

131 *Ibid*.

reasonably assume that had they knocked they would have given the ar-estrees an opportunity to escape or destroy evidence.

Also illustrative is *People v. Hammond*, where an informer had just purchased heroin from the defendant in his home. The informer reported that the defendant was in the process of preparing heroin for sale, was under the influence of heroin, and had a gun. The officers broke in, made the arrest, and seized heroin. The search was upheld on the ground that the arresting officers had reasonable cause to believe the defendant was in the process of committing a felony, was armed, and was under the influence of a narcotic. They could have concluded in good faith that if they complied with the formalities of section 844 the defendant might attempt to dispose of the heroin or use the gun. Under such circumstances, noncompliance with section 844 does not compel exclusion of the evidence seized during the search.

The supreme court supplied an alternative basis for these decisions in *People v. Martin*. The court said that failure to comply with the notice requirements of sections 841 and 844 is unrelated and collateral to the product of the search; therefore, the exclusionary rule should not be applied. If the officer already has grounds for making the arrest, and, therefore, to make the search incident thereto, what the search uncovers will in no way depend upon compliance with the statutory formalities. In addition, there is no constitutional right to destroy or dispose of evidence. No basic constitutional guarantees are violated because an officer succeeds in getting to where he is entitled to be more quickly than he would have otherwise.

The federal law on this problem is not clear. The principal decision is *Miller v. United States*, where officers knocked on the door of an apartment with reason to believe that there was contraband and marked money inside. Defendant said: "Who's there?" The officer replied "Police" several times in a low voice. Defendant opened the door, not unfastening an attached chain, and asked what the officers were doing there. He then attempted to close the door. The officers ripped off the chain, entered, and found the marked currency and 381 capsules filled with heroin. The Government for some unknown reason conceded that the validity of an entry

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134 Readers who disagree should ask themselves what they would have done under the same circumstances.
136 357 U.S. 301 (1958).
137 Perhaps because it was late at night and he didn't want to wake up everybody in the apartment house.
138 Why does the Solicitor General so readily concede away questions that have not yet been decided and that are of such great importance in law enforcement? See also the discussion of the *Henry* case in the text accompanying note 63 *supra*. 
to execute an arrest without a warrant must be tested by criteria identical to those in section 3109 of title 18 of the United States Code. That section provides that an officer executing a search warrant may break open a door or window, if, after notice of his authority and purpose, he is refused admittance. The Court held that the defendant could not lawfully be arrested in his home by officers breaking in until he was given notice of their authority and purpose. The Court did recognize that in some states there are decisions to the effect that noncompliance with the formalities is justified where officers in good faith believe that they or someone within are in peril of bodily harm or someone within is fleeing, or attempting to destroy evidence. But the Government made no claim of such circumstances. The Court neglected to discuss the question whether violation of the statute would require suppression of the evidence. 139

Justice Clark, dissenting, pointed out that the court of appeals had reached the opposite result in concluding that “necessitous circumstances” warranted the entry. Apparently, the officers’ conduct was correct to the point where the defendant attempted to close the door. At that point they should have gone through the formality of announcing their authority. Then they could have broken in. Meanwhile, the defendant could have been busily engaged either in escaping through the back door or flushing the contraband down the toilet. Confronted by an emergency, the officers made a snap judgment. Their decision seems reasonable, certainly more reasonable than the alternative required by the Court.

Miller is a decision based on a statute rather than on the fourth amendment. Thus, the question remains open whether its doctrine will be applied to the states even if the Court, as a result of Mapp, undertakes to create uniform rules applicable throughout the country.

The California courts may be criticized for their judicially created exceptions to the statutory formalities. But the results are sensible and workable. Nothing in the fourth amendment requires technical formalities in making arrests. All that is required is that the search and seizure be reasonable. As one commentator said: “[I]t would seem that the perfection of small firearms and the development of indoor plumbing through which evidence can quickly be destroyed, have made [such a statute] ... a dangerous anachronism. In many situations today ..., a rule requiring officers to forfeit the valuable element of surprise seems senseless and dangerous.” 141

139 Perhaps it was not briefed or argued. One suspects the Solicitor General would have conceded the point anyway.
Standing to Complain

The California courts have stated that the exclusionary rule applies even when the evidence is obtained by means of an illegal search violative of the rights of a person other than the defendant. In other words, if evidence that incriminates the defendant is discovered in the course of an illegal search of the premises of some other person, it will be inadmissible against him. Thus, the defendant has standing to complain and may rely on the rights of other persons. This follows from the basic purpose of the rule as perceived by the California courts. In their view, the rule is designed to discourage illegal searches and seizures.

This problem has given the federal courts great difficulty. Until recently, they generally required a defendant seeking to challenge the legality of a search to establish that he was the victim of an invasion of privacy. To do this he had to establish that he had some interest in the property seized or premises searched. Therefore, in a narcotics case, he was placed in the predicament of having to admit possession in order to move to suppress. Possession itself, of course, is a crime. The problem was resolved recently in Jones v. United States, where the Court distinguished cases that turn upon possession of contraband from other cases. In the former type of case it is no longer necessary to show an interest in the property seized. In the latter type of case it continues to be necessary to show an invasion of privacy of the defendant. The Court in Jones said, however, that even in a non-contraband case the denial in some lower federal courts to guests and invitees of standing to complain was incorrect; that anyone legitimately on the premises where a search occurs may challenge its validity when its fruits are to be used against him.

A number of commentators have suggested that because of the difference between rules concerning standing to complain California courts afford a defendant greater rights than he has in the federal courts. However, when Jones is read in the light of United States v. Jeffers, much of the difference disappears. In Jeffers, the defendant had been permitted to use the hotel room of his aunts. Without their knowledge he stored narcotics there. Acting upon a tip, police officers obtained a key from the hotel manager and searched the room in the absence of both defendant and the aunts. The Court held that the narcotics were illegally seized. Apparently, the decision is based on the theory that the whole process of the search and seizure amounted to a breach of defendant's right of privacy. Yet the Court could as easily have gone off on the ground that a defendant has standing to com-

144 342 U.S. 48 (1951).
plain where the right of privacy of some other person has been violated to obtain evidence against him.

Cases can be imagined where California courts would give greater rights in the area of standing to complain than federal courts. One can imagine a situation where the defendant, himself illegally on the premises, is surprised in the course of an illegal search. Or, officers might break into a hotel room to listen to conversations through the paper-thin wall adjacent to defendant’s room. Or, an illegal search of the quarters of defendant’s accomplice to which he had no legitimate right of access might reveal incriminating evidence against him. Seemingly, in each of these cases, the evidence would be admissible in federal but not in California courts. It may be predicted that such cases will be rarities.

Arrest Warrants

It is not clear from Mapp whether the portion of the fourth amendment relative to arrest and search warrants is made applicable to the states. Justice Traynor in Cahan looked forward to the development of workable rules governing the issuance of warrants. Actually the number of decisions since Cahan is few; and there are significant problems and gaps in the law which are worthy of brief mention.

The California statutes contain fairly detailed provisions relative to obtaining and executing arrest warrants. Reported judicial decisions are a rarity and one may surmise that arrest warrants have posed few problems. Of interest is the fact that “John Doe” warrants, which are illegal in some jurisdictions, have been upheld in California, at least where there is some accompanying description.

One glaring deficiency in the California arrest warrant statutes, at least as presently applied, is that the magistrate issues an arrest warrant solely on the basis of a complaint that may be verified on the basis of information and belief, and that may follow the words of the statute. An arrest warrant must issue when the magistrate is satisfied “from the complaint” that the offense has been committed and that there is reasonable ground to believe that the defendant has committed it. As a matter of practice complaints seldom do more than repeat the language of the statutes. Thus, a Vehicle Code complaint might read: “A.B., on information and belief, accuses C.D.

146 CAL. PEN. CODE §§ 813–29.
147 CAL. PEN. CODE § 813 (felonies); cf. CAL. PEN. CODE § 1427 (misdemeanors, “satisfied therefrom”).
in this judicial district of moving left on a roadway when such movement was made without reasonable safety, in violation of Vehicle Code section 22107." Yet, the officer did not see the violation and is relying on hearsay. Such a complaint in practice entitles the officer to a warrant. He need not be present when the magistrate reads the complaint, if he does, and signs the warrant.

Perhaps this practice will not lead to much injustice in felony cases where the defendant will at least be entitled to have the issue of reasonable cause tried in the preliminary hearing. But it may lead to great injustice where less serious offenses are charged. It appears that the only statutory procedure for contesting a complaint in misdemeanor cases is the demurrer, and that would apparently be unavailable in the situation at hand. It certainly would be unavailable in traffic misdemeanors, where the defendant is not even entitled to a copy of the complaint until he pleads not guilty.

The United States Supreme Court recently reached a more satisfactory result in Giordenello v. United States. Defendant was arrested on a warrant based on a complaint charging simply that he had received and concealed narcotic drugs, to wit: heroin, with knowledge of unlawful importation in violation of the appropriate statute. The warrant was based on Rule 4(a) of the Federal Rules of Criminal Procedure which provides that the magistrate shall issue an arrest warrant if it "appears from the complaint" that an offense has been committed and that the defendant committed it. In other words, rule 4(a) is very similar to the analogous California provision. The warrant was executed and a search of the person of the defendant produced narcotics. He immediately confessed to the purchase and transportation. He waived a preliminary hearing and moved to suppress the evidence. The motion was denied and his conviction followed.

The court, in an opinion by Justice Harlan, held that the defendant had not waived his right to contest the validity of the warrant, and, therefore, the legality of the search incident to its execution, by waiving a preliminary examination. Furthermore, the complaint was inadequate since its allega-

149 See CAL. PEN. CODE § 1004 for grounds of demurrer. In Muller v. Justice's Court, 123 Cal. App. 2d 696, 267 P.2d 406 (1954), defendant sought a writ of prohibition to restrain a justice court from proceeding further in a misdemeanor case on the ground that the judge, before issuing the warrant, received no evidence. The court denied the petition on the ground that the applicable statute merely required the judge to satisfy himself from the face of the complaint that the offense had been committed and that there was reasonable cause to believe the defendant committed it. The decision is technically correct, but suaere: what would the court have done had the defendant raised the question whether there was sufficient detail on the face of the complaint for the judge to satisfy himself of reasonable cause? The defendant was representing himself in the proceeding.

150 CAL. VEHICLE CODE § 40513.

tions could not possibly provide a sufficient basis for the magistrate's finding of probable cause. It contained no allegation that the officer spoke with personal knowledge, no indication of any sources for his belief, nor any other sufficient basis upon which a finding of probable cause could be made. The purpose of the complaint, the Court said, is to enable the magistrate to determine whether there is probable cause to support an arrest warrant. Accordingly, he must adjudge for himself the persuasiveness of the facts relied upon by the officer to show probable cause and not accept without question the mere conclusion that the person named in the warrant has committed a crime.

What effect will Giordenello have on the practices of federal law enforcement officials and courts? One may doubt that many magistrates will intensify their perusal of complaints before issuing warrants. It is certain, however, that prosecutors and others will be more careful in their preparation. They will do more than repeat the statutory language, particularly where the complaint is based on information and belief. They will set forth the facts on which they base information and belief in such a way as to show probable cause, which seems more in line with the fourth amendment. Otherwise, they may be faced with dismissal, suppression of evidence, or reversal.

A Giordenello type decision in the California courts would have a similar prophylactic effect, particularly in the area of traffic and other minor offenses. It might encourage more defendants to contest and even appeal doubtful or imaginary charges. It might discourage overzealous officers from filing complaints in borderline cases, particularly on information and belief. This is the type of situation mentioned earlier where the state courts should act to clean their dirty linen. If they do not, the United States Supreme Court may one day do it for them. Giordenello, like Wolf, Rochin and Elkins, sounds a warning. It seems predictable on the basis of the search warrant decisions that the California courts will not be reluctant to correct the deficiency when an appropriate case arises.

Search Warrants

The California statutes set forth in some detail the requirements and procedure for the issuance and execution of search warrants. Apparently there has been no consequential increase in the use of search warrants since Cahan. Thus it has been said that in Los Angeles County municipal court there have been only 538 search warrants issued since 1931, an average of 1½ per month. Even if all were issued since Cahan they would be a drop.

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in the bucket. Some 500,000 felony criminal cases have gone through that court during the thirty-year period.\textsuperscript{154}

Since the search warrant is a rarity, the law relative thereto, as might be expected, is still in the process of evolution. Yet, there have been some developments of importance both in statutes and decisions. Perhaps most important was the revision of Penal Code section 1524 in 1957. That section authorizes a warrant to search for stolen or embezzled property, for "property or things . . . used as the means of committing a felony," and for "property or things in the possession of any person with the intent to use it as a means of committing" a felony or misdemeanor. These are the traditional uses of a search warrant, albeit somewhat awkwardly phrased. But the statute also authorizes issuance of a warrant to search for evidence which "tends to show a felony has been committed, or tends to show that a particular person has committed a felony." Thus, in California, a warrant may be obtained to search for so-called "mere evidence" which is neither contraband nor things used to commit a crime. Unfortunately, this portion of the statute has not been construed in reported decisions.

The few search warrant decisions of consequence can be summarized quickly. The exclusionary rule has been held applicable to search warrants. Evidence seized as the result of a search with a void warrant is inadmissible.\textsuperscript{155} A search warrant can be obtained on the basis of hearsay if the supporting affidavit sets forth sufficient facts to indicate the reliance is reasonable.\textsuperscript{156}

The supreme court recently rendered a rather restrictive decision on the specificity required of a warrant in \textit{Aday v. Superior Court}.\textsuperscript{157} The officers presented the magistrate with the required affidavit together with copies of two books entitled \textit{Sex Life of a Cop}, and \textit{Joy Killer}. Upon the basis of the affidavit and his reading of the books the magistrate concluded that there was a conspiracy to publish, print, and sell obscene books. The warrant authorized a search for checks, check stubs, cancelled checks, check books, bank statements, sales records, purchase records, customer correspondence, customer orders, invoices, bills, vouchers, statements, mailing lists, and similar items, as well as copies of books and magazines, including the two named books, "but not limited thereto." An eight-hour search ensued and copies of the named books, as well as others, and many orders, checks, letters, and similar items were seized. The court held that the description of the articles to be seized, with the exception of the two

\textsuperscript{154} Wood, \textit{We Should Make Greater Use of Search Warrants}, Cal. Peace Officer, May–June 1962, p. 27.


\textsuperscript{156} People v. Keener, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961).

named books, did not meet the specificity requirements of the statute. It ordered the return of everything seized, except the copies of the two named books.

Aday poses more problems than it solves. It can fairly be assumed that if the officers knew the name of one of the customers for Sex Life of a Cop, they could, on the basis of that and of the other facts known to them, procure a warrant to search for sales records, customer orders, invoices, and bills relative to that customer's purchases of the book. Suppose that during the search they discover other such documents relative to other sales of the same book. Can they seize them? Can they use the information to procure another search warrant? The search for the particular items was legal. Must they blind their eyes to whatever else they see? It has been held that during a proper search incident to a lawful arrest without a warrant immediate seizure of evidence unrelated to the crime for which the arrest was made is legal.158

Perhaps a warrant would have been properly issued to search for "sales records, customer orders, invoices, and bills relative to sales of Sex Life of a Cop" without knowledge of the names of the customers. This seems logical and reasonable. Again, can the officers take advantage of what they see during the search to seize other records or procure another search warrant? Under the Aday decision a warrant to search for "Sex Life of a Cop, Joy Killer, and similar books," would be valid as to the named books and invalid as to similar books. Assuming a warrant is issued to search only for the named books, it would seem reasonable to search boxes, file cabinets, closets, and even desks. If in the course of the search the officers come upon copies of Sex Life of a Bubble Dancer, and Passions of a Lesbian, can they open the books to see if they are obscene?159 Assuming the answer is yes, can they seize them? Do they have probable cause to obtain a search warrant for these books?160

If during the search for the named books, the search turns up a clearly visible hypodermic outfit and a bindle, can they open the bindle? Can they seize it? Can they post a guard and obtain a warrant to seize it?

Since the California law in the area of search warrants is skeletal and largely statutory, no useful purpose would be served by attempting a comparison with federal decisions.161

159 Cf. People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956), mentioned at note 53 supra, where officers entered an apartment after hearing someone moaning inside, and were permitted to examine a radio similar to a stolen radio.
CONCLUSION

We have seen that there is a rationale for local autonomy in search and seizure matters, even after Mapp, and that a state such as California can develop rules that are workable, and sometimes more adequate than the rules developed by federal courts. Whether we have national uniformity or local autonomy the rules should give reasonable leeway to peace officers. Major crime continues to increase five times as fast as the population. It is fine to have decisions which bring a roar of applause from the galleries at the "joint," and a rash of post-conviction proceedings. But what of the wife and five children of that policeman who was murdered a few weeks ago? What of that girl who was waylaid and brutally raped by four men in turn? What of that nice old lady who was almost beaten to death and robbed of her old age pension? What of that neighborhood church that was forced to abandon its evening program for senior citizens no longer willing to venture out at night? Is this the necessary price of civil liberty? Or is there some compromise? I understand that one Supreme Court Justice has been known to spend a night in a police prowl car. Perhaps there are a few other judges, and even a law professor or two, who might profit by a similar experience.

103 For the benefit of the uninitiated, it is sometimes known as San Quentin.