Means of Executing Searches and Seizures as Fourth Amendment Issues

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George E. Dix*

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I. INTRODUCTION

The fourth amendment requirement that searches and seizures be "reasonable," as enforced by the exclusionary rule, has become the major vehicle for Supreme Court efforts to impose limits upon state law enforcement activity. After some early waverings and despite occasional digressions, the Court has emphasized two aspects of fourth amendment reasonableness. First, the Court has required adequate evidence...
to justify the intrusion. In standard search or arrest situations, law enforcement officers must have "probable cause" to believe the place to be searched contains evidence of a crime or the person to be arrested has committed a crime. The Court has found sufficient flexibility in the language and policy of the amendment, however, to permit deviations from these criteria when, in a majority's judgment, the balance among competing interests militates in favor of exceptional treatment. Second, the Court has insisted, as a general rule, subject to certain exceptions, that the adequacy of the information available to law enforcement officials to meet the justification requirement be evaluated by a disinterested judicial officer before the law enforcement activity takes place. In a typical search situation, this means that a judicial officer must issue a search warrant only after determining that probable cause to search exists, and that the warrant describes the premises to be searched and the items to be seized with reasonable precision.

This Article examines whether and to what extent the fourth amendment's requirement of reasonableness does or should go beyond requiring a reasonably precise warrant and evidence adequate to justify an intrusion upon protected interests. Specifically, it addresses the relevance of the fourth


6. See, e.g., Terry v. Ohio, 392 U.S. 1, 27 (1968) (seizure of suspect for purposes of weapons frisk requires only reasonable belief that officer's safety or that of others is in danger); Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (warrant authorizing inspection to determine compliance with housing code requires only that reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to the particular dwelling at issue).

7. This Court has held that a search is per se unreasonable, and thus violates the Fourth Amendment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the Warrant Clause of the Fourth Amendment. . . . Although the Court has identified some exceptions to this warrant requirement, the Court has emphasized that these exceptions are "few," "specifically established," and "well-delineated."


9. Stanford v. Texas, 379 U.S. 476, 486 (1965) (given first amendment considerations, warrant authorizing search for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas" was not sufficiently precise). But see Andresen v. Maryland, 427 U.S. 463, 479-82 (1976) (warrant authorizing search for and seizure of "other fruits, instrumentalities, and evidence" concerning a described fraud crime was sufficiently precise).

10. In the search context, a protected interest arises when a person has a
amendment to what might usefully be called "manner" or "means" issues, that is issues concerning the manner or means by which an otherwise reasonable search or seizure is implemented. In Part II, the Article explores the number and nature of possible issues through a discussion of a recent Louisiana case. Part III evaluates the manner in which the Supreme Court has addressed these issues. Finally, Part IV considers the appropriate role of the fourth amendment in regard to three particular aspects of searches and seizures using the analysis that the Court has established for determining the scope of fourth amendment coverage. These three aspects are the amount of force used during the intrusion, the time at which the intrusion occurs, and the duration of the intrusion.

II. THE ISSUES ILLUSTRATED: *State v. Sierra*

The facts of *State v. Sierra* effectively illustrate the variety of possible "means" issues. In that case, on the basis of certain information, New Orleans police obtained a warrant authorizing the search of an apartment for several specifically described stolen items—a gold bracelet, two rings, and a revolver—and "other stolen property." Five officers served the warrant and entered the apartment, which was occupied by Paula Sierra and Danny Alfortish. The officers handcuffed Sierra and Alfortish and searched the apartment for approximately one and one-half hours. One officer was assigned to search each room of the apartment, and another was given responsibility for conducting a second search.

Defense testimony, sharply contradicted by the state's evidence, tended to show a series of incidents during the search. According to the defense, upon entering the apartment, the officers pushed Alfortish against a wall, slapped a warrant across his face, and struck him with a shotgun, breaking four of his ribs. A number of pieces of furniture were broken, including tables and a bed. Contents of drawers and cabinets were removed, strewn about the apartment, and not replaced. Alfortish was taken into the bathroom and his head pushed into a toilet. The defense evidence varied as to whether this resulted in immersing his entire face in the water or in only wetting the reasonable expectation of privacy in the seized item or the place searched. See *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

12. *Id.*
13. *Id.* at 617 (Calogero, J., dissenting).
14. *Id.*
tip of his hair. At the end of the search, one officer allegedly reached into Sierra’s clothing and fondled her.15

None of the described items and no other stolen property was located during the search. As the officers stood on a small balcony awaiting the car that was to pick them up, however, one of them noticed a small pot containing marijuana plants. Further investigation disclosed a similar pot on top of a bird cage in the living room.16 The plants were seized, and a return on the warrant described the items seized as “one hundred fifty-five 6-8 [inch] green plants.”17

Although the defense contested the sufficiency of the affidavit to establish probable cause, the state appellate court ultimately determined that the allegations were sufficient to obtain a warrant.18 The warrant apparently described the premises to be searched with adequate precision. The enumerated items also appear to have been described sufficiently, although the warrant’s authorization to search for “other [undescribed] stolen property”19 may have rendered it subject to challenge.20 The most difficult issue, however, was raised by Sierra’s claim that even if the warrant was valid and authorized a search of her premises, the manner in which the officers conducted this particular search rendered it unreasonable under the fourth amendment.21 Although the appellate court’s discussion does not detail Sierra’s precise arguments, the defense version of the search suggests a number of related but distinguishable claims.

If the alleged mistreatment of Alfortish was part of the process of gaining entry into the premises and was excessive under the circumstances, does the use of this manner of entry render the search unreasonable? Once police obtained entry, the officers allegedly caused physical damage to property, apparently unnecessarily since the damage was not essential to obtain access to locations where the stolen items might have been secreted. The officers also “damaged” the order of the premises by leaving items strewn so the occupants would have to spend considerable time and effort to return the premises to

15. Id. at 613-14.
16. Id. at 617 (Calogero, J., dissenting).
17. Id. at 617 n.2 (Calogero, J., dissenting).
18. Id. at 611-13.
19. Id. at 617 n.1 (Calogero, J., dissenting).
20. See Andresen v. Maryland, 427 U.S. 463, 479-82 (1976). In Sierra, unlike Andresen, the general catch-all clause at the end of the list apparently was not limited to items related to a specifically described single offense.
21. 338 So. 2d at 613.
their pre-search condition. Did these aspects of the officers’ conduct render the search unreasonable? What about the alleged assault upon Alfortish, apparently for purposes of learning where the items sought were secreted, and the alleged assault upon Sierra, apparently for motives unrelated to completing the search successfully? Finally, the officers remained on the premises after the search was completed but before their return ride arrived. Did this constitute an improper extension of the duration of the search and, if so, did it render the search unreasonable under the fourth amendment?

Easily imagined manipulation of the defense version of the facts raises similar issues. The report of the case does not disclose the time when the search was conducted. If the search had taken place at 3:00 A.M. and the police offered no justification for that particular time, would the search be unreasonable? Suppose the defense evidence tended to show that the officers, without first identifying themselves and requesting admission, had destroyed the door with an axe to secure rapid and surprise entry. Would this, in the absence of justification, cause the entry and search to violate fourth amendment standards? If the officers had failed to note the seizure of the plants on their return of the warrant, or if they had failed to make any return at all, would the search, or perhaps only the seizure of the plants, have been unconstitutional?

All of these actual and hypothetical claims of unconstitutionality assume that the reasonableness requirement of the fourth amendment goes beyond requiring adequate justification for a search and an adequately precise warrant. As the Louisiana Supreme Court noted in responding to Sierra’s arguments, the case law is far from clear on these issues. As the next section illustrates, the United States Supreme Court has offered only marginal help in analyzing these issues.

III. CONFLICTING SIGNALS FROM THE SUPREME COURT

Despite the numerous “means” issues law enforcement conduct presents and the frequency with which they must arise, the Supreme Court seldom has been inclined or compelled to address them. In part, this infrequent treatment results from a variety of statutes which specifically address a number of these problems. As the following discussion demon-
strates, the Court has been uncritically willing to exclude evidence in federal trials based on the investigating officers' failure to follow federal statutory standards. Consequently, the Court has frequently found no need to reach constitutional questions in federal cases.

Probably the most direct suggestion that fourth amendment reasonableness extends beyond the warrant and probable cause requirements was contained in *Schmerber v. California.* Following an automobile accident involving Schmerber, law enforcement authorities caused a physician at the hospital where Schmerber was being treated to extract a blood sample from him to determine its alcohol content. In addressing the admissibility of the report resulting from chemical analysis of the blood sample, the Court acknowledged that the extraction of the blood constituted a "search" separate from the seizure of Schmerber's person and an incidental search of his body that did not involve intrusion beneath the surface of the skin. Applying the fourth amendment's requirement of adequate evidence to justify a search, the Court held that a "clear indication" that searchers would obtain evidence relevant to guilt was necessary for a search involving an intrusion below the surface of the body. On the facts of the case, the Court concluded that the information constituting probable cause to arrest satisfied this requirement. The Court also determined that the officer reasonably could have believed that delaying the search to obtain a warrant could have frustrated the search, because the body would absorb some or all of the alcohol during the delay. Thus the case came within the "exigent circumstances" or "emergency" exception to the demand of a warrant.

The Court went on to analyze both the reasonableness of the officer's choice of a method to conduct the search and the unreasonableness of manner in which that method was undertaken on the facts of the case. Extraction and analysis of blood samples, the Court noted, is a highly reliable method of determining blood alcohol content. Moreover, the Court found that such extractions are "commonplace" and involve "virtually

24. Id. at 758.
25. Id. at 769-70.
26. Id. at 770.
27. Id.
28. Id. at 770-71.
29. Id. at 771.
no risk, trauma or pain,” although the Court left undecided whether a different conclusion would be required if the facts showed that Schmerber, because of “fear,” “health” or “religious scruple” found the extraction of blood more intrusive than would most persons.\(^{30}\) In addition, the Court stressed that the actual extraction of blood from Schmerber was accomplished by a physician in a hospital according to accepted medical practices.\(^{31}\) The Court cautioned, however, that extraction of blood by a police officer at a police station “might be to invite an unjustified element of personal risk of infection and pain,”\(^{32}\) which by implication would render the manner of conducting the extraction unreasonable.

Because the search was found reasonable, the Court’s suggestion that in other situations the manner of conducting a search of a suspect’s blood content would render it unreasonable was dicta. The Schmerber dicta, however, strongly suggests that the Court is willing, at least occasionally, to expand fourth amendment reasonableness beyond the evidentiary and warrant requirements. In some situations, the method chosen to effectuate the search may, by reason of the discomfort or risk of injury, render the search unreasonable. Moreover, even a method generally reasonable under this approach may be performed in such a manner as to render the particular search unreasonable.

In contrast to the Schmerber dicta, however, the Court has been substantially less inclined to expand the reasonableness analysis to scrutiny of the methods of search or seizure in other contexts. Several areas bear specific examination.

A. PREMISES SEARCHES

Searches of buildings or premises are perhaps the “typical” searches brought to mind when fourth amendment matters are raised. When the premises at issue are residential, the searches have been described by the Court as infringing upon a particularly sensitive aspect of the privacy interests the fourth amendment protects.\(^{33}\) Despite this pronouncement of excep-

\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Id. at 772.
\(^{33}\) See, e.g., South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (the Court has traditionally drawn a distinction between automobiles and homes or offices for fourth amendment purposes; “warrantless examinations of automobiles have been upheld in circumstances in which a search of home or office would not.”). See also Vale v. Louisiana, 399 U.S. 30, 33-34 (1970) (warrantless search
tional sensitivity to searches of premises, the Court has only occasionally addressed manner-of-search questions in this context.

1. Entry

Although the Supreme Court has never addressed the significance, if any, of the use of excessive force to gain entry to premises to conduct a search, it has rendered decisions in several cases raising the need to announce authority and purpose prior to "breaking" to accomplish entry. These decisions, however, leave the fourth amendment issue carefully unresolved.

In Miller v. United States, federal officers entered a District of Columbia apartment by breaking a chain lock and overcoming the occupant's resistance. The officers made no prior announcement of their purpose to arrest one of the occupants or demand for entry. Without carefully distinguishing between the validity of the entry and that of the arrest that followed, the Court held that the applicable standards governing entry to serve and execute a search warrant were those imposed by the law of the District of Columbia. The precedent dealing with entry to make an arrest in the District of Columbia, the Court continued, had developed a standard "substantially similar" to that imposed by a federal statute regarding entry to execute a search warrant. Under the federal statute, an officer was authorized to "break" a door to obtain entry only after giving notice of his authority and purpose and after being denied entry. The Court traced the purpose of the federal statute and the District of Columbia case law to a common law rule limiting authority of officers to break into a house to effect an arrest, and found that in the case before it the officers had not provided the required notice. Because the facts of residential premises unreasonable despite probable cause to believe defendant had secreted drugs there and presence of defendant's mother and brother on premises).

34. The Court has construed "breaking" quite broadly. See infra text accompanying note 60.
35. 357 U.S. 301 (1958).
36. Id. at 303-04.
37. Id. at 305-06.
40. 357 U.S. at 306 n.5.
41. Id. at 306-09.
42. Id. at 313.
failed to show that the occupants were aware of the officers' authority and purpose, there was no need to consider whether the rule being applied permitted an exception in such situations.\textsuperscript{43}

Neither Justice Brennan's majority opinion nor Justice Clark's dissent suggests that the matter before the Court had constitutional overtones. In addition, the Court did not address the possibility that it could have held the evidence admissible despite the violation of the common law requirement.\textsuperscript{44} Stressing that the requirement being applied was "deeply rooted in our heritage" and therefore should not be given "grudging application,"\textsuperscript{45} the Court held the evidence located in the search incident to the subsequent arrest inadmissible.\textsuperscript{46}

\textit{Ker v. California}\textsuperscript{47} appeared to present fourth amendment issues regarding permissible entry, but the Court managed to avoid explicitly addressing them. While under police surveillance, Ker had apparently engaged in a drug transaction, and officers pursued him until he disappeared after making a U-turn in the middle of a block. The officers proceeded to Ker's apartment, obtained a key from the building manager, and entered by unlocking the apartment door. While in the living room arresting Ker, the officers observed marijuana in the kitchen through an open door. Both Ker and his wife were charged and convicted of possession of marijuana.\textsuperscript{48}

All members of the \textit{Ker} Court, except Justice Harlan, agreed that under \textit{Mapp v. Ohio}\textsuperscript{49} the standards of reasonableness imposed upon state law enforcement officers are the same as those imposed directly upon federal officers by the fourth amendment. In applying these standards, however, the Justices parted company. Justice Clark, joined by Justices Black, Stewart and White, reasoned that the validity of the entry was to be determined by California law, subject to the requirement that no police action violative of the fourth amendment be authorized by state law.\textsuperscript{50} The Court interpreted California law as requiring prior announcement before entry, with an exception

\begin{itemize}
\item\textsuperscript{43} \textit{Id.} at 310.
\item\textsuperscript{44} The absence of notice, Justice Brennan concluded, rendered the arrest "unlawful" and the seized evidence therefore should have been suppressed. \textit{Id.} at 313-14.
\item\textsuperscript{45} \textit{Id.} at 313.
\item\textsuperscript{46} \textit{Id.} at 313-14.
\item\textsuperscript{47} 374 U.S. 23 (1963).
\item\textsuperscript{48} \textit{Id.} at 26-29.
\item\textsuperscript{49} 367 U.S. 643 (1961). \textit{See supra} note 2.
\item\textsuperscript{50} 374 U.S. at 34 (opinion of Clark, J.).
\end{itemize}
for "exigent circumstances."51 Emphasizing that the officers had reason to believe Ker was in possession of easily-destructible drugs and, on the basis of his U-turn, might be expecting police, the result dictated by state law, that the absence of prior announcement was excusable in this case, was within fourth amendment limits.52 Justice Harlan concurred, reasoning that state law enforcement conduct should be judged under a standard of "fundamental fairness" and that under this standard the conduct of the California officers did not violate the fourth and fourteenth amendments.53

Justice Brennan, joined by Chief Justice Warren and Justices Douglas and Goldberg, dissented. Justice Brennan found a clear fourth amendment requirement of prior announcement, subject only to certain exceptions.54 Stressing the ambiguity of the evidence Justice Clark relied upon to conclude that Ker was aware police were approaching and was attempting to destroy the drugs he possessed, Justice Brennan found no basis for invoking any of the exceptions.55

Finally, in Sabbath v. United States,56 the Court addressed the admissibility of evidence obtained in a search incident to an arrest by federal officers. The officers had opened an unlocked but closed door to gain entry to make an arrest.57 Speaking for eight members of the Court, Justice Marshall acknowledged that the federal statute58 expressly dealt only with entries to execute search warrants. Citing Miller, he explained that entries to effect an arrest are to be tested by criteria identical to those in the statute.59 Although the statute by its terms applied only to a "breaking" to gain entry, opening a closed door was a breaking under the statute's language.60 Without addressing whether an "exigent circumstances" exception could be read into the federal statute, the majority noted that

51. Id. at 39 (opinion of Clark, J.).
52. Id. at 40-41 (opinion of Clark, J.).
53. Id. at 46 (Harlan, J., concurring in the result).
54. Id. at 47 (Brennan, J., dissenting).
55. Id. at 60-61 (Brennan, J., dissenting).
57. Id. at 587.
58. See supra text accompanying note 39.
59. 391 U.S. at 588. Justice Marshall referred to the "validity" of entries without addressing whether the issue was of a constitutional, statutory or judicial supervisory nature. See id.
60. Id. at 590. Justice Marshall reasoned, without citing authority, that the statute was designed to proscribe unannounced intrusions into dwellings and that entry by opening a closed but unlocked door was as much an intrusion as entry accomplished by forcing open a locked door. Id.
no facts were produced that would bring the case within any of the exceptions that might be recognized. Justice Marshall cited *Ker* in a footnote and noted that exceptions to "any possible constitutional rule relating to announcement and entry" have been recognized and might well be read into the federal statute.

These so-called "no-knock" cases reflect a clear sympathy on the part of a majority of the Court for a requirement of advance notice prior to entry. This tendency is most evident in the Court's willingness to extend the federal statutory requirement in *Sabbath* and its uncritical willingness, evident in both *Sabbath* and *Miller*, to enforce a nonconstitutional advance notice requirement with an exclusionary sanction. The cases also reflect careful effort to avoid addressing the extent, if any, to which the fourth amendment requirement of reasonableness embodies any such requirement. In *Ker*, this may have been due in part to the majority's desire to find a role in the federal standard for state and local search and arrest rules. It seems likely, however, that this avoidance also reflects a perception on the part of the Court that to accept an advance notice requirement would be to expand the concept of fourth amendment reasonableness beyond the warrant and evidentiary requirements, a step the Court apparently believes should be taken only when necessary and only after full consideration of the long-run ramifications of the action.

Perhaps because of a conscious desire to avoid the fourth amendment issue, the Court's discussions do not address the possible relationship between the prior announcement requirement and fourth amendment interests. In *Miller*, the Court characterized the breaking of a house door to effect an arrest as

61. *Id.* at 591.

62. *Id.* at 591 n.8. In *Ker*, the Court stated that it had held in *Wong Sun* v. United States, 371 U.S. 471 (1963), that federal officers had failed to comply with the federal statute, 18 U.S.C. § 3109, in executing a warrantless arrest. 374 U.S. at 40 n.11. *Cf.* *Sabbath* v. United States, 391 U.S. 585, 588 (1968) (officers required by statute to announce "authority and purpose" before "break[ing]" in by opening a closed but unlocked door, citing *Wong Sun*). In *Wong Sun*, however, the issue was whether the arrestee's flight from the officer seeking admission constituted significant evidence of guilt bearing upon probable cause for the subsequent arrest. In finding no probable cause, the Court reasoned that where an officer fails to state his authority and purpose when seeking admission, the subject's flight must be regarded as "ambiguous conduct" adding little or nothing to the information establishing probable cause. 371 U.S. at 482. Thus *Wong Sun* does not address directly the different question of the independent effect of a failure to announce upon the statutory or constitutional validity of the officer's entry and the subsequent arrest.
“invad[ing] the precious interest of privacy summed up in the ancient adage that a man’s house is his castle.”63 There is no discussion, however, of the relationship of this aspect of privacy to those interests protected by the fourth amendment nor of the manner in or extent to which a prior announcement requirement would further fourth amendment interests. In a later footnote, the Miller Court observed that compliance with a prior announcement requirement also serves to safeguard police who might, in the absence of announcement, be mistaken for prowlers and shot by a fearful householder.64 The Court might also have noted that compliance might further the safety of others, including the occupants, by avoiding injuries from a fracas that might result from unannounced entry. But there is in fact no discussion in Miller, or in the other Supreme Court decisions as to how, if at all, the fourth amendment serves the purpose of minimizing violence during police activities. Although the cases reflect the Court’s obvious sympathy for a requirement of prior announcement, the discussions make no effort to relate the functions of such a requirement to those interests the fourth amendment protects or ought to protect.65

2. Timing of the Search: Nighttime Searches

Given the arguably greater intrusiveness of a search conducted during nighttime hours, the fourth amendment might be construed as protecting an interest in having otherwise legitimate searches conducted only at “reasonable” times. The closest the Court came to addressing the time of search issue was

63. 357 U.S. at 307.
64. Id. at 313 n.12 (citing McDonald v. United States, 335 U.S. 451, 460-61 (1948) (concurring opinion)).
65. Justice Brennan’s opinion in Ker was a more direct effort to relate prior announcement to fourth amendment interests. For example, he stressed that prior announcement was required even before the adoption of the Bill of Rights, 374 U.S. at 47, and that state and lower federal courts had also accepted such a requirement, id. at 49-50. Turning to the historical abuses that gave rise to the fourth amendment, Brennan acknowledged that the problems at issue then were “not . . . exactly” ones of unannounced entry, id. at 51, but urged that both the general warrant and unannounced entry “clearly invited common abuses.” Id. Then, in conclusory terms, he proclaimed that unannounced entries, as well as nighttime entries, are “even more offensive to the sanctity and privacy of the home” than announced and daytime entries. Id. at 52. Brennan seemed willing to concede that not all procedural aspects of search and arrest law are necessarily constitutional mandates, and asserted that the requirement of prior announcement “is no mere procedural nicety or formality.” Id. at 49. Presumably, in Brennan’s view, fourth amendment reasonableness does not constitutionalize such “niceties” or “formalities,” although he did not address the criteria which distinguish them from the procedural requirements that are incorporated into fourth amendment reasonableness.
in Gooding v. United States, 66 which involved the execution of a search warrant. An affidavit submitted by a member of the District of Columbia Metropolitan Police Department indicated that, upon the basis of an informer's report of purchases of heroin from Gooding at his apartment, the affiant was "positive" that additional heroin was being concealed there. 67 A search warrant issued, authorizing the officers to make the search "at any time in the day or night." The warrant was executed at about 9:30 P.M., and the search resulted in discovery and seizure of heroin and drug paraphernalia.

After his indictment on drug charges, Gooding moved for suppression of the results of the search. He did not urge that the nighttime search violated the fourth amendment, however. Rather, Gooding argued only that the issuance of the warrant did not comply with the applicable statutory provisions regarding nighttime warrants. 68 Consequently, the subsequent litigation did not directly raise any constitutional issues. Nevertheless, the Court's handling of the case contains useful indications of its attitude toward fourth amendment issues arising from the time at which a search is conducted.

The major task the Court confronted in Gooding was deciding which of several statutory provisions governed the issuance of the search warrant in that particular case. The alternative statutory provisions differed significantly in the extent to which they acknowledged that the subject of the search had an interest in the time at which the search was conducted and, to the extent that such an interest was acknowledged, in the manner in which that interest was protected. Those which acknowledged such an interest adopted widely varied mechanisms to protect it. One provision of the District of Columbia Code failed to recognize any interest in avoiding nighttime searches; it authorized the issuing judge to insert in the warrant a directive that it could be served at any time during the day or night. 69 A second provision was the then-current version of Rule 41 of the Federal Rules of Criminal Procedure. 70 Rule 41 permitted the judge to authorize service of a warrant at any

67. The affiant apparently anticipated the application of FED. R. CRIM. P. 41. See infra text accompanying note 71.
70. The Rule has since been amended to require, for nighttime service, a specific authorization in the warrant based upon "reasonable cause shown." See FED. R. CRIM. P. 41(c).
time, including the nighttime, if the affidavits supporting the warrant established "positive[ly]" that the property to be seized was on the premises.\textsuperscript{71} This provision apparently recognized a need to limit nighttime searches, but sought to circumscribe their availability only by manipulating the traditional evidentiary requirement to require more evidence than is ordinarily needed to establish probable cause. A third possibility was a general provision of the District of Columbia Code, which required that search warrants be served in the daytime unless the warrant authorized service at any time.\textsuperscript{72} Such authorization was permitted upon a showing to the issuing judge that service during the daytime was impossible, or that the property sought was likely to be removed if the search was not immediately made in the nighttime, or that the property sought was not likely to be found on the premises except during the nighttime. This provision sought to minimize nighttime intrusions by imposing a specific requirement that a judicial officer assess the adequacy of the justification for the execution of the warrant in the nighttime before the search could take place. A fourth alternative was a federal statute which permitted the issuance of a search warrant for controlled substances at any time, including nighttime, if the issuing authority "[was] satisfied that there [was] probable cause to believe that ground exist[ed] for the warrant and for its service at such time."\textsuperscript{73} The meaning of this section was unclear and depended largely upon the construction given the requirement of "probable cause to believe that grounds exist[ed] for . . . service [of the warrant] at [nighttime]." If the section were construed to require more than probable cause to believe the seizable items would be on the premises during the nighttime, it would recognize and might to some extent protect the subject's interest in being free of the exceptional intrusiveness of a nighttime search.

A six-member majority of the Court resolved the case by employing general tenets of statutory construction and gave no indication that there were constitutional overtones. The Court took this approach despite a vigorous dissent by Justice Marshall, who expressed the view that the fourth amendment protects against unjustified execution of search warrants in the nighttime and requires a showing of specific justification for such timing of the search.\textsuperscript{74} Although Justice Marshall ac-

\begin{itemize}
\item \textsuperscript{71} See \textit{Fed. R. Crim. P. 41(c)}.
\item \textsuperscript{73} \textit{21 U.S.C.} § 879 (1976).
\item \textsuperscript{74} \textit{416 U.S.} at 465 (Marshall, J., dissenting).
\end{itemize}
knowledged the constitutional issue "[was] not presented in this case and need not be resolved," he urged that constitutional considerations be taken into account in addressing the statutory construction issues presented by the case.

The opinion of the Court evinces no sensitivity to or acknowledgement of constitutional considerations. Relying on the proposition that more specific statutes should be preferred over general ones, and pointing to the apparent intent of Congress to maximize the number of law enforcement agencies that could utilize congressionally-provided weapons against drug traffic, the majority concluded that the federal statute governed the issuance of the warrant. In probing the meaning of this statute, the majority compared the statutory language with language used by Congress in other provisions in which Congress clearly intended to impose special requirements for nighttime searches. The majority found Congress's failure to use the specific language used in the other statutes and the apparent congressional intent to facilitate attack upon drug abuse determinative, and concluded that the statute "requires no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property . . . to be searched at that time."

Justice Douglas dissented, joined by Justices Brennan and Marshall, urging that the restrictive provision of the District of

75. Id.
76. Id. at 462.
77. Id. at 446-54.
78. See supra text accompanying note 73.
80. Id. at 458. The government argued, in the alternative, that even if the warrant was issued without compliance with the applicable statute, exclusion of the resulting evidence was necessary. Brief for Respondent at 52-59, Gooding v. United States, 416 U.S. 430 (1974). The government contended that there was no fourth amendment violation which would bring Mapp v. Ohio into play, id. at 52, and that the "considerations of justice" which control whether the Court's supervisory powers dictate suppression were inapplicable because non-compliance with the applicable statute was the fault of the issuing magistrate rather than the executing officers. Id. at 54. Despite this invitation, Gooding did not respond with an argument that urged fourth amendment considerations to support suppression. Rather, he argued that in applying the exclusionary sanction no distinctions should be drawn among reasons for a search warrant's invalidity. Reply Brief for Petitioner at 13, Gooding v. United States, 416 U.S. 430 (1974). No effort was made to suggest that not all failures to follow statutory requirements should require suppression, or to define which such failures should have exclusionary results. Thus, at virtually the last minute, counsel for Gooding ignored a final opportunity to inject at least some fourth amendment overtones into the argument.
Columbia Code be held applicable. The same three justices, in a dissent authored by Justice Marshall, argued that if the majority's view that the federal statute applied was to prevail, the statute should be read to require an additional showing of justification for a nighttime search above and beyond the showing of probable cause, in light of the privacy and constitutional implications involved. Because both the first portion of the statute and the fourth amendment require a showing of probable cause to believe the contraband will be on the premises prior to issuance of the warrant, Justice Marshall maintained that the majority's construction rendered the final clause of the statute, which requires probable cause for service in the nighttime, "totally without meaning."

Although Gooding can be regarded as a case in which the Court took the issues as framed by the litigation below with no constitutional overtones, this reading is too limited. The majority's failure to acknowledge that, despite the limited nature of the issue in the case before it, the subject area has significant constitutional ramifications strongly suggests hostility toward the proposition that fourth amendment reasonableness might address the timing of searches, including those conducted pursuant to warrants.

3. Conclusion

The Court's treatment of nighttime searches in Gooding is in sharp contrast to its prior announcement decisions. Gooding demonstrated an almost total lack of sensitivity to potential fourth amendment significance of the timing of a search. The prior announcement cases, on the other hand, suggest a strong sympathy for that requirement as a matter of policy, reflected in an uncritical willingness to enforce statutory formulations of the requirement by an exclusionary sanction. Curiously, however, the Court has avoided addressing the extent to which the fourth amendment imposes any limitations upon the manner in which officers gain entry to effect a search. As a result, it remains unclear whether the fourth amendment ever requires prior announcement, whether the amendment imposes any limits upon deceptive techniques that may be used to gain entry, and, more specifically, whether the use of force beyond that

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81. See 416 U.S. at 460-61 (Douglas, J., dissenting); supra text accompanying note 72.
82. 416 U.S. at 446.
83. Id.
necessary to obtain entrance will render the entry and ensuing search unreasonable in constitutional terms.

B. SEIZURES OF ITEMS

The Court has made clear that the exercise of dominion over an item in such a way as to interfere with a subject's rights in it is a "seizure" of that item and consequently must be reasonable under the fourth amendment. The seizure may be part of an effort to engage in further search, as in United States v. Chadwick[^84] and Arkansas v. Sanders[^85] in which officers seized a footlocker and suitcase, respectively, with the intention of inspecting their contents and seizing controlled substances the officers expected to find inside. Alternatively, the seizure may be merely to maintain possession of the items for their evidentiary value, as in Warden v. Hayden[^86] or for other law enforcement purposes, such as subjecting the items to forfeiture proceedings, as in Cooper v. California[^87]. If the seizure can be made without any preliminary "search," the Court apparently requires no warrant[^88] although Coolidge v. New

[^87]: 386 U.S. 58 (1967).
[^88]: See, e.g., Cardwell v. Lewis, 417 U.S. 583, 588-96 (1974). If it is the Court's belief that seizures are exempt from the warrant requirements, the rationale for this position is not clear. In G.M. Leasing Corp. v. United States, 429 U.S. 338, 351 (1977), the Court commented that seizure of automobiles located in public places "did not involve any invasion of privacy." But the Court could not have meant that this aspect removed the action from fourth amendment coverage; the terms of the amendment itself preclude this interpretation. The Court's further discussion suggests that the warrantless seizure of the automobiles at issue in G.M. Leasing was justified by the government's right to collect taxes and other debts due it by summary proceedings. See id. at 352 n.18. To the extent that this is the rationale for the holding, the case is inapplicable to most investigatory seizures.

In Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971), Justice Stewart attempted to explain the rule according to his understanding of the amendment's primary purpose in protecting against searches. The functions of the warrant clause, Stewart urged, are to prevent searches on less than probable cause and to limit permissible searches. The plain view seizure rule does not conflict with these objectives, because it applies only when a search is either unnecessary or is otherwise justified and it does not expand the scope of the search. This analysis ignores the value of the warrant requirement in assuring that "seizures," as contrasted with searches, are "reasonable" in fourth amendment terms.

Professor Grano defends the rule primarily on the ground that seizures intrude significantly less than searches upon protected fourth amendment interests and that this justifies relaxation of the limits imposed upon seizures. See Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 Am. Crim. L. Rev. 603, 647-48 (1982). In United States v. Chadwick, 433 U.S. 1 (1977), Chad-
Hampshire suggests that the right to make a "plain view" and warrantless seizure may apply only when the officers come upon the item "inadvertently." Regardless of the situation, however, the fourth amendment clearly requires that officers have probable cause to believe the item is subject to seizure. Officers may make seizures during a search conducted under the authority of a warrant, during a warrantless search, or under circumstances in which the item is so situated that no pre-seizure "search" is involved.

At least two aspects of seizures, in addition to the requirement of probable cause or other sufficient evidence and the need for a warrant, raise questions of fourth amendment reasonableness: the duration of a seizure and the return on a search warrant.

1. Duration of Seizures

Even if a law enforcement officer acts reasonably in taking control of an item during a search, the continued assertion of control over the item may become unreasonable because of its length. To the extent that one's possessory or control interest is increasingly infringed as one's property remains in official

wick had a large footlocker in his possession at the time of the incident at issue. In commenting upon his interests, the Court indicated that "a search of the interior [of the footlocker] was . . . a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker." Id. at 13 n. 8. It is not clear why seizures should be regarded as less intrusive than searches or why the difference should be regarded as sufficiently large to render the major procedural aspect of "reasonableness" inapplicable to searches. See Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (whether search of a car or seizure of it until warrant is obtained is a greater intrusion upon interests protected by fourth amendment is "debatable" and "may depend upon a variety of circumstances"). Elsewhere, Grano has argued that searches tend more than seizures to permit authorities to discern hidden thoughts and to find hidden possessions, major concerns of the amendment. Letter from Joseph D. Grano to George E. Dix (July 15, 1982). Some searches are intrusive largely because of their interference with use of the searched property and some seizures may assist the government in the kind of inquiries Grano regards as being at the forefront of fourth amendment concern, however.

Perhaps the distinction can be defended on grounds of exigency. In almost every case, seizure of an item in plain view will also fall within an "exigent circumstances" exception to any applicable warrant requirement. If this is correct, a general rule requiring a warrant may be undesirable because no general rule should be recognized which applies to fewer cases than its exceptions. Cf. Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971) (opinion of Stewart, J.) (in plain view seizure situations, "it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant.").
custody, the longer the duration of custody, the greater the intru-
sion upon protected interests. Moreover, continued custody
of an item may serve no legitimate law enforcement interest,
because any required search, inspection, or testing of the item
can conceivably be done with dispatch. Consequently, the jus-
tification for the initial seizure may disappear as the detention
continues.

The case law contains little support, however, for the view
that fourth amendment reasonableness requires that the dura-
tion of a seizure be limited by the purpose of that seizure. In
Chambers v. Maroney,\textsuperscript{91} for example, the Court held that a re-
cently stopped vehicle that was subject to search could be de-
tained for later movement to the police station in order to
conduct the search there. Although the result in Chambers
arguably turned upon the practical difficulty of safely conducting
a field search in that particular situation,\textsuperscript{92} Texas v. White\textsuperscript{93}
appears to have dispensed with any need to justify a decision to
assume custody of a vehicle for movement to the stationhouse
for search.

The only support for a fourth amendment limitation upon
the duration of a seizure appears in Justice White's dissent in
Coolidge v. New Hampshire.\textsuperscript{94} Police seized Coolidge's auto-
mobile because there was probable cause to believe it had been
used to transport the victim of a homicide. Searches of the ve-
hicle conducted immediately after its seizure and eleven and
fourteen months later revealed incriminating information. A
plurality of the Court found Chambers inapplicable because
there had been no right to conduct a warrantless search of the
automobile where it was found.\textsuperscript{95} Unlike the automobile in
Chambers, Coolidge's car was not recently stopped and thus
not sufficiently movable to invoke the exception to the warrant
requirement, and consequently, the police had no right to
search that continued through the movement of the car to the
station. Justice White, joined by the Chief Justice, dissented
on the ground that the car was evidence of Coolidge's guilt
which the officers came upon in "plain sight" and could there-
fore seize, retain, and search.\textsuperscript{96} Explaining his unwillingness to
rely on Chambers, Justice White suggested that Chambers con-

\begin{itemize}
  \item \textsuperscript{91} 399 U.S. 42 (1970).
  \item \textsuperscript{92} See \textit{id.} at 51.
  \item \textsuperscript{93} 423 U.S. 67 (1975).
  \item \textsuperscript{94} 403 U.S. at 510.
  \item \textsuperscript{95} \textit{id.} at 463 n.20.
  \item \textsuperscript{96} \textit{id.} at 510, 521 (White, J., dissenting).
\end{itemize}
templates "some expedition" in completing the search at the stationhouse so the automobile can be released and returned to its owners. Even if under Chambers the officer validly seized the car and moved it to the stationhouse for search rather than searching it at Coolidge's home, Justice White concluded that the retention of the car for over a year rendered its seizure unreasonable and that the searches conducted by virtue of this retention were thus necessarily tainted. Despite Justice White's views, however, there is little support in Supreme Court decisions for the proposition that citizens have an interest protected by the fourth amendment in having any seizure, valid at its inception, limited to a duration reasonably related to the purpose of the seizure.

2. Return on a Warrant

A related matter involves the fourth amendment reasonableness of an officer's failure to make a complete and accurate return on a warrant. Local requirements for search warrants generally include a requirement that the executing officer make a return to the issuing court or judge and file an inventory of the items seized with the court. This requirement serves several functions. To some extent, the return requirement acquaints the issuing judge with the facts of the search and any seizures that took place. This knowledge may alert the judge to improprieties that might not otherwise come to the judge's attention. In addition, the inventory and return serve to document the seizures made, to subject the items to the control of the court, to maximize the opportunity of the owners of the items rapidly to contest the validity of the seizures and, if the seizures are determined to be invalid, to secure the return of the property. Thus the return might be viewed as a procedural means of assisting subjects of searches to minimize the duration of improper seizures of their property.

In the one case in which the Supreme Court has been confronted with a search warrant return issue, Cady v. Dombrowski, the issue was summarily dismissed. In Dombrowski, officers secured a warrant to search an automobile for evidence

97. Id. at 523.
98. Model Code of Pre-Arraignment Procedure § 220.4 commentary (Official Draft 1975). Although statutes providing for a return generally do not prescribe in any detail what is necessary, the need for an inventory of seized property "is well-nigh universal." Id. at 517. Several states also require a description of the process of execution of the warrant. Id.
relating to a homicide investigation. The judge also issued an oral order authorizing officers to seize the car. That evening, the vehicle was towed to the sheriff's garage and searched, either before being moved or at the garage. Police prepared an inventory the same evening listing a number of items seized from the car. The inventory was not filed, however, until the next day, when the issuing judge held a hearing on the return. That morning, before the hearing, an employee of the State Crime Laboratory conducted another examination of the automobile in the sheriff's garage. During this examination, the searcher assumed custody of a white sock and a portion of a floor mat. These items were not listed on the return prepared earlier but filed after the laboratory employee's examination. The Circuit Court of Appeals, after rejecting other offered justifications for the laboratory employee's inspection and seizure, examined the possibility that his actions might be authorized by the search warrant. The court rejected this possibility on the basis that the warrant authorized a single search which was complete before the laboratory employee made his inspection. In reaching this conclusion, the court assumed, erroneously, that the return on the warrant had been filed, rather than merely prepared, before the employee's inspection and, correctly, that the fruits of the employee's inspection were not included in the return.

The Supreme Court reversed, emphasizing that the return was not filed until after the laboratory employee's inspection. The Court reasoned that the seizure of the sock and floor mat occurred while a valid search warrant was outstanding and thus the warrant justified the search for and seizure of these items. As to the failure to include these items in the return, the Court stated, without discussion and without citing any authority, that "we do not deem it constitutionally significant that they were not listed in the return of the warrant. The ramifications of that 'defect,' if such it was, is purely a question of state law." The four dissenters took the position that remand was necessary to determine whether the search of the car was the "fruit" of what they regarded as an invalid earlier search, and therefore did not reach the impact of the incomplete return.

The significance of Dombrowski should not be underesti-

100. Dombrowski v. Cady, 471 F.2d 280, 286 (7th Cir. 1972).
101. Id.
102. 413 U.S. at 449.
103. Id.
104. Id. at 454 (Brennan, J., dissenting).
mated. The case apparently constitutes a flat rejection of the view that fourth amendment reasonableness incorporates, at least to some extent, the major postsearch aspect of traditional search warrant law—the requirement of an accurate return. Moreover, the Court apparently adopted this position without an exploration of the interests the return requirement protects and the extent to which those interests are or should be protected by the fourth amendment. The offhand manner in which the Court rejected the argument suggests that the majority regarded the claim as bordering upon frivolous.

3. Conclusion

Although the reasonableness of a seizure might depend upon the length of time the state exercises control over an item, the Supreme Court's decisions provide little support for this possibility. This absence of support may explain the Court's failure in Dombrowski to consider the possible functions the return process might serve and the relationship of those functions to interests protected by the fourth amendment. Regardless of the propriety of the Court's result, its analysis grossly oversimplifies the issue.

C. DETENTIONS OF THE PERSON

The Supreme Court has recognized that detentions of the person constitute "seizures" within the meaning of the fourth amendment and must be "reasonable" in fourth amendment terms. The Court's decisions have attempted to distinguish at least six different types of detentions: arrests, field stops for interrogation, stationhouse investigatory detentions, investigatory detentions at fixed checkpoints in reasonable proximity to the international border, detentions at the scene

106. See, e.g., Draper v. United States, 358 U.S. 307, 310-11 (1959). The Court has never identified the distinguishing characteristic of an arrest. Specifically, it has not determined whether some detentions are from their inception "arrests" because of the officer's intention to bring formal charges against the subject. Under the analysis of at least some courts, the officer's intent appears to be the controlling consideration. See, e.g., State v. Darrah, 64 Ohio St. 2d 22, 25, 412 N.E.2d 1232, 1231 (1980) ("an arrest, in the technical, as well as the common sense, signifies the apprehension of an individual or the restraint of a person's freedom in contemplation of the formal charging with a crime.").
of execution of a search warrant,\textsuperscript{110} and grand jury appearances.\textsuperscript{111} Unlike searches, the Court has generally exempted detentions of the person from the warrant requirement.\textsuperscript{112} Therefore, to find a detention of the person is reasonable, the Court usually has required only that the detention be supported by adequate evidence. In defining the amount of evidence required, the Court has referred to the distinctions set out above. Arrests must be supported by "probable cause,"\textsuperscript{113} while field stops for investigation require only "reasonable suspicion."\textsuperscript{114} Fixed checkpoint detentions and grand jury appearances, on the other hand, are exempted from any evidentiary requirement of reasonableness.\textsuperscript{115}

Detentions of the person present perhaps even more opportunities than searches of premises and seizures of items for the Court to consider characteristics other than the existence of adequate evidence to justify the intrusion and the warrant process's role in establishing the adequacy of this evidence. Again, however, there are few explicit discussions of these issues in Supreme Court opinions, and the signals in the decisions are inconsistent and conflicting.

1. \textit{Stationhouse Investigatory Detentions: The Davis Dicta}

In \textit{Davis v. Mississippi},\textsuperscript{116} the Court held that the police unreasonably detained Davis and moved him to the stationhouse to obtain fingerprints. The unreasonable detention and movement required suppression of subsequently developed evidence. Although dicta in Justice Brennan's majority opinion suggested that under certain "narrowly-defined" circumstances such detention would be reasonable upon less than traditional probable cause, the dicta also suggested a willingness to define those circumstances in part according to the means used to accomplish the detention and investigation. Noting the absence of any danger that fingerprints would be destroyed, the Court stated that "the detention need not come un-

\begin{itemize}
\item[111.] See \textit{United States v. Dionisio}, 410 U.S. 1, 9 (1973).
\item[113.] Draper v. United States, 358 U.S. 307, 310 (1959).
\end{itemize}
expectedly or at an inconvenient time."\textsuperscript{117} In the case before it, the Court observed, with apparent disapproval, that Davis had been compelled to undergo interrogation as well as fingerprinting during his detention.\textsuperscript{118} This observation suggests that detention for fingerprinting on less than probable cause is constitutionally acceptable only if the police are barred from taking advantage of the suspect's presence for other purposes. Davis had been detained for fingerprinting twice on occasions nearly ten days apart. On the first occasion he was apparently released promptly. The second detention, however, lasted three days, and the fingerprints were not taken until the third day. The Court did not address whether the length of the second detention might have exceeded what would be acceptable under the Constitution, but did stress that requiring him to submit to a second detention, for no apparent reason, constituted a deviation from fourth amendment limitations.\textsuperscript{119}

Although Davis presents an unremarkable holding, the dicta contains a fascinating comment by the Court that, given what it perceives as the extreme reliability of fingerprint evidence\textsuperscript{120} and its ability to apply the warrant requirement to detentions for fingerprinting,\textsuperscript{121} even stationhouse detentions for this purpose might be acceptable if made upon less than probable cause. In an apparent tradeoff for this relaxation of the probable cause requirement the Court expressed a willingness to expand the fourth amendment to impose certain requirements concerning the manner in which such detentions are implemented: the detention must be preceded by notice, to avoid intrusive surprise; certain unexplained limits must be placed on the time the detention is implemented, to avoid the intru-

\textsuperscript{117} Id. at 727.
\textsuperscript{118} Id. at 728.
\textsuperscript{119} Id.
\textsuperscript{120} "[F]ingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identification or confessions." Id. at 727.
\textsuperscript{121} "[B]ecause there is no danger of destruction of fingerprints . . . the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprint context." Id. at 727-28. It is unclear, given the holding in United States v. Watson, 413 U.S. 411, 423-24 (1976), that no warrant is necessary for an arrest, what "general requirement" of a warrant Justice Brennan had in mind. Moreover, Justice Brennan's suggestion that exigent circumstances will never exist and therefore the Court need not recognize an exception to the warrant requirement is simplistic. Even if fingerprints are not destructible, a suspect who is aware that his fingerprints are incriminating may, rather than submit to the procedure, remove his intact fingerprints, fingers, and the remainder of his body from the jurisdiction. It appears that at least portions of the "Davis dicta" were not particularly well-conceived.
sive inconvenience of detentions effected at certain times; during the detention, officers must be barred from using the opportunity presented by the suspect's presence for other investigatory techniques, such as questioning; and the detention must be a single one, at least in the absence of justification for repeated detentions. This indication of a willingness to read broadly the requirement of reasonableness stands in interesting contrast to the Court's reticence in other areas related to detentions of the person.

2. Durations of Detentions

There are substantial indications that a detention of the person, valid at its onset, may become "unreasonable" under the fourth amendment because of its duration. Although this possibility is raised most directly by investigatory detentions upon less than probable cause, there are some signals that suggest a similar issue may be raised by a traditional arrest upon probable cause.

a. Nonarrest Detentions

Although the Court has never attempted definitively to distinguish arrests from those detentions that are at least initially valid despite the absence of probable cause, it appears likely that the duration of the detention is a major distinguishing factor. In other words, an investigatory detention upon less than probable cause may not last as long as an arrest. The Court has not expressly held that the duration factor is the basis for distinguishing different kinds of detentions, however, and its discussions provide little basis for giving that assumption much specific content. In United States v. Martinez-Fuerte, for example, which upheld "random" stops of vehicles at fixed checkpoints, the majority repeatedly emphasized that only "stops for brief questioning" and "brief detention[s]" are authorized. The facts before the Court required no elaboration upon the meaning of "brief," however, and the majority offered no useful discussion on this point.

Dunaway v. New York addressed the issue more definitely. Officers with "reasonable suspicion" but less than "probable cause" to believe Dunaway was involved in a rob-

123. Id. at 566.
124. Id. at 558.
bery-murder took him into custody at a neighbor's house, transported him to the stationhouse, and began questioning that resulted in his making statements and drawing sketches which implicated him in the offense. The first incriminating statement was made within an hour of the initiation of the interrogation. Although the officers apparently had probable cause to believe Dunaway was involved in the crime once this statement was made, a majority of the Court found the statements and sketches inadmissible, and held that the officers "violated the Fourth and Fourteenth amendments when, without probable cause, they seized [Dunaway] and transported him to the police station for interrogation." This language does not specify, however, the fatal error in the officers' course of conduct and the point at which the detention of Dunaway became unreasonable under the fourth amendment. It is unclear whether the fatal defect was the officers' detention of Dunaway for at least an hour on the basis of only "reasonable suspicion," movement of Dunaway from the scene of the detention to the stationhouse, beginning interrogation during the detention at the stationhouse, initially detaining Dunaway with the intention of moving him to the stationhouse, and perhaps questioning him there, or some combination of these factors. Despite the majority's failure to indicate the error, a reasonable reading of the Court's opinion suggests, at a minimum, that an investigatory detention in the field upon less than probable cause becomes unreasonable after an hour, at least when during that period the subject has been moved from the field to a stationhouse and subjected to interrogation. Under this reading, the duration of the detention is relevant to the fourth amendment reasonableness of the detention, although not necessarily independently controlling.

b. Arrests

The signals from the Court regarding the permissible duration of arrests are few and confusing. The major suggestion that reasonableness may limit the duration of an arrest is a comment by Justice Stewart in his concurring opinion in Gustafson v. Florida. Gustafson upheld the right of arresting officers to make a search of an arrestee's person, at least when the "arrest" is a detention intended to result in the subject's

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126. Id. at 203 n.2.
127. Id. at 216.
transfer to the stationhouse and formal booking on the charge. Gustafson was arrested for operating a vehicle without a valid operator's permit in his possession. Although the defense did not attack the validity of the arrest itself, Justice Stewart suggested that "a persuasive claim" might have been made that, given the minor nature of the offense at issue, the custodial arrest necessary to support an incidental search of the subject's person was unreasonable under the fourth amendment.

Basically, Justice Stewart's contention was that in those situations in which the offense implicates no serious public interest, an initially valid detention which lasts longer than is necessary to issue a summons or "ticket," and perhaps to obtain some assurance that the suspect will appear to answer the charges, becomes unreasonable because of its duration. Justice Stewart's discussion contains no indication that he recognized that the "claim" he was inviting would involve a substantial expansion of the nature of fourth amendment limitations upon arrest-type detentions.

The most significant signal that Justice Stewart misread the fourth amendment's implications regarding the duration of arrests is the Court's failure to acknowledge any fourth amendment significance in the widespread requirement that an arrested person be presented before a judicial officer without significant delay. One of the functions of this appearance is the determination of the conditions for pretrial release or detention. This function is somewhat analogous to that of the return on a search warrant. Both subject the "products" of the police action, the items seized or the person detained, to judicial supervision and thus provide the framework for terminating or modifying the seizure or detention even if that action was initially valid. If the duration of an arrestee's detention pursuant to a valid arrest triggers fourth amendment concerns, it is quite likely that the presentation of an arrestee before a magistrate, the vehicle for limiting the duration of that detention, also has fourth amendment significance.

In the relatively long period in which the Court has considered the significance of the federal requirement of prompt presentation, the Court has never explicitly suggested that this requirement has fourth amendment overtones. In *McNabb v.*

129. See also United States v. Robinson, 414 U.S. 218, 235 (1973) (arrest for operating a vehicle after revocation of an operator's permit).

130. 414 U.S. at 266-67 (Stewart, J., concurring).
United States,\textsuperscript{131} for example, federal officers arrested the defendants and detained them without the prompt presentation before a magistrate required by then-effective federal statutes.\textsuperscript{132} During this detention, the officers elicited certain incriminating statements from the defendants. Exercising its supervisory power over the administration of criminal justice in the federal courts,\textsuperscript{133} the Court held that effectuation of the congressional policy embodied in the statute's prompt presentation provisions\textsuperscript{134} mandated the exclusion of confessions obtained during a period of custody that followed a failure to present the defendants before a magistrate as required by law. The majority's discussion of the importance of the prompt presentation requirement reflects no consideration that the requirement may serve to limit the duration of an arrest that was valid at the onset.\textsuperscript{135} Rather, the Court stressed that prompt presentation "checks resort to those reprehensible practices known as the 'third degree.'"\textsuperscript{136} The Court did not specifically describe the manner in which it perceived this check as being accomplished. The Justices may have meant that prompt presentation facilitates pretrial release, which in turn eliminates the possibility of custodial interrogation that may invite coercion. Alternatively, it may have assumed that presentation before a judicial officer subjects the accused, even if still in custody, to some protective supervision of the judge and thus discourages officers from resorting to impermissible tactics during subsequent interrogation of the arrestee after continued detention. For present purposes it is sufficient to note that the majority gave no evidence that the prompt presentation requirement is important because it provides for pretrial liberty of a person whose arrest was unquestionably valid.

In Upshaw v. United States,\textsuperscript{137} the McNabb exclusionary remedy was applied to the prompt presentation requirement incorporated into Rule 5(a) of the Federal Rules of Criminal Procedure. Again, neither the majority's discussion nor that of the four dissenters reflected any fourth amendment concern. Relying on testimony given by the arresting officer, the majority added to the ambiguity surrounding the manner in which

\textsuperscript{131} 318 U.S. 332 (1943).
\textsuperscript{132} Id. at 342.
\textsuperscript{133} Id. at 341.
\textsuperscript{134} Id. at 345.
\textsuperscript{135} Id. at 343-44.
\textsuperscript{136} Id. at 344.
\textsuperscript{137} 335 U.S. 410 (1948).
prompt presentation is to check the use of "third degree" methods. The officer in *Upshaw* had specifically acknowledged his concern that if the defendant were presented, the magistrate would release him. The officer added that, even if the magistrate "held" the defendant, "we would lose custody of him and I no longer would be able to question him."138 Whether the Court regarded prompt presentation as a valuable device for securing release from improper custody or as a method of imposing judicial supervision upon presumably proper custody remained unclear after *Upshaw*. The Court did not resolve this ambiguity in *Mallory v. United States*,139 which held that delay for purposes of interrogation is "unnecessary delay" within the meaning of Rule 5(a), which requires exclusion of statements obtained during the questioning. Some of the Court's discussion in *Mallory*, however, suggests that the rationale for reliance upon Rule 5(a) may be its value in facilitating the determination of probable cause at the preliminary hearing, and thus in securing the release of a person whose detention is not in fact supported by probable cause.140

Although the Court has never directly confronted the issue, it has nonetheless implied that the Constitution does not mandate the *McNabb-Mallory* rule and consequently, that confessions obtained during delay in presenting a state defendant before a judicial officer need not be excluded from state criminal proceedings. In the Court's classic articulation of the voluntariness test for determining the admissibility of confessions, *Columbe v. Connecticut*,141 the Court emphasized that "undue delay in arraignment" is not a controlling consideration in determining the admissibility of a confession.142

The significance to be given these decisions is unclear. The Court could have reasoned in *McNabb, Upshaw* and *Mallory* that the fourth amendment requires that detention following an initially valid arrest be no longer than necessary to implement the government's interests and that prompt presentation of an arrested person is constitutionally necessary to implement this requirement. Consequently, the Court might have concluded that the officers' failure to present the defendant requires exclusion of any confession obtained after an unreasonable delay

138. *Id.* at 414.
140. *Id.* at 454.
142. *Id.* at 601.
in presentation, under *Weeks v. United States*. The availability of a nonconstitutional basis for the same result may explain the Court's failure to invoke this reasoning. Development of an exclusionary rule through the Court's supervisory power, however, is an extreme exercise of judicial authority. The Court might more appropriately have relied upon any available constitutional ground than upon its supervisory jurisdiction. On the other hand, the Court may have perceived difficulty in relating confessions, the evidence at issue, to any fourth amendment violation. Although *Weeks* clearly committed the Court to a fourth amendment exclusionary rule in federal criminal trials, the Court did not, until *Wong Sun v. United States*, accept the proposition that "verbal evidence" such as a confession could be the excludable "fruit" of a detention violative of the fourth amendment. Despite these possible explanations for the absence of fourth amendment consideration in the *McNabb-Mallory* line of cases, however, the opinions most likely reflect an assumption that prompt presentation has no fourth amendment significance.

*Gerstein v. Pugh* suggests, on first impression, that the Court's perception may have changed. In *Gerstein*, the Court held that the fourth and fourteenth amendments entitle a state defendant, arrested without a warrant and not indicted by a grand jury, to a timely judicial determination of probable cause for the detention. The decision is based, however, upon effectuation of the subject's fourth amendment right not to be arrested initially in the absence of probable cause. This basis is made evident by the Court's recognition that no judicial probable cause determination is necessary when a subject is arrested pursuant to a warrant, issued upon a prior determination of probable cause, or when a grand jury has indicted the subject and in the process determined that probable cause exists. Under *Gerstein*, the judicial determination must address only the basis for the initial detention, i.e., probable cause, and need not incorporate any justification for re-

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143. 222 U.S. 383 (1914). *Weeks* held that evidence seized during an unlawful search must be excluded from federal trials. *Id.* at 398. See also cases cited supra note 3.
144. See *Upshaw v. United States*, 335 U.S. 410, 434-36 (1948) (Reed, J., dissenting).
146. *Id.* at 485.
147. 420 U.S. 103 (1975).
148. *Id.* at 116 n.18.
149. *Id.* at 117 n.19.
taining the subject in custody. In other words, Gerstein does not address the extent to which an arrested person’s detention upon probable cause may become unreasonable because it continues longer than is necessary to effectuate the state’s purpose. Defendant’s interest in minimizing the post-arrest detention period apparently was not at issue in Gerstein. Nevertheless, the Court’s failure to distinguish such an interest suggests that the Court is inclined toward a reading of fourth amendment reasonableness that excludes this interest from protection.

3. Movement and Other Investigatory Techniques During Detention

The suggestion in Davis that stationhouse detentions upon less than probable cause would be acceptable only if officers were prevented from using the detention period as a vehicle for undertaking other investigatory techniques raises the question whether similar prohibitions against such techniques might be imposed in different situations. Unfortunately, the cases provide no ready answer to this question.

As observed earlier, the Court’s condemnation of the detention in Dunaway may have been based in part on the relation of the detention to custodial interrogation.150 It is unclear, however, whether the actual questioning or the officer’s intention to use the detention for questioning rendered the detention impermissible. In Martinez-Fuerte, on the other hand, the Court upheld checkpoint stops, stressing that detentions at checkpoints involve only a stop, “brief” questioning, and visual inspection of the interior of the vehicle from the outside.151 These cases suggest that the Court has assumed the existence of affirmative prohibitions against other intrusive techniques. At least some of these techniques, such as a thorough search of the vehicle,152 seem also to be barred by independent considerations.

A possible reason for the ambiguity in this area is the Court’s failure to address the relationship between custody and efforts to interrogate. Miranda v. Arizona153 and its progeny154 assume the propriety of custodial interrogation during post-ar-

152. See United States v. Ortiz, 422 U.S. 891, 897-98 (1975) (search of trunk of automobile at fixed checkpoint unreasonable because officers lacked probable cause to believe car contained illegal aliens).
rest periods of detention. On the other hand, the Davis dicta suggest that interrogation may be constitutionally prohibited during certain other types of detention. The rationale for this distinction is not clear. Perhaps the nature of the type of situation in Davis creates a greater risk of improper influences upon defendants than that presented by custodial interrogation following arrest. If this is true, however, the interest at risk might be better protected by focusing on the admissibility of any resulting confessions, rather than on the validity of the detention itself as the Court apparently did in Davis. Alternatively, the Court may have believed the availability of interrogation creates too great an opportunity to abuse the authority to detain. It is also possible that interrogation itself, even within the limits of Miranda, increases the intrusiveness of the detention sufficiently to render it unreasonable in the absence of evidence amounting to probable cause. Dunaway does not dispel the ambiguity underlying the Davis rationale, although it may establish that during some detentions an interrogation or intention to engage in interrogation will render the detention unreasonable under the fourth amendment.

A related issue is the extent to which, and the circumstances under which, interrogation is permissible during an otherwise valid field stop and the extent to which the subject's refusal to respond can be considered in determining whether probable cause exists for a subsequent arrest. Because of the practical impossibility of providing counsel at this stage, the Miranda right to the presence of counsel during interrogation cannot apply. On the other hand, the person stopped has a fifth amendment right to decline to give incriminating responses even to general inquiries. Perhaps this right requires that a warning of the right to remain silent be given in the field stop context. The Court has held that silence following the Miranda warnings cannot be used against the subject at trial, and

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155. The Court has not addressed, however, the equal protection concern that some defendants are subjected to interrogations during custody and a concomitant increased risk of conviction because of financial inability to secure pretrial release.


157. See Model Code of Pre-Arraignment Procedure § 110.2(5) (Official Draft 1975) (warning of right to remain silent required and subject must be told
an explicit invocation of the right to remain silent after Miranda warnings cannot be used procedurally to the suspect's detriment in other ways. What remains unclear is whether a suspect's refusal, perhaps on fifth amendment grounds, to cooperate in dispelling an officer's reasonable suspicion can have any effect in determining whether the officer has probable cause for an arrest and continued detention. In Brown v. Texas, the Court avoided a closely related issue by holding the initial stop invalid because it was not even based on reasonable suspicion. Consequently, the Court did not address whether a suspect properly subjected to a field stop could be criminally punished for refusing to provide his identity and residence.

Martinez-Fuerte leaves similar questions unanswered in the context of fixed checkpoint stops. In that case, during its description of the fixed checkpoint stop, the Court quoted language from United States v. Brignoni-Ponce to the effect that such stops require only the subject's response to a brief question or two "and possibly the production of a document evidencing a right to be in the United States." This language, and its subsequent approval in Martinez-Fuerte, leaves numerous questions unresolved. Does the statement that responses can be "required" mean officers may insist on responses even if they would be self-incriminating, or that a refusal to respond may establish probable cause to believe the subject is an illegal alien? Is there any requirement that the subject of such questions be informed of the right, if it exists, not to answer, and of the significance, if any, the officer can give to the suspect's refusal to answer? Even more tantalizing is the Court's offhand comment that documentation supporting the person's right to be in the United States may "possibly" be required. When may such documentation be required as a condition to release from a fixed checkpoint stop? May an officer consider a subject's refusal to respond to a request or demand for documentation in determining the existence of probable cause? If the subject declines to provide any documentation, may the officers conduct a search for documentation or other evidence bearing upon the person's status in the country? Moreover, what is the effect of impermissible questioning, searching, or otherwise dealing

that if he or she desires presence of counsel he or she may be taken to stationhouse and will not be questioned until a lawyer is provided).

159. Id. at 53 n.3.
with the subject, upon the validity of the detention itself? The Court's "border search" case law addresses none of these questions.

4. Conclusion

The Supreme Court cases dealing with detentions of the person contain suggestions that considerations other than the existence of adequate evidence to justify a detention may affect the validity of the detention. Justice Stewart has suggested that in some situations a "custodial" arrest may be insufficiently supported by state interests to be "reasonable." The Court's "prompt presentation" case law, however, is totally oblivious to the possibility that the duration of detention under a valid arrest and the presentation before a magistrate to inquire into the need for prolonged detention may have fourth amendment implications. *Dunaway* appears to confirm that a detention for investigation upon reasonable suspicion can be invalidated by the officer's subsequent conduct. What subsequent conduct renders the detention unreasonable and whether an intention to use the detention for such an "unreasonable" purpose renders it invalid from its inception is far from clear. Fourth amendment cases provide virtually no assistance in determining the permissible duration of the various types of detention and the investigatory procedures and incidental movement of the subject that officers can carry out during these detentions. In addition, the cases virtually ignore perhaps the most pervasive question in this area: the limits, if any, the fourth amendment places upon the force that may be used to effect a detention. It is unclear, for example, whether unnecessary force has any fourth amendment significance. Moreover, it may be that in regard to some detentions, even necessary force may become unacceptable, as the use of deadly force to effect a field stop on reasonable suspicion. Despite nearly seventy years of experience in administering the fourth amendment exclusionary rule, these matters remain virtually unexplored.

D. **Electronic Surveillance**

A fourth area to which the Court extends its ambivalence concerning the reaches of the fourth amendment consists of cases involving electronic surveillance. As in some of the other areas, the electronic surveillance context requires the Court to consider both statutory construction and constitutional limita-
tions. In contrast to its approach in the other areas, however, the Court at least has addressed the need to define which pro-
cedural defects, although of a statutory nature, will invoke the extraordinary exclusionary sanction in electronic surveillance cases. The most distinguishing feature of these decisions is the difference between the Court's early expansive view of the fourth amendment requirements regarding electronic surveil-
lance and the Court's subsequent reticence in applying the congressional effort to implement and perhaps expand upon those requirements.


One term before it applied the fourth amendment to a wide variety of electronic surveillance techniques in *Katz v. United States*, the Supreme Court issued an opinion which reflects an extremely expansive view of fourth amendment coverage in the area of electronic surveillance. At issue in *Berger v. New York* was the admissibility of evidence obtained by New York police using a "bugging device" installed in an office pursuant to a court order issued under a New York statute. Rather than examine the constitutional acceptability of the particular order which produced the evidence at issue in the case, a majority of the Court, speaking through Justice Clark, chose to consider the fourth amendment validity of the New York statute "on its face." The majority apparently foresaw the increasing role the amendment was to play in this area and used the occasion to offer guidance concerning the type of statutory provision for electronic surveillance that would survive constitutional scrutiny. In the majority's view, electronic surveillance poses unusually severe threats to the values protected by the fourth amendment. Thus, as a condition of recognizing the validity of some surveillance, the Court under-

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164. The dissenters rigorously contested the propriety of the majority's approach. See 388 U.S. at 90 (Harlan, J., dissenting) (no reason to abandon rule that litigant generally may not challenge statute on its face); id. at 111 (White, J., dissenting) (question before Court is "whether this search complied with Fourth Amendment standards" (emphasis in original)); id. at 82-83 (Black, J., dissenting) (instead of looking for "technical defects in the language of the New York statute," Court should examine whether application of statute violated petitioner's rights in this case).
165. The Court explained only that Berger was "indisputably affected" by the statute and therefore "clearly" had standing to challenge it on its face. *Id.* at 55.
took to define some constitutional limitations upon electronic surveillance not applicable to other investigatory techniques.

The catalogue of defects the majority identified in the New York statute also contains a list of requirements for future enactsments. Some of the defects were relatively unremarkable applications of the traditional evidentiary and warrant requirements of the fourth amendment. For example, the statute allowed a judicial officer to issue an order upon an apparently conclusory sworn allegation that reasonable grounds exist to believe that the order will permit the police to obtain evidence of crime, which prompted Justice Clark to remark that authorization on these grounds "raises a serious probable-cause question under the Fourth Amendment." Moreover, the majority concluded that the statute was defective for failure to require an adequately precise description of the thing to be seized. Although the statute required the surveillance order to identify conversations by reference to participants, the law did not require the order to specify the offense to which the conversations must be related or other characteristics of those conversations that might distinguish them from conversations irrelevant to the postulated crime. Similarly, the statute did not require the order to describe the "place" to be searched, nor did it direct that police terminate eavesdropping once they overheard incriminating conversations. Consequently, there was no assurance in the statute that the "search" would be limited to that authorized by the issuing judicial officer. Furthermore, the statute failed to require prompt execution of the warrant, which left open the possibility that the intrusion would be delayed so long that probable cause would cease to exist. Finally, the statutory authorization of a two month period of eavesdropping and allowance for easy extensions of the original order also increased the danger of surveillance at a time so removed from the showing of probable cause that no adequate evidentiary basis would exist for the intrusions.

The other defects the majority identified assume that the reasonableness of eavesdropping under the fourth amendment requires more than that the surveillance be based upon a disinterested judicial officer's evaluation of adequate evidence

166. Id. at 54-55.
167. Id. at 58-59.
168. Id. at 56.
169. Id. at 59-60.
170. Id. at 59.
171. Id.
before the fact. Noting that the surreptitious nature of eavesdropping precludes a requirement of notice "as [is required for] conventional warrants," Justice Clark emphasized that the New York statute did not overcome this "defect" by requiring any showing of "exigent circumstances" or other "special facts." 172 In addition, he observed that the state procedure failed to require a return on the eavesdropping order, "thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." 173 The statute's grant of permission to eavesdrop, the majority concluded, was "without adequate judicial supervision or protective procedures" and therefore invalid under the fourth amendment. 174

The precise contents of the latter two fourth amendment requirements identified by Justice Clark are not entirely clear. Absence of notice that eavesdropping will occur seems to be inherent in the technique. To require justification for the omission of notice in each particular case would be meaningless. Perhaps Justice Clark was arguing that if a state dispenses with advance notice in an unusually sensitive area such as eavesdropping, the state must implement some reasonable substitute designed to achieve as nearly as possible, the same objective advance notice serves in the standard search situation. The emphasis on the return requirement in Berger is somewhat anomalous when compared to the Court's facile rejection of an analogous argument in Cady v. Dombrowski. 175 Justice Clark's rationale for stressing the need for a return appears to be that the intrusiveness of eavesdropping varies with the use authorities may subsequently make of seized conversations. Thus an intrusion remains reasonable in fourth amendment terms only if states make reasonable efforts to maintain judicial control over the results of the intrusion. For present purposes it is important to note that the majority's analysis assumed that fourth amendment reasonableness in the electronic surveillance context goes beyond a requirement of adequate evidence to support the intrusion and advance judicial evaluation of the sufficiency of the evidence. The Court assumed that, as a general rule, some sort of advance notice of unusually intrusive "searches" is constitutionally necessary and that the searching officer's disposition of the "items" seized is constitutionally required to be regulated by a return procedure.

172. Id. at 60.
173. Id.
174. Id. at 60, 64.
2. The Federal Statute

The Berger opinion undoubtedly served as the framework for the comprehensive legislation governing state and federal electronic surveillance of spoken words, which Congress enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. This statute is one of the few legislative efforts to identify and safeguard interests related to the fourth amendment beyond what current case law suggests the Constitution requires.

Subject to certain exceptions, the statute permits interception of private spoken words only after a court has issued an order in conformity with the detailed requirements of the statute. The statute specifies grounds for an application for and issuance of an order, and the contents of the order itself. The order must contain "a particular description of the type of communications" officials intend to intercept, and must direct that it be executed as soon as practicable. In addition, the order must state that the officers are to conduct the interception in such a way as to minimize the interception of communications not covered by the order, and that the surveillance will terminate upon interception of the described communications or in thirty days.

The statute provides for a return on the order to the issuing court and for disposition of recordings of intercepted conversation as the judge directs. The law imposes two independent notice requirements. Officers must give notice to persons named in the order or the application and to "such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice" within 90 days of the termination of the interception. The notice must include the date and period of entry, as well as a statement of whether communications were intercepted. In addition, if authorities will use the intercepted communications or evidence derived from them, all parties to the proceeding are entitled to notice of the manner in which the communications

177. Id. § 2511.
178. Id. § 2518(1) (application), § 2518(3) (issuance).
179. Id. § 2518(1)(b)(iii).
180. Id. § 2518(5).
181. Id.
182. Id.
183. Id. § 2518(8)(a).
184. Id. § 2518(8)(d).
were intercepted ten days before the proceeding.\textsuperscript{185}

The statute contains its own exclusionary rule. Prosecuting authorities may not use intercepted communications or evidence derived from them in any federal, state or local proceeding if the interception violated the statute.\textsuperscript{186} A court must enter an order suppressing communications intercepted or derivative evidence if it finds that “the communication was unlawfully intercepted,” the order was “insufficient on its face,” or the interception was not made in conformity with the order.\textsuperscript{187}

In contrast to its expansive view of the fourth amendment at the time of Berger, the Court has implemented the federal statute and apparently views the underlying fourth amendment considerations very restrictively. The cases reflect a great reluctance to read the statute and its constitutional basis as imposing rigorous limitations upon the manner in which officials must carry out an otherwise valid interception under the statute.

3. Implementation of the Federal Statute

The Court has demonstrated reluctance to develop three aspects of the 1968 electronic surveillance statute which deal with implementation of an otherwise valid intercept order: the post-interception notice requirement, the provision for entry to install intercept equipment, and the mandatory directive to the officers to minimize interception of nondescribed communications. The Court’s approach in this area, however, must be assessed in light of its treatment of the statutory exclusionary rule.

The statute contains a myriad of procedural requirements for interception of protected communications and an unqualified directive that judges suppress the products of any “unlawful” interception.\textsuperscript{188} In United States v. Giordano\textsuperscript{189} and United States v. Chavez,\textsuperscript{190} however, the Court rejected the argument that deviation from any of the statutory requirements renders an interception “unlawful” within the meaning of the exclusionary sanction. Under Giordano and Chavez, only violations of statutory provisions that “directly and substantially imple-

\textsuperscript{185} Id. § 2518(9).
\textsuperscript{186} Id. § 2518(10)(a).
\textsuperscript{187} Id.
\textsuperscript{188} See supra notes 177-87 and accompanying text.
\textsuperscript{189} 416 U.S. 505 (1974).
\textsuperscript{190} 416 U.S. 562 (1974).
ment the congressional intent to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device require exclusion.\textsuperscript{191} To some extent, after \textit{Giordano} and \textit{Chavez}, the Court was faced with a task analogous to the task that would have been presented if it had held, in traditional search and arrest situations, that the fourth amendment addresses the means by which an otherwise valid search or seizure is implemented. \textit{Giordano} and \textit{Chavez} require the court to identify which statutory requirements are directly and sufficiently related to the underlying purpose of the federal statute before implementing the exclusionary sanction. A similarly broad reading of the fourth amendment, in the context of traditional limits upon implementation of searches and seizures, would require the Supreme Court to identify those limits that are sufficiently related to the underlying purpose of the fourth amendment to justify incorporating them into the amendment's requirement of reasonableness. The Court's performance of its self-assigned task under \textit{Giordano} and \textit{Chavez} may thus be instructive as to the desirability or practicality of a broadened interpretation of fourth amendment reasonableness.

a. Notice

The Supreme Court's treatment of the statute's post-interception notice requirement in two recent cases suggests that the Court's view of the importance of notice has changed significantly. The post-interception notice provisions were most likely designed to provide a substitute for the pre-interception notice stressed in \textit{Berger}.\textsuperscript{192} To some extent, the notice provisions are likely to have constitutional significance, at least if \textit{Berger} accurately reflects the fourth amendment requirements in this area.

In \textit{United States v. Kahn},\textsuperscript{193} the Court rejected the argument that the federal statute requires authorities to identify all known persons whose conversations will be intercepted in the application and interception order, even if there is no reason to believe that these persons are involved in the offense under investigation. The majority relied heavily upon the explicit language of the statute to support its ruling.\textsuperscript{194} The Court noted

\begin{itemize}
  \item 191. 416 U.S. at 527.
  \item 192. \textit{See supra} text accompanying note 172.
  \item 193. 415 U.S. 143 (1974).
  \item 194. \textit{Id.} at 151-53.
\end{itemize}
that the statutory provisions for information in the application\textsuperscript{195} do not mandate identification of nonsuspects whose conversations are likely to be overheard, and reasoned that it would be unreasonable to require the order to identify such persons because the judge could learn of their existence only through the application.\textsuperscript{196} This analysis, of course, ignores the possibility that the statute might impose only minimal requirements for an application and that the government, when it seeks an interception order that will invade the privacy of nonsuspects, must include more in the application than these minimal requirements demand. The majority responded to the lower court's concern that without such identification the intercept order would be equivalent to a "general warrant," by noting that the order identified the conversations to be intercepted by subject matter\textsuperscript{197} and that even a regular search warrant need not identify persons with privacy interests in the items to be seized or the premises to be searched.\textsuperscript{198} Clearly, the Court gave little significance to the implication of Berger that warrant requirements should be applied rigorously when electronic surveillance is involved. The majority also relied upon the statutory requirement that the order be executed so as to minimize the interception of undescribed conversations to reduce the "general warrant" flavor of the order under review.

In \textit{United States v. Donovan},\textsuperscript{199} however, the Court held that a surveillance application must identify those persons authorities have probable cause to believe are involved in the target offense and whose conversations will be intercepted if the application is granted. The Court then addressed the need to exclude evidence under the statutory exclusionary rule if an application fails to identify such an individual. The meager legislative history indicated to the Court that Congress intended the application identification requirement to satisfy what the legislators perceived to be a constitutional demand of particularization.\textsuperscript{200} Moreover, the Court concluded that compliance with the identification requirement would not have affected the judicial authorization of the intercept because the statutorily imposed preconditions for issuance were satisfied. Conse-

\textsuperscript{196} 415 U.S. at 152.
\textsuperscript{197} \textit{Id.} at 154.
\textsuperscript{198} \textit{Id.} at 155 n.15.
\textsuperscript{199} 429 U.S. 413 (1977).
\textsuperscript{200} \textit{Id.} at 437.
quently, under *Giordano* and *Chavez*, exclusion was not required.

A second issue before the Court directly involved the post-interception notice requirement. The Court concluded that while the government need not necessarily provide the court with precise identification of each party to each intercepted conversation, it must provide a description of the general class or classes they comprise. Identification of only those persons as to whom there is reasonable possibility of indictment will not suffice, and if the government seeks to supply the judge with a list of all identifiable persons whose conversations were overheard, the list must be complete. The Court stressed that this information was necessary to decide whether to give such persons post-intercept notice and to determine the possible constitutional nature of such notice. The Court cautioned, however, that if the government fails to perform its duty and the persons are therefore denied post-intercept discretionary notice, it does not necessarily follow that the conversations were "unlawfully intercepted" within the meaning of the statutory exclusionary rule. To reach this result, the Court relied on the primary significance of the issuance and service of the order, and pointed out that denial of inventory notices does not cast doubt upon the existence of a validly issued and served order. The Court found the only indication in the legislative history of the congressional rationale for the notice requirement was to "assure the community that the wiretap technique is reasonably employed." Other functions notice might perform received no consideration. Although the Court observed in a footnote that the litigants in *Donovan* were not prejudiced by denial of notice because the government provided them with the intercept order, application and relevant papers, the opinion did not indicate that this absence of prejudice was essential to the holding permitting use of the evidence.

b. Entry

*Berger* did not explicitly address the possibility of restrictions on the manner in which authorities implement an otherwise valid surveillance, or the degree of judicial supervision the

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201. *Id.* at 431.
202. *Id.* at 432.
203. *Id.* at 429-30.
204. *Id.* at 438.
205. *Id.* at 439.
206. *Id.* at 439 n.26.
Constitution might require. The spirit of the decision, however, strongly suggests that these are issues not wholly removed from constitutional scrutiny. Although interception of conversations conducted in premises intrudes significantly on an individual's privacy, a law enforcement officer's secret physical entry into those premises arguably presents an additional and even more significant intrusion upon the occupants' privacy interests. In *Dalia v. United States*, however, the Court nearly, if not entirely, removed this consideration from constitutional scrutiny. *Dalia* involved covert entry on business premises and installation of a device to accomplish court-authorized interception of conversations in those premises. After rejecting Dalia's argument that either the fourth amendment or the federal statute entirely bars such covert entries, the majority turned to his claim that the Constitution permits such entries only if they are specifically authorized by the issuing judge, presumably upon a showing that this exceptionally intrusive manner of implementation is necessary. Justice Powell, speaking for the Court, emphasized that the order as issued complied with the traditional requirements imposed by the fourth amendment: a neutral issuing authority, a showing of "probable cause," and a reasonably particular description of the things to be seized. Nothing in the Constitution's language or in the Court's decisions, he maintained, suggests that a warrant must address the "precise" manner of service, a matter generally left to the discretion of the executing officer. The Court did not address whether this subsequent

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208. *Id.* at 255-56.
209. *Id.* at 257.
210. *Id.* at 258. In support of this statement, Justice Powell cited a single passage in *Zurcher v. Stanford Daily*, 436 U.S. 547, 559-60 (1978). In *Zurcher*, the Court rejected the argument that the fourth amendment prohibits issuance of a warrant to search premises for evidence when the premises are those of a third party not suspected of involvement in the offense, even though those premises at issue in *Zurcher* were the arguably sensitive premises of a newspaper. The language to which the Court referred in *Dalia* apparently is the following:

>This is not to question that "reasonableness" is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized.

436 U.S. at 559-60. Contrary to Justice Powell's description, this clearly does not constitute a "holding" that the manner in which a search warrant is executed is
judicial review applies to such characteristics of the service as
the decision to employ means that require covert entry.

c. Minimization

Berger did not address the need for officers executing an
otherwise valid surveillance order to minimize their overhear-
ing or “interception” of conversations that do not come within
the category of conversations which the order permits to be in-
tercepted. Given the Court’s emphasis on the precise nature of
the descriptions of the communications sought, however, there
can be little doubt that the Court assumed that minimum inter-
ception of immaterial conversations would be necessary. Con-
gress explicitly recognized the need to minimize interception of
immaterial conversations, and required that each intercept or-
der contain a directive to the executing officers to conduct the
intercept in such a way as to minimize the interception of com-
munications other than those described.211

The minimization provision came before the Supreme
Court in Scott v. United States.212 The majority first rejected
Scott’s claim that the executing officers violated the minimiza-
tion requirement by making no effort to comply with it. The
Court apparently believed the relevant question to be whether,
if the officers had attempted to comply, their actual failure to
avoid intercepting any communications to which they had ac-
cess would have been a violation of the requirement.213 In ana-
lyzing this question, the majority emphasized that the
executing officers had reason to believe that the scheme under
investigation was extensive, that many participants were in-
volved, that the interception was fairly short in duration so the
officers had little opportunity to develop a basis for excluding
certain categories of calls, and that many of the calls were short
and ambiguous, making it difficult or impossible to determine
the calls’ relevance to the investigation.214 To support their re-

213. Id. at 137-39.
214. Id. at 140-42.
jection of Scott's argument that the officers' bad faith invalidated the interception under the statute, the majority relied heavily upon prior fourth amendment cases and found a congressional intent not to press the scope of the suppression rule beyond then-current constitutional law. Justice Rehnquist's opinion, which addressed the agents' compliance with the statutory requirement, gave no indication that the issue had constitutional overtones. Rehnquist's discussion proceeded as if the issue were a purely statutory question.

4. Conclusion

The electronic surveillance cases, perhaps better than any others, evidence the Court's fluctuations in dealing with manner-of-search issues. Berger reflects an expansive reading of fourth amendment reasonableness which imposes significant demands upon the manner in which officers implement a validly authorized search. The Berger Court placed special emphasis upon proper notice, which is apparently required after the intrusion if practicality precludes preinvasion notice, and upon judicial supervision of the disposition of the fruits of the search, which is accomplished through the return and inventory process. In contrast, the Court's treatment of these and related issues in construing and applying the statute apparently designed to implement Berger reflects a much narrower approach.

In Dalia, Justice Powell characterized Donovan as holding that the post-interception notice provisions of the statute are a constitutionally adequate substitute for pre-invasion notice. However, Donovan's holding that the notice provisions are not directly or sufficiently related to the congressional purpose to bring the statutory exclusionary rule into play suggests a far different view of the significance of the notice requirement. This different view is confirmed by Kahn, in which the Court's conclusion that neither the application nor the order needs to identify persons whose conversations may be intercepted but who are not suspects was reached without consideration of the value of such identification in assuring post-interception notice.

Although Berger did not address the manner of entry to implement an interception, it is reasonable to assume that this was likely due to oversight or constraints of space and time. The Berger majority would no doubt have regarded the deci-

215. Id. at 139.
216. Id. at 248.
sion to implement an intercept order by covert entry into premises as a matter of fourth amendment dimensions. Yet *Dalia* almost rejects this approach. *Dalia* clearly holds that the fourth amendment demands no pre-intrusion evaluation of the justification for covert entry. Although the decision leaves open the possibility of post-intrusion review of whether the use of covert entry to implement an interception was reasonable, the Court's emphasis on officers' traditional discretion to make decisions concerning the manner in which such orders are executed suggests that the Court will not engage in rigorous review of officers' discretionary decisions. Minimization of the scope of surveillance seems even more directly related than notice to the concerns underlying *Berger*. Scott, however, reflects an unwillingness to rigorously apply the statutory minimization requirement, a requirement that may be directly related to the basic concerns the Court expressed in *Berger*. The *Scott* majority's failure to acknowledge any constitutional overtones to the issue suggests that the manner in which a validly issued order is served is not a major concern.

Finally, the electronic surveillance cases provide some basis to evaluate the Court's willingness and ability to administer a rule that requires the Court to select those procedural requirements which should trigger the exclusionary sanction. Decisions applying the *Giordano-Chavez* standard, which provides that the requirements must be directly and substantially related to the underlying purpose of limiting electronic surveillance, provide few grounds for optimism. For example, regardless of whether the result of application of the standard to the post-intercept notice requirements at issue in *Donovan* is appropriate, the Court's failure to examine critically the possible functions of notice and their relationship to congressional concern is unfortunate. The same can be said of the Court's failure, in the same decision, to explore carefully the possible functions of the statutory requirement that all suspects whose conversations will be intercepted be identified in the application and order. The Court's unwillingness to connect this requirement with the notice matter, acknowledged in *Dalia* to be of constitutional dimensions, is especially distressing, although perhaps understandable in light of the Court's treatment of the notice requirements when directly confronted with them. Although *Donovan* is only a single decision, it warrants concern regarding the Court's ability to identify which procedural requirements are significantly related to fourth amendment principles and to distinguish these from incidental procedural rules.
E. SUMMARY

Despite Sierra's lesson that many characteristics of a search or seizure other than the adequacy of supporting evidence and compliance with the warrant requirement may be relevant to fourth amendment reasonableness, the Supreme Court's treatment of these matters is amazingly unclear. Perhaps the most significant example of the lack of guidelines in this area is the absence of any definitive or even suggestive pronouncements concerning the extent to which the degree of force used to effect a search or seizure affects the reasonableness of the law enforcement action. Despite the frequency with which this issue arises, the Court has failed to address the matter.217 Even when the Court has discussed other related issues, it has been unable to develop any consistent or coherent body of principles.

Although some signals from the Court indicate that reasonableness may encompass aspects of a search or seizure other than the evidentiary and warrant requirements, these signals have almost all been dicta. Schmerber, Davis, and Ker fall into this category. Berger was a curious advisory opinion, and although the Court's discussion perhaps was not technically dicta, it can scarcely be regarded as a definitive holding. On the other hand, Dunaway did involve an invalidation of the police procedure at issue there. The Court neglected to specify which aspects of the detention invalidated the procedure, how-

217. In Carroll v. United States, 267 U.S. 132 (1925), officers conducted a warrantless search of an automobile and discovered illicit liquor. The dissent noted that the search involved tearing the cushion before the liquor was found, id. at 172 (McReynolds, J., dissenting), a fact the majority opinion did not mention. In United States v. Ross, 102 S. Ct. 2157, 2169 (1982), the Court cited Carroll as upholding a search of the scope involved. After concluding that a warrantless search of an automobile may be as broad as a search authorized by a search warrant, 102 S. Ct. at 2172, the Court observed, "Since . . . a warrant could have authorized the agent [in Carroll] to . . . rip the upholstery in [his] search for concealed whiskey, the search was constitutionally permissible." Id., at 2169. For present purposes, this is significant because of the Court's failure to give any indication that the "force" used in the Carroll search, and the resulting damage to the automobile, had any independent fourth amendment significance. Given that a search of the cushion involved damage to property, would it have been "reasonable" if the officers had not first searched other parts of the car to exclude the possibility that the search could have been successfully accomplished without increasing its intrusiveness by ripping the cushion? The Ross discussion suggests that reasonableness imposes no requirement that officers conducting an otherwise valid search minimize damage to the subject's property during the search. On the other hand, the issue of force was not before the Court in Ross. The Court might respond differently if confronted directly with a search supported by probable cause but implemented in a manner involving unnecessary destruction of property.
ever. These cases suggest that the Court is willing to articulate, if not to apply, an expansive view of fourth amendment reasonableness in relationship to those procedures that present special dangers to underlying fourth amendment interests.\footnote{218} \textit{Berger} confronted the Court with the use of electronic surveillance. \textit{Davis} and \textit{Dunaway} involved detentions on the basis of less evidence than the traditional probable cause requirement demands. \textit{Schmerber} raised the fourth amendment issue in the context of penetration beneath the subject's skin, an exceptionally intrusive form of search. To some extent, the Court's dicta suggesting an expansive construction of reasonableness appears to be a tradeoff against its willingness to stretch the fourth amendment to permit exceptionally intrusive forms of investigation, however. The Court is most willing to apply an

\footnote{218. The same uncertainty is evident in the so-called "administrative search" cases. In some situations, the Court has upheld intrusions upon privacy for quasi-criminal purposes pursuant to a warrant issued upon a diluted "probable cause" standard, see, e.g., Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967); See v. City of Seattle, 387 U.S. 541, 545-46 (1967), or even without a court order and without any evidentiary basis at all. See, e.g., Donovan v. Dewey, 452 U.S. 594, 602-03 (1981). The Court's discussions have suggested, but not held, that this relaxation or abandonment of standard fourth amendment limitations in this area must be counterbalanced by relatively stringent limitations upon the execution of the searches authorized. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), for example, held that Congress had not authorized forcible entry to effectuate inspections of the premises of federally licensed dealers in alcoholic beverages. \textit{Id.} at 77. The Court did not address whether an inspection pursuant to legislatively-authorized forcible entry would be "reasonable" in fourth amendment terms. In United States v. Biswell, 406 U.S. 311 (1972), the Court upheld warrantless inspections of the commercial premises of firearms dealers licensed under The Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976). 406 U.S. at 317. The statute authorized entry for inspection "during business hours." 18 U.S.C. § 923(g) (1976). Although the Court stressed that neither the threat to privacy posed by the inspections nor the danger of abuse were, in its view, "of impressive dimensions," 406 U.S. at 317, it is unclear whether the limitation upon the timing of the inspections was essential to these conclusions. In Donovan v. Dewey, 452 U.S. 594, 602 (1981), the Court held that warrantless inspections of mines under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (Supp. III 1979), are reasonable. In part, this conclusion rested upon the majority's satisfaction with the "specific mechanism" provided in the statutory scheme to accommodate any special privacy concerns a specific mine operator might have. 452 U.S. at 604. Forcible entry to make an inspection is prohibited, and an inspector who is denied entry must seek an injunction against future refusals in a proceeding which permits the mine owner to obtain "an order accommodating any unusual privacy interest" that might be involved. \textit{Id.} at 605. The majority cited with apparent approval a lower court decision, Marshall v. Stoult's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979), \textit{cert. denied}, 444 U.S. 1015 (1980), in which the court ordered inspectors to keep the mine's trade secrets confidential. The implication is that, at least in particular situations, the manner in which an otherwise "reasonable" inspection is carried out might render it in conflict with the demands of the fourth amendment.}
expansive reading of reasonableness when the technique at issue appears to demand extraordinary regulation to assure its overall reasonableness.

Other decisions signal the Court's hostility toward reading the fourth amendment requirement of reasonableness as extending beyond the evidence and warrant requirements. Again, the signals are not particularly forceful, or they are arguably ambiguous. Gooding's apparent rejection of constitutional limits on the timing of a search may be attributable to the formulation of the issues in the lower courts. Dalia clearly rejected the proposition that reasonableness demands a pre-intrusion review of the propriety of covert entry to install an electronic surveillance device. The case leaves open the possibility of a requirement of post-intrusion review, however. The McNabb-Mallory line of cases does not attribute any constitutional significance to prompt presentation, but it appears doubtful that the Court has considered the arguments for using prompt presentation as a means to limit the duration of an initially reasonable arrest. Dombrowski rejects the argument that the return and inventory aspects of the warrant process are of constitutional dimensions. This result is in sharp contrast to the Berger discussion of the return. The minimal significance the Court attributed to post-interception notice in Kahn and Donovan confirms that Dombrowski may rest upon a perception that the fourth amendment protects no interest in minimizing the duration of a seizure.

Equally important is the Court's unwillingness to examine critically the possible functions of limits on means of implementing searches and seizures and the possible relationship of these limits to fourth amendment values. Gooding and Dombrowski, for example, reflect virtually no effort to examine the significance of nighttime service and the warrant return and inventory process. In situations in which the Court has examined the functions of, and values served by, the procedure, its analysis has made no attempt to relate these values to fourth amendment considerations. Thus, although Ker, Miller, and Sabbath involved an examination of the purposes the announcement requirement serves, none of the cases explored whether those purposes bear a significant relationship to fourth amendment protected interests. Similarly, the prompt presentation cases reflect a rather imprecise effort to examine the value of prompt presentation in preventing abuse of custodial interrogation. These decisions contain no inquiry into the potential value of appearance before a magistrate in implement-
ing a possible fourth amendment interest in having an initially valid arrest result in custody only of the necessary duration to effectuate the relevant state interest. Finally, the Court’s implementation of the Crime Control Act’s selective exclusionary rule confirms the Court’s reluctance or inability to undertake critical scrutiny of statutory requirements to determine the significance of their relationship to an underlying and primary purpose, even when the Court has previously acknowledged its obligation to do so.

IV. AN ANALYTICAL FRAMEWORK

Although the cases discussed in the preceding section confirm that a considerable number of characteristics of police action might affect the fourth amendment “reasonableness” of a search or seizure, the cases also suggest that certain aspects of search and seizure activity are of particular importance: the force used to effect a search or seizure, the time at which the search or seizure takes place, and the duration of the search or seizure. To the extent that these aspects of law enforcement conduct raise fourth amendment considerations, it is necessary to evaluate what procedural demands the reasonableness requirement generates. A need to avoid unnecessary force when entering premises to search, for example, may “constitutionalize” the requirement of prior announcement. Similarly, a need to minimize the duration of seizures may “constitutionalize” the requirement of a return on a search warrant or, in the case of a seizure of the person, the requirement of prompt presentation. The initial, and for present purposes controlling, question, however, is whether the use of force, the time at which the action takes place and the duration of the intrusion have, or should have, any independent fourth amendment significance.

The remainder of this Article attempts to answer this question. First, the Article examines the historical background of the fourth amendment. Next, there is a discussion of whether the force used in, or the timing or duration of, a search or seizure significantly affects the privacy interests the fourth amendment protects. Finally, the Article examines whether there are persuasive reasons why the Court should construe fourth amendment reasonableness in a way which avoids addressing specific characteristics of otherwise valid law enforcement practices.
A. HISTORICAL CONSIDERATIONS

Historical inquiry has limited value in establishing the content of the fourth amendment. As Professor Amsterdam has observed, although one can identify the practices which stimulated the development of the fourth amendment219 with some accuracy, and although it seems clear that courts must construe the amendment so as to address those practices, historical analysis is of little assistance when considering the extent to which the amendment should govern other practices. Amsterdam makes a persuasive case for the proposition that the amendment's content should not be limited to those matters which stimulated its development.220 Moreover, the terms of the amendment appear to support this view. The second clause of the amendment, which contains the requirements of probable cause and specificity for warrants, would have been sufficient by itself to deal with the major concern of the framers, which was colonial officials' abuse of general warrants. Therefore, the inclusion of the first clause and its broad requirement of "reasonableness" indicates that the framers intended to generalize beyond the practices that immediately concerned them.

At the time of the formulation and adoption of the amendment, nonpolitical and general investigatorial law enforcement techniques had not become the subject of either public concern or litigation.221 Consequently, the historical background of the amendment offers little help in addressing whether and how the amendment should restrict such techniques today. Nonetheless, historical inquiry may have some value. If the concern that gave rise to the fourth amendment was limited to the existence of an adequate evidentiary basis for searches and the issuance of a warrant upon probable cause and adequate specificity, history suggests, although by no means conclusively, that the current content of the amendment might be limited to these requirements. Insofar as the historical concerns included other matters, however, a more persuasive case is made for the proposition that courts should construe the amendment's general reasonableness clause to address these concerns and others like them.

As Professor Taylor has pointed out, the original understanding of the fourth amendment must refer to the objections

220. Id. at 399.
221. Id. at 398.
raised to general warrants and writs of assistance.\textsuperscript{222} Among the most fruitful sources from which to identify these objections are Lord Camden's opinion in \textit{Entick v. Carrington},\textsuperscript{223} Mansfield's opinion in \textit{Money v. Dryden Leach},\textsuperscript{224} and other aspects of the litigation arising from the investigation of \textit{The North Briton No. 45}.

Both \textit{Entick} and \textit{Money} were civil damage actions based upon searches and detention under the authority of general warrants issued by Lord Halifax, the Secretary of State, in connection with investigations of seditious libel. Although the appeals were decided on somewhat narrow grounds, the cases were widely regarded as an attack upon oppressive general warrants and reflect the concerns that can be said to have stimulated the fourth amendment.

\textit{Leach} and related litigation arose out of a warrant authorizing searches and apprehension of the unidentified author of \textit{The North Briton No. 45}. Authorities arrested a number of printers, one of whom turned out to be the actual printer of the described publication. The printer led the executing officials to the author, John Wilkes, a member of Parliament. Officials detained Wilkes and searched his residence. A test case on behalf of the printers resulted in an award of damages,\textsuperscript{225} and a suit brought by Leach, another printer, also resulted in a verdict against the defendants. This judgment was affirmed by the King's Bench on the narrow ground that because the plaintiff was not in fact the printer of the described publication the warrant was no defense to his detention.\textsuperscript{226} Wilkes himself successfully sued the undersecretary who supervised the execution of the warrant against him.\textsuperscript{227}

The reports of the decisions make clear that a major objection to the warrant was its general nature. This characteristic of the searches was not the judiciary's only concern, however. In Wilkes's litigation, for example, Chief Justice Pratt addressed the jury and attacked the legality of the warrant. In his list of the warrant's deficiencies, he identified the failure to specify the offenders by name and the absence of an inventory of the items carried away.\textsuperscript{228} In Leach's case, the court clearly

\begin{itemize}
\item \textsuperscript{222} T. Taylor, \textit{Two Studies in Constitutional Interpretation} 38 (1969).
\item \textsuperscript{223} 95 Eng. Rep. 807 (K.B. 1765).
\item \textsuperscript{224} 97 Eng. Rep. 1075 (K.B. 1765).
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Money v. Leach}, 97 Eng. Rep. 1050 (K.B. 1765).
\item \textsuperscript{227} \textit{Wilkes v. Wood}, 98 Eng. Rep. 489 (C.P. 1763).
\item \textsuperscript{228} \textit{Id.} at 498.
\end{itemize}
emphasized evidence that the search of Leach's premises required six hours and that officials held Leach in custody four days before presenting him before Lord Halifax, who determined Leach not to be the printer of the described libel and released him. Although the jury apparently determined that the four-day detention was unreasonable, the length of the detention was ultimately irrelevant because the warrant could not be used to justify Leach's detention at all.

*Entick* involved another warrant issued by Lord Halifax concerning a suspected seditious libel, although this warrant named the plaintiff as the person to be seized and to be brought, "together with his books and papers," before the Secretary for examination. The search of the plaintiff's residence, during which officials seized the plaintiff and various papers, required four hours. The plaintiff subsequently brought a trespass action against those who had executed the warrant. After a verdict in the plaintiff's favor, the case was argued to the Court of Common Pleas en banc. Lord Camden spoke for the court, which awarded judgment for the plaintiffs. The court found the warrant insufficient to prevent liability because the defendants had not strictly followed its terms. They had not taken a constable with them as the warrant directed. Moreover, after seizing the plaintiff and his papers, the officials brought him before Lord Halifax's assistant, rather than before Lord Halifax himself as required by the warrant.229

Lord Camden's opinion also discussed other aspects of the warrant not actually before the court. For example, Lord Camden observed that the warrant was too general, because it authorized the seizure of all of the suspect's papers, regardless of whether they were libelous or had any relationship to the libel.230 Moreover, the warrant was not predicated upon a showing that the person had "criminal papers" in his possession.231 In addition, Lord Camden clearly was concerned with the absence of any safeguards to regulate the post-seizure custody of the papers seized. Noting the absence of any requirement that the executing official "take an exact inventory [of the papers seized], and deliver a copy,"232 he concluded that the Secretary did not have the power to issue the warrants.233 The warrant did not grant the owner any right to reclaim the items seized,

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229. 95 Eng. Rep. at 809.
230. *Id.* at 1065.
231. *Id.* at 1067.
232. *Id.*
233. If the power to issue such warrants existed, he reasoned, safeguards of
even if he established his innocence at trial.234 In contrast, during the search for and seizure of stolen goods, the validity of which Lord Camden doubted, the seized goods were placed in the hands of a public officer until the owner’s right to them ripened.235

The value of this historical examination is questionable. The cases arose in the context of political controversy, and there is no indication that any of the views expressed in them were intended to address important concerns of day to day nonpolitical law enforcement. The underlying issues concerned civil liability, not admissibility of evidence. Consequently, the political rhetoric in the cases was not subject to the possible mitigating influence of consideration of proposed rules’ potential impact on the admissibility of reliable evidence in prosecutions for serious “nonpolitical” criminal offenses.

The English seditious libel cases clearly demonstrate, however, that concerns over the general warrants at issue were not limited to the existence of probable cause, judicial evaluation of probable cause before the search, and a valid warrant describing the items to be seized with reasonable precision. Both Entick and Wilkes expressed concern over the absence of an inventory requirement and a return of the seized items. Leach emphasized the officials’ failure to comply with the existing requirement of “prompt presentation” before the issuing executive officer. Moreover, the emphasis on the six-hour duration of the search in Leach suggests concern that officers should execute a warrant in a manner which at least avoids searches of extraordinary duration.

B. RELATIONSHIP TO UNDERLYING FOURTH AMENDMENT PRIVACY INTERESTS

Perhaps more fruitful than historical analysis is an examination of the extent to which the major characteristics of “searches” and “seizures” at issue in this Article—the amount of force used, timing, and duration—appear to infringe on interests the fourth amendment should protect. To the extent that these characteristics implicate fourth amendment interests, they appear to be within the purview of the amendment’s “reasonableness” requirement.

234. Id. at 1068.
235. Id.
A threshold problem with the usefulness of this approach, however, is the absence of a comprehensive and workable definition of basic fourth amendment interests. In *Katz v. United States,* widely regarded as the seminal case concerning fourth amendment coverage, the Court rejected the notion that the fourth amendment embodies a "general constitutional 'right to privacy.'" The Court's opinion, authored by Justice Stewart, offers primarily a negative definition of fourth amendment coverage. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." On the other hand, what a person "seeks to preserve as private may be constitutionally protected." Undoubtedly because of the unsatisfactory nature of Justice Stewart's discussion in *Katz,* cases citing *Katz* as precedent frequently cite Justice Harlan's "understanding" of the criteria applied by the majority. In his concurring opinion, Justice Harlan concluded that fourth amendment coverage is invoked if a person has "exhibited an actual (subjective) expectation of privacy," apparently in the form of an assumption that an intrusion of the sort at issue will not occur, and that "the expectation [is] one that society is prepared to recognize as 'reasonable.'" Although Justice Harlan's formulation uses
the word "privacy" as if it were self-defined, the subsequent cases demonstrate that this was hardly an appropriate assumption.\textsuperscript{241}

The major uncertainties as to the "privacy" interests which the fourth amendment protects, however, are not significant here in the way they are ordinarily considered. The present discussion concerns matters that clearly constitute "searches" or "seizures" within the meaning of the fourth amendment and consequently invoke the amendment's coverage. The question presented in this Article is a more subtle one: Do various characteristics of the manner in which the search or seizure is carried out have some independent fourth amendment significance? The answer to this question may well turn upon the answer to a further question: Does a search or seizure conducted in a certain manner, as with unnecessary and thus excessive physical force, intrude more significantly upon fourth amendment interests than one conducted without excessive force? If the answer is in the affirmative, that aspect of the manner in which the search or seizure is conducted can be said to have independent fourth amendment significance and to invoke the coverage of the amendment's requirement of reasonableness.

Unfortunately, posing the problem in this manner does not

\textsuperscript{241} See, e.g., Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (use of a "pen register," which records numbers dialed from a phone but not contents of the conversations, does not constitute a "search"); United States v. Miller, 425 U.S. 435, 443 (1976) (obtaining access to suspect's bank records by subpoena is not a "search"); United States v. White, 401 U.S. 745, 753 (1971) (overhearing conversation between suspect and informant who was surreptitiously carrying radio transmitter is not "search").
make it easier to answer. This conclusion will become obvious from an examination of the three characteristics of law enforcement conduct and the apparent underlying privacy interests involved.

A preliminary caveat is required, however. Recent Supreme Court cases strongly suggest that a characteristic of law enforcement conduct must not only infringe upon protected fourth amendment privacy, but it must do so significantly, to implicate the fourth amendment. In *United States v. Van Leeuwen*,242 officials delayed mailed packages that aroused suspicion until they obtained a basis to apply for a search warrant authorizing their inspection. Acknowledging that, at least in theory, “detention” of mail could become an unreasonable seizure, the Court nevertheless held that detaining these packages for twenty-nine hours invaded no interest protected by the fourth amendment.243 *Pennsylvania v. Mimms*244 addressed the fourth amendment significance of an officer’s requiring a person stopped for a traffic violation to step out of the car. Noting that the driver was already being detained and that the officer could already observe much of the driver’s person, the Court concluded that the additional intrusion upon the driver’s liberty “can only be described as *de minimis*.”245 It appears, therefore, that even an aspect of conduct that intrudes upon interests protected by the fourth amendment may do so in such an insignificant manner as to raise no fourth amendment question.

1. **Use of Force**

The cases are amazingly unclear as to the extent to which excessive force renders a search or seizure unreasonable. The “prior announcement” cases,246 however, can be read as at least leaving open the possibility that when unnecessary force, *i.e.*, force that would not have been necessary had the officers announced their purpose and requested opportunity to enter, is used to gain entry to premises, it will render the entry and search unreasonable. *Schmerber*,247 moreover, suggests that in some circumstances, such as those involving an unusually sensitive subject, even the force necessary to extract blood may

243. *Id.* at 253.
245. *Id.* at 111.
246. *See supra* text accompanying note 34.
247. *See supra* text accompanying notes 29-32.
render the "search" for the blood and its "seizure" unreasonable. If hints from these cases accurately identify a latent fourth amendment requirement, it is incredible that the Court has not resolved any of the more direct manifestations of this problem, such as the use of excessive force to make an arrest.

Perhaps the essence of fourth amendment concern is the intrusion itself. If so, it may follow that once an intrusion is determined to be permissible, the amount of force used to effect it is not significantly related to fourth amendment interests. The persuasiveness of this argument might be best assessed by investigating a specific search context. Consider, for example, a standard residence search, as was involved in *Sierra*. Why is this police action an infringement upon the fourth amendment interests of the occupants? Is it exclusively or primarily because of the officers' presence within the residence? If the officers' presence is the sole basis for finding an infringement upon fourth amendment interests, the manner in which they gain entrance and the amount of force they use after entry in an effort to locate persons or items is irrelevant to fourth amendment concerns. More likely, however, the officers' presence so invades the occupants' privacy interests as to invoke fourth amendment protection because the officers' presence affords an opportunity to inflict harm upon the occupants or their property and a perception of lessened personal security produces anxiety in the occupants.248 Furthermore, the entry is intrusive in part because it will sometimes involve personal injury or property damage that will affect the occupants after the officers leave. To the extent that the rationale for regarding the officers' conduct as within fourth amendment coverage includes these concerns, the rationale suggests that the use of force, or perhaps even the risk that force will be used, is a matter subject to fourth amendment restrictions.249

2. *Duration of the Intrusion*

The absence of extensive Supreme Court decisions regarding the effect of the duration of a seizure of a person or item is especially surprising, given the apparent importance of duration in distinguishing among the various types of detentions of

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249. The same seems to hold true in the context of detaining a person or making a search after entry. In both situations, the use of force seems to increase substantially the degree of the law enforcement activity's intrusion upon fourth amendment interests.
the person. The Court has permitted certain field stops upon less than probable cause in part because of the brevity of the detention at issue. Dunaway confirms that, at least under certain circumstances, a detention upon less than probable cause becomes unreasonable when it lasts for an "unreasonable" period of time. Supreme Court cases dealing with prompt presentation after arrest, however, show no sensitivity to the similar issue which may arise in the pre-arrest context. The Court's refusal to consider constitutionalizing the warrant return requirement in Dombrowski suggests hostility toward a similar approach to the duration of seizures of items.

Is the duration of a seizure significantly related to fourth amendment concerns? Consider the seizure of the automobile at issue in Coolidge. Perhaps the expectations of privacy related to a person's car are so pervasively infringed upon once the car is validly seized that the length of time authorities detain the car does not significantly affect those interests. But why does the fourth amendment protect against some seizures? Is it only because the right to seize items indiscriminately would constitute an irresistible incentive to expand the scope of searches so as to locate more items to seize? If this perception is correct, a subject's fourth amendment interests may not be affected by the length of time an item is detained. A more likely reason seizures are limited, however, is a recognition that the extent to which one has access to physical belongings affects one's freedom to engage in a number of activities. Thus one's privacy expectation of being able to exercise control over one's property is affected not only by the initial seizure and removal of an item which may be useful in that pursuit, but also by the authorities' continued retention of the item. While this approach comes close to constitutional recognition of a property right in reality or personal items, it is not an unreasonable reading of the underlying notion of privacy. To the extent that such a notion is part of fourth amendment privacy expectations, the duration of a seizure of property appears to have independent significance.

The question probably can be analyzed more easily when posed in the context of a seizure of the person. It is very diffi-

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250. It is at least arguable that the distinction between an arrest and a field stop for investigation may turn upon the officer's intention at the time of the initial deprivation of liberty. See supra text accompanying note 105.
251. See Terry v. Ohio, 392 U.S. 1, 26 (1968).
252. Judge Learned Hand made the argument in United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930).
cult to argue effectively that the initial seizure of one's person so completely intrudes upon one's fourth amendment interest in freedom of movement that the duration of subsequent confinement does not affect the underlying interest. The case law implicitly recognizes the absurdity of this argument, and Dunaway seems to refute it altogether. Moreover, if the duration of seizures of the person has independent fourth amendment significance, the interest would also logically appear to apply to seizures of property. Although the two situations raise privacy concerns which certainly are not identical, it is unlikely that they are sufficiently dissimilar to warrant differing treatment in defining the ambit of fourth amendment coverage.

In the context of a search rather than a seizure, the duration factor may be less significant. In some search situations, the duration of the search clearly affects the impact of the search upon privacy interests. Among the intrusive characteristics of premises searches such as that in Sierra is the bar which the law enforcement activity imposes upon the occupants' normal use of the premises. The longer the bar to normal use, the more intrusive the search. Generally speaking, however, the duration factor may be less important here than in seizure contexts. Most searches do not last days or weeks, as do some seizures. Consequently, even if fourth amendment reasonableness is affected by the duration of seizures, perhaps the risk that a search may be extended by several hours is not sufficiently significant to invoke constitutional restrictions on the duration of all searches. On the other hand, a search of residential premises, for example, often involves a more pervasive intrusion into privacy than the seizure of a limited number of items. Thus, even if the duration of searches is generally much shorter than that of seizures, the greater intensity of the intrusion in search situations justifies the imposition of limitations on the duration of both.

3. **Time at Which Search or Seizure Occurs**

A decision whether the time at which a search or seizure occurs has independent fourth amendment significance involves a more difficult inquiry. The basic question, however, is the same as that concerning force and duration: once it is ac-

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253. See supra text accompanying note 125.
254. Under Michigan v. Summers, 452 U.S. 692 (1981), police may detain at least some of the occupants for a period while they conduct the search and develop a basis to decide whether to arrest the occupants. See id. at 705.
knowledged that a search or detention may properly occur, are 
the subject's expectations of privacy so far extinguished that 
the time at which the activity takes place has no significant in-
cremental effect? Once again, the analysis must be undertaken 
in light of the interests that apparently underlie the fourth 
 amendment.

Generally, the timing question involves a decision whether 
to undertake the detention or search at night. In residential 
premises, more personal activities are likely to occur at night. 
To the extent that searches are intrusive because they inter-
rupt personal activities, night searches may be significantly 
more intrusive than those conducted during the day. Further-
more, abuse of law enforcement authority may be more prob-
able at night, because fewer witnesses are likely to be about 
and darkness makes it more difficult for potential eyewitnesses 
to observe any abuse that occurs. Consequently, if the fourth 
 amendment is concerned with the use of excessive force in 
making arrests, the time at which an arrest or search takes 
place also may be of concern because it may increase the risk 
that such excessive force will be used.

In addition, people often feel that functioning at night is 
more threatening and produces more anxiety than being com-
pelled to function during the day. This anxiety may result from 
a perception that protecting oneself, as from excessive force, is 
more difficult at night, although it is also probably attributable 
to a vague, unspecified apprehension of darkness. Being sub-
jected to law enforcement activity during the nighttime may 
thus make people more uncomfortable than a similar subjec-
tion during daylight hours. To the extent that the fourth 
 amendment circumscribes law enforcement conduct because of 
its tendency to create apprehension, nighttime execution of an 
otherwise reasonable activity may be subject to scrutiny under 
the fourth amendment.

The time at which a search or seizure is conducted, may 
thus affect underlying privacy interests. Whether the manner 
in which it does so has independent fourth amendment signifi-
cance is less clear. It is certainly arguable that the independ-
ent effect on privacy interests of the time of a search or seizure 
is less than that of the use of force and perhaps than that of the 
duration of the activity. On balance, however, the impact 
seems sufficient to make timing a matter of fourth amendment 
concern, although the relative intensity of that impact may be 
significant in addressing the extent to which the fourth amend-
ment should place procedural restrictions on the time law enforcement activities may occur.

4. Conclusion

Despite almost seventy years of experience with the fourth amendment exclusionary rule, the Supreme Court has not developed the concept of "reasonableness" sufficiently to clarify the extent to which the rule may be used to limit the force used in, the timing of, and the duration of a search or seizure. Several commentators have suggested that the Court's preoccupation with the warrant requirement may have left other areas of fourth amendment law insufficiently defined. The Court's basic task initially involves illumination of Katz's notion of privacy so that the ambit of fourth amendment coverage becomes more intelligible.

The three manner-of-search issues that are the focus of this Article clearly affect elements of fourth amendment privacy as it is currently understood. Perhaps the most important question is whether the impact is substantial enough to warrant granting these aspects of searches and seizures independent fourth amendment significance. It seems clear, however, that the question is easy to answer. Given the intrusions upon privacy that force, timing, and duration potentially involve, they clearly fall within the ambit of fourth amendment coverage. What remains to be explored, however, is whether countervailing considerations militate against extending fourth amendment coverage to these aspects of searches and seizures.

C. Countervailing Considerations

Justice Harlan's understanding of the Katz criteria for determining whether law enforcement activity contravenes the fourth amendment requires that the expectation of privacy violated "be one that society is prepared to recognize as 'reasonable.'" This requirement apparently means that, in most situations, the expectation of privacy violated must be one that other persons would also hold under the circumstances. In addition, the requirement suggests that the expectation of privacy be one which the Court finds no persuasive reasons to exempt from fourth amendment coverage. Only by reading the

255. Amsterdam, supra note 219, at 414; T. TAYLOR, supra note 222, at 47.
prescription in this manner can several post-Katz decisions be reconciled with the Katz criteria.

In United States v. Dionisio,\footnote{258} for example, the Court held that a subpoena to appear before a grand jury is not a "seizure" in the fourth amendment sense and therefore need not be justified as "reasonable." Justice Stewart, speaking for the majority, stressed that the intrusions upon privacy of a grand jury subpoena and the resulting appearance are less than that occasioned by other seizures of the person.\footnote{259} The Court primarily relied, however, upon its conclusion that an unlimited power in the grand jury to secure the attendance of witnesses is "necessary to the administration of justice."\footnote{260} Similarly, in Hoffa v. United States,\footnote{261} the Court held that the fourth amendment did not impose reasonableness requirements upon planting an undercover agent in a position of trust which enables the agent to overhear the subject's conversations, the contents of which would otherwise be unavailable to law enforcement officials. In each case, governmental action intruded upon an expectation of privacy that the defendant actually held which almost certainly was the kind of expectation most persons would harbor under the circumstances. Although the opinions do not openly acknowledge it,\footnote{262} both decisions apparently reflect a conclusion that countervailing considerations may be sufficiently strong to move the Court, as representative of "society," not to recognize particular expectations of privacy as "subject to pro-

\footnote{258} 410 U.S. 1 (1973).

\footnote{259} Id. at 10 (quoting with approval United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972)).

\footnote{260} 410 U.S. at 9-10 (quoting Blair v. United States, 250 U.S. 273, 281 (1919)). Justice Stewart confused the analysis somewhat by emphasizing not the inconvenience or burden of the appearance but the "historically grounded obligation" of every person to appear, apparently without question or concern, before the grand jury. See 410 U.S. at 9.

\footnote{261} 385 U.S. 293 (1966).

\footnote{262} The reasoning of Justice Stewart, who wrote for the Court in Hoffa, is particularly troublesome. Characterizing Hoffa's interest as one involving the ability to rely on his judgment that the agent would not reveal information entrusted to him, Justice Stewart responded that no member of the Court has ever expressed the view that the fourth amendment protects a person's misplaced belief that one to whom information is confided will not reveal it. \textit{Id.} at 302. Alternatively, the Court could have posed the issue as whether a reasonable person has a protected expectation that the government will not cause another to take advantage of personal relationships in order to collect information for use against the subject. Justice Stewart suggested that the risk of being subject to this technique is "probably inherent in the conditions of human society." \textit{Id.} at 303. This approach misconstrues the question, which is whether the fourth amendment limits this sort of investigatory law enforcement activity. Hof\textit{f}a necessarily involves a largely undefended conclusion that it does not.
tection." This approach, when applied to the question at issue here, requires a consideration of possible reasons why constructing fourth amendment reasonableness to include the force used in, timing of, and duration of searches and seizures might be so unwise as to render the expectation that one will be free from these aspects of search and seizure conduct beyond fourth amendment protection.

1. Avoidance of Full Constitutionalization

If particular law enforcement conduct intrudes upon interests the fourth amendment protects, it is at least arguable that full constitutionalization of the limits upon that conduct is appropriate. When a federal constitutional right is involved, federal constitutional doctrine should control all aspects of the matter that affect the underlying protected interest. On the other hand, the major objection to application of the fourth amendment reasonableness requirement to the manner-of-search issues considered here may be precisely that it would amount to undesirable full constitutionalization of search and seizure matters.

Assuming that such full constitutionalization would result from the proposed construction, opponents would argue that it insufficiently accommodates regional variations that bear upon law enforcement needs. Justice Rehnquist, dissenting in Robbins v. California, described as "[t]he great virtue" of pre-Mapp fourth amendment law "that it made allowances for [the] vast diversities between states." He believed that the majority's decision in Robbins that a warrant is necessary to examine the contents of an opaque sealed package found during a search of an automobile confirms the rejection of "the true spirit of federalism" precipitated by Mapp. To some extent, Justice Rehnquist's criticism is wide of the mark. Pre-Mapp law accommodated regional variations by disclaiming any effort to enforce federal constitutional limits upon local law enforcement. The states for the most part did not use federal standards designed to accommodate local problems, but instead permitted state law enforcement personnel and courts to flout federal constitutional requirements.

263. This is not a necessary result; see infra text accompanying note 269.
265. Id. at 439 (Rehnquist, J., dissenting).
266. Id.
Moreover, it is not clear why a federal constitutional limitation will fail to accommodate local problems. In *Robbins*, Justice Rehnquist decried the majority's failure to consider the plight of law enforcement officers in sparsely populated areas where the nearest magistrate empowered to issue a warrant may be fifty miles from the scene of the discovery of an item in a car.\footnote{Id. at 438-39.} Nothing in the plurality opinion, however, precludes the use of creative approaches, such as search warrants issued by telephone,\footnote{See, e.g., Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(C) (1978) (oral statement under oath transmitted by electronic communication can constitute affidavit for search warrant; magistrate may authorize officer to sign magistrate's name to warrant if officer is not in magistrate's presence).} to fulfill fourth amendment requirements in such rural areas. Justice Rehnquist also failed to consider the extent to which the consent doctrine will mitigate the impact of the majority's holding. This doctrine permits an officer who comes upon a package to inform the subjects that their failure to consent to a search will result in a prolonged period of detention because of the need to secure a warrant.\footnote{See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (search pursuant to voluntary consent is reasonable; voluntariness of consent is determined on the basis of the totality of the circumstances).} Neither logic nor the results of recent cases such as *Robbins* support the proposition that constitutionalization will result in legal standards that cannot accommodate regional variations or local needs.

A more meritorious objection is that full constitutionalization neglects state policy decisions that involve matters sufficiently ambiguous that no single approach is reliable enough to justify embodying them in federal constitutional rules. The real issue in *Robbins*, for example, was whether a requirement of pre-search judicial scrutiny of the offered showing of probable cause would prevent a sufficient number of unjustified searches to justify the additional expenditure of law enforcement and judicial time and effort required. Resolution of this issue involves a number of factual matters on which little or no reliable information is available. How often would courts declare such searches improper when first subjecting them to judicial scrutiny in a criminal prosecution? What effect would such post-search condemnation have upon law enforcement practice? How many searches that post-search scrutiny would not deter would the warrant requirement prevent? What actual burden would the warrant requirement place on law enforcement, in light of the consent doctrine, other demands upon law
enforcement time, and other considerations? One can argue that in the absence of reasonably reliable information about at least some of these concerns, it is appropriate to permit the states to resolve matters on the basis of their own speculation rather than to constitutionalize the speculation of a five-person majority of the Supreme Court.

Moreover, the more peripherally a matter affects fourth amendment interests, the more appropriate it becomes to respect state or local evaluations of the facts of a given situation. Robbins, for example, involved the basic decision whether to intrude upon the subjects' privacy interest in the contents of the container. When the question is instead the manner in which police should execute such an intrusion, the issue may be sufficiently peripheral to require more deference to local factual determinations than might have been appropriate in Robbins. Expanding fourth amendment coverage to encompass the means by which police execute a search or seizure might require the Supreme Court to constitutionalize speculation over an entire new array of factual matters, even if the practices involved are only peripherally related to the central purpose of the amendment, which is the prevention of unjustified intrusions upon privacy interests.

On the other hand, one could argue that the matters at issue are not, realistically speaking, sufficiently peripheral to justify the proposed distinction. The manner in which officials conduct law enforcement activity is often of greater significance in determining the impact upon the subject's privacy than the decision to engage in that activity. The decision to use deadly force to effectuate the detention of a suspect, for example, may implicate a subject's ultimate privacy interests. Moreover, if one is inclined to be cynical concerning the value of the warrant process in preventing unjustified law enforcement activity, limitations upon the manner of executing searches and seizures may have far more practical effect than the requirement of advance judicial authorization.

Finally, full constitutionalization is not necessarily the actual or desirable result of expansion of fourth amendment reasonableness into this area. It may be appropriate to regard fourth amendment reasonableness as addressing only a selected number of issues related to the execution of searches and seizures. These issues could be selected on the basis of their apparent impact upon underlying privacy interests and the extent to which they involve questions of fact upon which
speculation is necessary. Although avoidance of full constitutionalization may be a desirable objective, arbitrarily limiting the fourth amendment to the evidentiary and warrant requirements may be an unsatisfactory way of pursuing that goal.

2. Need for “Bright Line” Rules

If the primary purpose of the fourth amendment is to discourage improper law enforcement activity, there is an obvious need for standards that can be translated into rules of practical value to law enforcement officers. The Court has accommodated this need, albeit inconsistently and sometimes at the expense of logic, precedent, and perhaps even forthrightness. Probably the most extreme example is New York v. Belton, which addressed the application of Chimel v. California to the search of an automobile “incident to” the occupants’ arrest. In Chimel, the Court had held that, incident to a custodial arrest, an officer may search “the area into which an arrestee might reach in order to grab a weapon or evidentiary item.” In Belton, Justice Stewart, speaking for the Court, decried any intention of “alter[ing] the fundamental principles established in the Chimel case regarding the basic scope of searches incident to a lawful custodial arrest” and turned to the task of “determin[ing] the meaning of Chimel’s principles in this particular and problematic context.” Stressing the need for rules which permit an officer correctly to determine beforehand when a search is authorized as incident to an arrest, the Court held that an officer may search the entire passenger compartment of a car which the arrestee occupied at the time of arrest, without regard to the ability of the arrestee to reach those areas. Only a strong desire to promulgate a clear rule under-
standable to law enforcement officers in the field can explain the blatant discrepancy between the Court's purported reaffirmation of Chimel's principle and its approval of searches of areas which the arrestee could not conceivably reach.

It is likely that the same inclination has affected and will continue to affect the Court's definition of fourth amendment coverage. The Court's unwillingness to construe reasonableness as a protection against undercover surveillance,276 for example, was almost certainly influenced by what it perceived as the impossibility of defining, with completeness, those conditions under which authorities could conduct such surveillance. Thus, the Court was unwilling to use the fourth amendment to limit a law enforcement officer's receipt of information from a subject's former associate who, after receiving information, decided to betray the subject's confidence and disclose the information to authorities.277 The Court evidently concluded that if it were possible to develop criteria that would exclude such activity from fourth amendment coverage but prohibit officers from intentionally "planting" an agent in the subject's confidence, these criteria would be too convoluted and complex to serve as an adequate guide to law enforcement officials. As a result, the Court left the entire subject of "misplaced confidence" outside fourth amendment regulation.

Expanding the fourth amendment to address the means by which police execute searches and seizures might involve the same difficulties posed by undercover surveillance. Given the great variety of manner-of-search issues courts might construe to be of constitutional dimensions, the Supreme Court would be forced to develop a substantial body of law. If this case law could be expected to result in a series of rules for those activities which implicate fourth amendment interests, the rules undoubtedly would be so numerous and complex as to provide no practical guide for law enforcement officials. Potential long-term dangers include not only the absence of any effective legal regulation of the manner in which officials conduct searches and seizures, but the development of a general attitude on the part of police officers that the entire body of fourth amendment requirements is so unrealistic and incomprehensible that they should waste no effort attempting to comply with it.

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276. See supra text accompanying note 161.
This scenario, however, is not the necessary result of constitutionalizing certain manner activities. As noted earlier, constitutional doctrine need only address limited aspects of the method in which police execute searches and seizures. Moreover, there is no reason to believe that courts could not develop reasonably clear standards in these areas. Belton, for example, demonstrates that the Court is capable of laying down bright line rules, even if it is unwilling to defend them on logical grounds. In addition, manner issues may hold more promise for the development of bright line standards than other areas of fourth amendment jurisprudence, such as determining the sufficiency of evidence to establish probable cause. The unquestionable need for bright line standards, therefore, cannot justify a refusal to extend the reasonableness requirement to these activities.

3. Alternative Sources of Protection

Constitutionalization of certain manner issues might be unwise if other legal doctrines cover these issues and realistically can be said to regulate them adequately. The major doctrines outside the fourth amendment that extend to search and seizure activities stem from tort principles. A law enforcement officer's use of excessive force, for example, constitutes a battery. Determining the extent to which the duration of detention gives rise to tort liability is more problematic, however. Similarly, there appears to be little support for the proposition that the time at which a search or seizure occurs implicates tort principles.

There are more important considerations, however, than the theoretical possibility of tort liability. One is the practical value of applying tort principles and damages to search and seizure activities. Damage liability, for example, may not adequately substitute for the exclusionary remedy in certain situations. Although little empirical evidence is available, intuition suggests that whatever problems are present with civil liability will exist if civil liability is relied upon to remedy search and seizure abuses. These problems may prevent civil liability from providing realistic protection.278

A second consideration is the extent to which the litigation that has taken place has resulted in the development of clear standards that courts may readily apply to police conduct. Certain aspects of law enforcement activities may be more susceptible to regulation than others. Statutes and judicial decisions, for example, have addressed the problem of the use of excessive force during an arrest, although their assessments of the appropriate criteria vary. The availability of civil remedies has not had this effect, however, with regard to abuses in other areas. For example, one cannot say that the available tort law provides reasonable limitations upon the force that police may use to implement a search or upon the permissible duration of custody following an arrest upon probable cause. Although civil liability provides a theoretical basis to restrict means of law enforcement, it has not yet developed any reasonably precise guidelines to control its use. Perhaps in part for this reason, the imposition of civil liability does not appear to be a practical method to discourage law enforcement officers' excesses in conducting search and seizure activities.

4. Conclusion

Although the content of the privacy interests the fourth amendment protects has not been articulated precisely, there can be little doubt that the force used to effectuate a search or seizure, the time at which a search or seizure occurs, and the duration of a search or seizure have a significant and independent impact upon protected privacy interests as they are currently understood. This view strongly suggests that courts should construe fourth amendment reasonableness to regulate these aspects of law enforcement conduct. Before one embraces this position, however, several factors should be considered. The uncertainties surrounding the many factual determinations necessary to resolve the kinds of questions presented by manner-of-search characteristics of police action urge against full constitutionalization of manner-of-search activities. Furthermore, the need for "bright line" rules suggests that courts should consider the extent to which expansion of the fourth amendment into this area will permit the development of comprehensible standards to guide police officers. Finally, the legal process may already provide alternative means to protect privacy interests against these intrusions. The need to weigh each of these factors militates against across-the-board constitutionalization. Instead, the use of
force, timing and duration issues with respect to search and seizure activities should be considered individually.

D. SOME TENTATIVE CONCLUSIONS ON SEVERAL MAJOR ISSUES

This section has attempted to develop a framework for determining whether several major aspects of the execution of searches and seizures—the use of force, the time of the activity, and the duration of the intrusion—have fourth amendment dimensions. Part A reviewed the historical evidence which suggests that the framers of the amendment did not limit their concern to the evidentiary and warrant requirements. Part B examined the extent to which these three aspects of law enforcement activity independently intrude into protected fourth amendment interests. Part C explored possible countervailing considerations that, when analyzed within the Court's current analytical framework, might justify excluding these three aspects of searches and seizures from the fourth amendment's reasonableness requirement. This subsection develops some tentative conclusions by considering whether there are sufficient reasons to treat the incremental intrusion into privacy each of these aspects of law enforcement conduct entails as one that, in Justice Harlan's language, society is not prepared to protect by means of the fourth amendment. This subsection then examines other issues that might develop if the Supreme Court decides to constitutionalize each of these aspects. Finally, this subsection discusses a closely related question: if the fourth amendment imposes some requirements of reasonableness upon these three aspects of law enforcement activity, to what extent, and how, does the warrant requirement apply?

1. The Scope of Fourth Amendment Protection

a. Use of Force

Officers' use of force in conducting searches and seizures probably has the most significant effect upon privacy interests of any of the three aspects of law enforcement activities considered here. The case in favor of regulating the use of force under fourth amendment reasonableness is overwhelming. A decision to regulate the use of force, however, presents several additional questions.

First, should the use of force greater than that which reasonably appeared necessary to gain entry to make a search, or to execute a search once police obtained entry, or to effect a detention of the person, be subject to fourth amendment scrup-
tiny? An affirmative response would subject a large portion of this part of search and seizure law to constitutional regulation. Moreover, the criterion proposed, that the force reasonably appear to have been necessary, is arguably less than the "bright line" standard desirable in this area. There appears to be no practical alternative standard, however. Courts should administer the rule with sympathy for the context in which law enforcement officers must make decisions, but little more can be done. The impact on law enforcement of constitutionalizing this standard should be mitigated by the traditional imposition of the same requirement as a matter of nonconstitutional law. If constitutionalization does have a significant effect, this effect, in at least one sense, may confirm the wisdom of constitutionalization. It suggests that pre-existing legal remedies for violation of an important limitation on law enforcement conduct were so meaningless that the limitation itself had little practical significance.

Second, should the requirement of reasonableness prohibit the use of even some "necessary" force? This presents primarily the question whether the use of deadly force, even if necessary to accomplish officers' objectives, should be barred in certain circumstances, such as effectuating nonarrest detentions or arrests in which there is no reason to believe the suspect poses a danger to the safety of others. Such limitations have been urged and sometimes adopted as a matter of non-constitutional law. Adoption of such rules would bring the area closer to full constitutionalization, although by adoption of arguably "brighter" lines than those drawn by a general requirement of apparent necessity. The balance that needs to be struck in evaluating the rules is whether the need to safeguard the lives of persons about whom there is good reason to believe committed crimes outweighs the state's interest in effective law

279. Courts administer other legal doctrines with similar sympathy for the conditions under which the legally-relevant choices must be made. Although an assault is not criminal if engaged in for purposes of self defense, for example, the actor's belief in the need to use force must be "reasonable." See W. LaFave and A. Scott, CRIMINAL LAW 393 (1972). Courts give considerable leeway to the circumstances, however. As Justice Holmes said, "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921).

280. See, e.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(3) (Official Draft, 1975) (only nondeadly force may be used to effect an investigatory stop); TEX. PENAL CODE § 9.51 (deadly force may be used to make arrest only if offense includes use or attempted use of deadly force or there is reasonable belief that arrestee will cause death or serious injury to another if arrest is delayed).
enforcement. In the case of nonarrest detentions, the state’s interest is reduced because the basis for believing the person committed a crime is less than when an arrest is justified. In arrests of “nondangerous” suspects, the state’s interest is limited to enforcement of those laws which protect property and personal security from relatively minor attacks.

The state’s interest in each of these situations, however, also includes a broader interest in preserving the integrity of the legal process. Acceptance of the limits suggested implies that suspects’ interests in being free from life-threatening efforts to detain them outweigh the state’s interest in discouraging evasion of apprehension and other state interests. To the extent that acceptance of the limits would reduce suspects’ incentive to submit to officers’ efforts to place them in custody, the effect reasonably could be expected to apply as well to persons police believe have committed violent offenses. Suspects often may be unaware of whether the officers’ intent is to arrest them or to detain them for investigation or, if the former, to arrest them for an offense which under the rule would justify the use of deadly force. Perhaps the decision becomes such a close one, especially in the absence of reliable empirical evidence concerning the effects of alternatives, that constitutionalization of any position is unwise.

On balance, however, the need to compel society to confront these matters and the need to devise some practical protection for minor offenders and those suspected on the basis of minimal evidence seems to justify development of some fourth amendment limits beyond the general requirement of reasonableness. Declaring the use of deadly force unreasonable in these two contexts would be an appropriate place to start.

A third issue is whether the constitutionalization of a requirement of reasonable force also suggests constitutionalizing some incidental or implementation procedures. The major issue is whether prior announcement is a requirement of constitutional dimensions because of its possible effectiveness in sometimes reducing the need to use force. Again, the matter is a difficult one that perhaps could be best left, at least at this stage, to state resolution. A preferable approach, however, would be to constitutionalize the general requirement of prior announcement before entry for any law enforcement purpose. This is justified by the need for specific measures to implement the fourth amendment prohibition against unnecessary force together with the value of prior announcement in reducing in
other ways the intrusiveness of the entry. It seems reasonably clear that the constitutional standard should have sufficient flexibility to permit states to authorize "no knock" entries in the traditional exceptional situation: when there is reason to believe such notice would be useless and when adequate grounds exist to believe that giving notice would increase the likelihood of violent resistance, escape, or the destruction of evidence.

b. Time at Which Search or Seizure Occurs

The timing of a search or seizure appears to have a less significant impact on underlying privacy interests than the use of force. Furthermore, a general requirement that the timing of police search and seizure activities be "reasonable" or "minimally intrusive" would render a large number, perhaps a significant majority, of police actions arguably unconstitutional, without providing a "bright line" standard for resolving cases. Constitutionalization of such a general requirement is thus probably unwarranted. The problem of night police activity, however, may be sufficiently distinct from other timing issues to permit it to be treated independently.

Reasonableness in the context of nighttime searches and seizures should require that police conduct nighttime searches or entries to make arrests only upon reasonable grounds to believe that delaying the matter until the next day would endanger legitimate law enforcement interests, such as the success of the search or the safety of the officers. The most reasonable formulation of this requirement would demand that the evidence tending to establish the propriety of nighttime action meet the probable cause test. For example, a nighttime search would require a showing of probable cause to believe that a search conducted in the daytime would not result in discovery of the items sought.

The rule suggested above would also apply to entries to make arrests or other detentions of the person. A more difficult question is whether the same rule should apply to arrests and other detentions themselves. The frequent emergency aspect of arrests and field detentions and the difficulty of evaluating the effects of delay on a case-by-case basis appear to justify exempting from the limited bar on nighttime activity detentions of the person that do not require prior judicial approval. On the other hand, when the detention is of a sort that involves substantial predetention procedures, as under statutes which
implement the *Davis* dicta and permit stationhouse detentions for investigation pursuant to a court order, the requirement of a justification for nighttime detentions would reasonably apply.

c. Duration of the Intrusion

The duration of law enforcement activities seems so clearly related to their intrusiveness that explicit recognition of duration as part of fourth amendment reasonableness is inevitable. *Dunaway* probably constitutes such recognition, although the difficulty of evaluating the decision's significance demonstrates the need for some additional explication.

With respect to nonarrest detentions, the rationale for exempting the police activity from the requirement of probable cause demands a limit upon the duration of custody, which *Dunaway* appears to acknowledge. The need for "bright line" standards requires some specificity in this area, however. The Model Code of Pre-Arraignment Procedure would limit field detentions for investigation to a duration reasonably necessary to accomplish the purposes the Code authorizes: to identify the person, to obtain and verify an account of the person's presence or conduct, to obtain an account of a crime the person may have witnessed, and to determine whether to make an arrest. The detention would further be subject to an absolute limit of twenty minutes.281 Constitutionalization of such a standard may be criticized as unduly rigid, but both elements of the standard, a necessity test and a numerically defined outer limit, appear necessary. Similar limits must be developed for other situations, such as the border area checkpoint stop, the stationhouse detention for investigation, and detention of the occupants of premises subject to a search.

An arrest, defined as a detention made for purposes of pursuing formal criminal charges against the person, presents more difficult problems. Two matters in particular require specific attention. First, does reasonableness ever prohibit a so-called "custodial arrest?" Stated affirmatively, the question is whether reasonableness ever requires that an officer release an arrested subject upon the subject's representation that he or she will appear to respond to the charges. This representation may be formalized, in the context of issuing a citation, by requiring the subject to sign a promise to appear. The second question is whether reasonableness places any limits upon

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long term pretrial custody of a defendant who has been properly placed under custodial arrest. The answers to both questions turn on whether the fourth amendment limits the duration of an arrestee's custody following a valid arrest upon probable cause.

Conceptually, the duration of custody following arrest has a significant impact upon the intrusiveness of the arrest. The major question is whether countervailing considerations dictate that the matter not be regulated by fourth amendment reasonableness. Again, perhaps the primary objection to regulation is the difficulty of establishing reasonable "bright line" standards for what may be inherently a judgment call. The prospect of a trial judge reviewing a patrol officer's decision that a subject was not sufficiently likely to appear to justify field release, or of courts attempting to develop standards for making such decisions, is not attractive to those who seek to develop fourth amendment requirements into practical and objective rules. On the other hand, the matter is of such paramount importance to fourth amendment interests that the effort appears worthwhile.

In determining the permissible duration of an arrest, a major question is whether the fourth amendment incorporates the traditional bail limitations on the state's concern that the defendant appear for trial. For example, if an officer's decision to make a custody arrest is based not upon the perception that the defendant will not appear to answer charges but upon the reasonable belief that the defendant will commit further offenses before such an appearance, is the custodial arrest unreasonable under the fourth amendment? Traditional bail doctrine limits the considerations that can affect bail amounts to those related to the likelihood of appearance. There is increasing recognition, however, that this is an unrealistic requirement, which is probably widely ignored in practice. Whatever the resolution of this issue under bail doctrine, fourth amendment reasonableness should not be construed to preclude the states from considering the danger an arrestee poses to the community when deciding whether to make a cus-

283. Cf. Hunt v. Roth, 648 F.2d 1148 (8th Cir.), vacated and remanded, 102 S. Ct. 1181 (1982) (suggesting but not deciding that, pursuant to appropriate procedures, the fourth amendment permits denial of pretrial release or bail where defendant poses sufficient danger to community or where bail will not sufficiently assure defendant's presence).
todial arrest or deciding whether to release a defendant upon the defendant's appearance in court.

A final question the arrest situation poses is whether the duty to limit pretrial detention of persons properly subjected to custodial arrests raises an incidental fourth amendment duty to promptly present such persons before a magistrate. Because the need for prompt presentation is widely recognized on a nonconstitutional basis, constitutionalization would not be disruptive unless states widely ignore their own procedural requirements. Moreover, because the presentation of the subject before a judicial officer is central to the arrestee's right to termination of pretrial custody, and because no alternatives appear to be available, the intrusion upon state flexibility is justified.

The impact of recognizing duration as an element of reasonableness is less clear in the context of searches. To some extent, limitations are built into existing law. A warrant authorizing the search for a described item, for example, probably authorizes only that search reasonably regarded as necessary to determine whether the item is present on the premises. See Stanley v. Georgia, 394 U.S. 557, 571 (1969) (Stewart, J., concurring) (officers serving warrant for materials used in or derived from illegal wagering business acted impermissibly in seizing film and showing it on projector found on premises). A search which lasts longer than reasonably necessary to accomplish its objectives is therefore unreasonable.

Finally, similar problems arise in regard to seizures. Exercise of continued dominion over a seized item for a longer period than necessary could be considered unreasonable under the fourth amendment. Justice Stewart's opinion in Coolidge recognized this. More difficult problems are associated with incidental rights which may attend this limitation. The primary question is raised in Dombrowski: does the right to limit the state's possession of seized items to situations which serve legitimate state interests constitutionalize the requirement of an inventory and return on a search warrant? In addition, there may be a right to some equivalent procedure following warrantless seizures. Such a procedure would require that seized items be submitted to a judicial officer without substantial delay. The widespread acceptance of the return on a warrant as a matter of nonconstitutional procedure would greatly reduce the burden of constitutionalizing this aspect. Ultimately, the value of such judicial oversight of seizures seems to outweigh the in-
fringement on state autonomy that constitutionalization would involve.

2. Applicability of the Warrant Requirement

Given the Court's preoccupation with the requirement that a judicial officer assess the adequacy of police information available to establish probable cause before a search, it is not unreasonable to anticipate that the Court may regard such pre-intrusion judicial evaluation as appropriate for matters other than the sufficiency of the justification for the intrusion itself. In other words, the Court might require judicial approval not only for the search or seizure itself, but for the use of some intrusive method to execute the search or seizure.

In the search warrant context, this generally would mean that the warrant authorizing the search or seizure would also sanction, upon an adequate showing of "reasonableness," the execution of the search or seizure in the particular manner described. Thus, the police officer applying for a search warrant might seek the issuing magistrate's authorization of unannounced entry, forcible entry, or nighttime service, or permission to remain in the premises for an extended period of time. Initially, the rationale for such a requirement is the same as that for the traditional warrant requirement: a magistrate's evaluation of the justification for the incremental intrusion into privacy will prevent some such intrusions before the fact, because the magistrate's evaluation will be more impartial and perhaps better informed, and thus more accurate than that of the law enforcement officer.

The burden imposed upon law enforcement by such an expansion of the warrant requirement would differ among several types of situations. As applied to those situations in which the fourth amendment currently requires a warrant or court order, the expansion would merely increase the number of matters courts address when considering applications for warrants or orders. But as applied to law enforcement activity that does not require a warrant or court order under present law, expansion of the warrant requirement would require resort to an entire procedure which is not otherwise necessary. The cost of so increasing the need to utilize the court order process must be considered when assessing the wisdom of expanding the fourth amendment coverage to situations where utilization is not now demanded.

As the preceding discussion indicates, the Court has not
been receptive to the possibility that if the manner of conducting searches and seizures is subject to fourth amendment scrutiny, this scrutiny must be undertaken prior to an intrusion. In Gooding, this hostility is evident in the majority’s failure to consider any constitutional ramifications of its choice of one statutory provision from many which involve the role of the issuing magistrate and nighttime service of a search warrant. In Dalia v. United States, this hostility is express.

The Dalia majority rejected the argument that a covert entry to install an interception device must be specifically authorized, presumably upon a showing of justification, by the court order which gives officers authority to intercept conversations on the premises. Justice Rehnquist’s reasoning is somewhat

285. See supra text accompanying note 68.
287. The government urged that neither the fourth amendment nor the statute required explicit authorization for covert entry. It did suggest, however, that an issuing judge was nevertheless free to impose limits on the use of covert entry to carry out a particular order and noncompliance with such provisions in an order would “presumably” justify suppression of resulting evidence. Brief for Respondent at 55, Dalia v. United States, 441 U.S. 238 (1979). The Court did not address this argument directly. Instead, the Court stressed that the order in Dalia “implicitly” had authorized covert entry and thus, the Court reasoned, Dalia presented no question of executive authority to break and enter without judicial authorization. See 441 U.S. at 258 n. 21. Perhaps the Court intended this language to indicate that the statute authorizes, but does not require, an issuing court to address the manner of execution and to impose limits upon it. Where, as in Dalia, the order does not contain any specific provisions regarding entry, it will be regarded as embodying a judicial authorization to execute it in any manner permitted by statutory and constitutional limitations. Thus, the Court may have accepted the government’s argument indirectly.

This reading of the Court’s language, if it is correct, apparently creates a discretionary right in the issuing judge to limit covert entry. Does the subject of the investigation then have a corresponding right to have the matter addressed? A judge’s failure to address the issue of covert entry in a particular case might constitute an abuse of discretion. This result seems unlikely, however.

Further, if an issuing judge imposes limits on entry to implement the order, on what authority would a violation of these limits require suppression of the resulting evidence? 18 U.S.C. § 2518(10)(a) (1976) authorizes a motion to suppress on the basis that “the interception was not made in conformity with the order of authorization. . . .” The government, and perhaps the Court, may have contemplated that the statutory exclusionary rule would require suppression for violation of a limitation on covert entry in an order. Do these matters carry broader ramifications? Is it possible, for example, that even if nighttime entry need not be authorized by the judge issuing a search warrant, the judge has authority to prohibit nighttime execution of the warrant and a violation of such a prohibition will render the search unreasonable for purposes of the fourth amendment and the exclusionary rule? If so, is an issuing judge’s failure to address the matter in the warrant subject to later attack? Even if some review of the issuing judge’s action is available, such an approach would leave the matter largely within the issuing judge’s discretion. Generally, the Court
obscure, however, and the extent to which the *Dalia* rule will be applied to other search situations is unclear. Justice Rehnquist's comment that "nothing in the decisions of this Court" indicates that officers who anticipate unannounced entry to serve a search warrant must disclose this possibility in their application for the warrant\(^{288}\) suggests that Rehnquist views the *Dalia* holding merely as the application of a general rule that the judge who approves a search need not consider and authorize extraordinarily intrusive methods of implementing the search. He also maintained that judicial approval of covert entry would be "empty formalism," because authorization for covert entry is "unquestionably . . . implicit" in every bugging order.\(^{289}\) This statement is simply incorrect. Some bugging devices are used in public areas. Others are used in quasi-public locations such as hotel rooms, which permit installation without covert entry during the suspects' occupancy.\(^ {290}\) In addition, the manner officers use to gain covert entry is not implicit in every order and may have significant privacy implications. Depending upon the circumstances, entry by ruse may or may not be significantly more intrusive than nighttime breaking and entry. Further, some investigations permit use of either bugging or wiretapping. In these situations, the fact that bugging would require covert entry may be an important privacy-related consideration in the judge's decision whether to permit bugging. To require the issuing judge to address covert entry issues in bugging cases would not necessarily be the "empty formalism" Justice Rehnquist feared.

Taking the discussion in *Dalia* at face value, however, the language may indicate that *Dalia* is limited to those situations in which the extraordinarily intrusive method of accomplishing the search is the only available method. In such a case, an authorizing judge's consideration of whether the facts of the case justify the method of effectuating surveillance would serve no purpose. Read in this manner, the case has limited significance outside the eavesdropping context. The overall tone of the

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\(^{288}\) 441 U.S. at 257 n.19.

\(^{289}\) Id. at 258.

Court's discussion, however, suggests it did not intend to limit Dalia's holding to such situations.

Justice Powell also noted that the defendant's argument that even if the means by which a warrant is executed should not generally be the subject of presearch judicial scrutiny, the effect of covert entry in Dalia involved such a significantly incremental impact upon fourth amendment interests that the Court should have required such scrutiny "parses too finely the interests protected by the Fourth Amendment." If Justice Rehnquist intended to say that physical entry into premises is not of independent fourth amendment significance when it is permissible to intercept conversations by persons in those premises, his subsequent statement that, even in the electronic surveillance situation, covert entry involves "attendant interference with fourth amendment interests" is directly contradictory. This portion of the Dalia opinion can be read as limiting its holding to those situations in which the method of execution does not infringe sufficiently upon fourth amendment interests to give it independent fourth amendment significance. Again, however, this does not appear to have been the Court's intention. Moreover, if the Court finds no independent significance in covert entry, compared to the significantly different intrusion involved in interception of conversations on the premises, few if any of the other characteristics of implementation at issue here are likely to be distinguishable. Thus, under the Dalia reasoning, the other characteristics of search and seizure execution are unlikely to demand presearch judicial approval.

Several other aspects of the Dalia opinion may have broader ramifications. For example, Justice Powell's discussion cautioned that presearch consideration of various means of implementing a search warrant or order may be impractical because the need for some implementation techniques may become evident only after officers arrive on the scene and the opportunity to involve the issuing magistrate is past. This argument rests upon the "straw man" set up earlier in the discussion, stemming from the characterization of the defendant's argument as urging that search warrants specify "the precise manner," and presumably all aspects, of execution. But, as Justice Powell's later discussion suggests, a presearch authorization requirement could be limited to those methods of imple-

291. 441 U.S. at 257.
292. Id. at 257-58.
293. Id. at 257.
mentation that are foreseeable, or, in his own words, that are "reasonably likely" to be necessary. Any requirement of judicial evaluation could easily be limited to those characteristics of search and seizure activities that intrude with independent significance upon fourth amendment interests, and are reasonably foreseeable at a time when recourse to the issuing magistrate is still feasible.

Justice Powell also relied upon his understanding of the Court's prior decisions, and the government's concession, that "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." The Court has never construed, however, the availability of post-search review as to the adequacy of the showing of probable cause to dispense with the requirement of a search warrant and Justice Powell's discussion does not attempt to explain this distinction. Moreover, the review of the entry in Dalia scarcely inspires confidence in such review, if it is in fact available, as a substitute for presearch scrutiny.
Dalia does not provide a satisfactory approach to consideration of whether, when prior judicial authorization of a search or seizure is required, officials must submit the justification for foreseeable and extraordinarily intrusive methods of implementing the court order that are not inherent in the search or seizure authorized to the issuing judge for pre-intrusion consideration. The answer turns on whether the independent significance of the proposed method of executing the search or seizure, although sufficient to invoke fourth amendment protection, is also sufficient to justify a requirement of prior judicial evaluation. In resolving the question, it is appropriate to consider various implementation questions individually, in light of the likely effectiveness of post-intrusion review and the extent to which such review is likely to be less effective than pre-intrusion review during the warrant process.

Both unannounced forcible entry and nighttime service, for reasons discussed earlier, appear significantly and independently to affect underlying fourth amendment privacy interests. With regard to these activities, the question then becomes whether presearch evaluation of the justification for these methods will prevent their use in a substantial number of cases in which post-search review would result in their condemnation after the fact. Perhaps one can argue that given the press of cases and many magistrates' lack of training in the lower courts, it is unrealistic to expect these judges to go further than to evaluate the basic showing of probable cause. Lower court judges and magistrates may be neither inclined nor equipped to pass preliminary judgment upon the narrower questions.

Despite Justice Powell's facile assumption, the record in Dalia suggests that neither the criteria nor procedure for post-interception review of the reasonableness of covert entry to install bugging devices is well understood. This may have been the result of insufficient preparation or focus by the defense or the lower courts. It may also have been the result of a tactical decision by the defense to avoid litigating the reasonableness of entry because no reasonable challenge could be raised. Cf. 426 F. Supp. at 866 (affidavit of Dalia acknowledged that installation of bugging device in building would be impossible without forcible entry).
whether unannounced entry or nighttime service is justified on the facts presented. Moreover, the prospect of a trial court's more leisurely and thorough review of the propriety of the decision to use these implementation methods, should the search result in litigation, may itself be sufficient to stimulate law enforcement discretion in deciding whether to invoke these procedures.298

On the other hand, if the warrant process has reasonable promise and is to be taken seriously, the warrant requirement should be expected, if required, to perform these functions as well. To the extent that the argument against pre-intrusion judicial involvement suggests that judges issuing warrants are either incompetent or disinclined to review applications with care, there is no basis to distinguish judicial scrutiny of the probable cause showing from justifications offered for unannounced entry and nighttime service.

On balance, unless the warrant process is to be deprecated as a general matter, it seems that at least those methods of service that are extraordinarily intrusive, and both unannounced forcible entry and nighttime service appear to fall within this category,299 should be regarded as of sufficient con-

298. Perhaps the most influential acceptance of this cynical view of the warrant requirement is embodied in the American Law Institute's Model Code of Pre-Arraignment Procedure. The commentary to the section dealing with search warrants takes the position that reform efforts in this area present "an inherent and basically insoluble inconsistency" between improvement of the warrant process as a means of preventing unjustified searches, on the one hand, and encouraging its use on the other. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on Article 220 (Official Draft 1975). Continuing, the commentary refers to the "present perfunctory, routine character" of the warrant procedure and notes that the Code itself generally follows prevailing practice. Id. The Institute's apparent position is that the warrant procedure, as presently administered, is insufficient to constitute an effective barrier against improper searches, that any effective change in the procedure would cause law enforcement officers to circumvent the procedure by increased reliance upon exceptions to the warrant requirement, and that the problem is so "insoluble" that even attempts to develop a compromise position are not worth the effort.

299. The Model Code of Pre-Arraignment Procedure, despite its cynical assumptions concerning the warrant process, would require an issuing magistrate's approval for nighttime service of a warrant, but not for no-knock entry. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 220.2(3), 220.3(3) (Official Draft 1975). The commentary concerning entry notes that other provisions of the Code authorize no-knock entry without a magistrate's approval for purposes of making a warrantless arrest, see id. § 120.6(2), and suggests that to require judicial authorization for such an entry in the warrant context would be anomalous. See id. Commentary to § 220.3, at 515. Provisions of the Code place significant limitations upon officers' ability to make warrantless nighttime entries of private premises to make warrantless arrests, see id. § 120.6(3), yet there is no discussion as to why this is not offensively inconsistent with the requirement of a magistrate's approval of nighttime service of a search warrant.
cern to justify pre-intrusion judicial scrutiny. If such scrutiny proves ineffective, the judicial system should reconsider the practicality of the entire concept of pre-intrusion judicial scrutiny.\textsuperscript{300}

The commentary merely observes that "nighttime intrusions are alarming and danger-provoking, and should not be authorized without good cause shown." Id. Commentary to § 220.2, at 512-13. There is no discussion concerning the propriety of requiring the magistrate to determine, before the fact, whether good cause has been shown.

300. The shifts in federal law governing no-knock entry to serve drug search warrants illustrate the confusion and emotion this issue can create. Prior to 1970, 18 U.S.C. § 3109 governed this matter. Although the statute appeared on its face always to require prior announcement under all circumstances, the case law strongly suggested that the judiciary would read exceptions into the provision. See, e.g., Gilbert v. United States, 366 F.2d 923, 932 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967) (common law exception for situations in which prior notice would endanger officers applies to § 3109). Cf. United States v. Fair, 176 F. Supp. 571, 574-75 (D.D.C. 1959) (forcible entry proper a "short while" after knocking but receiving no response, where nature of offense and sound of shuffling feet after knock justified conclusion that drugs were being or were about to be destroyed). Contra United States v. Sims, 231 F. Supp. 251, 257-58 (D. Md. 1964) (no exception for situation where officers have reason to believe that prior announcement will increase risk to their safety).

Part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 879(b) (1976), authorized an issuing magistrate to approve a no-knock entry to serve a drug warrant. The legislative history suggests that Congress perceived such an entry to be constitutionally permissible but not authorized by existing statutes. There is no indication that Congress gave much attention to the propriety of involving the issuing magistrate in the decision whether such entry is appropriate. The House Report's discussion of Ker, see supra text accompanying note 47, read that case as upholding no-knock entry even though "the judgment of the exigency of the circumstances was that of the peace officers, not an independent judicial officer." H.R. Rep. No. 1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4566, 4592. Congress did not consider the matter further, however.

In 1974, Congress repealed this provision and other statutory provisions which impose special requirements upon District of Columbia officers. See Pub. L. No. 93-481, 88 Stat. 1455 (1974). The legislative history does not clearly indicate whether Congress assumed that courts would read exceptions to the requirement of judicial authorization into § 3109, or whether Congress intended to prohibit all no-knock entries, at least under search warrants which previously would have been governed by the 1970 legislation. The Conference Report on the bill discussed the perceived need to impose the same limits on District of Columbia officers as apply to other federal law enforcement agents, but the report does not address the no-knock provisions. See Conf. Rep. No. 1442, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5971. The matter was addressed to some extent, however, in the House Report on a companion bill to the Senate Bill which both houses eventually passed.

While the Committee recognizes that there exist certain, rare instances where a law enforcement official, in carrying out his duty under the law, may be justified in entering and searching property without first notifying the citizen of his intent and without a warrant, the Committee must caution the DEA that it is generally opposed to this practice as a means of drug law enforcement.

WHEN THE ACTIVITY DOES NOT REQUIRE PRIOR JUDICIAL APPROVAL, SUCH AS AN ARREST IN A PUBLIC PLACE, THE QUESTION CHANGES. IN THESE SITUATIONS, REQUIRING A JUDICIAL OFFICER TO EVALUATE THE JUSTIFICATION FOR CERTAIN IMPLEMENTATION METHODS WOULD AMOUNT TO THE IMPOSITION OF A WARRANT REQUIREMENT IN CASES IN WHICH CURRENT LAW DEMANDS NONE. PRESUMABLY THERE ARE SUFFICIENT REASONS TO CONCLUDE THAT THE ADEQUACY OF THE INFORMATION SUPPORTING THE INTRUSION NEED NOT BE SUBJECTED TO PRE-INTRUSION JUDICIAL SCRUTINY. IT SEEMS ALMOST NECESSARILY TO FOLLOW THAT THERE ARE ALSO SUFFICIENT REASONS NOT TO DEMAND THAT MANNER OF INTRUSION ISSUES BE SO SCRUTINIZED.

V. CONCLUSIONS

IN RESPONDING TO THE DEFENDANT'S CLAIMS IN SIERRA, THE LOUISIANA SUPREME COURT NOTED THAT, ALTHOUGH "THE LANGUAGE OF THE FOURTH AMENDMENT MAY ARGUABLY EXTEND TO SEARCHES MADE WITH PROBABLE CAUSE THAT ARE CONDUCTED IN AN IMPROPER MANNER, CERTAIN NO-KNOCK ENTRIES TO SERVE WARRANTS, APPARENTLY UNDER § 3109? IF SO, DOES IT REFLECT A VIEW THAT NO-KNOCK ENTRIES UNDER THIS PROVISION WOULD BE PROPER ONLY IN MORE LIMITED SITUATIONS THAN UNDER THE 1970 LEGISLATION? IF THIS IS TRUE, WOULD ABANDONING THE REQUIREMENT THAT A MAGISTRATE AUTHORIZE NO-KNOCK ENTRIES BEFORE THE FACT ACTUALLY TIGHTEN THE RESTRICTIONS UPON SUCH ENTRIES?

IN UNITED STATES V. CARTER, 566 F.2D 1265 (5TH CIR.), CERT. DENIED, 436 U.S. 956 (1978), THE DEFENDANT URGED THAT THE 1974 REPEAL OF § 879(B) REFLECTED A CONGRESSIONAL INTENTION THAT § 3109 SHOULD ALWAYS REQUIRE ADVANCE NOTICE, I.E., THAT NO-KNOCK ENTRIES BE LEGISLATORILY PROHIBITED. THE COURT REJECTED THIS ARGUMENT, CITING THE CONFERENCE REPORT'S DISCUSSION OF THE STATUS OF DISTRICT OF COLUMBIA OFFICERS, WHICH SEEMED TO ASSUME THAT THE LEGISLATION WOULD SUBJECT THEM TO THE REQUIREMENTS OF THE DEMAND FOR ADVANCE NOTICE, AND THE EXCEPTIONS THERETO, UNDER § 3109. 566 F.2D AT 1268. THE COURT DID NOT CONSIDER THE HOUSE REPORT.


301. IT IS POSSIBLE THAT USE OF A GIVEN PROCEDURE MIGHT NOT REQUIRE A WARRANT, FOR REASONS INCLUDING THE RELATIVELY LOW INTRUSION INTO PRIVACY THE PROCEDURE INVOLVES. ON PARTICULAR FACTS, HOWEVER, THE METHOD CHOSEN TO IMPLEMENT THE PROCEDURE MIGHT INCREASE THE INTRUSIVENESS TO A LEVEL WHERE REASONABLENESS DEMANDS THAT THE WARRANT REQUIREMENT BE APPLIED. PAYTON V. NEW YORK, 445 U.S. 573, 590 (1980) HOLDS THAT ENTRY INTO A SUSPECT'S HOME, WITHOUT CONSENT, TO ARREST THE SUSPECT REQUIRES A VALID ARREST WARRANT. ONE WAY TO VIEW THE PAYTON CONCLUSION IS THAT, ALTHOUGH ARRESTS GENERALLY ARE NOT SUFFICIENTLY INTRUSIVE TO DEMAND THE APPLICATION OF THE WARRANT REQUIREMENT, WHEN AN ARREST INVOLVES PENETRATION INTO THE SECURITY OF THE HOME THE OVERALL INTRUSIVENESS INCREASES TO A LEVEL AT WHICH RESORT TO THE WARRANT PROCESS BECOMES CONSTITUTIONALLY MANDATED.
there is little explicit support in judicial decisions for this proposition despite the tremendous number of cases that involve the fourth amendment.” A careful review of Supreme Court decisions discloses conflicting signals, and few definitive holdings, concerning this aspect of the scope of fourth amendment reasonableness. Under the analysis mandated by Katz, resolution of the matter should turn initially upon whether the manner in which police execute searches or seizures has an independent and significant impact upon the privacy interests protected by the fourth amendment. If these interests are implicated, however, the Court must also consider whether persuasive countervailing interests suggest that regulating the manner of conducting searches and seizures by means of the fourth amendment would be unwise. Perhaps the most important consideration involves the value of avoiding full constitutionalization of the legal standards governing law enforcement conduct.

Applying this analysis to three major characteristics of the manner in which police carry out otherwise reasonable law enforcement activities suggests several conclusions. First, the fourth amendment should be read to prohibit the use of more force than reasonably appears necessary to execute a search or seizure, and to prohibit the use of deadly force, even when necessary, to make nonarrest detentions and arrests of nondangerous suspects. Second, nighttime searches and entries should be considered reasonable only if police establish probable cause to believe that a nighttime search or seizure is essential to the success of the search. In addition, the duration of searches should be no longer than reasonably necessary to make the search, and limits must be developed for the duration of nonarrest detentions. Custodial arrests for minor offenses in which custody serves no significant state interest should be regarded as unreasonable, and post-presentation custody following a reasonable custodial arrest should be barred when such continued custody serves no legitimate state interest. Similarly, the state’s possession of an item properly seized should be regarded as reasonable only for a period of time reasonably necessary to serve the purpose for which the items were seized.

In recognizing these aspects of fourth amendment reasonableness, the Court should also constitutionalize some “incidental” procedural requirements designed to implement

302. 338 So. 2d at 615-16.
reasonableness in these contexts. Thus, the Court should read the fourth amendment to mandate a general requirement of prior announcement before forcible entry, prompt presentation of a person subject to a custodial arrest before a magistrate, and judicial supervision of items seized and retained by law enforcement officers. Finally, where the fourth amendment already requires a warrant or its equivalent, the Court should also read the warrant clause to require the issuing magistrate's authorization, upon a proper showing, of unannounced entry by force and nighttime execution of the warrant.

Given the amount of search and seizure litigation since the Court recognized the exclusionary rule in *Weeks*, it is both amazing and distressing that the case law contains little discussion of the appropriateness of claims such as those made in *Sierra*. If the fourth amendment is to serve as an effective safeguard of privacy interests threatened by law enforcement investigatory conduct, these issues need to be addressed and the scope of fourth amendment reasonableness must be cautiously expanded beyond the traditional evidentiary and warrant requirements.