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Current Problems in Search and Seizure

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CURRENT PROBLEMS IN SEARCH AND SEIZURE*

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The past three years have witnessed some significant developments in the scope of protection of the fourth amendment. I would like to discuss what seem to me to be four particularly noteworthy Supreme Court decisions of recent vintage in terms of their immediate impact, in terms of the unanswered questions they have raised, and in terms of their longer range influence on the development of fourth amendment conceptualization.

The first decision I would call to your attention is the 1967 decision, *Katz v. United States*.[1] The *Katz* case is primarily understood to be a case involving electronic eavesdropping, but its implications extend far beyond that particular aspect of fourth amendment protection. Katz was a bookie, engaged in his profession in a public telephone booth. Unbeknown to him at the time, federal agents had placed an electronic bug in the phone booth—not on the telephone line but simply in the booth—the effect of which was to pick up his half of the conversations. Recordings of these conversations were subsequently introduced against him in a federal prosecution.

The United States Supreme Court held that the use of this evidence in his trial was a violation of the fourth amendment with the now famous statement, "[T]he Fourth Amendment protects people, not places."[2] The Court said, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[3] In other words, the *Katz* case establishes a notion of reasonable expectations of privacy as a substantive part of the fourth amendment protection.

It is true that the notion of the right of privacy is not an entirely new concept in regard to the fourth or fifth amendment. As a matter of fact, as early as 1886, in *Boyd v. United States*,[4] there is language in Supreme Court opinions that recognizes that the fourth amendment is designed to protect privacy. Until the *Katz* decision, however, this was

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1. 389 U.S. 347 (1967).
2. *Id.* at 351.
3. *Id.* at 351-52.
4. 116 U.S. 616 (1886).

primarily window dressing. Under *Katz* the notion of a right of privacy in a restricted sense is now part and parcel of the fourth amendment, and the impact of the *Katz* decision thus goes beyond the problems of electronic eavesdropping.

Cases are beginning to appear in the lower courts in which these possibilities are being explored. For example, the Supreme Court of California in a rather recent decision, *People v. Edwards*,[5] was concerned with the situation in which officers received a tip from the defendant's neighbor—not of such reliability or particularity to constitute probable cause—that the defendant had some marijuana in his possession. The neighbor had seen it on the defendant's back porch. The police went to the defendant's home, did not find him there, entered his back yard and looked inside the garbage can. There they found a discarded bag with a few loose remnants of marijuana. This evidence was introduced against him at his trial for possession. The issue was raised on appeal as to whether the search and seizure violated the fourth amendment. The Supreme Court of California in approaching this case was not at all directly concerned with the fact that there had been a trespass on the defendant's property, which would have been a first consideration in pre-*Katz* analysis. Rather, the decision of the case turned simply on the question of whether one has a right of privacy in his garbage can that is protected against invasion by officers of the state. The court became very reflective about this matter and ultimately concluded that we all have skeletons in our garbage cans that we would prefer our neighbors not discussing over tea, and that there is, in fact, good reason for extending the constitutional protection to such an invasion.

My point is not whether the *Edwards* case is right or wrong or whether it is a proper application of *Katz*. I do not know. As a matter of fact, because of the very open-ended nature of *Katz*, we are getting a proliferation of decisions that cannot all be reconciled; that is to be expected. The point is that in dealing with unique problems such as this, whether they involve electronic eavesdropping or anything else, *Katz* now provides an overview of the type of analysis that is necessary to determine if a fourth amendment right has been infringed.

A second decision that seems to me of predominant significance in the past several years is the famous stop-and-frisk case, *Terry v. Ohio*,[6] decided in 1968. Briefly reviewing the facts in *Terry*: a plain-clothes officer observed Terry and two companions standing before a store

5. 80 Cal. Rptr. 633 (1969).
6. 392 U.S. 1 (1968).

front, walking back and forth, occasionally looking in and conversing. The officer, based on his experience, was convinced that these three individuals were planning a robbery. After his observations had continued for some period of time, the officer decided to approach the individuals and inquire as to what they were up to. He did so and received a response amounting to nothing more than a mumble, whereupon he wheeled Terry around between himself and the other two suspects, patted down Terry's clothing and came upon what he took to be a weapon, reached inside his pocket, and ultimately retrieved a pistol. Terry was convicted of carrying a concealed weapon. There was no suggestion made by the prosecution in this case that there was probable cause, as traditionally understood, for this intervention by the officer in the activities of these three men. The Supreme Court, however, said that did not make any difference. The conduct of the officer under the facts was entirely reasonable—the stopping and inquiring of the individuals under these suspicious circumstances could be justified, and the frisk which followed was a suitable means of self-protection on the part of the officer.

The *Terry* case does this: it recognizes that there is not one single standard of probable cause, in terms of knowledge to believe a crime has been committed, that would justify an interference with the freedom of an individual. There is a lower standard—you may call it a fluctuating standard—of probable cause. Or, if you prefer, you can just avoid using the term probable cause—employ it only in the context of arrest—and say that if the facts known to the officer reach a certain level of suspicion, so that it can be said that an investigation of what is going on is reasonably justified, then an intervention of this type is constitutionally legitimate. That does not mean *a fortiori* that he can carry out a frisk. There is a need for a further level of suspicion—that the officer has reason to believe that he is in danger of a possible assault through the use of a weapon. If that higher level is present, then the frisk also will be justified. In both instances, however, suspicion is not apt to reach the level of probable cause.

A number of questions are raised as a result of *Terry v. Ohio* that have not yet been answered. Bear in mind that all we have now is one case in which we have been told that here there was adequate suspicion to stop and adequate suspicion to frisk. We do not have any clear-cut test; we really cannot expect to get a very clear-cut test any more than we can expect to get a clear cut delineation of what we mean by probable cause. By the very nature of the activity it requires an accumulation of fact situations so that we can glean one group of cases in which adequate suspicion was present from another group in which it was not.

Outside that difficult factual problem, which I think we can never completely overcome, suppose an officer approaches an individual under what are considered suspicious circumstances, asks him to stop, and the individual does not stop. Does the officer at that point have the authority to forcibly stop him to investigate his activities? Justices Harlan and White in concurring opinions in the *Terry* case say, unequivocally, yes. It can well be argued that unless the officer possesses that authority then the power to stop and frisk becomes rather empty. On the other hand, it can be said that if the officer does have the authority to forcibly stop the individual and detain him against his will, how does this differ from an arrest? The point of *Terry v. Ohio* is to distinguish the circumstances in which you can stop without probable cause from situations in which you can arrest with probable cause.

Another approach you can take to this problem is to say that if the suspect fails to cooperate with the officer this provides the officer with additional facts which help to raise his level of suspicion to probable cause and thereby justify an arrest. There are numerous cases which indicate that the reaction of the suspect upon the approach of the officer is a factor that can be considered in determining whether probable cause exists. If this is true, if the failure to stop changes the situation to one of probable cause, then in effect we have said that an individual has no option. He either can voluntarily stop in response to question, or, if he does not stop, he is subject to being forcibly stopped and at that point being arrested. Probably the court will hold that the officer can forcibly stop the individual under the circumstances which justify stopping and frisking.

Bear in mind that the *Terry* case is concerned with field investigations. It does not in any way involve the possibility of stopping individuals and taking them to the station house and perhaps carrying out an interrogation process. This significant limitation, at least today, of where *Terry* applies was made rather clear by the very recent decision, *Morales v. New York*,[7] in which the New York courts had used *Terry* to justify detaining a suspect for custodial questioning on less than probable cause. The United States Supreme Court noted that what the New York court was doing here went beyond the holding in *Terry*. It was rather clear from the opinion, it seems to me, that the court was very nervous about this case and did not want to have to get into it if it did not have to, and it avoided deciding the issue by remanding the case to the New York courts with the hope that on reconsideration and a

7. 396 U.S. 102 (1969).

further factual determination they would be able to find that there was probable cause to arrest Morales at the time they took him into the police station. The question remains open, but from the *Morales* case we get the message that if custodial interrogation can be justified under the *Terry* decision, it is clearly an extension of *Terry*, and we have not gone that far yet.

As to a second question raised by the *Terry* case, if the officer does forcibly stop the individual, or if he stops of his own free will, is he under any legal obligation to respond to any questions the officer asks him? Again, it might be suggested that if the individual fails to provide any explanation for his activities then the officer can think that his suspicions are therefore confirmed and he has probable cause to arrest. Here the problem becomes a little more difficult, however, because we are up against the clear statement of the Supreme Court in *Escobedo*[8] and *Miranda*[9] that under the fifth amendment an individual has an absolute right to remain silent. If he chooses to exercise that right and then we use the exercising of the right to establish probable cause for arrest, we are doing what the court would call penalizing the individual for exercising his constitutional right, and there are any number of decisions that frown upon that, such as *Simmons v. United States,*[10] involving a conflict of fourth and fifth amendment rights; *United States v. Jackson,*[11] concerning the right to trial by jury; and *North Carolina v. Pearce,*[12] holding that an individual usually cannot receive greater punishment on retrial if he successfully appeals his conviction.

While these are open questions under *Terry v. Ohio,*[13] that case is clearly a ratification of the power of police to carry out limited forms of detention and, where appropriate, incidental frisks to search for possible weapons. In that sense, it does nothing more than affirm what has been true at common law, and is not that significant in terms of creating new constitutional doctrine. It does, however, serve a very useful purpose, I think, in giving a clear constitutional legitimization to those activities.

The third decision of predominant significance is the 1969 decision in *Chimel v. California.*[14] It seems to me that this is one of the most

8. Escobedo v. Illinois, 378 U.S. 478 (1964).
9. Miranda v. Arizona, 384 U.S. 436 (1966).
10. 390 U.S. 377 (1968).
11. 390 U.S. 570 (1968).
12. 395 U.S. 711 (1969).
13. 392 U.S. 1 (1968).
14. 395 U.S. 752 (1969).

important Supreme Court decisions in the area of fourth amendment protections that has come down in many years.

Unquestionably, the biggest "wild card" law enforcement officers have had in investigating offenses in recent years has been the authority to carry out a warrantless search incident to an arrest, whether the arrest be with or without a warrant. Severe limitations are placed on a policeman if he searches with a warrant, in that he must establish probable cause that specifically enumerated items are present in a specifically described place. That is simply what the fourth amendment says; it is very particular about the matter. On the other hand, if a search is carried out incident to an arrest, the officer has been free to seize anything in the area in which the arrest occurs that is relevant to the subject matter of the arrest. The result of this power, which had been continually ratified and, in fact, expanded by the Supreme Court in recent years, was that if an arrest was made in a home, for example, the police were pretty well free to search the entire premises and look for anything which might be reasonably relevant to the subject of the arrest. If they came upon unrelated contraband or instrumentalities of crime, they could seize that as well.

In *Chimel* the court severely restricted the reasonableness of a search without a warrant incident to an arrest, holding that the permissible search covered two possibilities: (1) a search of the person arrested for weapons and evidence which he might conceal or destroy, and (2) a search of the immediate area which the arrestee might reach. Any search extending beyond those limits would require a warrant. It seems to me, and this has been pretty well confirmed by discussions I have had with people in law enforcement, the impact of *Chimel* is far more potent than the impact of *Miranda,* for example, on the practical workaday problems of law enforcement. Unquestionably, there are many more instances in which evidence seized incident to an arrest is introduced in a criminal trial than is a confession, and this decision has the effect of severely limiting the potential scope of warrantless searches.

I think we can expect that gaps and exceptions are going to be very inventively applied to the *Chimel* decision. We are already getting some indication of this in decisions of lower courts. For example, in *Scott v. State*[15] a Maryland appellate court recently interpreted "within reach" to mean "within lunge." In this manner, the courts are rapidly softening the impact of *Chimel* and loosening its rather strong strictures on searches incident to arrest.

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15. 256 A.2d 384 (Md. App. 1969).

The fourth decision is a case that I think generally has been overlooked in terms of its implications on the development of the fourth amendment, and I think those implications are somewhat disturbing. The case I am referring to is *Davis v. Mississippi*,[16] also a 1969 decision. Concededly, the immediate holding in the *Davis* case is really not very significant. A victim of a rape identified her assailant as "a Negro youth," nothing more. On the basis of that description the police put out a dragnet and brought in every Negro youth they could find—some fifty to seventy-five—in the given area, fingerprinted them all, and interrogated most of them. This practice went on for several days, in the process of which Davis, the defendant in this case, was identified by fingerprints as being the perpetrator of the offense. These fingerprints were introduced in evidence at his trial. The United States Supreme Court, not surprisingly, reversed the conviction. We had here what was clearly an arrest without probable cause. We had fingerprints which were clearly the fruits of that illegal arrest, and in light of precedents stretching back to *Silverthorne Lumber Company*[17] there was no question but that evidence that was the fruit of an illegal arrest could not be introduced at trial.

The significant aspect of *Davis*, however, is not in the decision of the case; it is in the dictum in which the court said that it was conceivable that had the police in this case first obtained a warrant for the purpose of doing precisely what they did—that is, going out and bringing in everybody who met this general description and fingerprinting them—it was quite conceivable that this could satisfy fourth amendment standards.

In reaching that conclusion they cited the case of *Camara v. Municipal Court*.[18] I will digress a little to tell you something about the *Camara* case, which is actually unrelated but which helps us to understand what they were talking about. *Camara* and its companion case, *See v. City of Seattle*,[19] involved municipal inspectors who were checking residences and commercial buildings to enforce municipal ordinances—health, safety, fire regulations and the like. A question was raised as to whether these types of inspections could be carried out without the use of a warrant, since warrants were never obtained. On behalf of the city it was argued that it was impossible to establish probable cause to

16. 394 U.S. 721 (1969).
17. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
18. 387 U.S. 523 (1967).
19. 387 U.S. 541 (1967).

carry out these inspections because of their very nature. They were of a preventive design, and the only way the ordinances could effectively be enforced was by blanket inspections of all the buildings within a given area. The court considered the problem and concluded that the municipalities were quite incorrect in believing that no fourth amendment problem was in issue. Without consent given by the occupant, they held, the authorities would have to obtain warrants. But, they went on, in this sort of case it would not be necessary to have probable cause—as it is traditionally understood. To carry out a search one need not establish the probability of the commission of any offense. Rather, if the standard set out in the municipal ordinance was simply stated, and a reasonable method of carrying out an inspection to enforce that ordinance offered, a warrant could be obtained. The dissenting justices thought that this, in effect, created paper warrants by introducing a fluctuating standard of probable cause, varying in terms of the purpose for which a warrant was sought.

Returning to our present concern, *Davis v. Mississippi* cites *Camara* and suggests that a warrant might be obtainable simply for the purpose of taking fingerprints. The rationale appears to be that this type of interference with individual freedom is so minor that nobody could really object to it and, therefore, for this very limited purpose there is nothing wrong with interfering with the freedom of an entire class of people.

The *Davis* case opens up the possibility for an entirely new type of exercise of police authority—a temporary detention for the purpose of identification. There has recently been introduced in the United States Congress Senate Bill No. 2997, entitled "Detention for Obtaining Evidence of Identifying Physical Characteristics." Pursuant to the dictum in the *Davis* case, this bill allows warrants to be issued for temporary detentions for the obtaining of certain evidence of physical characteristics. The germane language of the proposal reads as follows: "As used in this section, 'identifying physical characteristics' includes but is not limited to, the fingerprint, palmprints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples." The last, of course, will include pubic hair, which is not infrequently used in rape cases for purposes of identification.

What are the chances of this proposal withstanding constitutional attack? First, I think it is clear that not all of the characteristics which are enumerated in this bill are of equal constitutional vulnerability. For example, I would think that seeking progressively fingerprints,

blood samples, urine samples and pubic hair, one is going to run into an increasingly difficult job convincing the court that this is a reasonable exercise of authority and does not inordinately interfere with the freedom of individuals. Second, the act provides for detentions up to five hours in duration. While in some instances this time period may be reasonable, it certainly will not be in all cases. Any continued detention after the identification evidence has been obtained, absent the then presence of probable cause, may be quite questionable. Third, one cannot help but be somewhat apprehensive about the class nature of this investigatory tool. In *Davis* the class was "Negro youths;" in the next case the suspect may be "a hippie," or "a college student," or "a college professor." The possibility of using this type of authorization for the purpose of compiling a comprehensive fingerprint file of all members of a particular group is readily apparent simply from reading the facts in the *Davis* case itself.

Finally, it may be suggested that, in any event, Senate Bill No. 2997 is unneeded, for whatever constitutional authority officers have to carry out such investigative practices can likely now be employed using conventional search warrant procedures. Our experience over the past few years indicates that the constant push for additional statutory authorization in police investigation is unnecessary. Recall that while great interest centered around the constitutionality of the New York stop-and-frisk law,[20] when the practice was finally approved in the *Terry* case no statute was involved at all. Again, while monumental efforts have been directed toward the drafting and passage of legislation at both the state and federal level to permit electronic eavesdropping, the only case in which the Supreme Court has approved a judicially authorized eavesdrop is *Osborn v. United States*[21] where a Nashville federal judge approved carefully proscribed electronic surveillance without the benefit of any particularized legislation. Finally, in reading the *Davis* decision itself, while the Court suggests that the officers' purpose might have been achieved with the use of a warrant, nowhere does the Court indicate that any such warrant would require a pre-existing statutory authorization.

In summary, the *Katz* decision has provided us with a new overview conceptualization of what the fourth amendment means, and for the foreseeable future, any fourth amendment case may warrant attention to the bearing of *Katz*. *Terry v. Ohio* firmly legitimizes an essential

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20. N.Y. CODE CRIM. PROC. § 180-a.
21. 385 U.S. 323 (1966).

field investigative method; peripheral questions as to the exercise of that power remain unanswered. *Chimel v. California* radically changes long-standing standards for warrantless searches and is having significant effect on police investigative practices. *Davis v. Mississippi,* while insignificant in itself, has opened a Pandora's box to investigative detentions. The fourth amendment protection is thus, strangely, simultaneously expanding and contracting and will remain a most complex area of constitutional adjudication for the foreseeable future.