A ROAD NOT TAKEN

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[*] The author's biography and list of other works is *available at* www.edu-cyberg.com/jonathanweiss.html. The author would like to acknowledge that this article could not have been completed without the aid of his close friend Angellina Mitchell. Both Lee Albert and Steve Wizner have raised important issues and relevant cases for me involving both form and content. I have done my best to accommodate their help. I am also grateful to the staff of the SETON HALL LEGISLATIVE JOURNAL who have worked on this article to improve it greatly. The defects are mine alone.

"Some discretion must be left to the locality."[1]

"The duties of the modern day officer vary from thief catcher to regulating the best of people."[2]

I. PREFACE

I originally started this article in Rome in 1966, with about half of it being written then. Since that time, the United States Supreme Court has moved far away from principles from which I began to base my interpretation. In fact, this article was meant to be part of a book called "Our Private Rights," accompanying my published article on Church and State and an unpublished one on Free Speech. The perspective and arguments made below were conceivable extrapolations from the law when I started. Now, they are far "out of the mainstream." Yet still, it appears to me that the time has come not only to describe in this article the road not taken, but to describe it in such a way in which I can suggest legislation that could remedy the defects many of us now find so obvious, and obviously worse than when I began, in the criminal law. Thus, this piece may serve the dual purpose of advancing a doctrine and formulating a legislative enactment of many of its policies.

II. INTRODUCTION

The whole exploration taken by this article is premised upon the belief that the Constitution creates indelible concepts with changing concrete meaning. In this context, the notion of precedence—*stare decisis*—is used to give the changing concrete meaning and keep some consistency, all while utilizing the skills of legal reasoning found in the common law. Furthermore, the processes of extrapolation, unification, and analysis, combined with history and philosophy, should also be included to help solidify meanings.

Out of these intertwined roles, numerous laws, practices, and problems have grown up. This article will examine each of these in terms of their import for private rights and practical criminal justice, all from the vantage point of Constitutional law. I will discuss those areas

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[1] Kunz v. N.Y., 340 U.S. 290 (1951) (Jackson, J., dissenting), n.9. "But some latitude for honest judgment must be left to the locality." *Id.* at 311.

[2] William F. Ricker, President, 1964 Graduating Class of Anne Arundel County Police Department, Maryland, as reported in The Star (Arundel) March 5, 1964.

of condoned discretion when police officers are entrusted with discretions in law enforcement. I will deal with those instances where the ends of police procedure of controlling those who commit crime becomes involved with the rights of those as citizens to be free from certain treatment. I will then move to the peculiar and particular legal prerogatives that seem to treat and afford different protections to the police officer, causing the officer to be treated differently than the private citizen. From all the above discussions, a doctrine of what constitutes "police force" will be derived. Then after the police force doctrine is fleshed out, a brief account of what the Constitution requires the police to be will be contrasted and implications will be drawn out. At the end of this process, I will derive the meaning of what is "reasonable" under the Fourth Amendment.

In my view, section four, clause four, in the Constitution in conjunction with section II, clause three, establish that there are rights that all individuals possess that remain inviolable (even if we take the Constitution as an explicit Social Contract or the embodiment in part of an implicit one). Moreover, in my opinion, the Supreme Court mistakenly denied that these inviolable rights were operative against individual States. The Bill of Rights, which Justice Black described as commands to be carried out fully were also declared inoperative.

In this connection, the Ninth and Tenth Amendments to the Constitution recognize and affirm that individual rights belong to all those under the Constitution.[3] In the historical debate that followed about "incorporation", Justice Black argued that the Thirteenth through the Fifteenth Amendments applied the Bill of Rights to the States;[4] while others argued that only some of them applied.[5] Yet, still some preferred the approach espoused by Justice Murphy, stating that they did apply but only as a minimum, although did not invoke the Ninth and

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[3] *See* U.S. Const. amend. IX (stating: "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by people."); *see also* U.S. Const. amend. X (stating: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.").

[4] Duncan v. Louisiana, 391 U.S. 145 (1968)(Black, J., dissenting), n.1. Justice Black noted: "[M]y view has been and is that the Fourteenth Amendment *as a whole*, makes the Bill of Rights applicable to the states." *Id.* at 167.

[5] *See* Palko v. Connecticut, 302 U.S. 319 (1937), (holding that no provision of the Bill of Rights applied to the States); *See generally* Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954) (arguing in favor of selective incorporation of the Bill of Rights).

Tenth Amendment.[6] Justice Murphy's opinion states the view underlying my thesis. Thus, it is in this perspective that I analyze the meaning of the Constitutional language and the basic considerations and cases that explored its concrete meaning. I will not employ any historical perspectives or analysis-confrontation in developing my ideas.

Justice Douglas in *Griswold v. Connecticut*[7] spoke about the "penumbra" cast by the various amendments upon each other.[8] He would have been better off, pointing as he did in his examples of interrelated amendments to call them the implicit unity underlying them. In particular it should be noted that the Fourth Amendment not only relates to privacy concerns such as guns and quartering troops—which is now often considered anachronistic—but is intimately related to the First Amendment. George Orwell's "1984" starkly presents how freedom of speech is chilled or destroyed by invasion of privacy.[9]

The Fourth and the Fifth Amendments, in spite of their obvious connections with other freedoms such as the First Amendment, purposes of preventing state or police abuse have never been as favorably viewed and in vogue as the First Amendment itself. The jaundiced view of the Fourth and Fifth Amendments can be attributed to misrepresentations made in the mass media, and also because of these amendment's association with those considered criminals. Moreover, the unfavorable view of these amendments can be part of a puritanical hang-over that nothing one does in private should be

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[6] Adamson v. California, 332 U.S. 46 (1947) (Murphy, J., dissenting). In regards to total incorporation, Justice Murphy stated:

> I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

Id. at 124.

[7] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). For a survey of the troublesome and widespread intrusions into privacy and the violation of Civil Rights by the current Attorney General and his office, see Washington Spectator, May 15, 2002, Volume 26, No. 10.

[8] *Id.* at 484-86. Justice Douglas stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.*

considered shameful in public.

Yet, both the Fourth and Fifth Amendments provide implicit promises, and I will attempt to expound upon those promises by using associated concepts. For instance, the concept of freedom from unwarranted government intrusion or interference is crucial to a democracy fostering a sense of individuality, differences, and creativity. It is those concepts that are allied to and as important as the First Amendment and other amendments preferred by some judges and commentators.

At least two essential themes guide this discourse. One is that there is too much unsupervised discretion given to the police officer at low level crimes without visibility, accountability, or methods of recourse. The other is that "reasonableness" is only mentioned once and is not *carte blanche*, but requires sufficient reasons based in Constitutional and democratic principles to overcome the Constitutional protections involved in privacy, and in some cases due process and equal protection arguments—notably a high burden to bear.[10]

III. POLICE POWER

This section will explore the role of the men and women colloquially called "the law." It will explore the constitutional, legal, and practical considerations surrounding the activities of those empowered to arrest, including necessary associated violence (or restraint) and the intrusion into what are normally considered private domains. These are the individuals that can order, invade, and determine the extent of privacy of judgment, property, and movement citizens have in their ordinary and unusual days of life. Further, it is their presence and agency that permits society to continue with order and values that make privacy a meaningful actuality.

A. *Initial Discretion*

This section will primarily focus on two aspects of the police officer's nature. The first aspect being that an officer is first and foremost an agent of the law. It is the police officer who is empowered to start in operation the whole chain of deprivations and sanctions that

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[9] George Orwell, *1984* (Knopf 1992) (1981).

[10] See also Jonathan Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 YALE L.J. 593 (1964)

society uses to punish. He or she is the one that is called upon to evaluate in given situations whether a man or woman is, or is not, acting inside in the law—laws our society has enacted and enforced for the common good and protection of individuals. Furthermore, a police officer determines what violence, intrusion or command he can, as society's agent, inflict upon a citizen. A police officer holds a special status and is entrusted with discretion and praised by the press as an object of respect. In short, a police officer embodies the law's sanctions by his status and prerogatives of action and decision.

Secondly, a police officer is a person who has certain particular functions that only a human being in a concrete situation can perform. In a more subtle way, police officers circulate and function in neighborhoods to mediate disputes, to settle quarrels, to exercise (and unfortunately sometimes abuse) authority in order to bring some peace and harmony to that community. Police officers become loved, praised, and sometimes famous for this role. They represent the state's concrete involvement in helping people live together. Between these poles, enforcer and role model, lies the police officer we encounter when we are mobile, the officer who warns or arrests, who orders or who just stares and affects the conduct of those passing through his jurisdiction. A police officer, then, is entrusted with a very human role of working out the immediate, proper and smoothest way for men to conduct themselves in our society. The police officer is, therefore, an agent of the law, an active public force, and even a mediator on the streets and in family homes.

The seminal article in the field of condoned discretion for police officer was penned by Professor Goldstein.[11] In his article, Professor Goldstein treats the criminal law as a warning to the public and restricting officials, thus criminal law's visibility is bolstered by its public accessibility in order to foster understanding of the practice of criminal law.[12] As a result of these processes, the formation of a basic aspect of a criminal law system is formed. In line with Professor Goldstein's assertion, Professor Frank Allen also persuasively argues that the first function of criminal law is to inform people what is and is not allowed by society and when violated, what sanctions will be

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[11] Joseph Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). *See also*, Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 449 (1991).

[12] Goldstein, *supra* note 11, at 544.

invoked against the actor.[13] In sum, the public is only aware of the meanings of criminal statutes when they are applied to people and the results reported. Police decisions that do not to invoke the criminal process fail to both follow the statute when the statute is violated and are not visible because they are not accessible by a means to the public at large.

Goldstein's model begins with total enforcement of every criminal statute.[14] Yet, admittedly, total enforcement is clearly not realizable because of due-process restrictions on police procedures, specific statutory conditions, and immunities from arrest that police officers and diplomats often enjoy.[15] Total enforcement minus these restrictions is full enforcement.[16] They are separated by what he terms *no enforcement*, that is, those types of restrictions enumerated above. Goldstein asserts: "[W]ithin the area of full enforcement, the police have not been delegated discretion not to invoke the criminal process."[17] Professor Goldstein continues, stating that full enforcement at the minimum requires:

(1) the investigation of every disturbing event which is reported to or observed by them and which they have reason to suspect may be a violation of the criminal law; (2) following a determination that some crime has been committed, an effort to discover its perpetrators; and (3) the presentation of all information collected by them to the prosecutor.[18]

Candidly, Goldstein admits that this is not a realistic expectation.[19] Thus, the question implicitly arises as to what are the criteria and controls of reducing full enforcement to actual enforcement.

The Goldstein article then discusses three examples of police

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[13] Francis Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735 (1977). In the article, Professor Allen states:

> Any operating system of law, even one in a totalitarian regime, demands high levels of voluntary compliance. This in turn requires the articulation and application of principles that are comprehensible to persons subject to the law, comprehensible not only in the sense of being capable of rational application by them, but also of appealing to almost instinctual feelings of fitness and propriety.

Id. at 748.

[14] *See supra* note 11.

[15] Goldstein, *supra* note 11, at 555-560.

[16] *Id.*

[17] *Id.* at 557.

[18] *Id.* at 559-60.

[19] *Id.* at 560.

decisions that do not fully invoke the criminal process.[20] The first instance deals with narcotic crimes.[21] Goldstein reports that the police procedure is to use arrested narcotics law violators as informers to get "big suppliers" if they, themselves, are only a small fry.[22] The reward for the informer is either no prosecution or a recommendation for a reduced sentence.[23] Goldstein attacks the efficiency of this procedure — as well one might when one sees its lack of success.[24] He suggests a policy of full enforcement which will allow an evaluation of the deterrent, administrative, and practical consequences of narcotics laws on those involved in its trade and prosecution.[25]

The second example provided by Goldstein involves police decisions not to invoke the felonious assault laws unless the victim signs a complaint in an area that became subsequently more controversial in the area of domestic violence and rape.[26] Police officers appear to be in favor of non-prosecution in part because non-prosecution seems to eliminate work.[27] In addition, in many contexts, non-prosecution is an acceptable method of settling disputes that are "social" in nature – that is, that the invocation to intervene is only for extraordinary circumstances.[28]

Goldstein argues that the exercise of discretion in this area has profound sociological consequences in terms of the image of neighborhood and self.[29] He concludes that examination of the effect of full enforcement in establishing a more stable and safe community would be very valuable.[30]

Goldstein's final example is of harassment.[31] As Professor

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[20] *Id.* at 562.

[21] Goldstein, *supra* note 11, at 562-68.

[22] *Id.* at 565.

[23] *Id.* at 565. It should be noted that in one jurisdiction, only 2 ½ percent of people charged with the sale of narcotics were convicted. *Id.* at 567.

[24] *Id.* at 568-72.

[25] Goldstein, *supra* note 11, at 572-73.

[26] *Id.* at 573.

[27] *Id.* at 574.

[28] *Id.* at 575. Goldstein states: "[S]ome policemen feel, for example, that assault is an acceptable means of settling disputes among Negroes, and that when both assailant and victim are Negro, there is no immediately discernible harm to the public which justifies a decision to invoke the criminal process." *Id.*

[29] *Id.* at 577.

[30] Goldstein, *supra* note 11, at 577.

[31] *Id.* at 580

Goldstein points out a "characteristic of harassment are efforts to annoy certain 'offenders' both by temporarily detaining or arresting them without intention to seek prosecution, and by destroying or illegally seizing their property without any intention to use it as evidence."[32] Gambling syndicates, Goldstein claims, have individuals periodically picked up (probably illegally), detained, forced to give up money, post bond, and then released.[33] The police attempt to punish men who violate the law by making life uneasy.[34] Goldstein finds such procedure repugnant.[35] It should be noted here that harassment could actually utilize the Constitution. An illegal arrest can be repeated countless times, and puts the victim in difficulty and he receives no reward. To harass and do nothing more, police need only to violate the Constitution in their arrests and arrest repeatedly.

These three examples illustrate three different points. The first illustrates a selection of enforcement by classification of criminal. The second illustrates a selection of enforcement by consideration of context. Finally, the third illustrates a policy toward a crime. All three illustrate that the police officer, in his/her capacity as an agent of the law, has a powerful effect in constituting the type of community to which people belong, and how those in the community conduct themselves.

Goldstein concludes admitting "that the exercise of discretion cannot be eliminated where human beings are involved," and that a full enforcement program is one for the future.[36] Goldstein's concession suggests that such a program could be initiated with the least hardship when the states, perhaps stimulated by the work of the American Law Institute, enact new criminal codes clearing the books of obsolete offences.[37] In the meantime, he advocates a police review board to examine the active discretion in enforcement and make recommendations.[38]

It is clear the police world and the world as Goldstein desires is different. Goldstein regards the criminal process as represented by police to be the carrying out of the policy of a legislature (with some

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32 *Id.*
33 *Id.* at 582-84.
34 *Id.* at 582-83.
35 Goldstein, *supra* note 11, at 584.
36 *Id.* at 586, 588.
37 *Id.* at 588.
38 *Id.*

inheritance from the common law) to see how society will be improved by imposing sanctions on those who commit certain acts. When the police do not impose those sanctions, but establish special, esoteric rules, a society is created different from the one envisaged by the legislature.

The police, on the other hand, clearly operate as if the state, in empowering them as agents of the law, has given them the authority to try to achieve the maximum good suggested by those statutes. In fact, police officers are commanded to eliminate narcotics trade to keep communities quiet, and to control illegal gambling. Ye, the police operate in terms more of the goals suggested by the laws than by the commands embodied in the law.

These are difficulties within the Goldstein position that need to be pointed out. There are many areas where one welcomes police discretion, either for selfish and beneficent reasons. Most persons in actuality do not want a traffic ticket every time a police officer catches him violating a traffic offense. Many people, including legislators, no doubt, as evidenced by the toleration of "warnings," envision the "bawling out" or verbal scolding and the inconvenience of confronting a police officer to be sufficient sanction to deter or reform future misconduct.

What must be understood is that police discretion has many drawbacks. Should police be allowed to verbally chastise citizens? Should the police have the option of actually applying sanctions to groups, like African-Americans, that he is prejudiced against but not to others whose melanin count is like his own?[39] Although we do not want all petty violations prosecuted, but we must be alert to the dangers in the operation of police discretion itself and the law to perform the role free of prejudice, special treatment pro and con, and even corruption (i.e. the giving of police benefit tickets to state troopers when stopped for speeding).

In addition, the fact that the police officer fits in as a member of the community prevents another difficulty. It may be better that he break up a fight, rather than arrest the participants. In the area of narcotics, an area that may be singularly inappropriate for legal sanctions, perhaps a means of controlling it is the best we can have. Beyond this, is there a danger that a literal following of the Goldstein's

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[39] *See* Heather McDonald, *The Racial Profiling Myth Debunked*, City Journal (Manhattan Institute), *available at*, http://city-journal.org.

thesis leads to a tremendous increase in arrests? One may wonder whether an increase in arrests really does not give the police more power and create more misery, with very little resulting rewards. Although uniform arresting may be more democratic and allow a clear evaluation of results, it may also destroy the objectives of empowering police to try to minimize damage.

Past these difficulties, Goldstein's basic descriptive points remain. We do not know what the criteria for selection of non-prosecution are, nor can we observe them. In fact, there is considerable reason to believe that in practice the criteria are wrong and often subject to abuse –abuse that has even led to citywide, destructive riots.[40]

Not only does the police officer have this potential tool with the allied prosecutor, but the lowest of the lesser included offenses often gives the police almost unlimited power. We have already seen the problem of discretion at "low visibility," recognizing that good police judgment has a function. The problem, as with plea bargaining, is made more difficult by many ordinances and statutes. For example, breach of the peace, disorderly conduct, loud and boisterous noise statutes permit arbitrary exercises of power. A quick glimpse at the vagrancy statute in the District of Columbia is illustrative of this point.[41]

William Douglas[42] raises the following questions regarding vagrancy statutes:

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[40] *See generally* Charles Sumner Stone, Jr, *Symposium: The Urban Crisis: The Kerner Commission Report Revisited: Thucydides' Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C.L. REV. 1711 (1993). The author notes police conduct, as well as general police resentment, as reasons for riots in "New York 1964, Watts in 1965, Newark and Detroit in 1967, and South Central Los Angeles in 1992." *Id.* at 1715-17. *See also* Erwin Chemerinsky, *The Fire This Time*, 66 S. CAL. L. REV. 1571 (1993). Professor Chemerinsky gives a comprehensive overview of numerous riots, including those in Chicago, Harlem and Los Angeles. As reasons for riots, Chemerinsky cites inequality in prosecution, discrimination and urban poverty. *Id.* at 1582.

[41] D.C. Code Ann. §22-3302 (1991) states:

> (1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his own confession or by his having been convicted in the District of Columbia or elsewhere, and having no lawful employment and having no lawful means of support, released from a lawful occupation or source and not giving a good account of himself when found loitering around in any park, highway, public building, or other public place, store, shop, or reservation, or at any other public gathering or assembly. . .

Id.

[42] William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960). *See also* Dorothy Roberts, *Supreme Court Review: Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

> Are they too vague? When the crime charged under a particular statute is one of status, may it be proved by a single act or can that single act prove several elements of the crime? And, since vagrancy is a crime of statutes, can a person once convicted be convicted again or, does double jeopardy apply. Is not vagrancy often used as a substitute crime?[43]

The extent of vagrancy convictions cannot be overstated, as Mr. Douglas observed:

> Last year in the District of Columbia, we had 421 prosecutions; and in 1958, we had 245. The FBI uniform crime reports for 1958 show, on a national basis 88, 330 arrests for vagrancy, out of a total number of arrests of 2,340,004. The figure for 1957 was 69, 520 arrests for vagrancy, out of a total of 2,078,670 arrests. The figure for 1956 was 75, 478 arrests for vagrancy, out of a total of 2,070,794.[44]

Then Mr. Douglas concludes:

> Vagrancy and arrest on suspicion are not distant, remote, speculative; they are just around the corner in many communities. It is what takes place in this block and in this neighborhood that gives the true reading on the health of our democratic way of life and the actual vigor of our Bill of Rights.[45]

To this, we can add that "due process" includes the presumption of innocence until proven guilty. As we suggested above, vagrancy encompasses no acts but rather descriptions.[46] Yet, due process requires that something be shown. To allow a ratification of police discretion to meet the requirement is to deny due process.

But, vagrancy is not the only word that gives the police virtually unlimited discretion in a neighborhood.[47] An ancient common law crime that can be employed is breach of peace. It also is often codified into a statute that augments and broadens the generality "disorderly conduct." Breach of the peace has been construed to mean that a

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[43] Douglas, *supra* note 45, at 5.

[44] *Id.* at 14.

[45] *Id.* at 16.

[46] *See* Brown v. United States, 381 U.S. 437 (1965). For a comprehensive discussion of the Bill of Attainder, *see also Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475 (1984).

[47] *See generally* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); *see also* City of Chicago v. Morales, 527 U.S. 41, 43 (examining the reasoning behind *Papachristou*); Wright v. New Jersey, 469 U.S. 1146, 1150 (discussing *Papachristou*); Hutchins v. District of Columbia, 188 F.3d 531, 537 (D.C. Cir. 1999)(declining to extend).

person is guilty if he disobeys a police officer's order to go home.[48] It generally has been interpreted to mean any words that might provoke violence.[49] As evidenced by *Chaplinsky v. New Hampshire*, this even means when directed towards a police officer who is sworn never to respond with violence but only restrain violence,[50] which is the majority view.[51]

The Supreme Court did consider the disorderly conduct problem in *Shuttlesworth v. Alabama*.[52] The apparent reason the Court took the case and the driving motive for reversal in that case, seemed to be indicated by the newly minted Justice Fortas who stated the case involved the harassing arrest of a civil rights leader, Fred Shuttlesworth, who had previously fought other cases in the Supreme Court.[53]

In *Shuttlesworth*, a police officer told Mr. Shuttlesworth to move on.[54] As he attempted to discuss it with the police officer, he was arrested for disorderly conduct.[55] The Supreme Court held that a disorderly conduct charge in the category of "failure to move on" must contain three elements.[56] Relying on *Thompson v. Louisville*[57]

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[48] *See* Robert Force, *Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance*, 46 TUL. L. REV. 367 (1972); John B. Phillips, Jr, *The Proposed Criminal Code: Disorderly Conduct and Related Offenses*, 40 TENN. L. REV. 725 (1973); Wendy B. Reilly, *Fighting the Fighting Words Standards: A Call for Its Destruction*, 52 RUTGERS L. REV. 947 (2000).

[49] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *Chaplinsky* is still good law in spite of its tension with later cases on similar rationale. See *also* Michael Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993). *Cf.* Willams v. District of Columbia, 419 F.2d 638 (App. Div. D.C. 1969). The *Williams* court dealt with a provision of the District of Columbia Code making it illegal for any person "to curse, swear, or make use of any profane language or indecent or obscene words. . .in any street . . .or in any other public place." *Williams*, 419 F.2d. at 640. The court did not decide the constitutionality of the provision, but set aside a conviction on a complaint which failed to charge that the language was spoken in circumstances which threatened a breach of the peace, defined by the court as language tending to provoke violence or so offensive to those hearing it as to amount to a public nuisance. *Id.* at 647-49.

[50] *Chaplinsky*, 313 U.S. at 571-72. *But cf., Chaplinsky, supra* note 49.

[51] *See also* Gooding v. Wilson, 405 U.S. 518 (1972). This case did not overturn *Chaplinsky*, but distinguished it on the grounds that it needed more precision. *Id.* at 522.

[52] Shuttlesworth v. Alabama, 162 F. Supp. 372 (D. Ala. 1958), *aff'd*, 358 U.S. 101 (1958).

[53] *Id.* 358 U.S. at 146.

[54] *Id. See also* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F.L. REV. 645 (1995). *Id.*

[55] *Shuttlesworth*, 358 U.S. at 148.

[56] *Id.* at 146. The three elements listed are: 1) a group of people so blocking the

("Shuffling Sam"), the Court pointed out the obvious constitutional infirmities of having no standard of proof and such possible infringement on motion and expression.[58] The Court expressly did not go so far as to question "disorderly conduct" or "breach of peace" in general but, rather by implication, held that a statute which prescribed certain activities as disturbing, in clear enough terms would be acceptable.[59]

Needless to say, the decision did not filter down to many lower courts or their prosecutors. The author had occasion to attempt to use the case in a trial in the District of Columbia a few months after the decision had been announced and reported in all of the local Washington papers. The prosecutor had never heard of the case! It was the first time any Judge or lawyer had mentioned it in the courtroom.

One could belabor the point at this juncture to dwell on the type of courts in which these individuals are tried. Moreover, the doctrine of what is vagrancy should call for a high level of proof. Yet, now it is clear beyond cavil how great the inadequacy of justice is at administrative magistrate levels. It becomes evident that "vagrancy" and "failure to move on" offers a simple tool for police to arrest, detain, and punish those without obvious great power or resources to contest any injustice.

The Supreme Court dealt with a slightly harsher version of this category that labeled people "gangsters" on the basis of convictions, reputations, and associations in *Lanzetta v. New Jersey*.[60] Under the due process clause of the Fourteenth Amendment the Supreme Court held it unconstitutional because of vagueness and uncertainty.[61] *Thompson v. Louisville*,[62] specifically involved the arrest of a man who, having bought a beer in a place while waiting for his bus, shuffled his feet in time to the music. The Court, in an opinion by Justice Black, held that

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sidewalk as to make passage impossible; (2) repeated reasonable requests by police officers to permit passage and/or move on; and (3) refusal and continued blockage. *Id.*

[57] Thompson v. Louisville, 362 U.S. 199 (1960). *See also* Johnson v. Florida, 391 U.S. 596 (1968); Garner v. Louisiana, 368 U.S. 157 (1961).

[58] *Thompson*, 362 U.S. at 207.

[59] *Id.*

[60] Lanzetta v. New Jersey, 306 U.S. 451 (1939). *See also* Rogers v. Tennessee, 532 U.S. 451 (2001); United States v. Lanier, 520 U.S. 259 (1997). *See also* Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 Md. J. Contemp. Legal Issues 199, 203 (1994).

[61] *Lanzetta*, 306 U.S. 451

[62] *Thompson*, 362 U.S. at 200.

a conviction based upon no evidence of guilt violated due process but did not reach the jurisprudential question of crimes not based on any disturbing act or the Constitutional issue of freedom of expression and assembly.[63]

Both *Lanzetta* and *Thompson* should be read to indicate the problem with having statutes which grant almost complete freedom that police exercise under loosely drawn statutes which govern the conduct of people found in public places. *Lanzetta* indicates a concern with loosely drawn statutes, [64] while *Thompson* indicates a concern that police must have some disturbance before they invoke loosely drawn statutes.[65] Such highly placed concerns, however, do not filter down to the neighborhoods.[66]

Some additional examples of broad statutes can be seen in section 3 of the District of Columbia's codes, which states: "Any person leading an immoral or profligate life who has no lawful employment and who have no lawful means of support realized from a lawful occupation or source."[67] But, that has not stopped many states from passing such ordinances.

The sections can grow more extreme. Section 8 in the District of Columbia's codes provides: "Any person who wanders about the streets at late or unusual hours of night without any visible or lawful business and not giving a good account of himself." Such a law has been in similar cases and been found to be invalid.[68]Let us note in passing that such a statute allows a police officer to have probable cause to arrest for vagrancy quite easily and such an arrest may lead to more serious charges. If a police officer believes, with no reason, that a man might be an addict, such a statute empowers an arrest for vagrancy, a search following such an arrest and, if lucky, a serious charge.[69] Thus, does the circle complete itself — plea bargaining with its lowest offenses are

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[63] *Id.*

[64] *Lanzetta,* 306 U.S. 451.

[65] *Thompson,* 362 U.S. 199

[66] *See supra* note 44. For instance, in the District of Columbia, vagrancy can also be loosely considered prostitution or admitting taking dope from someone who has been convicted of taking dope. *Id.*

[67] D.C. Code Ann. § 22-3302 (1991).

[68] *See* Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931); St. Louis v. Gloner, 109 S.W. 30 (Mo. 1908).

[69] For a discussion of "sham prosecution," *see generally* Michael Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine,* 102 YALE L.J. 281 (1992).

broad enough so anyone can plead out to practically any crime, as committing that offense is broad enough so anyone can be arrested and found with evidence leading to charging with that serious offense? An outrageous statute justifies itself in its convictions by what it can engender. An arrest on suspicion may end in a conviction under what is a suspicious statute.

In the District of Columbia, of course, the statute sweeps clean. Section 9 states: "And all persons who, by the common law, are vagrants, whether embraced in the foregoing classifications, or not." It is almost as if a platonic form of vagrancy exists imperfectly embodied in the previous eight examples, but discernable to those with right knowledge and true opinion wherever found.

If a police officer can, more or less at will, stop for vagrancy, order to move on for breach of peace, we have a society more or less controlled in public places by the police officer. Such a society is, in fact, what many of believe the poor have. In the author's experience, in the heart of the Negro ghetto in Washington, the police can tell the poor where to go, when to do something, and push them around under the threat and actual arrest for vagrancy. They have (or had) no rich lawyers to hope for the Supreme Court's remonstrance - and as many of them are guilty when so arrested of other crimes, the system perpetuates their necessary conviction for what should not be a crime.

Thus, the result in a neighborhood where a police officer has broad enabling statutes is broad discretion in determining the remainder of the criminal process. The situation that results is one where the condoned discretion of the officer is an excuse for a police-run community in public. The person given discretion to arbitrate disputes and make reasonable arrests often becomes part of the problem.

In recent years with neighborhood patrols by police with great authority to stop, frisk and arrest, we have seen the disastrous consequences in shootings of innocent men. These lead to unnecessary crowding of the court's docket, traumas in being imprisoned while waiting for the court or other processes, and families separated. An increase in viability, accountability, and supervision of such police activity is essential for a free society but has been confounded by vagrancy ordinances and current police ideology.

In general the recent years feature absurd doctrines like "zero tolerance" for minor acts which is not supported by empirical evidence that these acts create a general deference or that the prevalence of these minor acts in a neighborhood influences the frequency of major crimes.

In fact, the stopping of people to interrogate, frisk and the promulgation of police policies of extreme use of restraints and demanded positions of submission, have led to the increase of these practices rather than their reduction under the constitutional considerations.

B. *Search and Seizure*

One of the most commonly litigated areas of police discretion revolves around what knowledge is sufficient to allow a police officer to impose types of detention upon citizens.[70] This area involves two intertwined concepts - arrest and search and seizure.[71] The cases arise under a doctrine that evidence obtained through police action will be excluded from a trial concerning guilt related to the arrest or the search and seizure.[72] This exclusion applies to both the Federal and State courts.[73]

Following the common law, the Supreme Court stated that the constitutionality of an arrest is determined on the basis of whether the facts available to the officers at the moment of arrest would warrant a man of reasonable caution in the belief that an offense has been committed;[74] or, "whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing" an offense has been committed.[75]

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[70] *See generally* George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849 (1985); Eve Gates, *Tell It to the Judge: Brady, Baker, and the First Circuit Decision Allowing Police to Detain Suspects They Know to Be Innocent*, 27 N.E. J. ON CRIM. & CIV. CON. 225 (2001).

[71] The author notes that the September 11 imposition of searches has reached such a level that the Music Box theatre on Broadway, New York, NY, now gives out a slip with its tickets which reads: "As much of the heightened security in all possible places, please avoid bringing packages, baggage, backpacks, etc., to the theater as all such packages are subject to inspection and must be checked. There will be a $1.00 charge for each inspection." Do these searches catch anyone but clumsy amateurs? Perhaps that is the reason for the minimal charge.

[72] *See generally* United States v. Calandra, 414 U.S. 338, 348 (1974) (determining the exclusionary rule upholds the Fourth Amendment by producing a deterrent effect); Mapp v. Ohio, 367 U.S. 643, 657-58 (1961) (holding that the exclusionary rule is applicable in state courts); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that illegally obtained evidence is inadmissible in federal courts).

[73] *Mapp*, 367 U.S at 643.

[74] Carrol v. United States 267 U.S 132 (1925).

[75] Beck v. Ohio, 379 U.S. 89 (1964).

Any search subsequent to a proper arrest is constitutional.[76] Yet this general notion of constitutionality has undergone considerable expansion.[77] The rationale for expansion has never been fully articulated, but increased concerns for the safety of the officers or administrative efficiency in proving a crime or both are all viable options. As far as a search and seizure of property the general rules of reasonable suspicion are often stated to apply.

C. *Warrants*

The problem of warrants[78] enters as an acknowledgment that recourse to the judiciary may be desirable before police activity so the police did not possess unfettered discretion and there is a check before an intrusion or restraint can be justified. There are separate warrants for searching and seizing and arrest.[79] The person entrusted with issuing the warrant must do so on reasonable grounds.[80] If there is no emergency or imminent danger to an individual, the police officer must obtain a warrant rather than attempt to arrest or search on his own initiative.[81] Furthermore, a search must be justified on a reason relative to the purpose of the search.[82] Yet, the requirement that the reason of the

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[76] White v. U.S., 271 F.2d 829 (D.C. App. 1959).

[77] *Id.*

[78] A warrant is a writ directing or authorizing someone to do an act, and is most often used to authorize a law enforcement official to make an arrest, a search, or a seizure. BLACK'S LAW DICTIONARY, 1279 (7th ed. 1999).

[79] Under the Fourth Amendment the people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures [. . .] 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." U.S. CONST. amend. IV.

[80] Warrants must be issued by a neutral and detached magistrate capable of determining whether probable cause exists for the requested action. Shadwick v. City of Tampa, 407 U.S. 345 (1972). The magistrate cannot act as a "rubber stamp," and must actually read the affidavit in support of the warrant. Rooker v. Commonwealth, 508 S.W.2d 570 (Ky. App. 1974). If the magistrate fails to follow proper procedures, the warrant will be invalidated, even if probable cause actually existed. *Id.*

[81] Payton v. New York, 445 U.S. 573 (1980) (absent exigent circumstances police need warrant or consent to enter a home). The Court has established a narrow set of exceptions to the warrant requirements. *See e.g.* United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest if crime committed in officer's presence); United States v. Robinson, 414 U.S. 218 (1973) (warrantless search of person incidental to a valid arrest); Chimel v. California, 395 U.S. 752 (1969) (warrantless search of area within arrestee's reach following arrest); Warden v. Hayden, 387 U.S. 294 (1967) (warrantless entry of home while chasing an individual suspected of committing a grave offense).

[82] United States v. Joseph, 174 F.Supp. 539, 544 (E.D. Pa. 1959). *See also* Harris v.

search be relative to the purpose of the search is now extremely attenuated.[83]

An example of watering down of this requirement can be seen in *U.S. v. Rabinowitz*,[84] where the court held that, with a sufficient arrest warrant, the officers were not obligated to get a search warrant to justify their search of property in the case of a man who was counterfeiting government stamps.[85] There is, in general, the often highly technical doctrine that the search can only be for "instrumentality of the crime." Yet, no longer is this a concept approaching much relevance and now stretched for seizure of automobiles.

Therefore, an arrest must be justified on knowledge and the decision entrusted to a magistrate who, acting judicially, examines the objectively reasoned basis for issuing the permission for arrests without regard for the arrests consequences of restraint, cost, and worse. Yet, too, a search must be justified and must be clearly and explicitly directed to an instrumentality to the crime for which the reasonable suspicions arise.

Under the panoply of these general cliches, the cases were never really clear in terms of results or expression of rationale. As is often the case when the guidance refers to rules couched in terms of reasonableness. What is clear is that the police discretion in this area is supposed to be controlled by an objective third party to ensure it is based on knowledge.

D. *Relevant factors*

The role that context plays in making the judicial decision to accept or reject the evidence obtained through an arrest or a search is

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United States, 331 U.S. 145, 154 (1947) ("This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.").

[83] United States v. Rabinowitz, 339 U.S. 56, 61 (1950).

[84] *Id.*

[85] *Id.* at 63. The search parameters established in *Rabinowitz* were significantly restricted in Chimel v. California, 395 U.S. 752, 768 (1969), which limited the area of a search incidental to an arrest to the defendant's person and the area from which he might have obtained either a weapon or something that could have been used as evidence against him.

often a facet of the law that is occasionally recognized, but more often overlooked.

In a dissent in *Brinegar v. US*,[86] Justice Jackson stated a principle involving the gravity of crime and nature of context that has never been directly followed but will serve to focus on the issue. In that case, which may be of dubious validity today, officers chased people they knew to be bootleggers because they saw the car loaded down.[87] When stopped some of the liquor must have been visible so that the officers asked about it. One of the bootleggers said something to the equivalent of the items not being his.[88] The Supreme Court affirmed the admission of material garnered by the arrest and the subsequent search on the grounds that personal observation and memory justifies such arrests.[89]

Justice Jackson thought that automobiles raised a particular problem under the Fourth Amendment's prohibition of an unreasonable search and seizure because of their mobility.[90] He opined that the rules that applied to houses should be modified and relaxed, stating: "[u]ndoubtedly the automobile presents peculiar problems for enforcement agencies, [since it] is frequently a facility for the perpetuation of crime and an aid in the escape of criminals."[91] Unfortunately, the Justice does not expand upon this proposition, but even so can suggest certain criteria. For instance, if the police action takes place when the automobile is being used for the perpetuation of the crime. Then in such a case the automobile should not be able to be used as a shield from arrest. Furthermore, justification can also be found in order to allow for efficient arrests and protection of the public.

Once the car is immobilized any search at that point of arrest should be subject to the same principles as for any other immovable object. The principle should be that a search can only occur after recourse by phone for a warrant for impoundment and then a specific search for evidence, rather than a *carte blanche* search of both person

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[86] Brinegar v. United States, 338 U.S. 160 (1949)(Jackson J., dissenting).

[87] *Id.* at 162.

[88] *Id.* at 162 ("The arresting officer] testified that one case, which was on the front seat, was visible from outside the car, but petitioner testified that it was covered by a lap robe. Twelve more cases were found under and behind the front seat.").

[89] *Id.* at 170 ("Wholly apart from [the arresting officer's] knowledge that Brinegar bore the general reputation of being engaged in liquor running, [the officer's observations] constitute positive and convincing evidence that Brinegar was engaged in that activity").

[90] *Id.* at 182 (Jackson, J., dissenting).

[91] *Id.*

and vehicle based on any stop for any violation no matter how minor.[92]

Courts recognize that there is a special sanctity for a family's home as a historical consequence derived from its intimate connection with the family.[93] Therefore, the special sanctity awarded to homes argues for a higher standard before invasion or intrusion. Similarly, though, some of the same considerations made for homes are also applicable to automobile searches. Yet, still the easiest analogy to make between a search and seizure of a car is to one performed on an individual. The analogy goes as follows: people view their cars as an extension of themselves; as a place where they carry on private activities, decorate, listen to music, and use for the family. Therefore, cars and people are synonymous.

In sum, automobile searches should be governed by the same rules as individual searches. Thus, the prevention of immediate danger and the sighting of evidence directly connected with the crime before recourse to warrants and justifications should apply to automobiles. The bases of these principles lie in both curbing police abuse and also in the recognition of privacy of individuals, which is suggested by the penumbras or general implication of the unity of protections and the rights reserved to the people.[94]

Lurking behind such an analysis is the concept that the minimum police intrusion is desirable and should be justified. Justice Jackson comes close to articulating this, noting: "[b]ut if we are to make judicial

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[92] Courts have made a limited exception to this general rule in the case of home visits by social workers. *See* Wyman v. James, 400 U.S. 309 (1971). The Court ruled that while home visits required by state statutes and regulations as condition for assistance under New York's Aid to Families with Dependent Children program possessed some of characteristics of a search in the traditional criminal law sense, these visits did not fall within Fourth Amendment's proscription against unreasonable searches and seizures so long as they were made by a caseworker and not permitted outside working hours. *Id.* at 318, 321. Forcible entry, entry under false pretenses, visitation outside working hours, or snooping in the home were forbidden under the program. *Id.* at 321.

[93] See *supra* note 92.

[94] The importance of curbing police abuse is well described in Justice Jackson's dissent in *Brinegar*. *Brinegar*, 338 U.S. at 180-1 (Jackson, J., dissenting)(stating: "These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.").

exceptions to the Fourth Amendment for these. . .on the gravity of the offense. . .it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime."[95] It would seem that Justice Jackson would have no difficulty with a roadblock to detect a kidnapping, but would balk at one for bootleggers or diseased ornamental flowers. In other words, what Justice Jackson suggests is that when defining an area of police discretion, we should evaluate police action on knowledge of what is at stake in the particular situation in terms of detection difficulties and original gravity.

Therefore, the general principle for the issuance of warrants or a post-hoc justification, which is analogous to the actual issuance of a warrant and based on similar standards, for police action, rests not only on the sanctity of the individual and his chosen location, but also upon what other values are at stake. Prevention of serious crime or saving a life may call for exceptions to the principles of privacy and individual rights.

It can be further made more subtle to state that any search's limitation should also be examined in terms of the dangers presented immediately to others or the demonstration that the search is either: 1) the only method to detect a serious crime involving bodily harm or 2) by far the most effective. In short, a tempering of the means should enter into the calculation of the reasonableness of the search. If this basic principle confronted the absolute nature of privacy and the desirability of prevention of outside intrusion the warrant or search laws governed by a "reasonableness" standard, balancing individual dangers against individual constitutional rights. The benefit of such a governing standard is that determinations are controlled not by what is discovered or what the motive of the police or others are, but by the dangers to other individuals who are protected by the constitution and society.[96]

The doctrine of emergency has considerable authority here as well.[97] In *McDonald v. US*,[98] the police made observations and

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[95] *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting).

[96] *See also* author's articles: *The Justification of Punishment*; *The Elements of the Law*, *available at* http://www.edu-cyberg.com/jonathanweiss.html; Weiss & Wizner, *Pot, Prayer, Politics, and Privacy: The Right to Cut Your Own Throat In Your Own Way*, 54 IOWA L. REV. 709 (April 1969).

[97] We need not go into the rationale for the exclusionary rule as the remedy for exceeding police authority at this point - except to suggest that other remedies, such as tort law and civilian review boards, have been shown to be both inadequate and time

surrounded a house; the landlady let the officers in where upon they heard an adding machine, peeped through a door and saw operations involving a number racket going on.[99] The officers broke in and gathered evidence.[100] The evidence gathered was eventually rejected by the Supreme Court which said: "[w]here. . .officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. . .exigencies of the situation made that course imperative."[101]

Justice Jackson wrote a concurring opinion in *McDonald*,[102] arguing that crimes recognized as intrinsically evil, *malum in se*, justify emergency actions; whereas, crimes defined solely by statute, *malum prohibitum*, do not.[103] This concurring opinion suggests the point Justice Jackson was soon to make in *Brinegar*.[104] Later, the Court sharpened its rejection for evidence procured in such as fashion by rejecting a search in *Henry v. US*.[105] The search in *Henry* involved the police being tipped off to the fact that the cartons being loaded into a car contained contraband.[106] The search was rejected because there was no particular tie to the boxes and individuals loading them.[107] In short, there must be evidence for suspicion before the police are granted the powers of sudden arrest justified by mobility of vehicles.[108]

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consuming. The Government meets the requirement of due process by following all the rules, and even the current Court has recognized that exclusion as applied to the *Miranda* warning has a salutary rather than negative effect on police procedure. A similar rationale extends to "confessions" obtained by torture.

98 McDonald v. United States, 335 U.S. 451 (1948).

99 *Id.* at 455.

100 *Id.*

101 *Id.* at 454.

102 *Id.* at 457 (J. Jackson, concurring).

103 *Id* at 460 (J. Jackson, concurring).

104 *Brinegar*, 338 U.S. at 180-8 (Jackson, J., dissenting).

105 Henry v. United States, 361 U.S. 98 (1959).

106 *Id.* at 99.

107 *Id.* at 104 ("The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband.").

108 *Id.* at 105 ("The fact that the suspects were in an automobile is not enough. *Carroll*, 267 U.S. 132, liberalized the rule governing searches when a moving vehicle is involved. *Id.* But that decision merely relaxed the requirements for a warrant on grounds of practicality. *Id.* It did not dispense with the need for probable cause. *Id. See also* United States v. Di Re, 338 U.S. 581 (1950)(declaring the right to search a non-moving car did not imply a right to search one of the passengers who was ambiguously identified as being involved in an illegal gasoline rationing coupons operation)).

In a more general fashion, *Milller v. U.S.*,[109] dealt with the police knocking and identifying themselves, only to break in when the suspect ran.[110] They had not asked for entry but arrested after entrance.[111] Although the Court stated that lawfulness of arrest depends on state law, they implied that officers must state authority and purpose. Since the knock and partial identification was ambiguous, the state court was reversed with directions to exclude the evidence obtained as a result of the arrest.[112] Police officers may not break into a house when they can get sufficient evidence to justify a search on the outside.

Then starting with *Kerr v. California*,[113] the Court permitted an entrance with a passkey into the room of the accused without a warrant, stating a clear rejection of the above rationale Justice Jackson articulated.[114] The police in *Kerr* observed the suspect with a known narcotics peddler and had information from a "reliable informer."[115] On the state court level, the court in *Beck*[116] upheld an arrest and its concomitant search on the basis of the suspect's appearance and previous record.[117] The Supreme Court reversed, stating that under such facts, and the associated justification for the arrest, would lead to arrests on grounds of probable cause of anyone with a previous record.[118] In

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[109] Miller v. United States, 357 U.S. 301 (1958).

[110] *Id.* at 303-4.

[111] *Id.* ("Officer Wurms knocked and, upon the inquiry from within – 'Who's there?'— replied in a low voice, 'Police.' The petitioner opened the door on an attached door chain and asked what the officers were doing there. Before either responded, he attempted to close the door. Thereupon, according to Officer Wurms, 'we put our hands inside the door and pulled and ripped the chain off, and entered.'").

[112] *Id.* at 309 ("The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight."). *See also* Wong Sun v. United States, 371 US 471, 482-83 (1963) (When an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight from the door must be regarded as ambiguous conduct.). While the officer in *Wong Sun* eventually announced he was a narcotics officer, he disguised his mission at the outset by stating he had come for laundry and dry cleaning, and did not adequately dispel this impression at the time defendant fled. *Id.* at 482-83.

[113] Kerr v. State of Cal., 374 U.S. 23 (1963).

[114] *Id.* at 35 (Officers' information at the time they arrived at the suspect's apartment "clearly furnished grounds for a reasonable belief that petitioner George Kerr had committed and was committing the offense of possession of marijuana" and was sufficient to establish probable cause for an arrest without warrant).

[115] *Id.* at 28-9 (Informant told police that he had purchased marijuana from the suspect on four or five occasions).

[116] Beck v. State of Ohio, 191 N.E.2d 825 (Ohio 1963).

[117] *Id.* at 827.

[118] Beck v. State of Ohio, 379 U.S. 89, 94 (1964).

Kerr, the Court accepted that arrest as legitimate because it was lawful under state law;[119] in *Beck*, the Court said, it "will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record, so that it can determine for itself whether, in the decision as to reasonableness, the fundamental, e.g., constitutional, criteria established by this Court have been respected."[120] In effect, the *Beck* Court established a minimum objective standard for probable cause.

What emerges from the cases is that the Supreme Court has thus far looked at arrest as a practical matter governed by state law, instead of reasonableness being a function of constitutionally recognized factors. Yet reasonableness is, as has been urged, depends upon consideration of the context of arrest, and should not be a function of state law but rather answer the question: Is it necessary to arrest in that way, at that time? All constitutional amendments must be applied to the states.

The peculiar deficit of this type of general deference to the states is that it appears not so much to look to the existence of individual rights and privileges but, rather, to the efficiency, zeal, and aesthetics of police operation as defined by the individual states. The Court seems primarily concerned with what the police had as alternatives thereby narrowing the imposition of various forms of detention to the fulfillment of clearly identifiable and legitimate police aims.

Except in distinguished searches of houses from searches of persons based on old English common law, the courts have not examined rules governing discretion based on notions of privacy, essential dignity, prevention of harm to the officers, or prevention of harm to society. Thus far historically, only Justice Jackson has suggested this particular mode of analysis, utilizing Constitutional considerations as to possible future danger to persons or other things of value.

E. *Court Supervision*

To put this matter in another perspective, the courts' utilization of search and seizure has really been tantamount to police supervision.

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[119] *Kerr*, 374 U.S at 33(stating "The States are not precluded from developing workable rules governing arrests, searches and seizures "provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures.").

[120] *Beck*, 379 U.S. at 94.

Rather than define certain rights and certain emergencies, courts have rather dealt with what a police officer should have done in light of the information he possessed. Now, it might be argued that the exclusionary rule prohibits introduction in evidence of any matter seized against the Fourth and Fourteenth Amendments.[121] If those protections were first clearly defined, then police officers would have standards of private rights and emergencies to follow so that courts could exclude evidence according to how properly those rules were followed.

One might also suggest that it is inappropriate for courts to supervise police practices. Most judges have little practical police experience, and in all cases they were not present at the scene where constitutional rights may have been violated. Once again, when courts do not use the Constitution as the grounds for judging conduct in areas where constitutional rights are involved but, instead, general concepts of reasonableness, what transpires is impractical confusion based on ignorance. Instead, courts should look to the rights involved and judge police conduct accordingly.

When Justice Marshal decided that the Supreme Court was the final arbiter of the meaning of the Constitution in *Marbury v. Madison*,[122] the apparent rationales included; judicial experience in reading legal language; the training in legal reasoning as to how principles applied to a range of facts; when a difference in degree became a difference in nature, and when one new factor introduced can change the outcome. The common law training that judges could use would seem most appropriate in cases of "reasonableness." Rather than defering to a remote doctrine of state police practices, the Supreme Court should see that the Constitution entrusted to the concept of reasonableness as particularly relevant.

Invocation of police power governed by reasonableness should be a matter of constitutional, and hence national, concern based on the rights interpreted by the Court and balanced against facilitating police behavior. Justice Jackson pointed us in this direction by his examples.

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[121] The exclusionary rule prohibits the use at trial of evidence obtained in violation of an accused person's constitutional rights. BLACK'S LAW DICTIONARY, 465 (7th ed. 1999). *See* Weeks v. United States, 232 U.S. 383 (1914)(Fourth Amendment bars the use of evidence unconstitutionally seized by federal officers); *Mapp*, 367 U.S. 643(All evidence obtained by searches and seizures in violation of the Fourth Amendment is constitutionally inadmissible in state courts).

[122] *Marbury*, 5 U.S. 137.

Moreover, privacy interests should enter the analysis. Also, common law reasoning as to the comparative strengths of these values with one based in the constitutional principles of respecting individual rights, and police powers justified by protecting individuals from harm would lead to "reasonable" standards involving implicit or explicit danger. Thus, all intrusions would be based upon individual rights and protections, which, in sum, would allow courts to examine the means to protect victims in light of what other means are available and to what degree important privacy principles are compromised. Unfortunately, the Supreme Court has never approached this analysis; yet, still such an analysis can be inferred from context and suggestions made by Justice Jackson.

In may be instructive to contrast this problem with Professor Goldstein's[123] situations. In cases of low-visibility police proceedings where the legislative mandate may be ignored, courts have not yet really supervised their implementations. If the courts did supervise police misconduct under the Constitution, courts should certainly supervise police nonfeasance under a statute. Conversely, if courts decline to ensure the enforcement of legislation by refusing to embroil themselves in police procedures, they should avoid defining constitutional rights by the "reasonableness" of police procedures. It would make sense to examine the means that police establish damage and danger as not important since there will be innocent victims whose rights and privacy have been compromised. My analysis would urge examination of the effects on all individuals involved. There are difficulties obviously apparent in this context. One such difficulty is that courts are not present when the police decide not to arrest, apprehend, detain, or charge. This supervision would also put an enormous burden upon the courts.

Yet, at the moment, the American system of jurisprudence is built in such a way as to ensure that courts will not be able to properly supervise police procedure not only in the method of arrest and collection of evidence, but also, not in the area where the police have usually acted with some discretion. Professor Goldstein's point should, however, be kept in mind in formulating a full constitutional system in this area.

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[123] *See generally* Goldstein, *supra* note 11.

1. Plea Bargaining

In another context—plea bargaining—it is important to consider what distorts the ability of courts to engage in the reasonableness analysis of arrest and evidence collection.[124] In the abstract, the plea bargaining system is simple. To begin, for most potential criminal acts numerous and associated charges are brought. For example, a charge of rape invariably results in a charge against the accused for rape, but also a charges for assault and battery, assault, fornication, disorderly conduct, lascivious carriage, and attempted rape, to name a few of a possible many. The prosecution can charge the accused with all those crimes. Thus, when the case comes up, the bargaining begins—if the prosecution has a strong case, they may insist on a plea of guilty to a crime with a high penalty; if they have a weak case they may be persuaded to take a plea to a crime that carries lesser penalties.

There are at least two factors operating to make sure that a plea to a lesser-included offense is often agreed to by the accused. The first factor is the amount of litigation in the courts. The District Attorney can only afford to prosecute a certain number of cases, and the courts can only handle a certain number a year. The prosecutor would, therefore, prefer to have a plea of guilty and may be willing to bargain for a lesser-included offense. Also, courts often offer lighter sentences as an inducement to plead guilty.

The second factor is that the defense bar is, by and large, fee oriented. For instance, in the District of Columbia, "Rule 1" in criminal defense is to "Get the fee" and probation officers and Judges will often inquire as to whether "Rule 1" has been satisfied before proceeding with the disposition of the individual the lawyer represents. Appointed counsel with their interest in fees are interested in: (a) pretending they accomplished something, and (b) disposing of the case quickly. Hence, plea bargaining allows them to have an excuse or justification for their fee. Moreover, it saves them work investigating and defending the case.

The result of plea bargaining is pernicious. First, the spectacle is poor. If the law is to be impressive to deter, then to make it appear to a man accused of crime that his punishment is a matter of bargaining is an error. People who get off easily for crimes that carry heavy penalties may not be very much deterred. First, deterrence is low because the

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[124] Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 BUFF. L. REV. 909 (Spring/Summer 2001); Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 118.

sanction must be heavy for a serious crime in order to deter. Second, the accused who got off may gather cynicism about the system and, perhaps, even a feeling that society does not strongly condemn his acts. Furthermore, for the victim of the crime to see the perpetrator off on a minor offense maybe less than heartening.

Second, innocent people do plead guilty. There are not many defense attorneys who will not admit to pleading an innocent person guilty because of the risks involved. Especially where the arrested is a prey for all types of pressures and possible persecutions while arrests for the possibility of charging multiple offenses gives the police officer enormous leverage over the person arrested. The police officer had the initial decision to book for a particular act, and he can enter any charge he wants and its order of magnitude will determine the number of lesser-included offenses and, in part, the range of bargaining. It is for this reason that District Attorneys ask the police officer what he feels about the case.

What the officer books for, may, in fact, determine what penalty the accused will receive. Since police officers are not lawyers, a possible alternative would be to have them describe the event, justify the description by reference to a particular crime, but leave the crime to be booked for and bail posted for up to a District Attorney or some other more impartial agency - something not contemplated.

Not only is it wrong to have people sanctioned because of the fear of risking higher penalties, but also because the extreme rarity of cases contested do not lead to an understanding by courts of the proper sanctions. In addition, plea bargaining does not allow the legislature to evaluate the appropriateness of the sanction applied in all the instances where it is relevant. Moreover, the sentencing itself may be improperly affected.

Yet, what the judge reads will be the same description he would have read if she had pled to assaulting an officer. Although the charge is reduced, the language of description is not. The inflammatory description that would trigger an extreme sanction is still there. The defendant and the defendant's lawyer cannot rebut the description or even attempt to tone it down, for that would be denying the guilty pleas as entered. The penalty which should reflect, if one accepts plea bargaining as having any validity, the choice of the prosecutor that a lesser sanction should be applied because of various mitigating circumstances or uncertainties or difficulties in establishing guilt, yet it generally does not so reflect those factors because the accompanying

description is not so toned down.

The above problem of over description pervades the entire process. The woman who pled guilty is brought for a probation screening. When asked to explain why she acted as she did, she is unable to do so because that would be to deny her plea of guilty. If there was any justification for plea bargaining it would be to ensure an appropriate lesser sanction given the circumstances. But, the mere admission of guilt prevents the discovery powers of the court and the probation officer from finding the appropriate sanction.

Moreover, given this system there is a tendency to overcharge in order to coerce a guilty plea so that people, by that act of discretion, are forced to forfeit their right to due process. Also, by pleading guilty they are then on a list of possible subjects to be interrogated and detained in the future for similar crimes. For instance, in the area of sex crimes, of course, this is now particularly pernicious. So an overcharge for rape pled to as lascivious carriage could result in the person being always suspected and labeled as sex criminal.

Plea bargaining, as can be seen, is one of the rotten underpinnings of American law.[125] The operation of a system of plea bargaining tends to give the police more unwarranted power. To begin with, there is no question that an arrest alone is a punishment of sorts. In effect, a police officer can make a decision to punish by the mere act of arrest. Since the punishment of an individual should presumably rest upon his guilt, we want, for an ideal system, the least amount of punishment previous to a legal finding of guilt commensurate with an efficient system of crime detection and prosecution.

Yet, plea bargaining prevents this minimizing of non-judicially sanctioned punishment. Since plea bargaining results in so many guilty pleas, those who are arrested can have no recourse against the fact of their arrest, and often, the treatment received while arrested. In the abstract, we have no way of reckoning how many sanctions of arrest are applied improperly because the pleas of guilty do not truly reflect the pleas of guilty men or women. Sanctions are, therefore, applied by police officer with too much power over whom we have too little control and about whom we have too little knowledge.

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[125] The legal systems of other nations, such as Japan, function well without plea bargaining. *See* J. Mark Ramseyer and Eric B. Rasmusen, *Why is the Japanese Conviction Rate so High?*, 30 J. LEGAL STUD. 53 (2001). Japanese law does not permit plea bargains, though an analogous system exists in which defendants can plead guilty in exchange for a sentence suggestion lower than what the defendant would receive at a contested trial. *Id.*

Plea bargaining prevents imposition of the proper sanction. Likewise, pleas of not guilty prevent the discovery of proper evidence for the imposition of a sanction, and obfuscate the panorama of possible decisions and factual situations for legislative consideration and evaluation of appropriate sentences. In terms of any rational code of criminal justice, plea bargaining clearly is an evil.

Plea bargaining's only justification advanced now is the necessity to allow the courts to function given the heavy volume of crimes still being processed and tried. Even novels have been written about what would occur should no pleas of guilty be entered—the result is chaos.

The plea bargaining system certainly bears more supervision and scrutiny than what occurs now. To punish a man as a result of his protesting his innocence is to make protesting innocence a sanctionable act. If even the purpose of law is either vengeance or a spectacle, we should hesitate more in applying severe sanctions to those less clearly guilty than those clearly guilty — yet, a system based on plea bargaining prevents this result by coercion rather than proof.

2. Related Constitutional Considerations to Plea Bargaining

All of this brings us up to an extreme and historically ignored idea: the relevance of the Fifth Amendment to multiple charging and plea bargaining. First, the existence of a charge of multiple offenses tends to coerce a guilt fee. Second, putting this extra leverage in the hands of the police not only acts as punishment, often without legally-found guilt, but allows the police to coerce guilty pleas by their charge with its effect on freedom, bail costs and with its forcing a plea to a lesser included. These two factors indicate that the function of multiple charging to coerce confessions of guilt forces a person to testify to a crime he may not have committed. Such a procedure seems to violate Due Process. It is, of course, gilding the Lilly, to point out that poverty as opposed to wealth can determine whether the person goes ahead with the trial they deserve under the Constitution rather than forgo it thereby suggesting Equal Protection problems.

The double jeopardy clause and its meaning are highly controversial. To the best of the author's knowledge, no one has yet urged the proposition that it means you may only charge one crime for one act. It could be argued that taking the following three factors into account: 1) the privilege against self-incrimination places the burden of proof on the state; 2) the right to due process should require that no one

should receive unauthorized punishment due to the police and prosecutor being given an unsupervised, unjustified discretion, and 3) the implication of double jeopardy must be understood so the State cannot repeatedly accuse one of the same illegal act.

With those factors in mind, then we must reject delegating discretionary power to give the police and the prosecutor more than one attempt to convict for one act, rather than characterizing that act as many illegal acts piled in each other like Chinese boxes or Russian Matrucka dolls. While it may be true there can be a series of crimes: breaking and entering, kidnapping, assault, and murder, each of these categories are tied to a specific action in the series rather than another way of characterizing one discrete act.

The Fifth Amendment should prevent charging multiple, lesser-included offenses in order to eliminate or at least control a system built upon plea bargaining. We may recognize that it puts a man in double jeopardy to charge him with two crimes at the same time when we could not charge them with one after another with an intervening acquittal. When the function of two simultaneous charges is to coerce a guilty plea, the entire system is corrupted. So that it is reasonable to say that charging lesser-included offenses places a man in double jeopardy when the policy of giving a man a fair chance to defend himself is an essential component of due process.[126]

In the District of Columbia, for example, the Office of Assistant United States Attorneys in the Court of General Session had for many years an announced policy of allowing a lawyer to pick the judge for sentencing his client as the lawyer pleads his client guilty no later than five days before the trial date. The best judges are, of course, well known and often disposed to give a lighter sentence just because the accused pled guilty. In addition to the obvious problems pointed out above, such a wholesale technique blatantly hinders the law. As a lawyer must be faithful to his client's interest, he must, in this situation, be more tempted to plead his client guilty. For, if the attorney can pick his judge he may be able to ensure a higher chance for a light penalty or freedom.

This system results in a decrease of cases being litigated, but is

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[126] The right to present an effective defense was recognized in Gideon v. Wainwright, 372 U.S. 335 (1963). There the Court stated, "[s]tate and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Id.* at 344.

improper for two reasons: First, tricky or borderline cases are not litigated in the trial court and then appealed because it is not to the client's interest in the vast majority of criminal cases.[127] Therefore, appeals courts can supervise less and receive less of the difficult cases that create a richer range and more complete picture. Second, the inconsistency of the sentencing between various members of the bench is less likely to be corrected because the hard and harsh judges are likely to be avoided in the majority of the cases. Rather than being corrected, all judges are freer to impose more outrageous sentences.[128] With the avoidance of hanging judges encouraged by this low-visibility process of plea bargaining, the appellate courts may not have sufficient examples to act or a courageous bar to deploy.[129]

Beyond all these points lurks the fact that the defendant has pled guilty. Two results follow: First, the defendant has a record. Regardless of innocence or severity of the actual act committed, the person has a certain given record. That record will influence later prosecutorial decisions as to prosecute and aid verdicts of guilty at later accusations. A man with a record is a man considered guilty of a crime and treated as more likely to commit another one and merit for the second an even stronger sanction when his original plea may have been coerced. Second, the system favors the rich who can obtain the best lawyers. For the best lawyers can refuse the plea and count on their superiority. A subdivision of this point is the improvable but observable phenomenon that prosecutors often lose cases when put to the test of a real trial because of their lack of experience due to plea bargaining.

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[127] Such cases are not without their perils, as evidenced by Martin Luther King's 1963 imprisonment in Birmingham City Jail for his defiance of a court injunction ordering an end to civil rights demonstrations. *See* MARTIN LUTHER KING, JR., *Letter from Birmingham Jail, in* WHY WE CAN'T WAIT (Signet Classic 2000) (1964).

[128] In the vast "Calder mobile" of criminal procedure, parole once functioned as a possible corrective to disparities in the imposition of sentences by Sentencing Judges. It is now less possible to make such corrections because of pressures on parole boards from victims' rights and vengeance advocates whose views now dominate the popular press and media.

[129] *See* Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995). The problem of low-visibility in Social Security hearings is evident in the case of Helen Anyel, an administrative law judge accused of bias against non-English speaking Hispanic claimants. *Id.* While advocates spent years amassing victorious appeals against her rulings and forced a reopening of all her cases, she remained in her position. *Id.*

F. *Deeper Constitutional Considerations*

This article has suggested the constitutional infirmities in search and seizure not being reasonably related to danger; warrants based on reason; the intrinsic denial of due process in plea bargaining; and its concomitant denial of equal protection and the prosecution of the poor. But deeper problems are involved as their invocation also affects the freedom of expression and assembly.

"Disorderly Conduct" and "Breach of Peace" are often invoked and sanctioned by the court in such a way that the First Amendment is violated in practice. Let us start with the basic concept of "disturbance." What is a disturbance? To start with the promise of the First Amendment, we should say that no pure expression of ideas is a disturbance. Clearly, the advocacy of some doctrine in Latin in a book not much distributed would not be a breach of the peace. Change the language, change the distribution, it seems hard to now make it a disturbance.

Now, let us have the person express the belief in the street. If he says it to a friend and a police officers thinks it disturbs either (a) him or (b) any normal person, then is it a disturbance? Under traditional interpretations, it would not seem to be so, as these do not seem words calculated to create violence.[130]

When do they become calculated to create violence? It must be when said to a person, not a friend, who is thereby probably led to react with violence. But, why do we arrest the provoker? In *Feiner v New York,*[131] a man was arrested because the crowd was restive. Should not the police have protected the speaker and arrested those who threatened him? It is obvious that popular ideas and their advocates do not need protection from crowds, it is unpopular ideas that do.

In *Chaplinsky v. New Hampshire*,[132] Justice Murphy's inexplicably worst opinion, a Jehovah's Witness was held to be properly arrested and convicted for properly objecting to his prior arrest by calling the man who had told him not to worry "a fascist, and a goddamned

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[130] Brandenburg v. Ohio, 395 U.S. 444 (1969). The Constitution does not permit a State to prohibit advocacy of the use of force or violation of the law "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

[131] Feiner v. New York, 340 U.S. 315 (1951).

[132] *Chaplinsky*, 315 U.S. 568.

racketeer."[133] But a problem with that case is that since police officers are sworn to uphold law and order, it follows *a fortiori* that the police officer should not be considered a danger to be provoked into violence by the man's speech. Then, on February 2, 2002 a man was arrested for disorderly conduct after an angry crowd threatened him for supporting Osama bin Laden to face trial in late February, so the issue may still be revisited.[134]

First, the provoker provokes by the expression of ideas. Yet, one of the possible presumptions of the First Amendment is that ideas being expressed are protected and not a source of danger. Second, to arrest for the words involves a calculation of what may lead to violence. This necessitates the police officer making a calculation of psychology. Yet an officer cannot say anybody would react violently, since this is not true, as our example of friends illustrates. Therefore, that would mean that some ideas are *ipso facto* violence provoking — clearly against the First Amendment. Rather, the police officer rests his arrest on how he considers the person addressed will react. Such an evaluation puts too heavy a burden on the officer, it would appear, and gives him/her unlimited discretion. Even if the police officer can spot criminals as a surgeon spots disease, it is unlikely that sudden estimates reveal accurate psychological appraisal.

But, let us turn the issue around and remember the cases of *Kunz*[135] and *Feiner*.[136] Why do we arrest the speaker of the words? Should we not arrest whoever does violence? Is not the purpose of the Constitution to prevent any suppression of ideas, rather than ratifying the violation reaction of those who oppose them?[137]

All of this analysis, of course, does not consider two other cases of

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[133] *Id.* at 569.

[134] *Court Decisions First Judicial Department Criminal Court New York County Part B: People v. William Harvey*, N.Y. L.J., February 5, 2002, at 19 (col. 2).

[135] Kunz v. New York, 340 U.S. 290 (1951).

[136] *Feiner*, 340 U.S. 315.

[137] *Cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940). Cantwell, a Jehovah's Witness, played a recorded sermon in public that sharply attacked the Catholic faith. *Id.* Onlookers were highly offended, and Cantwell was arrested for breach of peace. *Id.* The Court ruled that while breach of the peace constitutes acts or statements "likely to provoke violence and disturbance of good order, even though no such eventuality be intended." *Id.* at 309. Cantwell's actions did not comprise "assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse." *Id.* at 310. His action were instead, "only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion." *Id.* at 310.

possible breach of the peace: (1) threats of violence, and (2) noise and non-ideological disturbance. There is a crime of "threats" in most if not all jurisdictions. Needless to say, it, too, should be supervised carefully but the direct triggering of the sanctioning on an estimation of the legitimate reaction to fear from such threats can be argued to cross the line from speech to action. For instance, a statement "I'll punch you in the nose." can be tantamount to a balled fist or missed swing. Certainly when violence in fact results, whomever threatened can be seen to be the causative agent and treated accordingly. In short, breach of the peace does not have to be invoked where words are used as an ingredient prelude to force or to have all the affect of force.

As to noise, it should be clear that what is loud to one man may not be loud to another. If I play my radio at 10:30 at night to hear baseball at a normal volume (which is, again, subjective) the level I deem "normal" may disturb the man upstairs; while, when he and his children scamper about at 8:30 in the morning that may disturb my sleep (again, a subjective concept since such an hour could be consider late to others). Yet, both of us, at both times, will think we are following normal activity.

Pursuing this question of normality, police officers tend to think that their standards are normal. They also like to command respect and obedience. Their estimate of what comprises disturbance, is, however, often just as arbitrary at root as me or my neighbor. To enshrine it by giving it a sanction is to give power where there should be none, and open up a general area of discretion. It goes without saying that a disturbance can be portrayed easily in a courtroom. And, the fact of a disturbance can be used as an excuse to justify illegal entry and illegal arrests—particularly against dissenters from the popular or prevailing view.

Yet, we all want our peace and quiet. But, what it is for a particular community may vary. Better for the local legislature to define it by precise rules (e.g. time and decibels). Legislative parameters provides warnings to people as to what constitutes a disturbance, and police and courts have guidelines to follow.[138] Something along these lines appears to be the Supreme Court's

[138] The government's ability to regulate free speech is particularly limited when religious ceremonies and rituals are involved. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Restrictions directed against a particular ethnic group would be invalid under Yick Wo v. Hopkins, 118 U.S. 356 (1886).

rationale in *Kovacs v. Cooper*,[139] but the noise element of the sound truck should have been clearly delineated. In short, police should not be considered the community embodiment of community judgment of what comprises a disturbance.

In this context it is interesting to note that the police are often empowered to break up political gatherings, but give protection to commercial events and star appearances. Yet the first implies not only freedom of expression, but also freedom of assembly. Regardless of disputes about the extent of private property in the area of abortion rights, union leafleting, and organized protests against organizations which meet, the considerations should be judged not adversely for their political content but for their interference with other's freedom of assembly or threats as described above.

I walk to work through Times Square and have been blocked and hemmed in so that screaming fans can worship stars or promoters stage exhibitions. Yet, I have also seen street musicians arrested for bothering no one and picketers hounded. Clearly this is the world turned upside down. Keeping the peace must include as much as possible the freedoms of expression and assembly, and disturbances and breaches of the peace must not threaten the exercise by others of those freedoms. Commerce and popularity get unneeded protection; unpopular groups and speakers deserve it.

G. *Double Jeopardy Betrayed*

No account of unnecessary discretion would be complete without mentioning the misuse of perjury. Lying in a courtroom is considered a crime, and on occasions has called for its prosecution for many reasons from deterrence to prevention of reoccurrence. There are of course famous instances of its misuse to get unpopular people: Oscar Wilde and Alger Hiss come immediately to mind as people whose arrogance lured them into a court procedure that trapped them into prosecution and punishment for perjury as a cover for antipathy on other grounds.[140] It should be noted that there may be a defense of selective prosecution available,[141] except for mentioning this abuse of discretion, there is not

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[139] Kovacs v. Cooper, 336 U.S. 77 (1949).

[140] *See* Henry G. Miller, *Defamation: Sword or Petard*, 69 N.Y. ST. B.J. 20 (1997).

[141] See United States v. Ali, 27 Fed. Appx. 728 (9th Cir. 2001); United States v. Bin Laden, 126 F.Supp.2d 256 (S.D.N.Y. 2000); Unites States v. Hommosany, 2000 WL 254050 (2nd Cir. 2000).

much more to say and hard to conceive a remedy except that of proving malicious intent and selective prosecution as a barrier.

Rather there are two instances that call for reform: (1) When a person is prosecuted for a crime and pleads innocent successfully that should be the end of the matter. Yet, if the person testifies that they did not commit the crime, in many jurisdictions they can be prosecuted then for perjury for such statements. That is clearly trying the person for the same act by the subterfuge of prosecuting its denial. Such prosecutions should be legislated out of existence. We note in passing that many corporate executives in big trials lie and this is expected and rarely, if ever, prosecuted.

Secondly, a person is acquitted in either a state or federal court and then prosecuted for the same act.[142] Once again, one acquittal for the same act should bar further prosecution in any other jurisdiction for that act. No matter how corrupt we feel the first one may be – even if such a systems protects evil people or perpetrators of racism. Here a federal and state law is needed. This area's problems suggest their own legislative answers. But there are others needed for the problems previously confronted.

IV. Required Legislative Reforms

Noting that while so long as courts sit the ideas and perspective argued above will be an anathema rather than a norm, I propose that legislation be enacted to restore a balance of reasonableness and constitutionality. My suggestions are outlines and rest on the principles that decision makers should be visible and accountable; that people should have control of the police in a democracy, and problems are best solved by personal involvement in a fair system and in courts with due process and equal protection.

The following are sketches rather than drafts of laws. Drafting them is left to the experts. The exclusionary rule is only pointed to in order to note that this selection of proposed legislation indicates its desirability and certain suggestions imply its use for the matter is

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[142] As to double jeopardy, Alexander Hamilton wrote:

> Would it be proper that the persons who had disposal of his fame and his most valuable rights as a citizen, in one trial, should, in another, for the same offense be also the disposers of his life and fortune? Would there not be the greatest reason to apprehend that error, in the first sentence, would be the parent of error in the second sentence.

Federalist Papers, No. 65. (Mentor 1991, p 399).

already the subject of much study, comment, and good analysis.

A. *Civilian review Boards*

There is much literature on the proposition on the use and establishment of an agency to review police abuse and misuse of discretion.[143] They should be run by civilians and staffed by lawyers and follow criminal law procedures. The initial confidentiality granted and identity exposed only when the pursuit of the matter requires it for due process and may produce sanctions.

B. *Community Civilian Review Boards*

In addition to a central civilian review board, each precinct should have its own. Such boards would make the reporting much easier, private, and less threatening for the person who wants to complain. Lesser offenses such as harassment and cursing would seem best treated at a local level.

C. *Advisory Board*

Commensurately, there should be an advisory Board for each precinct and it should be comprised primarily of citizens. In addition, regular meetings at which complaints and suggestions are aired should be held. Here, for example, there could be discussions of allocation of resources and low-visibility discretion examined. Questions such as the following could be discussed: Should the police arrest all jay walkers, bicycles on the street, graffiti, public drinking, and other either potentially dangerous or unaesthetic matters? Or should police exercise discretion in these regards? Furthermore, issues such as selective or racial tendencies and desuetude should be discussed as well as recommendations for proper regulation. Hopefully in these venues the abuse of disturbance laws will be thoroughly discussed, relevant factors considered, and formulations of guidelines for the police formulated with legislative effect.

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[143] Compare the minority report by the NYCLU, NEW YORK CIVIL LIBERTIES UNION, DEFLECTING THE BLAME/ THE DISSENTING REPORT OF THE MAYOR'S TASK FORCE ON POLICE/COMMUNITY RELATIONS (1998), to the official Giuliani report considering remedies for publicized police atrocities, MAYORAL POLICE/COMMUNITY RELATIONS TASK FORCE, TASK FORCE ON NYC POLICE/COMMUNITY RELATIONS-REPORT TO THE MAYOR (1998).

D. *Search and Seizure Guidelines*

There should be formulated guidelines covering searches and warrants in which the factors are spelled out in advance, all of which would help the police officers as well as guard privacy.[144] These factors should include, but not be limited to, the apprehension in time to prevent further physically dangerous activity; the public or privacy of the search, and the possibility of arrest leading to repetition or dangerous acts in fleeing from the crime.

E. *Reasonable Force*

We have not previously discussed reasonable force but the same doctrines should apply and be so formulated. The force required should be the minimum to detain and protect those arresting with the least potential damage to the individual searched or arrested.

F. *Neighborhood Sweeps*

Sweeps of neighborhoods, particularly by those from outside of the neighborhood, and in neighborhoods justifiably and historically afraid of and antagonistic to the police, should be outlawed. Leaving aside the psychological effect, the number of false arrests, and the resulting atrocities which have occurred, it should be noted that police presence is often more effective in deterring crime than detecting it.

For example, the Serenos in Spain as they were controlling ingress and egress to private homes they did keep down street crime.[145] While far from endorsing such practices, the same police could be placed noticeably as police in areas where people go and want to be safe—particularly in environs plagued by violence. Commensurate with this idea is the placement of police at some point in those neighborhoods, and those officers should be extensively recruited from the

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[144] New Jersey seems to already be taking this step, yet such a step was taken by the Supreme Court and not the Legislature. *See* New Jersey v. Carty, 107 N.J. 632 (2002)(Holding law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing, beyond the initial valid motor vehicle stop, prior to seeking consent to search. Appearing "nervous" is not sufficient to provide a reasonable, articulable suspicion for requesting consent to search).

[145] A *Sereno* is a Spanish "night watchman." The name is derived from the cry *"Sereno!"* which is the Spanish equivalent of "All is well." Francis S. Saltus, *The Andalusian Sereno*, POET'S CORNER, *at* http://www.geocities.com/Athens/Acropolis/2012/poems/saltus01.html.

neighborhood they are sent to protect.

An obvious consequence of this change in the law is the banning of spot barricades, random searches, and confiscation of property before proof of guilt. The same considerations, including racism, invasion of privacy, possibility of abuse in planting evidence and arrest, govern these procedures that have also been demonstrated to be ineffective.

G. *Plea Bargaining*

Plea bargaining should be banned by the legislature or eliminated with all deliberate speed. Individuals should be prosecuted no matter how they are arrested for the act they committed and should not be charged with a series of crimes all based on one act. Innocent people should not be in jail because of the state's coercive power.

Three associated concepts not addressed in detail, or at all, are invoked by this legislative prohibition of plea bargaining. The first is the right to counsel, rather than none, for misdemeanors and incompetents for major and even capital crimes.[146] The second is that when devices are found which can demonstrate innocence—the most obvious being DNA—all those currently incarcerated or incarcerated in the past should have the right to have that device employed and predicate immediate new hearings or habeas corpus with able counsel appointed. Similarly, the area of harmless error on appeal—a judge made concept—should be examined carefully by legislators to see if it can be more precisely defined. The spectacle of the state violating the laws, including those of evidence, with impunity is not one to be encouraged.

The third is that "rap" or "yellow sheets" should be abolished where previous arrests composed often of multiple charges for a singular act are listed, as if proven or relevant, and effect arrest, prosecution, and length of incarceration.[147]

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[146] I leave the argument for the abolition of capital punishment in the able hands of so many others with only the remark that is falls very unequally upon different groups and is not reversible. *See e.g.* Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria On Executions, And The Potential Abolition of Capital Punishement*, 33 CONN. L. REV. 733 (Spring, 2001) and Judge Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135 (Spring 2001).

[147] The negative implications of law enforcement officials labeling people as offenders and warning neighbors of past criminal activity is beyond the scope of the legislative remedies proposed in this article. These policies should, however, be critiqued not only for their ineffectiveness, denial of presumption of innocence, and assumption that the debt to

H. *Testimony*

It is indeed remarkable how many convictions have been found to be based on prosecutorial suppression of evidence[148] or with the use of forced perjured testimony. The banning of "turned witnesses," jail house confessions obtained by planted pigeons, and the testimony obtained by deals, should be implemented in spite of the whining complaints that it would make prosecution more difficult.

What is more remarkable is that nothing happens to the lawyers who have committed such offenses. Leaving aside the judge created doctrine that prosecutors are immune from civil suit except in extraordinary circumstances, the disgrace is that none are disciplined by the profession. Legislation directing the vigorous pursuit of disciplinary procedure, overseen by a civilian review board properly constituted by either elections or by selection of experienced criminal defense lawyers, should be enacted. This perspective also indicates the wisdom of excluding evidence wrongfully obtained garnering respect of the Constitution and deterring such future actions.

I. *Police Orders and Procedures*

The police are sometimes prosecuted when brutal acts or deaths occur during the performance of their duty. The resulting political consequences for the community are often very harmful and the police themselves may not get a fair trial as a result of the uproar—even civil liberals picketed for the indictment of the police involved in the Diallo death.[149] Their defense is often that they were following orders. In the Rodney King case which may have been mis-prosecuted, the jury had to decide when the police officers went beyond the approved practice of

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society has not been paid, but also because they lead to harassment and distract from correct police procedure. In a similar manner, the disqualification of ex-felons from voting has unfortunately been upheld as constitutional by the United States Supreme Court. Richardson v. Ramirez, 418 U.S. 24 (1974). Such policies demonstrably affected the outcome of the 2000 Presidential election and should be repealed. *See e.g.* Neal R. Peirce, *Should Ex-felons Be Disenfranchised?*, THE SAN DIEGO UNION-TRIBUNE (December 27, 2000) at B7, and Nancy J Northup, *Votes That Will Never Be Counted*, CHICAGO TRIBUNE (November 12, 2000) at 19.

[148] *See e.g.* Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995).

[149] *See e.g.* Cathy Burke, *Sarandon Heads Cast in Protest Arrests*, NEW YORK POST (March 26, 1999) at 7; *Jackson Leads Protest over N.Y. Cops*, CHICAGO SUN TIMES (March 26, 1999) at 3.

subduing a suspect, and a violent one at that.[150] This procedure makes no sense.

Before an individual is prosecuted where defense counsel will raise the following of orders, there should be a court proceeding to examine the propriety of the orders claimed to be followed. Whether this should be a matter of a preliminary hearing should be studied and subject to experiment. Such an area is particularly appropriate for the enforcement of the Federal Civil Rights law. In these recent famous cases, Diallo and King, the police department was not even a defendant.

The solution is to hold the individual cases in abeyance with a rapid trial in Federal Court of the local police procedures and orders to see if they violate constitutional and civil rights. Only if the procedure is found appropriate should the police be prosecuted for acting beyond them, or if it is found inappropriate should the police be prosecuted for going beyond any conceivable interpretation of them.[151]

A further virtue of this legislative bifurcation is the avoidance of inference of guilt from one police officer to another. The general topics of conspiracy and severance are worthy on their own for reform. In the Dialo case for example, where a number of police officers shot and killed a man in his apartment doorway, each police officer had different view, different apprehension of danger, and shot in a different sequence. Unfortunately, the officers were armed pursuant to "police department policy by rapidly repeating pistols." Such a policy is the type which the author suggests the city should be held accountable for and, perhaps, also those who promulgated such a rule.

When police officers are prosecuted in such cases they should be given separate trials by separate counsel paid for by the state but not employed by the state.[152] Such a procedure can easily be legislated.

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[150] *See* Metro Desk, *The Christopher Commission on Tuesday issued a 228-page report on the activities of the Los Angeles Police Department*, LOS ANGELES TIMES (July 10, 1991) at A12; Richard A. Serrano, *Koon Says King Attacked, Left Police No Choice*, LOS ANGELES TIMES (March 20, 1992) at A1; Richard A. Serrano, *Conflicts Persist in King Trial Beating: Testimony differs over behavior of the motorist and the location and severity of the injuries he suffered at the hands of the officers*, LOS ANGELES TIMES (March 22, 1992) at B1; Richard A. Serrano, *Chokehold Ban Cited as Reason King Was Beaten*, LOS ANGELES TIMES (March 25, 1992) at B3; Richard A. Serrano, *Tape Is Not the Full Sotry, Jurors Are Told in King Case*, LOS ANGELES TIMES (April 22, 1992) at B1.

[151] In the *Louima* case, for example, no police procedure officially sanctioned would have protected a police officer for the acts of stick sodomy.

[152] *See also* Mark Hamblett, *Attorney's Conflict Upsets Louima Case Convictions*, N.Y.L.J. at p.1 (January 2002).

Otherwise we will have the police, in effect, not protected as all citizens should be and victimized by their own employer at their own criminal defense. Going after the policy is obviously a more effective mode of correction than the public punishment and obloquy visited on an individual police officer who may have acted reasonably in the circumstances and according to rules. Due process in this regard requires legislative protection.

J. *Free Speech*

When public gatherings are engaging in free speech and assembly and are arrested without justification of the crimes they committed or arrested without appropriate possible warning, they should be given the statutory right to sue the state or city for the violation of their civil rights. The Federal Civil Rights statute should be amended to make this clear.

K. *Civil Damages*

At the moment, if a person is convicted and that conviction then reversed on appeal they cannot sue for civil damages. This leads to convictions just in order to protect the police, department, or city. Just as a police officer should be prosecuted for excessive force even during a lawful arrest or search, so too should a person who prevailed on appeal traceable to wrongful policy or police misconduct be allowed to pursue his civil remedy in order to receive justice and to create a deterrent against such future misconduct.[153]

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[153] It cannot be over-emphasized how the practical consequences of these arrests evolve. Take, for example, the District of Columbia. There is one court, known as "Drunk and Disorderly" ("DDO"). The majority of those arrested in the DDO are forced to plead their case the day following arrest. Unwashed, unshaven, they are herded from lock-up in little groups into the courtroom. They are not apprized of their rights. Practically all plead guilty. An occasional denial slows the schedule and leads to a trial. The trial proceeds by the police officer, who has been sitting with his colleagues in the jury box, going to sit next to the judge in the witness chair. The accused, standing up facing the judge and police officer, then has occasion to tell his story. In the author's witnessing of over 500 disorderly cases, he has not seen the accused believed once, in spite of the government's burden of proof and the presumption of innocence. The author will leave to others to depict, in general, the complete chaos, and lack of justice in local misdemeanor courts. For our purposes, it is sufficient to point out that breach of the peace category is sufficient to arrest. Once arrested, if there is a conflict of story, an experienced police officer, sitting next to a judge, will have his version prevail against an unprepared person standing in front of the judge. The sloppiness of the court serves to ratify police actions in this area.