Proposed Federal Rule of Criminal Procedure 41.1

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Note: Proposed Federal Rule of Criminal Procedure 41.1

I. INTRODUCTION

In Davis v. Mississippi\(^1\) the United States Supreme Court held that the detention of a criminal suspect for purely investigatory purposes was a "seizure" within the meaning of the Fourth Amendment.\(^2\) That being so, traditional jurisprudence would seem to dictate that such detentions could no longer be made upon a showing of less than probable cause to arrest.\(^3\) Since probable cause is usually absent at the investigatory stage, the Davis holding would appear to severely limit the scope of permissible criminal investigatory procedures, and such a limitation would proportionately limit success in the detection and apprehension of crime. Yet to allow the police broad latitude here would endanger fundamental individual liberties. The Davis court, in dicta, suggested a possible solution to this dilemma: under carefully delineated circumstances detentions for fingerprinting might be permissible upon a showing of less than probable cause as traditionally defined. This suggestion resulted in the formulation of Rule 41.1,\(^4\) a proposed addition to the Federal Rules of Criminal Procedure. Rule 41.1 would permit certain identification procedures to be taken pursuant to court order upon the showing of a certain standard of evidence not amounting to probable cause to arrest. This procedure, if constitutional, would be an efficient compromise between the investigatory techniques requisite to effective law enforcement and the right to be free from unreasonable searches and seizures.

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2. Id. at 726-727. The Fourth Amendment to the United States Constitution reads:

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

3. In determining the existence of probable cause to arrest, the issue is:

   whether at that moment the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.


This note will examine the conditions which created the need for such a procedure as that embodied in proposed Rule 41.1, the mechanics through which the rule would be implemented, the constitutionality of the less than probable cause to arrest standard, the separate identification procedures available under the rule, and the sanction for noncompliance with the court order.

II.

A. The Davis Case and the Need for a Workable Rule

The petitioner in Davis was one of at least 24 Negro youths who were rounded up after an alleged rape, brought to the police station, briefly questioned and fingerprinted. All were then released except petitioner, who was held overnight in jail and fingerprinted a second time. The latter fingerprints were matched by the F.B.I. with prints found in the victim's home. This evidence was admitted over objection at petitioner's trial for rape and he was subsequently convicted. The Court held the fingerprint evidence to be the product of a detention made illegal due to the lack of probable cause to arrest, and therefore inadmissible at trial.\(^5\) The fingerprints taken immediately after petitioner was brought to the police station, as well as those taken during the time he was in jail, were held to be inadmissible because, the Court said,

5. In Weeks v. United States, 232 U.S. 383 (1914), the Court held that evidence which is the product of an illegal search and seizure is inadmissible in federal prosecutions. In 1961 the Court held that the exclusionary rule enunciated in Weeks was applicable to state prosecutions as well by virtue of the due process clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).
6. 394 U.S. at 726-27.
7. See Armentano, The Standards for Probable Cause Under the
to arrest is whether a prudent man, given all the facts and circumstances known to him at the time of his decision, would believe that the suspect had committed the offense. This traditional formulation, requiring something more than a 50 per cent probability, coupled with the broad language of Davis, has created serious problems for law enforcement officers in criminal investigations. Federal officers may have, for example, fingerprints found at the scene of the crime which would positively identify the criminal. Under Davis, given the absence of probable cause to arrest, the officers could not constitutionally detain a suspect long enough to obtain his fingerprints. Without the suspect’s fingerprints they might never be able sufficiently to connect him with the crime to meet the requirement of probable cause to arrest. This situation has prompted one court to comment that “[w]hat [the policeman] needs is . . . some creative legal thinking on the subject of how [he] should proceed under these circumstances.”

Fourth Amendment, 44 Conn. B.J. 137, 179 (1970):

[A]t present, there are at least six probable cause standards:
(1) the probable cause necessary to effect a search or arrest with a warrant; (2) the probable cause necessary to justify a warrantless search incident to an arrest; (3) the probable cause required to obtain a search warrant to make an administrative search; (4) the cause, as explained in Terry, which will justify a self-protective search where probable cause to arrest is absent; (5) the probable cause required to make a routine border search; and (6) the probable cause, expressed in terms of a “clear indication,” which must be shown to justify an intrusion beyond the surface of the skin.

8. See note 3 supra.

9. Criticism has been directed at Davis for its unnecessarily broad language and the sweeping scope of the decision. See Carrington, Speaking for the Police, 61 J. Crim. L.C. & P.S. 244, 255-56 (1970). The decision also prompted one court to observe satirically:

It is true that the learned author of the Davis opinion did not describe the manner in which authorization of a judicial officer is to be obtained for the purpose of a detention for fingerprinting of someone for whose arrest probable cause does not exist. Perhaps that procedure will be made clear in the process of the gradual unveiling of the edifice of perfect justice in which the high court is engaged.


10. Carrington, supra note 9, at 256-57.

11. The police might make a “pretext arrest” for a lesser offense for which they may or may not have probable cause to arrest and then attempt to use the fingerprints thus obtained in their investigation of the principal crime. However, if the fingerprints connected the suspect with the crime, the evidence so obtained would be excluded at trial if the original arrest could be proved to be merely a sham tactic. Mills v. Wainwright, 415 F.2d 787, 790 (5th Cir. 1969).

B. The Mechanics of Rule 41.1

The "creative legal thinking" thus called for resulted in the formulation of proposed Rule 41.1. A Rule 41.1 "nontestimonial identification order" is available upon a showing of a certain standard of evidence, not amounting to probable cause to arrest, for any of the following identification tests:

- fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, and lineups.

Such an order "may be issued by a federal magistrate upon request of a federal law enforcement officer or an attorney for the government." The request "may be made prior to the arrest of a suspect, after arrest and prior to trial or, when

13. The term "nontestimonial identification" has been applied to these procedures because they have uniformly been held not to be within the Fifth Amendment's privilege against self-incrimination. Grimes v. United States, 405 F.2d 477 (5th Cir. 1968) (fingerprints and hair samples); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplar and voice sample); Schmerber v. California, 384 U.S. 757 (1966) (blood sample); United States v. Nesmith, 121 F. Supp. 758 (D. D.C. 1954) (urine specimen); Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967) (photographs); Holt v. United States, 218 U.S. 245 (1910) (lineup).


"Federal Magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631-639, a United States commissioner, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

Preliminary Draft at 92.

"Federal law enforcement officer" is defined in Rule 41.1(1)(2) as any government agent who is engaged in the enforcement of the criminal laws and who is authorized by the Attorney General to apply for or execute a nontestimonial identification order.

52 F.R.D. at 466.

"Attorney for the government" is also defined by reference to Preliminary Draft, Rule 54(c). 52 F.R.D. at 469. The Preliminary Draft provides:

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

Preliminary Draft, at 91-92.
special circumstances of the case make it appropriate, during trial."\textsuperscript{16}

Upon a showing, supported by sworn affidavits, that the requisite evidentiary standard has been satisfied, "the federal magistrate shall issue an order requiring the person named in the affidavit to appear at a designated time and place for non-testimonial identification."\textsuperscript{17} The order shall be signed by the federal magistrate and shall state:

1. that the presence of the person named in the affidavit is required for the purpose of permitting nontestimonial identification procedures in order to aid in the investigation of the offense specified therein;
2. the time and place of the required appearance;
3. the nontestimonial identification procedures to be conducted, the methods to be used, and the approximate length of time such procedures will require;
4. the grounds to suspect that the person named in the affidavit committed the offense specified therein;
5. that the person will be under no obligation to submit to any interrogation or to make any statement during the period of his appearance except for that required for voice identification;
6. that the person may request the federal magistrate to make a reasonable modification of the order with respect to time and

\textsuperscript{16} Rule 41.1(b), 52 F.R.D. at 463. The official comments state: Subdivision (b) makes clear that the order may be requested prior to arrest; between arrest and trial (see Lewis v. United States, 382 F.2d 817 (D.C. Cir. 1967), in which it is held that the Mallory rule is not applicable to the taking of a handwriting exemplar between arrest and initial appearance before the magistrate); or where special circumstances exist, during trial. This is consistent with the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial \textsuperscript{1970}, which provides that the court may order such identification procedures "[n]otwithstanding the initiation of judicial proceedings . . . ."

\textsuperscript{17} Rule 41.1(d), id. at 463.
place of appearance, including a request to have any nontestimonial identification procedure other than a lineup conducted at his place of residence; and
(7) that the person, if he fails to appear, may be held in contempt of court.¹⁸

A Rule 41.1 order

may be served by a federal law enforcement officer. The order shall be served upon the person named or described in the affidavit by delivery of a copy to him personally. Service may be had at any place within the jurisdiction of the United States.¹⁹

Rule 41.1(e) also provides that

[a]: the request of the person named in the affidavit, the federal magistrate shall modify the order with respect to time and place of appearance whenever it appears reasonable under the circumstances to do so.²⁰

Once the time and place of appearance have been determined, Subdivision (i) further promotes the goal of minimal inconvenience to the suspect:

No person who appears under an order of appearance issued pursuant to this section shall be detained longer than necessary to conduct the specified nontestimonial identification procedures unless he is arrested for an offense.²¹

¹⁸. Rule 41.1(h), id. at 464-65. The official comments state: Subdivision (h) prescribes the contents of the order. It makes clear that the court shall indicate the “procedures to be conducted, the methods to be used, and the approximate length of time such procedures will require.” It is contemplated that courts will, by rule or other means, use this authority to pursue the objectives identified in United States v. Wade, 338 U.S. 218, 239 (1967), where the court said that there is need for
[1] legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings • • •
and in Adams v. United States, 399 F.2d 574, 579 (D.C. Cir. 1968): police require skillful and imaginative legal planning, bottomed upon cooperative utilization, rather than utter disregard, of judicial power, and designed to achieve legitimate ends by means which have some appeal in terms of their concern for statutory and constitutional protections.
See also American Law Institute, A Model Code of Pre-Arraignment Procedure § A 5.09(3) (1968).
Subdivision (h)(5) is intended to make clear that the defendant shall not be required to give testimonial evidence. The rule, by its express terms, is limited to nontestimonial identification procedures.
Id. at 470-71. See note 13 supra.
¹⁹. Rule 41.1(g), id. at 464.
²⁰. 52 F.R.D. at 464. The official comments state: “Subdivision (e) affords the suspect an opportunity to request modification of the order where convenience to him makes such modification reasonable.” Id. at 470.
²¹. Id. at 465. The official comments state: “Subdivision (i) deals with implementation of the nontestimonial identification order. It stresses the fact that . . . any period of detention shall be as brief as possible.” Id. at 471.
Subdivision (d) also stresses the fact that the detention shall be as brief as possible: "After such identification procedures have been completed, the person shall be released or charged with an offense."22

Whatever the results of the identification procedures, Subdivision (j) provides:

Within forty-five days after the nontestimonial identification procedure, a return shall be made to the federal magistrate who issued the order setting forth an inventory of the products of the nontestimonial identification procedures obtained from the person named in the affidavit. If, at the time of such return, probable cause does not exist to believe that such person has committed the offense named in the affidavit or any other offense, the person named in the affidavit shall be entitled to move that the federal magistrate issue an order direct that the products of the nontestimonial identification procedures, and all copies thereof, be destroyed. Such motion shall, except for good cause shown, be granted.23

Given the lower standard necessary to procure these identification tests, the express inclusion of a right to have the results destroyed if probable cause is not established is well-considered.24 This right should be construed to include the complete expurgation of any record of such detention, since the record is susceptible to misinterpretation and misuse.25

22. Id. at 463.
23. Id. at 465-66. The official comments state:
Subdivision (j) provides for a return which shall set forth the results of the identification procedures. If there is no probable cause adequate to justify an instituting of a prosecution, the person is entitled to a court order directing that the results of the identification procedures be destroyed.
Id. at 471.
24. A person arrested without probable cause, or acquitted at trial after a valid arrest, also appears to have this right:
There is, to say the least, serious question whether the Constitution can tolerate any adverse use of information or tangible objects obtained as the result of an unconstitutional arrest of the individual concerned. . . . [I]t is hard to see how an arrest not based on probable cause, followed by complete exoneration of the person arrested . . . could be used to support any adverse inferences whatsoever regarding him. . . . [I]n consequence, if appellant can show that his arrest was not based on probable cause it is difficult to find constitutional justification for its memorialization in the FBI's criminal files.

25. For example, companies which research the complete private life of potential employees through the services of investigatory agencies usually examine court records. This creates the possibility of innuendo and resultant adverse effects to the suspect. See Countryman,
The rule provides that for “good cause shown” a motion for destruction of the products of the tests may be denied. Though such motions should be carefully considered by the courts to prevent emasculation of this protective provision, several situations might satisfy the “good cause” requirement. First, good cause might be shown where a strong possibility exists that sufficient evidence would be forthcoming in the immediate future which would, in conjunction with the results of the identification procedures, establish probable cause to arrest. Another instance might include the situation where the evaluation of the identification tests has been unavoidably delayed, although in most instances 45 days should be ample time for the complete evaluation of the products of the tests provided for under Rule 41.1. This saving-of-the-evidence possibility may lessen the tendency to find probable cause to arrest in close cases where in fact probable cause should not be found. In these cases, especially where further evidence may be available in the near future, the magistrate may prefer to delay a final decision on the probable cause to arrest issue until all possible evidence in the case has been introduced. The magistrate’s awareness that the identification evidence will not be destroyed and the record expunged if in his discretion he finds “good cause” may thus allow him valuable latitude in his determination of probable cause. In cases where the good cause shown is later rebutted or ceases to exist, the motion should be granted immediately.

C. THE CONSTITUTIONAL VALIDITY OF RULE 41.1

1. The Standard of Evidence Required to Obtain a Rule 41.1 Order

An examination of the constitutionality of the less than


26. In introducing a bill somewhat similar to Rule 41.1 in 1969, Senator John L. McClellan expressed doubts about the utility of allowing eradication of such evidence if probable cause to arrest was not established. He felt that such a procedure might lead to picking up a suspect more than once. 115 Cong. Rec. 28896, 28899 (1969).

27. Where the requested procedures produce a positive identification and probable cause to arrest is thereby clearly established, the police may arrest the suspect immediately. However, in cases where the issue remains in doubt even after the identification procedures are completed, the police may prefer to have the magistrate determine the existence of probable cause to arrest. It is at this point that the discretion to deny the motion to destroy the products of the identification procedures may play a significant role.
probable cause standard embodied in Rule 41.1 necessarily involves as a first step a review of the Fourth Amendment as it has been construed by the Supreme Court. The Amendment prohibits all unreasonable searches and seizures and provides that warrants shall issue only upon a showing of probable cause. The "reasonableness clause" and the "warrants clause" are independent safeguards, the first proscribing unreasonable searches and seizures of any kind, and the second providing protection against abuse of the warrant procedure. It has been suggested that these two clauses contain substantially identical standards designed to protect personal liberty against unconstitutional searches and seizures whether by warrant or otherwise. This suggestion is supported by a recent summation by the Supreme Court of its interpretation of the Fourth Amendment:

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.

However, the Fourth Amendment area is marked by conflicting decisions which "[n]o trick of logic will make... perfectly consistent." For example, a prior judicial determination of the probable cause requirement through the warrant procedure is generally necessary to a reasonable search, but the police will be allowed to make an independent determination of probable cause in emergent circumstances, subject to judicial review. Moreover, a review of the Fourth Amendment cases fails to yield a definitive statement on the relationship between "probable cause" and "reasonableness." This failure results partially from the dichotomy between the warrant and non-warrant procedure, and from the confusion which is seemingly inherent in a case by case approach. However, the Court seems to

28. Rule 41.1(c)(2) defines the standard as "reasonable grounds, not amounting to probable cause to arrest, to suspect that the person... committed the offense." 52 F.R.D. at 463. See text at note 41 infra.
29. See note 2 supra.
35. United States v. Stoval, 388 U.S. 293 (1967), one commentator notes, "... is an apt illustration of the preference for case-by-case
recognize that a determination of the constitutionality of a particular search or seizure necessitates a balancing of contending individual and societal interests. Thus it can be persuasively argued, as the Court stated in Camara v. Municipal Court,\textsuperscript{86} that reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach . . . gives full recognition to the competing public and private interests here at stake. . . .\textsuperscript{37}

This concept of reasonableness as the ultimate standard has resulted in the proposition that probable cause to arrest is not an absolute prerequisite to every conceivable interference with personal liberty. Thus in Terry v. Ohio\textsuperscript{88} it was held that without probable cause to arrest a police officer may make a self-protective search for weapons of a person reasonably believed to be dangerous. Since the warrant procedure is not involved here the basis for the "frisk" is the reasonableness under all the circumstances of the action taken. The critical factor justifying the "frisk" for weapons in Terry was the Court's concern for the personal safety of the police officer in a confrontation with a potentially dangerous suspect. In the absence of such compelling considerations probable cause to arrest or to search is generally necessary for a lawful restriction of one's personal freedom.

The development which directly led to the Rule 41.1 standard was the recognition by the Davis Court of the difficulty created for law enforcement officers by its holding that investigatory detentions are subject to the constraints of the Fourth Amendment. It recognized that the balancing of competing interests which determines the reasonableness of a particular search and seizure is also relevant to the amount of evidence necessary to establish probable cause in a particular case. Thus, the Davis Court thought,

\begin{quote}
It is arguable . . . that, because of the unique nature of the fingerprinting process, . . . detentions [for fingerprinting] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense.\textsuperscript{39}
\end{quote}

\begin{footnotes}
\item 36. 387 U.S. 523 (1967).
\item 37. Id. at 539 (citations omitted). Camara involved warrantless housing code inspections, but this same language has been quoted in the criminal context. Terry v. Ohio, 392 U.S. 1, 20--21 (1968).
\item 38. 392 U.S. 1 (1968).
\item 39. 394 U.S. at 727.
\end{footnotes}
The Court's analysis of the "unique nature of the fingerprinting process" supports the concept of balancing the interests of society in crime prevention against the seriousness of the infringement upon one's personal liberty. Thus detentions for the sole purpose of fingerprinting might not have to meet the traditional probable cause standard because

...detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life or thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eye-witness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, 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 fingerprinting context.40

Proposed Rule 41.1 attempts to define the narrow circumstances suggested in Davis which would strike a balance between contending societal and individual interests. Rule 41.1(c) provides that a nontestimonial identification order shall issue upon a showing:

(1) that there is probable cause to believe that an offense has been committed;
(2) that there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
(3) that the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.41

40. Id. at 727-28.
41. 52 F.R.D. at 463. The official comments state:
The "reasonable grounds to suspect" formulation is consistent with Terry v. Ohio, 392 U.S. 1 (1968), and the language of Davis v. Mississippi, 394 U.S. 721 ... (1969). ... It is also consistent with the decisions of the United States Court of Appeals for the District of Columbia. See, e.g., United States v. Greene, 429 F.2d 193, 197 n.7 (D.C. Cir. 1970). The third requirement is that there be reason to believe that the identification procedure will be of "material aid in determining whether the person named in the affidavit committed the offense."

52 F.R.D. at 469-70.

The Federal District Court sitting in St. Paul, Minnesota, has adopted the following rule:

It is ordered that the magistrates at St. Paul and Minneapolis are authorized to issue orders requiring the furnishing of handwriting exemplars under the terms and conditions speci-
Requirements (1) and (3) should present no great difficulty in most cases. "Probable cause to believe that an offense has been committed" should be construed as that quantum of evidence necessary to establish probable cause as traditionally defined, a concept with which the courts have long been familiar. The term "material aid" ensures that the requested procedures


[December 13, 1971].

Rule 41.1 of the Colorado Rules of Criminal Procedure provides for the taking of fingerprints upon a showing that:

(1) A known criminal offense has been committed; and
(2) There is reason to believe that the fingerprinting of the named or described individual will aid in the apprehension of the unknown perpetrator of such criminal offense, or that there is reason to suspect that the named or described individual is connected with the perpetration of the crime; and
(3) The fingerprints of the named or described individual are not in the files of the agency employing the affiant.


In 1969, Senator McClellan introduced a bill (proposed 18 U.S.C. § 3507, S. 2997, 91st Cong., 1st Sess. (1969) ) similar to proposed Rule 41.1. This bill would have provided for the issuance of a subpoena for "identifying physical characteristics" upon a showing that:

(1) reasonable cause exists for belief that a specifically described criminal offense punishable under a statute of the United States by death or imprisonment for more than one year has been committed;
(2) procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense; and
(3) such evidence apparently cannot be obtained by the investigating officer from any investigative or law enforcement agency of the United States, any State, or any political subdivision of any State.


Arizona has adopted a statute which provides for the taking of identification procedures similar to those available under proposed Rule 41.1. Ariz. Rev. Stat. Ann. § 13-1424 (1971). The bill appears to have been based upon proposed 18 U.S.C. § 3507, as the prerequisites for the issuance of the court order pursuant to this statute are essentially the same. Noticeably lacking from the formulation of the basis for the issuance of the order both in this statute and in proposed 18 U.S.C. § 3507 is the requirement of cause to believe that the person subject to the requested order committed the crime. This requirement must be implied, however, and it is clear that, at least with respect to 18 U.S.C. § 3507, something less than probable cause is required. See introductory remarks of Senator McClellan, 115 Cong. Rec. 28896 (1969).
have a legitimate purpose other than harassment, and in most cases it should be obvious whether the identification tests will be of "material aid." For example, a showing that a check has been forged would clearly indicate that a handwriting exemplar would be of material aid in determining whether the suspect forged it.

The critical formulation here, "reasonable grounds, not amounting to probable cause to arrest, to suspect," is an attempt to articulate a standard of evidence consistent with the Fourth Amendment, yet consisting of less than probable cause in the traditional sense. This standard should in essence be viewed as incorporating the concept of "variable probable cause." In Wise v. Murphy, a dissenting judge explained the difference between this concept and probable cause as traditionally defined:

Unlike our present concept where we focus on only one issue— is there probable cause to believe the person is guilty of a crime — . . . this test would call for the examination of a variety of factors such as: the gravity of the crime; whether the police are concerned mainly with detention rather than prevention; the seriousness of the intrusion necessitated by the type of detention employed. . . . In essence, probable cause becomes one of a number of factors balanced in a test to determine the overriding standard of reasonableness.

42. See text accompanying notes 36-40 supra.
43. The concept of variable probable cause is attributed to Justice Jackson's dissent in Brinegar v. United States, 338 U.S. 160, 183 (1949). The Rule 41.1 standard should be construed consistently with the suggestion in Davis that traditional probable cause might not be necessary for fingerprint detentions. See text accompanying note 40 supra. This suggestion is susceptible to two interpretations. First, the Court might simply have meant that if traditional probable cause requires something more than a 50% probability in all cases it would now accept a lower probability, perhaps 40%, without respect to the strength of the competing interests present in each case. This interpretation is inconsistent with the concept of variable probable cause. Second, the Court might have been suggesting that rather than adhere to the more mathematical probabilities traditionally associated with probable cause, it would consider in each case all of the competing interests to determine the overall reasonableness of a search or seizure. This would support the utilization of the variable probable cause concept of Rule 41.1 and would appear to be the better interpretation. First, the Court has been willing in several recent cases to explicitly adopt the balancing of interests approach used in the determination of variable probable cause. E.g., Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 539 (1967). Second, the Davis Court's suggestion concerning fingerprinting was founded upon the same type of analysis as that required for a finding of variable probable cause. See text accompanying note 40 supra.
Thus the term "reasonable grounds"\textsuperscript{45} encompasses the necessary balancing of individual and societal interests inherent in a finding of reasonableness under the Fourth Amendment. It allows for a consideration of the limited nature of the detention contemplated under Rule 41.1 and the concomitantly limited infringement upon the personal liberty of the individual suspect. The specific denial of the necessity for probable cause to arrest assumes that the detention is of a lesser order than a formal arrest.\textsuperscript{46} This specific denial, in conjunction with the phrase "reasonable grounds . . . to suspect," rejects the comparatively rigid evidentiary standard traditionally associated with probable cause to arrest. Thus Rule 41.1 would require not probable cause to believe but rather, reasonable grounds to suspect. More than a mere semantic distinction, this wording significantly changes the substantive evidentiary showing necessary for a lawful detention.

The relative novelty of the variable probable cause concept requires an initial determination of its practical feasibility. Although susceptible to deceptively simple definition, the concept will likely prove to be exceptionally difficult and complex in application. This would be especially true during the early stages following its adoption. The rule states that less than probable cause to arrest is sufficient but otherwise provides no guidelines as to the minimum quantum of evidence necessary to satisfy the "reasonable grounds to suspect" formulation. Of particular difficulty will be situations where multiple suspects are involved.

This problem is further complicated by the nature of variable probable cause itself. The concept lacks the relatively more tangible elements which constitute traditional probable cause. The magistrate can no longer rely on mathematical probabilities but must now consider in both abstract and con-

\textsuperscript{45} The term "reasonable grounds" in federal statutes has been construed to be the substantial equivalent of "probable cause." See, e.g., Draper v. United States, 358 U.S. 307, 310 n.3 (1959).

\textsuperscript{46} This assumption may be of doubtful validity in certain instances where a series of identification procedures is requested. For example, in a rape case it is conceivable that all of the following tests could be requested: blood, hair and voice samples, fingerprints and lineups. Furthermore the magistrate may order that a suspect be brought before him by force if necessary where it appears that he is likely to alter or destroy the evidence or flee the jurisdiction. See text accompanying note 112 infra. This is such a substantial deprivation of personal liberty that at best only a tenuous distinction could be made between this procedure and a "formal arrest."
crete terms all of the conflicting societal and individual interests as well as the quantum of evidence shown in each case. He is thus more likely than before to be persuaded by his own personal predilections and conceptions of justice. Thus the inevitable result of the utilization of the variable probable cause concept is likely to be an uneven interpretation and application of Rule 41.1.\footnote{If such a procedure as Rule 41.1 is adopted at the state level, the situation will be further complicated by the fact that state magistrates are often not legally trained, or only informally so.}

2. Is Rule 41.1 Constitutional?

A determination of the constitutional validity of this lower than probable cause to arrest standard involves three distinct analytic situations: A Rule 41.1 order may be requested of (1) an arrestee for purposes of identification for the crime for which he was arrested; (2) an arrestee for purposes of identification for crimes other than that for which he was arrested; and (3) a suspect who is not yet in custody. Regarding the first situation, it is clear that if made after arrest or during trial, an order to compel an arrestee to submit to nontestimonial identification procedures pertinent to the crime for which he was arrested is generally valid. The initial probable cause to arrest will in most Rule 41.1 cases supply the necessary legal basis for a finding of the reasonableness of the identification procedure or search. Though as a general rule probable cause to arrest does not establish probable cause to search, which must be independently established,\footnote{United States v. Bailey, 327 F. Supp. 802, 806 (N.D. Ill. 1971).} in certain cases the facts which constitute probable cause to arrest concomitantly establish probable cause to search. This occurs where the thrust of the known facts points not only to a probable belief that a crime has been committed and that the suspect committed it, but also that the evidence sought is connected with that crime and will be discovered where the search is to take place.\footnote{This was recognized to be the case in Schmerber v. California, 384 U.S. 757, 770 (1966), where the facts which constituted probable cause to arrest for drunken driving also validated the taking of the arrestee's blood sample even though the arresting officer made these determinations without the aid of prior judicial authorization.} The proper application of Rule 41.1 satisfies these conditions in its requirement that the identification procedures be of "material aid" in determining whether or not the suspect committed the crime. In most instances it should be immediately apparent whether or not the requested test will
materially aid in this determination. For example, it is clear that a blood sample would materially aid in the identification of a narcotic user and that a lineup would be of material aid in identifying the perpetrator of a crime for which there is an eyewitness. The same would be true of the other procedures available under Rule 41.1 in most cases.50

Regarding the second situation, innovative developments by the District of Columbia Circuit Court of Appeals support the proposition that a person lawfully arrested for one crime may be compelled to submit to certain identification procedures for other similar crimes for which there is no probable cause to arrest. The court held in Adams v. United States51 that because of an unnecessary delay in presentment to a magistrate when promptness was required by Rule 5(a) of the Federal Rules of Criminal Procedure,52 the products of a lineup obtained during the delay53 were illegal and therefore inadmissible.54 The court went on to suggest, however, that

50. This does not mean, of course, that a Rule 41.1 order will or should issue automatically in this context without a careful examination of whether the requested procedure will be of material aid. It simply means that requirements (1) and (2) of the standard are antecedently satisfied by the initial lawful arrest and that also in many cases requirement (3) ("material aid") will be easily satisfied due to the nature of the procedures which may be requested under Rule 41.1.

51. 399 F.2d 574 (D.C. Cir. 1968).

52. Rule 5(a) provides in relevant part:
   An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner [United States magistrate]

53. The defendants in Adams were lawfully arrested for an attempted robbery of a liquor store, but were then held overnight and placed in lineups to be viewed by witnesses to other liquor store robberies. The conviction appealed from was that for the successful robbery of a different liquor store than the one for which they were originally arrested. Judge McGowan of the Court of Appeals for the District of Columbia Circuit stated that the delay in presentment was caused by the fear that if immediately presented the suspect would be immediately released on bail pursuant to the Bail Reform Act of 1969 (18 U.S.C. §§ 3146-52 (Supp. IV 1969) ). McGowan, Constitutional Interpretation and Criminal Identification, 12 WM. & MARY L. REV. 235, 246 (1970).

54. In Mallory v. United States, 354 U.S. 449 (1957), the Court held that under Rule 5(a), confessions obtained by police after arrest and before presentment to a magistrate without unnecessary delay are inadmissible at trial. The purpose of presentment without unnecessary delay is to provide the arrested person with judicial advisement of his rights, including the right to counsel. Counsel must be appointed, absent waiver, for his protection at any critical stage of the prosecution. In United States v. Wade, 388 U.S. 218 (1967), it was held that lineups are
Once brought under judicial authority by virtue of the presentation to a magistrate required by Rule 5 (a), the police could invoke the aid of that authority to make the prisoner reasonably available for line-up identification in respect of other crimes for which there is less than probable cause to arrest. This lineup identification may be implemented by making the arrestee's participation in the lineup "a condition of release, by suspending the order of release, or by continuing the preliminary hearing until the lineup is completed." Thus in United States v. Stevenson the appellant was arrested for robbery of a sandwich shop and pursuant to an "Adams order" was compelled to stand in a lineup to be viewed by witnesses to other crimes for which there was no probable cause to arrest. A witness to the robbery of a service station identified him and he was convicted of armed robbery.

Implicit in the Adams order cases is the assumption that it is not improbable that a person involved in a specific type of crime may be connected with other crimes having a similar modus operandi. The validity of this assumption is at least such "critical stages" necessitating the right to counsel. But cf. the applicability of the Mallory rule to the taking of handwriting exemplars before presentment, supra note 16.

55. 399 F.2d 574, 579 (D.C. Cir. 1968).

The court also stated:

[T]he facts of life with respect to liquor store robberies in this community today suggest that there may be a not improbable
questionable even if the scope of the "similar modus operandi" requirement is carefully restricted. Perhaps influencing the court's adoption of the similar modus operandi rationale is the thought that once an individual has lost his liberty through a valid arrest it is not necessary or meaningful to require probable cause to infringe upon a freedom which no longer exists. As Chief Justice Warren Burger argued in his concurring opinion in Adams,

The matter of placing one in a lineup when he is already in detention—whether temporarily under arrest or confined under a long sentence in a prison—is not the same as arresting a suspect off the street or from his home. The former is not being deprived of his liberty when placed in a lineup. . . . The reason for requiring probable cause for an arrest is to protect against arbitrary interference with liberty. When the condition of custody already exists, however, the constitutional requirement of an arrest on probable cause would be totally superfluous—a sheer ritual serving no legitimate protective function.

To the extent, if any, that this argument assumes as a prerequisite some rational nexus between the crime for which the person was arrested and the identification procedure requested, it is perhaps justifiable. But the District of Columbia Circuit connection between some of those robberies and persons caught in the act of fleeing from an abortive attempt to rob a liquor store.

60. Judge McGowan has been told that the Adams order has helped the police solve many "open" or unsolved crimes. McGowan, supra note 53, at 248. It might be intuitively thought that this assumption is correct, but considering the fundamental nature of this premise with respect to the Adams order cases, certainly empirical studies on this issue are necessary before it can be accepted at face value.

61. In United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969), the court in upholding an Adams order relied upon what it said was the lower court's careful inquiry into the matter of modus operandi and its explicit finding that in fact similar crimes were involved.

62. 399 F.2d at 580-81.

63. The Chief Justice's argument seems nevertheless overstated. Surely the concept of liberty encompasses more than merely not being confined within prison walls. The prisoner, as well as the man at liberty, possesses the right to be free from government edicts which direct him to do things for which the government has no legitimate purpose. And the purpose of solving crime by the utilization of compelled lineups becomes illegitimate when no rational connection can be shown between the person in custody and the probability that he committed the crime for which he will be displayed in public. Thus, unless the Adams court can empirically demonstrate that the probability that one who commits a particular crime may also be involved in other similar crimes—rather than relying upon what presently appears to be an intuitive major premise—the constitutionality of this procedure must remain in doubt.
seems to have allowed the originally narrow premise of *Adams*, which involved a person arrested for robbery of a liquor store who was placed in lineups for other liquor store robberies, to be expanded. Robberies of commercial establishments considered as a generic class apparently now satisfy the requirement of a similar *modus operandi*. Basing the *Adams* order lineups upon the tenuous link between a person arrested for one crime and the probability that he is involved in other similar crimes can be justified, if at all, only when the suspect is already in custody and the concept of similar *modus operandi* is carefully delineated. Nevertheless, *Adams* and its companion cases support the less than probable cause to arrest standard of Rule 41.1 with respect to a request for an identification order for similar crimes other than the one for which the suspect was arrested.

Finally, a Rule 41.1 order may be requested to compel a suspect not yet in custody to submit to nontestimonial identification procedures on less than probable cause to arrest. In

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64. For example, in United States v. Stevenson, 443 F.2d 661 (D.C. Cir. 1971), a person arrested for armed robbery of a sandwich shop was compelled to stand in a lineup for a crime involving the armed robbery of a service station.

65. The official comments to the proposed rule further state that the *Adams* order cases support the idea that a suspect not yet in custody may also be compelled to stand in lineups on less than probable cause to arrest:

In giving judicial authorization to place a suspect in a lineup, the Court of Appeals for the District of Columbia has indicated that such authorization could be given as to a suspect not yet under arrest and as to whom there was no probable cause adequate to justify an arrest. See United States v. Greene, 429 F.2d 193, 197 n.7 (D.C. Cir. 1970): “Approximately one year after *Wade*, the Supreme Court for the first time held that probable cause to arrest is not an indispensable condition to every conceivable police restraint of personal liberty. [*Terry v. Ohio, 392 U.S. 1.*] After that, the Court, in *Davis v. Mississippi*, [394 U.S. 721], threw out the idea that a suspect perhaps could, under judicial supervision, be compelled to submit himself to finger-print examinations.”

52 F.R.D. at 468. Wise v. Murphy (John Doe v. Murphy), 275 A.2d 205, 214 n.21 (D.C.C.A. 1971), supports the official comments’ analysis:

It is significant that . . . the United States Court of Appeals for the District of Columbia obviously also had in mind a defendant who was released by the magistrate under the Bail Reform Act of 1966, 18 U.S.C. § 3146 et seq. In the case of a bailed defendant, as in this case, the contemplated court-ordered lineup entails brief detention of the person then at liberty. Although the opinion of the court did not discuss the constitutionality of such limited detention absent grounds for formal arrest, it is certain that the court contemplated persons at liberty being ordered into a lineup on less grounds for formal arrest. It would seem that if constitutional doubts regarding such recommended procedure existed the suggestion would not have been made.
terms of effective aid to law enforcement officers at the investigatory stage and the important constitutional issues it sharply presents, this is the most significant and troublesome category. Apparently the only case which has considered the validity of this proposition is Wise v. Murphy. In Wise, which involved an alleged rape at knifepoint, the victim was shown photographs of possible suspects, one of which she stated had facial features similar to those of the man who attacked her. However, she could not make a positive identification without seeing the suspect in person. The issue then, was whether the suspect could be compelled to stand in a lineup absent facts constituting probable cause to arrest. The court ruled in the affirmative.

The basis for the decision was two-fold. First, although the court recognized that a compelled lineup was a “seizure” of a person within the meaning of the Fourth Amendment, it stated that the seizure did not amount to a “formal arrest.” Second, the court held that the relevant standard was thus not probable cause to arrest, but rather the reasonableness of the detention contemplated under all the facts and circumstances of the case. The technical distinction the court drew between a formal arrest and a detention for a lineup is supported by the decision of the Supreme Court in Terry v. Ohio, which differentiated between a formal arrest and a “stop and frisk.”

66. Consideration has been given this proposition at other levels, however, including court-adopted rules for criminal procedure, proposed legislation and a statute adopted in 1971. See note 41 supra.

67. (John Doe v. Murphy), 275 A.2d 205 (D.C.C.A. 1971) (The appeal of Wise was dropped and the case discusses only the appeal of “John Doe,” so termed because the court felt that the lower than probable cause to arrest standard demanded the preservation of the suspect’s anonymity in the event probable cause to arrest could not subsequently be established).

68. The case was remanded, however, for further evidentiary hearings.

69. Fickling, A.J., in dissent, made the following comments:

Despite the fact that detention and arrest may not be synonymous, to assert that the detention contemplated by the lineup order is not an arrest is to participate in semantic nonsense. It would appear that, at the least, two factors must be present before a distinction from an arrest could be justified: (1) the time involved must be extremely brief, and (2) it must involve a stop rather than an affirmative command to move somewhere else. Within these narrow confines, it is conceivable that the Fourth Amendment reasonableness standard might be satisfied.

275 A.2d at 224 (footnotes omitted).

70. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution.
tive difference between an arrest and a compelled lineup may be difficult to grasp in some instances, but the distinction nevertheless seems to be generally valid. A formal arrest initiates a process that may deprive a person of his freedom for an indeterminate length of time and generally results in the prosecution of the person at trial. A detention for lineups or the other procedures available under Rule 41.1, while restricting one’s liberty, does so only briefly. If probable cause to arrest is not established, the suspect must be immediately released.

The distinction between an arrest and a detention for a lineup has the advantage of permitting the court to found its decision upon the ultimate standard of reasonableness rather than the probable cause standard traditionally required in the arrest context. In finding that the compelled lineup was reasonable absent probable cause to arrest, the Wise court considered the following factors: (1) the seriousness of the crime of rape; (2) the lack of feasible alternatives left to the police after Davis; and (3) the limited nature of the detention contemplated. Moreover, the court was demonstrably careful to minimize the inconvenience to the suspect and to maximize the protection of his constitutional rights, even to the extent of pro-

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It is intended to vindicate society’s interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual’s freedom of movement, whether or not trial conviction ultimately follows.


71. See note 46 supra.

72. Grave reservations exist, however, as to whether this type of court-ordered lineup, not connected with a formal arrest, may be used constitutionally in other than serious felonies involving grave personal injuries or threats of the same. The governmental interest, though serious, is not of the same magnitude in commercial crimes involving property or money such as forgery or false pretenses or other less serious offenses. In such cases it is highly likely that the governmental interests in law enforcement cannot outweigh the right of liberty, or freedom from being ordered into even the most antiseptic lineup, under circumstances short of traditional probable cause for formal arrest.

275 A.2d at 216.

73. Id. at 213.

74. This same balancing process led the court in People v. Morales, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968), to hold that police can temporarily detain a suspect for questioning concerning a particularly heinous murder on less than probable cause to arrest after advisement of his Fifth and Sixth Amendment rights. In Morales v. New York, 396 U.S. 102 (1969), the Supreme Court declined to consider the question of the constitutionality of temporary detentions for questioning on less than probable cause to arrest grounds.

75. The court directed, or counsel agreed at oral argument, that
viding for direct appeal prior to implementation of the lineup order. The Wise court "conclude[d] that court-ordered lineups predicated on reasonable grounds short of a basis for formal arrest can be squared with the Fourth Amendment . . . ." However, the quantum of evidence which the court felt necessary to constitute "reasonable grounds" is unclear since the case was remanded for more particularized findings to determine the basis on which the police decided to show the photographs of several suspects, including those of the petitioner, to the victim. The case is nonetheless significant for its explicit holding that probable cause to arrest is not a prerequisite to a valid court-ordered lineup and its resulting support for proposed Rule 41.1.

D. The Nontestimonial Identification Procedures of Rule 41.1

The concept of variable probable cause employed by the Wise court necessarily entails in each case an analysis of the particular identification procedure requested under Rule 41.1. It was this very type of analysis of the "unique nature of the fingerprinting process" which led the Davis Court to suggest that with prior judicial approval a lower standard than probable cause as traditionally defined might justify a brief investigatory detention for fingerprinting purposes. However, proposed Rule 41.1 would expand the scope of acceptable identification procedures to include:

- fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical or medical examinations, handwriting exemplars, voice samples, photographs, and lineups.

The inclusion of these additional procedures compels an examination of the reasons which led the Davis Court to its conclusion.

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76. Id. at 211.
77. Id. at 208.
78. The dissenting judges disagreed on what standard the majority was applying. One stated that an "articulable suspicion" was sufficient, while the other felt the majority was requiring a showing approaching traditional probable cause to arrest. Id. at 221, 228.
79. 52 F.R.D. at 466-67.
sion regarding the lowered evidentiary standard possibly acceptable in the fingerprinting context in order to determine whether these additional tests might also be constitutionally acceptable under that lowered standard. Davis considered the following generalized criteria relevant to a determination of the reasonableness of the fingerprinting process:

1. the degree to which the procedure intrudes into the private life and thought of the individual;
2. the opportunity for harassment inherent in the nature of the procedure;
3. the intrinsic reliability of the procedure; and
4. the destructibility of the evidence sought, which determines

5. the possibility of inconvenience to the suspect and allows for
6. the opportunity to procure prior judicial authorization of the procedures.

The nature of the variable probable cause standard dictates that all of the factors deemed relevant by the Davis Court with respect to fingerprinting, in addition to such factors as the gravity of the offense involved and the possibility that the evidence might not otherwise be available, must be considered in the context of the procedural safeguards demonstrably present in Rule 41.1: in every instance prior judicial authorization must be obtained; the suspect may request a reasonable modification of the time and place for taking the tests, even to the extent of having them conducted in his home; the detention shall be as brief as possible; and, if probable cause to arrest is not established, the record of such detention shall be destroyed upon motion. The balanced structure of Rule 41.1 thus approximates as close as is reasonably possible the carefully delineated circumstances suggested in Davis. The taking of fingerprints pursuant to Rule 41.1 then would seem clearly to be permissible on less than probable cause to arrest grounds. It seems equally clear that palm prints and footprints should be similarly treated.

Several other procedures should also be considered to be rather clearly within the ambit of the Davis suggestion. Physical measurements violate none of the criteria discussed in

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80. See text accompanying note 40 supra.
81. The criminal files of the F.B.I. contained over 18 million fingerprints as of May, 1969, and the civil files over 65 million. 115 Cong. Rec. 28896, 28898 (1969) (comments of Senator McClellan, in introducing bill similar to proposed Rule 41.1). See note 41 supra.
82. Palm prints and footprints are equated with fingerprints with respect of reliability: "any ridged areas of the hand or foot is [sic] unique in every person and can be identified exactly like fingerprints and such identifications have the same legal validity." Id. at 28898.
Davis to such an extent as to meaningfully distinguish them from fingerprints. Hair samples and handwriting exemplars⁸³ also are largely consistent with the criteria established in Davis. Neither of these procedures would intrude into the private life or thought of a suspect and each is sufficiently reliable.⁸⁴ The danger that a suspect would in some manner “destroy” his hair is surely negligible and thus both these procedures would seem to admit of no emergency circumstances which would necessitate their execution at an inconvenient time. Although it is conceivable that there exists an opportunity for harassment with respect to hair samples and handwriting exemplars through repeated requests for these procedures, this threat is not that persuasive in view of the requirement of prior judicial authorization of Rule 41.1 orders.

However, it is questionable whether the other procedures of Rule 41.1 should be permitted without a showing of evidence closely approximating probable cause to arrest. Blood, saliva and urine specimens are probably borderline cases here, though their reliability when executed correctly is probably sufficient to satisfy one of the Davis criteria. Their validity upon grounds less than probable cause to arrest will depend upon the varying factual contexts in which the requests for such procedures are made. In many cases the time element would not be critical and there would be no need for an immediate testing which would inconvenience the suspect. For example, where a blood specimen is sought to determine a suspect’s blood type, it would be possible to arrange a mutually convenient time and place to take the test. Time would be a critical factor, however, where the purpose of the test is to determine the existence of a chemical agent such as a narcotic in the person’s body which dissipates over time. In this case, the convenience of the suspect would very likely be sacrificed in light of the need for immediate testing. A request for a urine or saliva sample would almost always occur in this context. Requests for blood, urine and saliva samples further provide the opportunity for harassment, unlike fingerprints which need be taken but once.

⁸³. A federal district court has already adopted proposed Rule 41.1 with respect to handwriting exemplars. See note 41 supra.

⁸⁴. These are scientific procedures of recognized reliability and if a proper foundation is laid, an expert may testify with respect to them. See, e.g., State v. Post, 255 Iowa 573, 123 N.W.2d 11 (1963) (hair); State v. Fisher, 242 Ore. 419, 410 P.2d 216 (1966) (handwriting analysis compared to fingerprinting). See also text accompanying note 101 infra.
A more serious objection to these procedures is the necessarily intrusive nature of the testing method, especially in the case of blood specimens. Rule 41.1 (i) attempts to minimize this factor by providing:

Blood tests shall be conducted under medical supervision, and the federal magistrate may require medical supervision for any other test ordered pursuant to this section when he deems such supervision necessary.85

The Davis Court did not discuss searches which involve penetrations into a suspect's person. However, the Court has previously recognized that "[t]he integrity of an individual's person is a cherished value of our society."86 It would seem that this cherished societal interest in that integrity should not permit personal intrusions on grounds amounting to less than traditional probable cause.

The taking of voice samples is also questionable, but for different reasons. The main objection here concerns their reliability. Whether the samples are to be used for identification by a witness listening to them, visual analysis of a voiceprint or by purely mechanical means, their reliability is suspect.87 The most dependable of these methods seems to be normal aural perception,88 but aural comparisons decrease rapidly in reliability over time,89 making time a factor here also. Apparently no federal court,90 and only one state court,91 has accepted such tests for use in establishing probable cause for arrest or deemed them sufficiently probative to be admissible at trial.92 In this context the New Jersey Supreme Court has argued that

85. 52 F.R.D. at 465. The official comments state: "Subdivision (i) deals with implementation of the nontestimonial identification order. It stresses the fact that certain tests will require competent medical supervision . . . ." Id. at 471. Proper medical supervision of the taking of blood specimens is required moreover by Schmerber v. California, 384 U.S. 757 (1966).
87. See M. HECkER, SPEAKER REcOGNMON: AX INTERaRwr E SuRvuv or TaE Lmr mTuRz (ASHA Monographs, No. 16, 1971).
88. Id. at 2, 73, 99.
89. Id. at 47. Typically there would be no tape recordings to compare orally, but rather the victim's recollection of the voice at the time of the crime would be the basis of comparison.
91. The Minnesota Supreme Court held in Trimble v. Hedman, 192 N.W.2d 432 (Minn. 1971), that voiceprint analysis is competent evidence to establish probable cause and that it ought to be also admissible at trial for the purposes of impeachment.
92. It was stated in People v. King, 266 Cal. App. 2d 437, 460, 72 Cal. Rptr. 478, 493 (1968), that the expert witness'
before an intrusion into a person's privacy can be proper within the protections afforded by the Fourth Amendment, the product of the search must have the capacity to be admissible in evidence. If admissibility at trial can be considered sufficient indication of the procedure's reliability, then voice samples compared aurally might qualify here since such evidence is admissible. However, it is doubtful that reliability by itself will be a decisive factor. Voice samples seem to satisfy the other factors considered important in Davis. Their reliability then would be merely one of the many factors included in the determination of variable probable cause.

Thus in certain factual situations voice samples may properly be compelled on less than probable cause to arrest. Such might be the case where a police officer is sent to a home in response to a telephoned plea for help and is shot by a sniper upon his arrival, or in the case of a telephone bomb threat. Here a recording of the telephone call might conceivably be the only available evidence. Although the voice sample might never be admitted at trial, to the extent that it narrows the scope of investigation by eliminating possible suspects it would be very helpful. In certain cases, the voice sample could be taken by simply calling the suspect at his home and recording the ensuing conversation, surely a minimal inconvenience. Under admission that his process is entirely subjective and founded on his opinion alone without general acceptance within the scientific community compels us to rule "voiceprint" identification process has not reached a sufficient level of scientific certainty to be accepted as identification evidence in cases where the life or liberty of a defendant may be at stake.

95. These were the facts in Trimble v. Hedman, 192 N.W.2d 432 (Minn. 1971).
96. It is not certain whether this procedure would even require authorization pursuant to Rule 41.1. Two considerations are relevant here: (1) the procedure does not require an antecedent detention of the suspect as do the other identification tests, with the exception of photographs which may be taken from a distance; and (2) since no "seizure" of the suspect is involved the relevance of Rule 41.1 depends upon whether this procedure can be classified a "search." Such a procedure does invade the privacy of the suspect and thus may require a legal basis equivalent to probable cause (or "reasonable grounds") to sustain it as a valid search or as a permissible invasion of privacy. However, the analogy which can be drawn from recent wiretapping and electronic surveillance cases would seem to indicate that it may be constitutionally permissible to telephone a suspect and record the ensuing conversation under these circumstances. It appears from these cases that a government agent may with permission enter a suspect's home and either record his conversation or transmit
these circumstances, an order to compel voice samples based upon grounds not amounting to probable cause to arrest might well be justified.

Much of the crime which most concerns the public can only be solved by eyewitness identification. Lineups are thus an essential investigatory technique. However, it is also true that one of the major causes of incorrect verdicts is eyewitness misidentification. The Davis Court stated that fingerprinting might be permissible on less than traditional probable cause grounds because it is "not subject to such abuses as the improper lineup." The Supreme Court in Wade v. United States also thought the potential for unduly suggestive lineups so great as to classify the lineup as a "critical stage" of the trial process necessitating the right to effective assistance of counsel. There the Court again emphasized the intrinsic unreliability of nonscientific identification procedures compared to such analytic techniques as those applicable to fingerprints, blood samples, clothing and hair. However, Wade also suggested that careful regulation of the procedures used at lineups through rules specifically designed to minimize improper suggestiveness could possibly eliminate the basis for regarding lineups as a "critical" stage of the trial process.

Rule 41.1(h) specifically empowers the court to develop procedural safeguards consistent with the Wade suggestion in an effort to minimize the possibility of an improperly suggestive lineup. Nonetheless, these commendable efforts do not reach the core issue of the inherent unreliability of eyewitness identification. The emotional stress which attends the witnessing of a crime distorts one's perception, and while procedural safeguards may minimize this danger, they cannot eliminate it. Moreover, the period of time necessary to conduct

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97. For example, robberies, house-breakings, and street assaults.
98. Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968).
100. 388 U.S. 218 (1967).
101. Id. at 227-28.
102. Id. at 239.
103. See note 18 supra.
104. Where photographs are sought for the same purpose, they would seem to be subject to much the same infirmities as the lineup with respect to suggestiveness. Fickling, A.J., dissenting in Wise, stated: The Court stressed the scientific reliability of that [finger-
the lineup is considerably longer than that required for the other procedures included in the rule. The inherent infirmities in a lineup should dictate that a suspect not be subjected to one without a showing of probable cause.106

E. THE SANCTION FOR NONCOMPLIANCE WITH THE COURT ORDER

In addition to the type of identification procedure requested, the sanction which implements Rule 41.1 is an important element in the matrix that determines the reasonableness of the rule. Subdivision (f) provides:

Any person who fails without adequate excuse to obey an order to appear served upon him pursuant to this section may be held in contempt of the court which issued the order or, in the event that the order was issued by a United States Magistrate, may be held in contempt of the district court of the district in which the magistrate is sitting.106

This sanction107 would seem to be most effective against the

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105. But see Biehunik v. Felicette, 441 F.2d 228 (2d Cir. 1971), where it was held that police officers could be compelled to stand in a lineup on less than probable cause grounds where one of their number had been accused of police brutality and unlawful conduct. The court based its decision upon the rationale of the "substantial public interest in ensuring the appearance and actuality of police integrity." Id. at 230.

106. Rule 41.1, 52 F.R.D. at 464. The official comments state:
Subdivision (f) prescribes a sanction—contempt of court—for failure to comply with the order. See United States v. Hammond, 419 F.2d 166 (4th Cir. 1969), in which a conviction of criminal contempt is sustained following a refusal by defendant to comply with a court order to appear in a lineup. The reference to contempt of a United States magistrate is in accord with 28 U.S.C. § 636(d) (Supp. V, 1969).

Id. at 470.

107. The contempt sanction may be either criminal or civil. It is
criminal if it is imposed to punish the defendant and vindicate the court’s authority; it is civil if its purpose is to coerce a recalcitrant party into compliance with the court order. Chiet v. Hammonds, 305 F.2d 565 (5th Cir. 1962). The alleged contemnor must have notice of the order which must be specific and definite. See text accompanying note 18 supra. Criminal contempt additionally requires that the alleged contemnor have a reasonable opportunity to be heard, the right to counsel and the right to testify and call witnesses by way of defense or explanation. In re Rubin, 378 F.2d 104 (3d Cir. 1967); Yates v. United States, 316 F.2d 718 (10th Cir. 1963); Fed. R. Crim. P., Rule 42.
innocent and those for whom the contempt sentence would likely be harsher than that of the crime for which they are sought to be convicted. Contempt of court may be the only sanction available to force compliance with the court order in some cases. For example, an especially obstinate suspect might refuse to give a voice sample or a handwriting exemplar. Short of actual torture, punishment for contempt might be the only way to effect compliance with a Rule 41.1 order.

Where the suspect is likely to flee or to alter or destroy the evidence, the need to procure an immediate testing should arguably invest law enforcement officers with the right to prevent such an occurrence by reasonable means. Subdivision (d) thus provides:

If it appears from the affidavit that a person named or des-

108. An “offense” under Rule 41.1(l) (1) is classified as one punishable by more than one year in prison. 52 F.R.D. at 466. It has been said that “[p]unishment of criminal contempt should reflect the 'least possible power adequate to the end proposed.'” United States v. Bukowski, 435 F.2d 1094, 1110 (7th Cir. 1970). Contempt sentences of greater than one year have been upheld in the following cases: United States v. Bukowski, supra (3 years reduced to 18 months); United States v. Sternman, 433 F.2d 913 (6th Cir. 1970) (3 years); Frank v. United States, 395 U.S. 147 (1969) (suspended sentence of five years but with probation for five years). Sentences imposing imprisonment for more than six months for criminal contempt must be accompanied by a jury trial or an intelligent waiver thereof. Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

109. Due process, of course, prohibits anything approaching the rack and screw. Rochin v. California, 342 U.S. 165 (1952). See in this connection Schmerber v. California, 384 U.S. 757, 765 n.9 (1966), where the relationship between testimonial evidence protected by the Fifth Amendment and nontestimonial identification procedures is discussed:

[Testimonial] incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction [of blood] or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the “search,” and nothing we say today should be taken as establishing the permissibility of compulsion in that case.

110. Each refusal to comply with a court order is a punishable offense, however, and there thus seems to be no due process limitation in this respect. See Yates v. United States, 355 U.S. 66 (1957).

111. It would be a question of interpretation whether the passive destruction of a chemical agent in the blood would qualify here. This might well be the case since none of the evidence available under the procedures other than blood, saliva and urine specimens seems capable of destruction.
scribed in the affidavit may, upon service of the order to appear, either flee or alter or destroy the nontestimonial evidence, the federal magistrate may direct a marshal or other federal law enforcement officer to bring the person before the federal magistrate. The federal magistrate shall then direct that the designated nontestimonial identification procedures be conducted expeditiously.

However, it was thought in *Davis* that detentions for fingerprinting might be permitted on less than probable cause grounds for two reasons which are pertinent here. First, the fingerprinting procedure does not intrude upon the personal security of an individual to the same extent as other types of searches and seizures. Second, because fingerprints are “indestructible,” no emergent circumstances would necessitate an unexpected and inconvenient seizure of the individual. Thus to allow officers to apprehend a suspect, presumably even in the middle of the night, and take him before a magistrate by force if necessary, contradicts the basic rationale of *Davis*. This procedure could be as aggravating to the individual as any conceivable search which under present law requires a strict showing of probable cause. Thus, in each instance in which a Rule 41.1 request is made, it would appear that the magistrate would be required to determine the likelihood that the suspect will flee or alter or destroy the evidence prior to his determination of whether there exists “reasonable grounds to suspect” that the person named in the affidavit committed the offense. In this manner, the magistrate's awareness of the type and manner of the seizure contemplated will enable him to make a more intelligent and comprehensive determination of whether the ultimate standard of reasonableness is satisfied by the quantum of evidence shown in each case. The necessarily intrusive and unexpected nature of this procedure, as well as its potential for abuse, are persuasive reasons for requiring a showing of noth-

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112. 52 F.R.D. at 463. The official comments state:

Subdivision (d) prescribes the procedure for issuing the nontestimonial identification order, including provision for conducting the identification procedure where there are grounds for believing that the suspect will flee or destroy the evidence.

Id. at 470.

113. See text accompanying note 40 supra.

114. Some of the factors utilized by courts in determining the right to, and amount of, bail of an arrestee may be relevant here on the issue of whether the suspect is likely to flee the jurisdiction: (1) the nature of the offense; (2) the seriousness of the punishment; and (3) the character and reputation of the suspect. Christoffel v. United States, 196 F.2d 560 (D.C. Cir. 1951).
ing less than probable cause to arrest as a basis for such an order. Nevertheless, magistrates in their individual judgment may decide to issue a Rule 41.1 order in these circumstances on less than probable cause to arrest. This possibility raises the further issue of whether physical force may be employed to procure identification evidence once a suspect who was found likely to flee or alter or destroy the evidence has been brought before the magistrate. Once such a suspect is in custody, Subdivision (d) provides that “[t]he federal magistrate shall then direct that the nontestimonial identification procedures be conducted expeditiously.” A reasonable inference from this language might be that the “expeditious” execution of the tests may include the exercise of reasonable force where necessary. The rationale here is that the possibility of the suspect fleeing or destroying the evidence is sufficient to invest the government with the right to physically compel the production of the evidence.

This interpretation is unacceptable on two grounds. First, an interpretation of this provision consistent with the general scheme of Rule 41.1 would preclude the use of force under these circumstances. Where a suspect is not likely to flee or destroy the evidence the only express sanction provided for under Rule 41.1 for noncompliance with the court order is contempt of court. Moreover, the only substantive distinction between such a suspect and one who is likely to flee or destroy the evidence disappears once the latter is in custody. Upon presentment to a magistrate, the suspect may refuse to comply with the court order. He may then be arrested for contempt of court, and since once arrested he obviously could not flee the jurisdiction, measures could be taken to prevent destruction of the evidence. Thus any difference in treatment between the two types of suspects can not reasonably be justified once the suspect is in custody.

Finally, such a procedure would appear to be invalid under the Fourth Amendment absent a showing of probable cause. Not only would the suspect be taken by force before the magistrate but he would also be subject to a forcible extraction of the evidence. The nature of this procedure is necessarily so intrusive upon human dignity that no subtle distinction between this and a formal arrest can be permitted. As such, probable cause to arrest must be considered a constitutional prerequisite to both a forced presentment to a magistrate and any subsequent use of force to procure the evidence sought.
III. CONCLUSION

The significant departure from traditional Fourth Amendment jurisprudence marked by proposed Rule 41.1 leaves its constitutionality open to debate. It would appear inevitable that some will view the rule as an erosion of a great constitutional principle, while others will consider it a necessary and justifiable means to provide for more effective law enforcement. The constitutionality of Rule 41.1 must be resolved on three levels. The first issue is whether in fact any standard of less than traditional probable cause as suggested in the *Davis* dicta will be acceptable to the present Court. The recent changes in the Court's personnel will possibly strengthen the current tendency to engage in a comprehensive consideration of all the circumstances, including the relative strength of conflicting societal and individual interests, to determine the validity of a particular search or seizure. Moreover, the difficulties created for police at the investigatory stage by the *Davis* decision make it likely that a less than probable cause to arrest standard will be found constitutional. Second, the Court will have to determine whether the particular formulation of that less than probable cause to arrest standard as embodied in Rule 41.1 is constitutionally acceptable. If the Court in fact decides that probable cause as traditionally defined is not a prerequisite to the taking of the identification procedures available under Rule 41.1, it would appear likely that the Rule 41.1 formulation will be found satisfactory. Third, if Rule 41.1 is found to generally satisfy the requirements of the Fourth Amendment, it must then be determined whether the variable probable cause standard has been properly applied in each particular case. This would involve an examination of the gravity of the crime, the nature of the particular identification procedure requested, and whether the procedure relates to the identification of a person already in custody, either for the crime for which he was originally arrested or for one having a similar *modus operandi*, or to a person not yet arrested. Thus it seems probable that the Supreme Court will adopt proposed Rule 41.1 if it is submitted for their consideration.\footnote{115. Adoption of a rule of procedure does not conclusively establish its constitutionality, however, for this would constitute a non-binding advisory opinion by the Court. Order of the Court Adopting Amendments to the Rules of Civil and Criminal Procedure, 383 U.S. 1029, 1032 (1966) (Black, J., dissenting).}