

1983

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Recommended Citation

Ronald J. Bacigal, *Warrantless Searches and Seizures in Virginia*, 17 U. Rich. L. Rev. 721 (1983).

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WARRANTLESS SEARCHES AND SEIZURES IN VIRGINIA

*Ronald J. Bacigal**

I. INTRODUCTION

There is a well-recognized lack of consistency and clarity in fourth amendment decisions. At times, each search and seizure case seems unique and the decisions appear to rest on factual determinations rather than on legal principles. Nonetheless, it is desirable to have some understanding of the basic principles of the fourth amendment, and the way in which these principles affect individual cases.

At the most basic level the fourth amendment can be viewed as serving two distinct purposes: (1) protection of the privacy interests of individual citizens; and (2) regulation of police investigatory activities.¹ These two purposes are at times complementary but can also conflict, and a court's choice between the two purposes can lead to opposite results. For example, in a case involving an intrusion into the body, such as surgery to remove a bullet, or body cavity searches for drugs, defense counsel is likely to emphasize the extreme invasion of privacy, while the prosecution will focus upon the rational and reasonable procedures the police followed when intruding upon privacy.² On the other hand, a case involving random stops of automobiles saw the prosecution emphasizing the minimal invasion of privacy caused by a brief stop, while the defense focused upon the absence of any control over the police power to select motorists in an arbitrary or capricious manner.³

The second source of difficulty in fourth amendment cases is the

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This article is an excerpt from the author's recently published *VIRGINIA CRIMINAL PROCEDURE* and is reproduced with permission of the copyright owner, The Harrison Co., Norcross, Ga. The article is intended to stand alone as an informative discussion of warrantless searches. Murray Janus reviews the book at page 881 of this issue.

1. See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

2. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966); *Lee v. Winston*, 551 F. Supp. 247 (W.D. Va. 1982).

3. *Delaware v. Prouse*, 440 U.S. 648 (1970).

relationship of the amendment's two conjunctive clauses.⁴ The first clause provides for the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," while the second clause provides that "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." The United States Supreme Court's vacillation over the requirement for a search warrant has been referred to as a form of judicial schizophrenia. At times, the Court insists that warrantless searches are "per se unreasonable" subject only to a few "well-delineated exceptions."⁵ At other times, the Court refers to reasonableness as the ultimate standard for determining constitutional searches, and notes that reasonableness can only be determined by examining the particular facts of each case.⁶ The underlying rationale for "well-delineated exceptions" differs from the rationale for "reasonable" warrantless searches. Most of the "well-delineated exceptions" appear to focus on the need for immediate action and the impracticality of obtaining a warrant.⁷ "Reasonable" warrantless searches are upheld, however, even if the police bypassed an opportunity to obtain a search warrant. "Reasonable" warrantless searches appear to be justified by focusing upon the balancing of important government interests against what is usually labeled a "de minimis" intrusion upon privacy.⁸

For purposes of analysis, warrantless searches have been placed in two categories:

(1) Exceptions based on the need for immediate action:

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

U.S. CONST. amend. IV.

5. See Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198 (1977).

VA. CODE ANN. § 19.2-59 (Repl. Vol. 1983) provides that "no officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer." Despite this restrictive language, the Virginia Supreme Court has recognized those exceptions to the fourth amendment which have been adopted by the United States Supreme Court. *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977).

6. See, e.g., *Cady v. Dombroski*, 413 U.S. 433 (1973).

7. In *Terry v. Ohio*, 392 U.S. 1, 20 (1968), the Court stated "that the police must, whenever practicable, obtain advance judicial approval of searches and seizures."

8. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

- (a) Search of person incident to arrest
- (b) Search of area under control of person arrested
- (c) Hot pursuit
- (d) Stop and frisk
- (e) Exigent circumstances
- (f) Plain view
- (g) Search of vehicles incident to arrest
- (h) Search of vehicles pursuant to exigent circumstances

(2) Exceptions based on “reasonableness” (a lessened expectation of privacy):

- (a) Consent by the defendant
- (b) Consent by a third party
- (c) Open view
- (d) Airport searches
- (e) Border searches
- (f) Search of vehicles based on an inventory or a diminished expectation of privacy
- (g) Search of inmates

In addition, administrative searches, a separate category of searches, give rise to another set of exceptions to the warrant requirement.

These categories must be approached with some caution as courts often mix together the underlying rationales. For example, the search of motor vehicles can be placed in a number of distinct categories depending upon the rationale put forth in the particular case.

II. WARRANTLESS SEARCHES

A. *Exceptions Based on the Need for Immediate Action*

1. Search of Person Incident to Arrest

A search incident to arrest is invalid unless the arrest itself is lawful.⁹ The search must be “incident to” or “substantially contemporaneous” with the lawful arrest. The search may actually precede the arrest if the search and arrest are nearly simultaneous and the police have probable cause to arrest at the time the search

9. *Hart v. Commonwealth*, 221 Va. 283, 269 S.E.2d 806 (1980). For a discussion of arrests, see R. BACIGAL, *VIRGINIA CRIMINAL PROCEDURE* §§ 2-1 to -7 (1983).

takes place.¹⁰ The defendant may be searched at the place of the arrest or when he is administratively processed at the jail.¹¹ Even a "substantial delay" (ten hours) between the arrest and the taking of the defendant's clothing for use as evidence has been upheld by the United States Supreme Court.¹²

The basis of the "search incident" exception is the need for police to take immediate action to guard against the defendant's use of weapons to resist arrest or effect an escape, and to prevent the defendant from destroying evidence.¹³ These underlying justifications for the exception limit the surrounding area which may be searched,¹⁴ but do not determine the limits of a proper search of the arrestee's person. The search of the arrestee's person is further justified by the United States Supreme Court's determination that a person who has been taken into custody retains no significant expectation of privacy.¹⁵ A custodial arrest, thus, justifies a search of the person, and the police need not point to particular facts suggesting the presence of weapons or easily destructible evidence.¹⁶

By statute, "strip searches" may not be conducted of persons arrested for traffic infractions, Class 3 or 4 misdemeanors, or violations of city, county or town ordinances which are punishable by less than 30 days in jail.¹⁷

2. Search of Area Under Control of Person Arrested

In *Chimel v. California*,¹⁸ the United States Supreme Court held that officers have the right to search not only the defendant, but also the area within his immediate control. While there is no right

10. *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Wright v. Commonwealth*, 222 Va. 188, 278 S.E.2d 849 (1981); *Italiano v. Commonwealth*, 214 Va. 334, 200 S.E.2d 526 (1973).

11. *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974).

12. *United States v. Edwards*, 415 U.S. 800 (1974).

13. *Chimel v. California*, 395 U.S. 752 (1969).

14. See *infra* notes 18-27 and accompanying text.

15. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

16. See cases cited *supra* note 15.

17. VA. CODE ANN. § 19.2-59.1 (Repl. Vol. 1983). Strip searches are defined as "having an arrested person remove or arrange some or all of his clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts, or undergarments of such person." *Id.* Strip searches must be conducted by persons of the same sex as the person arrested and out of the sight of all other persons. "Body cavity" searches must be conducted under the supervision of medically trained personnel. *Id.*

18. 395 U.S. 752 (1969); see also *Hollis v. Commonwealth*, 216 Va. 874, 223 S.E.2d 887 (1976).

to search an entire house as an incident of lawful arrest, a search may be made in the area into which the arrestee might reach in order to grab a weapon or evidentiary items. Identifying the area or items "within lunging distance"¹⁹ of the arrestee is obviously a factual question. "Unlike searches of the person . . . searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest."²⁰ The search of areas under the control of the arrestee, therefore, can only be justified by the practical need to remove weapons and evidence from the defendant's control.

The courts have not been impressed with the argument that an arrestee in the secure grip of the police (e.g., handcuffed) is no longer a real threat to seize weapons or evidence.²¹ The courts assume that such an arrestee still has considerable freedom of movement even though he is under the control of the police. The courts have attached greater significance to the police practice of removing items from the control of the arrestee. In *United States v. Chadwick*, the Court held that "[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest."²²

The search of an area under the control of the arrestee must be made substantially contemporaneous with the arrest. The Virginia Supreme Court has allowed a search of a motel room to take place 10 to 30 seconds after the arrestee was taken from the room.²³ The United States Supreme Court has upheld a search for weapons conducted just before the defendant was arrested.²⁴ Areas and items not accessible to the defendant at the time of arrest may subsequently come under his control. The police may not arrest a person and then bring that person into contact with his possessions for the purpose of conducting a search incident to arrest.²⁵

19. *State v. Bracco*, 15 Or. App. 672, 517 P.2d 335 (1973).

20. *United States v. Chadwick*, 433 U.S. 1, 16 n.10 (1977).

21. See *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973).

22. 433 U.S. 1, 15 (1977). In *Chadwick*, the search of the footlocker also took place more than an hour after the arrest occurred. See *infra* notes 60-98 and accompanying text.

23. *Kirkpatrick v. Commonwealth*, 211 Va. 269, 176 S.E.2d 802 (1970).

24. *Warden v. Hayden*, 387 U.S. 294 (1967). See *infra* notes 28-29 and accompanying text for a discussion of hot pursuit.

25. *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973).

The police, however, do have the authority to "monitor the movements of an arrested person" and to remain at his "elbow at all times."²⁶ While properly accompanying the arrestee, the officer may observe seizable items, and such items may be seized under the "plain view" doctrine.²⁷

3. Hot Pursuit

In *Warden v. Hayden*,²⁸ the United States Supreme Court recognized the hot pursuit exception to the warrant requirement. The case, typical of the hot pursuit exception, involved a fleeing robber who entered a certain house. The police, informed of the robbery, knocked at the house, were admitted, and searched the entire house. Hayden, who was found in an upstairs bedroom feigning sleep, was arrested. Meanwhile, an officer discovered a shotgun and pistol in the adjoining bathroom, while another policeman found a jacket and trousers of the kind worn by the robber in a washing machine in the basement.

The Supreme Court affirmed the warrantless search, stating that under the exigencies of the situation, the search was imperative. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."²⁹ Where speed is essential, a thorough search for persons and weapons is permissible to insure that the police can gain control of all weapons which can be used against them or to effect an escape.

4. Stop and Frisk

In a stop-and-frisk situation, there is a limited right to check for weapons.³⁰

5. Exigent Circumstances

Many of the "well-delineated exceptions" to the warrant clause requirement are merely specific types of exigent circumstances.³¹

26. *Washington v. Chrisman*, 455 U.S. 1 (1982).

27. *Id.* See *infra* notes 47-59 and accompanying text for a discussion of plain view.

28. 387 U.S. 294 (1967). See also *United States v. Santana*, 427 U.S. 38 (1976); *Kirkpatrick v. Commonwealth*, 211 Va. 269, 176 S.E.2d 802 (1970).

29. *Warden v. Hayden*, 387 U.S. 294, 298 (1967).

30. For a discussion of stop and frisk, see BACIGAL, *supra* note 9, §§ 3-1 to -4.

31. See *supra* notes 5-8 and accompanying text.

Search incident to arrest, hot pursuit, and stop and frisk are particular types of emergencies which occur often enough that the courts treat them as separate exceptions to the warrant clause. What is considered in this section is the basic rationale which is used to identify exigent circumstances which do not fit within the other well-established categories.

An exigent circumstance can be defined as a situation where the law enforcement officer confronts "an immediate major crisis in the performance of duty [which] affords neither time nor opportunity to apply to a magistrate."³² In *Camara v. Municipal Court*,³³ the Court spoke of dispensing with the warrant requirement whenever "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."³⁴ In determining whether the delay to obtain a warrant will frustrate the purpose of the search, the courts have considered three factors:³⁵ (1) the time required to obtain a warrant; (2) the time required to frustrate the search by destroying or altering the object of the search; and (3) the likelihood that the destruction or alteration will take place.³⁶

The first factor requires the court to examine the particular facts and assess the difficulty or ease with which a warrant could have been obtained. The time required to obtain a warrant will obviously vary according to the physical setting involved (e.g., urban vs. rural community), the number of magistrates on duty,³⁷ and the time of day or night.³⁸ The second factor requires the court to assess the difficulty or ease with which the purpose of the search could be frustrated, most typically by the defendant's destruction of the sought-after evidence. Such a determination again requires close examination of the particular facts. For example, there is a

32. *District of Columbia v. Little*, 178 F.2d 13, 17 (D. C. Cir. 1949).

33. 387 U.S. 523 (1967).

34. *Id.* at 533. See also *Wright v. Commonwealth*, 222 Va. 188, 278 S.E.2d 849 (1981).

35. In *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), the Court rejected a proposed "murder scene" exception and noted that "the seriousness of the offense under investigation [does not] itself [create] exigent circumstances . . ." Many lower courts regard the gravity of the suspected offense as a factor to be considered. See, e.g., *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978).

36. See generally Bacigal, *The Emergency Exception to the Fourth Amendment*, 9 U. RICH. L. REV. 249 (1975).

37. See, e.g., *Shepard v. State*, 319 So. 2d 127 (Fla. Dist. Ct. App. 1975) (considering the efficiency of the administrative machinery for issuing a warrant). See also *Fore v. Commonwealth*, 220 Va. 1007, 265 S.E.2d 729 (1980).

38. *Raffield v. State*, 333 So. 2d 534 (Fla. Dist. Ct. App. 1976) (difficulty of obtaining a warrant on Christmas Eve); *People v. Torres*, 45 A.D.2d 185, 357 N.Y.S.2d 93 (1974) (difficulty of obtaining a warrant on Saturday night).

great difference in the time required to dismantle a bootleg still, and the time required to flush a small quantity of drugs down a nearby commode.³⁹

The third factor, determining the likelihood that destruction of evidence will occur, is perhaps the most difficult determination. Except in rare cases,⁴⁰ the sought-after evidence will not self-destruct, and an affirmative act is required by some party to destroy or alter the evidence. The courts, therefore, must assess the *probability* that someone will act to destroy the evidence. If the defendant himself has the power to destroy the evidence, the courts assume that he is likely to avail himself of the opportunity.⁴¹ The likelihood that third parties will destroy evidence, however, is much less clear. In *Vale v. Louisiana*,⁴² the United States Supreme Court was not impressed by the possibility that defendant's mother and brother could destroy evidence. The Court, perhaps in dicta, indicated that an emergency exists only when the actual destruction of evidence is imminent.⁴³ Lower courts have been much more willing to recognize the threat of third party destruction of evidence as sufficient exigent circumstances to justify a warrantless search.⁴⁴

A warrantless search is one possible response to an emergency situation; an alternative response would be for the police to "freeze the status quo" (act to prevent the destruction of evidence) until a warrant can be obtained. The United States Supreme Court has not ruled upon this issue⁴⁵ but some lower courts have recognized

39. See, e.g., *United States v. Delguyd*, 542 F.2d 346 (6th Cir. 1976); *Keeter & Bray v. Commonwealth*, 222 Va. 134, 278 S.E.2d 841 (1981).

40. In *Schmerber v. California*, 384 U.S. 757 (1966), the police took a blood sample to test the alcohol content of the suspect's blood. Since alcohol is absorbed by the blood system, the police knew that the evidence was presently being destroyed through the mere passage of time without the need for any affirmative act by the suspect.

41. The assumption that defendants will destroy incriminating evidence is the basis of the search incident to arrest exception, see *supra* notes 18-27 and accompanying text, and one form of "no-knock" exception, see *BACIGAL, supra* note 9, § 4-14.

42. 399 U.S. 30 (1970).

43. *Id.* at 34. See also *United States v. Davis*, 423 F.2d 974, 979 (5th Cir. 1970), where the court stated: "There is almost always a partisan who might destroy or conceal evidence."

44. See, e.g., *United States v. Turner*, 650 F.2d 526 (4th Cir. 1981); *United States v. Gardner*, 553 F.2d 946 (5th Cir. 1977); *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973); *Fore v. Commonwealth*, 220 Va. 1007, 265 S.E.2d 729 (1980); *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977).

45. In *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980), the Court noted that "the legality of temporarily detaining a person at the scene of suspected drug activity to secure a search warrant may be an open question."

the power of police to detain and monitor the actions of third parties who might destroy evidence.⁴⁶

6. Plain View

The plain view exception to the warrant requirement must be distinguished from the concept known as "open view" or "open fields."⁴⁷ The open view/open fields concept addresses the question of whether the police infringed upon the defendant's expectation of privacy (i.e., conducted a search).⁴⁸ Stated conversely, the open view/open fields doctrine addresses the issue of whether the defendant knowingly exposed an item to public view and, thus, had no expectation of privacy protected by the fourth amendment.

In contrast to the concept of open view, the plain view doctrine involves the seizure of an item in which the defendant unquestionably maintained an expectation of privacy. Like other exceptions, the plain view doctrine authorizes a warrantless invasion of this expectation of privacy; but unlike other exceptions, the plain view doctrine authorizes only a warrantless *seizure*, not a warrantless *search*.⁴⁹ In *Coolidge v. New Hampshire*,⁵⁰ the Court listed three requirements for plain view seizures: (1) the police were lawfully in a position to view the seizable item; (2) it is immediately apparent to the police that what is in plain view is an item subject to seizure; and (3) the discovery of the item was "inadvertent."

Under the first requirement the police must establish their justification for being in a place where they could view the seizable item. If the police have entered private property or any area protected by the fourth amendment, they must justify their initial intrusion into the area by pointing to an arrest or search warrant,⁵¹ or to one of the recognized exceptions to the warrant requirement.⁵² For example, the police may lawfully enter the defendant's premises pursuant to a search warrant for narcotics. If while prop-

46. See, e.g., *United States v. Tate*, 648 F.2d 939 (4th Cir. 1981); *Keeter & Bray v. Commonwealth*, 222 Va. 134, 278 S.E.2d 841 (1981); *Ferdin v. Superior Court*, 36 Cal. App. 3d 774, 112 Cal. Rptr. 66 (1974).

47. See *infra* notes 118-26 and accompanying text.

48. See BACIGAL, *supra* note 9, § 4-3.

49. Plain view "applies only where there was no search for the object seized." *Lugar v. Commonwealth*, 214 Va. 609, 612, 202 S.E.2d 894, 897 (1974).

50. 403 U.S. 443 (1971).

51. *Holloman v. Commonwealth*, 221 Va. 947, 275 S.E.2d 620 (1981); *Upton v. Commonwealth*, 211 Va. 445, 177 S.E.2d 528 (1970).

52. *Lugar v. Commonwealth*, 214 Va. 609, 202 S.E.2d 894 (1974).

erly searching for the narcotics, the police come across obscene materials, the police will point to the search warrant as the justification for entry of the premises and point to the plain view doctrine as justification for seizure of the obscene material.⁵³ The initial intrusion which must be justified before the plain view doctrine applies is not merely an intrusion into private premises but the particular intrusion into a specific part of the general premises. In *Holloman v. Commonwealth*,⁵⁴ the police were lawfully on the premises and could legitimately examine all containers which might contain the beer and whiskey listed in the search warrant. The search warrant did not justify the examination of small containers which could not hide beer and whiskey. Items thus found within the small containers were not subject to plain view seizure because the police could not justify their intrusion into the containers.

The second requirement for plain view seizures is that the observed item be immediately recognizable as a seizable item. In *Upton v. Commonwealth*,⁵⁵ the police found seven "nude" pictures while searching a drawer for narcotics. The police seized the pictures as evidence of the defendant's intent to "sell, rent, lend, transport, or commercially distribute"⁵⁶ obscene materials. The Virginia Supreme Court held the seizure unlawful, because nudity does not automatically constitute obscenity; thus, the police could not have immediately recognized the nude pictures as seizable evidence of a crime.

The most unsettled aspect of the plain view doctrine is the requirement that discovery of an item in plain view be "inadvertent." The "inadvertence" requirement was promulgated by a plurality of the Justices in *Coolidge v. New Hampshire*.⁵⁷ The plurality opinion indicated that when the discovery of an item is "anticipated" (i.e., where the police know in advance the nature and location of the item) the plain view doctrine does not apply. The plurality appeared to regard anticipated discovery as a form of planned warrantless seizure which would frustrate both the war-

53. See *Upton v. Commonwealth*, 211 Va. 445, 177 S.E.2d 528 (1970) (seizure held unlawful because obscene material not immediately recognizable as seizable). See also *United States v. Crouch*, 648 F.2d 932 (4th Cir. 1981).

54. 221 Va. 947, 275 S.E.2d 620 (1981).

55. 211 Va. 445, 177 S.E.2d 528 (1970). See also *Walter v. United States*, 447 U.S. 649 (1980).

56. VA. CODE ANN. § 18.1-228 (repealed 1975).

57. 403 U.S. 443 (1971).

rant requirement and the fourth amendment's function in checking police power.⁵⁸ The binding precedential effect of the "inadvertence" requirement is uncertain, since it represented the view of only a plurality of the Justices. The most recent Virginia case, however, appears to have adopted the requirement.⁵⁹

7. Search of Vehicles Incident to Arrest

It is doubtful that there is a single "automobile" exception to the warrant requirement.⁶⁰ The United States Supreme Court has upheld automobile searches incident to arrest, pursuant to "exigent circumstances,"⁶¹ and on the theory that individuals have a "lesser expectation of privacy in a motor vehicle."⁶² The present section addresses the search of vehicles incident to arrest, while subsequent sections consider the search of an automobile under exigent circumstances,⁶³ and the inventory of automobiles in which defendants have a lessened expectation of privacy.⁶⁴

The purpose of a search incident to arrest is to locate weapons and evidence related to the offense for which the arrest is made.⁶⁵ In order to justify a search of a vehicle incident to arrest, the initial arrest must be valid,⁶⁶ and the defendant must be in or very near the vehicle. The arresting officer may then search that area of the vehicle which is under the control of the defendant.⁶⁷ In *New York v. Belton*,⁶⁸ the United States Supreme Court held that "when a policeman has made a lawful custodial arrest of the occu-

58. See BACIGAL, *supra* note 9, § 4-1.

59. *Holloman v. Commonwealth*, 221 Va. 947, 275 S.E.2d 620 (1981).

60. See generally Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale In Search of a Clearer Label*, 27 MERCER L. REV. 987 (1976).

61. See *supra* notes 31-46 and accompanying text.

62. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977).

63. See *infra* notes 81-98 and accompanying text.

64. See *infra* notes 139-52 and accompanying text.

65. See BACIGAL, *supra* note 9, § 4-9.

66. An indiscriminate stop of a vehicle without probable cause was held invalid in *Delaware v. Prouse*, 440 U.S. 648 (1979). If there is a valid custodial arrest of the driver, the driver's person may be searched. *United States v. Robinson*, 414 U.S. 218 (1973). If the driver is merely stopped in order to issue a citation, the driver may be ordered to exit the automobile. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). If upon exiting the vehicle, the officer has reason to believe the driver is armed and dangerous, the officer may frisk the driver for weapons. *Id.*

67. *Preston v. United States*, 376 U.S. 364 (1964); *Kirby v. Commonwealth*, 209 Va. 806, 167 S.E.2d 411 (1969).

68. 453 U.S. 454 (1981).

pant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."⁶⁹ The Court adopted this straightforward rule⁷⁰ with respect to the interior of vehicles, in order to avoid endless litigation over the question of which particular areas of the interior were actually within "lunging distance" of the defendant.⁷¹

While the interior of the automobile can always be searched incident to arrest, the same is not necessarily true of the vehicle's trunk. Unless the automobile's trunk is an area under the immediate control of the defendant, the search of the trunk must be justified by probable cause to search. Of course, in a given case there may be both probable cause to arrest the driver and probable cause to search the car, but the two theories are distinct and should not be confused.⁷²

When legitimately searching any portion of the vehicle which is under the control of the arrestee, the police may encounter a sealed container, as, for example, a suitcase,⁷³ footlocker,⁷⁴ wrapped package,⁷⁵ or a paper bag.⁷⁶ In *New York v. Belton*,⁷⁷ the Court permitted the police to open the zippered pockets of a jacket found in the passenger compartment because "if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach." While the Court has never addressed a search incident to arrest of containers found in the trunk of the arrestee's vehicle,⁷⁸ the rationale of *Belton* seems to apply to all portions of the automobile which are under the control of the

69. *Id.* at 460. The Court went on to state that "the police may also examine the contents of any containers found within the passenger compartment." *Id.*

70. Justice Powell noted that dissatisfaction with the exclusionary rule spurs the Court to "reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder." *Robbins v. California*, 453 U.S. 420, 430 (1981) (concurring opinion).

71. See *supra* notes 18-27 and accompanying text.

72. *Westcott v. Commonwealth*, 216 Va. 123, 216 S.E.2d 60 (1975); *McKoy v. Commonwealth*, 212 Va. 224, 183 S.E.2d 153 (1971). See *infra* notes 81-98 and accompanying text.

73. *Arkansas v. Sanders*, 442 U.S. 753 (1979).

74. *United States v. Chadwick*, 433 U.S. 1 (1977).

75. *Robbins v. California*, 453 U.S. 420 (1981).

76. *United States v. Ross*, 456 U.S. 798 (1982).

77. 453 U.S. 454, 460 (1981).

78. The Court in *United States v. Ross*, 456 U.S. 798 (1982), limited its holding to the search of vehicles based on probable cause to search and did not deal with search incident to arrest. In *Ross*, the Court noted that *United States v. Chadwick*, 433 U.S. 1 (1977), dealt only with the government's argument that all movable containers found in public are subject to a warrantless search. 456 U.S. at 812.

arrestee.⁷⁹ If the trunk is within reach of the arrestee, so also will containers in the trunk be within his reach.⁸⁰

8. Search of Vehicles Based on Exigent Circumstances

In *Carroll v. United States*,⁸¹ the Supreme Court held that automobiles may be searched without a warrant when: (1) there is probable cause to believe that seizable items are within the vehicle, and (2) it is not practicable to secure a warrant because the vehicle could be moved while the police look for a magistrate. The inherent mobility of automobiles was thus recognized as one of the first forms of exigent circumstances.⁸² The requirement for mobility, however, has been eroded by recent decisions. *Chambers v. Maroney*⁸³ held that if the emergency existed at the time the vehicle was stopped, the search of the automobile could take place after the vehicle was immobilized and taken to the police station. In *Patty v. Commonwealth*,⁸⁴ the Virginia Supreme Court upheld a warrantless search even though the automobile had been immobilized and the police had ample time to obtain a search warrant.⁸⁵ While the particular automobile's mobility or lack thereof is now a questionable requirement, the courts continue to require that the police have full probable cause to search the vehicle.⁸⁶

The search of containers found in a vehicle has had a checkered history.⁸⁷ In its most recent decision, *United States v. Ross*,⁸⁸ the Supreme Court rejected those previous holdings and rationales

79. In *Belton*, the Court noted that while the police could not search all the drawers in an arrestee's house simply because the police had arrested him at home, the drawers within an arrestee's reach could be searched because of the danger their contents might pose to the police. 453 U.S. at 461.

80. Justice Powell has noted his willingness to give police broad powers in search incident cases so that the officer would not be required "to make close calculations about danger to himself or the vulnerability of evidence." *Robbins v. California*, 453 U.S. 420, 431 (1981) (concurring opinion).

81. 267 U.S. 132 (1925). See also *Vass v. Commonwealth*, 214 Va. 740, 204 S.E.2d 280 (1974).

82. See *supra* notes 31-46 and accompanying text.

83. 399 U.S. 42 (1970). See also *Texas v. White*, 423 U.S. 67 (1975).

84. 218 Va. 150, 235 S.E.2d 437 (1977).

85. See also *Fore v. Commonwealth*, 220 Va. 1007, 265 S.E.2d 729 (1980); *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977).

86. *Saunders v. Commonwealth*, 218 Va. 294, 237 S.E.2d 150 (1977).

87. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981); *Robbins v. California*, 453 U.S. 420 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

88. 456 U.S. 793 (1982).

which were inconsistent with the decision in *Ross*.⁸⁹ The Court held that if there is probable cause to believe that a seizable item⁹⁰ is located in the vehicle, the proper scope of the search is not defined by the nature of the container in which the item is secreted. A lawful search "generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."⁹¹ The Court thus refused to recognize any "nice distinctions" between glove compartments, upholstered seats, trunks, and wrapped packages. If there is probable cause to believe a seizable item is located in the vehicle, police may search any container or any part of the vehicle where the item could be located.⁹²

The holding in *Ross* throws doubt upon the continuing validity of the Virginia Supreme Court's decision in *Abell v. Commonwealth*.⁹³ In *Abell*, the court held illegal an "exigent circumstances" search of an attache case found in the vehicle's trunk.⁹⁴ The court found that the police had probable cause to stop and search the automobile, but the court noted that the exigent circumstances ceased when the vehicle's keys were removed, and the attache case came within the exclusive control of the officers. Having eliminated the risk that the vehicle could be moved "there was no reason why [the police] could not have obtained a warrant before conducting the search."⁹⁵ *Abell* relied upon the rationale of *Arkansas v. Sanders*,⁹⁶ a rationale which was specifically rejected in *Ross*. It should also be noted that although the Virginia Supreme Court later referred to *Abell* as a search incident to arrest case,⁹⁷ this appears to be a misstatement as the *Abell* opinion clearly notes that "the present case does not involve . . . a war-

89. The Court specifically referred to *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *Robbins v. California*, 453 U.S. 420 (1981).

90. *Ross* dealt with contraband, but the rationale would seem to apply to any seizable item. See BACIGAL, *supra* note 9, § 4-6.

91. 456 U.S. 798, 820-21 (1982) (footnote omitted).

92. See *Michigan v. Thomas*, 458 U.S. 259 (1982). See generally BACIGAL, *supra* note 9, § 4-6.

93. 221 Va. 607, 272 S.E.2d 204 (1980).

94. *But see Hamby v. Commonwealth*, 222 Va. 257, 279 S.E.2d 163 (1981) (upholding the search of a briefcase found in the vehicle's interior during an "inventory" of the automobile). See *infra* notes 139-52 and accompanying text.

95. *Abell*, 221 Va. at 614, 272 S.E.2d at 209.

96. 442 U.S. 753 (1979).

97. *Hamby*, 222 Va. at 262, 279 S.E.2d at 166.

rantless search incident to arrest."⁹⁸

B. *Exceptions Based on Reasonableness*

1. Consent by the Defendant

Valid consent to a search eliminates the need to obtain a search warrant and the need for probable cause.⁹⁹ The only justification for the search that the government need offer is that the defendant's¹⁰⁰ consent to search was "freely and voluntarily given."¹⁰¹ The burden of proof is on the prosecution to demonstrate that the consent was, in fact, freely and voluntarily given.¹⁰²

The same standard applies in determining the voluntariness of a consent to search as pertains to confessions.¹⁰³ A court thus looks to the totality of the surrounding circumstances and considers such factors as the youth of the accused, his lack of education, length of any detention, prolonged nature of questioning, deprivation of food or sleep, and the psychological impact of these things on the accused. No single factor is controlling, and the officer's failure to inform the defendant of his fourth amendment protections or his right to refuse consent does not render the consent involuntary.¹⁰⁴

Where consent is obtained through coercion, it will not be deemed voluntary. In *Bumper v. North Carolina*,¹⁰⁵ the consent to a search of a house by the defendant's grandmother was held to be involuntary when the officer falsely claimed to have a search war-

98. *Abell*, 221 Va. at 617, 272 S.E.2d at 210.

99. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Bumper v. North Carolina*, 391 U.S. 543 (1968).

100. The term defendant here refers to the person whose premises, property, or person was the subject of a police investigation. See *infra* notes 110-17 and accompanying text for a discussion of the consent of third parties.

101. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

102. 412 U.S. at 222. See also *Lowe v. Commonwealth*, 218 Va. 670, 239 S.E.2d 112 (1977); *Hairston v. Commonwealth*, 216 Va. 387, 219 S.E.2d 668 (1975), *cert. denied*, 425 U.S. 937 (1976).

103. See *BACIGAL*, *supra* note 9, § 7-1 to -15. The voluntariness of the consent is a question of fact to be determined by the trial court and must be accepted on appeal unless clearly erroneous. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979).

104. *United States v. Watson*, 423 U.S. 411 (1976).

105. 391 U.S. 543 (1968). See also *Sullivan v. Commonwealth*, 210 Va. 205, 169 S.E.2d 580 (1969). Informing the defendant that an affidavit for a search warrant "was being prepared," did not render the defendant's consent involuntary in *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979).

rant. In *McMillon v. Commonwealth*,¹⁰⁸ the court noted that "since arrest carries its own aura of coercion, the burden on the government to show voluntary consent is particularly heavy."¹⁰⁷

When conducting a consent search the police have no more authority than they have been given by the consent.¹⁰⁸ The terms of the defendant's consent will establish the permissible scope of the search in regard to time, duration, area, and intensity. Thus consent to search an apartment for a fugitive does not give the police the privilege to search spaces which obviously could not hide a man.¹⁰⁹

2. Consent by a Third Party

One of the difficult concepts in the area of third-party searches is the realization that one person is permitted to waive the right to privacy of someone else. The theory behind third-party consent is not particularly clear, but in *United States v. Matlock*,¹¹⁰ the United States Supreme Court held that one who shares use, access, or control of property or premises also shares in the right to consent to a search.¹¹¹ Whatever the defendant's subjective expectation of privacy may be,¹¹² by sharing use, access, or control with a third party the defendant is deemed to have "assumed the risk" that the third party will consent to a search.¹¹³

Although third-party consent searches arise most often in situations involving spouses and parent-children relationships, the legal status of the parties is not the controlling factor.¹¹⁴ It is the practi-

106. 212 Va. 505, 184 S.E.2d 773 (1971).

107. *Id.* at 509, 184 S.E.2d at 776 (quoting *Gorman v. United States*, 380 F.2d 158, 163 (1st Cir. 1967)). But in *Lowe v. Commonwealth*, 218 Va. 670, 677, 239 S.E.2d 112, 117 (1977), the court found that voluntary consent was given by a defendant who was "in custody, handcuffed, sitting on the floor and surrounded by his armed captors." The officers did not have their guns drawn, and no threats or promises were made to the defendant.

108. "Consent to search a garage would not implicitly authorize a search of an adjoining house . . ." *Walter v. United States*, 447 U.S. 649, 657 (1980).

109. *Lugar v. Commonwealth*, 214 Va. 609, 202 S.E.2d 894 (1974).

110. 415 U.S. 164, (1974).

111. *See Black v. Commonwealth*, 223 Va. 277, 288 S.E.2d 449 (1982); *Henry v. Commonwealth*, 211 Va. 48, 175 S.E.2d 416 (1970).

112. Consent "is a particularly open concept, which refers to both an 'internal' state of mind and an 'external' performance . . ." Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 55 (1974).

113. *Frazier v. Cupp*, 394 U.S. 731 (1969).

114. In *United States v. Matlock*, 415 U.S. 164 (1974), the Court appeared unconcerned with whether the defendant's roommate of the opposite sex was his wife, common-law wife,

cal day-to-day living arrangements which determine whether the third party had the right to consent to a search.¹¹⁵ In *United States v. Block*,¹¹⁶ the Fourth Circuit held that a parent could not consent to the search of a footlocker which had been set aside for a son's use. Thus, consent of a third party cannot extend to areas or materials used exclusively by the defendant.¹¹⁷

3. Open View/Open Fields

The plain view doctrine previously discussed¹¹⁸ involves the seizure of an item in which the defendant unquestionably maintained an expectation of privacy. The open view/open fields concept considered in this section addresses the issue of whether the defendant has an expectation of privacy protected by the fourth amendment. Stated conversely, the question is whether the police conducted a search within the meaning of the fourth amendment.¹¹⁹

The fourth amendment which protects individuals in their "persons, houses, papers, and effects" does not extend to open fields.¹²⁰ Thus, no search warrant is necessary for a search of a field beyond the curtilage of a dwelling house.¹²¹ Likewise, no search occurs when the police observe an item which the defendant has exposed to public view. It is "entirely lawful, for a police officer who is on a public street or sidewalk to look, either deliberately or inadver-

or paramour. In *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962), the court discussed the effect of a parent's consent on the legality of a search and seizure.

115. Although hotel proprietors and landlords have a limited legal right of access to the premises, this is not the type of access which empowers them to consent to a search of the individual's room. See *Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United States*, 365 U.S. 610 (1961); *United States v. Jeffers*, 342 U.S. 48 (1951). See also *Morris v. Commonwealth*, 208 Va. 331, 157 S.E.2d 191 (1967) (the court held that a nurse lacked control over the defendant's hospital room and thus could not consent to a taking of personal effects from the room). Cf. *Craft v. Commonwealth*, 221 Va. 258, 269 S.E.2d 797 (1980) (the court held that no search occurred when the emergency room surgeon gave the police a shirt and bullet removed from the defendant).

116. 590 F.2d 535 (4th Cir. 1978). Cf. *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970) (where the court held that the mother had a legal right to remove an item of first class mail, addressed to their son, from the family mailbox and deliver it to the police); *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962) (where the defendant did not exclusively occupy or use any portion of his parent's house).

117. See, e.g., *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978).

118. See *supra* notes 47-59 and accompanying text.

119. See BACIGAL, *supra* note 9, § 4-2 to -3.

120. *Hester v. United States*, 265 U.S. 57 (1924).

121. *Patler v. Commonwealth*, 211 Va. 448, 177 S.E.2d 618 (1970).

tently, into an automobile parked on the street and to observe what is exposed therein to open view."¹²²

An individual may expose his property to open view, and thereby relinquish his expectation of privacy, by abandoning the property.¹²³ In *Abel v. United States*¹²⁴ the Court held that the fourth amendment does not protect property left in a hotel room trashcan. Several cases involving the search of garbage cans placed on the street have held that the items in question were abandoned.¹²⁵ When a person drops or throws contraband while he is being followed or approached by an officer, the property is treated as being abandoned. Such situations are commonly referred to as "dropsy" cases and raise the question of whether police officers "routinely perjure" themselves in testifying that the defendant dropped the drugs when he saw the officer approaching.¹²⁶

4. Airport Searches

The outbreak of aircraft hijackings in the past decade has led to the adoption of new measures to deal with the critical time when passengers board an airplane. The Federal Aviation Administration's "profile" of potential hijackers was originally used to single out individuals for a search.¹²⁷ Today, a metal-detecting device known as a magnetometer is most often used to screen all passengers.¹²⁸ If a passenger activates the magnetometer he is usually given a chance to remove all metal objects from his person and to be scanned again by the magnetometer. If the magnetometer is again activated there exists probable cause for a follow-up frisk or

122. *Cook v. Commonwealth*, 216 Va. 71, 73, 216 S.E.2d 48, 50 (1975). In *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977), the court questioned whether the viewing of a vehicle identification number could be considered a search. See VA. CODE ANN. § 46.1-9 (Repl. Vol. 1980).

123. *United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980). *Hawley v. Commonwealth*, 206 Va. 479, 144 S.E.2d 314 (1965). See also *Craft v. Commonwealth*, 221 Va. 258, 269 S.E.2d 801 (1980), where the defendant voluntarily sought medical treatment to remove a bullet from his body. The court held that no search or seizure occurred when the hospital gave the bullet to the police.

124. 362 U.S. 217 (1960).

125. *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978). *Contra* *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), cert. denied, 409 U.S. 1068 (1972).

126. See *People v. McMurty*, 64 Misc. 2d 63, 314 N.Y.S.2d 194 (Crim. Ct. 1970).

127. See *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

128. For an explanation of the workings of a magnetometer, see McGinley & Downs, *Airport Searches and Seizures — A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972).

search.¹²⁹

The Fourth Circuit has held that the use of the magnetometer itself constitutes a search under the fourth amendment.¹³⁰ A magnetometer search "does not precisely fit into one of the previously recognized categories for dispensing with a search warrant."¹³¹ Nonetheless, upon balancing the enormous dangers to life and property against the slight intrusion upon privacy, airport searches are normally held to be lawful under the general rubric of "reasonableness."¹³²

5. Border Searches

A search at a border incident to the entrance of a person into the United States is not protected by the fourth amendment; hence there is no requirement for probable cause or the issuance of a warrant. "Travelers may be . . . stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."¹³³

Rules applying to border searches are relevant in Virginia because of the ports in the Tidewater area,¹³⁴ and because an airport at which passengers arrive after a non-stop flight from outside the country is "the functional equivalent to a border" of the United States.¹³⁵ A search by customs agents of passengers at such an airport is not limited by the fourth amendment.¹³⁶ Thus, a person and his baggage arriving at a customs area may be searched with-

129. *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974); *United States v. Kirsch*, 493 F.2d 465 (5th Cir. 1974).

130. *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972). *See also United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980) (dealing with X-ray scanners), *cert. denied*, 451 U.S. 972 (1981).

131. *United States v. Edwards*, 498 F.2d 496, 498 (2d Cir. 1974). Most cases reject an implied consent theory because such consent is not freely and voluntarily given. "To make one choose between flying to one's destination and exercising one's constitutional right . . . in many situations [is] a form of coercion." *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974). However, *United States v. Edwards* held that notice and consent were factors to be considered under the general rubric of "reasonableness." *See also United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980).

132. *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974).

133. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

134. *See, e.g., United States v. McGlone*, 394 F.2d 75 (4th Cir. 1968).

135. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

136. *See United States v. Warner*, 441 F.2d 821 (5th Cir. 1971).

out the slightest suspicion.¹³⁷

While border searches are not controlled by the fourth amendment, the nature and extent of the search by customs officials is limited. Mere suspicion alone will not justify certain types of searches. If a customs official wishes to have a person disrobe, a real suspicion justifying the search must exist. If an examination of body cavities is made, there must be a clear indication that contraband will be found.¹³⁸

6. Inventory or Search of Vehicle Based on a Diminished Expectation of Privacy

Earlier discussion considered searches of an automobile incident to arrest¹³⁹ or based upon exigent circumstances.¹⁴⁰ Such searches did not focus upon the automobile as having a unique status in fourth amendment law. The cases merely recognized that an automobile may be an area under the control of the arrestee or that the mobility of an automobile may constitute one form of exigent circumstance. If the automobile has a distinct position in fourth amendment law it is not because of a vehicle's mobility.¹⁴¹ What makes the automobile unique is that "the extensive regulation of motor vehicles"¹⁴² and the high incident of "police-citizen contact involving automobiles"¹⁴³ diminish the expectation of privacy that one can have with regard to motor vehicles. This diminished expectation of privacy in automobiles may be relevant in determining the required level of probable cause and the necessity for a search warrant.¹⁴⁴

137. See *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967). A "stop" beyond the customs area "may be justified under circumstances less than those constituting probable cause for arrest or search." *United States v. Cortez*, 449 U.S. 411, 421 (1981). See also *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

138. *Henderson*, 390 F.2d 805. See also *United States v. Briones*, 423 F.2d 742 (5th Cir.), cert. denied, 399 U.S. 933 (1970). By statute, body cavity searches must be conducted under the supervision of medically trained personnel. VA. CODE ANN. § 19.2-59.1 (Repl. Vol. 1983).

139. See *supra* notes 60-80 and accompanying text.

140. See *supra* notes 81-98 and accompanying text.

141. The United States Supreme Court has recognized that automobile searches have been upheld when there was no real danger that the vehicle would be moved. See *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973). See also *Patty v. Commonwealth*, 218 Va. 150, 235 S.E.2d 437 (1977).

142. See, e.g., VA. CODE ANN. §§ 46.1-3, -7, -8, -9, -351.1 (Repl. Vol. 1980) (provisions for stopping, inspecting, and seizing vehicles under certain conditions).

143. *Cady*, 413 U.S. 433.

144. See, e.g., *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977). In *United States v. Chadwick*, 433 U.S. 1 (1971), the Court characterized as an "extreme view" the

One clearly distinct aspect of the so-called automobile exception to the warrant requirement is the right of police to inventory the contents of automobiles held in the custody of the police. In *South Dakota v. Opperman*,¹⁴⁵ the United States Supreme Court upheld the right of the police to inventory an impounded vehicle for the purpose of (1) protecting the owner's property while he is in custody or elsewhere, (2) protecting the officer against claims of the owner for alleged missing property, and (3) protecting the police and public from physical harm from the potentially dangerous contents of a seized automobile.¹⁴⁶ The above justifications for an "inventory" are distinct from the justifications for a "search" incident to arrest or due to exigent circumstances. For a search incident to arrest the police must have probable cause to arrest; for an exigent circumstances search the police must have probable cause to believe seizable items are in the automobile; for an inventory the police must be acting pursuant to police department regulations covering impounded automobiles.¹⁴⁷ Thus the inventory exception does not apply when the inventory is merely a pretext concealing an investigatory police motive.¹⁴⁸ A recent Virginia statute further limits the inventory exception by denying the police authority to impound and inventory an automobile when the arrested driver designates another person at the scene to remove the vehicle from the scene of the arrest.¹⁴⁹

An inventory of the contents of an automobile includes the authority to open and inventory sealed containers found in the vehicle. In *Hamby v. Commonwealth*¹⁵⁰ the court upheld the opening of an unlocked briefcase found in the vehicle's interior. The court

government's argument that the warrant clause did not apply to automobiles. Thus, while the expectation of privacy in automobiles is diminished when compared to dwellings, some expectation of privacy in automobiles remains and is protected by the fourth amendment.

145. 428 U.S. 364 (1976).

146. See *Girardi v. Commonwealth*, 221 Va. 459, 270 S.E.2d 743 (1980), *cert. denied*, 451 U.S. 913 (1981); *Reese v. Commonwealth*, 220 Va. 1035, 265 S.E.2d 746 (1980); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972).

147. See *supra* note 146.

148. In *Reese v. Commonwealth*, 220 Va. 1035, 265 S.E.2d 746 (1980), the court contrasted an investigatory police motive with the "benign purposes" underlying inventory searches.

149. VA. CODE ANN. § 19.2-80.1 (Repl. Vol. 1983). The statute deals only with impounding the vehicle after arrest when "there is no legal cause for the retention of the motor vehicle." The statute would not apply to situations where the police have probable cause to search the vehicle. See *supra* notes 60-98 and accompanying text. See also BACIGAL, *supra* note 9, § 2-42.

150. 222 Va. 257, 279 S.E.2d 163 (1981).

rejected the argument that an inventory search is limited to simply sealing and removing personal luggage as a whole, and thus limited *Arkansas v. Sanders*¹⁵¹ to searches of containers incident to arrest or based upon exigent circumstances.¹⁵²

7. Search of Inmates

In *Bell v. Wolfish*¹⁵³ the United States Supreme Court assumed *arguendo* that the fourth amendment has some application to prison inmates, but went on to note that any reasonable expectation of privacy would be of a diminished scope. The Virginia Supreme Court has refused to recognize a prisoner's expectation of privacy in cells and lockers when prison security officers are searching for drugs and weapons. In *Marrero v. Commonwealth*¹⁵⁴ the Court held that the time and manner of such searches must be left to the discretion of prison authorities. The Court approved the random¹⁵⁵ search of inmates and rejected the defendant's argument that prison officials must demonstrate an "informed judgment of the actual need for the search."¹⁵⁶

III. ADMINISTRATIVE SEARCHES

A. Generally

Prior to *Katz v. United States*¹⁵⁷ the Supreme Court had characterized the fourth amendment as primarily concerned with searches for evidence of criminal activity and only peripherally concerned with the right of privacy.¹⁵⁸ Thus, in *Frank v. Maryland*,¹⁵⁹ the Court held that "inspections" by health department officials were not "searches" which triggered fourth amendment protections. The *Frank* case was overturned in *Camara v. Municipal Court*¹⁶⁰ when the Court stated that it was "anomalous to say

151. 442 U.S. 753 (1979). Much of the rationale of *Arkansas v. Sanders* was disapproved in *United States v. Ross*, 456 U.S. 798 (1982).

152. See *supra* notes 81-98 and accompanying text.

153. 441 U.S. 520 (1979).

154. 222 Va. 754, 284 S.E.2d 809 (1981).

155. Cf. *Delaware v. Prouse*, 440 U.S. 648 (1979) (holding unconstitutional the "random" stopping of automobiles).

156. *Marrero*, 222 Va. at 756, 284 S.E.2d at 810.

157. 389 U.S. 347 (1967).

158. See BACIGAL, *supra* note 9, § 4-2.

159. 359 U.S. 360 (1959).

160. 387 U.S. 523, 530 (1967). See also *See v. City of Seattle*, 387 U.S. 541 (1967) (companion case to *Camara*).

that the individual and his private property are fully protected . . . only when the individual is suspected of criminal behavior." *Camara* and *Katz* together define a search as any government action which intrudes upon a legitimate expectation of privacy. The underlying motivation for the search, whether it be criminal investigation or benign purposes of public health and safety, is no longer relevant in defining the scope of fourth amendment protections.¹⁶¹

Having placed administrative searches within the scope of the fourth amendment, *Camara* went on to hold that, absent consent or exigent circumstances,¹⁶² a search warrant is required before the administrative search can take place. The administrative search warrant, however, does not have to be based on traditional probable cause which requires a reasonable belief that items related to a *crime* are located in the premises that the government seeks to enter.¹⁶³ *Camara* held that the reasonableness of the government's request for an administrative search warrant will be determined by considering such general factors as the passage of time since the last inspection, the condition of the particular building, conditions in the general area, or the need for periodic inspections in an entire area of the community. It is clear that, unlike a criminal search warrant, an administrative search warrant need not be based on specific knowledge of a violation in a particular building.

The Virginia Code sets forth separate procedures for inspections in connection with the manufacturing, emitting or presence of a toxic substance.¹⁶⁴ Such inspections differ from traditional administrative searches in the following regard: (1) the inspection warrant must be issued by a judge of the circuit court;¹⁶⁵ (2) consent to enter the premises must be sought and refused before a warrant may issue;¹⁶⁶ (3) in the case of entry into a dwelling, notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed;¹⁶⁷ (4) the inspection warrant is

161. *But see* *Wyman v. James*, 400 U.S. 309 (1971) (inspection "visits" by welfare officials not searches within the traditional meaning of that term).

162. *See infra* notes 170-80 and accompanying text.

163. *See* BACIGAL, *supra* note 9, § 4-6.

164. VA. CODE ANN. § 19.2-393 (Repl. Vol. 1983).

165. *Id.*

166. VA. CODE ANN. § 19.2-394 (Repl. Vol. 1983). Consent need not be sought if the affidavit for a warrant sets forth facts reasonably justifying the failure to seek consent. *Id.*

167. *Id.* § 19.2-396 (Repl. Vol. 1983).

valid for a maximum of ten days;¹⁶⁸ (5) the executing officers may not effectuate a forcible entry, an entry, or an inspection in the absence of the owner, custodian or possessor of the premises unless specifically authorized by the issuing judge.¹⁶⁹

B. *Exceptions to the Administrative Warrant Requirement*

In extending the warrant requirement to administrative searches, *Camara v. Municipal Court*¹⁷⁰ recognized two exceptions: (1) consent; and (2) emergency situations. As to consent searches the Court recognized that "most citizens allowed inspection of their property without a warrant" and consequently "warrants should normally be sought only after entry is refused."¹⁷¹ The Court has never indicated that consent to an administrative search differs from consent to a search for evidence of criminal activity. Presumably, the free and voluntary consent standard of *Schneckloth v. Bustamonte*¹⁷² applies to administrative searches.¹⁷³

The Court has recognized a form of "implied consent" which is applicable to inspections of certain heavily regulated businesses. In *Colonnade Catering Corp. v. United States*¹⁷⁴ (liquor distributor), *United States v. Biswell*¹⁷⁵ (firearm dealer), and *Donovan v. Dewey*¹⁷⁶ (Mine Safety and Health Act), the Court held that the defendant's decision to enter into a business which is subject to heavy government regulation amounts to implied consent to the warrantless inspections authorized by existing statutes and administrative regulations. The implied consent doctrine was limited to closely regulated industries in *Marshall v. Barlow's, Inc.*,¹⁷⁷ where the Court refused to approve warrantless inspections under the broadly applicable Occupational Safety and Health Act. As to the

168. *Id.* § 19.2-395 (Repl. Vol. 1983). All other warrants are valid for 15 days. See BACIGAL, *supra* note 9, § 4-13.

169. VA. CODE ANN. § 19.2-396 (Repl. Vol. 1983). The judge may authorize forcible entry upon a reasonable suspicion of an immediate threat to public safety, or where reasonable attempts to serve a previous warrant have been unsuccessful. *Id.*

170. 387 U.S. 523 (1967).

171. *Id.* at 539.

172. 412 U.S. 218 (1973).

173. See *supra* notes 99-109 and accompanying text.

174. 397 U.S. 72 (1970).

175. 406 U.S. 311 (1972).

176. 452 U.S. 594 (1981).

177. 436 U.S. 307 (1978).

emergency exception to the administrative warrant requirement, such emergencies rarely occur in the housing inspection or business inspection context. The leading case in the area of emergency inspections is *Michigan v. Tyler*,¹⁷⁸ which involved an inspection of the scene of a fire by fire marshals.¹⁷⁹ The case involved three separate inspections made: (1) while the firefighters were still at the scene, (2) a few hours later, and (3) some weeks later. The Court held that the second inspection was an extension of the first inspection, thus both inspections were lawful because "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." The third inspection, however, occurred after the exigent circumstances had ceased. Thus the warrantless inspection in the absence of an emergency was unlawful.

The holding in *Michigan v. Tyler* raises serious doubts about the continuing validity of *Bennett v. Commonwealth*,¹⁸⁰ where the Virginia Supreme Court upheld a warrantless entry by fire marshals the day following a fire.

178. *Michigan v. Tyler*, 436 U.S. 499 (1978).

179. In considering an inspection after the fire was extinguished, the Supreme Court noted that the initial entry by the firemen was clearly lawful. "[I]t would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze." *Tyler*, 436 U.S. at 509.

180. 212 Va. 863, 188 S.E.2d 215 (1972).