Comments

Detention for Taking Physical Evidence Without Probable Cause

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Physical evidence taken from the person of a criminal suspect can be of substantial benefit to law enforcement officials in the investigation of crime. It may help to identify suspects in the investigatory process and to prove guilt at trial. By matching physical evidence taken from a suspect with evidence left at the scene of a crime, for example, police might either exculpate the suspect, thereby allowing the investigation to be directed toward other individuals, or identify the culprit.

Several types of evidence taken from the body may be classified as "physical evidence." Fingerprints, as well as palm prints and foot prints, are of primary importance to law enforcement officials in identifying suspects and investigating crime. Blood, hair, saliva and urine samples are also physical evidence. Although handwritten samples and voice exemplars are not evidence taken from the body, for purposes of this discussion they will be classified as physical evidence because they are a means of identification. Measurements of parts of the body, photographs and lineup identifications are also useful in the comparison of personal physical characteristics and can be classified as physical characteristic evidence.

This analysis will examine the circumstances in which physical evidence can constitutionally be taken before arrest. A recent line of cases has dealt with the problem of using detentions to seize physical evidence and to hold lineups where probable cause to arrest does not exist. The principles enunciated by these decisions regarding the constitutionality of such detentions will be examined. The constitutionality of taking physical evidence will then be discussed in the context of a recent Arizona statute which authorizes a magistrate to order a detention for the purpose of taking evidence of identifying physical

characteristics in situations in which there exists less than probable cause to arrest.[1] In addition, suggestions will be made for enhancing the degree of reasonableness of the Arizona procedure for pre-arrest confiscation of physical evidence.

The problem of pre-arrest seizure of physical evidence can best be understood against the background of the law involving seizure of such evidence subsequent to arrest. Once a suspect has been arrested, he is subjected to routine identification procedures. Usually his fingerprints are taken and he is photographed. Since the inconvenience to the suspect is minimal and the administrative need for proper identification procedures is great, warrants are not required.[2] Other types of incriminating external physical evidence, such as hair, may be taken by police without a warrant after arrest for use at trial.[3] If the seizure of the evidence involves a physical intrusion into the body, as in taking blood samples, however, a warrant is necessary.[4] Handwriting samples[5] and voice exemplars[6] may be taken after arrest; if not given voluntarily, they may be compelled by court order.[7]

Where evidence is seized following a valid arrest, the person's liberty has already been legally restrained. Any additional incon-

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1. ARIZ. REV. STAT. ANN. § 13-1424 (Supp. 1971-72). The statute is set out at note 69 *infra.*

2. A person in lawful custody may be required to submit to photographic identification, United States v. Amorosa, 167 F.2d 596 (3d Cir. 1948), or fingerprinting, United States v. Krapf, 285 F.2d 647 (3d Cir. 1960) as part of the routine identification process. No warrant is needed for these post-arrest identification procedures because they are not considered searches and seizures within the meaning of the fourth amendment. United States v. Laub Baking Co., 283 F. Supp. 217, 225 (N.D. Ohio 1968). For a discussion of post-arrest identification procedures, see Thompson, *Detention After Arrest and In-Custody Investigations: Some Exclusionary Principles,* 1966 U. ILL. L.F. 390, 391-402.

3. In United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969), a federal agent clipped several strands of hair after the suspect was arrested. At trial it was shown that this sample came from the same person as the hair found at the scene of the crime. The court admitted that this constituted a "seizure" within the meaning of the fourth amendment, but concluded that some official, in-custody investigative techniques designed to uncover incriminating evidence are such minor intrusions that they are not unreasonable in the absence of a warrant. Therefore, the clipping of hair was deemed not to fall within the purview of the warrant requirement for intrusive searches mandated by Schmerber v. California, 384 U.S. 757 (1966). *Accord,* Grimes v. United States, 405 F.2d 477 (5th Cir. 1968).

4. Schmerber v. California, 384 U.S. 757 (1966). The *Schmerber* Court considered a warrantless, post-arrest seizure of an intoxicated driver's blood. The existence of exigent circumstances (the rapid dissipation of alcohol in the blood) obviated the need for a warrant, but the Court emphasized that absent such an emergency, a search warrant would be required where intrusions into the human body were concerned. *Id.* at 770.

5. Gilbert v. California, 388 U.S. 263 (1967); United States v. Beshers, 437 F.2d 450 (9th Cir. 1971); Lewis v. United States, 382 F.2d 817 (D.C. Cir. 1967); State v. Craig, 67 Wash. 2d 77, 406 P.2d 599 (1965).

6. United States v. Wade, 388 U.S. 218 (1967); State v. Ramirez, 76 N.M. 72, 412 P.2d 246 (1966).

7. Although a person cannot be physically compelled to give a voice or writing sample against his will, his refusal would be contempt if a court ordered the sample. United States v. Doe, 405 F.2d 436 (2d Cir. 1968).

venience or physical restraint involved in taking the physical evidence is relatively insignificant in comparison to the initial detention occasioned by the arrest. Seizure of evidence prior to arrest,[8] however, necessarily involves an antecedent detention. Therefore, not only must the actual seizure of evidence be scrutinized,[9] but the detention itself must also be justified since it constitutes a significant invasion of privacy and restriction of personal liberty.

The specific problem of detention without probable cause to arrest for the purpose of taking physical evidence has received little judicial consideration. The Supreme Court in *Davis v. Mississippi*,[10] however, made it clear that indiscriminate detentions for the purpose of obtaining physical evidence based on little or no suspicion violate the fourth amendment. The Court suggested, however, that detention for fingerprinting might be constitutional if authorized by a magistrate, even though there was no probable cause to arrest.[11] The constitutionality of such a detention is questionable, as is that of pre-arrest detentions to obtain other types of physical evidence. Therefore, an examination of constitutional issues emanating from the fourth amendment is necessary.

CONSTITUTIONALITY OF DETENTION FOR TAKING PHYSICAL EVIDENCE WITHOUT PROBABLE CAUSE TO ARREST

Any official restraint of a person, as well as the seizure of physical evidence during the period of restraint, is subject to the fourth amendment's prohibition of unreasonable searches and seizures.[12] If the initial detention is illegal, any physical evidence seized at that time is a di-

8. The issue of whether physical evidence can be taken before arrest usually arises only when there is no probable cause to arrest. If probable cause to arrest exists, the suspect could be arrested and physical evidence could be taken from his body, most of it without warrant. See text accompanying notes 2-6 *supra*. Even if there is no probable cause to arrest, it may be advantageous for police to examine physical evidence taken from a suspect.

9. Even though the initial detention of the person is legal, if the manner in which the evidence is taken is so unreasonable as to "shock the conscience," the seizure violates the due process clause of the fourteenth amendment. Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, the seizure was held unreasonable when officers, without judicial order or the individual's consent, had the defendant's stomach pumped to recover morphine capsules.

10. 394 U.S. 721 (1969). In *Davis* police summarily rounded up several black youths for fingerprinting during the investigation of a rape case. The detention was illegal and, consequently, the fingerprints were excludable.

11. *Id.* at 728.

12. In Terry v. Ohio, 392 U.S. 1 (1968), the Court rejected the notion that because an on-the-street stop and frisk is not an arrest, it is not subject to the constraints of the fourth amendment. The Court concluded that the fourth amendment governs all intrusions by public agents upon personal security. *Id.* at 18 n.15. The actual seizure of the evidence is also subject to the command of the fourth amendment. In Schmerber v. California, 384 U.S. 757, 767 (1966), the Court viewed testing procedures as plainly constituting searches of persons and antecedently dependent upon seizures of persons within the meaning of the fourth amendment.

rect product of that prior illegality.[13] The principles of the fourth amendment as they apply to pre-arrest detentions and seizures of evidence during those detentions, however, are unclear.

Traditionally, the fourth amendment has been interpreted to mean that searches and seizures can be conducted only with a warrant,[14] and that the warrant must issue only upon a showing of probable cause.[15] The United States Supreme Court, however, has recognized several significant exceptions to the warrant requirement.[16] Arrest warrants also must be supported by probable cause, although it is generally recognized that officers can validly arrest a suspect without a warrant if a felony is committed in the officer's presence, or if he has probable cause to arrest.[17] Under traditional fourth amendment criteria, therefore, a detention for the purpose of securing physical evidence would have to be supported by a showing of probable cause if it is viewed as an arrest, a search, or a combination of the two. Labeling a particular detention or restriction of physical mobility something other than an arrest, however, does not resolve the constitutional issue of whether probable cause is nonetheless required.

Strict View: Any Detention is an Arrest

One view is that *any* restriction of personal freedom of movement amounts to an arrest and must therefore be supported by a showing of probable cause.[18] The Supreme Court has bolstered this view in

13. Davis v. Mississippi, 394 U.S. 721 (1969).

14. Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

15. The requisite probable cause to conduct a valid search involves the determination of whether the items are in fact seizable by virtue of being connected with criminal activity and whether the items will be found in the place to be searched. Rugendorf v. United States, 376 U.S. 528, 533 (1964). This latter condition requires only a showing of probability, not absolute proof. Spinelli v. United States, 393 U.S. 410, 419 (1969).

16. *E.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (search made in "hot pursuit" of suspect); Schmerber v. California, 384 U.S. 757 (1966) ("emergency" prevented taking time to get a warrant); United States v. Rabinowitz, 339 U.S. 56 (1950) (search incident to a lawful arrest) (*Rabinowitz* rule modified in Chimel v. California, 395 U.S. 752 (1969)); Carroll v. United States, 267 U.S. 132 (1925) (impracticality of securing warrant due to automobile's mobility) (rule approved, Chambers v. Maroney, 399 U.S. 42 (1969). *See* "Warrantless Automobile Searches," 13 ARIZ. L. REV. 313, 341 (1971).

17. Probable cause to arrest exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132 (1925); *cf.* Terry v. Ohio, 392 U.S. 1, 22 (1968). The same probable cause standard applies to arrests for misdemeanors, although it is generally recognized that an officer must secure an arrest warrant if the misdemeanor is not committed in his presence. Adair v. Williams, 24 Ariz. 422, 210 P. 853 (1922); City of St. Paul v. Webb, 256 Minn. 210, 97 N.W.2d 638 (1959).

18. *See* Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L.C.&P.S. 402 (1960), where it is suggested that since any

Carroll v. United States,[19] in which a warrantless search of an automobile was approved because it would have been impractical to obtain a warrant under the circumstances. Given the elusive character of automobiles and the extent to which they are used in crime, a right to detain and search automobiles on less than probable cause would have substantial justification. Nevertheless, the Court concluded that probable cause was necessary.

In light of *Terry v. Ohio*,[20] however, it is doubtful that every restriction of liberty is necessarily an arrest. The Court affirmed the admissibility in evidence of a gun discovered during a stop and frisk. Although it was not specifically stated that the stop was a valid detention and that policemen could compel a person to stop, this can be inferred since a frisk necessarily entails restraint.[21] Moreover, the view that every detention is an arrest ignores the differences between the two and the consequences to the person involved. After arrest the individual is usually booked, fingerprinted and photographed. He may be interrogated and placed in jail to await an initial appearance before a magistrate.[22] A limited detention, such as a stop and frisk, does not result in these consequences for the suspect who is detained. The stop is momentary, and the frisk merely involves a patting down of the outer clothing to detect concealed weapons.

In addition to the on-the-street detention approved in *Terry*, there

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distinction between arrest and detention is untenable, probable cause should be required for both. *Accord*, Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967). According to Abrams, the purpose of the detention is irrelevant. Any interference with individual liberty is subject to the fourth amendment and the warrant clause of that amendment ("no Warrants shall issue, but upon probable cause") is unequivocal in requiring probable cause. The reasonableness clause of the fourth amendment ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated") is supplemental to the warrant clause. That is, even though a search is made with probable cause, it must be conducted in a reasonable manner. Abrams concludes, therefore, that probable cause, not reasonableness, is the standard.

19. 267 U.S. 132 (1925). Brinegar v. United States, 338 U.S. 160 (1949), another case involving moving automobiles, was also decided on the assumption that probable cause is necessary to stop and search an automobile. Justice Burton, concurring in *Brinegar*, suggested the existence of an intermediate zone short of arrest which would warrant stopping a car for questioning on less than probable cause to arrest.

20. 392 U.S. 1 (1968). In *Terry* the Court concluded that a frisk of a suspicious person on the street was not an unreasonable search even in the absence of probable cause to arrest or search.

21. Note, *The Limits of Stop and Frisk—Questions Unanswered by Terry*, 10 ARIZ. L. REV. 419 (1968). The note suggests that if the Court were required to decide whether a policeman has a right to demand a person on the street to stop, it would hold he has such a right if the stop were reasonable under the circumstances. In his concurring opinion in *Terry*, Justice Harlan agreed, noting that although the officer lacked probable cause "he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry [and] restraining his liberty of movement briefly . . . ." 392 U.S. at 33.

22. W. LAFAVE, ARREST, 202-07 (1965).

are other instances in which restrictions of personal liberty on less than probable cause have received judicial sanction.[23] The Uniform Arrest Act,[24] adopted in several states,[25] authorizes a 2-hour detention for on-the-street questioning and investigation if an individual does not identify himself and explain his presence to the satisfaction of the officer. The officer need not have probable cause, only "reasonable grounds to suspect."[26] Detention is similar to a stop and frisk, the only real difference being that the former is more extended in time. Although the Supreme Court has never considered the validity of such a statute, state courts have upheld its constitutionality.[27]

It is also generally recognized that detentions and searches at the nation's borders can be made without probable cause.[28] The national interest in preventing the influx of contraband and disease into the country is sufficiently compelling to justify an automatic, routine search. It is therefore inaccurate to state that every restriction of physical mobility or invasion of personal privacy amounts to an arrest or search which must be supported by probable cause.

The Reasonableness Test

One alternate method of determining whether a particular restriction of liberty is an arrest requiring probable cause is to determine whether the restriction or detention is "reasonable." This determination involves balancing society's interest in detaining and searching a suspect against the suspect's interest in his personal liberty and privacy. Under this standard, the test is not whether there is probable cause, but whether the invasion of personal security is justified by the need of society to investigate and detect crime. Arrest is merely one form of restriction of liberty, but the restriction is so severe and its consequences to the suspect so grave that probable cause is required. On the other hand, detention may involve a lesser invasion which is only

23. *See* Cook, *Varieties of Detention and the Fourth Amendment,* 23 ALA. L. REV. 287 (1971). They include border searches and road blocks.

24. The Act is set out in full and discussed by its reporter in Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315 (1942).

25. DEL. CODE ANN. tit. 11, § 1902 (1953); N.H. REV. STAT. ANN. § 594:2 (1955); R.I. GEN. LAWS ANN. § 12-7-1 (1956). Other states have similar statutes: HAWAII REV. STAT. § 708-41 (1968); MASS. ANN. LAWS, ch. 41, § 98 (Cum. Supp. 1970); MO. ANN. STAT. § 544.170 (1953).

26. *But see* De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960), in which the Delaware supreme court, in order to prevent a "semantic quibble," interpreted "reasonable grounds to suspect" to be equivalent to the probable cause standard for arrests. This interpretation clearly frustrates the purpose of the statute, which is to allow the detention in situations where probable cause does not exist.

27. *Id.*; Kavanagh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961).

28. *See* note 86 *infra.*

a minor inconvenience to the individual and thus might be justified by a showing of something less than probable cause.[29]

The reasonableness test was formulated in *Camara v. Municipal Court*[30] and applied in *Terry*.[31] In determining the circumstances under which a warrant could be issued to inspect dwellings for health and fire prevention purposes, the *Camara* Court recognized that to require probable cause in such circumstances would frustrate administrative searches. The appropriate test, the Court concluded, was reasonableness. In determining the reasonableness of a search, it is necessary "first to focus upon the governmental interest which allegedly justified official intrusion upon the constitutionally protected interests of the private citizen,"[32] for there is "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[33]

Implementing this balancing test, the *Terry* Court recognized a governmental interest in effective crime prevention and detection, which includes on-the-street police encounters with suspicious persons.[34] If an officer is justified in stopping and questioning a suspect,[35] he has an interest in insuring his own personal safety, which may necessitate a frisk for weapons.[36] On the other hand, the individual who is confronted on the street has an interest in protecting his privacy. The Court concluded, however, that the stop and frisk is a relatively minor interference and society's need to investigate incipient crime is so great, as is the officer's need to insure his own safety during the investigation, that the procedure is reasonable.[37]

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29. The notion of balancing competing interests to determine the reasonableness of a detention under the fourth amendment is also described in terms of "variable probable cause." Under this notion, probable cause is the evidentiary standard which must be met in each case, but the degree of suspicion required to establish probable cause varies in direct proportion to the severity of the invasion. Thus, less evidence would be required to establish probable cause to detain than would be required to establish probable cause to arrest. The term probable cause is therefore not limited to the arrest context, but could be applied in other situations—for example, "probable cause to stop," and "probable cause to detain to take physical evidence." In Camara v. Municipal Court, 387 U.S. 523 (1967) the Court spoke of "area probable cause" necessary to obtain a warrant for a housing safety inspection. This interpretation of probable cause facilitates compliance with the fourth amendment requirement that "no Warrants shall issue, but upon probable cause" by giving probable cause a different meaning depending on the context in which it arises. For a development of the notion of variable probable cause, see Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969); Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521 (1968).

30. 387 U.S. 523 (1967).
31. 392 U.S. at 21.
32. 387 U.S. at 534-35.
33. *Id.* at 536-37.
34. 392 U.S. at 22.
35. *See* note 21 *supra*.
36. 392 U.S. at 23.
37. *Id.* at 27.

Factors Affecting Reasonableness

The balancing of conflicting interests is a highly subjective process, since it is difficult to assess the relative values of conflicting interests—an individual's personal liberty and society's self-protection, for example. Determining whether a particular detention is reasonable, however, is facilitated if certain factors affecting the detention are examined.

One significant determinant of the reasonableness of a detention is whether it is authorized by a magistrate. The Supreme Court has unequivocally expressed a preference for searches and seizures conducted under the authority of a warrant issued by a magistrate.[38] *Davis v. Mississippi*[39] held illegal a prolonged detention for fingerprinting after police had indiscriminately brought several suspects into custody. The Court suggested, however, that "because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[40] The Court indicated that in such a case the general requirement that the authorization of a judicial officer be obtained in advance of detention would also apply to fingerprinting.[41] The implication is clear: if the detention in *Davis* had been authorized by a magistrate after a convincing showing of its reasonableness, the detention might have been legal.

Another significant factor in determining the reasonableness of a detention is the extent to which the individual's interests are invaded. In this regard, the purpose of the detention is relevant. A detention for prolonged interrogation, for example, is a much greater invasion of personal liberty than a simple fingerprinting or photographing.[42] Generally, a detention conducted for gathering physical evidence involves little or no effort or active participation by the person being

38. In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court said:
> 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.

39. 394 U.S. 721 (1969).
40. *Id.* at 727.
41. *Id.* at 728.
42. In suggesting that a detention for fingerprinting might be constitutional, the Court in *Davis* said: "Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." 394 U.S. at 727.

detained.[43] The general circumstances under which the detention is conducted also affect the degree of invasion of personal interests. In *Wise v. Murphy*[44] the District of Columbia Municipal Court of Appeals suggested that a court-ordered lineup held without the requisite probable cause for an arrest might be constitutionally sound under the *Terry-Camara* balancing test if protective measures were taken to make the lineup as inoffensive as possible.[45] Additionally, the duration of the detention may influence its reasonableness. Other factors remaining constant, the shorter the detention, the more reasonable it is. Similarly, the place and time of the detention are relevant. If the detention is held at a time which is convenient for the detainee, after working hours, for example, and at a place protected from the public eye, the likelihood of viewing it as reasonable is greatly increased.

The reasonableness of a detention for taking physical evidence is further enhanced if there are no undesirable consequences to the individual as a result of the detention. Although a detention may differ significantly from an arrest, there exists the potential danger that a person's reputation may be adversely affected by the stigma so frequently attached to detention.[46] The legally significant fact that there existed only suspicion, rather than probable cause, that a person committed a crime would be little basis for distinction in the eye of the public. If protective measures were taken to conceal knowledge of the detention from the public, however, then injury to reputation need not be a factor.[47]

In balancing conflicting interests to determine the reasonable-

43. The only types of physical evidence which the detainee must make an effort himself to provide are the handwriting and voice exemplars, and even these can be provided in a quick, mechanical fashion.

44. 275 A.2d 205 (D.C. Mun. Ct. App. 1970).

45. *Id.* at 208: [N]othing resulting from such a lineup need be used officially in any other way. Thus, the lineup need not be photographed for use in connection with any other proceeding concerning others standing in it. The subjects need not be commingled with others accused or suspected of crime. The total time for assembly and viewing need hardly be more than a few minutes. In short, the process is to be as antiseptic as possible.

46. Foote, *Safeguards in the Law of Arrest,* 52 NW. U.L. REV. 16, 37 (1957), notes that inferences are bound to be drawn against anyone who is taken to a police station against his will to be investigated and that the attempt to minimize this stigma by not labeling the detention an arrest is more apparent than real.

47. For example, the individual should be given an opportunity to appear at the detention voluntarily, rather than being escorted by police. As suggested in Wise v. Murphy, 275 A.2d 205 (D.C. Mun. Ct. App. 1970), a detention need not be given public notice. If an official record is kept of the detention, care should be taken to safeguard its confidentiality. Certainly no one wants the public to know that he was once suspected of committing a crime, even if that suspicion can be shown to have been groundless. The adverse consequences can further be minimized if it is made clear to the detainee that he is not under arrest. He can then truthfully say he has never been arrested, which may have significance when he applies for employment or is otherwise questioned about his moral character or criminal background.

ness of bringing a suspect into custody, the nature of the particular crime under investigation is likewise pertinent. Society has a more substantial interest in solving and preventing serious crimes, particularly those involving violence, than it has in preventing crimes of a less serious nature. Thus, a detention for taking physical evidence may be justified in the investigation of a felony, but it may not be reasonable where a misdemeanor is involved because society's interests are not as compelling.[48]

An additional, independent factor to consider regarding the efficacy of allowing detentions without probable cause involves the administrative capability of courts to define a lesser standard of cause which would justify issuing the order. Courts must determine what facts can create a suspicion sufficient to justify the detention. If the difficulty of devising a coherent, uniform standard from a multitude of varying fact situations proves insurmountable, it may be necessary to retain the probable-cause-to-arrest standard for all restrictions of personal liberty.[49]

Notwithstanding all the precautions that can be taken to insure the reasonableness of an investigatory detention, it may nonetheless constitute an unreasonable search and seizure if probable cause is not present. A stationhouse detention is a more severe restriction of liberty and invasion of privacy than the frisk approved in *Terry*.[50] Even if detentions held on less than probable cause are constitutional as a matter of principle, it is possible that only those detentions would be reasonable which involve a minimal inconvenience to the individual, as suggested by *Davis* with regard to fingerprinting.[51]

Application of the Reasonableness Test

Although the limits of detention without probable cause remain

48. Wise v. Murphy, 275 A.2d 205, 216 (D.C. Mun. Ct. App. 1970):
> Grave reservations exist, however, as to whether this type of court-ordered lineup, not connected with a formal arrest, may be used constitutionally in other than serious felonies involving grave personal injuries or threats of the same. . . . [I]t would seem that some offenses, not involving serious personal injury or danger, weigh less as a part in the 'central element in the analysis of reasonableness.'

49. Probable cause, however, is itself an illusive concept with ill-defined boundaries. There is no standard to which particular fact situations are compared. As the Court said in Brinegar v. United States, 338 U.S. 160, 176 (1949), the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. Delineating a standard of cause which, by definition, is less than probable cause, may be impossible if the reference point, probable cause, is uncertain. Perhaps for this reason courts should not be asked to define several standards. *See* De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960); note 26 *supra*. *See also* LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331, 365-66.

50. *See* Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

51. *See* text accompanying note 39 *supra*.

undefined, several lower courts, encouraged by the *Davis* dicta, have invoked the *Terry-Camara* balancing test in determining the legality of detentions without probable cause to arrest. These decisions, however, have gone beyond the limited detention for fingerprinting suggested in *Davis* and have approved detentions for lineups without probable cause for arrest.

In *Biehunik v. Felicetta*[52] the Court of Appeals for the Second Circuit reversed an order of the district court enjoining a lineup involving police officers suspected of committing an assault while on duty. The lineup had been ordered by a police commissioner under circumstances which did not establish probable cause for an arrest. The court concluded, however, that probable cause was not essential since the lineup was reasonable under the *Terry-Camara* test of balancing competing interests.

Two factors were particularly significant in the court's determination. First, society's interest in a lineup involving policemen is more compelling than a lineup of ordinary criminal suspects because of the substantial public interest in ensuring the existence of police integrity.[53] In other words, since society has an interest in investigating crime, it has an even greater interest in assuring that its crime fighters are competent and respectable. Second, the policeman's employment relationship implies that in certain aspects of his affairs he does not have the full privacy and liberty from police officials that he would otherwise enjoy under the fourth amendment.[54] This lessens the adverse impact of the lineup on the policemen's personal interests. *Biehunik* is thus distinguishable from a case involving a lineup of "ordinary" criminal suspects because, under the reasoning of the court, the public interest in such a lineup is less compelling and a lineup would be more offensive to an ordinary suspect than to a policeman. Both of these factors tend to lessen the precedential value of *Biehunik* as authority for lineups of non-police suspects on less than probable cause.

In *Wise v. Murphy*,[55] however, the District of Columbia municipal court considered a court-ordered lineup of non-police suspects in a rape case where there was no probable cause to arrest. The court remanded the case for an evidentiary hearing and concluded that if the government could demonstrate its reasons for suspecting the individual, the lineup would be reasonable. The opinion expressly recognized the vitality of the *Terry-Camara* test and relied on the dicta

52. 441 F.2d 228 (2d Cir. 1971).
53. *Id.* at 230.
54. *Id.* at 231.
55. 275 A.2d 205 (D.C. Mun. Ct. App. 1970).

in *Davis* to support the decision. Significantly, two prerequisites were established for the determination of the reasonableness of a detention. First, the government must provide more than inarticulate hunches in connecting the suspect with the crime. It must provide a sufficiently detailed recitation of articulable facts showing why that particular individual is suspected.[56] These facts need not amount to a showing of probable cause, but they must connect the individual with the crime to an extent sufficient to prevent the procedure from degenerating into the type of dragnet operation condemned in *Davis*. Second, to be reasonable the detention must be conducted under controlled conditions that make it as inoffensive as possible and minimize the adverse consequences to the individual.[57]

People v. Morales,[58] a Court Appeals of New York case, dealt with a detention for interrogation without probable cause. A murder confession was obtained by the police during the detention and the defendant was subsequently convicted. Although *Morales* was a pre-*Davis* decision and dealt with interrogation rather than the seizure of physical evidence, it is significant in that it adopted the balancing test described in *Camara*. The court concluded that the public need for the detention outweighed the defendant's personal interests because of three factors: the crime involved violence and was therefore of great public interest; there were no practical alternative investigative techniques; and the detention was brief. The court did not define the evidentiary standard to be applied, but suggested that such a detention be limited to those persons reasonably suspected of possessing knowledge of the crime under investigation. The Supreme Court reviewed *Morales*[59] but remanded for an evidentiary hearing without determining the validity of the detention.[60]

Not all cases employing the *Camara* balancing rationale, however, have found that the government interests predominate. In *Dionisio v. United States*[61] the Court of Appeals for the Seventh Circuit considered a district court order requiring the defendants to furnish voice exemplars to a grand jury. The defendants refused and were

56. *Id.* at 217.
57. *Id.* at 207-08.
58. 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968).
59. Morales v. New York, 396 U.S. 102 (1969).
60. The Court noted that such a detention went beyond the decision in *Terry*, but suggested that on remand the state might be able to show the existence of probable cause for arrest, the voluntariness of the confrontation, or that the confessions which were elicited were not the product of an illegal detention. This last possibility has been interpreted as suggesting that a detention without probable cause might be constitutional. Wise v. Murphy, 275 A.2d 205, 212 (D.C. Mun. Ct. App. 1970).
61. 442 F.2d 276 (7th Cir. 1971).

found in contempt of court. There was no probable cause to arrest the defendants; rather, the government was engaged in a fishing expedition attempting to match voice prints already in its possession with samples it requested from twenty suspects. The court determined that the *Terry-Camara* balancing test was the appropriate standard, but concluded that the requirement of reasonableness, much less a standard of probable cause, had not been met because the government had given no indication of its reasons for suspecting the particular individuals in question. *Dionisio*, therefore, stands as a limiting principle in the area of judicially authorized detentions without probable cause. Although probable cause to arrest might not be required to compel production of voice exemplars or to obtain other types of physical evidence, the government is not permitted to detain without having met at least a minimal evidentiary standard.[62]

In sum, several courts have applied the reasonableness standard of *Camara* and *Terry* to determine the legality of detentions inflicted without a requisite showing of probable cause to arrest. These detentions have not been limited to the taking of fingerprints as suggested in *Davis*, but have also been used in conducting lineups, taking voice exemplars and interrogating. In the absence of the emergence of a uniform evidentiary standard,[63] the cases have largely been decided on an ad hoc basis. Consequently, the result depends more on the judge's sense of fairness and attitude toward the relative values of personal liberty and law enforcement interests than on whether a specific evidentiary standard has been satisified.

THE ARIZONA STATUTE: DETENTION FOR OBTAINING EVIDENCE OF IDENTIFYING PHYSICAL CHARACTERISTICS

On October 7, 1969, Senate Bill 2997 was introduced in the United States Senate.[64] The bill was entitled "Detention for obtaining evidence of identifying physical characteristics" and allowed detention of a criminal suspect for 5 hours for the purpose of obtaining evidence such as hair, blood, fingerprints, personal identification and other physical evidence. The evidentiary standard to be met before the detention could be legally conducted was not probable cause, but rather a mere showing that the evidence might help identify the crimi-

62. *See also* Davis v. Mississippi, 394 U.S. 721 (1969).
63. Although it is unclear as to the degree of guilt that must be shown before detention becomes constitutional, *Davis* itself prohibits detentions where no evidence is shown.
64. S. 2997, 91st Cong., 1st Sess. (1969).

nal. In introducing the bill, Senator McClellan of Arkansas noted that the language in *Davis* "reads almost like an invitation to Congress to enact legislation in this area" of criminal investigation.[65] Hearings were held,[66] but no copies of the record were made[67] and no final action was taken on the bill.

In 1971 Arizona enacted a statute embodying language almost identical to that contained in Senate Bill 2997.[68] Section 13-1424[69]

65. 115 CONG. REC. 28,896-900 (1969).
66. CCH CONG. INDEX 2467 (1969-70).
67. Letter from Senator McClellan to P. Michael Drake, Nov. 15, 1971 [copy on file in the offices of *Arizona Law Review*].
68. The Senate bill differed only in that it required the evidence to be taken from the individual in the presence of a U.S. Magistrate and the detention was limited to five hours rather than three. The requirement that the evidence be taken before a magistrate clearly would enhance the reasonableness of the detention since the magistrate's presence would induce officers to seize the evidence in a reasonable manner. It is unfortunate that the Arizona legislature chose not to adopt a similar protective provision.
69. ARIZ. REV. STAT. ANN. § 13-1424 (Supp. 1971-72):

A. A peace officer who is engaged, within the scope of his authority, in the investigation of an alleged criminal offense punishable by at least one year in the state prison, may make written application upon oath or affirmation to a magistrate for an order authorizing the temporary detention, for the purpose of obtaining evidence of identifying physical characteristics, of an identified or particularly described individual residing in or found in the jurisdiction over which the magistrate presides. The order shall require the presence of the identified or particularly described individual at such time and place as the court shall direct for obtaining the identifying physical characteristic evidence. Such order may be issued by the magistrate upon a showing of all of the following:

1. Reasonable cause for belief that a specifically described criminal offense punishable by at least one year in the state prison has been committed.
2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense.
3. Such evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the criminal identification division of the Arizona department of public safety.

B. Any order issued pursuant to the provisions of this section shall specify the following:

1. The alleged criminal offense which is the subject of the application.
2. The specific type of identifying physical characteristic evidence which is sought.
3. The relevance of such evidence to the particular investigation.
4. The identity or description of the individual who may be detained for obtaining such evidence.
5. The name and official status of the investigative officer authorized to effectuate such detention and obtain such evidence.
6. The place at which the obtaining of such evidence shall be effectuated.
7. The time that such evidence shall be taken except that no person may be detained for a period of more than three hours for the purpose of taking such evidence.
8. The period of time, not exceeding fifteen days, during which the order shall continue in force and effect. If the order is not executed within fifteen days, a new order may be issued, pursuant to the provisions of this section.

C. The order issued pursuant to this section shall be returned to the court not later than thirty days after its date of issuance and shall be accompanied by a sworn statement indicating the type of evidence taken. The court shall give to the person from whom such evidence was taken a copy of the order and a copy of the sworn statement indicating what type of evi-

authorizes a magistrate to issue an order allowing the temporary detention of an individual for the purpose of obtaining evidence of identifying physical characteristics. The significance of the provision is that it appears to allow the detention upon a showing of less than probable cause to arrest or search. The Arizona legislature was clearly attempting to implement the procedure ostensibly sanctioned by the *Davis* line of cases. The statute is one of the first of this kind[70] and presents an appropriate vehicle for examining both the feasibility of defining a standard of less than probable cause and the difficulties inherent in conducting pre-arrest seizures of evidence. The statute's provisions will be analyzed in detail, with emphasis on their reasonableness in light of the test expressed in *Terry* and *Camara* as well as their consistency with the principles established by *Davis* and subsequent cases.

Limitation to Felonies

The statute prescribes a particular procedure which must be followed if an order authorizing the detention is to be obtained. The order may be issued only by a magistrate upon a showing by the police officer that the necessary requirements of the statute have been met.[71] One such requirement is a showing of "[r]easonable cause for belief that a specifically described criminal offense punishable by at least one year in the state prison has been committed."[72] The standard of "reasonable cause for belief" is arguably the same as probable cause[73] but anomalously pertains only to the question of whether a crime has been committed and not to a determination of whether a particular individual has committed the crime.[74] In any event, the purpose of the

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dence was taken, if any.

D. For the purposes of this section, "identifying physical characteristics" includes, but is not limited to, the fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, or photographs of an individual.

70. The only similar provision is COLO. R. CRIM. P. 41.4 (1970) which authorizes a court order for fingerprinting if:

(1) a known criminal offense has been committed; and
(2) there is reason to believe that the fingerprinting of the named or described individual will aid in the apprehension of the unknown perpetrator of such criminal offense, or that there is reason to suspect that the named or described individual is connected with the perpetration of the crime.

This provision also appears to be a direct response to the dicta in *Davis*. It is limited to fingerprinting and appears to be within the procedure authorized in such instances. *See* text & note 97 *infra*.

71. ARIZ. REV. STAT. ANN. § 13-1424(A) (Supp. 1971-72).

72. *Id.* § 13-1424(A)(1).

73. As previously noted, section 13-1424 is derived from the Senate bill introduced in 1969. Reasonable grounds for belief is used in federal arrest statutes, *e.g.* 18 U.S.C. § 3052 (1970), and means substantially the same as probable cause. Draper v. United States, 358 U.S. 307, 310 n.3 (1959).

74. It is not clear whether the legislature was attempting to establish the standard

provision appears to be to limit the application of the statute to suspected felonies[75] and to require probable cause to believe that an actual crime has been committed before anyone can be detained. As noted previously,[76] a detention for the purpose of investigating serious crimes bears a greater justification than one for misdemeanors.

The Nexus Requirement

The language of the statute must be construed to require the police to connect logically the suspect with the crime if the statute is not to be unconstitutional on its face.[77] Subsection (A)(2) requires a showing that "[p]rocurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense."[78] Without more, a literal reading of this provision negates any requirement of the establishment of a nexus between the suspect and the crime under investigation. The requirement that procurement of evidence *may* contribute to the identification is, in most situations, a hollow one. Generally, assertions that the evidence may help identify the criminal are virtually impossible to contradict. This requirement arguably could be met if the evidence taken at the detention merely indicates that the suspect was not the perpetrator of the crime, thus reducing the number of possible suspects and thereby contributing to the identification of the criminal.[79]

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of proof required to detain or merely requiring that there be probable cause to believe a crime has been committed. The former is unlikely since there is no requirement of a nexus between the crime and the individual detained. The latter is more probable but is an unfortunate choice of language. The traditional term "probable cause" should have been adopted to avoid any confusion as to the meaning of the provision.

In a guideline for implementation of the statute by police officers, the Arizona Department of Public Safety has interpreted this provision to require "probable cause that a crime has been committed that is a felony." Arizona Department of Public Safety, Suggested Standards for Implementing A.R.S. 13-1424—Court Orders for Taking Physical Evidence (1971) [copy on file in the offices of *Arizona Law Review*]. If this is the interpretation the legislature intended, and it seems reasonable to assume that it was, then the provision should have been worded more explicitly.

75. In Arizona, a felony is a crime or public offense which is punishable with death or by imprisonment in the state prison. ARIZ. REV. STAT. ANN. § 13-103(A) (1956). Generally, confinement in the state prison is for not less than one year. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-231 (1956) (arson); 13-245 (Supp. 1971-72) (aggravated assault); 13-302 (Supp. 1971-72) (burglary); 13-572 (1956) (perjury).

76. *See* text & note 48 *supra*.

77. The notion that the suspect must be connected with the crime before official action can be taken against him is the import of the probable cause requirement. Carroll v. United States, 267 U.S. 132, 153-54 (1924). Although probable cause may mean different things in different contexts, Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967), it is nevertheless true that police must provide facts showing why official action should be taken against a particular individual. As the Court stated in Terry v. Ohio, 392 U.S. 1, 21 n.18 (1967): "This demand for specificity in the information upon which police action is predicated is the central teaching of this court's Fourth Amendment jurisprudence."

78. ARIZ. REV. STAT. ANN. § 13-1424(A)(2) (Supp. 1971-72).

79. The "may contribute" standard, however, would not permit a detention in

It is possible that the requirement of establishing a nexus between the crime and the suspect can be gleaned from Subsection (B)(3) which provides that any order issued pursuant to the statute must specify "[t]he relevance of such evidence to the particular investigation."[80] Logically, to explain the relevance of the evidence to the investigation, the officer must show why the evidence may implicate the individual, thus providing the necessary nexus between the crime and the suspect. In construing the statute, it would be incumbent upon the court to find a requirement that such a nexus be shown, if a reasonable reading of the language would permit it.[81]

To establish the requirement that a nexus be shown between the suspect and the crime, it would have been less difficult and confusing simply to require "reasonable suspicion" or "grounds for suspicion" that the suspect committed the crime. A provision of this sort would clearly indicate that a connection must be shown between the individual and the crime. Furthermore, such a provision would also signify that a standard of less than probable cause is contemplated.

Degree of Suspicion Required

Assuming the statute properly requires an officer to demonstrate his reasons for suspecting a particular individual, the required degree of suspicion is unclear. The statute provides no minimum evidentiary standard. The requirement that the evidence "may contribute" to

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those instances where the evidence could not possibly help identify the criminal. For example, this would preclude holding a lineup when there were no eye-witnesses to the crime under investigation.

80. ARIZ. REV. STAT. ANN. § 13-1424(B)(3) (Supp. 1971-72). Subsection (B)(3), along with subsection (A)(2) ("procurement of the evidence may contribute to the identification") would appear to allow detention of an individual who is admittedly not the suspect. For example, to show that a typewriter that was recovered from a burglary suspect is the same one that was stolen from a repair shop, the repairman could be detained for fingerprinting in order to ascertain whether his prints match those on the typewriter. Procurement of this evidence may contribute to the identification of the criminal and it is relevant to the particular investigation.

It is doubtful, however, that such a detention would be constitutional. Official government coercion generally can be exercised only against individuals who are suspected to some degree of having committed a crime. *See* note 77 *supra*. The fact that the statute appears to be susceptible to an unconstitutional application, however, should not also render it invalid in situations where its application is constitutional. A recognized rule of statutory construction provides that a court, in order to uphold an ambiguous statute, can apply the doctrine of restrictive interpretation to preserve validity and restrict the statute to constitutional application unless an express contrary intention of the legislature is indicated. Oglesby v. Pacific Fin. Co., 44 Ariz. 449, 38 P.2d 646 (1934). Section 13-1424 does not clearly indicate that the legislature intended the procedure to apply to nonsuspects. Consequently, the rule of construction can be invoked.

81. An Arizona rule of statutory construction provides that it is the duty of the court to uphold statutes if the language will permit. Coggins v. Ely, 23 Ariz. 155, 202 P. 391 (1921). This is true even though the language is indefinite and uncertain. Peterson v. Sundt, 67 Ariz. 312, 195 P.2d 158 (1948).

the identification of the criminal[82] is vacuous, satisfied even in the most indiscriminate investigation.

In construing the statute, therefore, a court has two available approaches. It can determine that the provision is unworkable and therefore invalid because it provides insufficient guidelines and standards for implementation. Alternatively, the court can apply what it believes to be a sufficient standard of cause in a case-by-case analysis.[83] If courts were to develop the standard of cause in terms of "reasonable suspicion"[84] or "grounds for suspicion," such phrases would offer little guidance to a magistrate faced with a determination of whether a particular fact situation conforms to the standard. They would, however, at least provide a conceptual reference point on which an appellate court could focus, allowing it to begin the process of statutory construction which would gradually give rise to an indication of the degree of suspicion deemed necessary by the court.[85] Such has been the result where federal courts have undertaken a determination of the standards of cause necessary to conduct various types of

82. ARIZ. REV. STAT. ANN. § 13-1424(A)(2) (Supp. 1971-72).

83. See note 81 *supra* for cases invoking the statutory rule of construction which requires courts to uphold the validity of a statute if possible.

84. The Arizona Department of Public Safety guideline, *supra* note 70, interprets section 13-1424(A)(2) ("procurement of evidence . . . may contribute to the identification") to mean that

> the circumstances of the case create a *reasonable suspicion* that the suspect may be the one who committed the offense under investigation. . . . Situations which would give rise to a reasonable suspicion include the following:
>
> a. For fingerprints in a burglary, where the suspect was observed prowling in the area prior to the offense, and has a prior criminal record for property offenses.
> b. For hair in a rape case, where a police composite of the suspect is similar to a photograph of a convicted rapist.
> c. For a lineup in an armed robbery, where one victim has tentatively identified the suspect from a photograph. [Emphasis added.]

The fact that the Department of Public Safety has injected the standard of "reasonable suspicion" into the statute is clearly not an interpretation which a court is required to follow. It signifies, however, that the department also recognizes the apparent lack of a standard in the statute and is attempting to salvage the provision by providing a workable standard.

85. Although appellate courts in Arizona have not yet considered section 13-1424, magistrates are beginning to grapple with it. One situation in which the order has been utilized involved an armed robbery in Tucson, Arizona. The victim was shown photographs of several individuals and picked out one photograph, saying it "looked very much like the suspect." The victim also indicated that the culprit was characterized by acne scars and frosted hair. In addition, a policeman had seen the person tentatively identified in the photograph two weeks before, at which time she had been identified as having acne scars and frosted hair. Application for Detention Order [copy on file in the offices of *Arizona Law Review*]. On the basis of these facts, the detention order was issued. The suspect was identified at the lineup and subsequently convicted, State v. Ice, No. A-20253 (Pima County Super. Ct., Dec. 14, 1971). It is possible that these facts constituted probable cause to arrest, but even if that were the case, law enforcement officials should be allowed to hold section 13-1424 detentions in such instances. There may be situations in which there is probable cause to arrest but the suspect did not in fact commit the crime. If he were to ultimately be exonerated by the examination of a hair sample, for example, from his standpoint it would be more desirable to be exculpated at a simple detention than after being arrested, booked and perhaps incarcerated.

border searches.[86] Under the Arizona statute, as in the case of border searches, determining what facts justify a particular search or seizure would be extremely difficult. There is optimism in some quarters, however, that courts are competent to deal with the problem of multiple cause standards.[87]

Evidence Otherwise Unavailable

Subsection (A)(3) presents another condition which the officer seeking the order must fulfill. There must be a showing that "[s]uch evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the criminal identification division of the Arizona Department of Public Safety."[88] This provision has two salutary effects. It should prevent the procedure from being used for harassment purposes and serve to economize judicial and law enforcement resources by avoiding an unnecessary duplication of work. Some types of physical evidence, such as fingerprints or blood type, need be taken only once because they are not variable. If after the order is issued, but prior to the detention, the suspect can establish that the type of evidence sought is otherwise available, the magistrate must rescind the order. Furthermore, if after the detention it is shown that the evidence was oherwise available, it would be inadmissible at trial as the fruit of an illegal detention.[89]

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86. For example, there is reason to search every person, his baggage or automobile entering the United States from a foreign country, by reason of entry alone. Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961). Before a person can be required to disrobe for a strip search, however, there must be a "real suspicion" that he is carrying contraband. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1968). This standard, however, requires something less than probable cause to arrest. Furthermore, if an intrusive search of a body cavity is made, there must be a "clear indication" of guilt. Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966). A "clear indication" is more evidence of guilt than "real suspicion," but it is still less than probable cause to arrest. *Id.* Many commentators regard the judicial creation of several standards of cause as obliterating the probable cause requirement. *See generally* Comment, *Border Searches: A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968).

87. *See* Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393 (1963). In discussing detentions on less than probable cause, Leagre states:

> [T]here is no reason to suspect that the Court would be incapable of eliciting fundamental standards through a process of judicial inclusion and exclusion. Thus it would seem difficult to conclude that the vice of vagueness is a sufficient reason for discarding a formulation of reasonableness under all the circumstances; a certain amount of such vagueness is rather the essence of a constitutional principle.

Id. at 420. *See also* Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966): "The uncertainty of what constitutes a 'clear indication' over and beyond a 'mere suspicion' is difficult but not impossible to resolve."

88. ARIZ. REV. STAT. ANN. § 13-1424 (A)(3) (Supp. 1971-72).

89. Since the police would already be in possession of the evidence, exclusion of the evidence obtained at the detention is inconsequential. Nevertheless, it is clear that

Specificity of the Order

Section 13-1424(B) contains several other provisions designed to promote the reasonableness of the procedure and maintain strict judicial supervision. The order issued by the magistrate must state "[t]he alleged criminal offense which is the subject of the application."[90] This provision adds nothing to the statute other than requiring expression in the order of what the policeman had to establish under section 13-1424(A)(1).[91] The order must also state "[t]he specific type of identifying physical characteristic evidence which is sought."[92] Thus the order must specifically define the extent to which the detainee's privacy will be invaded. For the detention to remain legal, only that evidence specified in the order can be taken. Otherwise, the procedure escapes the judicial control that is the primary prerequisite of reasonableness. If the police need to seize other evidence, they can obtain another order, provided they can show the relevance of the evidence to the investigation.

The order must also specify the time[93] and place[94] at which evidence will be taken but is deficient in that it does not require that the detention be held at a place where the procedure can be adequately insulated from public cognizance.[95] Nor does it require the detention to be held at a time convenient to the detainee. It does, however, limit the length of the detention to 3 hours. It should be possible to obtain any type of physical evidence within this period of time, though it may necessitate police preparation prior to the detention.

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the exclusionary rule demands exclusion as a matter of principle. Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958). In *Bynum* the prosecution argued that it should make no difference in practical or legal effect that fingerprints taken during an illegal detention were sent to the F.B.I. for analysis when a prior set of fingerprints had been taken and was available. The court of appeals disagreed: "It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way." *Id.* at 469.

90. ARIZ. REV. STAT. ANN. § 13-1424(B)(1) (Supp. 1971-72).

91. *See* text accompanying note 72 *supra.*

92. ARIZ. REV. STAT. ANN. § 14-1424(B)(2) (Supp. 1971-72). Section 13-1424 (C) requires that the court shall give to the individual detained a statement "indicating what type evidence was taken, *if any.*" (Emphasis added.) This provision contemplates that a detention may be held but no evidence taken. This result is possible since the statute nowhere requires that evidence actually be taken. The provision appears to be aimed at the situation where it is discovered, subsequent to detention, that the evidence is no longer needed. The provision, however, should not operate to allow harassment of individuals by subjecting them to repeated, needless detentions. If such is the case, the court should refuse to issue the order.

93. ARIZ. REV. STAT. ANN. § 13-1424(B)(7) (Supp. 1971-72). The period of time in which the order must be executed is limited to fifteen days. *Id.* § 13-1424 (B)(8). This assures that the order cannot be retained and used later at the whim of a law enforcement officer. The fifteen day limitation presents no handicap to officials, however, since a new order can be issued if sufficient grounds still exist.

94. *Id.* § 13-1424(B)(6).

95. *See* text & note 47 *supra.*

Types of Physical Evidence

The last section of the statute defines "identifying physical characteristics" as including, but not limited to, "fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance [lineups], or photographs of an individual."[96] It is possible to distinguish these various types of evidence. That is, while it may be reasonable to take one type of evidence, seizure of another type may be unreasonable. It is significant that the *Davis* Court, in suggesting that a detention might be reasonable without probable cause, limited its discussion to fingerprinting:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the 'third degree.' Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.[97]

Other types of physical evidence such as footprints, palmprints, measurements, saliva samples, hair samples and urine samples are similar enough to fingerprints in the manner of their seizure and the inconvenience involved to the individual that they can be logically included in the *Davis* rationale.

The reasoning of the *Davis* dicta, however, indicates that lineups and custodial interrogations may stand on a different footing. They represent a greater inconvenience to the detainee and are not as effective in solving crime as is fingerprinting. In permitting lineups, section 13-1424 has gone beyond the parameters of *Davis*.[98] Moreover, it

96. ARIZ. REV. STAT. ANN. § 13-1424(D) (Supp. 1971-72).
97. 394 U.S. at 727.
98. *But see* Wise v. Murphy, 275 A.2d 205 (D.C. Mun. Ct. App. 1970), which held that a court-ordered lineup without probable cause to arrest was not precluded by the dicta in *Davis*. The court noted that eye-witness identification, though less scientific than fingerprinting, is not always less accurate. Moreover, it said, the *Davis* court appeared to be more concerned with preventing unfair, suggestive and improperly conducted lineups than with preventing all lineups conducted without probable cause. *Id.* at 216. *Wise*, therefore, would appear to approve those lineups contemplated by section 13-1424.

is probable that blood tests do not fall within the dicta in *Davis* since they are considerably more offensive than fingerprinting because they involve a physical penetration of the body.[99] If seizing a particular type of evidence under section 13-1424 is unconstitutional, however, such as taking blood or conducting a lineup, this should not invalidate the statute for purposes of taking other types of physical evidence.[100]

Seizure of the types of evidence enumerated in section 13-1424 should not violate an individual's fifth amendment privilege against self-incrimination. In *Schmerber v. California* the Court found that the petitioner clearly had been compelled to submit to a procedure designed to obtain evidence that might be used in his prosecution.[101] Relying on his minimal participation as a mere donor, however, the Court found that the incriminating product of that compulsion "was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner."[102] A similar rationale would conclude that the types of evidence enumerated in the statute are not testimonial nor communicative in nature, but merely physical evidence.[103]

In summary, the detention allowed by section 13-1424 appears capable of a construction that protects the interests of the individual being detained without debilitating the usefulness of the procedure. The statute, however, is deficient in certain respects. To safeguard the detainee's reputation, the statute should prescribe certain protective measures[104] to insure the confidentiality of the fact of detention. Additionally, provisions should be made for obtaining the evidence at a time and place convenient for the detainee. Finally, the language de-

99. If detentions to take blood are to be constitutional, they must be accompanied by a sufficient showing of cause. The Court has said in Schmerber v. California, 384 U.S. 757 (1965), that searches intruding beyond the body's surface are forbidden by the fourth amendment if made on the mere chance that desired evidence might be obtained. There must be a "clear indication" that such evidence will be found. *Id.* at 769-70. Section 13-1424 appears to require a lesser standard than that mandated by Schmerber. Thus, unless the Arizona supreme court construes the statute to require a "clear indication" for the seizure of blood, application of the statute to the taking of blood samples is arguably unconstitutional.

100. If specific portions of a statute are held to be invalid and the statute is severable, effect will be given to those remaining sections which are valid. State v. Coursey, 71 Ariz. 227, 225 P.2d 713 (1950); Millet v. Frohmiller, 66 Ariz. 339, 188 P.2d 457 (1948).

101. 384 U.S. 757, 761 (1966).

102. *Id.* at 765.

103. Gilbert v. California, 338 U.S. 263 (1967) (handwriting); United States v. Wade, 388 U.S. 218 (1967) (lineup); Schmerber v. California, 384 U.S. 757 (1966) (blood). *But see* Justice Black's dissent in *Schmerber* where he argues that material taken from one's body is communicative. *Id.* at 773-78. His argument presumably would also include hair, saliva, and urine.

104. *See* note 45 *supra* for examples of protective measures that might be required.

fining the degree of suspicion which is required to connect the suspect with the crime should be more explicit.[105]

Notwithstanding all the measures taken to increase the reasonableness of the detention, it is possible that the statute contemplates a sufficient restriction of personal liberty and invasion of privacy to render it unconstitutional. Such a detention is a significantly greater invasion than the frisk approved in *Terry v. Ohio*.[106] Furthermore, the frisk in *Terry* was justified not because of its evidentiary and investigatory value, but because it was essential to insure the personal safety of the officer.[107] The dicta in *Davis* and subsequent cases[108] have approved detentions similar to those contemplated in section 13-1424, but until the Supreme Court speaks definitively on the issue, the constitutionality of detentions made for the specific purpose of obtaining physical evidence without probable cause remains in doubt.

Collateral Issues

Assuming *arguendo* that section 13-1424 is constitutional, additional problems must be considered.[109] One such issue is whether the detainee, once he is in custody pursuant to a section 13-1424 order, can be legally interrogated once he has been given his *Miranda*[110] warnings. This is doubtful inasmuch as interrogation is not physical evidence and the statute does not provide for it. Clearly, if the procedure allowed by section 13-1424 is to be held constitutional, it must be narrowly defined and controlled. Only those procedures authorized by the court order should be tolerated. To allow the statute to be used for purposes of interrogation on less than probable cause would be an intrusion into the area of communicative evidence that would assuredly be unconstitutional.[111]

Another problem that must be considered is whether the detainee is constitutionally entitled to the presence of counsel during the detention. In *United States v. Wade*[112] the Supreme Court indicated

105. See text accompanying notes 84-85 *supra*.
106. 392 U.S. 1 (1968), particularly *id.* at 19 n.16, where the Court expressly said it was not commenting on investigative detentions made without probable cause.
107. *Id.* at 23-27.
108. *See* text & notes 52-61 *supra*.
109. It is possible that religious objections could be asserted to the seizure of certain types of evidence, particularly blood. This problem raises many complex first amendment issues and is beyond the scope of the current analysis.
110. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966), *noted*, "No Miranda Warnings for Ernest A. Miranda," 11 ARIZ. L. REV. 61, 85 (1969).
111. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969); Schmerber v. California, 384 U.S. 757 (1965).
112. 388 U.S. 218 (1967). In *Wade* the defendant contended that a lineup in which he was identified was a "critical stage" of the proceedings, and therefore he had a right to have counsel present. *See* "Lineups," 12 ARIZ. L. REV. 89, 122 (1970).

that there is no sixth amendment right to counsel during a systematized or scientific analysis of the accused's fingerprints, blood sample, clothing, hair and the like since such a confrontation does not represent a critical stage of the criminal process and there is minimal risk that counsel's absence might derogate the accused's right to a fair trial.[113] Arguably, there should be a right to the presence of counsel during the seizure, as opposed to the analysis of the evidence, to assure that the technique used is indeed reasonable. This argument, however, would receive no support from the *Wade* rationale since the manner of seizure has no bearing on the accuracy and integrity of the fact finding process. Similarly, in *Gilbert v. California*,[114] a companion case to *Wade*, the Court held that taking a writing exemplar was not a critical stage requiring the presence of counsel. If an unrepresentative exemplar is taken, it can be corrected at trial by making an unlimited number of additional exemplars for analysis and comparison.[115]

The *Wade* Court held, however, that a post-indictment lineup is a critical stage requiring the presence of counsel.[116] Not only would the presence of counsel often avert possible prejudice accompanying the manner in which the lineup is conducted, it also assures a meaningful confrontation at trial in that the attorney can verbally reconstruct the lineup and attempt to demonstrate that it was prejudicial and that the identification was unreliable. The post-indictment element should not be a distinguishing factor regarding lineups held under section 13-1424. The fact that a lineup is held before arrest rather than after indictment does not reduce the possibility of prejudice. Thus, if a lineup is held under section 13-1424, *Wade* arguably would require that counsel be present or that there be an intelligent waiver.[117] Ari-

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On the concept of "critical stage," *see e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

113. 388 U.S. at 227-28. *Cf.* United States v. Ash, 40 U.S.L.W. 1135 (D.C. Cir. Mar. 1, 1972) (right to counsel applies to photographic identifications of in-custody suspects).

114. 388 U.S. 263 (1967).

115. *Id.* at 267.

116. Although the factual situation in *Wade* involved a post-indictment lineup and the Court's holding may therefore be limited to those facts, it is arguable that the decision stands for the proposition that counsel is required at all lineups, regardless of their occurrence in time:

> The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information.

United States v. Wade, 388 U.S. 218, 251 (1967) (White, J., concurring and dissenting, joined by Harlan and Stewart, J.J.). *See also* "Lineups," 12 ARIZ. L. REV. 89, 122 (1970).

117. *See* 388 U.S. at 251.

zona, however, has interpreted *Wade* to require the presence of counsel in post-indictment lineups only.[118] Therefore, under Arizona's interpretation of *Wade*, there would seem to be no right to counsel at a lineup held under section 13-1424 if it were conducted before indictment.[119]

A further issue which may arise under section 13-1424 is the effect of noncompliance with the order. An officer would presumably be permitted to use a reasonable amount of force in taking evidence which can be obtained without the cooperation of the individual, such as hair samples.[120] It could be argued, however, that the use of force may render the procedure unreasonable since the detention will be constitutional only if its adverse consequences to the detainee are minimized. Since there is no probable cause to arrest, society's need to conduct the detention is less compelling. Arguably, therefore, under the rationale of the reasonableness test, the invasion of personal interests should be correspondingly less severe. If use of force is prohibited, an individual would nonetheless be in contempt of court if he refused to allow the evidence to be taken.[121] Likewise, if the individual fails to appear for the detention or refuses to give evidence which by its nature requires his cooperation, such as voice or writing samples, he would be in contempt of court.

CONCLUSION

Section 13-1424 is a creative response to the problems of modern law enforcement officials. It provides police with a potentially valuable weapon while protecting, to an extent, the interests of the citizen. The statute is plagued by obscure language and fails to define explicitly a standard of cause, but these deficiencies can be remedied. Moreover, several provisions could be added to minimize the adverse consequences to the detainee.

The emerging notion of detention for the purpose of obtaining physical evidence on less than probable cause has received some judi-

118. State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969), *noted*, "Lineups," 12 ARIZ. L. REV. 89, 122 (1970).

119. Most detentions under section 13-1424 would probably be held before arrest or indictment. It is possible, however, that police may wish to detain to take physical evidence even after an individual has been arrested or indicted and he is out on bail.

120. It is reasonable to assume that a certain amount of force would be permitted to take the evidence inasmuch as some force is permitted in making arrests: "No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for his detention." ARIZ. REV. STAT. ANN. § 13-1401(B) (1956).

121. *Id.* § 12-864 (1956). For a discussion of the problem of a suspect's noncooperation in taking physical evidence, see Comment, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074, 1081-91 (1969).

cial approval in *Davis v. Mississippi* and other cases. Nevertheless, it is clear that the detention authorized by section 13-1424 is a much greater invasion of personal interests on less than probable cause than anything that the Supreme Court has heretofore found compatible with the fourth amendment.