they only narrow the field of possible choice. The question still remains: which Catholic? In making this critical decision, other factors—ideology and party affiliation—are likely to be conclusive.

Second, Presidents show a clear preference for men resembling themselves. Thus, nearly half the appointees were within five years of the President's age, over half subscribed to a similar religion, and nearly half came from the same region. These relationships are far too high to be written off as mere coincidence. That Presidents tend to choose men with whom they share these basic attributes is not surprising, for even more than most of their decisions, the choice of a Justice is fraught with uncertainty. The President is faced with the task of predicting how a man will act on the bench, and this risky enterprise is made even riskier, when, as usually happens, the President knows little about constitutional law, is not well acquainted with the appointee personally, and recognizes that the appointment may, indeed, change the man.[44] Nor can the President apply an Alexandrian solution to these knotty problems and simply ask the prospective appointee what he will do, for tradition and the separation of powers forbids this, too. As Lincoln put it, "[W]e cannot ask a man what he will do, and if we should and he should answer us, we should despise him."[45] Moreover, while Presidents perceive the uncertainty of their choice, they also perceive its importance in affecting law, politics, and their public reputations for years to come. "The good that Presidents do is interred with their bones," Krislov notes wryly, but "[t]heir Supreme Court appointments live on after them."[46] Presidents, therefore, tend to fall back, and, consciously or unconsciously, choose men who resemble persons they are familiar with and can trust—persons, in short, like the Presidents themselves.

Thus, demographic factors, about which Presidents claim to be unconcerned and journalists whisper with the knowing style of a tout on a lucky streak, do, indeed, matter after all.

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[44] *See* Public Util. Comm'n v. Pollak, 343 U.S. 451, 466-67 (1952).
[45] BOUTWELL, 2 REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 29 (1902).
[46] KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 6 (1965).

SUSPICIOUS OBJECTS, PROBABLE CAUSE, AND THE LAW OF SEARCH AND SEIZURE

John L. Kuipers†

The complexities comprising the law of search and seizure have been described as a "quagmire".[1] Among the many elements which can combine together to furnish probable cause for a given search or seizure, the suspicious object often performs an important role. This Article will examine the function which the suspicious object frequently plays in prompting a search or seizure and will discuss the treatment which courts accord such objects in assessing the presence or absence of probable cause for a given police intrusion.

For the sake of brevity, this Article will not treat the role of suspicious objects in the law of arrest. Particular emphasis will, however, be placed upon the law governing search and seizure without a warrant, in order to analyze the problems peculiar to that area of jurisprudence.

I. PROBABLE CAUSE

A. *Definition*

A warrant for search or seizure can issue only upon satisfaction of the constitutionally-imposed requirement that probable cause (also called reasonable grounds) must exist prior to the desired intrusion and must furnish the justification therefor.[2] Most searches and seizures without a warrant are subject to the same restriction.[3]

Although difficult of precise definition,[4] probable cause is said to exist where the facts and circumstances known to the police officer and of which he has reasonably trustworthy information are adequate to warrant a man of reasonable caution in the belief "that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched."[5] Probable cause requires a higher quan-

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1 Chapman v. United States, 365 U.S. 610, 622 (1961) (dissenting opinion).

2 U.S. CONST. amend. IV states: "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."

3 There are, however, some exceptions. *See* text accompanying notes 29-46 *infra*.

4 "Verbal formulations defining probable cause are elusive and probably impractical." City, Hughes, Rose, Shannon & Young, *Search and Seizure—A Symposium*, 54 MASS. L.Q. 203, 216 (1969).

5 Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961). "In terms of the quantum of evidence re-

tum of persuasion than does reasonable suspicion,[6] and the latter is insufficient to satisfy the constitutional mandate for issuance of a warrant.[7]

B. *Elements*

While no exhaustive list of elements is feasible,[8] a determination of probable cause frequently includes consideration of factors relevant to the intrusion such as the presence of a suspicious object,[9] the time of day,[10] the location,[11] the seriousness of a suspected offense,[12] suspicious conduct by a suspect,[13] the suspect's reputation[14] or race,[15] the police officer's expertise[16] and the extent[17] and timeliness[18] of his background information.

Whatever variables are present in a given fact situation must cumulatively furnish a sufficient quantum of persuasion to transport the arguments for an intrusion across the nebulous boundary which separates mere suspicion from probable cause.[19] Where one or more variables in the probable cause equation are weak, the others must be proportionally stronger in order successfully to discharge the requisite burden of persuasion.

1. *The Nature of the Suspicious Object*

It is essential to understand clearly the nature of the suspicious object in the context of a probable cause determination. For purposes of analysis,

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quired, this is substantially the equivalent of the probable cause needed for an arrest warrant and of the reasonable grounds needed for arrest without warrant." However, "[e]ach requires probabilities as to somewhat different facts and circumstances—a point which is seldom made explicit in the appellate cases." LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. ILL. L. FORUM 255, 260 (footnotes omitted) [hereinafter cited as LaFave].

6 People v. Peters, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

7 Reasonable suspicion is sufficient for a limited search and seizure in certain situations. *See* text accompanying notes 29-46 *infra*.

8 Each case must be decided on its own facts and circumstances. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

9 People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970).

10 Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969).

11 Taylor v. State, 9 Md. App. 402, 264 A.2d 870 (Ct. Special App. 1970) (high crime area).

12 Note, *The Role of Reputation in Establishing Probable Cause for Arrest and Search*, 1969 WASH. U.L.Q. 339, 352.

13 "Suspicious conduct . . . is an essential element of probable cause." *Id.* at 346 (collecting cases).

14 "Courts recognize that reputation is a reliable element of probable cause, but it is uncertain what weight it is accorded." *Id.* at 340-41. However, Spinelli v. United States, 393 U.S. 410, 414 (1969) indicates that an allegation of known criminality without corroboration is "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."

15 United States v. Chaidez-Castro, 430 F.2d 766 (7th Cir. 1970).

16 People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970).

17 Draper v. United States, 358 U.S. 307 (1959). Such information may come from personal observation, from police reports, from informants, etc.

18 Timeliness is especially important in search and seizure cases. Too long a period between the time when facts were gathered and the time of search can be fatal. LaFave, *supra* note 5, at 264.

19 For a discussion of reasonable suspicion versus probable cause, *see* Brinegar v. United States, 338 U.S. 160, 175 (1949).

a given object may be classified as patently suspicious, extrinsically suspicious, or latently suspicious.[20] The patently suspicious object is one possessing characteristics sufficiently obvious to engender within the reasonable man a belief that the item is associated with unlawful activities. A mutilated corpse or a bloody dagger are examples of patently suspicious objects.

An extrinsically suspicious object appears inherently innocuous to either the trained or untrained observer, and becomes suspect only when viewed by one having certain extrinsic background information. Thus, in *State v. Carter*,[21] a seemingly innocent string of burlap hanging from the ear of a motorist stopped by police was rendered highly suspicious by the officer's knowledge that a man wearing a burlap face mask had just committed a robbery.

The latently suspicious object is not sufficiently obvious to trigger suspicion in the ordinary prudent man, but is recognizable by an individual possessing expertise, *i.e.*, special training and experience beyond that of the average layman. Marijuana is a rather common example of a latently suspicious item. The well-trained person can readily detect the peculiar characteristics[22] of this substance under circumstances in which the untrained layman would likely not discern anything unusual.

When a latently suspicious object is used as an element to demonstrate probable cause, it is essential to show that the expertise of the observer was adequate to permit a reasonable inference of suspicion regarding the item in question. It is therefore important to describe the kind and degree of training and skill attained by the observer and to indicate how this was utilized in the facts and circumstances of the case. The recent case of *People v. Nickles*[23] illustrates the relation between expertise and the latently suspicious object. In that case a police officer observed a pipe with a chrome cover lying on the floor of an automobile and confiscated it as a device used for smoking marijuana in violation of state law. The court sustained this seizure and stated:

> In the present case [the officer] testified that from his prior experience as an officer the subject pipe was of the sort in which marijuana was smoked, and that he had seen such a pipe used for the smoking of marijuana on at least two occasions previously . . . . Since [he] was testifying as a witness with special knowledge of the subject on which he undertook to give his opinion as an expert, the question of the degree of his knowledge went to the weight of his knowledge rather than to its admissibility.[24]

Where the latently suspicious object is an important element in the probable cause equation, failure to demonstrate expertise may result in a judicial

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[20] *See* Note, *The Role of Reputation in Establishing Probable Cause for Arrest and Search*, 1969 WASH. U.L.Q. 339, 346, describing a similar classification system for suspicious conduct.

[21] 161 N.W.2d 722 (Iowa 1968). The extrinsically suspicious burlap string formed one element constituting probable cause for the issuance of a warrant to search the vehicle.

[22] People v. Gordon, 10 Cal. App. 3d 454, 89 Cal. Rptr. 214 (2d Dist. 1970) (smell); People v. Figueroa, 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (2d Dist. 1969) (appearance).

[23] 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970).

[24] *Id.* at 993, 88 Cal. Rptr. at 768.

finding of no probable cause for the intrusion. Thus, in *Taylor v. State*[25] an officer "observed laying [*sic*] on the front seat two brown envelopes, and, from my past experience, knowing that these envelopes are used for narcotic drugs, I examined the envelopes."[26] The defendant appealed his conviction, and the reviewing court held that this evidence had been unconstitutionally seized. The opinion stated:

> The officer's right to seize the brown envelopes within the car . . . depended upon whether he had probable cause to believe that the brown envelopes . . . contained narcotic drugs. It is, of course, the function of the court to determine for itself the persuasiveness of the facts relied upon by the police to show probable cause—a function which it manifestly cannot perform unless it is informed of the facts upon which the officer acted. . . . In this connection, the expertise of the officer in narcotics cases may be an important factor in assessing the existence of probable cause.[27]

Since the officer failed to state any basis for his conclusion that the envelopes were latently suspicious, the court ruled that "if [the] constitutional standard is to be satisfied in the case before us, it must be shown, with specificity, rather than by mere conclusion, why the brown envelopes were recognized . . . to be of such distinctive nature and character as would permit [the officer] to conclude, based on his particularized expertise, that such envelopes probably contained narcotics."[28]

II. The Role of Suspicious Objects in Stop and Frisk Situations

Although probable cause is constitutionally required to justify most searches and seizures,[29] some intrusions are permitted upon a lower standard of justification under certain limited circumstances. The role of the suspicious object in such special situations will now be considered.

A. *Stop and Frisk*

In *Terry v. Ohio*,[30] the United States Supreme Court upheld the temporary detention (stop) and limited search (frisk)[31] of an individual upon "reasonable suspicion" which was not sufficient to constitute probable cause for arrest.[32] In approving the lesser standard, the Court noted that "the police officer must be able to point to specific and articulable facts which, taken together with

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25 9 Md. App. 402, 264 A.2d 870 (Ct. Special App. 1970).
26 *Id.* at 405, 264 A.2d at 872.
27 *Id.* at 407, 264 A.2d at 873.
28 *Id.* at 407-08, 264 A.2d at 873.
29 U.S. Const. amend. IV.
30 392 U.S. 1 (1968).
31 A "frisk" is "a carefully limited search of the outer clothing . . . to discover weapons . . . ." *Id.* at 30.
32 *See* Note, *Stop and Frisk: Invasion of Privacy Without Probable Cause*, 4 U. San Fran. L. Rev. 284 (1970).

rational inferences from those facts, reasonably warrant that intrusion."[33] The intuitive hunch is therefore an inadequate basis for a valid stop and frisk even under the liberalized *Terry* standard.[34] Thus, a police officer should detain a person only "if all the circumstances indicate that [there exist] reasonable grounds to suspect the individual has committed, is committing, or is about to commit a crime . . . ."[35] A frisk is permissible "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others . . . ."[36] The validity of the frisk is dependent upon the validity of the stop.[37]

The suspicious object in stop and frisk cases usually involves either an initially-visible "suspicious bulge" suggestive of a concealed weapon,[38] or else an object which, though not initially visible, is felt in the suspect's outer clothing during the frisk and which the officer's sense of touch suggests might be a weapon.[39] Although many such objects are of the latently suspicious type, the role of expertise is here usually limited to visual perception of the "suspicious bulge" or tactile determination that the concealed item feels like a weapon.[40] It is thus not surprising that a concealed object thought to be a weapon is sometimes revealed as contraband upon removal from the suspect.[41] The admissibility of such evidence will depend upon the reasonableness of the action leading to its exposure. If the contraband was removed during a valid frisk upon the reasonable belief that it was a weapon and was of a shape and texture such that a prudent man could regard the concealed object as a weapon, it will be admissible against the suspect.[42] This is true even where the contraband is removed simultaneously with another item believed to be a weapon but later found to be no weapon at all.[43]

Some question has arisen regarding the relative consistency of a concealed object necessary to warrant seizure, *i.e.*, whether a *soft* concealed item which a policeman believes to be a weapon may legally be removed from the suspect. The California supreme court recently considered this question and concluded:

> [A]n officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to

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[33] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[34] *Id.* at 27.

[35] NATIONAL DISTRICT ATTORNEYS ASSOCIATION, MANUAL ON THE LAW OF SEARCH AND SEIZURE 3a (1970) [hereinafter cited as MANUAL].

[36] Terry v. Ohio, 392 U.S. 1, 24 (1968). *See* MANUAL, *supra* note 35, at 5a.

[37] MANUAL, *supra* note 35, at 5a.

[38] People v. Courtney, 11 Cal. App. 3d 1185, 90 Cal. Rptr. 370 (1st Dist. 1970).

[39] People v. Watson, 12 Cal. App. 3d 130, 90 Cal. Rptr. 483 (3d Dist. 1970); MANUAL, *supra* note 35, at 5a.

[40] "Experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens." People v. Courtney, 11 Cal. App. 3d 1185, 1190, 90 Cal. Rptr. 370, 373 (1970).

[41] People v. Mosher, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969).

[42] *Id.*

[43] People v. Watson, 12 Cal. App. 3d 130, 90 Cal. Rptr. 483 (3d Dist. 1970) (bag of marijuana removed with smoking pipe erroneously thought to be a weapon).

> point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down. Only then can judges satisfy the Fourth Amendment's requirement of a neutral evaluation of the reasonableness of a particular search by comparing the facts with the officer's view of those facts . . . . Thus, for example, an officer who believes a soft object is a "sap" in the form of a small bag of sand must be able to point to its weight and consistency to justify an intrusion into the suspect's pocket.[44]

A California Court of Appeals recently extended the *Terry* doctrine to a situation other than the usual personal encounter between officer and suspect. In *People v. Baker*,[45] an employee of a bowling alley observed some white powder and a gun in the defendant Baker's locker. Police then inspected the locker without a warrant, removed the gun, and arrested Baker when he returned to the locker and opened it. The court sustained the legality of the police action and stated:

> [I]t would be small consolation to the widow of a slain policeman for some judge to say that her husband . . . had time to apply for a search warrant. It was not unreasonable for the officer to search for and remove the weapon . . . under the circumstances of this case.
>
> This is not to say that the rule . . . which prevents a search without a warrant merely because there is probable cause to search, may be violated with impunity. It is only when, as in this case, the officer has probable cause to investigate and is reliably informed of a hazard to his safety that he may neutralize and minimize the danger which might otherwise attend the investigation. *Terry* permits no less.[46]

III. Searches Without a Warrant

The fourth amendment requirement that "no Warrants shall issue, but upon probable cause . . ." is designed to subject the police officer's arguments for the necessity of an intrusion to the detached analysis of a magistrate.[47] This procedure is usually considered to be preventive rather than penal in nature.[48] Despite the general warrant requirement, some searches are permissible without a warrant when based on probable cause and exigent circumstances.[49] Suspicious objects frequently play a significant part in such warrantless searches.

A. *Dwellings*

The warrantless search of a dwelling without consent, based upon probable cause and exigent circumstances, is extremely restricted in its permissible

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[44] People v. Collins, 1 Cal. 3d 658, 663, 463 P.2d 403, 406-07, 83 Cal. Rptr. 179, 182-83 (1970).

[45] 12 Cal. App. 3d 152, 90 Cal. Rptr. 508 (1st Dist. 1970).

[46] *Id.* at 166-67, 90 Cal. Rptr. at 518.

[47] Johnson v. United States, 333 U.S. 10 (1948).

[48] 23 Vand. L. Rev. 1370, 1375 (1970).

[49] Chapman v. United States, 365 U.S. 610 (1961); State v. Findlay, 259 Iowa 733, 145 N.W.2d 650 (1966).

scope.[50] In the absence of peculiar and compelling circumstances, there is no legal basis for the search of a dwelling without a warrant. In *Agnello v. United States*,[51] the United States Supreme Court declared that "[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant."[52] Several state courts have reached similar conclusions.[53] Although the United States Supreme Court has approved certain searches without a warrant when made during "hot pursuit"[54] or conducted incident to a lawful arrest,[55] and has alluded to the possibility of a valid warrantless dwelling search based upon a need for immediate action, it has apparently never specifically approved such a search under the facts of the cases.[56]

The role of the suspicious object in establishing probable cause is the same whether a dwelling is searched with or without a warrant. Crucial emphasis is not on probable cause—which is always required—but rather upon the presence or absence of exceptional circumstances. Thus in *People v. Gaines*,[57] the warrantless search of a dwelling was upheld where an officer saw the defendant throw a suspicious item thought to be contraband drugs into an apartment, and a strong likelihood existed that the drugs would be destroyed by a person inside. A warrantless dwelling search was also sustained where a bomb was thought to be on the premises.[58] The court pointed out that a bomb has unique characteristics which obviously distinguish it from ordinary contraband, and therefore approved a search under the urgent circumstances of the case. Finally, a recent case held that exceptional circumstances in the form of a race riot were sufficient to permit the warrantless search of a dwelling for weapons reasonably believed to be on the premises.[59]

B. *Vehicles*

In contrast to the restricted application of the exigent circumstances doctrine to justify the search of a dwelling without a warrant, a more liberal attitude prevails toward the warrantless search of a vehicle where probable cause and exigent circumstances coincide. In *Carroll v. United States*,[60] the United

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50 McClurg v. Brenton, 123 Iowa 368, 98 N.W. 881 (1904).

51 269 U.S. 20 (1925).

52 *Id.* at 33.

53 People v. King, 9 Cal. App. 3d 419, 88 Cal. Rptr. 273 (2d Dist. 1970); McClurg v. Brenton, 123 Iowa 368, 98 N.W. 881 (1904).

54 Warden v. Hayden, 387 U.S. 294 (1967).

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

56 Chapman v. United States, 365 U.S. 610 (1961); Johnson v. United States, 333 U.S. 10 (1948); Stoll, *Warrantless Searches: A Proposal to End a Dilemma*, 8 AM. CRIM. L.Q. 20 n.3 (1969).

57 265 Cal. App. 2d 642, 71 Cal. Rptr. 468 (1st Dist. 1968), *cert. denied*, 394 U.S. 935 (1969).

58 People v. Superior Court of the City and County of San Francisco, 6 Cal. App. 3d 379, 85 Cal. Rptr. 803 (1st Dist. 1970); *accord*, United States v. Melville, 309 F. Supp. 829 (S.D.N.Y. 1970). The admissibility of evidence not in plain view and discovered by one searching the premises for a bomb without a warrant is not clear.

59 Barton v. Eichelberger, 311 F. Supp. 1132 (M.D. Pa. 1970).

60 267 U.S. 132 (1925).

States Supreme Court declared:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[61]

The probable cause requirement for the valid search of a vehicle is probably the same as that necessary for the search of persons or premises.[62] However, where probable cause is present the possibility of rapid movement out of the jurisdiction frequently constitutes exigent circumstances which justify the warrantless search of a vehicle.[63] Thus, in *Chambers v. Maroney*[64] the United States Supreme Court approved the warrantless search of a vehicle at a police station some time after the arrest of the occupants on robbery charges. The Court held that "[t]he probable-cause factor still obtained at the station house *and so did the mobility of the car* unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured."[65] This somewhat strained concept of mobility bears little resemblence to the traditional view of exigent circumstances and suggests the evolution of a doctrine permitting warrantless search of a vehicle on probable cause alone.

A suspicious object observed in a vehicle can furnish the basis for requisite probable cause to search.[66] Similarly, extrinsic background information can combine with expertise to generate reasonable grounds for the search of an automobile.[67]

C. *Movable Goods*

Where constitutionally seizable items are in plain view of one lawfully in a position to obtain that view, the observance of such objects is not a search,[68] and their subsequent seizure is permissible.[69] Proper application of the "plain view" doctrine requires that the item in question must be recognized as seizable by virtue of its being open and visible to the observer.[70] Conversely, the plain view of a simply suspicious-looking or unusual object which is not itself contraband does not justify its seizure without a warrant.[71] Since the opening of a

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61 *Id.* at 153.
62 *See* United States v. Francolino, 367 F.2d 1013, 1017 (2d Cir. 1966).
63 Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).
64 399 U.S. 42 (1970).
65 *Id.* at 52 (emphasis added).
66 People v. Spelio, 6 Cal. App. 3d 685, 86 Cal. Rptr. 113 (2d Dist. 1970).
67 United States v. Brown, 411 F.2d 478 (5th Cir. 1969).
68 People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).
69 *Id. But see* text accompanying notes 97-100 *infra.*
70 People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970).
71 People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).

package constitutes a search,[72] a warrant is usually necessary to examine the contents of a package which is not obviously contraband.[73]

Difficult problems frequently arise in distinguishing between an object barely recognizable as contraband and an extremely suspicious item which falls just short of such identification. "When the nature of the package observed approaches a matter of common understanding, the rejection of the probability that it is contraband appears to the layman to evince a lack of common sense on the part of the judiciary."[74] The California courts have adopted the position that "a search warrant is not necessary where the object itself constitutes contraband . . . or the shape, design or manner in which a package or container is carried affords reasonable grounds for believing it contains contraband."[75] This statement must be considered in light of the California supreme court's holding in *People v. Marshall.*[76] In that case, police officers were informed that the defendant was selling marijuana and entered his dwelling with an arrest warrant. While seeking the accused, the officers noticed a closed paper bag which resembled that described by their informant as a source of supply, and from which a marijuana-like odor emanated. The policemen searched the bag without a warrant and discovered marijuana. In sustaining the defendant's motion to suppress this evidence, the court ruled that it was inherently impossible for the contents of a closed opaque container to be in plain view. A search was necessary to reveal its contents, and, since there were no exigent circumstances, such a search required a warrant. The decision further stated that the smell of marijuana could be used to confirm the observation of contraband already visible, but could not justify the search without a warrant. "In plain smell" was held not equivalent to "in plain view." The well-argued dissent urged that smell should be usable to justify the warrantless search of a closed but suspicious container.

Since *Marshall*, the California lower courts have approved the warrantless breaking open and inspection of a suspected marijuana cigarette, which is technically a search since the contents of the cigarette are not initially visible through the outer wrapping.[77] Such a search is held permissible where "the usual exterior indicia of a marijuana cigarette are present, as well as other circumstances to bolster the inference that the cigarette contains marijuana."[78] Exigent circumstances in the form of mobility (as where the suspicious item is found in a vehicle) furnish additional grounds for distinguishing the *Marshall* holding.[79]

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72 People v. Alexander, 253 Cal. App. 2d 691, 61 Cal. Rptr. 814 (2d Dist. 1967).
73 People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970).
74 People v. Baker, 12 Cal. App. 3d 152, 168, 90 Cal. Rptr. 508, 519 (1st Dist. 1970).
75 People v. Nickles, 9 Cal. App. 3d 986, 993, 88 Cal. Rptr. 763, 767 (1st Dist. 1970); *accord*, Henry v. United States, 361 U.S. 98, 104 (1959) (dictum).
76 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).
77 People v. Anderson, 266 Cal. App. 2d 125, 71 Cal. Rptr. 827 (4th Dist. 1968).
78 *Id.* at 132, 71 Cal. Rptr. at 832.
79 *Id.*

Some federal court decisions have indicated a fairly liberal attitude toward the warrantless inspection of a suspicious closed package, at least where probable cause and mobility are present. In *Fernandez v. United States*,[80] an immigration officer stopped a car 60 to 70 miles north of the Mexican border to check the driver's citizenship. The officer smelled the odor of marijuana coming from beneath the hood, and upon inspection found marijuana wrapped in brown paper. This search was sustained in reliance on *Carroll v. United States*,[81] and the court suggested that the *odor alone* might have furnished probable cause for the defendant's arrest.[82] However, the court in *Contreras v. United States*[83] ruled the search of a closed paper sack found in a vehicle illegal where there was no probable cause to believe the bag contained contraband. The lack of reasonable grounds distinguishes this case from *Fernandez*.

A recent series of California cases dealing with the search of suspicious parcels at airport terminals merits consideration because the discussion of suspicious objects, exigent circumstances, and search without warrant illustrates some of the problems inherent in such situations. In *People v. McGrew*,[84] the defendant had delivered a footlocker for air shipment. An airline employee became suspicious, searched the locker, found marijuana, and summoned police. The California supreme court sustained suppression of this evidence on the grounds that, even though the police could smell marijuana, the contraband was not in plain view since the footlocker was closed when the officers arrived. Furthermore, because the locker had been shipped on a "space available" basis, the airlines were under no contractual duty to ship before a warrant could be obtained, and there were therefore no exigent circumstances necessitating a warrantless search. Finally, the court concluded that the contract for carriage did not serve to waive the accused's rights under the fourth amendment. A companion case was decided on similar grounds.[85]

In *People v. Superior Court for the County of Los Angeles*,[86] an airline employee opened a package upon suspicion that its consignor had misdeclared the contents, and called police after finding drugs. The employee voluntarily re-opened the parcel when police arrived. The court held this action sufficient to satisfy the "plain view" doctrine, and thus distinguished *McGrew*. The opinion also cited *Chambers v. Maroney*[87] and speculated as to the continued validity of the stricter *McGrew* test if the *Chambers* holding were applied

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80 321 F.2d 283 (9th Cir. 1963).
81 267 U.S. 132 (1925).
82 Fernandez v. United States, 321 F.2d 283, 287 n.8 (9th Cir. 1963) (dictum); *see also* United States v. Miranda, 426 F.2d 283 (9th Cir. 1970).
83 291 F.2d 63 (9th Cir. 1961).
84 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969), *cert. denied*, 398 U.S. 909 (1970).
85 Abt v. Superior Court of Los Angeles County, 1 Cal. 3d 418, 462 P.2d 10, 82 Cal. Rptr. 481 (1969); *see* People v. Segovia, 13 Cal. App. 3d 134, 91 Cal. Rptr. 266 (4th Dist. 1971).
86 11 Cal. App. 3d 887, 90 Cal. Rptr. 123 (2d Dist. 1970).
87 399 U.S. 42 (1970).

to movable property such as a package consigned for air shipment. However, the later case of *People v. McKinnon*[88] demonstrated that the *McGrew* decision was still viable. In *McKinnon*, police were called after airline employees opened a suspicious parcel. An officer observed brick-like objects wrapped in an opaque material, smelled the odor of marijuana, removed the wrapping, and exposed marijuana inside. The court affirmed suppression of this evidence, citing *McGrew*, and dismissed the challenge to *McGrew*'s continued validity after *Chambers* by pointing out that a state may adopt a stricter criterion of reasonableness than is required by federal standards.

In *People v. Gordon*,[89] a leather trunk and a cardboard box were delivered for air shipment. The airline agent became suspicious of the parcels and summoned police. An officer detected the odor of marijuana emanating from the cardboard box,[90] but could detect no such smell from the trunk. He searched the box without a warrant, found marijuana inside, and then searched the leather trunk, finding more drugs. Admission of this evidence was sustained, and *McGrew* was distinguished on the ground that here the parcels had been delivered for immediate shipment, thus furnishing exigent circumstances, while the *McGrew* shipment had been on a "space available" basis.

The *Gordon* case furnishes a good example of what might be called "imputed probable cause". Although only one of the packages smelled of marijuana, both parcels were searched without a warrant. The *Gordon* court did not discuss this problem, but it could be argued that since odor was an essential element in establishing probable cause to search, each package should have been judged individually in this respect. Furthermore, the fact that the first box searched was found to contain drugs did not compel the conclusion that the second parcel also held contraband. Nevertheless, in *Gordon* the marijuana odor and the presence of drugs in the box were apparently sufficient to impute probable cause to search the less suspicious leather trunk without a warrant.

That there are limits to the use of imputed probable cause to validate warrantless searches appears from the case of *Irwin v. Superior Court of Los Angeles County*.[91] The defendant Irwin had been standing near his luggage in the lobby of an airport terminal. Another person had just been arrested in that area for possession of narcotics, and the arresting officer noticed that Irwin's luggage bore a claim check number next in sequence to that on the luggage just seized. Relying on this fact, a policeman searched the defendant's luggage without a warrant and found drugs. The California supreme court ordered this evidence suppressed, ruling that the search was based on an inarticulate hunch and was therefore unreasonable. The sequential claim check number did not supply a sufficient nexus between a prior arrest and the warrantless search of

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88 13 Cal. App. 3d 555, 91 Cal. Rptr. 696 (4th Dist. 1970).
89 10 Cal. App. 3d 454, 89 Cal. Rptr. 214 (2d Dist. 1970).
90 Here the expertise of the officer in identifying the marijuana odor emanating from the latently suspicious box helped furnish probable cause to search.
91 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969).

Irwin's luggage to permit imputation of probable cause from the former act to the latter. A case clearly discussing the limitations of the imputation theory would be an invaluable aid to a better understanding of this doctrine.

IV. Seizure Without Search

The problem of seizure without search has been succinctly summarized as follows:

> Search and seizure has become, over the past decade one of the most complex areas of constitutional law. Analysis of the litigation in this area reveals, however, that the great bulk of cases deal not with the problem of search and seizure, but only with the problem of the search. In virtually every case involving a motion to suppress some article of evidence, the motion will be granted or denied in accordance with the judge's determination of the constitutionality of the search and its effect on the resulting seizure. If the search is found to be constitutional, invariably the seized items will be admissible. If the search is found to be unconstitutional, the seized items will then be deemed illegally seized and hence inadmissible.[92]

Since "[t]he Fourth Amendment prohibits both unreasonable searches and unreasonable seizures,"[93] and the words "search" and "seizure" are not synonymous,[94] the constitutionally valid seizure must be based upon probable cause, just as in the case of a search. It then follows that the role of a suspicious object in determining the requisite probable cause will be an important element in cases of seizure without search, just as in the search and seizure cases discussed previously.

A. *Objects in Plain View*

Most cases involving seizure without search originate when a suspicious object is observed by one lawfully in a position to have that view, and probable cause exists to believe that the object is constitutionally seizable. Under these circumstances the act of observing does not constitute a search,[95] and the permissibility of immediate seizure is the primary consideration. The validity of such a seizure depends largely upon where the object is located, whether its discovery is inadvertent,[96] and whether exigent circumstances exist.

The United States Supreme Court recently analyzed the plain view doctrine in some detail. In *Coolidge v. New Hampshire*,[97] a divided Court invalidated

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92 Note, *Probable Cause to Seize and the Fourth Amendment: An Analysis*, 34 Albany L. Rev. 658 (1970) (footnotes omitted). Case law dealing with the subject of seizure apart from the subject of search is difficult to find. State v. Elkins, 245 Ore. 279, 422 P.2d 250 (1966).

93 United States v. Jeffers, 342 U.S. 48, 51 (1951).

94 State v. Raymond, 258 Iowa 1339, 142 N.W.2d 444 (1966).

95 Ker v. California, 374 U.S. 23 (1963); People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968); State v. Brant, 260 Iowa 758, 150 N.W.2d 621 (1967). *See* text accompanying notes 68-71 *supra*.

96 Coolidge v. New Hampshire, 403 U.S. 443 (1971).

97 *Id.*

the warrantless seizure of petitioner's automobile where police officers had arrested him inside his home and then removed the vehicle from the driveway for use as evidence of the crime. Although the vehicle could easily be seen from the street, and the police had probable cause to seize it as evidence, the seizure was held unjustified under the plain view doctrine since the officers could have obtained a warrant prior to their intrusion, but did not. In reaching its decision "that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest,"[98] the Court recognized two limits upon the plain view doctrine. First, "plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances'."[99] Second, "the discovery of evidence in plain view must be inadvertent."[100] Insofar as this latter criterion precludes the use of planned warrantless seizures—ostensibly justified on plain view grounds—as a means of circumventing the fourth amendment warrant requirement, it is neither particularly novel nor startling.[101]

Unfortunately, other of the Court's language is more controversial. Thus, the majority opinion declares that the plain view doctrine does not violate fourth amendment principles "because plain view does not occur until a search is in progress."[102] This statement, however, apparently does not cover those cases in which objects in plain view are seized from vehicles[103] or from private property (outside the curtilage) independent of any prior or contemporaneous search whatever.[104]

A careful reading of the *Coolidge* opinion also raises the question of whether its pronouncements regarding objects in plain view are confined to cases involving "mere evidence", or whether they also apply to "fruits of a crime", "instrumentalities of a crime", and "contraband". While the opinion initially recognizes that the distinction between an "instrumentality of a crime" and "mere evidence" has been abolished,[105] the Court then holds invalid "the seizure of objects—*not contraband nor stolen nor dangerous in themselves*—which the police know in advance they will find in plain view and intend to seize."[106] The majority subsequently cautions that "this is not a case *involving contraband or stolen goods or objects dangerous in themselves.*"[107] This peculiar lan-

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98 *Id.* at 484.
99 *Id.* at 468 (emphasis by the Court).
100 *Id.* at 469.
101 *E.g.*, Niro v. United States, 388 F.2d 535 (1st Cir. 1968) (warrantless seizure of stolen goods stored in a garage held invalid where officers could have obtained a warrant, but did not).
102 Coolidge v. United States, 403 U.S. 443, 467 (1971).
103 *E.g.*, Marshall v. United States, 422 F.2d 185 (5th Cir. 1970) (use of flashlight to reveal a seizable weapon inside an automobile held not to constitute a search).
104 *Cf.* Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379 (1967).
105 Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971).
106 *Id.* at 471 (emphasis added).
107 *Id.* at 472 (emphasis added).

guage prompted Justice Black to observe that "[t]he majority correctly notes . . . that this Court . . . flatly rejected the distinction for purposes of the Fourth Amendment between 'mere evidence' and contraband, a distinction which the majority appears to me to reinstate at another point in its opinion . . . ."[108] Justice White concluded that "[t]he distinction the Court draws between contraband and mere evidence of crime is reminiscent of the confusing and unworkable approach that I thought *Warden v. Hayden* . . . had firmly put aside."[109]

Justice Harlan summarized the situation well when he stated:

> From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.[110]

1. *Dwellings.*

Where dwellings and related buildings are involved, the suspicious object is usually either observed through a window from outside, or else is discovered inside while the observer is legally on the premises. In the latter case, immediate seizure without a warrant is generally allowed upon a showing of probable cause and inadvertent discovery,[111] whether the item seized is the instrumentality of a crime,[112] the fruit of a crime,[113] contraband,[114] or mere evidence.[115]

Where a seizable object is seen inside a building by an observer outside the building, the general rule is that probable cause alone is insufficient to allow warrantless seizure, at least in the absence of compelling exigent circumstances.[116] This is attributable to the fact that "effects enjoy derivative protection when located in a house or other area within reach of the Fourth Amendment."[117] "It is, of course, hornbook law that the known existence of contraband on the premises would be insufficient in itself to justify a search and seizure without a warrant."[118] The curtilage is also within the ambit of fourth amendment protection.[119] In *Pendleton v. Nelson*,[120] the police observed marijuana on a table in-

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108 *Id.* at 507 n.4.
109 *Id.* at 519.
110 *Id.* at 490.
111 *Id.* at 469.
112 Warden v. Hayden, 387 U.S. 294 (1967).
113 United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969).
114 People v. Fein, 11 Cal. App. 3d 587, 90 Cal. Rptr. 42 (2d Dist. 1970).
115 Coolidge v. New Hampshire, 403 U.S. 443 (1971); Warden v. Hayden, 387 U.S. 294 (1967).
116 Taylor v. United States, 286 U.S. 1 (1932).
117 Coolidge v. New Hampshire, 403 U.S. 443, 513 (1971).
118 People v. King, 9 Cal. App. 3d 419, 424, 88 Cal. Rptr. 273, 275 (2d Dist. 1970).
119 United States v. Taylor, 428 F.2d 515 (8th Cir. 1970).
120 404 F.2d 1074 (9th Cir. 1968).

side the defendant's garage, entered the building, and seized the contraband without a warrant. The reviewing court declared the seizure illegal and stated: "The view of the narcotics through the window may have provided probable cause to obtain a search warrant, but since no exigent circumstances were shown to exist, such view did not authorize a seizure without such a warrant or consent."[121]

The United States Supreme Court recently discussed the permissibility of seizing an object which is observed in plain view on the premises during the course of a search incident to arrest.[122] The Court ruled that "[w]here . . . the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee."[123]

2. *Vehicles*

Very frequently a constitutionally seizable object is observed in plain view within a motor vehicle. Once probable cause is shown,[124] immediate warrantless seizure of the item is usually permissible, since exigent circumstances in the form of mobility are almost always present. The problems inherent in vehicle searches and seizures have been the subject of much comment[125] and will not be discussed in this Article.[126]

The recent case of *Chambers v. Maroney*[127] provided the United States Supreme Court with an excellent opportunity to distinguish the law of vehicle search from that of vehicle seizure. In *Chambers*, the automobile in which the petitioner had been arrested was taken to a police station and searched there some time later. Justice Harlan, in an able dissent, stated the issue as follows:

> The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant. It does not dispute that such a course would fully protect the interests of effective law enforcement; rather it states that whether temporary seizure is a "lesser" intrusion than warrantless search "is itself a debatable question and the answer may depend on a variety of circumstances." . . . I believe it clear that a war-

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121 *Id.* at 1077.

122 Proper scope of a search incident to arrest is defined in Chimel v. California, 395 U.S. 752 (1969).

123 Coolidge v. New Hampshire, 403 U.S. 443, 465 n.24 (1971). The Court also held that police need not obtain a warrant even if they anticipate that they will find specific evidence during the appropriately limited search of an arrestee and of the area under his immediate control. *Id.* at 482.

124 Inadvertent discovery is also required, at least where the seizure of evidence is involved. *Id.* at 469.

125 *E.g.*, 23 VAND. L. REV. 1370 (1970).

126 For an excellent pre-Coolidge discussion of the problems involved in the warrantless seizure of *evidence* in plain view within a motor vehicle, and some suggested guidelines for permitting such a seizure, see People v. Curley, 12 Cal. App. 3d 732, 90 Cal. Rptr. 783 (2d Dist. 1970).

127 399 U.S. 42 (1970).

> rantless search involves the greater sacrifice of Fourth Amendment values.
>
> The Fourth Amendment proscribes, to be sure, unreasonable "seizures" as well as "searches." However, in the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day —necessary to enable the officers to obtain a search warrant.[128]

The Court's majority, however, refused to make the potentially valuable distinction between search and seizure, stating: "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."[129] Nevertheless, Justice Harlan's logic appears irrefutable.

V. Conclusion

Probable cause is a requisite element which dominates the complex law of search and seizure. Since a suspicious object is often an important factor in determining the presence or absence of probable cause, a clear understanding of the nature and function of the suspicious object will assist greatly in assessing the validity of a given search or seizure. Proper application to search and seizure cases of the elementary principles governing the legal effect of suspicious objects could introduce a modicum of order into an otherwise chaotic area of jurisprudence.

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[128] *Id.* at 63.
[129] *Id.* at 52.

SURVEY OF IOWA LAW

CIVIL PROCEDURE

Jeff H. Jeffries†

Included in this broad Survey of Civil Procedure are cases decided by the Iowa supreme court during the year following September 1, 1970. Since procedure on the appellate level was exhaustively covered in a relatively recent article,[1] that area, with minor exceptions, will not be discussed. In addition, a prior Survey amply dealt with procedural considerations in the preservation of the trial record for purposes of appeal[2] and, again with minor exceptions, that aspect will not be considered. Rather, it is hoped that the following will provide an overview of the recent decisions, in conjunction with the Iowa Rules of Civil Procedure and recent amendments thereto, as each effects the instigation of lawsuits and their pre-trial pleading stage. In fact, those two stages, although practicably inseparable, provide convenient divisions for purposes of this Survey. A final division acts as a catch-all for those sundry decisions and rule changes which, although significant, are not conducive to being pigeon-holed.

I. Pre-Pleading Considerations—Who and When to Sue

In Iowa, a civil action is commenced by serving the defendant with an original notice.[3] Inaccurate drafting, particularly in original notices of suit, has been the basis of recent appeals in Iowa. Under the Iowa rules, the caption of an original notice must name the parties, and the notice must be "directed to the defendant."[4] Fatal defects are, of course, jurisdictional. *Engelson v. Mallea*[5] involved an action brought in Iowa by the mother of an illegitimate child under the Uniform Support of Dependents Act. The defendant was sued in a paternity suit in Minnesota under the name of Mallea. Although his name was Millea, he appeared in the Minnesota action, pursued it and was ordered to pay child support in the amount of $10.00 per week. He then moved to Iowa where he was named defendant in the instant suit for his failure to pay the support. The defendant was served personally under the name of Mallea and his special appearance, alleging misnomer, was overruled. The issue was whether the mistake in spelling of his last name was fatal as a procedural matter.

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1 Rendleman & Pfeffer, *Appellate Procedure and Practice,* 19 Drake L. Rev. 74 (1969).

2 Blackburn, *Civil Procedure,* 19 Drake L. Rev. 129 (1969).

3 Iowa R. Civ. P. 48.

4 Iowa R. Civ. P. 50.

5 180 N.W.2d 127 (Iowa 1970).