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Probable Cause To Arrest

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I. INTRODUCTION

Probable cause to arrest is an exceedingly difficult concept to objectify.[1] The traditional definition was stated in *Beck v. Ohio*[2] as follows:

> [W]hether at that moment the facts and circumstances within their 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.[3]

Judicial opinions frequently manifest empathy with the policeman's plight in attempting to apply this vague standard.[4] While the standard does not mean that the arresting officer must have evidence that would satisfy a fact finder of guilt beyond a reasonable doubt,[5] probable cause is clearly more than "mere suspicion."[6] It is axiomatic that probable

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1. Brinegar v. United States, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, however, as the very name implies, we deal with probabilities. . . . [T]hey are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."); People v. Superior Court, 274 Cal. App. 2d 7, 11, 78 Cal. Rptr. 757, 760 (1969) ("In adopting a Gestaltist approach in this area, courts are not being innovative; they are merely accepting the fact that straight line measurements [i.e., weighing each individual factor separately] may not always provide the proper answers. Both the psychologist who studies human behavior, and the policeman who deals with the problems on his beat, have learned that the ultimate configuration or structure that evolves from total experience is not the simple total of its constituent parts."); State v. Mark, 46 N.J. 262, 271, 216 A.2d 377, 382 (1966) (Probable cause "is a commonsensible rather than a technical concept.").

2. 379 U.S. 89 (1964).

3. *Id.* at 91. Similar language may be found in Henry v. United States, 361 U.S. 98, 102 (1959); Dumbra v. United States, 268 U.S. 435, 441 (1925); Stacey v. Emery, 97 U.S. 642, 645 (1878).

4. *E.g.*, Lathers v. United States, 396 F.2d 524, 531 (5th Cir. 1968) ("An officer need not be astronomically precise before making an arrest."); Overstock Book Co. v. Barry, 305 F. Supp. 842, 850 (E.D.N.Y. 1969) ("To arrest one, a police officer does not have to determine first that the law under which he is acting will later be found to be constitutional by a court."); United States v. Traceski, 271 F. Supp. 883, 886 (D. Conn. 1967) ("Police officers are not required to be curbstone legal technicians.").

5. Dumbra v. United States, 268 U.S. 435, 441 (1925).

6. Wong Sun v. United States, 371 U.S. 471, 479 (1963); Henry v. United States, 361 U.S. 98, 101 (1959); Mallory v. United States, 354 U.S. 449, 454 (1957).

cause can never be established by the fruits of illegal search,[7] and the good faith of the officer can add nothing to facts that otherwise do not reach the level of probable cause.[8] Nevertheless, police, by virtue of their experience and expertise, may be able to identify certain activities as indicative of criminal behavior that might not appear so to a judge or layman. The viewpoint of an experienced officer, therefore, may be taken into account in determining the presence of probable cause.[9]

II. THE FACTUAL CONTEXTS

In the final analysis, one's understanding of probable cause can be at best fragmentary—a patchwork concept assembled from various Supreme Court decisions, as amplified by lower court holdings, that provide relatively meaningful standards in particular factual contexts. The present article will attempt to assimilate these decisions to provide a general overview of the constitutional standard for probable cause to arrest at its current state of development. In the discussion to follow, the reader should keep in mind that the constitutionality of an arrest becomes a critical issue only when fruits of the arrest, such as tangible evidence or a confession, are introduced at the trial of the defendant.[10]

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7. Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Lustig v. United States, 338 U.S. 74 (1949); Johnson v. United States, 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 581 (1948).

8. Henry v. United States, 361 U.S. 98, 102 (1959); Director of Gen. R.R. v. Kastenbaum, 263 U.S. 25, 27-28 (1923); Curry v. Superior Court, 7 Cal. App. 3d 836, 848, 86 Cal. Rptr. 844, 851 (1970) ("In passing upon the question of probable cause for arrest, therefore, the trial judge assumes the agreeable *persona ficta* of the reasonable man and in that guise looks at the conduct of the police as in a speculum to see whether his image is mirrored therein, illumined by the reliable information possessed by the police.").

9. "Among the pertinent circumstances to be considered is the qualification and function of the person making the arrest. An officer of a narcotics detail may find probable cause in activities of a suspect and in the appearance of paraphernalia or physical characteristics which to the eye of a layman could be without significance. His action should not, therefore, be measured by what might or might not be probable cause to an untrained civilian passerby, but by a standard appropriate for a reasonable, cautious, and prudent narcotics officer under the circumstances of the moment." State v. Poe, 74 Wash. 2d 425, 428, 445 P.2d 196, 199 (1968). *See also* Jackson v. United States, 302 F.2d 194, 196 (D.C. Cir. 1962) ("probable cause is not to be evaluated from a remote vantage point in a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of the arrest").

10. The concern of the present article is solely with the constitutional standards for a valid arrest, which is, in and of itself, a fourth amendment issue. *See* Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958); Albrecht v. United States, 273 U.S. 1 (1927). Yet it is equally clear that once a defendant has been convicted, an illegal arrest, standing alone, is not a reversible error. *See* Ker v. Illinois, 119 U.S. 436, 440 (1886). This is the case because appellate courts are concerned only with those constitutional violations that deprive the defendant of a fair trial. *See* Stroble v. California, 343 U.S. 181 (1952). When the arrest was made with a

A. *Offense Committed in the Presence of an Officer*

The clearest case of probable cause to arrest is afforded by an offense committed in the presence of an officer.[11] At common law this was the only justification for a misdemeanor arrest without a warrant.[12] So obvious is the authority of the officer to arrest in the case where he has personally witnessed the commission of a crime that it has seldom become the subject of appellate inquiry. One illustration, while not wholly in point, is *United States v. Rabinowitz*,[13] in which a printer who possessed plates for forging "overprints" on cancelled stamps disclosed that he had delivered a quantity of the forged stamps to the defendant. A government agent went to the defendant's place of business and bought four of the stamps, which were determined to be forgeries. Thereafter, a warrant for the arrest of the defendant for the illegal sale was obtained, and the arrest was held valid.[14]

B. *Good Faith Mistake Regarding the Identity of the Arrestee*

Several California cases have held that if the officer makes a good faith mistake as to the *identity* of the person he is arresting, the arrest

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technically defective warrant or without probable cause the error is "harmless," for if the issue is not raised until after conviction, it is self-evident that any technical irregularities could have been corrected and that at some time between arrest and conviction the prosecution did have probable cause to arrest. Even in cases of forcible abduction the Supreme Court has refused to find reversible error because "in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." *In re Johnson*, 167 U.S. 120, 126 (1897).

11. "[T]he term 'presence' is a word of art, denoting that the commission of a misdemeanor is perceptible to the officer's senses, whether they be visual, auditory, or olfactory." Salmon v. State, 2 Md. App. 513, 522, 235 A.2d 758, 763 (1967). An arrest for a misdemeanor committed in the presence of the officer must be made immediately. People v. Gray, 23 Mich. App. 139, 178 N.W.2d 172 (1970).

12. Carroll v. United States, 267 U.S. 132, 156-57 (1925). There would appear to be no decisions suggesting this standard as a constitutional standard of "reasonableness," and the implication seems to be to the contrary. *See, e.g.*, Bad Elk v. United States, 177 U.S. 529 (1899); Lurie v. District Att'y, 56 Misc. 2d 68, 288 N.Y.S.2d 256 (Sup. Ct. 1968). Statutes in some jurisdictions authorize an officer investigating a traffic accident to make arrests for offenses reasonably connected with the accident, though not committed in the officer's presence. *See, e.g.*, FLA. STAT. § 317.111 (1967); TENN. CODE ANN. § 59-1019(e) (1968).

13. 339 U.S. 56 (1950).

14. "[W]hen the warrant for arrest was obtained, the officers had reliable information that respondent was an old offender, that he had sold four forged and altered stamps to an agent of the Government, and that he probably possessed several thousand altered stamps bearing forged overprints." *Id.* at 58. A more general underlying principle may also be observed: it is not essential that all the facts necessary to establish probable cause be known personally by the arresting officer. "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." United States v. Ventresca, 380 U.S. 102, 111 (1965). "[P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the 'laminated' total." Smith v. United States, 358 F.2d 833, 837 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967).

may be valid, even though there was at the time no probable cause to arrest the person actually taken into custody. In *People v. Campos*,[15] officers were looking for one "Willie Campos," who lived on Paramount Boulevard and was wanted by federal authorities. Presumably, although it is not clear, they had probable cause to arrest him. The officers approached and questioned a suspect who responded that he was "Willie Campos" and that he lived on Paramount Boulevard. The officers then gained the suspect's consent for a search of his automobile, during which a quantity of marijuana was discovered. Later it was learned that the party arrested was an entirely different "Willie Campos" who coincidentally lived on the same street, and that at the time of the arrest[16] the officers had no incriminating information regarding him. Nevertheless, the court held that in light of the good faith mistake of the arresting officers their conduct was entirely legitimate, notwithstanding the total absence of any suspicion of the party arrested.[17] Similarly, in *People v. Prather*,[18] an officer had received a briefing regarding a suspect wanted for murder. The officer arrested a motorist who fit the description, and a subsequent search of the vehicle disclosed a quantity of marijuana. Despite the fact that the arrestee was not the murder suspect, the arrest was held valid, and his conviction for transporting and possessing marijuana was affirmed.

In *People v. Hill*,[19] officers, having probable cause to arrest the defendant for robbery, went to his apartment and arrested the occupant, who, while fitting the description of the defendant, was actually an innocent third party. The officers conducted a search of the premises incident to the arrest[20] and later sought to introduce the items seized at

15. 184 Cal. App. 2d 489, 7 Cal. Rptr. 513 (1960).

16. The court did not opine as to whether the arrest occurred at the moment of the initial stopping or after the discovery of the marijuana, but the problem would appear the same in either instance. If the arrest occurred immediately, there was clearly no probable cause to arrest this person; if it occurred later, probable cause was present, but the question then is whether the initial stopping, questioning, and resulting consent search were reasonable when there was no suspicion, objectively appraised, as regards this individual. *Cf.* Terry v. Ohio, 392 U.S. 1 (1968).

17. "Although it is true that the officers were not looking for this defendant, the evidence shows that they had reasonable cause to believe that he was the one concerning whom they had information." 184 Cal. App. 2d at 494, 7 Cal. Rptr. at 515-16. A similar coincidence occurred in People v. Miller, 193 Cal. App. 2d 838, 14 Cal. Rptr. 704 (1961).

18. 268 Cal. App. 2d 48, 74 Cal. Rptr. 82 (1969).

19. 69 Cal. 2d 550, 446 P.2d 521, 72 Cal. Rptr. 641 (1968).

20. Today the search would be unreasonable. *See* Chimel v. California, 395 U.S. 752 (1969).

the defendant's trial. The court held that both the good faith but erroneous arrest of the occupant[21] and the ensuing search were valid.[22]

C. *Good Faith Mistake Regarding the Existence of Probable Cause*

If probable cause to arrest is apparently present, the fact that the information known is subsequently determined to be false will not render the arrest illegal,[23] nor does it matter that the arrest initially was made for the wrong offense.[24] As the Court of Appeals of Kentucky noted in *Pennington v. Commonwealth*:[25]

> It is entirely possible that a defendant may be convicted on a charge when there was not probable cause for the initial arrest or may be acquitted on a charge where there was probable cause. Therefore, the outcome of the trial on the major offense should not be determined by the disposition of the arresting charge.[26]

A different result may be reached, however, where there is no crime such as that for which the suspect was arrested.[27] Skepticism may also be expressed where the initial arrest was on a sham charge of vagrancy, even though probable cause for a more serious offense was present.[28] Some courts, however, have held such practices legitimate.[29] Clearly the practice of arresting persons on "suspicion" of a particular offense is not to be condoned,[30] but even here the use of the term will not invalidate an otherwise legal arrest based on probable cause.[31]

D. *Bad Faith of the Arresting Officer*

As previously noted,[32] where the reasonably believed facts taken together fail to establish probable cause to arrest, the fact that the officer

21. "When the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." 69 Cal. 2d at 553, 446 P.2d at 523, 72 Cal. Rptr. at 643.

22. "[A] search based on a valid but mistaken arrest is not unreasonable as an unwarranted invasion of either the arrestee's or the defendant's privacy." *Id.* at 555, 446 P.2d at 525, 72 Cal. Rptr. at 645.

23. "If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent." Henry v. United States, 361 U.S. 98, 102 (1959). *See also* Henderson v. Beto, 309 F. Supp. 244 (N.D. Tex. 1970); Boddie v. State, 6 Md. App. 523, 252 A.2d 290 (1969); Henderson v. State, 422 S.W.2d 175 (Tex. Crim. App. 1968).

24. McNeely v. United States, 353 F.2d 913 (8th Cir. 1965); Daly v. United States, 324 F.2d 658 (8th Cir. 1963); People v. Colbert, 6 Cal. App. 3d 79, 85 Cal. Rptr. 617 (1970); Simms v. State, 4 Md. App. 160, 242 A.2d 185 (1968); State v. Cloman, 456 P.2d 67 (Ore. 1969).

25. 429 S.W.2d 364 (Ky. App. 1967).

26. *Id.* at 366; *accord*, State v. Zito, 54 N.J. 206, 213, 254 A.2d 769, 772 (1969).

27. *See* State v. Rater, 453 P.2d 680 (Ore. 1969).

28. *See* Mills v. Wainwright, 415 F.2d 787 (5th Cir. 1969).

29. *See* Klingler v. United States, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

30. *See* McMahon v. Municipal Court, 6 Cal. App. 3d 194, 85 Cal. Rptr. 782 (1970).

31. *See* Commonwealth v. Perez, 258 N.E.2d 1 (Mass. 1970).

32. *See* note 8 *supra*.

acted in good faith in making the arrest will not serve to validate it. The result is less clear, however, when the officer concedes that he did not believe that he had probable cause at the time he made the arrest, but the court, objectively viewing the information known to the officer, concludes that he did. Language in *Carroll v. United States*[33] may be construed to mean not only that probable cause must objectively exist but further that the officer must have acted in good faith.

> The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony. . . .[34]

Some cases appear to follow this reasoning. In *Winkle v. Kropp*,[35] officers followed an automobile that drove through a red light. They interrogated the driver and his companion. The registration papers for the vehicle were in the name of neither of the parties, although the defendant explained that the car belonged to his brother-in-law. The two parties, questioned separately, gave the officers conflicting stories concerning their plans. One of the officers took the keys from the ignition, opened the trunk of the vehicle, and discovered burglar's tools and a weapon, for the possession of which the defendant was convicted. The Michigan Supreme Court affirmed the conviction,[36] finding at the time of the search the officers had probable cause to believe the vehicle was stolen. Significantly, in a subsequent denial of a petition for writ of habeas corpus,[37] three members of the court noted: "[W]hether they actually did so believe it is beside the point in determining the reasonableness of the search and seizure."[38] On a further petition for writ of habeas corpus, the federal district court found the reasoning of the state court fallacious in a three-step argument. First, it was highly questionable that the information known to the officers attained the level of probable cause to support an arrest for possession of a stolen automobile. Secondly, assuming that probable cause was present, it did not follow that a search of the trunk could be considered reasonably incident thereto, since there were no fruits or instrumentalities of the offense that could be expected in the trunk. Finally, assuming even further that the search could be legitimately justified as incident to a legal arrest, the argument was unavailing in the present case because "the officers specifically denied having believed that any offense other

33. 267 U.S. 132 (1925).
34. *Id.* at 156.
35. 279 F. Supp. 532 (E.D. Mich. 1968), *cert. denied*, 394 U.S. 1003 (1969).
36. People v. Winkle, 358 Mich. 551, 100 N.W.2d 309 (1960).
37. People *ex rel.* Winkle v. Bannan, 372 Mich. 292, 125 N.W.2d 875 (1964), *cert. denied*, 379 U.S. 645 (1965).
38. *Id.* at 327, 125 N.W.2d at 893.

than the traffic violation had occurred. . . ."[39] Absent such subjective belief in the presence of probable cause, the arrest was illegal. "[T]he question of what a prudent man would have believed under the circumstances does not even arise."[40]

Similarly, in *Moss v. Cox*,[41] an officer arrested the petitioner Moss for "ill-fame," suspecting him of picking pockets, although it was conceded by the officer that at the time of the arrest he knew of no pockets that Moss had picked. In the course of a search of his person incident to the arrest, Moss discarded a cigarette containing marijuana, which was introduced at his trial for its possession. The prosecution contended that if, at the time of the arrest, information collectively known by the police reached the level of probable cause, even if this fact had not been communicated to the arresting officer, the arrest was legal, and the search reasonably incident thereto. The federal district court disagreed, observing that "[t]he officer's subjective intent and beliefs are quite crucial."[42]

> [T]he use of the arrest power by officers, operating under the impression that an arrest for that offense could not stand up, to apprehend a person on a sham or pretextual charge is so dangerous to interests of privacy and personal security as to call into play the exclusionary rule.[43]

The alternative approach—that the presence or absence of probable cause is a purely objective question—is suggested by *Terry v. Ohio*:[44]

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?[45]

This language had been interpreted by some courts to mean that the officer's subjective evaluation of his conduct is immaterial.

In *Klinger v. United States*[46] the officer received a radio report concerning a service station robbery, including a description of the suspect and the vehicle he was driving. Shortly thereafter, the officer

39. 279 F. Supp. at 537.
40. *Id.*
41. 311 F. Supp. 1245 (E.D. Va. 1970).
42. *Id.* at 1252.
43. *Id. See also* State v. Mannhalt, 1 Wash. App. 598, 462 P.2d 970 (1969).
44. 392 U.S. 1 (1968). *See also* Director Gen. of R.R. v. Kastenbaum, 263 U.S. 25, 27-28 (1923).
45. 392 U.S. at 21-22.
46. 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

observed a parked automobile and two men. One of the men and the vehicle vaguely matched the description he had received. The two were arrested for vagrancy, and a search of the vehicle revealed a pistol, resulting in the defendant's conviction for transporting the weapon in interstate commerce. At a hearing on a motion to suppress the evidence, the arresting officer testified that he did not believe at the time that he had sufficient facts to arrest the suspect for armed robbery. The Eighth Circuit, citing *Terry*, held that the existence of probable cause was simply a matter of appraising the objective facts known to the officer. "His subjective opinion is not material."[47]

Similarly, in *People v. Smith*,[48] the officer stopped the defendant for exceeding the speed limit and charged him further with being an unlicensed driver and driving an unregistered vehicle. The officer then proceeded to search the car, a search which under New York law would not be reasonably incident to a traffic arrest of this type.[49] As a result of the search, the officer seized a quantity of heroin and a counterfeit twenty dollar bill. The court held that, regardless of whether the officer realized it, he had probable cause to arrest the defendant for the possession of a stolen vehicle, and the search *was* justifiable as incident to an arrest for that offense. Again, citing *Terry*, the court observed:

> A reasonable ground for belief that a crime has been or is being committed to constitute probable cause does not rest upon the subjective reaction of the police officer making the arrest. It depends, rather, upon an objective appraisal of the facts and circumstances to determine the existence or non-existence of probable cause.[50]

E. Distinctive Odors

In a few cases police have relied upon a distinctive odor as a ground for arrest. In *Johnson v. United States*,[51] an officer received information from an informant that unknown persons were smoking opium in a designated hotel. Officers went to the hotel and smelled opium burning. The scent led them to a particular room; they knocked, announced themselves, and after a short delay the defendant opened the door and allowed the officers to enter. Following a brief conversation in which the defendant denied there was a smell of opium in the room, an officer said, "I want you to consider yourself under arrest because we are going to

47. *Id.* at 304.

48. 62 Misc. 2d 473, 308 N.Y.S.2d 909 (Sup. Ct. 1970).

49. *See* People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967); Casler v. State, 33 App. Div. 2d 305, 307 N.Y.S.2d 695 (1970).

50. 62 Misc. 2d at 476, 308 N.Y.S.2d at 914.

51. 333 U.S. 10 (1948).

search the room." The search turned up opium and a smoking apparatus warm from recent use. The Court held that the information known to the officers at the time of their entry would have been sufficient to justify the issuance and execution of a search warrant. The search made here, however, was not pursuant to a warrant but to an arrest, and the validity of the arrest was the crucial issue. While there was probable cause to believe a crime was being committed, the officers possessed no knowledge that would lead them to know who was guilty. They therefore lacked probable cause to obtain an arrest warrant and likewise lacked probable cause to make an arrest without a warrant.

While the *Johnson* decision has occasionally been cited and followed by lower courts,[52] its rationale and continued validity are questionable. Given the distinctive odor of burning opium, the probabilities are very strong that the drug is being illegally consumed on the defined premises. While the officers may not know the *identity* of the offender, the likelihood that *someone* within the confines is engaging in the illegal use of opium would scem strong enough to justify the arrest of the occupant. Furthermore, since the evidence very well might be rapidly disappearing, the "exigent circumstances" could justify a warrantless search.[53]

Several recent California decisions[54] have for all practical purposes rcpudiated *Johnson*. *People v. Nichols*[55] explains the fatal flaw in the holding to be a failure to distinguish between a warrantless entry to seize contraband and a warrantless entry to make an arrest. As to the possibility of multiple occupany of the premises the court responded:

> Courts have recognized that it is reasonable for an officer to infer that the person in apparent possession of a dwelling house is in possession of the narcotics found there, even though the possession may be shared by someone else.[56]

F. Flight or Furtive Action upon Officer's Approach

When an officer approaches a suspect with information that does not rcach the level of probable cause, what additional weight may be given to the reaction of the suspect upon seeing the officer? In *United*

52. *E.g.*, People v. Madow, 60 Misc. 2d 742, 303 N.Y.S.2d 974 (Rockland County J. Ct. 1969).

53. *See* Vaillancourt v. Superior Court, 273 Cal. App. 2d 791, 78 Cal. Rptr. 615 (1969).

54. *Id.*; People v. Goldberg, 2 Cal. App. 3d 30, 82 Cal. Rptr. 314 (1969); People v. Nichols, 1 Cal. App. 3d 173, 81 Cal. Rptr. 481 (1969).

55. 1 Cal. App. 3d 173, 81 Cal. Rptr. 481 (1969).

56. *Id.* at 176, 81 Cal. Rptr. at 483. *See also* Robbins v. MacKenzie, 364 F.2d 45 (1st Cir.), *cert. denied*, 385 U.S. 913 (1966); United States v. Burruss, 306 F. Supp. 915 (E.D. Pa. 1969).

States v. Di Re,[57] the Supreme Court held that the suspect's failure to resist or protest his innocence cannot be taken by the officer to be an admission of guilt, confirming his suspicions. But when the response of the suspect suggests guilt in a more affirmative fashion the decisions are not in agreement. Courts frequently have observed that flight, standing alone, is insufficient to establish probable cause to arrest.[58] Support for these decisions may be gleaned from *Wong Sun v. United States*.[59] At two in the morning federal officers arrested Hom Way and found narcotics in his possession. Hom Way told the officers that he had bought an ounce of heroin from a person he called "Blackie Toy." At six the same morning officers went to a laundry operated by James Wah Toy. When Toy came to the door, one officer identified himself, whereupon Toy slammed the door and ran to his living quarters in the back of the laundry. The officers broke in, followed Toy to his bedroom, and placed him under arrest. The Court found that the arrest was made without probable cause, first because the officers did not know Hom Way to be reliable,[60] and secondly because nothing in the circumstances occurring at Toy's premises provided justification for an arrest without a warrant.

> Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion. . . .
>
> A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked.[61]

Nevertheless, flight is frequently acknowledged as a factor properly considered in determining whether the known data reached the level of probable cause.[62]

Decisions are somewhat less consistent when the suspect engages in some sort of "furtive activity." In *Rios v. United States*,[63] officers were

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57. 332 U.S. 581 (1948).

58. *E.g.*, United States v. Rubio, 404 F.2d 678 (7th Cir. 1968), *cert. denied*, 394 U.S. 993 (1969); Johnson v. Middlebrooks, 383 F.2d 386 (5th Cir. 1967).

59. 371 U.S. 471 (1963).

60. Where probable cause is based on hearsay information, a critical issue in the determination of the constitutionality of the arrest may be the reliability of the informant, a dimension of the protection of the fourth amendment not pursued in the present article. In addition to *Wong Sun*, the following cases also raise as an issue the reliability of a police informant: Recznik v. City of Loraine, 393 U.S. 166 (1968); McCray v. Illinois, 386 U.S. 300 (1967); Ker v. California, 374 U.S. 23, 35, 36 (1963); Draper v. United States, 358 U.S. 307 (1959); Husty v. United States, 282 U.S. 694 (1931).

61. 371 U.S. at 483-84.

62. *E.g.*, Coleman v. United States, 420 F.2d 616 (D.C. Cir. 1969); United States v. Brock, 408 F.2d 322 (5th Cir. 1969); United States v. Rubio, 404 F.2d 678 (7th Cir. 1968).

63. 364 U.S. 253 (1960).

patrolling an area notorious for narcotics offenses. They observed the defendant entering a taxicab and decided to follow him. The officers had never seen the defendant before and had no reason, aside from the general reputation of the neighborhood, to suspect him. When the cab stopped at a traffic light, the officers got out of their car and approached it from opposite sides. At this point the defendant became alarmed and attempted to get out of the cab. In the process, he dropped a package which the officers readily identified as heroin. The defendant was ultimately subdued by the officers in an alley, and he was convicted of the unlawful possession of narcotics. The Court unanimously agreed that at the time the officers first approached the vehicle there was no probable cause to arrest.[64] At a later point in time, however, probable cause was clearly present, and the Court found it appropriate to remand the case for a factual determination of when the arrest occurred.[65] In this manner, the Court implicitly held that the reaction of the suspect to the confrontation with the officers could supply the needed information to legitimize the arrest.[66]

When the suspect attempts to dispose of incriminating evidence[67] or calls a warning to another[68] upon the approach of the officer, a number of decisions have found probable cause for an arrest. An admission by a suspect may be adequate additional data to justify an arrest,[69] but dissatisfaction on the part of the officer with the identification of the suspect is not enough.[70] When the officer's conduct is legitimate, any forcible resistance by the suspect may supply the modicum of information needed to raise the circumstances to the level of probable cause.[71]

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64. "[U]pon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approach the taxi in which the petitioner was riding." *Id.* at 261.

65. On remand, the district court held that the arrest had not occurred when the officers first approached the vehicle. United States v. Rios, 192 F. Supp. 888 (S.D. Cal. 1961).

66. *Accord*, People v. Jackson, 98 Ill. App. 2d 238, 240 N.E.2d 421 (1968); State v. Cage, 452 S.W.2d 125 (Mo. 1970); People v. Maize, 32 App. Div. 2d 1031, 305 N.Y.S.2d 37 (1969).

67. *See, e.g.*, Gamez v. Beto, 406 F.2d 1000 (5th Cir. 1969).

68. *See, e.g.*, United States v. Nicholas, 319 F.2d 697 (2d Cir.), *cert. denied*, 375 U.S. 933 (1963).

69. Bell v. United States, 285 F. 145 (5th Cir. 1922); Andry v. Henderson, 303 F. Supp. 1184 (E.D. La. 1969).

70. Jones v. Peyton, 411 F.2d 857 (4th Cir. 1969), *cert. denied*, 396 U.S. 942 (1970).

71. Cavness v. United States, 187 F.2d 719 (9th Cir. 1951) (defendant forcibly resisted the approach of a narcotics agent and attempted to destroy inhaler tube in his possession); People v. Satterfield, 252 Cal. App. 2d 270, 60 Cal. Rptr. 733 (1967) (defendant slammed a door upon an officer's approach and shouted "the law. It's the law."); Boddie v. State, 6 Md. App. 523, 252 A.2d 290 (1969) (attempted assault on officer with vehicle).

It is always possible that the reactions of a suspect may be nothing more than a manifestation of genuine fear of the officer, connoting no sense of guilt whatever. In *People v. Privett*,[72] seven or eight "roughly dressed" officers approached the defendant's residence at nighttime. When they knocked, the defendant turned out an interior light and did not immediately respond. The court held that under the circumstances the defendant's conduct was reasonable and did not establish probable cause to arrest. Likewise the refusal to admit an officer without a warrant may be viewed as nothing less than the assertion of a constitutional right.[73]

Perhaps the recent holding in *Peters v. New York*[74] is the most disconcerting use of furtive conduct to validate an arrest. An off-duty officer, while in his own apartment, observed the defendant and another "tiptoeing out of the alcove toward the stairway." The officer had been a resident of the apartment building for twelve years and did not recognize either of the men as tenants. Believing that the two were about to commit a burglary, the officer entered the hallway, slamming the door behind him, whereupon the two men ran down the stairs. The defendant was apprehended one and a half flights down. The officer patted him down and, discovering a hard object in his pocket, removed what turned out to be a plastic container of burglar's tools. It was argued by the defendant that the officer had carried out a search under the pretext of a frisk.[75] The Court found it unnecessary to consider the issue because the suspicious behavior of the two men coupled with their flight when approached by the officer established probable cause to arrest.

> [D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.[76]

The search was therefore justifiable as reasonable incident to the arrest. Justice Harlan, in a concurring opinion, submitted that the officer did not have "anything close to probable cause to arrest Peters before he recovered the burglar's tools." If the Court was of the opinion that the facts known to the officer here were sufficient to establish probable

72. 55 Cal. 2d 698, 361 P.2d 602, 12 Cal. Rptr. 874 (1961).

73. People v. Gaines, 265 Cal. App. 2d 642, 71 Cal. Rptr. 468 (1968), *cert. denied*, 394 U.S. 935 (1969).

74. 392 U.S. 40 (1968).

75. In the companion case, *Sibron v. New York*, the Court distinguished a legitimate frisk accomplished by patting down the outerclothing of the suspect, and an illegitimate search when the officer initially reached into the pocket. *See also* Terry v. Ohio, 392 U.S. 1 (1968).

76. 392 U.S. at 66.

cause, it was curious that they were unable to reach the same conclusion in *Terry v. Ohio*,[77] decided the same day. Certainly the flight of the suspects at the approach of a gun-carrying stranger, not in uniform, was hardly indicative of guilt. Justice Harlan preferred to validate the arrest through the same analysis employed by the Court in *Terry*.[78]

G. Presence at the Scene of Criminal Activity

Can probable cause for arrest be established by the presence of a suspect at the scene of a crime or in the company of others engaged in criminal activity? A narrowly restricted negative response is provided by *United States v. Di Re*.[79] In that case an officer was informed by *R* that he was going to buy counterfeit ration coupons from *B*. The officer followed *B* and observed him enter the defendant's car. The officer went to the vehicle and found *R* on the back seat holding two counterfeit ration coupons. The defendant was seated by *B* on the front seat. *R* told the officer he had received the coupons from *B*. All three were taken into custody. The officer had no warrant for arrest. At the police station, the defendant was ordered to place the contents of his pockets on a table. This revealed two gasoline and several fuel oil ration coupons. Two hours later the defendant was booked and thoroughly searched, at which time 100 gasoline coupons were found. All turned out to be counterfeit. The defendant was convicted of knowingly possessing counterfeit gasoline coupons, a misdemeanor. He contended on appeal that there was no probable cause for the arrest. The government contended that there were grounds for arrest for the felony of conspiracy. The Court noted that the only crime committed in the officer's presence was by *R*, the informant, who was observed in possession of the coupons. As to *B*, the officer had previous information that would appear to be corroborated by what he had observed.[80] But there was no information about the defendant, nor could his presence in itself give rise to probable cause to arrest for the illegal possession of the coupons. The question then became whether there was probable cause to arrest the defendant on

77. 392 U.S. 1 (1968). *See* text accompanying note 107 *infra*.

78. The reluctance of the majority of the Court to accept this theory may be explained by the fact that the officer's actions went beyond the carefully circumscribed limits of the "frisk." *See* note 69 *supra*.

79. 332 U.S. 581 (1948).

80. *See* United States v. Alexander, 415 F.2d 1352 (7th Cir. 1969), *cert. denied*, 397 U.S. 1014 (1970) (distinguishing *Di Re* where defendant occupied the position of *B*). *See also* Andry v. Henderson, 303 F. Supp. 1184 (E.D. La. 1969); People v. Esparza, 2 Cal. App. 3d 245, 82 Cal. Rptr. 467 (1969).

a charge of conspiracy, to which, again, the Court responded in the negative:

> The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is far-fetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal.[81]

Furthermore, the Court noted, there is nothing ostensibly criminal in the passing of papers from one person to another—the defendant would not necessarily know they were ration coupons, and, if he did, he would not necessarily know they were counterfeit. Finally, the fact that *R* singled out *B* and only him, as guilty, where there appeared no reason not to incriminate the defendant as well, was a convincing reason to conclude that the defendant was not a party to the crime.

Courts have thus manifested a general reluctance to impute guilt to the defendant from the company in which he is observed.[82] In *Sibron v. New York*,[83] probable cause was not established by the suspect "conversing with a number of known addicts over an eight-hour period."[84] Likewise, in *United States v. Johnson*,[85] in which officers detected the distinctive odor of burning opium emanating from a particular room in a hotel, the Court held that the answering of the door by the defendant did not in itself establish grounds for her arrest.[86]

H. Past Criminal Conduct as a Factor

Can the defendant's criminal record be a factor in determining whether probable cause exists? In *Beck v. Ohio*,[87] police stopped Beck, who was driving his car, placed him under arrest, and searched the car, finding nothing. They took him to the police station, and there searched his person, finding clearing house slips beneath a sock. He was

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81. 332 U.S. at 593.

82. United States v. Rundle, 402 F.2d 701, 705 (3d Cir. 1968); Pearson v. United States, 150 F.2d 219, 221 (10th Cir. 1945).

83. 392 U.S. 40 (1968).

84. *Id.* at 47.

85. 333 U.S. 10 (1948). *See* text accompanying notes 48-53 *supra*.

86. *See also* Cunha v. Superior Court, 2 Cal. 3d 352, 356, 466 P.2d 704, 708, 85 Cal. Rptr. 160, 164 (1970) ("[a]n area known to be the site of frequent narcotics traffic should not be deemed to convert circumstances as innocent as an apparent transaction by pedestrians who seem generally concerned with their surroundings into sufficient cause to arrest those pedestrians"); People v. Reulman, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964) (suspect seen walking aimlessly in area where narcotics user's kit was found).

87. 379 U.S. 89 (1964).

subsequently charged with a gambling violation. No formal arrest or search warrant had been issued. The arresting officer had acted on the following information: (1) he had a police picture of the defendant; (2) he knew the defendant had a record in connection with clearing houses and schemes of chance; and (3) he had "heard reports" concerning the defendant's activities from an informant. The Court held the arrest to be illegal, saying:

> We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissible or entirely irrelevant upon the issue of probable cause. . . . But to hold that knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will.[88]

The Court suggested that it was possible that an informant had given enough information to constitute probable cause, but there was inadequate specific information in the record.

Courts are frequently critical of the suggestion that prior convictions in effect diminish an individual's protection under the fourth amendment.[89] Still, as *Beck* indicates, the prior criminal record of the suspect is a factor to be considered in the determination of probable cause, and, in *United States v. Rabinowitz*,[90] the fact that the suspect was "an old offender" was a factor cited by the Court in sustaining the validity of an arrest.[91]

I. Outwardly Innocent Behavior

It might be assumed that outwardly innoeent behavior could never contribute to probable cause. For this reason, the decision of the Supreme Court in *Draper v. United States*[92] is extremely troublesome. In *Draper* an informant told a narcotics agent that the defendant had gone to Chicago and would return with three ounces of heroin on September 8th or 9th. He also gave the agent a description of the defendant and the

88. *Id.* at 97.

89. *See* United States v. Fay, 344 F.2d 625, 630 (2d Cir. 1965) ("[i]t would be an abusive rule which would automatically authorize the police to subject persons to arrests without warrants, as if they were outlaws, simply because they had been previously convicted"); Clay v. United States, 239 F.2d 196, 199 (5th Cir. 1956) ("[t]he mere act of a known gambler driving an automobile on a public highway will not justify an officer forcing him to stop to be searched or arrested for a suspected violation of the Federal Wagering Tax Act").

90. 339 U.S. 56 (1950).

91. *See also* United States v. Chapman, 413 F.2d 440 (5th Cir.), *cert. denied*, 396 U.S. 888 (1969) (officer, who knew moonshine whiskey traffic flourished in area where he observed defendants load a truck with several pounds of sugar, and who knew both defendants had previously violated the tax laws, had probable cause for arrest).

92. 358 U.S. 307 (1959).

clothing he was wearing, said he would be carrying a "tan zipper bag," and said he habitually "walked real fast." On September 9th the agent and another officer observed a man of this description alight from a train from Chicago and start walking "fast" toward the exit carrying a tan zipper bag. They thereupon arrested him and found two envelopes containing heroin and a syringe, which were later introduced in evidence at his trial. The defendant contended that (1) probable cause could not be based on hearsay, and (2) even if it could, the information given was not sufficient to show probable cause. In regard to the first contention, the Court said that probable cause did not have to be based on evidence that would be admissible at a trial. Secondly, it held that the information possessed by the officer was sufficient to establish probable cause, since the informant in the past had been found to be accurate and reliable, and the suspect fit exactly the description given.

Had the *Draper* court simply held that information supplied by an informant of tested reliability can establish probable cause for arrest, the decision would not be nearly as disturbing as it is. The troublesome aspect of the case is the court's indication that probable cause was established only because the informant's information was corroborated by the officers' observations. Yet the officers observed only perfectly innocent activity—they merely confirmed that the informant was correct as to the suspect's mode of transportation, dress, effects, and manner of walking. The upshot of the reasoning is that since the informant was correct about those nonincriminating matters, he may be assumed to have been correct with regard to incriminating matters as well.

Draper has been frequently utilized by lower courts to uphold the validity of an arrest when the observations made by officers were of wholly innocent behavior.[93] Some cases, however, reflect a degree of caution in determining the import of facts not incriminating in themselves.[94] Observing the defendant exchange something with a known narcotics user, for example, has been held an insufficient ground for arrest.[95] Likewise, seeing a "colored male walking briskly" across a parking lot in what the arresting officer considered to be a "furtive

93. *E.g.*, United States v. Acosta, 411 F.2d 627 (5th Cir. 1969); United States v. Riso, 405 F.2d 134 (7th Cir. 1968); Smith v. United States, 358 F.2d 833 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967).

94. *E.g.*, State v. Watson, 73 N.J. Super. 477, 485, 180 A.2d 206, 210 (Essex County Ct. 1962) ("The probability that the person observed by the officer . . . was about legitimate business appears at least equally as probable as the conclusion . . . that he was then violating the law."); State v. Roach, 259 A.2d 119 (R.I. 1969).

95. Perry v. United States, 336 F.2d 748 (D.C. Cir. 1964); People v. Verrecchio, 23 N.Y.2d 489, 245 N.E.2d 222, 297 N.Y.S.2d 573 (1969).

manner," provided inadequate reason to believe the defendant was a robber presently sought by police.[96] And the fact that an anonymous informant told officers that a described person had stolen some cameras and would thereafter enter another camera shop with a large brown leather camera case, though verified by the officer's observations as in *Draper,* did not establish probable cause because, *inter alia,* "[a]t any given time during the day a white man carrying a large brown leather camera case could enter a camera shop."[97]

Such judicial skepticism would appear to be supported by *Henry v. United States,*[98] in which F.B.I. agents, investigating a theft of whiskey from interstate commerce, had received information vaguely implicating the defendant's companion. The agents twice observed the two men park in an alley, load some cartons, and drive away. The agents then followed the car and motioned them to stop. Upon observing that the cartons in the back of the vehicle were imprinted with the name "Admiral" and addressed to an out-of-state company, the men were taken into custody, and the car was searched, whereupon it was discovered that the cartons contained stolen radios. This evidence became the subject matter of the prosecution. The Court concluded that the facts known to the officers at the time the car was stopped were insufficient to establish probable cause to arrest.

> Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent. . . . The fact that packages have been stolen does not make every man who carries a package subject to . . . seizure.[99]

Cases frequently reflect the attitude of the *Henry* court when an individual is observed in a place where he has a perfect right to be. In *Irwin v. Superior Court,*[100] one party was arrested at an airport carrying luggage that the police knew contained marijuana. The defendant, who was seen standing close to baggage that bore the next consecutively numbered baggage tag, was also arrested. The court found no justification for the arrest.[101] Similarly, the mere fact of walking along a public highway in the early morning hours has been held not indicative of criminal behavior.[102] The Court of Special Appeals of Maryland,

96. Cleveland v. State, 8 Md. App. 204, 221, 259 A.2d 73, 83 (1969).

97. United States *ex rel.* Chatary v. Rundle, 282 F. Supp. 926, 928 (E.D. Pa. 1968). It might be suggested that the same could be said of a man leaving a train carrying a tan zipper bag.

98. 361 U.S. 98 (1959).

99. *Id.* at 103-04.

100. 1 Cal.3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969).

101. "The most that can be said of this circumstance, in isolation, is that Irwin was the next passenger in line at the baggage check-in counter." *Id.* at 427, 462 P.2d at 15, 82 Cal. Rptr. at 487.

102. State v. Goodman, 449 S.W.2d 656 (Mo. 1970).

however, neared the bounds of credibility in *Brown v. State*.[103] At 4:45 a.m. an officer observed a man pushing a baby carriage, with price tag attached, through a parking lot. Upon observing cans of food, clothing, and boxes of jewelry in the carriage, the officer made an arrest. Unblinkingly, the Maryland court said that it could "think of no more innocent conduct."[104] The Court of Appeals for the Second Circuit was less sympathetic in *United States v. Follette*,[105] in which an officer was investigating a report of prowlers in the early morning, and the suspect was discovered on a roof top. He told the officer he had taken flight from assailants and had gone to the roof "to find a place to sleep." The court found probable cause to arrest.[106]

Several state decisions have grappled with the inferences that properly may be drawn from observations by officers of matters consistent with illegal narcotics activity. In *People v. Corrado*,[107] for example, officers received a tip that a quantity of marijuana would be passed at a designated intersection and proceeded to the scene for surveillance. A car with three teenagers, all unknown to the officers, parked at the location. One of them got out and walked to another car, remained for a few seconds, and then returned. He got back into the original car and was observed by the officers to hand four manila envelopes to another of the occupants. At this point the police stopped the car, seized the envelopes, opened them, and found what appeared to be marijuana. The suspects were then arrested. In finding the arrest illegal, the New York Court of Appeals held that "their conduct was no more suspicious than that found by the Supreme Court in *Henry*."[108]

> Even if we accept the argument that such demeanor would be characteristic of *modus operandi* used for a 'drop,' this conduct is far more easily explained by the typical activities of three teenagers than by the fact that the three were handling contraband.[109]

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103. 5 Md. App. 367, 247 A.2d 745 (1968).

104. *Id.* at 371, 247 A.2d at 747. In dissent, Judge Orth argued, "I do not see how a prudent and reasonably cautious man could believe other than that the appellant was a thief caught *flagrante delicto*. I cannot find the actions of the appellant so 'consistent with innocent travel on a public thoroughfare' as to preclude this belief." *Id.* at 375-76, 247 A.2d at 750; *cf.* Mercer v. State, 6 Md. App. 370, 251 A.2d 387 (1969).

105. 391 F.2d 231 (2d Cir.), *cert. denied*, 391 U.S. 917 (1968).

106. "Being on a roof in what we take to have been an early November morning is quite different from what were considered the benign circumstances in Henry v. United States. . . ." *Id.* at 233.

107. 22 N.Y.2d 308, 239 N.E.2d 526, 292 N.Y.S.2d 648 (1968).

108. *Id.* at 312, 239 N.E.2d at 528, 292 N.Y.S.2d at 651.

109. *Id.* at 311, 239 N.E.2d at 528, 292 N.Y.S.2d at 650. Cynics may argue that we are rapidly approaching the point where narcotics transactions may be considered "typical activities" of teenagers.

Similarly, in *Remers v. Superior Court*,[110] the Supreme Court of California found that the display of a tinfoil package to a companion in an area known for frequent narcotics traffic was insufficient to justify an arrest, because the facts were ambiguous.[111]

J. Facts Arising During Temporary Detention

Since officers may detain a suspect under circumstances short of probable cause, it is quite possible that during such a confrontation the level of suspicion will reach the level of probable cause and justify an arrest. This sequence of events led to the decision in *Terry v. Ohio*.[112] There an officer observed three men whom he suspected of planning a robbery. When he approached them and asked some questions they mumbled something that was inconclusive. The officer then proceeded to frisk the defendant and found a pistol that was subsequently introduced into evidence against the defendant on a charge of carrying a concealed weapon. On appeal, the conviction was affirmed. The police were acknowledged to have the power to stop and briefly detain an individual under suspicious circumstances. Incidental to this power is the right to carry out a cursory "frisk" of the suspect if the officer has reason to believe he may be in danger of bodily harm. If the frisk reveals what may reasonably be thought to be a weapon, then the officer has probable cause to arrest for carrying a concealed weapon. Incident to that arrest he may make a reasonable search and seize the weapon. Thus, a situation that initially amounted to little more than a "hunch" on the part of the officer may evolve into a legitimate arrest and incidental search.[113] It is necessary that the frisk be a reasonable exercise of authority under the circumstances and not a subterfuge for carrying out an illegal search. In *Sibron v. New York*,[114] under the guise of a "frisk" the officer removed some glassine envelopes containing heroin from the suspect's pocket. The Court reversed the conviction on grounds of illegal

110. 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970).

111. "[E]ven if dangerous drugs are often packaged in tinfoil, so many other, legitimate items—such as foods or tobacco—are packaged in tinfoil that a tinfoil package is not a suspicious circumstance, and a man of reasonable caution who possesses the knowledge that dangerous drugs are often packaged in tinfoil would not be justified in assuming, upon seeing a tinfoil package, that it is likely to contain drugs." 2 Cal. 3d at 663, 470 P.2d at 15, 87 Cal. Rptr. at 206. *Cf.* People v. McLean, 6 Cal. App. 3d 300, 85 Cal. Rptr. 683 (1970) (repetitive purchase of balloons was sufficiently incriminating since such are commonly used as containers for narcotics).

112. 392 U.S. 1 (1968).

113. *See also* People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965).

114. 392 U.S. 40 (1968).

search and seizure. Nevertheless, where the frisk is a legitimate exercise of police power, a legal arrest and incident search may be the end result.

It is possible that developments other than discovered weapons may establish probable cause for an arrest following detention. Probable cause, for example, may be established if the suspect fails to adequately explain suspicious circumstances that have been observed by the officer. In *Commonwealth v. Howell*,[115] a police officer observed the defendant walking down the street during the afternoon wearing one topcoat and carrying another, apparently attempting to hide something under the second coat. The officer inquired about what he was carrying under the coat, and the defendant responded that it was a tape recorder. The officer then asked the defendant for identification, whereupon he was handed a driver's license that indicated the holder was 47 years of age and white. Since the defendant appeared much younger and was a Negro, the officer took him into custody and drove him to the police station. The owner of the driver's license was at the station when the officer and the defendant arrived and had already reported the theft of a coat, wallet, and tape recorder from his car. The court held that when the defendant failed to fit the description of the proffered driver's license the officer had probable cause to arrest. Likewise, in *People v. Monreal*,[116] an officer observed the defendant taking gloves and a screwdriver from the trunk of an automobile and suspected burglarious intent. When he received an uncertain explanation concerning the ownership and registration of the vehicle, he looked into the automobile for evidence of its registration, smelled marijuana, and then discovered marijuana in a cigarette butt discarded on the sidewalk by the defendant. Again, the arrest was sustained.

Probable cause also may be established if the suspect himself reveals evidence to the arresting officer. In *People v. Superior Court*,[117] an officer approached the defendant intending to arrest him for hitchhiking and frisked him as authorized by *Terry*. He saw a bulge in the right rear pocket but determined it was not a weapon. When the officer asked the defendant what he had in his pocket, the latter replied, "Here, hold this, I'll get it for you," and handed his cigarette to the officer. The cigarette was hand-rolled and the officer believed it to contain marijuana. This could only be determined by opening it, however, and the officer proceeded to do so, discovering what he believed

115. 213 Pa. Super. 33, 245 A.2d 680 (1968).

116. 264 Cal. App. 2d 263, 70 Cal. Rptr. 256 (1968). *See also* Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969).

117. 273 Cal. App. 2d 459, 78 Cal. Rptr. 153 (1969).

was marijuana. The defendant was then arrested on this charge, and the arrest was found valid.[118] Again, in *People v. Bloom*,[119] an officer stopped two suspects believing them to be runaway juveniles. Determining that they were both over eighteen, he radioed in to check their records. While waiting for a report he asked the defendant what he had in a valise he was carrying. The defendant responded that it contained school books. When the officer appeared skeptical, the defendant said, "I'll show you," unzipped the valise and pulled out a book. The officer looked down into the valise and observed what appeared to be marijuana. A valid arrest was made for its possession.[120]

In some cases, the suspect, by virtue of his own incriminating statements, has provided the probable cause to justify his arrest. In *People v. Leos*,[121] for example, an officer observed the defendant in a high-crime area in the early morning and stopped him for questioning. In the process of making a superficial search for weapons, the officer noticed a large bulge in the defendant's rear pocket. The defendant blurted out, "You got me. It's my weed." The court held that at this point the officer had probable cause to arrest the defendant for possession of marijuana and was entitled to seize the marijuana incident to that arrest. The result, while sound, is somewhat ironic since presumably, as the bulge did not give the appearanee of being a weapon, the officer could not have legally confiscated the marijuana had the defendant not made the incriminating statement establishing probable cause.[122]

III. CONCLUSION

The foregoing discussion illustrates that in the area of probable cause to arrest, courts are involved in a continuing tug of war between the interest in security through police protection and the interest in

118. "We believe that Officer Lunder, in the context of the circumstances of this case, had a right to investigate the contents of the cigarette voluntarily given to him by the defendant. The usual exterior indicia of a marijuana cigarette were present. The defendant appeared slightly intoxicated but had no odor of alcohol on his breath, and he had just engaged in the furtive act of throwing away an unidentified item removed from his pocket in response to a question about the item." *Id.* at 465, 78 Cal. Rptr. at 156.

119. 270 Cal. App. 2d 731, 76 Cal. Rptr. 137 (1969).

120. *See also* People v. Mejia, 272 Cal. App. 2d 486, 77 Cal. Rptr. 344 (1969); People v. Fry, 271 Cal. App. 2d 350, 76 Cal. Rptr. 718 (1969).

121. 265 Cal. App. 2d 822, 71 Cal. Rptr. 614 (1968).

122. *See also* People v. McLean, 6 Cal. App. 3d 300, 85 Cal. Rptr. 683 (1970) (officer asked suspect if he had anything illegal in his pocket, and suspect replied "speed"); State v. Morse, 54 N.J. 32, 36, 252 A.2d 723, 725 (1969) ("an arrest may be made on the person's admission to the arresting officer even though without the admission the officer could not know of the offense").

privacy and freedom of action. The various perspectives from which the cases can be viewed—good and bad faith conduct, mistake, flight, suspicious behavior, and so forth—are all manifestations of this underlying conflict of interests. When one ventures beyond the simplest instance of an arrest for an offense actually observed by the arresting officer, the opportunities for inconsistencies increase simply because the estimation of probabilities by reasonable men will frequently differ,[123] and the result may hinge on the perspective taken by the court in perusing the facts. This phenomenon is particularly evident in cases involving a good faith mistake by the arresting officer. Viewing the problem from the standpoint of the officer, a court may rationally conclude that his aets were quite reasonable under the circumstances. Yet, by assuming the point of view of the defendant, one is faced with nothing less than an arrest without probable cause. The same policy choice is raised when the bad faith of the officer is a factor; if the standards established by the fourth amendment are viewed as a control over improper police methods, bad faith on the part of the officer should render his conduct constitutionally impermissible. But if the problem is examined from the standpoint of whether the defendant should be heard to complain of the eircumstances surrounding the consummation of his arrest, the motivation of the arresting officer is immaterial.

Beyond these considerations, when the question is the evaluation of the collected data that resulted in the decision to arrest, the diversity of decisions merely manifests the necessity for precise factual analysis of each case. By making careful analogies and distinetions, it is possible to maintain that the various results are for the most part reasonably consistent. Perhaps a more realistic appraisal, however, would reveal that the lines of distinetion in many instances are so thin that they constitute little more than a distinction without a difference. In such instances it may be more profitable to look elsewhere for the real grounds of decision. These may lie, for example, in reliance upon police expertise, in the nature of the offense involved, or even in subtle Gestalt considerations not necessarily appearing in the reported facts.

With continuing publicity concerning the rising rate of crime, with growing unrest and sporadic outbreaks of violence in the social fabric, and with inereasing sophistication and concentration of police efforts in crime detection, it is reasonable to predict that substantial strain will be placed upon the constitutional concept of probable cause within the foreseeable future, and that this area will continue to be intensely

123. *See* note 1 *supra.*

litigated. It may be persuasively argued that the compactness and interdependence of contemporary society justify, if not necessitate, the surrender of a substantial part of the freedom and privacy that support the concept of probable cause. The counter to this argument, however, is that the careful preservation of the freedom and privacy minimally mandated by the requirement of probable cause to arrest may be necessary to the psychic health of an increasingly hectic and depersonalized society.