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NYLS Journal of Human Rights

Volume 3
Issue 2 *Vol III Part Two Spring 1986 - Homelessness*

Article 6

1986

Beyond the Quagmire: The Fourth Amendment Rights of Residents of Private Shelters for the Homeless

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BEYOND THE QUAGMIRE: THE FOURTH AMENDMENT RIGHTS OF RESIDENTS OF PRIVATE SHELTERS FOR THE HOMELESS

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I. INTRODUCTION

Covenant House is a shelter for homeless and runaway youths, located on West Forty-first Street in Manhattan. With Covenant House's open-intake policy, and the typical exposure of runaways to street crime, fugitive children periodically come to the shelter. Because the police have at times also come to Covenant House seeking such fugitives, the fourth amendment rights of Covenant House minors and group shelter residents should be delineated to protect what may be their only refuge of privacy.

Covenant House itself consists of two connected buildings opening onto a courtyard that borders a main street. Round-the-clock security guards patrol the Covenant House area, and inquire into the business of any visitor. Two doors are available to residents, one opens onto the courtyard and another, usually open only during lunchtime, is at the rear of the complex. Building "A" has one floor for reception, two floors of residential housing, and five floors of administrative offices. Building "B" contains three floors of residential housing, and two floors of assorted services.

A residential floor usually houses between twenty and forty residents. Private rooms are available to about twenty-five mi-

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The author wishes to thank the Covenant House attorneys, Gregory A. Lolcer, Anne B. Donahue, and Edmund J. Burns, for their comments and insights upon reading drafts of the article.

The ideas expressed in the article are those of the author and are not necessarily those of Covenant House.

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nors, and when the rooms are full, the couches in the lounge area are used for sleeping. Each resident without a room is given a locker. The keys to the rooms and the lockers are held exclusively by staff members who are always present.

A shelter such as Covenant House is unlike most private or public areas encountered in fourth amendment jurisprudence. In this article the Covenant House shelter is used as a model for examining the fourth amendment as it applies to residents of a shelter.

The most compelling observation confronting one after study of the law of search and seizure is the glaring lack of clarity and consistency in United States Supreme Court decisions.[1] This is unfortunate because clear and easily applicable standards are crucial to lawful police responses to the myriad and tension-filled dramas the police face daily. The confusion is somewhat understandable, however, when seen in the light cast

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1. Justice Harlan in Coolidge v. New Hampshire, 403 U.S. 443 (1971), observed that "state and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty" in the law of search and seizure. *Id.* at 490 (Harlan, J., concurring). Similarly, Justice Clark in Chapman v. United States, 365 U.S. 610 (1961) stated:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. For some years now the field has been muddy, but today the Court makes it a quagmire.

Id. at 622 (Clark, J., dissenting). *See generally* LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the Quagmire*, 8 CRIM. L. BULL. 9 (1972). Professor Amsterdam presents a delightful analogy comparing the Supreme Court to Pythia, the priestess of the Oracle of Delphi. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970). His point is that Supreme Court decisions, because practical application is left to others (judicial and police officers) and such a few number of cases actually reach the Court, have a limited effect:

> According to Par Lagerkvist, the role of the Pythia or priestess of the Oracle at Delphi was of incomparable grandeur and futility. This young maiden was periodically locked to a tripod above a noisome abyss, where her god dwelt and from which nauseating odors rose and assaulted her. There, the god entered her body and soul, so that she thrashed madly and uttered inspired incomprehensible cries. The cries were interpreted by the corps of professional priests of the oracle, and their interpretations were, of course, for mere mortals the words of the god. The Pythia experiences incalculable ecstasy and degradations; she was viewed with utmost reverence and abhorence; to her every utterance, enormous importance attached; but, from the practical point of view, what she said did not matter much.

Id. at 785-86.

by the direct conflict between two vital policies: the individual's right to be free from arbitrary governmental intrusion, and society's need for effective law enforcement.[2] The clash of these weighty values, ubiquitous in fourth amendment analysis, makes the accommodation demanded between them highly troublesome, if not impossible, to attain. This difficulty is enhanced by the inevitable change in perceptions that comes with the turnover in Supreme Court membership.

The most well established and oft-repeated fourth amendment rule is that "the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant."[3] This strict requirement grew out of strong colonial opposition to the infamous writs of

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2. *See* People v. Hanlon, 36 N.Y.2d 549, 330 N.E.2d 631, 369 N.Y.S.2d 677 (1975) where the court said: "Since colonial times it has been the task of the courts to reconcile the dichotomy between effective law enforcement and individual rights. Our courts have frequently grappled with these often antithetical interests in a myriad of situations." *Id.* at 555, 330 N.E.2d at 635, 369 N.Y.S.2d at 681. The Court stated in Camara v. Municipal Court, 387 U.S. 523 (1967) that:

> the basic purpose of (the Fourth Amendment) as recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is "basic to a free society."

Id. at 528. *See also* Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964), where the author characterizes the dichotomy between efficiency in crime prevention and privacy of the individual as two models of criminal procedure: the crime control model and the due process model. *Id.* at 9-23.

3. Steagald v. United States, 449 U.S. 819 (1981). *See also* Payton v. New York, 445 U.S. 573 (1980); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Johnson v. United States, 333 U.S. 10 (1948); Agnello v. United States, 269 U.S. 20 (1925). The fourth amendment of the United States Constitution 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.

U.S. CONST. amend. IV.

Section 12 of Article I of the New York Constitution is identical, "and this identity of language supports a policy of uniformity in both state and federal courts." People v. Ponder, 54 N.Y.2d 160, 161, 429 N.E.2d 735, 445 N.Y.S.2d 57 (1981).

This article is concerned primarily with the fourth amendment rights of the U.S. Constitution. Except for occasional references to New York state law, state protections are not considered. Although state law may not act to decrease federal constitutional protections, states may independently offer increased protections from government interference.

assistance.[4] Outside of a "few specially established and well-delineated exceptions,"[5] a warrantless search or arrest inside a home is impermissible and the fruits of the search will be suppressed at trial.[6] In reality, however, very little of fourth amendment law comports with this glib statement. These "exceptions," with increasing frequency, account for the precipitating force behind police searches and seizures.[7] The basic warrant requirement is also subject to many subtle and varied distinctions. These difficulties are compounded when they are applied to private shelters. Shelters do not comfortably fit into any of the usual settings ruled on by the courts; it is neither a typical home nor a public space. Thus, several interesting and perplexing questions of first impression arise upon a study of the issues.

Many "categories" of jurisprudence that are delineated and separated in this article are really amorphous, spilling into one another, and necessitating an awareness that no subject of fourth amendment law exists in a vacuum. The article discusses, in the order listed, the following topics: general issues involved in the application of the fourth amendment; areas protected by

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4. These writs allowed a customs official to "enter and go into any house, shop, cellar, warehouse or room or other place, and in case of resistance, to break open doors, chests, trunks and other packages there to seize and from thence to bring, or any kind of goods or merchandise whatsoever, prohibited and uncustomed." 13-17 Charles II c. II, c. 11 §§ IV, V. *See also* O. DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION, at 208 (1951): "The evidence indicates that it was the use made of the incidental provisions of (the revenue acts) to attack fundamentally the liberty and property of Americans that in six short years transformed thousands of loyal British subjects into active revolutionists." *Id.* at 208. William Pitt in a Parliamentary debate eloquently exhibited the passions behind the movement to restrict the police:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

Miller v. United States, 357 U.S. 301, 307 (1958). *See also* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (1937); Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 141-45 (1970); Payton v. New York, 445 U.S. 573, 608-9 (1980) (White, J., dissenting); Warden v. Hayden, 387 U.S. 294, 301 (1967); Boyd v. United States, 116 U.S. 616 (1886).

5. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

6. Mapp v. Ohio, 367 U.S. 643 (1961). *See also* N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1984).

7. Indeed, Professor LaFave, perhaps the foremost commentator on fourth amendment law, has expressed the fear that the exceptions are swallowing the rule. *See* LaFave, *supra* note 1.

the fourth amendment; the warrant requirement; exceptions to the warrant requirement; and searches by Covenant House officials.

II. PRELIMINARY MATTERS

A. *Application of the Fourth Amendment to Juveniles*

The initial and most fundamental hurdle to clear in assesssing the rights of Covenant House residents is the extent to which the fourth amendment applies to juveniles. The Supreme Court, in the watershed case *In re Gault*,[8] recognized that a juvenile offender who faces possible incarceration is deprived of liberty and thus entitled to some due process protection.[9] The Court made clear, however, that the announced safeguards[10] were directed toward the adjudicatory stage of proceedings only.[11] Moreover, the Court reiterated its earlier statement in *Kent v. United States*[12] that in adjudicatory hearings, only those rights required by notions of fundamental fairness and due process under the fourteenth amendment would apply.[13] To this date the Supreme Court has refused to consider whether alleged juvenile offenders are entitled to full fourth amendment protection.[14]

Nonetheless, lower courts have extended *Gault* to its logical conclusion, providing due process rights at all stages of the juvenile process.[15] New York state court decisions indicate that

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8. 387 U.S. 1 (1967).

9. The four due process requirements announced in *Gault* were the privilege against self-incrimination, the right to counsel, the right to notice, and the right to confront and cross-examine witnesses. *Id.* at 31-57.

10. *Id.*

11. *Id.* at 13.

12. 383 U.S. 541 (1966).

13. *Id.* at 562.

14. *See* David Levell W. v. California, 449 U.S. 1043 (1980), *denying cert. to* In re David W., 103 Cal. App. 3d 469, 163 Cal. Rptr. 87 (deleted on direction of Supreme Court by order dated July 18, 1980). In dissenting from the Court's denial of certiorari, Justice Marshall stated that "this Court has never considered the scope of Fourth Amendment protections when asserted by a minor." *Id.* at 1046.

15. The Supreme Court has held that the "beyond a reasonable doubt" standard is required in delinquency proceedings where a child is charged with an act that if committed by an adult would be a crime. In re Winship, 397 U.S. 358 (1970). The law of double jeopardy is applicable to juvenile proceedings, Breed v. Jones, 421 U.S. 519 (1975). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (right to jury trial is not constitution-

some, if not complete, fourth amendment rights are accorded minors in juvenile proceedings. The strongest statement so far has been made in *In re Williams.*[16] In *Williams* the family court, using a due process and fair treatment analysis, concluded that juveniles should be protected *at least* to the extent of adults:

> After much reflection I am persuaded that the "requirements of due process and fair treatment" demand that the constitutional guarantee against unreasonable searches and seizures be extended to children charged with the doing of any act which if done by an adult would be a crime, and that a Family court ought to be no less zealous than a criminal court in requiring reality of consent, freely and intelligently given without fear of coercion before permitting contraband discovered as the result of a search without a warrant to be used against them in juvenile delinquency proceedings. Indeed, because of the child's tender years and lack of understanding of his constitutional rights even more rigorous standards than those applied to adults should prevail when it is claimed that a child has knowingly waived a constitutional right.[17]

In several other decisions New York courts, without discussing rationale, have tacitly assumed the full application of the fourth amendment to juveniles: *In re Ronny,*[18] (consent); *In re Lang,*[19] (stop and frisk); *Kwok T. v. Mauriello,*[20] (exigent circumstances); *In re Robert P,* (voir dire examination).[21]

B. Probable Cause

Probable cause defines the quantum of proof that a state official must have before he or she is entitled to search or seize; it is a fundamental requirement for a reasonable search under

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ally required in delinquency proceedings).

16. 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966).

17. *Id.* at 169, 267 N.Y.S.2d at 109.

18. 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Fam. Ct., Queens Co. 1963).

19. 44 Misc. 2d 900, 255 N.Y.S.2d 987 (Fam. Ct., N.Y. Co. 1965).

20. 43 N.Y.2d 213, 220, 401 N.Y.S.2d 52, 56 (1977). The court stated: "In the absence of a valid search warrant, governmental intrusion into the privacy of the home is, with certain limited exceptions, prohibited by constitutional limitations."

21. 40 A.D. 2d 638, 336 N.Y.S.2d 212 (App. Term. 1st Dep't 1972).

the fourth amendment.[22] *Except for consensual searches or arrests, no search or seizure can pass constitutional muster without probable cause.* More than any other of the numerous facets of fourth amendment law, the probable cause requirement represents a compromise for accommodating two opposing interests, that of crime prevention and detection, with that of individual privacy and security.[23] The inherent vagueness of the probable cause standard makes principled analysis in the streets, as well as in the courts, nearly impossible.

For probable cause to *arrest* a person there must be sufficient evidence that (1) a violation of the law has been committed, and (2) the person arrested committed the violation.[24] For probable cause to *search* particular premises there must be sufficient evidence that (1) the specific items to be searched for are connected with criminal activity, and (2) these items will be found in the place to be searched.[25] "[I]ssuance of a warrant is a discretionary act based upon a finding of probable cause as a result of certain information given to a magistrate" under oath, and thus, a reviewing court passes on this exercise of discretion only in light of the information submitted to the magistrate.[26] An arrest cannot be justified by what a subsequent search discloses.[27] Also, an aggrieved party challenging an affidavit submitted for a warrant must demonstrate by a preponderance of the evidence either a deliberate misrepresentation of the truth or a reckless disregard for the truth by the affiant, and that the untruthful information was necessary for establishing probable

22. The fourth amendment prohibits unreasonable searches and seizures as well as requiring probable cause before a warrant shall issue. *See supra* note 3. In the cases in which a warrant is not required, "unreasonable" is equivalent to "lacking probable cause."

23. The tension in the administration of the probable cause requirement is between processing the highest number of criminals and protection of individuals by limiting official power. *See* Note, *Announcement in Police Entries, supra* note 4, at 149-50. *See also* Henry v. United States, 361 U.S. 98, 104 (1959): "Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

24. KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE, 268 (1980).

25. *Id.*

26. People v. Hendricks, 25 N.Y.2d 129, 130, 303 N.Y.S.2d 33, 34 (1969).

27. Johnson v. United States, 333 U.S. 10 (1948); People v. Loria, 10 N.Y.2d 368, 223 N.Y.S.2d 462 (1961).

cause.[28]

Probable cause is present where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is [being] committed."[29] Exactly how probable any evidence must be before there is "probable cause" is not clear. The Supreme Court, however, has sent signals indicating that probability must approach fifty percent. In *Mallory v. United States*,[30] information that a rape had been committed by a masked black man was insufficient to arrest three black men who had access to the scene of the rape.[31] Also, in *Wong Sun v. United States*,[32] the Court held improper the arrest of several people with the same nickname as the suspect.[33]

The probable cause requirement is often the factor upon which a fourth amendment case is decided. Although, because of the fact specific nature of the determination, rules for when probable cause is present or absent are nearly impossible to make, a list of cases dealing with the issue can give a flavor for when probable cause is established: *Henry v. United States*,[34] (no probable cause where defendant's partner was implicated, but not suspected, and the two were seen loading and delivering unidentifiable cartons); *People v. Plevy*,[35] (probable cause exists where statements by defendant's father, neighbors, as well as independent police investigations showed that defendant was seen carrying and surreptitiously hiding victim's clothing); *People v. Sciacca*,[36] (no probable cause for search by officer who had only a second-hand anonymous tip that the truck used in a burglary

28. Franks v. Delaware, 438 U.S. 154 (1978); People v. Alfinito, 16 N.Y.2d 181, 264 N.Y.S.2d 243 (1965).

29. Draper v. United States, 358 U.S. 307, 313 (1959); Carroll v. United States, 267 U.S. 132, 162 (1960). *See also* Henry v. United States, 361 U.S. 98 (1959), where the Court referred to the Virginia Declaration of Rights of 1776. "Common rumor or report,suspicious or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this very day." *Id.* at 100.

30. 354 U.S. 449 (1957).

31. *Id.*

32. 371 U.S. 471 (1963).

33. *Id.*

34. 361 U.S. 98 (1959).

35. 52 N.Y.2d 58, 436 N.Y.S.2d 224 (1980).

36. 78 A.D.2d 545, 432 N.Y.S.2d 90 (1980).

was in a certain garage[37]); *People v. Esposito*,[38] (no probable cause where police merely had a suspicion that airport baggage loaders were involved in thefts of outgoing and incoming passengers' luggage); *People v. Ponder*,[39] (probable cause exists where serious crime committed, a gun had been used, the defendant had been seen running, his criminal background was known,[40] and a bullet was seen outside his grandmother's home).

C. *Consent*

The police may make a constitutional warrantless search, regardless of probable cause, if they receive the consent of the individual whose premises, effects or person are to be searched.[41] The consent must be freely and voluntarily given, and knowledge of the right to refuse consent is only one factor to be considered and is not dispositive.[42] The Supreme Court has indicated that a subjective test for voluntary consent must be met.[43] False claims of present authority[44] that are used to gain entrance vitiate consent.[45]

Consent is an important issue for Covenant House. Whose consent would validate an otherwise unlawful search in such a group shelter? A third party may consent to a search of an area in which another has an expectation of privacy, when there is "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[46] It is not clear whether apparent or actual authority is required, though in

37. *Id.*

38. 37 N.Y.2d 156, 371 N.Y.S.2d 681 (1975).

39. 77 A.D. 223, 433 N.Y.S.2d 288 (4th Dept. 1980), *affd.*, 54 N.Y.2d 160, 445 N.Y.S.2d 57 (1981).

40. Although a wide variety of information may contribute to the conclusion that probable cause exists, the probative value of each piece of information must be carefully weighed. The fact that a suspect has a criminal record may contribute toward the existence of probable cause, but his past record will never by itself establish probable cause. Beck v. Ohio, 379 U.S. 89 (1964).

41. Beck v. Ohio, 379 U.S. 89 (1964).

42. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the Court rejected the requirement of a *Miranda*-like warning.

43. In United States v. Mendenhall, 446 U.S. 544 (1980), the Court addressed the question if the consent was "*in fact* voluntary" (emphasis added).

44. As opposed to threats of future action.

45. Bumper v. North Carolina, 391 U.S. 543 (1969).

46. United States v. Matlock, 415 U.S. 164, 164 (1974).

Stoner v. California,[47] the Supreme Court, invalidating consent by a hotel clerk, declared "the rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority.' "[48] Consent by minors (or residents), because of their inferior interest, is most likely insufficient to allow a search of the premises.[49]

Rules regulating valid consent by employees are by no means set and clear. Courts typically attempt to assess and evaluate the employment responsibilities of the employee with regard to the search being challenged.[50] Thus, in *United States v. Block*,[51] although the employee was left in sole charge of the store, his age (20 years old) and status (handyman) acted to vitiate the consent.[52] Similarly, in *United States v. Lagow*,[53] the court held a clerk's consent to search the corporation's premises insufficient.[54] These cases indicate that consent by Covenant House employees, such as receptionists and child-care workers (lacking administrative authority), would not be upheld in court. Any argument to the contrary must be based on the questionable doctrine of apparent authority.[55]

D. Standing

Another fourth amendment rule that is troublesome in analysis is that of the standing required to raise a constitutional claim. The doctrine of "standing" holds that a particular defendant may move to exclude from a criminal trial impermissibly seized evidence only if his or her *own* constitutional rights were violated.[56] That is, a defendant has no right to exclude evidence just because *somebody's* rights were violated. This doc-

47. 376 U.S. 483 (1964).
48. *Id.* at 488.
49. *See* W. LAFAVE, SEARCH AND SEIZURE 736-38 (1978).
50. *Id.* at 767-70.
51. 202 F. Supp. 705 (S.D.N.Y. 1962).
52. *Id.*
53. 66 F. Supp. 738 (S.D.N.Y. 1946).
54. *Id.*
55. If the doctrine were accepted—and it might be merely as a way to avoid the exclusionary rule—the circumstances as they objectively appeared to the police would have to reasonably lead them to believe the employee actually had the authority to admit them.
56. The exclusionary rule never works to bar the arrest itself. *See* Frisbie v. Collins, 342 U.S. 519 (1952).

trine is of great consequence in terms of remedies for residents of shelters such as Covenant House. The standing doctrine allows that even if the police unlawfully enter the Center, a resident without standing will be unable to move to suppress the illegally seized evidence. The cases indicate that establishing standing in a setting like Covenant House is an extremely difficult, if not impossible, task.

Abandoning the traditional entitlements to standing, the Supreme Court in *Rakas v. Illinois*[57] turned the inquiry, in effect, into a personalized expectation of privacy test.[58] A defendant may now seek to exclude evidence derived from a search or seizure only if *his or her* legitimate expectation of privacy was violated.[59] The ruling, therefore, restricts the opportunity for challenging the propriety of searches and seizures. The Court has found that an individual has no expectation of privacy, and hence no standing to assert any fourth amendment violation, in the following situations: by a car passenger in the glove compartment or under the seat,[60] by one friend in another friend's handbag,[61] by a customer in a briefcase belonging to an officer of his bank,[62] by a defendant in the wire-tapped conversation of a co-defendant,[63] nor by a son in his mother's apartment.[64] New York courts have closely followed the Supreme Court's guidance.[65] These decisions and their case-by-case approach have created

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57. 439 U.S. 128 (1978). Before *Rakas*, standing to assert a fourth amendment claim was possessed by anyone who: (1) had a possessory interest in the premises searched; (2) had a possessory interest in the items seized; or (3) was legitimately present at the scene of the search.

58. *Id.* at 149.

59. Rakas v. Illinois, 439 U.S. 128 (1978). *See infra* notes 88-107 and accompanying text for discussion of areas of constitutional protection and the general expectation of privacy.

60. *Id.*

61. Rawlings v. Kentucky, 448 U.S. 98 (1980).

62. United States v. Payner, 447 U.S. 727 (1980).

63. Alderman v. United States, 394 U.S. 165 (1969).

64. United States v. Salvucci, 448 U.S. 83 (1980).

65. *See* People v. Ponder, 54 N.Y.2d 160, 445 N.Y.S.2d 57 (1981) (grandson has no standing to assert improper search of grandmother's home at trial).

California, on the other hand, has extended standing to a defendant to assert the fourth amendment violation of anyone. "If law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified." People v. Martin, 45 Cal.2d 655, 290 P.2d 855 (1955) (Traynor, J.).

confusion. This jurisprudence is understandable only when viewed against a backdrop of antipathy towards the exclusionary rule by a majority of the court members.[66]

The *Rakas* decision inextricably complicates fourth amendment analysis for Covenant House residents. The difficulty of individualizing the expectation of privacy in a setting as diverse as Covenant House is compounded by the current confusion in the law.[67]

Perhaps the only safe observation is that there is a trend away from finding standing. The following sections assess the likelihood of residents of shelters like Covenant House establishing standing in various premises: (1) their own rooms and lockers; (2) another's room or locker; (3) quasi-public areas (this includes all areas except offices, bedrooms and lockers); and (4) a brief examination of the feasibility of the shelter as a corporation establishing standing.

1) Shelter Residents' Own Rooms and Lockers

There is a likelihood that a shelter resident can establish standing to challenge a search of his or her *own* room or locker. In *McDonald v. United States*,[68] the Supreme Court protected a boarder's right in his room in a boarding house.[69] Similarly, the Court in *Stoner v. California*[70] applied the fourth amendment safeguards to a guest in his motel room,[71] even though various employees of the motel—maids, busboys, etc.—had access to the

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66. *See* Rakas v. Illinois, 439 U.S. at 137-38:

> Each time the exclusionary rule is applied it exacts a substantial cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected . . . . Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke the rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

67. Professor LaFave has commented that "the Supreme Court has addressed the Fourth Amendment issue on a number of occasions, but in the eyes of some in a not entirely consistent fashion." LAFAVE, *supra* note 49, at 544.

68. 335 U.S. 451 (1948).

69. *Id.* at 456.

70. 376 U.S. 483 (1964).

71. In another case, United States v. Hansen, 652 F.2d 1374 (10th Cir. 1981), the government conceded that each defendant had standing to challenge the search of his own person and motel room and the seizure of evidence from such searches.

rooms.[72] These decisions make much sense and should be followed for Covenant House residents. Not only are the bedrooms not public in the way the hallways and lounges are, but they represent the last, and perhaps only, enclave of privacy for their occupants.[73]

2) Other Shelter Residents' Rooms or Lockers

A resident of a shelter will most likely not be able to establish standing to challenge searches in other residents' rooms or lockers based upon current law. The Supreme Court in *Rawlings*[74] held that the defendant did not have an expectation of privacy in his friend's handbag because he did not have a right to exclude others from the handbag.[75] Similarly, in *Alderman*[76] the Court found no standing by a son to challenge the search and seizure in his mother's apartment because it was his mother who held the right to exclude others.[77] In *United States v. Hansen,*[78] the Court of Appeals for the Tenth Circuit considered the question with regard to a guest in a friend's hotel room.[79] The court declared:

> Assuming that Means had an ownership or possessory interest in the key, there is no indication that he took any precautions to maintain his privacy to the key. It was found in a room from which he demonstrated no rights to exclude others. Since Means has not shown that his reasonable expectations of privacy were violated by the search of Hansen's room 241, we hold that Means cannot challenge that search or the seizure of the key to his room, 242.[80]

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72. 376 U.S. at 488-89.

73. *But see* People v. Van Buren, 87 A.D.2d 900 (3rd Dep't 1982), where the court refused standing to a guest in his room in his friend's apartment. *See also* United States v. Briones-Garza, 680 F.2d 417 (5th Cir. 1982), where the court refused standing to challenge an illegal action in a drop house shared with fifty other people.

74. 448 U.S. 98 (1980).

75. *Id.* at 104.

76. 394 U.S. 165 (1969).

77. *See also* People v. Ponder, 54 N.Y.2d 160, 445 N.Y.S.2d 57 (1981).

78. 652 F.2d 1374 (10th Cir. 1981).

79. 652 F.2d 1374, 1384 (10th Cir. 1981).

80. *Id.*

According to the logic of these cases, because Covenant House residents have no rights with respect to other residents' rooms or lockers, they would not be permitted to challenge searches in them.

3) Quasi-Public Areas

It is highly doubtful that a resident or staff member would be able to establish standing in any of the quasi-public areas (this includes all areas except offices and bedrooms) in the complex. The essentially free reign given to residents and staff to wander about the building makes finding a privacy interest unlikely, especially given the restrictive notions of privacy by the courts. In *United States v. Agapito,*[81] the United States Court of Appeals for the Second Circuit compared the privacy interests in homes and motels:

> But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home.[82]

4) Corporate Standing and Civil Actions

One interesting anomaly surfaces; a shelter such as Covenant House is protected by the fourth amendment, yet, in most areas of the facility, it appears that no one has standing to challenge improper searches and seizures. This riddle is resolved by attributing standing to the owner (or lessee of the owner) of the buildings—Covenant House. A present possessory interest in a premise, even after *Rakas,* should be sufficient to support standing. "Under the *Mancusi* expectation-of-privacy test, as doubtless was true before, an individual with a present possessory interest in the premises searched has standing to challenge that

81. 620 F.2d 324 (2d Cir. 1980).

82. 620 F.2d 324, 331 (2d Cir. 1980), quoting United States v. Jackson, 588 F.2d at 1052 (5th Cir. 1978). *But see* People v. Williams, 24 A.D.2d 274, 265 N.Y.S.2d 416 (1st Dep't 1965), where standing was accorded to the defendant in a common kitchen and lounge area.

search even though he was not present when the search was made."[83] Such standing is of no use to a resident defendant; it has value only with regard to a civil action to recover damages for unlawful searches or seizures.

It is clear that civil suits by corporate plaintiffs are permissible,[84] and that corporations may assert fourth amendment rights.[85] Such suits may be brought on the corporation's own behalf, or on behalf of its members.[86]

The standing cases draw dramatic attention to the importance of a shelter administrative policy that prohibits police presence within the shelter complex. Despite the policy, case law

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83. LAFAVE, *supra* note 49, at 545. *See also* Sokolov v. Villiage of Freeport, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (1981) where the property owner had standing to assert fourth amendment rights in an empty apartment building.

Professor LaFave goes on to claim that the *Rakas* and *Rawlings* decisions should not affect this rule:

> This conclusion is not put into doubt by Rakas v. Illinois. . . . The Court there only rejected the notion that a justified expectation of privacy would inevitably arise out of being lawfully present, and noted that the defendants there had not claimed any possessory interest in the place searched (there an automobile). The Court stated in *Rakas:* "one of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in likelihood have a legitimate expectation of privacy by virtue of this right to exclude."

Id. at 159-60 (1982 Pocket Part).

Professor LaFave distinguishes the *Rawlings* decision by noting that the Court declared that the petitioner did not "have any right to exclude other persons from access to Cox's purse." *Id.*

84. *See* Allee v. Medrano, 416 U.S. 802 (1974); Fulton Market Storage v. Cullerton, 582 F.2d 1071, *cert. denied,* 439 U.S. 1121 (1978); Advocates for Arts v. Thompson, 532 F.2d 792 (7th Cir. 1978), *cert. denied,* 429 U.S. 894 (1976); California Diversified Promotions, Inc. v. Musick, 505 F.2d 278 (9th Cir. 1974); Citizens for a Better Environment v. Nassau County, 488 F.2d 1353 (2d Cir. 1973).

85. *See* See v. City of Seattle, 387 U.S. 541 (1967); Marshall v. Barlows, Inc., 436 U.S. 307 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1973); Grosjean v. American Press Co., 247 U.S. 333 (1936); Silverthorne Lumber Co. v. United States, 251 U.S. 395 (1920).

86. *See* Allee v. Medrano, 416 U.S. 802 (1974); California Diversified Promotions v. Musick, 505 F.2d 278 (9th Cir. 1974). This concept of having corporate organizations assert privacy interests of their members is by no means novel: Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974) (organization may assert constitutional rights of its members); NAACP v. Button, 371 U.S. 415, 428 (1963) (association—though a corporation—may assert on own behalf first amendment associational rights of members and lawyers); Warth v. Seldin, 422 U.S. 490, 515 (1975) (association may assert rights of others when seeking declaratory or injunctive relief); Comm. for Auto Responsibility v. Solomon, 603 F.2d 992, 998 n.13 (D.C. Cir. 1979), *cert. denied,* 445 U.S. 915 (1980) (listing conditions for "associational standing").

leads to the inevitable conclusion that evidence which is in fact the fruit of an unlawful search will nonetheless still be admissible against a shelter individual as defendant in most instances. The only available remedy to redress unlawful entries is a civil action for damages.

III. Areas Protected By the Fourth Amendment

The fourth amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ."[87] The courts, however, have not always agreed on which areas are protected against unreasonable searches and seizures.

In *Katz v. United States*,[88] the seminal case regarding fourth amendment coverage, the Supreme Court held the Constitution to be applicable whenever an individual harbors a justifiable expectation of privacy, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[89] Justice Harlan, in an oft-cited concurrence, stated a two-pronged test for determining whether a person is entitled to fourth amendment protection in a particular situation.[90] The test requires "first, that a person have an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[91] This inquiry created an important battleground for fourth amendment litigation.[92]

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87. U.S. Const. amend. IV.

88. 389 U.S. 347 (1967).

89. *Id.* at 351.

90. *Id.* at 361.

91. *Id. But see* Amsterdam, *Perspectives on the Fourth Amendment*, 56 Minn. L. Rev. 349 (1974), where the author questions the wisdom of the subjective prong: "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance." *See also* United States v. White, 401 U.S. 745 (1971) (Harlan, J., dissenting). Justice Harlan enunciated his own doubts about this conception. "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." *Id.* at 786.

92. *See* Katz v. United States, 389 U.S. 347 (1967) (phone calls in public booth pro-

A. *The Covenant House Complex*

It is most likely that Covenant House, in its entirety, is sheltered by the umbrella of fourth amendment protection. If there is any doubt about this coverage, it is because of the quasi-public nature of much of the complex. Although not open to the general public, Covenant House shelters approximately 200 residents and employs 300 staff members. The exposure of certain areas—lounges, cafeterias, hallways, clinics, etc.—to these people potentially vitiates the expectation of privacy. Case law demonstrates, however, that this is not a problem for coverage in the first instance.

Business premises cases present the best analogy to Covenant House for assessing fourth amendment protection.[93] A commercial facility, like Covenant House, is readily accessible to large numbers of employees, yet closed to the general public. The Supreme Court has consistently held that business and commercial premises are entitled to protection from unreasonable searches and seizures. In *See v. City of Seattle,*[94] the Court states, "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unofficial entries upon his private commercial property."[95]

Other areas of the law also indicate that Covenant House is covered by the fourth amendment. In *McDonald v. United*

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tected from electronic surveillance); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974) (corporation's use of open field to make visual readings of smoke emissions permissible); United States v. Miller, 425 U.S. 435 (1976) (bank records not protected); Smith v. Maryland, 442 U.S. 735 (1974) (phone numbers dialed not protected); See v. City of Seattle, 387 U.S. 541 (1967) (business premises protected); Bell v. Wolfish, 441 U.S. 520 (1979) (reasonable expectation of a diminished scope accorded prison inmates).

93. The hotel cases are not as analogous because of the general public invitation to most areas within hotels.

94. 387 U.S. 541 (1967).

95. *Id.* at 543. *See also* Mancusi v. DeForte, 392 U.S. 364, 367 (1968), where the Court declared: "This Court has held that the word 'houses', as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may be extended to commercial premises."

In McDonald v. United States, 335 U.S. 451 (1948), a boarding house was held to be protected. *See also* Stoner v. California, 376 U.S. 483 (1964).

Professor LaFave has observed that, "Not all business or commercial premises are open to the public at large. A factory for example, may be readily accessible to the employees of the company, but it does not follow from this that police may enter those premises at will. LAFAVE, *supra* note 49, at 340 (1978).

States,[96] the Supreme Court held that a room in a boarding house was protected against unreasonable searches and seizures,[97] and in *Stoner v. California*,[98] the Court held hotel rooms to be within the reach of the fourth amendment.[99] In *Rush v. Obledo*,[100] a federal district court in California was faced with the question whether warrantless inspections of day-care centers were permitted.[101] Answering no, the court states "[t]o subordinate the fundamental fourth amendment rights of many thousands of day-care providers and other residents of their homes . . . would be inconsistent with the priorities and values established by the Constitution."[102]

Commercial premises that extend a general invitation to the public, such as department stores, are not accorded the same protection. "[A]s an ordinary matter, law enforcement officials may accept a general public invitation to enter commercial premises for purposes not related to the trade conducted thereupon."[103] The actual practice of admitting people into the facility must be considered in determining the extent of the justified expectation of privacy.[104]

At Covenant House there is no general invitation for public admittance, and thus Covenant House maintains its expectation of privacy. Unless specifically invited to Covenant House, security guards question strangers and may turn individuals away. Thus, the fourth amendment prohibitions against unreasonable searches and seizures are applicable to the Covenant House setting.

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96. 335 U.S. 451 (1948).

97. *Id.*

98. 367 U.S. 483 (1964).

99. *Id.* at 490.

100. 517 F. Supp. 905 (N.D. Cal. 1981).

101. *Id.* at 906.

102. *Id.* at 916.

103. United States v. Berret, 513 F.2d 154, 156 (1st Cir. 1975), citing United States v. Berkowitz, 429 F.2d 921, 925 (1st Cir. 1970).

104. LAFAVE, *supra* note 49, at 340. This explains why hallways and lobbies in hotels and apartment buildings, which have free public access, are not protected from police intrusions. *Id.* at 306-12.

B. Rooms Exposed By Windows to the Public

Covenant House has several windows and glass doors that allow outsiders a view of otherwise private areas; one window faces the main street, a door exposes the reception area of one building, and several windows and doors in the main reception area (which is public) allow views into a lounge. Two distinct problems are posed by this situation. First, what is the status of things seen or heard, through the windows? Second, when are police allowed to cross the threshold into the private areas because of discoveries through their senses?

Evidence gathered by a police officer situated in a public place purely through unenhanced utilization of one or more senses does not constitute a "search" within the meaning of the fourth amendment.[105] The mere viewing or hearing of criminality, however, does not give the officer the right to cross from a public vantage point to a private one.[106] Thus, although what an officer becomes aware of through a window of Covenant House is admissible evidence against a resident, the officer does not have the right, solely on the basis of such discovery, to enter the shelter. It should be noted, however, that in most instances the threat of the destruction or removal of evidence, or of the escape of a suspect, or of the danger to life or property will justify a police officer's entry into the private setting.[107]

105. *See* Katz v. United States, 389 U.S. 347 (1967); United States v. Ortega, 471 F.2d 1350 (2d Cir. 1972); United States v. Jaborda, 635 F.2d 137 (2d Cir. 1980).

106. In Washington v. Chrisman, 455 U.S. 1 (1982), the Supreme Court overruled the decision of the Washington Supreme Court. The Washington Supreme Court had held that a policeman standing at the door of a private room had no right to enter without a warrant even after seing marijuana. The Supreme Court did not overrule based on this rationale. Rather, it held that because the defendant was under arrest and inside the room, the officer had a right to be in the room and hence could seize contraband in plain view.

107. *See infra* notes 172-234 and accompanying text on exigent circumstances. *See also* United States v. Santana, 427 U.S. 38 (1976), for an example of this situation.

IV. THE WARRANT REQUIREMENT

A. *Arrest At Covenant House*

1. *The Major Cases*

An important question for Covenant House is what type of warrant, if any, is required for the police to enter the shelter buildings to arrest a shelter resident. This question does not lend itself to easy resolution; not only is there a dearth of reported decisions concerning the type of warrant needed for arrests, but the decisions that do address the problem are not easily applied to residences such as Covenant House. Nevertheless, a review of the main pronouncements and their rationales indicates that at minimum an arrest warrant is necessary, and a sound argument can be made for requiring both an arrest warrant *and* a search warrant.

In *United States v. Watson*,[108] the Supreme Court, in a 6-2[109] decision, held that a warrantless public arrest based on probable cause did not run afoul of the Constitution.[110] Justice Stewart, in a concurring opinion joined by Justice Powell, emphasized that "[t]he Court does not decide, nor could it decide in this case, whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest."[111]

In *Payton v. New York*,[112] the Court partially answered the

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108. 423 U.S. 411 (1976) (Defendant's warrantless felony arrest in a restaurant by postal inspectors for possession of stolen credit cards did not violate fourth amendment because there was probable cause for the arrest).

109. Justice Stevens took no part in the decision.

110. The Court explicitly referred to *felony* arrests in public. In 1970 New York abolished any distinctions in arrest procedures for felonies and misdemeanors. According to the practice commentary this was because, "the distinction between a felony and a misdemeanor is frequently fine and impossible of ascertainment at the time of arrest, especially with respect to degree crimes." N.Y. CRIM. PROC. L. § 140.10 (McKinney's Practice Commentary, 1973). Although warrants were required for misdemeanor arrests under the common law, the Supreme Court has never incorporated this rule into the Constitution and it is unlikely that they will. *See* LAFAVE *supra* note 49, at 231-33.

111. 423 U.S. at 443.

112. 445 U.S. 573 (1980) (Acting with probable cause but without warrant, police entered the homes of two defendants without consent or exigent circumstances; the Supreme Court held that the fourth amendment, made applicable to the states through the fourteenth amendment, prohibits police from making warrantless and nonconsensual entry into a suspect's home in order to make a felony arrest). A warrantless arrest made in

question Justice Stewart alluded to in *Watson*. The Court held an arrest warrant to be necessary, absent consent or exigent circumstances, to effect an arrest of a suspect in his or her own home.[113] The Court reasoned that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"[114] and "any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind."[115] Although an arrest warrant merely documents probable cause that a suspect committed the crime—a search warrant evidences probable cause that evidence is in a particular place—the Court found the interposition of a magistrate for an arrest warrant sufficient protection against unlawful intrusions into the home.[116] The arrest warrant entitles a police officer to enter the suspect's dwelling only "when there is reason to believe the suspect is within."[117]

In *Steagald v. United States*,[118] the Supreme Court, in a 7-2 decision, held that police officers must obtain a search warrant, absent consent or exigent circumstances, before searching a third party's home for the person named in an arrest warrant because an arrest warrant is inadequate to protect the fourth amendment interests of persons not named in the warrant.[119] The Court recognized that a magistrate's determination of probable cause to believe that the object of a search is in a particular

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violation of *Payton* will not prevent the defendant from being brought to trial. The principal consequence of an invalid arrest is likely to be that evidence seized during the arrest will not be admissible.

113. *Id.* at 599-601.

114. *Id.* at 585-86, *citing* United States v. United States District Court, 407 U.S. 297 (1972).

115. 445 U.S. at 589. The New York Court of Appeals based its opposite decision on the "substantial difference" between an intrusion which attends a search of the premises and one which attends an entry to arrest a suspect, the latter being less objectionable. People v. Payton, 45 N.Y.2d 300, 310, 408 N.Y.S.2d 395, 399-400, 380 N.E.2d 224, 228-29 (1980).

116. 445 U.S. at 602.

117. *Id.* at 603. Note that this determination is now made by the police officer.

118. 451 U.S. 204 (1981) (Federal drug enforcement agents searched the home of defendant acting on a warrant to arrest another person. The individual named in the warrant was not found; however, the agents did find cocaine and other incriminating evidence during the search).

119. The fourth amendment claim of the person named in the warrant had not been raised. Therefore, the Court left open the question whether the subject of an *arrest* warrant can object to the absence of a *search* warrant when he is apprehended in another person's home. *Id.* at 212.

place is needed to safeguard an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.[120] The Court perceived a dangerous potential for abuse. "Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances."[121] The Court addressed the practical problem of a mobile suspect forcing the police to make several trips to a magistrate by pointing out that no warrant is needed in a public place (the suspect may be seized entering or leaving the third party premises), that the police need only an arrest warrant in the suspect's own home, and that the exigent circumstances doctrine is often available.[122]

In his dissent, Justice Rehnquist, trying to minimize the impact of *Steagald*, made an interesting and highly relevant observation concerning when a dwelling becomes a suspect's home for fourth amendment purposes.

> If a suspect has been living in a particular dwelling for any significant period, say a few days, it can certainly be considered his "home" for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if the suspect concurrently maintains a residence elsewhere as well. In such a case the police could enter the premises with only an arrest warrant.[123]

2. *Analysis*

Several questions of first impression are raised when these principles are applied to shelters such as Covenant House. The scenarios in these cases categorize the warrant requirement ac-

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120. *Id.* at 216. The Court found an agent's personal determination of probable cause inadequate protection from an illegal search, since an officer may lack the objectivity necessary to correctly weigh "the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home." *Id.* at 212.

121. *Id.* at 215. Moreover, the Court expressed concern over the police using arrest warrants for pretext searches. The Court also analogized the potential for abuse to the horrors of the general warrants the Fourth Amendment was aimed at. *Id. See supra* note 4.

122. *Id.* at 221-22.

123. *Id.* at 230-31.

cording to typical localities—public places and traditional homes. Temporary shelters such as Covenant House do not fit comfortably within the pronouncements of any of these cases. Nevertheless, the rationales of the decisions are helpful in assessing the posture of Covenant House shelters in the scheme of fourth amendment treatment of dwellings. Two distinct questions need resolution. Is a shelter such as Covenant House a home for *Payton* arrest purposes? If yes, is an arrest warrant sufficient for entry, or does *Steagald* require a search warrant also?

a) The Need For An Arrest Warrant

Covenant House shelters will most likely be considered a home for *Payton* purposes. This conclusion may be arrived at through two separate avenues. First, and most obvious, the emergency shelter provided by residences such as Covenant House can be directly analogized to a home. Second, the *Watson* decision is specifically limited in scope to public places, with a warrant required for any arrest where the subject has an expectation of privacy.

The Supreme Court has never explicitly defined what is to be a home for fourth amendment purposes. Several indicators, however, point to an elastic concept. In *Stoner v. California,*[124] the Court equated homes and rooming houses with hotels. "No less than a tenant of a house, or the occupant of a room in a boarding house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."[125] Additionally, in his dissent in *Steagald,* Justice Rehnquist has shown that he would consider any dwelling in which an individual has lived for a few days a home for fourth amendment purposes.[126] Also, one court has explicitly held with regard to *Payton* that a family day-care home is to be afforded

124. 376 U.S. 483, 490 (1964).

125. 376 U.S. at 490, *citing* Johnson v. United States, 333 U.S. 10 (1948). *See also* United States v. Salmasian, 515 F. Supp. 685, 688 (W.D.N.Y. 1981), where the court stated: "Also, I assume *arguendo* (but do not decide) that an individual inside a hotel room is entitled to the same degree of protection from warrantless arrests as he would have in his own home . . . ."

126. *See supra* note 123.

the same fourth amendment protections as a private home.[127] New York courts have always equated homes and hotels for fourth amendment purposes.[128]

It makes sense to treat a shelter such as Covenant House as a home for fourth amendment purposes, even though it is an institution that is providing temporary shelter. The services offered—shelter, food, clothing, counseling, and medical care—are all comforts found, in one way or another, in a traditional home. More important, perhaps, is the crucial privacy interest of residents at shelters. Privacy is the special and cherished value of the fourth amendment that supports the unique protection provided to the home. This privacy interest was given special recognition in New York's Runaway and Homeless Youth Act,[129] the enabling legislation for Covenant House. The act, along with other regulations, provides explicit safeguards for protecting the identity of residents.[130] Such state legislative concern should be

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127. Rush v. Obledo, 517 F. Supp. 905 (N.D.Cal. 1981). A family day-care home is a private home in which regular care is given to six or fewer children, plus any resident children, for any part of a 24 hour day. The court held that the protections afforded to a private home by the fourth amendment are in no way diminished by the fact that the occupant of the home is paid to care for a few children from other families part of the day.

128. *See* People v. Wood 31 N.Y.2d 975, 341 N.Y.S.2d 310, 293 N.E.2d 559 (1973); People v. Brown, 77 A.D.2d 537, 430 N.Y.S.2d 303 (1st Dep't 1980).

129. The N.Y. Runaway and Homeless Youth Act, Article 19-H, N.Y. EXEC. L. § 532-b(1) (McKinney 1978) provides that "an approved runaway program is authorized to and shall: . . . (e) assist in arranging for necessary services for runaway or homeless youth, and where appropriate, their families, including but not limited to, food, shelter, clothing, medical care, and individual and family counseling."

130. The Act directs the New York State Division for Youth to enact regulations in consultation with the department of Social Services "prohibiting the disclosure or transferral of any records containing the identity of individual youth receiving services." N.Y. EXEC. LAW § 532-d (4).

The division for youth in compliance with the Runaway and Homeless Youth Act of 1978, N.Y. EXEC. LAW § 532-d (4), has enacted the required regulations. These regulations explicitly define the obligation of confidentiality in dealing with young people served in programs like Covenant House:

> Disclosure or transferral of records or information containing the identity of individual youth receiving services shall be prohibited, except as provided in section 182-12(a) hereof.

N.Y. ADMIN. CODE tit. 9 § 182.6(6) (1986).

> Approved runaway programs shall develop policies and procedures which prohibit the disclosure or transferral to any individual or to any public or private agency, without the written consent of the youth, of all information including lists of names, addresses, photographs, and records of evaluations of individuals served by the runaway program. All such information shall be kept

of great weight in determining standards of reasonableness for the protection of shelter residents under the fourth amendment.

The second approach to requiring a warrant for arrests within Covenant House would be to limit *Watson* to arrests in public places. If an arrest warrant is not required in private places, a strong argument can be based on the glaring inconsistency between the protection from seizures of property in private places and seizures of people in private places.[131]

> Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest . . . is quintessentially a seizure . . . the constitutional provision should impose the same limitations upon arrests that it does on searches. Indeed, [a strong] argument can be made that the restrictions upon arrests . . . should be greater. A search [causes] only . . . temporary inconvenience to the law-abiding citizen . . . [while an] arrest . . . is a serious personal intrusion regardless of whether the person seized is [innocent or guilty].[132]

After presenting this argument in his concurrence in *Watson*, Justice Powell indicates that "logic must defer to history and experience"[133] in allowing different levels of protection from arbitrary search and arbitrary arrest. In the same opinion, however, Justice Powell states that the Court has not considered warrantless arrests in places where "the person has a reasonable expectation of privacy."[134] Indeed, Justice Powell has left the door open to bringing the fourth amendment within the bounds of reason by allowing for the establishment of a principle which requires an arrest warrant in places of privacy, but as with

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confidential.

N.Y. ADMIN. CODE tit. 9 § 182.12(a) (1986).

This explicit protection of confidentiality should also be helpful in arguing that Covenant House, in its entirety, is covered by the fourth amendment. *See infra* notes 134-71 and accompanying text.

131. In *Payton*, the Court approvingly cited language in Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971). "Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere." 445 U.S. at 586 n.25.

132. United States v. Watson, 423 U.S. 411, 428 (1976) (Justice Powell, concurring).

133. *Id.* at 429.

134. *Id.* at 433.

searches, not in public.[135]

b) The Need for a Search Warrant

If a shelter such as Covenant House is considered a home for fourth amendment purposes, it is an open question whether a search warrant is required along with an arrest warrant to enter the shelter to make an arrest. Although Covenant House may be classified as the home of the subject of the arrest warrant, it is also the home for approximately two hundred others not named in the warrant. The Supreme Court might readily declare that because Covenant House is the home of the subject of the arrest warrant, *Payton* controls and no search warrant is necessary. Or the Court may just as readily hold that because Covenant House is a home for many others, *Steagald* controls and a search warrant is necessary. The underlying rationales of the two decisions must therefore be carefully examined.

Consideration of the principles supporting the *Steagald* decision indicates that the soundest approach is to *require an arrest warrant and a search warrant* to enter Covenant House to arrest a suspect. The *Steagald* Court was concerned with the potential abuse to third parties' privacy interests and the possibilities for searches conducted under pretext. If a search warrant is not required, the fundamental and cherished privacy interest of non-suspect residents of Covenant House would be precariously balanced on a tightrope, ready at any moment to fall with the onrush of zealous police officers. The police with the ubiquitous bench warrant[136] would be allowed free entry to bedrooms and other chambers of privacy. Permitting police to search within the complex without a search warrant would be tantamount to the practice, severely criticized in *Steagald,* of allowing the search of 300 homes in order to find one suspect.[137] The transient nature of the people at the shelter also makes any police determination that a suspect is actually a resident always subject to serious question. "[T]he right protected—that of presumptively innocent people to be secure in their homes from un-

135. *See supra* note 108 and accompanying text.

136. A bench warrant is tantamount to an arrest warrant. People v. Ocasio, 106 Misc. 2d 138, 430 N.Y.S.2d 971 (Monroe Co. Ct. 1980). *See also* N.Y. CRIM. PROC. LAW § 1.20(28) and (30) for definitions of arrest warrant and bench warrant.

137. *See supra* note 121 and accompanying text.

justified forcible intrusions by the Government—is weighty."[138] Only a search warrant, with a neutral magistrate's determination that probable cause exists to find a suspect in a particular place, is sufficient to protect the rights of shelter residents and withstand a challenge under the fourth amendment.

The rationale of *Payton* does not undermine this approach. *Payton* was an expansive decision with most of the analysis centered on distinguishing *Watson* and explaining why a warrant was needed for an arrest in a home. Concern over the type of warrant the police must have in order to enter a home for an arrest was summarily treated. The Court, with little analysis, simply stated that an arrest warrant justified requiring the subject to open the doors of his or her home to the police. The *Steagald* Court picked up on the argument that did not move the *Payton* Court—that an arrest warrant does not provide insurance that probable cause exists that a subject is in a particular place—and, perhaps, undermined *Payton* to the point of limiting it to, at most, traditional homes.

B. Application, Issuance, and Execution

The law surrounding proper execution of warrants has special importance for an institution such as Covenant House. Strict procedures for dealing with police requests for admittance must be developed. With the privacy of a large group of residents playing such an important role in their well being, it is crucial to exclude any interference that disturbs the equilibrium of the shelter.

1. Application and Issuance

The strict requirements of the warrant process find their origin in the rocky history of the relationship between the state, through its police officers, and individual citizens. It is precisely the warrant application and issuance process that is supposed to provide the final safeguard for privacy. Interposition of a magistrate is meant to bring a rational force into an often chaotic and emotional situation. This point was most eloquently stated by Justice Jackson in the now-famous passage from *Johnson v.*

138. Steagald v. United States, 451 U.S. 204, 222 (1981).

United States:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.[139]

In New York, a police officer seeking a warrant must put the facts establishing probable cause into a signed, written affidavit.[140] For a nighttime search, this affidavit must assert probable cause to believe that the search warrant cannot be executed between 6:00 a.m. and 9:00 p.m., or that the property will be removed or destroyed if not seized forthwith.[141] No such time limitations exist for arrest warrants.[142]

A warrant must be issued by a neutral and detached judicial officer or magistrate.[143] Search warrants must describe the property and place, and must state the allowable execution time, and

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139. 333 U.S. 10, 13-14 (1948). In McDonald v. United States, 335 U.S. 451, 456 (1948), Justice Douglas put it more starkly: "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted." *See also* The Virginia Declaration of Rights, adopted June 12, 1776:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence are grievous and oppressive, and ought not to be granted.

Quoted in Henry v. United States, 361 U.S. 98, 100 (1959).

140. N.Y. CRIM. PROC. LAW § 120.20 (McKinney 1981).

141. *Id.*, § 690.30 (McKinney 1984).

142. *Id.*, § 120.80 (McKinney 1981).

143. *Id.*, § 120.10. In Connally v. Georgia, 429 U.S. 245 (1977), the Court invalidated a state provision that granted $5.00 to the magistrate every time a warrant was issued. *See also* Coolidge v. New Hampshire, 403 U.S. 433 (1971).

whether entry without notice of authority and purpose is allowed.[144] Arrest warrants must state the offense and identity of the defendant, unless the identity is unknown, in which case a description by which the individual can be identified with reasonable certainty will suffice.[145] The warrant must be addressed to a police officer whose scope of authority embraces the county of issuance.[146]

The fourth amendment requires that a warrant have a particular description of the premises to be searched and the item to be seized.[147] For shelters such as Covenant House, the question is whether a warrant that does not particularize a specific area in the buildings of the Center is lawful. Search warrants for apartments or hotels have been held invalid if the warrants failed to describe the particular subunit to be searched with sufficient definiteness to preclude indiscriminate searches of one or more subunits.[148] It is unlikely, however, that these cases will have a major impact on searches in Covenant House. The rationale of these decisions is based upon the fact that in most multiple-occupancy buildings it is not typical that the criminality under question has access to all of the separate living

144. N.Y. CRIM. PROC. LAW § 690.45 (McKinney 1984). *See infra* notes 130-143 and accompanying text for discussion of the notice of authority and purpose requirement.

In United States v. Chadwick, 433 U.S. 1 (1977), the Court stated that a warrant should be drafted so that the search is limited in scope and is no more intrusive than it must be. *See also* Stanford v. Texas, 379 U.S. 476 (1965), where the Court held that persons and things to be searched under a warrant must be particularly described.

145. N.Y. CRIM. PROC. LAW § 120.10 (McKinney 1981).

146. *Id.*, §§ 690.25 (McKinney 1984), 120.10 (McKinney 1981). The arrest warrant may be addressed to classifications of police officers. Failure to follow the New York procedural requirements will result in suppression of the fruits of the search. *See id.*, § 710.20 (McKinney 1984). In People v. Kennedy, 75 Misc.2d 10, 347 N.Y.S.2d 327 (N.Y. Co. Ct. 1973), the court suppressed evidence obtained because of the failure of a wiretap order to comply with the state minimalization requirement.

147. U.S. CONST. amend. IV. *See* United States v. Higgins, 428 F.2d 232 (7th Cir. 1970); Stanford v. Texas, 379 U.S. 476 (1965). The particular description requirement has a certain elasticity to it. "Technical requirements of elaborate specificity [are impracticable and insistence on them can indicate] a grudging or negative attitude by reviewing courts toward warrants [which] will tend to discourage police officers from submitting their evidence to a judicial officer before acting." United States v. Ventresca, 380 U.S. 102, 108 (1965).

148. "[T]he officers who are commanded to search [must] be able from the particular description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed." United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955).

quarters.[149] A sound argument can be made to require particularity in search warrants covering shelters such as Covenant House.[150] Residents do not have access to many areas of the complex: offices are normally not entered, and admission to floors on which a resident does not live is prohibited.[151] Furthermore, each resident floor can be entered only by using a guarded elevator or a special key. Thus, the particularity requirement will in all likelihood require specificity to at least a floor or two.

2. *Execution*

The constitutional mandates over proper police entry are "deeply rooted in our heritage and should not be given grudging application."[152] Historically, these entry requirements were found to be necessary to decrease the potential for violence and to protect privacy when warrants were executed.[153] As an outgrowth of this, the police are required, before using force, to give

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149. LAFAVE, *supra* note 49, at 78.

150. An interesting question arises upon consideration of particularity and arrests. Should the particularity clause require the police to search the complex beginning with the most likely place to find a suspect, or should they be given free reign once legitimately in the complex? On the one hand, the inherent mobility of a suspect and the importance of flexibility in police tactics argue for no limitations. On the other hand, the spectre of pretext searches might call for a requirement for the police to first look where it is most likely the suspect would be. Although such a limit might make good policy, it is hard to imagine that search procedures, imbued with tactics and uncertainties, would be restricted by a constitutional principle.

151. For instance, there is little reason to allow residents onto the floors housing corporate offices. Such a restriction would force the police to limit the scope of their application.

152. Miller v. United States, 357 U.S. 301, 313 (1958) (Defendant's arrest was unlawful and the evidence seized inadmissible because the police officers had not expressly demanded admission or stated the purpose for their presence before breaking down the defendant's door).

153. The announcement rule was first stated in Semayne's Case, 77 Eng. Rep. 194 (K.B. 1907):

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house either to arrest him, or to do execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors. . . .

Id. at 195. In Ratcliffe v. Burton, 127 Eng. Rep. 123 (C.P. 1802), Justice Rooke observed: "What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary!" *Id.* at 127. *See generally* Note, *Announcement in Police Entries*, *supra* note 4; Thomas, *The Execution of Warrants of Arrest*, 1962 CRIME. L. REV. 597.

clear notice of their authority and purpose.[154] In executing a search warrant in New York, a police officer must show the occupant a copy of the warrant upon request.[155] As with all police actions controlled by the fourth amendment, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness."[156]

The police do not have to give notice of authority and purpose before entry if exigent circumstances exist. In *Ker v. California*,[157] the Supreme Court, justifying the officer's failure to give notice, found that "[i]n addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police."[158] The Court has yet to decide whether a blanket exception to the announcement requirement exists for all drug cases.[159]

New York is one of a small number of jurisdictions that have adopted legislation specifically authorizing entry without prior announcement upon a sufficient showing to the magistrate of a need to do so, if necessary to prevent the escape of the de-

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154. N.Y. CRIM. PROC. L. §§ 690.50(1), 690.50(3) (McKinney 1984). *See also* Model Code of Pre-Arraignment Procedure 220.3(4) (Proposed Official Draft, 1975).

155. *Id.* §§ 120.80(2), 690.50(1), 690.50(3) (McKinney 1982). *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 220.3 (Proposed Official Draft 1975): part of execution is requirement that service of warrant be effected before commencing search, unless exigent circumstances exist. In that case, service of warrant can take place afterwards. In either case, a warrant must be issued or left at the premises.

156. Dalia v. United States, 441 U.S. 238, 258 (1979) (Federal agents' actions in covertly entering defendant's office to install a court-ordered electronic surveillance device were found not to violate fourth amendment, even though surveillance order did not expressly authorize entry of the defendant's business).

157. 374 U.S. 23 (1963) (Officers entry and search of defendant's apartment without a warrant was valid as incident to valid arrest based on probable cause to believe that the defendant was involved with drugs, and the method of entry was not unreasonable).

158. *Id.* at 40. *See also* Miller v. United States, 357 U.S. 301 (1958).

159. In Rodriguez v. Butler, 536 F.2d 982 (2d Cir. 1976), the court indicated that it was not resolving the question of whether under *Ker* a reasonable belief that narcotics are present within always justifies an unannounced entry. "New York evidently holds that it does, [however, federal] courts interpreting the requirements of the federal . . . announcement statute . . . are not in full accord on this question." *Id.* at 987.

For an argument against such an exception, *see* Note, *Announcement In Police Entries*, *supra* note 4, where the author argues for a requirement of a showing of articulable facts leading to probable cause that the suspect will destroy the evidence if announcement is made.

fendant, the destruction of evidence, or harm to the executing officer.[160] Also, the Court of Appeals for the Second Circuit has interpreted the New York provision to permit avoidance of the notice requirement if exigent circumstances are present.[161]

In New York, a search warrant must be executed within 10 days of issuance, and, unless it expressly authorizes execution at any time of day or night, it may be executed on any day of the week only between the hours of 6:00 a.m. and 9:00 p.m.[162] An arrest warrant may be executed at any time by any officer to whom it is addressed or to whom the officer delegates it.[163]

The manner-of-entry decisions have several important implications for Covenant House policy. First, barring exigent circumstances, the police must announce their authority and purpose, and show a copy of the warrant. Exigent circumstances should rarely permit waiver of these requirements. Unlike a private home where announcement immediately puts the occupants

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160. N.Y. CRIM. PROC. LAW §§ 690.50(2) (McKinney 1984), 120.80(4) (McKinney 1981).

161. Rodriguez v. Butler, 536 F.2d 982, 985 (2d Cir. 1976), *citing* People v. Floyd, 26 N.Y.2d 558, 562, 312 N.Y.S.2d 193, 195, 260 N.E.2d 815, 816 (1970), *and* People v. Gallmon, 19 N.Y.2d 389, 396 n.1, 280 N.Y.S.2d 356, 362 n.1, 227 N.E.2d 284, 288 n.1 (1967) (Fuld, J., dissenting) . *But see* People v. De Lago, 16 N.Y.2d 289, 292, 266 N.Y.S.2d 353, 356, 213 N.E.2d 659, 661 (1965) where the court stretched the exception to a search for gambling equipment, without any specific showing of need. "Even though there is nothing in the affidavit to show specifically how or where these gambling materials would be likely to be destroyed or removed, the likelihood that they would be was an inference of fact which the judge signing the warrant might draw." *Id.*

The New York cases indicate that a strict interpretation of the rules of entry is applied when actual force is used to effect entry. People v. DiBernardo, 89 Misc.2d 931, 392 N.Y.S.2d 1001 (Suffolk Co. Sup. Ct. 1977).

162. N.Y. CRIM. PROC. L. § 690.30 (McKinney 1984). This requirement is to protect against the staleness of the warrant. *Id.* This statutory period (10 days) is an outer limit, and a search executed inside the period may be untimely if enough time has elapsed so that there is no longer probable cause to believe the items listed in the warrant will still be on the premises. United States v. Nepstead, 424 F.2d 259 (9th Cir. 1970).

If the search warrant is issued by a district court or New York City criminal court, or a superior court judge it can be executed anywhere in New York. N.Y. CRIM. PROC. LAW § 690.20 (McKinney 1984). Arrest warrants meet the same requirements except a warrant issued by a city, town, or village court is executable anywhere if there is written endorsement of the local criminal court in which the arrest is to be made. *Id.*, § 120.70 (McKinney 1981). The only court allowed to issue an arrest warrant, is that court in which the accusatory instrument was filed. *Id.*

163. *Id.*, § 120.60 (McKinney 1981). Delegation is allowed if there is reason to believe the defendant is in a particular county other than the one in which the warrant is returnable, that county has made a written endorsement, and the delegated officer is employed in the locality where the arrest is made.

on notice, announcement to the receptionist or administrator in charge will rarely tip off a resident whose property or person is the subject of a warrant.

Shelters, such as Covenant House, believe that the police should be required to show the warrant to a shelter administrator, and that the administrator should be allowed an opportunity to get the requested resident or item before the police come into the shelter on their own. This is sound policy for two reasons: the privacy of the residents is undisturbed, and the justifications for additional searches and seizures inside the center are not present when the police are not legitimately inside the center.[164] There are no cases that hold that a police officer with a valid warrant must show any particular occupant a copy of the warrant, or that a police officer must allow an occupant who indicates assured cooperation the right to return with the subject of the warrant. It might be argued that under the general fourth amendment requirement that officers conduct themselves reasonably in executing a warrant, there is an obligation on the police officers to minimize the degree of intrusion necessary to find the described items by affording the occupant an opportunity to reveal the precise location of the item or individual within the described premises.[165]

The issue of searches of people who are present on premises being searched under a warrant needs mentioning. If the police are first, legitimately in the shelter searching or arresting under a warrant, they may want to search residents present in the search area, but not named in the warrant. In *Ybarra v. Illi-*

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164. *See infra* notes 235-61 and accompanying text.

165. *See* LAFAVE, *supra* note 49, at 186. Such an argument, based on reasonableness, might also be of weight in resolving the conflict concerning what type of warrant the police need in order to enter Covenant House (*see supra* at notes 108-38 and accompanying text). With cooperation assured, it is reasonable, to minimize the intrusion, to require the police to have at least an arrest warrant and a search warrant before they can ignore Covenant House staff members' offers of assistance (of course this would apply only in the absence of exigent circumstances). Cooperation by Covenant House officials can be counted on much more than family members in a private home. Further, the likelihood of escape is minimal given that there are only two exits from the complex.

It would certainly be helpful to inform the police beforehand that Covenant House officials will fully cooperate upon presentation of a valid warrant. Such knowledge by the police might increase the reasonableness of giving Covenant House staff an opportunity to bring the subject of the warrant themselves.

nois,[166] the Supreme Court declared unconstitutional an Illinois statute allowing the police reasonably to detain and search any person found on the premises searched under a search warrant in order to prevent the disposal or concealment of the articles described in the warrant.[167] Mere presence in a place searched under warrant was insufficient to justify a search.[168] The Court also held that traditional probable cause was the standard to be met to justify a search of persons present on the premises being searched under a warrant. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to the person."[169] The Court expressly refused to extend the protective frisk doctrine of *Terry v. Ohio*[170] to persons who may be concealing contraband.[171] The case has important consequences for police searches at shelters such as Covenant House. Unless shelter residents are named in the warrant, or qualify for a frisk under *Terry*, they cannot be searched and their mere presence in the room searched under warrant is insufficient justification for a police search of their persons.

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166. 444 U.S. 85 (1979) (Police officers' warrantless pat down of all customers who happened to be present, in an authorized search of the bar, found violative of the fourth amendment).

167. *Id.* at 90-96.

168. *Id.* at 94-95 *citing* United States v. Di Re, 332 U.S. 581 (1948). The Court in *Di Re* said it was "not convinced that a person, by mere presence . . . loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

169. 444 U.S. at 91.

170. 392 U.S. 1 (1968) (Where police officer concluded in light of his experience, that unusual and suspicious conduct by defendant and two others evidenced likelihood of criminal activity, a search of their persons was reasonable under the fourth amendment). *See infra* notes 250-58 and accompanying text.

171. *See generally* Note, *Criminal Law—Search of Persons Present on Premises Subject to a Search Warrant—Ybarra v. Illinois*, 28 U. KAN. L. REV. 512 (1980). *See also* Note, *Fourth Amendment Rights of Persons Present When a Search Warrant is Executed: Ybarra v. Illinois*, 66 IOWA L. REV. 453 (1981), where the author points out that the court did not explicitly deal with the contention that a person may pose a threat *solely* because of his presence in a *particular group* or at a *particular location*.

V. WARRANTLESS SEARCHES AND ARRESTS

A. *Exigent Circumstances*

The Supreme Court has recognized that some warrantless entries into the home to search or arrest are reasonable under the fourth amendment. An exigent circumstance can justify such entries and is an exception to the constitutional rule.[172] The scope and definition of this principle is highly important to an assessment of Covenant House's rights against intrusions by the police. It is precisely the situation of anxious warrantless police officers demanding entrance to Covenant House that is of gravest concern. Not that much can be done to halt a zealous officer—calling the police seems futile[173]—but an understanding of Covenant House's rights will enable prompt post-incident action.

The exigent circumstances exception is an emergency doctrine. The lack of predictability of street situations makes principled analysis and easily employable rules difficult if not impossible to formulate. The necessary accommodation between the individual's privacy interests and the promotion of effective law enforcement meets its Goliath in the panic of ongoing crimes. The best approach for approximating any understanding of the exigent circumstances rule is first to examine the central cases closely, and then to screen additional decisions to breathe life into the various components of the rule.

1. *The Doctrine*

In *Warden v. Hayden*,[174] the Supreme Court first carved out the exigent circumstances exception. In *Hayden*, a cab driver informed the police that an armed robber had entered a

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172. A state must provide a judicial determination of probable cause as a prerequisite to extended restraint on liberty promptly after any warrantless arrest. Gerstein v. Pugh, 420 U.S. 103 (1975).

173. It is possible that a call to a higher level police officer may allow for a more reasoned opinion which will put a stop to the intrusion.

174. 387 U.S. 294 (1967). For sources on exigent circumstances *see generally* Mascolo, *Emergency Arrest in the Home*, 3 W. NEW ENG. L. REV. 387 (1981); Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L.F. 655 (1978); Donnino & Girese, *Exigent Circumstances For A Warrantless Arrest*, 45 ALB. L. REV. 90 (1980).

specific house, later determined to be Hayden's home.[175] The police arrived within five minutes, entered, seized evidence, and arrested Hayden.[176] The Court held that the entry and seizures were permissible under the Constitution.

> 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. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.[177]

The Court in *United States v. Santana*[178] outlined the "hot pursuit" branch of the exigent circumstances exception. In *Santana,* the police, after buying heroin from and arresting the dealer, immediately went to the supplier's home two blocks away.[179] Upon arrival, Santana, the supplier, was standing on her front porch.[180] When the police identified themselves, Santana fled into her home, whereupon the police rushed in and arrested her.[181] During the arrest, several packets of heroin fell from a paper sack Santana was holding.[182] The Court held the arrest and seizure constitutionally proper as a clear case of "hot pursuit." "[H]ot pursuit means some sort of chase, but it need not be an extended hue and cry in and about [the] public streets. . . . Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence."[183] The case establishes the proposition that an arrest set in motion in a public place (Santana's front porch, exposed to public view) cannot be defeated by the expedient of escaping to a private place.

These two cases, *Hayden* and *Santana,* provide the skeleton

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175. 387 U.S. at 297.
176. *Id.*
177. *Id.* at 298-99.
178. 427 U.S. 38 (1976).
179. *Id.* at 40.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 43.

of the exigent circumstances principle. A general statement of the rule is if, to a reasonably prudent person, any delay incident to securing a warrant would (1) pose significant risk of danger to life or property, (2) allow the escape of the suspect, or (3) permit destruction of evidence, then a warrantless search or seizure reasonable in scope is constitutionally proper.[184] This account, however, is lacking in the requisite specificity needed for application to various possible street occurrences.

The most ambitious effort to add flesh to these bones was undertaken by the Court of Appeals for the District of Columbia in *Dorman v. United States.*[185] In *Dorman* an armed robber absconded from a clothing store wearing a stolen suit; his probation papers, which identified him by name and address, were left behind in his pants in the store.[186] Four hours later, the police made a warrantless entry into Dorman's home.[187] Not finding him there, the police searched the home and found the stolen suit hanging in the closet.[188] The court upheld the search as conducted pursuant to exigent circumstances.[189] The court elaborated "useful," "[non]comprehensive," "considerations," that are "material" to ascertain those situations that cannot "brook the delay incident to obtaining a warrant."[190] The court's list of possible relevant requirements for the exception to apply included (1) a grave offense is involved, (2) the suspect is reasonably believed to be armed, (3) there exists a clear showing of probable cause, (4) a strong reason exists to believe that the suspect is in the premises being entered, (5) there is a likelihood that the suspect will escape if not swiftly apprehended, and (6) under the circumstances the entry, though not consented, is made peaceably.[191] This list, hardly immune from criticism,[192] has been

184. The Supreme Court has not faced the issue of the duration of an emergency search. One commentator has argued that, "upon the termination of the supporting basis for the warrantless presence, the police must cease any further search activity and must seek a warrant." *See* Mascolo, *The Duration of Emergency Searches: The Investigative search and the Issue of Re-Entry*, 55 N.D.L. REV. 7, 15 (1979).

185. 435 F.2d 385 (D.C. Cir. 1970).

186. *Id.* at 387-88.

187. *Id.* at 388.

188. *Id.*

189. *Id.*

190. *Id.* at 392.

191. *Id.* at 392-93.

192. Professor LaFave expresses concern with regard to the practical utility for a po-

adopted by the Court of Appeals for the Second Circuit.[193]

The New York Court of Appeals, in *People v. Mitchell,*[194] outlined a general guideline. In *Mitchell,* the police searched a hotel for a missing chambermaid, last seen on the sixth floor.[195] The chambermaid's hacked body was found in a sixth floor room.[196] The court, upholding the search, recognized "the general obligation of police officers to assist persons whom they reasonably believe to be in distress."[197] The court summarized the basic elements of the exigent circumstances exceptions:

(1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property;
(2) the search must not be primarily motivated by intent to arrest and seize evidence;
(3) there must be some reasonable basis, approximating

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liceman forced to make a prompt decision as to whether exigent circumstances exist of such a cumbersome test:

> Finally, it is not inappropriate to suggest that the rules governing search and seizure, including when a warrant is required, are more in need of greater clarity than greater sophistication. Guidelines as to what constitutes "exigent circumstances" are likely—in the long run— to be more effective in preventing unnecessary warrantless searches and seizures if expressed in terms which the police can easily understand and readily apply, than if developed in a more complicated fashion toward the end of theoretical perfection.

LaFave, *supra* note 1, at 30. Professor LaFave goes on to suggest that the better proposal is one that is "theoretically correct 95 out of 100 cases but understandable in its application to virtually all cases," rather than one that is 100 percent theoretically perfect but understandable to the police in only 75 percent of the cases. LaFave, *supra* note 1, at 30 n.76. *See also* Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem,* 1978 U. ILL. L.F. 655, 679 (1978) where the author added:

> Indeed, the prospect of policemen checking the *Dorman* list to see if exigent circumstances justify his warrantless entry seem ludicrous. If the Fourth Amendment is to have the practical effect of safeguarding personal liberty by regulating police procedure, an interpretation of Fourth Amendment reasonableness must be stated in terms readily comprehensible to the police in their day-to-day activities.

193. United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978).

194. 139 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976). *See generally* N.Y. CRIM. PROC. LAW § 140 (McKinney 1981).

195. *Id.* at 175-76.

196. *Id.*

197. *Id.* at 177. The Court warned, however, "the limited privilege afforded to law enforcement officials by the emergency does not give them carte blanche to rummage for evidence if they believe a crime has been committed." *Id.* at 179.

probable cause, to associate the emergency with the area or place to be searched.[198]

2. *Destruction of Evidence*

The destruction of evidence was not discussed in *Dorman*,[199] and is clearly a critical circumstance to be considered in determining the presence of any exigency. The belief that evidence will be destroyed is necessary before warrantless entry is permitted, but to what degree of belief is not clear. The goal of such a standard is not to ensure that no evidence is ever destroyed.[200] The fact that particular kinds of evidence readily lend themselves to destruction is not sufficient in itself to establish an exigent circumstance.

In *Vale v. Louisiana*,[201] the Supreme Court held impermissible a warrantless search for drugs of Vale's mother's house,[202] even though Vale's mother and brother arrived at the scene immediately after the arrest.[203] The Court stated a strict, though dubious, standard. "[T]he goods ultimately seized were not in the process of destruction. Nor were they about to be removed from the jurisdiction."[204] The dissent pointed out that a different standard was formulated in the past.[205] In *Johnson v. United States*,[206] the Court declared exigent circumstances to be present when "evidence or contraband was threatened with removal."[207] The *Vale* decision indicates that the destruction of evidence exception to the warrant requirement is to be narrowly

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198. *Id.*

199. Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

200. *See* United States v. Di Re, 332 U.S. 581, 595 (1948). Mr. Justice Jackson stated:

> It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

See generally Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465 (1971).

201. 399 U.S. 30 (1970).

202. *Id.* at 33-35.

203. *Id.* at 33.

204. *Id.* at 35.

205. *Id.* at 39 (Black, J., dissenting).

206. 333 U.S. 10 (1948).

207. *Id.* at 15 (exigent circumstances were not present).

construed.

The courts have applied the destruction of evidence principle in a wide variety of cases: *Michigan v. Tyler*[208] (an entry to fight a fire requires no warrant, and once in the building, officials may remain for a reasonable time to investigate the cause of the blaze); *Schmerber v. California*[209] (blood samples taken by a physician at the direction of police officer of driver suspected of being intoxicated is permissible without a warrant); *Cupp v. Murphy*[210] (scrapings of blood samples from defendant's fingernails before arrest admissible); *United States v. Gomez*[211] (voices, scurrying feet, the sound of water running and the sound of a toilet flush are sufficient for creating exigent circumstances); *People v. Vaccaro*[212] (reliable information that a gun delivery was rapidly being distributed was sufficient to justify warrantless raid); *United States v. Reed*[213] (search by Drug Enforcement Agency agents two and one-half months after accusatory information was received was impermissible without a warrant).

3. *The Presence of Weapons*

The threat to the safety of the police or innocent bystanders posed by an armed suspect creates an obvious basis for action without a warrant. Mere possession or ownership of a dangerous weapon, without more, will not reasonably support the belief that the suspect poses a threat.[214] Additionally, the seriousness of the offense, by itself, will not justify a warrantless search.[215]

In *People v. Etcheverry*,[216] the police received confidential information that a fugitive named in a one year outstanding ar-

208. 436 U.S. 499 (1978).
209. 384 U.S. 757 (1966).
210. 412 U.S. 291 (1973).
211. 633 F.2d 999 (2d Cir. 1980).
212. 39 N.Y.2d 468, 384 N.Y.S.2d 411, 348 N.E.2d 886 (1976).
213. 572 F.2d 412 (2d Cir. 1978).
214. United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976).
215. Mincey v. Arizona, 437 U.S. 385, 393-394 (1978). The Court held that a four-day search of Mincey's apartment after a shootout in which Mincey had shot and killed a narcotics agent to be impermissible, lacking the requisite exigency. The rationale that the public interest in prompt investigation of extremely serious crimes justified the search was rejected by the Court.
216. 39 N.Y.2d 252, 383 N.Y.S.2d 292, 347 N.E.2d 654 (1976).

rest warrant was armed and at his mother's home.[217] Upholding the police search of the home, the New York Court of Appeals identified a paint brush, hastily abandoned, as evidence that the defendant was attempting to elude the police.[218] Citing *Hayden*, the court concluded that "an armed fugitive was at large within the confines of a house, necessitating a prompt thorough search by the police."[219] Similarly, in *People v. Velez*,[220] the court found ample justification for a warrantless arrest "of two dangerous and armed robbers who had just perpetrated a felony murder. . . ."[221] In *United States v. Artieri*,[222] the court used a subjective-objective test to determine that "the agents making the entry had reasonable grounds to believe and did believe that the defendant Artieri was likely to be armed."[223]

4. *Flight*

Flight is another instance that is obviously grounds for a warrantless arrest. The mere possibility of escape, however, is insufficient to give rise to exigent circumstances.[224] In *United States v. Manning*,[225] the court justified a search "where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity *which justifies the officer's belief* that an escape or destruction of evidence is being attempted."[226]

5. *Other Factors of Importance*

No list of relevant factors for an emergency doctrine can be complete. The following is a brief catalogue of criteria that has been important in past exigent circumstances decisions:

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217. *Id.* at 254.
218. *Id.* at 255.
219. *Id.* at 256.
220. 88 Misc.2d 378, 388 N.Y.S.2d 519 (Sup. Ct., N.Y. Co. 1976).
221. *Id.* at 391.
222. 491 F.2d 440, 444 (2d Cir. 1974), *cert. denied*, 419 U.S. 878 (1974).
223. *Id.* at 444.
224. United States v. Acevedo, 627 F.2d 68, 71 (7th Cir. 1980), *cert. denied*, 449 U.S. 1021 (1980); Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., concurring and dissenting); Miller v. United States, 357 U.S. 301, 309 (1958) (dictum).
225. 448 F.2d 992, 1001 (2d Cir. 1971), *cert. denied*, 404 U.S. 995 (1971).
226. *Id.* at 1001 (emphasis added).

a) *Delay:* Delay by itself is not controlling;[227] securing a warrant always involves some delay. But the warrant process does take time,[228] and the delay involved is a circumstance to be considered.[229]

b) *Stakeout:* Some courts have held warrantless searches impermissible on the ground that the police could have kept the premises under surveillance while a warrant was obtained.[230] But a stakeout is not required if delay would heighten risks of violence, destruction of evidence or escape.[231]

c) *Time of Entry:* As the *Dorman* court pointed out, this factor works both ways. On the one hand, the late hour may underscore the delay. On the other hand, nighttime entries have been seen as particularly intrusive, and may elevate the degree of probable cause required before a warrantless action can commence.[232]

d) *Probable Cause:* The court in *Dorman* ambiguously referred to clear probable cause.[233] This standard has not been picked up by other courts, but is worth watching. Belief that a suspect is present is always a prerequisite for any warrantless entry.[234]

B. *Legitimately on the Premises*

Once a police officer is legitimately on the premises a panoply of warrantless search justifications arise. The wide variety of

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227. Dorman v. United States, 435 F.2d at 394 (quoting Chappell v. United States, 342 F.2d 935, 938 (D.C. Cir. 1965)).

228. United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978) (several hours); United States v. Campbell, 581 F.2d 22, 27 n.7 (2d Cir. 1978) (between 4 and 5 hours).

229. In United States v. Gray, 626 F.2d 102, 104 (9th Cir. 1980), the agents were unable to locate the federal magistrate, and the nearest state judge resided approximately 55 miles away. Bad and hazardous roads caused by a continuing snowstorm made travel impracticable.

230. United States v. Pacheco-Ruiz, 549 F.2d 1204 (9th Cir. 1976); United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976). Several courts have upheld warrantless entries only after concluding that circumstances were such that surveillance was not feasible; United States v. Cognato, 408 F. Supp. 1000 (D. Conn. 1976); United States v. Rodriguez, 375 F. Supp. 589 (S.D. Texas 1974).

231. United States v. Calhoun, 542 F.2d 1094, 1102 (9th Cir. 1976) (surveillance was possible). *See also* LAFAVE, SEARCH AND SEIZURE, *supra* note 49, § 6.1.

232. 435 F.2d at 393.

233. *Id.* at 392.

234. Payton v. New York, 445 U.S. 573, 602-03 (1980).

available legal searches[235] makes it crucial to exclude the police from the premises whenever possible to protect the privacy interests of the residents. This section will outline the various rules formulated by the courts in this area of fourth amendment law.

1. *Incident to Arrest*

In *Chimel v. California*,[236] the police came to the home of the defendant with an arrest warrant; they suspected the defendant of robbing a coin shop.[237] After arresting the defendant, the police conducted a full-scale search of the defendant's three-bedroom house and discovered the stolen coins.[238] The Court found the search improper because it was unnecessarily broad.[239] A search incident to arrest is justified if the scope is limited to that required to protect the safety of the arresting officer.

> There is ample justification, therefore, for a search of the *arrestee's person* and the area *"within his immediate control"*—construing the phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching any room. . . .[240]

The *Chimel* standard, as interpreted and applied by lower courts, has increasingly proved wanting as a meaningful restriction upon the scope of a search incident to arrest. The term "control" has often been strained by courts which have condoned searches despite the arrestee's obvious inaccessibility to

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235. One author sees the elastic interpretation of these doctrines as effectively returning us to the days when full searches were permitted whenever an arrest took place. Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Property of Searches Conducted Contemporaneously with an Arrest On or Near Private Premises*, 30 SUP. CT. REV. 973, 988-89 (1979).

236. 395 U.S. 752 (1969).

237. *Id.* at 753.

238. *Id.* at 754.

239. *Id.* at 768.

240. *Id.* at 763. *See also* United States v. Chadwick, 433 U.S. 1 (1977) for an articulation of the rationale allowing a limited search: "[t]he potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *Id.* at 14-15.

the area searched.[241] "It is not at all clear that the 'grabbing distance' authorized in the *Chimel* case is conditioned upon the arrested person's continued capacity to 'grab'."[242] The exception is applicable to any situation in which a full custody arrest occurs.[243]

2. *The Plain View Doctrine*

The plain view doctrine is often applied to allow the police who are on the premises for lawful purposes to make a warrantless seizure of evidence which they see in plain sight. The three requirements, as elaborated in *Coolidge v. New Hampshire*,[244] are (1) the police must legitimately be on the premises, (2) the articles discovered must be immediately incriminating, and (3) the discovery must be inadvertent.[245] The Court balanced the policies of preventing general exploratory searches, with the efficacy of allowing the police to take what they see and thus avoid the timely and costly warrant process.

It is not clear what degree of awareness the police must have of the likelihood of finding the object before its discovery in plain view is no longer inadvertent.[246] Professor LaFave points out the inherent difficulty of "an after-the-fact inquiry into what the officer intended or knew, especially when it is to his advantage to claim a lack of such knowledge or in-

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241. *See* Kelder & Statman, *supra* note 235, at 985.

242. People v. Fitzpatrick, 32 N.Y.2d 499, 508, 346 N.Y.S.2d 793, 799 (1973) (quoting People v. Floyd, 26 N.Y.2d 558, 563, 312 N.Y.S.2d 193, 196, 260 N.E.2d 815, 817 (1970)).

243. *See* United States v. Robinson, 414 U.S. 218 (1973) (where a search incident to arrest for a traffic violation was upheld). If a *Chimel* search does occur, two additional grounds are available for challenging its propriety: the legality of the underlying arrest, and, similarly, whether the arrest was a subterfuge, made simply to afford the police an opportunity to conduct a search.

244. 403 U.S. 443 (1971).

245. Thus far only the plurality of four in *Coolidge* has supported the inadvertence requirement. *See* Texas v. Brown, 460 U.S. 730 (1983) (plain-view doctrine elaborated).

246. The possibilities are: total surprise, negligent to see, or no probable cause for a warrant. *See also* Oliver v. United States, 104 S. Ct. 1735 (1984) regarding the "Open Fields Doctrine" which says that open fields do not provide the setting for those intimate activities that the fourth amendment is intended to shelter from government interference or surveillance. Open fields are accessible to the public and police in ways that a home, office or commercial structure would not be; because fences or "No Trespassing" signs do not effectively bar public from viewing open fields, any asserted expectation of privacy in open fields is not one that society recognizes as reasonable.

tent. . . . "[247] The number of "inadvertent" seizures is likely to rise just as the number of "dropsy"[248] cases multiplied after *Mapp*.[249]

3. *The Stop and Frisk*

In *Terry v. Ohio*,[250] the Supreme Court established the rule that an officer, for his or her own safety and protection, may conduct a limited patdown for weapons upon a reasonable belief that the person to be searched is armed and presently dangerous, despite the lack of probable cause for either a full arrest or a full search.[251] The stop must be based on specific and articulable facts suggesting that the suspect is armed and presently dangerous.[252] A reasonable stop in New York allows the officer to ask only three questions: (1) name, (2) address, and (3) explanation of conduct.[253] The permissible frisk involves a two-step process. First, a patdown to feel for hard objects which may be weapons, and secondly, reaching inside a pocket of clothing only if a hard object is found.[254]

In *Ybarra v. Illinois*,[255] the Court rejected the proffered justification for the search, but, by analyzing the facts with the *Terry* rationale, acknowledged the applicability of a *Terry* stop and frisk at the scene of a search or arrest.[256] Professor LaFave has marshalled a list of relevant factors for such a stop:

> Among the relevant circumstances in making an assessment of the apparent danger [posed by companions of persons arrested] are the nature of the crime for which the arrest was made, the time and place of the arrest, the number of officers who are present as compared to the

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247. LaFave, *supra* note 1, at 29.

248. "Dropsy" cases are those in which the police gain probable cause upon seeing the defendant drop the evidence. *See* Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. LAW BULL. 549 (1968).

249. Mapp v. Ohio, 367 U.S. 643 (1961).

250. 392 U.S. 1, 21 (1968) (Reasonableness of a stop and frisk is determined by balancing the justification for the intrusion with the extent of the intrusion).

251. *Id.* at 21.

252. *Id.*

253. N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1983).

254. 392 U.S. at 24.

255. 444 U.S. 85 (1979).

256. *Id.* at 93.

number of arrestees and companions, and whether the companions have made any movements.[257]

4. *The Protective Sweep*

The emerging protective sweep doctrine enables law enforcement officials to conduct a cursory search of premises for potential accomplices or allies.[258] Like the stop and frisk and incident to arrest searches, the protective sweep is grounded in the concern for protection of police officers. The risk is most often present at arrest, but can arise from a police entry upon private premises to execute a search warrant.[259] The doctrine is important because it puts the police legitimately on the premises for possible plain view seizures whether or not the alleged accomplices are discovered. The variety of situations in which the sweep has been invoked to establish a foundation for seizure of evidence is vast.[260] Very often the courts do not identify the standard of justification used in passing on the validity of a protective sweep. When courts do identify a standard, they require a showing that the officers possessed a reasonable basis for the belief that other persons on the premises posed a threat either to the officer's physical safety, or to the destruction of evidence.[261]

5. *Application to Shelters such as Covenant House*

Once the police are legitimately on the premises of a shelter, a Pandora's Box is open. A protective sweep may take the police through all the rooms on a floor, increasing the opportunity for a plain view seizure. If police are confronted by a resident who gives them cause for fear, they may frisk the resident. The police may not frisk everyone they see, only those creating an articulable indication of danger. If a resident is arrested, the police have the authority to search the immediate area, but this may

257. LAFAVE, *supra* note 49 at 120-22.

258. *See generally supra* note 170 and accompanying text discussing the protective sweep doctrine.

259. People v. Sturgis, 76 Misc.2d 1053, 352 N.Y.S.2d 942 (Sup. Ct., N.Y. Co. 1973).

260. *See* Kelder & Statman, *supra* note 235.

261. *Id. But see* Vale v. Louisiana, 99 U.S. 30 (1970), where the Court did not find such a danger in the presence of the defendant's family.

include drawers and bags, as well as areas in plain view.

VI. SEARCHES BY COVENANT HOUSE PERSONNEL

An important problem for Covenant House concerns establishing when staff members themselves are permitted to search residents or their belongings. The most illuminating and relevant line of cases for this purpose deals with searches by school officials in public schools of students and students' lockers. The treatment of the students' fourth amendment rights in these cases presents an excellent analogy for the rights of residents as against searches by Covenant House personnel. The comparison is appropriate because in both schools and shelters the institution's administrative officials are responsible, and can even be said to have a duty, to maintain order and discipline and look after the health and welfare of shelter residents. Also, both institutional administrations are vested with powers of control, restraint and discipline over others, if only temporarily.

The doctrine of "state action" holds that constitutional prohibitions are applicable only when the state is involved; actions taken by individuals in their private capacity are not regulated by the Constitution.[262] Thus, searches by shelter staff that do not constitute state action are free from constitutional restraints. This article will not determine whether specific acts by Covenant House staff are state action. The following analysis assumes, arguendo, that state action is present when a search is conducted by staff.[263]

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262. *But see* Smith v. Maryland, 442 U.S. 735, 739 n.4 (1979) where the Court assumed state action was present because the telephone company acted at the request of the police in recording the phone numbers dialed by the defendants. The Court, however, went on to hold that the defendant had no privacy interest in such information, *id.* at 745-46, so this dicta is of little weight in determining where private action becomes state action.

263. In fact, it is unlikely that acts by Covenant House staff constitute state action. The Supreme Court has expressed a clear bias against finding actions of private organizations to be state action. *See* Blum v. Yaretsky, 457 U.S. 991 (1982) (Private hospital transferring patients not state action despite state funding, extensive state regulation and strong state interest in the services provided); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (School for troubled adolescents not state action despite 90% public funding, detailed state regulation, and public function); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) (Warehouseman's summary sale of goods entrusted to him not state action even though acts were authorized by state legislature); Jackson v. Metropolitan Edison Co., 419 U.S. 163 (1973) (Utility company terminating electric service not state action despite

Searches by Covenant House officials within the Covenant House complex typically arise in two ways. First, as often happens, the police come to Covenant House with a warrant, looking for a person or an object. Covenant House policy is that on such an occasion an attempt is made by the shelter administration to search for the desired person or object, while at the same time asking the police to remain in the lounge.[264] A second scenario involves the situation in which Covenant House personnel believe, without police impetus, that something is wrong and want to investigate the situation themselves. This can include searching lockers, rooms, suitcases, and the residents themselves, for weapons, drugs or stolen property. The school search cases present direct insight into the rights of the parties involved in these situations.

Putting aside the cases that hinge on the distinction between officials acting as private individuals or as government agents, the cases involve two theoretical approaches, proprietary interest and *in loco parentis*. If either of these doctrines can be applied, the search will be validated. The two methodologies do not compete with each other, and the cases can be organized to portray a workable analytical model.

The theory of proprietary interest rests on the basis that students' possession of lockers is exclusive only in relation to other students.[265] Thus, in *People v. Overton*[266] the New York Court of Appeals upheld a warrantless search of a student's locker by police detectives pursuant to the consent of a high school vice-principal.[267] The court used an expectation of privacy analysis to validate the search.

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its monopoly status, public importance and complex state regulations); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (Racially discriminating club receiving state liquor license not subject to state action).

264. Since no consent is given by Covenant House to a search by the police, the police, while waiting in the lounge, are not legitimately on the premises for the purpose of searching. *See supra* notes 235-61 and accompanying text. *See also supra* notes 41-55 and accompanying text for a discussion of consent to searches, and *supra* notes 108-38 and accompanying text on the necessity of a warrant.

265. *Cf.* Stoner v. California, 376 U.S. 483, where a hotel guest was held to have an expectation of privacy not only from other guests and strangers, but also from the management of the hotel.

266. 20 N.Y.2d 360, 283 N.Y.S.2d 22 (1967).

267. A federal district court subsequently rejected defendant's claim for post conviction relief. Overton v. Rieger, 311 F. Supp. 1035 (S.D.N.Y. 1970).

> When Overton was assigned his locker, he, like all the other students at Mount Vernon High School, gave the combination to his home room teacher who, in turn, returned it to an office where it was kept on file. The students at Mount Vernon are well aware that the school authorities possess the combinations of their lockers.[268]

This rationale might be used to support searches of residents' rooms by Covenant House personnel. Just as students know that school authorities have the combinations to their lockers, Covenant House residents are perfectly aware that the administration has keys to their rooms. This line of reasoning, however, has its limits. For instance, this reasoning would most likely not allow for a search of a resident's suitcase, which in no way has been made available to Covenant House staff, nor for a search of the resident's person.[269]

The *in loco parentis* doctrine is at once stronger and weaker than the proprietary interest rule. The theory is that school officials take the place of parents with regard to the education and protection of the students, and that in assuming the parental role school officials are vested with the powers of control, restraint and discipline over the children which parents have, in order to protect the educational process and the health and morals of the students.[270] This doctrine is stronger than the proprietary interest theory because it allows for searches of the person and all belongings; within school bounds there are not auto-

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268. 20 N.Y.2d at 363, 283 N.Y.S.2d at 25. *But see* Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971), where the Dean of Men at Troy State University was not accorded the same privilege.

269. In People v. Scott D., 34 N.Y.2d 483, 358 N.Y.S.2d 403 (1974), the court of appeals distinguished *Overton* as a right to privacy case in which school authorities had retained extensive control.

270. The court in People v. Jackson, 65 Misc.2d 909, 911, 319 N.Y.S.2d 731, 733 (App. Term 1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167 (1971) stated:

> A school official, standing *in loco parentis* to the children entrusted to his care, has, *inter alia*, the long honored obligation to protect them while in his charge, so far as possible, from harmful and dangerous influences, which certainly encompasses the bringing to school by one of them of narcotics and "works", whether for sale to other students or for administering such to himself or other students . . . .

But see New Jersey v. T.L.O., 469 U.S. 325 (1985), where the U.S. Supreme Court stated that, in view of "publicly mandated educational and disciplinary policies," *id.* at 336, it was more proper to look at school officials as state actors rather than *in loco parentis*.

matic limits. The *in loco parentis* doctrine is weaker because the right to search is not automatic; the fourth amendment is held to create some, though not full, protection.

In *People v. Scott D.*,[271] the New York Court of Appeals invalidated a search by a school teacher of a seventeen year old student for drugs.[272] The court was quick to hold that instructors[273] do not possess all parental prerogatives[274] and that "[h]igh school students are protected from unreasonable searches."[275] Just as rapidly, however, the court qualified this protection by lowering the standard of probable cause needed to initiate a search.

> [O]n the other hand, particular conditions change the basis for probable cause and therefore the standard of reasonableness of searches and seizures under constitutional limitations. . . . Youngsters in a school, for their own sake, as well as that of their age peers in the school may not be treated with the same circumspection required outside the school or to which self-sufficient adults are entitled.[276]

The court recognized that "[g]iven the special responsibility of school teachers . . . and the grave threat of drug abuse among school children, the basis for finding sufficient cause for a school search will be less than that required outside the school precincts."[277]

The standard for delineating permissible from impermissible searches seems to be whether there was "reasonable suspicion"[278] to conduct the search. This vague degree of cause is not

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271. 34 N.Y.2d 483, 358 N.Y.S.2d 403 (1974).

272. *Id.* at 491, 358 N.Y.S.2d at 410.

273. *Id.* at 486, 358 N.Y.S.2d at 406.

274. *Id.* at 485, 358 N.Y.S.2d at 405. Note also that the court in People v. Bowers, 77 Misc.2d 697, 356 N.Y.S.2d 432 (App. Term 1974), held that the doctrine of *in loco parentis* did not extend to security guards.

275. 34 N.Y.2d at 488, 358 N.Y.S.2d at 407.

276. *Id.* at 486-87, 358 N.Y.S.2d at 406.

277. *Id.*

278. People v. Bowers, 77 Misc.2d at 699, 356 N.Y.S.2d at 434, quoting People v. Jackson, 65 Misc.2d at 911, 319 N.Y.S.2d at 733: "As such, the courts have held that it would not be 'unreasonable or unwarranted that he [a coordinator of discipline] be permitted to search the person of a student where the school official has reasonable suspicion that narcotics may be found on the person of his juvenile charge.' "

all that helpful. At this point we know that it calls for less proof than "probable cause", but does not permit random causeless searches.[279] Among the factors that may be material are "the child's age, history and record in the school, the prevalence and seriousness of the problem in the school to which the search was directed, and, of course, the exigency to make the search without delay."[280] If Covenant House staff members are aware of articulable facts leading them reasonably to believe a resident is in possession of weapons, drugs or other items that could be dangerous, the *in loco parentis* doctrine will support a search of the resident.

CONCLUSION

The complexity of fourth amendment case law makes application of the underlying principles of the fourth amendment to concrete situations extremely difficult. The importance, however, of privacy and security to homeless people, indeed, the importance of privacy and security to all of us, makes it incumbent upon us to understand these complex rules and to be vigilant and forceful in asserting the rights of homeless people. This article has attempted to delineate the fourth amendment rights of residents of shelters for the homeless, and the obligations imposed by the fourth amendment on the shelters and the police. May it help protect the peace and privacy of shelter residents when combined with strong advocacy.

279. *See* People v. Scott D., 34 N.Y.2d at 487, n.31, 358 N.Y.S.2d at 406, n.31.
280. 34 N.Y.2d at 489, 358 N.Y.S.2d at 408.