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A Diversionary Approach for the 1980's.—Various changes in social thought and policy of the past several years carry important implications for the treatment of young offenders. These changes include a marked decrease in public willingness to spend tax money for social programs, a shift in focus from offender-rights to victim-rights, and an increase in the desire for harsher treatment of serious offenders. The general social ethos reflected in those positions has prompted a reassessment and new direction for the delivery of juvenile diversion services in Orange County, California. Authors Arnold Binder, Michael Schumacher, Gwen Kurz, and Linda Moulson discuss a new Juvenile Diversion/Noncustody Intake Model, which has successfully combined the collaborative efforts of law enforcement, probation, and community-based organizations in providing the least costly and most immediate level of intervention with juvenile offenders necessary to protect the public welfare and to alter delinquent behavioral patterns.

Home as Prison: The Use of House Arrest.—Prison overcrowding has been a major crisis in the correctional field for at least the last few years. Alternatives to incarceration—beyond the usual probation, fines, and suspended sentences—have been tried or proposed. Some—such as restitution, community service, intensive probation supervision—are being implemented; others have simply been proposed. In this article, authors Ronald P. Corbett, Jr. and Ellsworth A.L. Fersch advocate house arrest as a solution to prison overcrowding and as a suitable punishment for many nonviolent, middle-range offenders. The authors contend that with careful and random monitoring of offenders by special probation officers, house arrest can be both a humane and cost-effective punishment for the offender and a protection to the public.

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explains that exclusionary rules developed to keep illegally obtained evidence from being used in court and that both arrests and searches can occur without a warrant in specific circumstances.

Assessing Correctional Officers:—Authors Cindy Wahler and Paul Gendreau review the research on correctional officer selection practices. Traditionally, selection of correctional officers was based upon physical requirements, with height and size being a primary consideration. A number of studies have

employed the use of personality tests to aid in the identification of the qualities of "good" correctional officers. These assessment tools, however, have provided qualities that are global and not unique to the role of a correctional officer. Noting a recent trend towards a behavioral analysis within the field personnel selection, the authors argue that a similar type of analysis may provide a more fruitful avenue for assessment of correctional officers.

All the articles appearing in this magazine are regarded as appropriate expressions of ideas worthy of thought but their publication is not to be taken as an endorsement by the editors or the Federal probation office of the views set forth. The editors may or may not agree with the articles appearing in the magazine, but believe them in any case to be deserving of consideration.

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The Warrant Clause: The Key to the Castle

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

The fourth amendment to the Constitution is one of the pillars of our system of government. The language seems straightforward, but each pregnant phrase has been litigated, the subtle distinctions among them delineated, the interrelationships noted. The courts' exegesis of this section of our bible of government has attracted much scholarly work.¹

But what do we say to the layman who asks, "Just what do all those fine words mean?" How can we explain it simply to the Asian student at an American university who says quizzically, "The policeman cannot come into your home?" What do we say to the irritable businessman who grumbles, "Those OSHA inspectors are just going to be in here all hours of the day and night." In addition to the visitor or the concerned citizen there are others connected with the criminal justice system, such as probation and parole officers and child protection workers, who need a short summary to supplement the training which they receive on the job. This article is an attempt to provide such information, noting particularly the recent changes made by the United States Supreme Court.

Why Do We Have It?

Every school child knows that the colonists' hatred of taxation without representation led to the American Revolution. True enough. But, as the Declaration of Independence says, when one people dissolve political ties with another, "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to

the separation." The declaration's catalog of abuses does not list those practiced under writs of assistance and general warrants, but the memory of them was fresh in every mind.

Abuse of the power to search and seize was a source of discontent in Great Britain, as well as in America. After the development of printing, the Crown devised methods to restrict the freedom of the press. Governmental authority acquired broad power to look for libelous books and other publications through the issuance of general warrants. It was when the English Parliament was meeting to discuss resolutions condemning these general warrants that William Pitt asked his classic question of why a man's house is called his castle. His reply was that the poorest man in his cottage could defy the King, whose forces dared not cross the threshold of the ruined tenement. In the 1765 case of *Entick v. Carrington*, Lord Camden held a general warrant invalid: there must be a specific grant of power. Without it, search and seizure became a trespass, since one's papers were property.²

The abusive practices were transplanted to the American colonies. These general warrants or writs of assistance, used ostensibly to enforce the custom laws by allowing the search for smuggled goods on which duty had not been paid, became just as unpopular as they were in England. The drafters of the Bill of Rights wanted to assure that these practices were stamped out in the new country and added the fourth amendment to assure that result.³

Where Are We Now?

Over the years the fourth amendment has been seen as protecting privacy interests rather than property ones, but privacy in a narrow sense. That invasion of privacy which has become a 20th century tort is redressed by the ordinary processes of civil law. The privacy protected by the fourth amendment against unreasonable searches and seizures is the right to be free from governmental intrusion, and can only exist in situations in which you may have a reasonable expectation of privacy. Obviously a governmental official can intrude for serious reasons of public health or safety. The fireman can

¹ For a sample, see LeFave, *Search and Seizure: A Treatise on the Fourth Amendment* and Hall, *Search and Seizure*.

² See Uelmen, "1991: A Fourth Amendment Odyssey," 70 *ABAJ* 86 (Sept. 1984) for a brief historical review of the events in Great Britain.

³ For a brief historical review of events leading to its adoption, see Justice Douglas' dissent in *Warden v. Hayden*, 387 U.S. 294 (1967).

break into a building to put out a fire. A health officer can come onto private property to destroy a rabid animal. And if you choose to stand on a street corner to hand out leaflets to anyone passing by, you can hardly complain if a police officer takes one.

There is no expectation of privacy in "open fields." This past term the Supreme Court clarified this expression, holding that steps taken to protect privacy, such as erecting fences and "No Trespassing" signs do not necessarily establish legitimate expectations of privacy in an open field. The test is not whether the individual chooses to conceal assertedly "private activity," but whether the government's intrusion infringes upon the personal and societal values protected by the amendment.⁴

The amendment protects this privacy from unreasonable searches and seizures. What is unreasonable may be very difficult to determine; two observers can arrive at different conclusions. The warrant clause spells out one test of reasonableness, whether the search or seizure occurred under a warrant issued upon probable cause.

Probable Cause

Probable cause exists if a reasonable person would conclude from the facts and circumstances that a crime occurred or that evidence of a crime is located at the place to be searched. It is the magistrate who weighs those facts and circumstances. A neutral and detached magistrate interposed between the government and the individual protects from arbitrary intrusion, as a jury of your peers protects from untoward consequences of arbitrary governmental prosecution.

Some of the facts and circumstances which the magistrate weighs will include information from witnesses and victims or from informants. The Supreme Court established a "two-pronged test" of an informant's "veracity and reliability" and of "the basis of his knowledge" in order to determine whether the informant's information would amount to probable cause. The Court recently replaced this rigid approach with one which permits consideration of the "totality of the circumstances" and which leaves the magistrate free to make subjective judgments more on hunch and intuition as the police officer does.⁵ Just this past term the Court reiterated that the "two-pronged test" was hypertechnical and reaffirmed the "totality of the

circumstances" analysis, holding that the "totality of the circumstances" analysis is better suited to the practical, common-sense decision as to probable cause which the magistrate must make.⁶ The information can be presented to the magistrate by affidavit or in person. It can be presented by telephone or by radio so long as there is a dialogue with the magistrate. This encourages getting a warrant in situations where leaving the scene of a suspected crime might cost valuable time.

The practical common-sense determination that probable cause exists for a search or seizure does not mean that enough evidence exists to convict. Information from a reliable informant who bases his tip to the police on personal observation might be enough information for a magistrate but not for a jury.

Particularly Describing

When the totality of the circumstances presents enough information to warrant a search or seizure, such action must still be limited. The limitation is that the warrant must particularly describe the place to be searched and the person or things to be seized—a protection against the general warrants which the colonists hated. A search under a general warrant is void *ab initio*. The indignity of a general search is exactly the kind of governmental intrusion on personal privacy which the fourth amendment forbids.

The description of the place to be searched or person or things to be seized defines the geographic scope of the warrant. The fourth amendment does not countenance open-end warrants completed while a search is being conducted.⁷ That particularity of description which convinces a neutral magistrate to authorize the warrant is a safeguard. If the search warrant is subsequently held defective in some respects because of a failure to describe with particularity some items seized, all need not be excluded from use at trial. The remedy is a partial suppression so that evidence validly seized can be used.

The Exclusionary Rule

Warrants are occasionally issued based on less than probable cause, and searches and seizures have been made under warrants which did not particularly describe the persons and places to be seized. When challenges to the admission of evidence so obtained was made in court proceedings, the Court developed the exclusionary rule to compensate. The evidence, invalidly obtained, is excluded from use in court. The justification for the rule is to keep court proceedings pure, free from the taint of arbitrary

⁴ *Oliver v. United States*, 104 S. Ct. 1735 (1984).

⁵ *Illinois v. Gates*, 103 S. Ct. 2317 (1983).

⁶ *Massachusetts v. Upton*, 104 S. Ct. 2085 (1984).

⁷ *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

police activity and to deter government officials from these egregious abuses of privacy in the future.

The rule—which is difficult to justify to laymen, whose frequent response is “the courts are letting these criminals out”—is controversial among lawyers.⁸ Since the evidence excluded is often highly suggestive of criminal activity, the general public cannot understand how the rule protects law abiding citizens. There is no empirical evidence that the rule does work as a deterrent, its prime justification. The insidious advance of exceptions to the fourth amendment by police anxiously ferreting out crime is hard to see as dangerous when the evidence excluded is of a particularly heinous crime. One author suggests that the Supreme Court may need to look to pre-exclusionary rule search and seizure law to deal with these cases,⁹ and during the last term it may have done so.

In *Nix v. Williams*,¹⁰ the Court weakened the rule by adopting the inevitable or ultimate discovery exception. In that case, evidence of the discovery and condition of a little girl's body, obtained by illegal questioning of the suspect without his attorney present, could be admitted on the ground that it would ultimately have been discovered since a volunteer search party would have found the body. In *United States v. Leon*,¹¹ the Court urged a balanced approach, saying that the rule should not be applied so as to bar use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. Justice White did add that suppression of evidence would still be appropriate “if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.”¹² Further, the Court decided in *Massachusetts v. Sheppard*,¹³ that the rule should not be applied when the officer conducting the search acted in objectively reasonable reliance upon a warrant issued by a detached and neutral magistrate which is subsequently determined invalid. Justice Brennan dissented in both *Sheppard* and *Leon*, saying that

the language of deterrence and of cost/benefit analysis is irrelevant to the preservation of personal freedoms. “While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy.”¹⁴ He added, “Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”¹⁵

Although the Court has not held the exclusionary rule inapplicable, the holdings will certainly make the exclusion of illegally obtained evidence more difficult for defense counsel. The Court emphasized this past term that the rule does not apply if the connection between illegal police action and discovery and seizure of evidence is attenuated because the police had an “independent source” for discovery of the evidence.¹⁶ Justice Stevens dissented strongly, emphasizing the facts of the case, and saying: “A rule of law that is predicated in the absurd notion that a police officer does not have the skill required to obtain a valid search warrant in less than 18 or 20 hours or that fails to deter the authorities from delaying unreasonably their attempt to obtain a warrant after they have entered a home, is demeaning to law enforcement and can only encourage sloppy, undisciplined procedures.”¹⁷

Arrest Without A Warrant

An arrest, or seizure, is an actual or constructive detention of a person under real or pretended legal authority. There must be some restraint, even if it is a slight touch to show the intention to take a person into custody. Certain seizures do not amount to a traditional arrest. Investigations at airports, immigration stops, and “stop and frisk” actions are considered preventive police work and reasonable. It is unreasonable seizures which the fourth amendment forbids, and an arrest under a warrant issued based on probable cause and particularly describing the person to be seized is presumptively reasonable. But in spite of the concern for personal autonomy which the amendment reflects, police can arrest without a warrant. Obviously officers do not have to dash downtown for a warrant when one person threatens to shoot another. They do not have to wait

⁸ See Smith, “Stop Obscuring the Truth” and Greenholz, “Don't Tamper with the Fourth Amendment,” both at 70 *ABAJ* 18 (May 1984).

⁹ Harris, “The Fourth Amendment Past and Future,” 68 *Judicature* 37 (June-July 1984).

¹⁰ 104 S. Ct. 2501 (1984).

¹¹ 104 S. Ct. 2405 (1984).

¹² *Id.* at 3421.

¹³ 104 S. Ct. 3424 (1984).

¹⁴ *United States v. Leon*, 104 S. Ct. 3430, 3431 (1984).

¹⁵ *Id.* at 3443.

¹⁶ *Segura v. United States*, 104 S. Ct. 3380 (1984).

¹⁷ *Id.* at 3400.

until the victim is killed or the goods carted off before arresting the suspected perpetrator of a crime.

The problem is determining which warrantless activities are permissible. In order to arrest, the officers assume the probable guilt of the arrestee. A determination of probable cause should be made promptly after the warrantless arrest, so that the hurried assessment made by the police is followed by a subsequent determination by a neutral magistrate.

Arresting on the street or in a public place based on probable cause that a crime has been committed is quite a different thing from following a suspect to arrest him in his home. Physical entry by police is exactly the intrusion which the fourth amendment is designed to prevent. Entry into a dwelling in order to arrest without a warrant must be justified by some exigent circumstances. Hot pursuit is the oldest recognized justification for a warrantless entry to search for and arrest a suspect and means just what it says. The destruction of evidence rule also permits entry based on probable cause and without a warrant in order to prevent a suspect from destroying evidence. But the likelihood of escape which may justify a seizure without a warrant in one place probably does not so justify it when the suspect is in his own home. He has already had an opportunity to flee, and the police can get a warrant.

Search Without A Warrant

A search occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed."¹⁸ There is no expectation of privacy in "open fields." Refining the doctrine this past term, the Court held that the test of legitimate expectation of privacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the amendment.¹⁹ Thus, the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the fourth amendment rights of those who have a justifiable interest in the privacy of the residence.²⁰

The most common search without a warrant occurs as an incident to an arrest. The police can conduct a search of the person and the immediate surroundings, including those things which are in plain

view. The police can only seize what is open to observation; for an additional search, a warrant is required. Thus police may not search locked luggage if the search is remote from the arrest and no exigency exists. The search incident to arrest is for the protection of the police, designed to recover any weapon which could be used against the officer. Police can search for evidence which could be destroyed, particularly in drug cases, where drugs can be flushed down a toilet or thrown into the fire. For a more extensive search a warrant is required. Of course, the police can search without a warrant if consent to the search is given.

Automobiles are a troublesome area. Since there is a much more limited expectation of privacy in an automobile than in a dwelling, the same considerations about privacy which limit exceptions to the necessity for a warrant do not apply with the same force in cases involving automobiles. The Court has justified warrantless searches of automobiles for various reasons. One is the need to protect the owner's property while the car is in police custody, as well as to protect the police from claims of lost property subsequently made by the owners. Therefore, when an automobile is lawfully impounded, the police can make a routine inventory search, particularly when valuables are in plain view. Just this term, the Court held that a warrantless search of an automobile conducted approximately 8 hours after the initial search was valid because police had probable cause to believe there was contraband inside.²¹ Of course, a warrantless search is always possible to protect the police from potential danger.

Other Public Employees

Probation and parole are matters of grace, granted when their rehabilitative purpose serves the ends of society. Although a parolee has diminished expectation of privacy,²² he is not entirely without constitutional protection. However, strong fourth amendment protections are not among them. The parole officer can make supervisory visits without a warrant since the purpose of these visits is not to search for evidence of crime but to assist the individual in making a readjustment to society. Consent to warrantless searches can be made a condition of probation. "Searches of the residence and person of probationers, however, are not conducted only when there is suspicion of crime...the primary purpose of such searches is to deter the commission of crime and to provide supervisors with information on the progress of their rehabilitation efforts. It is clear that a requirement that searches only be conducted when officers have 'reasonable suspicion' or

¹⁸ *United States v. Jacobsen*, 104 S. Ct. 1652, 1656 (1981).

¹⁹ 104 S. Ct. 1735 (1984).

²⁰ *United States v. Karo*, 104 S. Ct. 3296 (1984).

²¹ *Florida v. Meyers*, 194 S.Ct. 1852 (1984).

²² *United States v. Thomas*, 729 F.2d 120 (2d Cir. 1984).

probable cause that a crime has been committed or that a condition of probation has been violated could completely undermine the purpose of the search condition."²³

In the course of a supervisory visit, any evidence of crime which is in plain view or which is seized under one of the other exceptions to the warrant clause would be usable in a subsequent prosecution. But if a probation or parole officer has information leading him to believe that a crime has been committed, he cannot use the excuse of a supervisory visit to search for evidence of that crime. If that occurs, the evidence seized must be excluded in any subsequent prosecution.²⁴ There is a subtle difference between searching for evidence of crime and searching for evidence that the individual is violating the conditions of his release. But the Third Circuit recently held that the exclusionary rule does not apply to probation revocation proceedings; the Third Circuit became the seventh circuit to so hold.²⁵

Probation and parole officers and child protection workers operate under statutes which set the limits of their responsibility and authority. A parole officer may have the power to arrest his charge. And a child protection worker may remove a child from dangerous surroundings to take him into protective custody without a warrant. When removing the child from an abusive situation the worker often sees evidence of the crime of child abuse. When on the premises performing this lawful duty, the worker can obtain evidence of the abuse and such evidence is subsequently admissible in a criminal trial.²⁶

Public employees have great responsibilities—protection of the public as well as rehabilitation of the criminal. But they also serve as role models. Since they protect constitutional rights of those they supervise, they reinforce the idea of living by the rules within a constitutionally protected system.

Administrative Warrants

When Congress enacted the Occupational Safety

and Health Act, it provided for unannounced inspections of workplaces as one way to accomplish the goal of improved working conditions. In an action testing the need for a search warrant following the denial of permission for inspection by a businessman, the Supreme Court held that the warrant clause of the fourth amendment protects commercial buildings as well as private homes.²⁷ Except for certain "closely regulated" industries, such as those manufacturing firearms or alcohol, a warrant is required for an inspection.

The Court did add that for these administrative warrants, the same showing of probable cause which a warrant to search for evidence of crime requires is not necessary. A showing of "reasonable legislative or administrative standards for conducting an inspection" would be adequate. In a recent case, OSHA selected a company for inspection as part of the agency's program for inspecting high-hazard industries. The Court held there that the traditional "specific evidence" standard for probable cause applied in criminal cases was not required for an inspection warrant.²⁸ Of course, most businessmen will permit warrantless inspections. Since the purpose of such inspections is the discovery and correction of unsafe conditions, they clearly benefit the businessman by avoiding industrial accidents and payment of workmen's compensation benefits.

Conclusion

The concerned layman, the interested visitor, and the convicted criminal all have a stake in the health of the fourth amendment. In his classic *Democracy in America*, de Toqueville expressed concern about the tyranny of the majority in a country with much uniformity of thought, customs, and mores. The Constitution is the protection for those in the minority, whose homes remain their castles. As we find more exceptions to the warrant clause and the fourth amendment in general, we end with a passkey to the castle.

²³ *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982).

²⁴ *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982).

²⁵ *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983 *en banc*).

²⁶ *State v. Hunt*, 406 P.2d 208 (1965).

²⁷ *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

²⁸ *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1 (1st Cir. 1982).