CRIMINAL PROCEDURE—WARRANTLESS FELONY ARRESTS MADE IN PUBLIC ARE VALID DESPITE THE EXISTENCE OF SUFFICIENT TIME TO OBTAIN A WARRANT; THE "TOTALITY OF THE CIRCUMSTANCES" TEST APPLIES TO CONSENT SEARCHES WHEN CONSENT WAS GIVEN SUBSEQUENT TO ARREST—*United States v. Watson*, 423 U.S. 411 (1976).

On August 17, 1972, federal postal officials were advised by a previously reliable informant that Henry Ogle Watson had a stolen credit card in his possession.[1] Having learned from the informant, one Khoury, that Watson desired to make additional stolen credit cards available, the postal officials prevailed upon Khoury to arrange a meeting with Watson.[2] Six days after the informant's initial contact,[3] the meeting took place in a public restaurant under the surveillance of postal inspectors.[4] Upon receipt of a prearranged signal from Khoury that Watson did possess stolen credit cards, the officers moved in and placed Watson under arrest. The arrest was made without a warrant having been previously obtained.[5] After removing Watson to the street outside the restaurant, the postal inspectors gave him his *Miranda* warnings and conducted a search of his person and discovered no stolen credit cards.[6] The postal inspectors then asked if they could search Watson's nearby automobile.[7] Watson gave his permission, and he reiterated his approval even after being cautioned by the officials that anything found would be used against him.[8] This search produced two allegedly stolen credit cards[9] which formed the basis of a subsequent "indictment charging Watson with possessing stolen mail."[10]

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[1] United States v. Watson, 423 U.S. 411, 412 (1976). The informant's reliability was well established by the fact that he had provided postal inspectors with credible information on numerous other occasions, some of which even related to Watson. *Id.*

[2] *Id.* at 412–13.

[3] The meeting had initially been arranged for August 22, 1972, but was cancelled and rescheduled for the next day. *Id.* at 413.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* In response to the officer's request to search his car, Watson replied, " 'Go ahead,' and he repeated these words when the inspector cautioned that '[i]f I find anything, it is going to go against you.' " *Id.* The inspectors used Watson's keys to enter and search the vehicle. *Id.*

[9] *Id.* The stolen credit cards were found in an envelope under the floor mat. *Id.*

[10] *Id.* The specific statutory authority relied upon by the Government was 18 U.S.C.

Challenging the validity of his arrest and the voluntariness of his consent to search the car, Watson moved, prior to trial, for suppression of the credit cards.[11] The motion having been denied, he was subsequently convicted.[12] However, the Ninth Circuit reversed,[13] holding that the postal inspectors' failure to obtain an arrest warrant when there was sufficient time to do so was violative of the fourth amendment.[14] Additionally, in applying the "totality of the circumstances" test enunciated in *Schneckloth v. Bustamonte*,[15] the circuit court found that the consent to search the car was not voluntarily given by Watson, the invalidity of the arrest being an important factor in reaching this determination.[16]

The Supreme Court granted certiorari[17] and, in *United States v. Watson*,[18] reversed the Ninth Circuit.[19] The Court held that the warrantless arrest was valid and that Watson's consent to the automobile search was voluntary.[20] Speaking for the majority, Justice White premised the Court's holding upon both a specific statutory grant of authority to make warrantless felony arrests and the existence of

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§ 1708 (1970). United States v. Watson, 423 U.S. 411, 413 n.2 (1976). Section 1708 provides in pertinent part:

> Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—
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> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1708 (1970).

[11] United States v. Watson, 423 U.S. 411, 413 (1976).

[12] *Id.* at 414.

[13] United States v. Watson, 504 F.2d 849, 853 (9th Cir. 1974), *rev'd*, 423 U.S. 411 (1976).

[14] *Id.* Relying on Warden v. Hayden, 387 U.S. 294 (1967), and Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Ninth Circuit found that the Government "ha[d] shown no 'exigent' circumstances which would justify not obtaining an arrest warrant during the six-day interim." 504 F.2d at 852.

[15] 412 U.S. 218, 233 (1973). For a more complete discussion of this case see notes 71–77 *infra* and accompanying text.

[16] United States v. Watson, 504 F.2d 849, 852–53 (9th Cir. 1974), *rev'd*, 423 U.S. 411 (1976). The court noted that Watson was not merely in custody but was there as a result of an infringement of fourth amendment rights. In addition, it pointed out that the defendant was not informed of his right to refuse consent. 504 F.2d at 853. Hence, the court found "that the totality of circumstances *strongly suggests coercion*." *Id.* (emphasis added).

[17] United States v. Watson, 420 U.S. 924 (1975).

[18] 423 U.S. 411 (1976).

[19] *Id.* at 425.

[20] *Id.* at 414–15, 424–25.

probable cause for the arrest.[21] With respect to the search of the car, the Court applied the "totality of the circumstances" test enunciated in *Bustamonte* to determine the voluntariness of Watson's consent, although he was already under custodial arrest at the time of the search. In applying this test, the majority held that, since the arrest was legal, the remaining circumstances did not vitiate the voluntariness of the consent.[22]

The Court's decision in *Watson* appears to be significant in two major respects. For the first time the Supreme Court squarely addressed the issue of whether law enforcement officials must obtain an arrest warrant, when they have sufficient time to do so, before making an arrest in a public place.[23] Additionally, the Court's decision clearly sanctions the applicability of the *Bustamonte* standard for determining the voluntariness of consent to situations where an individual is in custody and under arrest.[24]

Since the significant element of the court of appeals' finding that Watson's consent was involuntary was its determination that his arrest was illegal, the Supreme Court addressed this issue first. In support of its holding that Watson's arrest did not violate the fourth amendment, the Court first pointed to the specific congressional grant—18 U.S.C. § 3061(a)(3)—which empowers the Postal Service to authorize its investigative employees to make warrantless felony arrests when " 'they have reasonable grounds to believe' " that a felony has been or is being committed.[25] Furthermore, it was observed that the effect

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[21] *Id.* at 423. The statute relied upon was 18 U.S.C. § 3061(a)(3) (1970). 423 U.S. at 415. For a discussion of this statute and its implementing regulation see note 25 *infra* and accompanying text.

[22] 423 U.S. at 424–25. For a discussion of the circumstances surrounding Watson's consent see text accompanying note 81 *infra*.

In his concurrence, Justice Powell even went so far as to state that the voluntariness of the consent was so strong that it should be upheld even if the arrest were found unconstitutional. 423 U.S. at 425. Justice Marshall, dissenting, pointed out that neither the court of appeals nor the briefs before the Supreme Court dealt with the specific question of consent given while in lawful custody. *Id.* at 435. He therefore would have remanded the case to the Ninth Circuit for a more detailed determination concerning the voluntariness of the consent. *Id.* at 435–36.

[23] The Court spoke only of public arrest, thereby indicating it was not reaching the issue of when an officer may enter a private residence without a warrant to effectuate an arrest. *See id.* at 424. This fact was expressly noted by Justices Powell and Stewart in their respective concurrences. *Id.* at 432–33.

[24] *Id.* at 424–25. In *Bustamonte*, the Court specified that its holding was limited to a non-custodial situation. 412 U.S. at 248–49.

[25] 423 U.S. at 415 (quoting from 18 U.S.C. § 3061(a)(3) (1970)). This statute, in pertinent part, authorizes investigative officials of the postal service to

make arrests without warrant for felonies cognizable under the laws of the

of the Ninth Circuit's decision, if unmodified, would be to invalidate section 3061(a)(3) in all cases where no "exigent circumstances" were present.[26] Noting the existence of similar legislative grants of power to other federal law enforcement agencies,[27] the Court perceived a congressional judgment that the seizure of persons by statutorily designated officials without a warrant was constitutionally permissible if probable cause existed.[28] Since probable cause was found to be present in the instant case, the Court concluded that the postal inspectors acted within the scope of their statutory authority when Watson was arrested in a public place.[29]

The majority next buttressed its holding with reference to previous fourth amendment cases. It was determined that nothing in these prior cases prohibited warrantless felony arrests where probable cause did in fact exist.[30] Based upon these precedents, the Court reasoned

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United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

18 U.S.C. § 3061(a)(3) (1970). This authority given to the Board of Governors of the Postal Service was implemented pursuant to regulation. *See* 39 C.F.R. § 232.5(a) (1975).

[26] 423 U.S. at 415.

[27] *Id.* at 415–16. For other examples of congressional authority empowering federal officials to make warrantless arrests see 18 U.S.C. § 3052 (1970) (F.B.I. agents); *id.* § 3053 (United States marshals); 21 U.S.C. § 878 (1972) (designated officers of the Bureau of Narcotics and Dangerous Drugs).

[28] 423 U.S. at 415. This intent on the part of Congress is evidenced by its treatment of the statute empowering agents of the F.B.I. to make warrantless arrests. The forerunner to the present version of 18 U.S.C. § 3052 had been interpreted as requiring federal officers to obtain an arrest warrant when there was sufficient time to do so, and the exception arose only in those instances where there was a likelihood that the person to be arrested would be able to escape. In United States v. Coplon, 185 F.2d 629, 634–35 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952), Judge Learned Hand, interpreting this statute, held that it required agents to obtain an arrest warrant "when there is time to obtain one," absent the possibility of escape. The year after Judge Hand's decision in *Coplon*, Congress amended section 3052, eliminating the provision that required F.B.I. agents to obtain warrants subject to the likelihood of the suspected felon's escape before a warrant could be obtained. *See* Act of Jan. 10, 1951, ch. 1221, § 1, 64 Stat. 1239, *amending* 18 U.S.C. § 3052 (1948) (codified at 18 U.S.C. § 3052 (1970)). Subsequently, in Coplon v. United States, 191 F.2d 749, 755 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952), the District of Columbia Circuit noted that Congress' action in amending the statute immediately after the opinion rendered by the Second Circuit reflected its desire to make clear that the power of F.B.I. agents to make warrantless arrests for felonies committed in their presence should not be limited to instances where there was no time to obtain a warrant. *See also* 423 U.S. at 423 n.13.

[29] 423 U.S. at 415.

[30] *Id.* at 417–18. In Carroll v. United States, 267 U.S. 132, 156–57 (1925), the Supreme Court considered under what circumstances a search might be made without a warrant and reiterated the customary rule that enforcement officials may make warrantless felony arrests based upon probable cause. Subsequently, the Court, in Henry v. United States, 361 U.S. 98, 102 (1959), while finding that the facts did not sufficiently

that the issue was not whether there was sufficient time to obtain an arrest warrant, but rather "whether there was probable cause" to make an arrest.[31] Thus, having found sufficient probable cause to warrant the postal inspectors' actions with respect to Watson, the Court held the arrest to be constitutionally valid.[32]

Furthermore, the majority determined that these fourth amendment cases reflected "the ancient common-law rule" that a law enforcement officer could arrest for a felony without a warrant, provided there were probable cause to do so.[33] This common law rule "has survived substantially intact" in the majority of state jurisdictions.[34] In light of this long-standing collective judgment, the *Watson* Court,

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prove the existence of probable cause, nonetheless found that the statute in question "state[d] the constitutional standard"—allowing warrantless felony arrests where probable cause exists. 361 U.S. at 100.

[31] 423 U.S. at 417–18. Using the standard for probable cause set forth in Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (reasonable grounds to believe that an offense "has been or is being committed") the Court, in Draper v. United States, 358 U.S. 307 (1959), held that under the facts of the case the federal narcotics agents had probable cause to believe that Draper was committing a narcotics violation at the time of the arrest. *Id.* at 313–14. The arrest was made pursuant to a federal statute which empowered federal narcotics enforcement agents to make warrantless felony arrests. Thus, the arrest, albeit without a warrant, was "lawful, and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid." 358 U.S. at 310, 314 (footnote omitted).

Finding probable cause at the time of the arrest, the Court in Ker v. California, 374 U.S. 23, 35, 40–42 (1963), held that, under the circumstances, the police actions of entering and searching the premises were not unreasonable. And in Gerstein v. Pugh, 420 U.S. 103, 114 (1975), the Court held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." The *Gerstein* Court, while reiterating its preference for obtaining a magistrate's review of the factual justification in assessing the existence of probable cause, noted that "it ha[d] never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Id.* at 113.

[32] 423 U.S. at 414–15, 424.

[33] *Id.* at 418–19. At common law, there were two conditions which attached to a peace officer's right to make warrantless arrests. First, there had to be reasonable grounds to believe that a felony had been committed, regardless of whether the crime had in fact been committed; second, the officer had to have "reasonable belief in the guilt" of the person being arrested. The power of private persons, on the other hand, was limited to instances where a felony had actually been committed. Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 566–67 (1936). *See also* 10 HALSBURY'S LAWS OF ENGLAND 343–45 (3d ed. 1955). The *Watson* majority indicated that the 1792 Congress extended this common law authority to federal marshalls and their deputies by giving them the same power as the sheriffs in the various states. 423 U.S. at 420–21.

[34] 423 U.S. at 421. For examples of jurisdictions which have codified this common law rule see DEL. CODE ANN. tit. 11, § 1904(b) (1975); KAN. STAT. ANN. § 22-2401(c)(1) (1974); 16 KY. REV. STAT. § 431.005 (1975); N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1971).

although acknowledging a preference for a magistrate's determination of probable cause, nonetheless "decline[d] to transform this judicial preference into a constitutional rule."[35]

While at first blush the Court's holding appears to be soundly based on past precedent, a closer examination of the prior fourth amendment cases relied upon reveals that such reliance may have been misplaced. Concededly, these cases do not require officers to obtain warrants for felony arrests based upon probable cause; however, it is not clear that they lend strong support to the *Watson* Court's determination that exigent circumstances need not be present for a probable cause arrest to be valid.[36] This issue was not addressed by the prior cases. For example, the primary issue in *Carroll v. United States*,[37] a case relied upon by the *Watson* majority,[38] was the propriety of a warrantless automobile search.[39] Rather than squarely addressing the issue of warrantless arrests, the *Carroll* Court merely alluded to the common law rule governing warrantless felony arrests in rejecting the assertion that the validity of the search was dependent upon the validity of the arrest.[40]

Similarly, in *Draper v. United States*,[41] *Henry v. United States*,[42] and *Ker v. California*,[43] all of which were relied upon by the *Watson* majority,[44] the Court was not primarily concerned with the arrest issue presented in *Watson*, but rather the existence of probable

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[35] 423 U.S. at 423.

[36] In his concurrence, Justice Powell conceded that "[n]one of the decisions cited by the Court today squarely faced the issue" of whether the police, possessing probable cause to make a felony arrest, must nevertheless obtain an arrest warrant when there is time to do so. *Id.* at 426 n.1. Justice Marshall similarly agreed with the lack of precedential value of the cases relied upon by the majority. *Id.* at 436 (dissenting opinion).

[37] 267 U.S. 132 (1925).

[38] 423 U.S. at 417.

[39] 267 U.S. at 134. Finding reasonable grounds to believe that the car in question was transporting bootlegged liquor, the Court upheld the stopping and subsequent search. *Id.* at 160–62. In upholding the validity of the search, the Court formulated a special rule permitting the search of automobiles without a warrant. *Id.* at 153. It premised its holding on the impracticability of obtaining search warrants in these circumstances. *Id.* The *Carroll* Court stated that

> [t]he right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.

Id. at 158–59.

[40] *Id.* at 156–59.

[41] 358 U.S. 307 (1959).

[42] 361 U.S. 98 (1959).

[43] 374 U.S. 23 (1963).

[44] 423 U.S. at 417–18.

cause. In fact, the *Draper* Court never addressed the issue of the practicability of obtaining an arrest warrant[45] and was concerned primarily with whether an on-the-spot verification of information previously obtained from a reliable informant constituted probable cause.[46] The *Henry* Court faced the issue of whether or not observations of the suspects' allegedly suspicious activity by FBI agents gave them probable cause to arrest them.[47] While the Court in *Henry* declared that the relevant statute authorizing FBI agents to make warrantless felony arrests "state[d] the constitutional standard," this was not central to its holding.[48] The Court in *Ker* did not even confront the issue of the validity of a warrantless arrest where there is time to obtain a warrant, since it was determined that "time clearly was of the essence."[49] Rather, the issues before the *Ker* Court were the existence *vel non* of probable cause to arrest and the propriety of the mode of entry used to effectuate the arrest and accompanying search.[50] In another case cited by the *Watson* majority, the suspect

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[45] *See* 358 U.S. at 310. Rather, the key issue addressed by the Court in *Draper* was

> whether knowledge of the related facts and circumstances gave [the arresting agent] "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" . . . to believe that petitioner had committed or was committing a violation of the narcotic laws.

Id. at 310 (footnote omitted).

[46] *Id.* at 309–10, 313. The arresting officer, Marsh, an experienced federal narcotics agent, had been tipped off by a " 'special employee' " of known reliability. *Id.* at 309. The informer had told Marsh on September 3, 1956, of Draper's actions as a narcotics dealer. *Id.* Four days later, the informant told the agent that Draper had left for Chicago and would return by train within a day or two with drugs. *Id.* "[A] detailed physical description of Draper" was then given to the authorities. *Id.*

Subsequently, Marsh saw Draper depart from the train; his description matched perfectly with the one previously given. *Id.* at 309, 313. It was this personal verification of information given by the informant which the Court deemed sufficient to establish probable cause. *Id.* at 313.

[47] 361 U.S. 98, 98–100. In assessing the existence of probable cause, the Court found that the facts were insufficient to allow the reasonable inference that defendant Henry was violating the law, and it therefore invalidated the arrest. *Id.* at 102.

Apparently, two F.B.I. agents were investigating the theft of a shipment of whiskey from interstate commerce. *Id.* at 99. They were given information " 'concerning the implication of the defendant Pierotti [an associate of Henry's] with interstate shipments.' " *Id.* The agents followed Henry's automobile. Shortly after seeing cartons being loaded into the vehicle, the officers made the arrest and seized the cartons which were later found to contain stolen radios. *Id.* at 99–100. The *Henry* Court found defendant's actions "outwardly innocent" and, therefore, insufficient to form the basis of probable cause. *Id.* at 103–04.

[48] *Id.* at 100.

[49] 374 U.S. at 42.

[50] *Id.* at 34–35, 37–38. The officers' actions were predicated upon their personal observations as well as corroborative information previously obtained from an informant. *Id.* at 25–28.

was arrested pursuant to an administrative warrant;[51] however, in that case the primary issue before the Court was the validity of the search subsequent to the arrest.[52]

It would thus seem that upon a careful reading, the case law relied upon by the *Watson* Court does not fully sustain the conclusion reached. Nor does the common law appear to provide conclusive support. The general rule for warrantless felony arrests at common law is that a peace officer may arrest upon probable cause even if the felony was not committed in his presence. In fact, a felony need not actually have been perpetrated.[53] A peace officer could not, however, execute an arrest if the alleged crime was a misdemeanor unless it amounted to a "breach of the peace . . . committed in his presence."[54] In the early period of English common law, there existed no statute empowering justices of the peace to issue warrants for the arrest of those suspected of having committed felonies.[55] This

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The officers had gained entrance to Ker's apartment by use of a passkey obtained from the building manager. *Id.* at 28. Ker attacked the mode of entry as violative of his fourth amendment rights. *Id.* at 37. The Court, however, found that in light of the exigent circumstances present in this case the mode of entry was "sanctioned by the law of California" and "was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment." *Id.* at 40–41.

[51] Abel v. United States, 362 U.S. 217, 218–19 (1960). Attention had been drawn to defendant Abel when the F.B.I. had informed agents of the Immigration and Naturalization Service that he was suspected of espionage and was residing illegally in the United States. *Id.* at 221–22. Abel was arrested in his hotel room and served with an order "to show cause why he should not be deported." *Id.* at 222.

[52] *Id.* at 218–19. The *Abel* Court specifically eschewed any consideration of the validity of the arrest warrant. *Id.* at 230–31. Rather, in sustaining the administrative arrest and subsequent seizure, the majority expressly stated that defendant's claim as to the invalidity of the administrative warrant was not properly before the Court. *Id.* The Court noted that by including portions of the transcript of the motion to suppress, questions as to the validity of the arrest warrant had been "expressly disavowed" by Abel's counsel. *Id.*

The *Watson* majority also relied upon Gerstein v. Pugh, 420 U.S. 103 (1975), even though, as in *Abel*, the question of the validity of the warrantless arrest in *Gerstein* was determined to be not properly before the Court. *See id.* at 105, 111. In *Gerstein*, the primary issue was whether an individual who was incarcerated pending trial on a prosecutor's information had a right to a judicial finding of probable cause. *Id.* In fact, the Court noted in passing that it was unclear whether the defendant's arrest had or had not been pursuant to a warrant. *Id.* at 105 n.1.

[53] 2 M. HALE, PLEAS OF THE CROWN 84–85 (1st Am. ed. 1847); *see also* 10 HALSBURY'S LAWS OF ENGLAND 343–45 (3d ed. 1955); 1 J. CHITTY, CRIMINAL LAW 18–19 (1819).

[54] 10 HALSBURY'S LAWS OF ENGLAND 345 (3d ed. 1955). What constituted a breach of the peace at common law was not clearly delineated. Rather, " '[b]reach of peace [was] a generic term including violations of public peace or order.' " Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 574 (1924) (footnote omitted).

[55] Wilgus, *supra* note 54, at 548. If necessary to effectuate a warrantless felony ar-

power to issue arrest warrants was gradually assumed by the common law justices.[56] However, the constable's power to make summary arrests of alleged felons continued.[57] It was generally felt that the public welfare necessitated the immediate arrest of those reasonably suspected of having committed felonies.[58]

The *Watson* Court's reference to the common law authority to make warrantless felony arrests is less persuasive when one considers the definitional distinctions between common law and modern day felonies.[59] A common law felony encompassed "[o]nly the most serious crimes."[60] Today, however, statutory felony classifications often

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rest, a constable could break into a house to take a suspected offender into custody. 1 J. CHITTY, CRIMINAL LAW 19–20 (1819).

[56] Wilgus, *supra* note 54, at 548.

[57] *Id.* The leading case of Samuel v. Payne, 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780), cited by the *Watson* Court, 423 U.S. at 419, expanded the wide powers already enjoyed by constables. There, Lord Mansfield held that a felony charge by a private individual was sufficient justification for a constable to execute an arrest. Samuel v. Payne, *supra* at 359–60, 99 Eng. Rep. at 230–31. He went on to say that even if no felony had in fact been committed a constable who makes a warrantless felony arrest upon reasonable grounds would not be liable in an action for false imprisonment, because

> it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge.

Id. at 360, 99 Eng. Rep. at 231. Uncertainty remained as to the liability of peace officers for warrantless felony arrests until 1827 in Beckwith v. Philby, 6 B. & C. 635, 108 Eng. Rep. 585 (K.B. 1827), where the court held that a constable need only show reasonable grounds for suspecting that a felony had been committed to justify imprisoning a suspect. *Id.* at 637, 108 Eng. Rep. at 585–86. It was there stated that

> [t]here is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.

Id. at 638–39, 108 Eng. Rep. at 586. For a general discussion of the development of the constable's arrest power at common law see 1 J. CHITTY, CRIMINAL LAW 17–22 (1819); Hall, *supra* note 33, at 567–78.

[58] *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 582 (2d ed. 1952), where it is stated that "felons ought to be summarily arrested and put in gaol." *See also* 2 M. HALE, PLEAS OF THE CROWN 85–86 (1st Am. ed. 1847); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 189 (1883); Wilgus, *supra* note 54, at 560.

[59] 423 U.S. at 438–40 (Marshall, J., dissenting).

[60] *Id.* at 439 (Marshall, J., dissenting). The common law felonies were those crimes for which the punishment required "a forfeiture of all the offender's lands, or goods." 4 W. BLACKSTONE, COMMENTARIES *95. At common law, the definition of felony encompassed "felonious homicide (divided by statutes into murder and manslaughter), mayhem, arson, rape, robbery, burglary, larceny, prison breach . . . , and rescue of a felon." R. PERKINS, CRIMINAL LAW 10–11 (2d ed. 1969) (footnotes omitted).

include generally all those offenses which are punishable by imprisonment.[61]

Finally, the *Watson* Court turned to pragmatic policy considerations to further reinforce its holding as to the arrest. It was asserted that adherence to the standard governing searches, *i.e.*, that a warrant must be obtained in all but exigent circumstances,[62] would result in "endless litigation" over such issues as the practicability of obtaining a warrant, whether the suspect was likely to flee, and other questions relating to the existence of exigent circumstances.[63] While this potential for excessive litigation is a valid policy consideration, it should not stand as an impasse to constitutional protections.[64]

Justice Powell, concurring, offered another policy consideration militating against the imposition of a warrant requirement for felony arrests when sufficient time to obtain the warrant exists. It was asserted that such a requirement "could severely hamper effective law enforcement" by pressuring officers to obtain an arrest warrant as soon as probable cause exists, thereby bringing a halt to the investigatory process before sufficient evidence for a conviction is obtained.[65] There certainly exists a societal interest in ultimately convicting guilty parties which at times necessitates continued police investigation beyond the point where probable cause to arrest is established.[66] However, it is doubtful that the imposition of a warrant

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[61] *See, e.g.*, ILL. ANN. STAT. ch. 38, § 2-7 (Smith-Hurd 1972); MASS. ANN. LAWS ch. 274, § 1 (1968). Under federal law, however, a felony is limited to those offenses which are "punishable by death or imprisonment for a term exceeding one year." 18 U.S.C. § 1 (1970).

[62] *See, e.g.*, Katz v. United States, 389 U.S. 347, 357-59 (1967); Jones v. United States, 357 U.S. 493, 499 (1958); Johnson v. United States, 333 U.S. 10, 13-15 (1948).

[63] 423 U.S. at 423-24.

[64] In his concurring opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), Justice Harlan, while recognizing that the expenditure of concededly limited judicial resources is a "substantial policy consideration," nevertheless concluded that this "should not be permitted to stand in the way of otherwise sound constitutional principles." *Id.* at 410-11.

[65] 423 U.S. at 431-32 (Powell, J., concurring). Justice Powell premised his argument on the fact that efficient police investigatory practice often necessitates the postponement of arrests "even after probable cause has been established." *Id.* at 431. This is because evidence required for probable cause is less than "the level required to prove guilt beyond a reasonable doubt." *Id.* at 431 n.4. Therefore, it was reasoned that the police should have the prerogative to obtain an arrest warrant when they feel that they have collected sufficiently convincing evidence to obtain a conviction, rather than having to seek a warrant the moment they have the minimum evidence to establish probable cause. *Id.* at 431-32. If the police obtain an arrest warrant the moment that probable cause arises but delay in effectuating it in order to obtain additional evidence, they run the risk, according to Justice Powell, that the warrant will grow stale. *Id.* at 432.

[66] *Id.* at 431 n.4 (Powell, J., concurring).

requirement would jeopardize that societal interest. Arrest warrants rarely grow stale between the time they are procured and the time of their execution.[67] Law enforcement officials would still be free to exercise their professional judgment concerning the proper moment to effectuate an arrest during the course of their investigation.[68] It would appear, therefore, that the imposition of a warrant requirement in felony arrests would not place significant pressure on police to cut short investigations before sufficient evidence to convict has been obtained.

In addition to its holding with regard to warrantless felony arrests, the *Watson* decision is significant in that it squarely applies the "totality of the circumstances" test to a consent to be searched given by a suspect while under arrest.[69] Under this test, a court looks to all of the surrounding circumstances, with the knowledge of the right to refuse to be searched being but one of the factors in determining the voluntariness of the consent.[70] The "totality of the circumstances" test was first adopted by the Court in the landmark case of *Schneckloth v. Bustamonte*,[71] but was confined to a situation where the consenting party was not under arrest.[72]

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[67] *See, e.g.*, United States v. Joines, 258 F.2d 471 (3d Cir.), *cert. denied*, 358 U.S. 880 (1958), wherein the Third Circuit held that the failure to execute an arrest warrant for three weeks, despite sufficient opportunity to do so "did not render the warrant invalid." 258 F.2d at 472. Recognizing that there may be legitimate reasons for the police to postpone an arrest, the court went on to hold that "there is no constitutional right to be arrested promptly or otherwise." *Id.* at 472–73.

[68] In Powell v. United States, 352 F.2d 705 (D.C. Cir. 1965), the court held that to provide grounds for reversal arising from pre-arrest delay, the claimant must affirmatively prove "that there was no legitimate reason for the delay, and that he was prejudiced by the delay." *Id.* at 708. *Cf.* Jones v. United States, 402 F.2d 639, 641 & n.3 (D.C. Cir. 1968) (unreasonable delay in making arrest, which impairs defendant's ability to account for his actions, is sufficient ground for reversal).

Some courts have even gone so far as to allow law enforcement officials to postpone arrests made without a warrant. *See* Carlo v. United States, 286 F.2d 841 (2d Cir.), *cert. denied*, 366 U.S. 944 (1961), wherein the Second Circuit held that "[d]elay by law enforcement officers in arresting a suspect does not ordinarily affect the legality of the arrest." 286 F.2d at 846. Despite the delay in effectuating a warrantless arrest for more than three months, the court stated that investigative officials have the prerogative to postpone an arrest in order to "strengthen their case." *Id.*

[69] 423 U.S. at 424.

[70] Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

[71] 412 U.S. 218 (1973).

[72] *Id.* at 248. The pre-*Bustamonte* Court cases dealing with consent searches followed a wavering line of development. The first case in which the Court addressed the issue was Amos v. United States, 255 U.S. 313 (1921), where, in invalidating a search "demand[ed]" by internal revenue agents, the Court spoke in terms of waiver of a defendant's constitutional rights. *Id.* at 315–17.

This waiver approach was ignored in the case of Davis v. United States, 328 U.S.

The *Bustamonte* Court rejected the constitutional-waiver approach that consent to search was "an intentional relinquishment or abandonment of a known right or privilege,"[73] which would have required that the consenting party know of his right to refuse.[74] This requirement had been held applicable in previous fifth and sixth amendment cases.[75] The *Bustamonte* Court identified the purpose of the fifth and sixth amendments as ensuring the right to a fair criminal trial.[76] Fourth amendment rights, on the other hand, protect individual privacy from unreasonable intrusion.[77] The Court therefore reasoned that

> [t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.[78]

Consequently, it was determined that a prophylactic warning of the

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582 (1946), which dealt with a consent search, given only after the government agents indicated that they would break in to obtain the evidence. *Id.* at 586–87. The Court upheld the search on the ground that the property seized—gasoline ration coupons—at all times belonged to the Government and was "subject to inspection and recall by it." *Id.* at 588, 593–94. The Court distinguished *Amos* as involving the seizure of private papers from a private residence. *Id.* at 592.

In Zap v. United States, 328 U.S. 624 (1946), decided the same day as *Davis*, the Court upheld the use of evidence obtained during an audit of the defendant's books conducted over his protest. *Id.* at 627, 630. While apparently looking at all of the circumstances, the Court rested its decision upon the fact that the defendant, in accepting the government contract, impliedly waived his fourth amendment rights. *Id.* at 628–29.

Two years later, in Johnson v. United States, 333 U.S. 10 (1948), the Court invalidated a search conducted after the defendant had allegedly acquiesced to the officer's entering her hotel room. *Id.* at 12, 16–17. The Court, citing *Amos*, declared that the permission to enter "was granted in submission to authority rather than as an *understanding and intentional waiver of a constitutional right*." *Id.* at 13 (emphasis added).

Finally, in Bumper v. North Carolina, 391 U.S. 543 (1968), a consent which followed an officer's claim that he was in possession of a search warrant was deemed invalid. *Id.* at 546, 548. The Court made no allusion to the constitutional-waiver standard, but rather averred that the prosecution had failed to shoulder its "burden of proving that the consent was, in fact, freely and voluntarily given." *Id.* at 548 (footnote omitted).

[73] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In *Johnson*, two defendants who had "stated that they were ready for trial," were tried and convicted without the aid of counsel. *Id.* at 460. The Court, in reversing, held that a waiver of one's sixth amendment right to counsel must be knowingly and intelligently made. *Id.* at 464–65.

[74] 412 U.S. at 235, 246.

[75] *See, e.g.*, Barber v. Page, 390 U.S. 719, 725 (1968) (right of confrontation); Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (right against self-incrimination, right to counsel); Green v. United States, 355 U.S. 184, 191–92 (1957) (double jeopardy); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942) (jury trial).

[76] 412 U.S. at 236–37.

[77] *Id.* at 228.

[78] *Id.* at 242.

suspect's right to withhold consent was not required.[79]

In *Watson*, the Ninth Circuit had found that the defendant neither knew nor was told of his right to refuse consent to the search of his car.[80] This, along with the fact that Watson was determined to have been illegally arrested, vitiated the voluntariness of the consent.[81] In reversing the Ninth Circuit, the Supreme Court reaffirmed its reasoning in *Bustamonte* and rather summarily applied the "totality of the circumstances" test.[82] The Court's determination that Watson's consent was freely given was premised on several key factors: Watson was legally under arrest; he was not threatened with force or subjected to more subtle types of pressure; no promises were made by the postal inspectors; Watson was on a public street when he gave his consent; there was nothing to indicate that he "was a newcomer to the law"; he was advised of his *Miranda* rights; and he was further warned that anything found in the car would be used against him.[83] The majority thereby concluded that the "totality of the circumstances" indicated that Watson's consent was by "his own 'essentially free and unconstrained choice.' "[84]

In his dissent, Justice Marshall reiterated the position he had taken in *Bustamonte*—that a prophylactic warning should be required whenever consent to a search is sought from an individual.[85] Fur-

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[79] *Id.* at 231–33. The "totality of the circumstances" test as enunciated in *Bustamonte* was the product of a line of pre-*Miranda* decisions concerning the voluntariness of in-custody confessions. Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 241 (1974).

Justice Traynor's analysis in People v. Michael, 45 Cal. 2d 751, 290 P.2d 852 (1955), became the cornerstone of the Supreme Court's formal adoption of the "totality of the circumstances" test. 412 U.S. at 221, 230–31. It was held in *Michael* that

> [w]hether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.

45 Cal. 2d at 753, 290 P.2d at 854. The California court reasoned that a contrary holding, whereby the police would have to prove that the defendant knew he had the right to refuse consent,

> would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.

Id. at 754, 290 P.2d at 854.

[80] United States v. Watson, 504 F.2d 849, 853 (9th Cir. 1974), *rev'd*, 423 U.S. 411 (1976).

[81] United States v. Watson, 504 F.2d 849, 853 (9th Cir. 1974), *rev'd*, 423 U.S. 411 (1976).

[82] 423 U.S. at 424–25.

[83] *Id.* (footnote omitted).

[84] *Id.* at 424 (quoting from Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

[85] 423 U.S. at 457.

thermore, the dissenting Justice asserted that even were this position not accepted, the fact that Watson's consent was given while in custody should compel the Government to demonstrate effectively that he knew he had the right to withhold consent.[86] Justice Marshall also contended that a "custodial interrogation is inherently coercive," and therefore the fact of custody should in itself be determinative of the lack of voluntariness of a consent and not just another factor to be weighed.[87]

Although it is true that the Court in *Bustamonte* did distinguish between a custodial and a noncustodial situation, its analysis indicated that by the term "custodial" it was referring to "the specter of incommunicado police interrogation."[88] The in-custody situation in *Watson* was far removed from the inherently coercive atmosphere that prompted the Court in *Miranda v. Arizona*[89] to establish such a prophylactic warning rule. On the contrary, Watson's arrest and subsequent consent to the search occurred within a matter of minutes of one another,[90] and there was no showing that he had been pressured into giving the consent.[91] In fact, the evidence clearly showed that Watson was repeatedly cautioned that any incriminating evidence found would be used against him.[92]

While *Watson* is the first case in which the Supreme Court squarely addressed the issue, application of the *Bustamonte* standard to an in-custody consent is not unique. Lower courts, in assessing the voluntariness of consents, have not hesitated to apply the "totality of the circumstances" test to such situations. For example, in *United States v. Horton*,[93] the Fifth Circuit expressly stated that the standard for judging the voluntariness of consent is the same whether an individual "is under arrest or in custody."[94] Applying the "totality of the circumstances" test, the circuit court upheld the voluntariness of the

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[86] *Id.* at 457–58.

[87] *Id.* Justice Marshall pointed out that the *Bustamonte* Court had distinguished between custodial and non-custodial situations and had relied on this distinction in reaching its conclusion. *Id.* at 457. *Bustamonte* in turn had relied upon Miranda v. Arizona, 384 U.S. 436 (1966), as the basis for this distinction. 412 U.S. at 232.

[88] 412 U.S. at 247.

[89] 384 U.S. 436, 478–89 (1966). Miranda had been arrested at his home and brought to a police station for questioning. *Id.* at 491. He was interrogated for approximately two hours at the end of which the police "officers emerged from the interrogation room with a written confession signed by Miranda." *Id.* at 491–92.

[90] *See* 423 U.S. at 413.

[91] *See id.* at 424–25.

[92] *Id.* at 413, 425.

[93] 488 F.2d 374 (5th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

[94] 488 F.2d at 380 n.4.

consent despite the facts that the defendant had been arrested and handcuffed and was not given his *Miranda* warnings.[95] Likewise, the Second Circuit, in *United States v. Miley*,[96] held that an arrest did not in and of itself preclude the finding that a subsequent consent was voluntary.[97]

The Ninth Circuit has also applied *Bustamonte* standards in assessing the voluntariness of an in-custody consent. In *United States v. Heimforth*,[98] the court squarely held that the " 'totality of circumstances' test applies to all consent searches regardless of whether the consenting party is in police custody when the consent is requested."[99] Similarly, in *United States v. Townsend*,[100] it was stated that consent given in a custodial situation is merely one factor to be considered in light of all the circumstances.[101]

However, in *United States v. Rothman*,[102] the Ninth Circuit had applied the *Bustamonte* test with a different result. In finding the defendant's consent to be the product of coercion, the court relied heavily upon the facts that he had been held incommunicado and interrogated prior to giving his consent to the search.[103] While the

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[95] *Id.* at 377, 380–81. In assessing the surrounding circumstances, the appeals court found "no evidence in the record of any intimidation, physical or psychological abuse, or threats tending to invalidate the consent." *Id.* at 381. Defendant Horton twice gave his express consent to a search of the automobile. *Id.* at 380–81. The investigating agents were further assisted by Horton, who supplied the key and identified the luggage wherein heroin was found. *Id.* at 378, 381. *See also* United States v. Luton, 486 F.2d 1021 (5th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974).

[96] 513 F.2d 1191 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975).

[97] 513 F.2d at 1201–02. The court of appeals pointed out that the lower court had clearly considered all of the surrounding circumstances, and it refused to overturn the trial judge's determination that the defendant's consent was voluntary. *Id.* at 1201.

[98] 493 F.2d 970 (9th Cir.), *cert. denied*, 416 U.S. 908 (1974).

[99] 493 F.2d at 972. The circuit court remanded the case to the district court "for the limited purpose of" making a more detailed finding concerning the voluntariness of the consent. *Id. See also* Hayes v. Cady, 500 F.2d 1212 (7th Cir.), *cert. denied*, 419 U.S. 1058 (1974), where the court, relying on *Heimforth*, agreed that the *Bustamonte* standard controls even where the consenting party was in custody. 500 F.2d at 1214.

[100] 510 F.2d 1145 (9th Cir. 1975).

[101] *Id.* at 1146. *See also* United States v. Kohn, 365 F. Supp. 1031, 1032–34 (E.D.N.Y. 1973).

[102] 492 F.2d 1260 (9th Cir. 1973).

[103] *Id.* at 1264–65. Rothman had been arrested at an airport after assaulting a federal deputy. *Id.* at 1263. He was handcuffed and given his *Miranda* warnings. *Id.* Refusing to allow the officers to open his luggage, he was interrogated for approximately two hours and finally acquiesced and opened his luggage. *Id.* at 1263–64.

The circuit court averred that "[a]rrest is but one factor, albeit a critical one, in determining whether or not the consent was voluntary." *Id.* at 1264 n.1. Finding that the consent was the product of psychological coercion and the search was neither inci-

Rothman court reached a different result than the *Watson* Court, the cases would appear to be easily reconciled on the basis that Rothman's consent was "systematically psychologically coerced,"[104] whereas Watson's was not.[105]

Thus, the position taken in *Watson* appears to be wholly consistent with the decisions of lower courts faced with the issue of the voluntariness of an in-custody consent. The Court's decision in *Watson*, as in *Bustamonte*, reflects a determination to provide greater flexibility to law enforcement officials acting in their investigative capacity. Simultaneously, the Court has implicitly reaffirmed the position that the lower courts, both state and federal, should stand sentinel over the rights of individuals by closely scrutinizing all the circumstances surrounding the voluntariness of a consent.[106]

While the Court's position on the issue of consent is not particularly unsettling, its position concerning warrantless felony arrests is somewhat more troublesome. Previous cases have uniformly held that, absent exigent circumstances, a warrant must be obtained before a lawful search may be conducted.[107] What the *Watson* case has now held is that where there exists probable cause to believe that an individual has committed a felony, he may be arrested in a public place whether or not it is practical to obtain a warrant.[108] Thus, the Court has made clear that the validity of warrantless searches and the validity of warrantless felony arrests are to be judged by different standards. While this position has never before been directly espoused by the Court, its genesis can be traced to prior case law. For example, such a posture can be seen in *Trupiano v. United States*,[109] a case

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dent to the defendant's arrest nor a valid administrative search, the court reversed Rothman's conviction. *Id.* at 1265–66.

[104] *Id.* at 1265.

[105] 423 U.S. at 424–25.

[106] *See id.* In all consent situations an extremely difficult factual determination is involved. Not only is the exact language used by the officer important, but the tone and innuendo are equally crucial. Wefing & Miles, *supra* note 79, at 216. While it can be said that this argues in favor of a rule requiring that the individual be advised of his fourth amendment rights, such a prophylactic rule may be easily undermined by police abuse. Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 158–59 (1967). In the final analysis, allowing lower courts to scrutinize all the circumstances involved may provide greater protection of individual fourth amendment rights. 5 RUTGERS-CAMDEN L.J. 556, 560 (1974).

[107] *See* cases cited note 62 *supra*.

[108] 423 U.S. at 415, 423–24.

[109] 334 U.S. 699 (1948). *Trupiano* was overruled in United States v. Rabinowitz, 339 U.S. 56 (1950), "[t]o the extent that [it] require[d] a search warrant solely upon the basis of the practicability of procuring it." *Id.* at 66 (citation omitted). The rule established in *Rabinowitz*—that the test to determine the validity of a search "is not whether it is

not cited by the majority in *Watson*.[110] In dealing with the right to search incident to a lawful arrest, the *Trupiano* Court held that such a search would not be upheld if there was prior opportunity to obtain a search warrant.[111] Yet the failure to obtain an arrest warrant despite sufficient time to do so did not invalidate the arrest, since the officers had actually observed the illegal activity.[112]

In fact, one circuit court upheld a warrantless arrest made fourteen days after the commission of a felony.[113] Similarly, in another case, an arrest "made two weeks after the last transaction by an officer with personal knowledge of appellant's activities," was upheld.[114] And finally, it has been held that where there is probable cause, the failure to obtain a warrant does not invalidate the arrest.[115]

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reasonable to procure a search warrant, but whether the search was reasonable," *id.*—was itself overruled in Chimel v. California, 395 U.S. 752, 760, 768 (1969). *See* Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975).

[110] *Trupiano* was, however, cited by Justice Powell in his concurrence. 423 U.S. at 426–27 n.1.

[111] 334 U.S. at 705, 708. The Court in *Trupiano* pointed out that the fourth amendment requires that "law enforcement agents must secure and use search warrants wherever reasonably practicable." *Id.* at 705. The arrest, however, was upheld, despite the lack of a warrant. *Id.* at 704–05.

[112] *Id.* at 705. Federal agents had knowledge for at least three weeks that certain buildings on a farm were being used for the illicit distilling of whiskey. The agents were led onto the farm by the owner-informer whereupon an agent observed one of the petitioners engaged in illicit distilling. *Id.* at 701–02, 704. The petitioner was arrested and the contraband was seized. *Id.* at 702. Both the arrest and the search were conducted without the use of a warrant. *Id.* at 703.

[113] Dailey v. United States, 261 F.2d 870, 871, 873 (5th Cir. 1958), *cert. denied*, 359 U.S. 969 (1959). Dailey was arrested for selling narcotics to a merchant seaman who was, in fact, an undercover agent. 261 F.2d at 871. The court found the arresting officers had reasonable grounds to believe defendant was violating the narcotic laws. *Id.* The court then went on to state that there was no requirement that the officers execute the arrest immediately after probable cause arose, for

> [i]f an arresting officer has reasonable grounds to believe that a person has violated the narcotic laws, *he may defer the arrest for a day, a week, two weeks, or perhaps longer.*

Id. at 872 (emphasis added). *See also* United States v. Figueroa, 204 F. Supp. 641, 644 (S.D.N.Y. 1962) (one-month delay in effectuating the defendant's arrest did not affect its legality).

[114] Abramson v. United States, 326 F.2d 565, 567 (5th Cir.), *cert. denied*, 377 U.S. 957 (1964). Relying upon Dailey v. United States, 261 F.2d 870 (5th Cir. 1958), *cert. denied*, 359 U.S. 969 (1959), the court stated that warrantless arrests were valid in narcotics cases. 326 F.2d at 567. It has been suggested, however, that narcotics cases have been singled out by courts for special treatment. 8 ST. LOUIS U.L.J. 415, 418 (1964).

[115] Mills v. United States, 196 F.2d 600, 602 (D.C. Cir.), *cert. denied*, 344 U.S. 826 (1952). Likewise, in United States v. Swanner, 237 F. Supp. 69 (E.D. Tenn. 1964), the district court held that the lapse of approximately five weeks between the commission of the felony in the officer's presence and the making of the arrest did not invalidate that arrest. *Id.* at 72.

Thus, the *Watson* Court did not break totally new ground in its holding as to the warrantless arrest.

By its decision in *Watson*, the Court has decided that a determination of probable cause by a police officer, based upon a reasonable belief that a felony has been committed, is sufficient to justify a warrantless arrest in a public place.[116] This position, as Justice Powell pointed out in his concurring opinion, does create a legal anomaly.[117] The fourth amendment addresses searches and seizures equally, and "an arrest . . . is quintessentially a seizure."[118] As such, the affording of less protection to those being arrested than those having their person or property searched would appear questionable.

Furthermore, effective law enforcement would not be hindered by the imposition of an arrest warrant requirement where it is practicable to obtain one. Warrantless felony arrests would still be upheld where exigent circumstances exist. Moreover, police investigations would not be encumbered.[119] On the other hand, the requirement of an arrest warrant with its attendant judicial scrutiny of the existence of probable cause would certainly minimize unnecessary invasions of privacy. There would appear to be no reason to place greater trust in a police officer's determination of probable cause to arrest than in his determination of probable cause to search.[120] A balancing of the competing policy interests involved would therefore seem to compel the imposition of identical standards for arrests and for searches.

With regard to the Court's disposition of Watson's consent to be searched, the application of the "totality of the circumstances" test to an in-custody situation may be a desirable result in view of the absence of any extremely coercive police tactics in the case. It is arguable, however, that when consent is obtained from an individual subjected to the more inherently coercive atmosphere of a station-house interrogation, a prophylactic warning of the right to withhold consent

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[116] *See* note 23 *supra*. However, the *Watson* Court's limitation of its holding to warrantless felony arrests made in public has subsequently been extended. In United States v. Santana, 96 S. Ct. 2406, 2410 (1976), the Supreme Court held that

> a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place.

In *Santana*, the suspect had entered the hallway of her home in an effort to avoid the police officers. The officers then followed her through the open door and effectuated the warrantless arrest. *Id.* at 2408.

[117] 423 U.S. at 427.

[118] *Id.* at 428.

[119] *See* notes 77–78 *supra* and accompanying text.

[120] *See* Johnson v. United States, 333 U.S. 10, 14–15 (1948).

should be given. While the application of the *Bustamonte* standard was probably correct under the particular facts of *Watson*, the flexibility of this standard imposes a special responsibility on lower courts to carefully scrutinize the dynamic interplay of competing factors surrounding police-suspect encounters.[121] It thus becomes more essential than ever that lower courts be extremely vigilant in standing sentinel over the fourth amendment rights of individual citizens.

Marc Evan Richards

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[121] *See* 5 RUTGERS-CAMDEN L.J. 556 (1974).