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Some Observations on the Supreme Court’s Use of Property Concepts in Resolving Fourth Amendment Problems

Fernand N. Dutile*

There is a tendency among lawyers and laymen alike to consider “property rights” wholly distinct from “human rights”, and to disparage the former in favor of the latter. To a large extent the tendency has been appropriate. One of the happiest chapters of recent times has been the effort to champion human values even at the expense of restricting the individual’s use of his “own” property. The public accommodations section of the 1964 Civil Rights Act, the increase in aesthetic zoning, the extension of landlords’ responsibilities with respect to leased properties and the expansion of consumer protection highlight the law’s attempt to remedy the imbalance between the protection accorded the use of “property” and that granted “human” values such as freedom, health and welfare. It is more accurate to view the legislation and judicial pronouncements as selecting among various human values on the basis of their importance to society rather than as choosing between a human right and a property right. In the public accommodations area, for example, Congress was faced with a choice between the owner’s freedom to restrict his

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5. To be sure, some of these measures may also promote the economic value of the property in question, but other more humanistic values are emphasized. At least one court has been chastised for not recognizing the priorities in aesthetic zoning:

My colleagues dilute the concept by leaning upon the well accepted basis of economics, related to an alleged effect of off-premises signs upon the value of property throughout the municipality. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 7, 198 A.2d 447, 452 (1964) (dissenting opinion).
premises, however capriciously, and the freedom of the public to use such facilities. It chose the latter. Nonetheless, the distinction—and perhaps it is a convenient one—persists.

Under this distinction the fourth amendment to the United States Constitution would surely be listed as embodying a signally human right:

The right of the people to be secure in their persons, 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.

Mere recital of its words conjures up the resentment engendered by England's use of the writs of assistance and the long struggle for freedom from such tyranny which the Revolutionary War represented. Yet its very words—"their persons, papers, and effects" and "the place to be searched"—imply the importance of property concepts in assessing the scope of the amendment's applicability. That assessment requires knowledge of which of these papers and effects are "theirs". Does this word refer to "ownership" or "possession" or "custody" as these are known to the local civil law or to something totally different? Similar inquiries arise as to which "places" are within the purview of the fourth amendment and who may consent to a search and under what circumstances. The owner? The tenant? The licensee? Whether the government must assert a superior property interest before it can seize chattels and, given an unconstitutional search, who has standing to protest the use of its fruits are further questions indicating the extent to which property concepts are inextricably entwined with the human rights preserved in the fourth amendment, and reflect therefore, the inherent connection between property rights and security.

Not surprisingly, then, the United States Supreme Court has dealt for decades with property concepts in resolving search and seizure problems. However it has not always precisely defined or consistently explored the ramifications of the property concept involved. Nor has it always considered the true relationship of the property interest to the security guaranteed by the fourth amendment.

In Warden v. Hayden, for example, the Court tells us:

The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have

6. For example, Boyd v. United States, 116 U.S. 616 (1886), in which the Court discusses the importance, in fourth amendment cases, of the government's right to "possession" of the seized property and of the presence or absence of a "trespass" in securing that property.

recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.\(^8\)

Again, in *Katz v. United States*,\(^9\) Mr. Justice Stewart, speaking for the Court, stated that the presence or absence of a technical trespass was not necessarily controlling in determining whether a search requiring prior judicial approval had taken place. He emphasized that the fourth amendment "protects people—and not simply 'areas'."\(^10\) The crux of the matter, according to the Court, was that the Government had violated the privacy upon which Katz had justifiably relied. Yet no sure-fire test is given for determining when one justifiably relies on privacy. Further, when cases like *Hayden* and *Katz* de-emphasize the traditional property notions, there is the danger that the inherent connection between security and the legal relationship of the person to the property will be neglected.\(^11\) Surely one's expectation of privacy as a lessee, for example, might well be different from that of a former licensee.

This article will analyze the use of property concepts by the Supreme Court in fourth amendment cases and, in the light of its decisions, assess the true role of the property concept in delimiting the scope of the amendment.

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\(^8\) *Id.* at 304.


\(^10\) *Id.* at 353.

\(^11\) In *Boyd v. United States*, 116 U.S. 616 (1886), Mr. Justice Bradley, in holding that the revenue law requiring the citizen to produce his books or accept as true the Government's allegations was unconstitutional under the fourth and fifth amendments, quoted extensively from *Entick v. Carrington* and Three other King's Messengers, 19 Howell's State Trials 1029:

> The great end for which men entered into society was to secure their property. . . . By the laws of England, every invasion of private property, be it ever so minute is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass. 116 U.S. 616, 627 (1886).


> The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted.
Five basic areas involving an interplay between property concepts and search and seizure have been dealt with by the Supreme Court and shall be considered in order: (1) the property interest as it bears upon whether a search took place and, if so, whether a third party consent was effective; (2) the interest of the sovereign in the chattel searched; (3) the property interest as it bears upon the scope of search; (4) the interest of the sovereign in the article seized; (5) the property interest as it bears upon standing to assert the unlawfulness of a search and seizure.

It is submitted that in the area of search and seizure, at least, one cannot always say where the "property" right ended and the "human" right began. It may well be that the second often dies with the first.

Property Interest as It Bears Upon Whether a Search Took Place and, If So, Whether a Third-Party Consent Was Effective.

Property interests have been critical in determining whether a search has occurred. If a search has occurred, the inquiry then concerns whether that search was justified by consent, by search warrant, by lawful arrest to which the search was incident or by emergency. As we shall see, property interests may also be relevant in resolving the consent issue.

Was There a Search?

As early as 1886 the Supreme Court emphasized the importance of the doctrine of trespass in assessing whether a search has taken place. That concept served well enough as the key to a search when the private premises concerned were a home, office, garage, or hotel room, although, the Court was not always consistent. The issue in Hester v. United States was the admissibility of

16. Nor was the Court prepared to accept the trespass doctrine wholesale from the civil law. In Zap v. United States, 328 U.S. 624 (1946) and McGuire v. United States, 273 U.S. 95 (1927), the Court refused to apply the trespass ab initio concept to void governmental action. It is interesting to note, also, that while the trespass doctrine is normally used to determine whether a search occurred, which search might be validated by a warrant, in McGuire there was a warrant so the Court would have been compelled, had it accepted the petitioner's urging, to find that there was a trespass which was not authorized by the search warrant. Said the Court:

   Even if the officers were liable as trespassers ab initio, which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth amendments. "Id. at 99. See also On Lee v. United States, 343 U.S. 747 (1952).
17. 265 U.S. 57 (1924).
revenue officers' testimony that they had found moonshine whiskey in a broken jug and other vessels near the house in which defendant lived and that they had there viewed other suspicious activities. The Court validated the search even though the witnesses held no warrant and despite any trespass on the land. It found that the matters attested to were merely acts and disclosures of the defendant and his associates which had occurred outside the house. Holding that the fourth amendment's protection does not extend to open fields, the Court said that the "evidence was not obtained by the entry into the house and it is immaterial to discuss that." 18 There is no adequate discussion of why a trespass on land by federal officers might not constitute the same kind of violation of one's security under the amendment as would a trespass which involves a wall of some sort. It is difficult to believe that the Court would have ruled the same way had the officers broken down a substantial fence in order to gain their vantage point. Yet the existence of that fence should not control whether a search has taken place. Nor is there any sign that the Court relied on a subjective expectation of privacy in the open field case different from that in the "enclosure" cases. Under that concept, one would not seem to lose his security expectation merely by stepping into his own back yard. The protection guaranteed citizens' "houses" under the fourth amendment must be intended to extend beyond the dimensions of the improvement upon their land. Otherwise, distinction must be made among closed porches, open porches, terraces, enclosed tennis courts and lawns. The trespass doctrine—consistently applied—provides an easier and more predictable standard since the line between trespass and non-trespass is relatively clear, thus allowing law enforcement personnel to adjust their conduct more easily and more consistently to fourth amendment requirements. Perhaps the Hester Court was swayed by the fact that the defendant himself did not own the land but lived there with his father, the legal titleholder. That fact, however, reflects on standing rather than on whether a search took place. In any event, the Court indicated that it was not convinced that a trespass actually occurred.

Nonetheless, the trespass doctrine might have continued to work well but for the advent of the electronic surveillance cases. Until that point, there were few threats to the security of premises that could be occasioned without a trespass. To be sure a passerby on a public street might see into a building, but any occupant intent on privacy could be aware—if he cared to be—that there were areas from which persons could see through his windows and could take steps to assure that they were covered when he wanted privacy. Also, people not on his property might hear what occurred on his premises. This the average citizen could also cope with because he could determine with

18. Id. at 58.
sufficient certainty the extent to which people could hear from the adjoining areas, and modulate his conversation so as to prevent unwanted overhearing. With respect to indoor activity, additional security could be provided by increased soundproofing. In short, with no technical assistance, the ordinary man was in a position to assess the risk of non-trespassory eavesdropping and to minimize that risk if he cared to.

This situation changed, however, with the increasing use of the telephone, and with the development of small devices capable of intercepting telephonic conversations without the speakers' knowledge. One no longer had the ability to accurately assess the risk of interference with his security.

To be sure, the Court early spoke of protection of one's expectation of security. In *Ex Parte Jackson*, decided in 1877, the Court held that letters and sealed packages were subject to search only pursuant to a warrant. However that case went off on the people's right to be "secure in their papers" (rather than in their "houses"). In any event, since letters and sealed packages were the subject matter of the Court's pronouncement it is easy to see how the Court might equate the unauthorized opening of these with breaking the close of a home.²⁰

That *Ex Parte Jackson* did not establish constitutional protection for general expectations of security was forcefully made clear by *Olmstead v. United States*.²¹ There the Court affirmed a conviction of conspiracy to violate the Prohibition Act despite the admission at trial of evidence secured by wiretapping a private telephone conversation. The Court concluded that there was no trespass upon the property of the defendants:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects . . . . The intervening wires are not part of his house or office. . . .²²

The *Olmstead* Court emphasized that an actual physical invasion of the premises would have been required for the wiretap to constitute a search within

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19. 96 U.S. 727 (1877).
20. Compare the doctrine of "breaking bale" at common law where for the purposes of larceny—which required a trespass against another's possession—it was considered to be such a trespass for the thief to break open bales lawfully bailed into his possession:

   [If he had given the bales or sold them etc., it is not felony, but when he broke them and took out of them what was within he did that without warrant, as if one bailed a tun of wine to carry, if the bailee sells the tun it is not felony nor trespass, but if he took some out it is felony. . . .

   "Carrier's Case," Y. B. Pasch. 13 Edw. 4, p.9, pl. 5 (1473).
22. *Id.* at 464.
the meaning of the fourth amendment. 23 Goldman v. United States 24 buttressed Olmstead by upholding the admissibility of evidence secured by use of a detectaphone placed against the wall of an adjoining room. Interestingly, agents had earlier trespassed into the defendant's premises but the device planted pursuant to that entry failed to operate correctly. The Court made plain that its decision rested on the fact that the trespass which did occur did not materially contribute to the successful use of the detectaphone. Based on the Olmstead doctrine, Goldman established the trespass concept as critical 25 even in electronic surveillance cases. However, there was evidence that technology had perhaps dulled that concept's effectiveness. Said Mr. Justice Murphy in his Goldman dissent:

There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy .... 26

The trespass criterion maintained its dominance even in the "false friend" cases. In On Lee v. United States, 27 a laundry operator was visited by an old friend and former employee who, unknown to his host, was an undercover operator carrying a transmitter. Thus, statements made by the laundry owner were heard by an agent outside the laundry, who later testified to them. The lack of trespass was found to be determinative of the admissibility of the evidence. However, the Court implied that an argument could be made for a constructive trespass: "Whether an entry such as this, without any affirmative misrepresentation, would be a trespass under orthodox tort law is not at all clear." 28 The Court concluded that On Lee did not raise the question technically left open by Goldman—the validity of such devices employed by means of a forceful physical entry, an entry secured through a show of authority 29 or one otherwise without consent. However, the discontent with the Olmstead-Goldman line of reasoning persisted. Indeed, Mr. Justice Douglas, dissenting in On Lee, confessed his feeling that he had erred in Goldman. 30 Mr. Justice Burton, also in dissent, stated:

23. Mr. Justice Brandeis, in dissent, anticipated, to a large extent, the future course of the law in this area. Pointing out that the Constitution is adaptable to new conditions, he said, "It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made."

Id. at 479.


25. This is so in cases at least where the sovereign does not claim ownership of the chattel sought.

26. 316 U.S. at 139.


28. 343 U.S. at 752.

29. The entry in Johnson v. United States, 333 U.S. 10 (1948), while not for the purpose of planting electronic surveillance equipment, is an example of admission so obtained.

30. 343 U.S. at 762.
It is argued that, in the instant case, there was no illegal entry because petitioner consented to [the visitor's] presence. This overlooks the fact that [the visitor], without warrant and without petitioner's consent, took with him the concealed radio transmitter to which [the receiving set of the agent outside] was tuned. For these purposes, that amounted to [the visitor] surreptitiously bringing [the agent outside] with him. 31

Such an argument indicates that he deemed the trespass criterion to be unsatisfactory or the Court to be incorrect in assessing that a trespass did not occur.

Three other "false friend" cases, decided between 1963 and 1966, confirmed the trespass doctrine's role in assessing whether a search violative of the fourth amendment 32 had taken place. All three resulted in affirmed convictions. In *Lopez v. United States*, 3 33 the Court approved the use of evidence secured by secreting a pocket wire recorder on an agent which recorded his conversation with the defendant in the latter's private office. Noting that the agent had been admitted to the office with the defendant's consent, the Court said:

It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. 34

*Hoffa v. United States*, 35 a jury-tampering case, concerned evidence secured by a government-paid informer in a hotel room. The informer had gained access by exploitation of his relationship with the petitioner. The critical fact in the Court's view was that the agent "was in the suite by invitation..." 36 *Lewis v. United States* 37 parallels *Lopez* and *Hoffa*, but elaborates on the importance of the "false friend" remaining within the limits of the invitation. Indeed, it is on this basis that the Court is able to distinguish *Lewis* from *Gouled v. United States*. 38 There, although the agent secured admission to the premises by consent, the evidence was procured through surreptitious rummaging while the host was out of the room.

31. *Id.* at 765-66.

32. It is not specifically clear in these cases whether the Court's theory is that there was a search but it was consented to or that there was in fact no search. The latter theory seems the stronger in view of the law's requirement that the government in such cases show a free and intelligent consent. *E.g.*, Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).


34. *Id.* at 438-39.


36. *Id.* at 302.


38. 255 U.S. 298 (1921).

The peak of the trespass doctrine came in 1961 with the Court’s decision in *Silverman v. United States.* A spike mike had been pushed through a party wall until it hit the heating ducts, enabling the conversation in the defendant’s premises to be heard by government agents. This unauthorized physical penetration into premises occupied by the defendant constituted the key factor, although the Court felt constrained to disclaim any slavish adherence to civil law concepts:

In these circumstances we need not pause to consider whether or not there was a technical trespass under local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.  

Again:

But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into constitutionally protected area.  

The disclaimer is not convincing for the term used by the Court—“invasion”—needs interpretation. What better synonym than “trespass” could one find? What handier test than that of “trespass” could there be in deciding future cases under the *Silverman* “invasion” doctrine? Presumably the civil trespass doctrine itself relates at least partially to the kind of security guaranteed by the Constitution. Then, would not the local tort and property law be expected to expand and contract with the constitutional perception of what constituted an invasion? That the Court’s decision is rested on the trespass concept is clear from its explicit statement distinguishing the facts before it from cases otherwise on all fours:

But in both *Goldman* and *On Lee* the Court took pains explicitly to point out that the eavesdropping has not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area.  

Indeed, Mr. Justice Clark and Mr. Justice Whittaker concurred on the ground that the Court had found a “sufficient trespass.” Mr. Justice Douglas, also concurring, saw the Court as eschewing “the trivialities of the local law of trespass” but failing to reject “distinctions turning on the kind of electronic equipment employed.” His emphasis would be on whether the home’s privacy was invaded. Mr. Justice Douglas failed to recognize that by using the nature
of the device as determinative of an invasion, the Court has in effect used a trespass doctrine, for the added feature of the device in Silverman is its penetrative aspect. Surely, had it not been inserted into the wall, the situation would have been controlled by Goldman and On Lee.

As late as 1967, in Berger v. New York, again in the context of electronic surveillance, the Court reaffirmed its emphasis on trespass as the key to whether a search occurred. Beginning with Olmstead, as founded on the principle "that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house," the Court reviewed with approval some of the principal cases in the area: Goldman, On Lee, Silverman, Wong Sun v. United States, and Lopez. Said Mr. Justice Clark:

We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments.

Further:

Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment.

What the Court in Berger characterized as a search, due to the trespassory intrusion, could have been validated by an appropriately authorized court order, but the Court declared the New York statutory provisions providing for such "warrants" overbroad.

In this context Katz v. United States, came to the Court. The defendant, suspected of wagering violations, sought to exclude evidence secured when government agents overheard his side of a telephonic communication by means of a device attached to the top of the public telephone booth he was using. Decided cases in the area suggested the public nature of the phone booth and the non-trespassory nature of the electronic paraphernalia as the crucial facts

45. 388 U.S. 41 (1967).
46. Id. at 51.
47. 371 U.S. 471 (1963). The Court cited Wong Sun as the first case specifically including verbal evidence within the fourth amendment.
48. 388 U.S. at 44. (Emphasis added.)
49. Id. at 64. (Emphasis added.)
50. The Court faulted the New York eavesdropping statute for (1) failing to require that the suspected crime and the conversations to be seized be set out with particularity; (2) allowing seizures of conversation over too long a period; (3) providing for renewals of the warrant without a new demonstration of probable cause; (4) omitting a termination date on the eavesdrop once the conversation sought is intercepted; (5) failing to provide for notice (or, as an alternative, special facts creating exigency) or for a return of the warrant.
in that situation. The formulation of the issues by the petitioner reflected just such concepts. But the Supreme Court declined to accept that formulation. Citing Warden v. Hayden, the Court asserted that the theory that property interests determined the rights of the Government in search and seizure questions had been discredited, and that the trespass concept no longer controlled. Since the "Fourth Amendment protects people—and not simply areas", this conviction must fall because the government "violated the privacy upon which he [the defendant] justifiably relied. . . ." The security which one is entitled to rely upon, concluded the Court, may exist beyond the confines of a home, an office or a hotel room.

The bomb had fallen! The Court had shifted away from the trespass concept—difficult enough in application—to a far more nebulous principle, one of “justifiable reliance upon privacy.” It is submitted that the price paid for the extension of the fourth amendment to the Katz situation might be too great, not merely from a law enforcement perspective, but also from a personal security perspective. Is it not possible that the less precise one's right to security becomes, the more it is diminished. Must not one know his right—and the extent of that right—to appreciate and enjoy it fully? Although we do not yet know where Katz will take us, it is possible that the equation of one's right to security in his own home with that while in a public telephone booth may eventually weaken the former as much as it strengthens the latter.

Indeed, it is not an inevitable conclusion that Katz had a justifiable expectation of privacy. Should he have reasonably expected substantial security in a public phone booth—open to public view, and with glass walls not completely soundproof? On this point, the Court stated:

52. The petitioner has phrased those questions as follows:
   A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
   B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the fourth amendment to the United States Constitution.

53. Id. at 349-50.

54. Justice Brennan suggested as much when he said, "[T]he right [of communication] can only be secure if its limitations are defined within a framework of principle." Lopez v. United States, 373 U.S. 427, 450 (1963) (dissenting opinion).

In Miranda v. Arizona, 384 U.S. 436 (1966), the Court, in requiring that specified warnings be given certain suspects as a precondition to admissibility of their statements, dramatically recognized this critical connection between awareness of a right and its exercise.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.56

The implication is that if the agents read his lips (rather than intercepted the conversation), the evidence so gotten would be admissible. Would Katz not be able to invoke a violation of his "justifiable reliance" if the agents, without electronic devices, had stood so close to the booth as to enable them to overhear what was said within? What if the agents had read an incriminating statement in the defendant's handwriting on a clipboard lying flat upon the metal shelf below the phone in the booth, which reading required that the agent put his face up against the glass? Would this transgress the privacy upon which Katz justifiably relied any less than the interception that in fact took place? Would it make any difference how close the agents came to the phone booth? Is it the same case if the public booth is in the police station? The suggestion here is not, of course, that similar situations could not be equally hypothesized for houses, apartments and the like under the traditional trespass rule, but rather that reference to the trespass rule provides a more predictable, definable rule which carves out a considerable area of security for every citizen. Obviously, the significance and the burden of the fourth amendment are not that one be absolutely secure and "in privacy" wherever and whenever he chooses but rather that there be in his daily life substantial access to privacy. He may of course waive a good deal of it, as he does whenever he leaves his home to walk on a public sidewalk. On those occasions he grants to the public the ability to overhear what he says loudly enough, to see what he is wearing, to know with whom he chooses to walk, and to learn where he chooses to go. Presumably he would be no less shocked to learn that all these things were being noted by a government agent than that his side of a telephone conversation had been recorded by such an agent through a listening device attached to the public phone booth in which he spoke.

Even if the Katz situation should be denominated a search and seizure, the Court need not have upset the traditional concepts in so ruling. It could have found that a conversation in a closed telephone booth—even if that booth is available to public use—falls into the same category as the sealed letter of Ex Parte Jackson57 and any trespass with respect to that enclosure is as prohibited as tearing open the letter. It would then be a simple matter to hold that the field or scope of an electronic device trespasses to the same extent as does a

56. 389 U.S. at 352.
57. 96 U.S. 727 (1877). See text p. 6 supra.
wooden pole used to remove articles from within a building by one who does not actually go onto the property. Establishing such a principle based upon the traditional concept of trespass expanded to meet new methods of invading premises would promote the stability of the law by preserving the validity of the many pre-Katz cases which do not involve electronic devices and now have been called into question by his commencement of the "privacy" standard. Restricting the expansion to electronic devices results in a distinction between standard devices for amplifying (or conducting) sound, which are electronic, and those for increasing vision, such as binoculars and telescopes, which are not. Nonetheless, the distinction is not arbitrary. Our case law on search and seizure developed in the context of binoculars and telescopes and presumably reflects the citizen's risk with respect to them. Further, the two situations would be treated similarly. Use of non-electronic seeing devices and hearing devices, i.e., a hearing horn, would not be considered trespassing unless the user or the device itself (as opposed to its scope) actually invades the premises. Use of electronic seeing devices, i.e., any electronic device that might be developed calculated not to illuminate an object so that the naked eye may perceive it but rather to increase the size of the image perceived or to penetrate barriers to ordinary vision, and electronic hearing devices would be trespassing if their field or scope invaded the premises. Obviously, under this principle, there would be a search in such cases even if the evidence could have been heard or seen without the electronic device.

58. According to its developer, the Varoscanner provides the same ability to see in the dark as is available in equipment being used by American soldiers in Vietnam. The unit combines an infrared light source and a telescopic sight into a single piece which can be easily held in one hand. It enables the user to observe activities even on the darkest night while remaining invisible. . . . Crime Control Digest, June 5, 1968, at 5. According to the suggested distinction, the Varoscanner could trespass since it does not "illuminate" for the naked eye (as does, for example, a flashlight) but rather requires an eyepiece specially designed to work with the infrared light source. There too the distinction serves a real purpose, since the person illuminated by the flashlight is in a position to assess the risk of observation and protect against it, unlike the person "illuminated" by the Varoscanner who might not be aware of his visibility to the Varoscanner user. The claims made for the Varoscanner illustrate that the developments of modern science may have outrun the assertion that "... the eye cannot by the laws of England be guilty of a trespass." Entick v. Carrington and Three Other King's Messengers, 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (K.B. 1765) quoted in Boyd v. United States, 116 U.S. 616, 628 (1886).

59. In Silverman v. United States, 365 U.S. 505 (1961), Mr. Justice Douglas, concurring, argued that the "command of the fourth amendment [should not] be limited by nice distinctions turning on the kind of electronic equipment employed." Id. at 513. One advantage of the suggested test is that it distinguishes not on the basis of the kind of equipment used but rather on the basis of whether that equipment was electronic. The distinction is a clear-cut one. See Justice Burton's comment that the . . . "important thing is that the direction of the line that emerges from successive cases be clear." On Lee v. United States, 343 U.S. 747, 767 (1952) (dissenting opinion).
Was there effective third-party consent?

It is clear that a person may effectively consent to a search of his own premises\textsuperscript{60} although courts are likely to scrutinize any asserted consent to insure that it was given voluntarily and intelligently.\textsuperscript{61} On the other hand, every third-party cannot effectively give that consent in his behalf. In Weeks v. United States,\textsuperscript{62} the Court held inadmissible evidence secured through two searches—one consented to by a neighbor who notified police of the location of the key and the second by an unknown person, perhaps a boarder who gave entry to the police. No serious attention was given these "consents", the assumption being that they could not bind defendant. A determination of which third party has the status required to give effective consent to a search which otherwise would violate an accused's fourth amendment rights may involve (1) the relationship of that person to the defendant or (2) the interest which he has in the premises. (To some extent, the latter may depend upon the former). For example, a wife's interest in the premises as a tenant-by-the-entireties or a joint tenant or even as a tenant-in-common would presumably include a possessory right sufficient to authorize her to invite others upon the premises. The same kind of right might exist where she is party to a lease \textit{e.g.}, of a hotel room. Alternatively, it can be argued that her relationship with her husband carries an implied agency to admit others.\textsuperscript{63} Both theories have received attention,\textsuperscript{64} though not from the Supreme Court.

In Amos v. United States,\textsuperscript{65} the petitioner's wife had allowed government officers to enter his home without a warrant. The Court avoided the question of the wife's authority by holding that, even if it be assumed that a wife might waive her husband's right, any such waiver here resulted from implied coercion by the officer. The wife in Warden v. Hayden\textsuperscript{66} "offered no objection" when

\textsuperscript{60} This is the underlying principle of Bumper v. North Carolina, 391 U.S. 543 (1968) and obtains, at least, where "his own" refers to premises the possession of which he is entitled to. As is suggested in this section, some third-party consent is based on the theory that that person has a sufficient interest in the premises to validate his authorization of a search.

\textsuperscript{61} See, \textit{e.g.}, Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951).

\textsuperscript{62} 232 U.S. 383 (1914).

\textsuperscript{63} Zap v. United States, 328 U.S. 624 (1946) presents an analogous situation. There, employees consented to inspection of defendant's papers, as did, the Court ultimately concluded, the defendant. There was no allegation that the employees had any formal interest in the premises.

\textsuperscript{64} See \textit{e.g.}, State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965); \textit{Comm. ex rel. Cabey v. Rundle}, 432 Pa. 466, 248 A.2d 197 (1968). On third-party consent, see \textit{Hall, Kamisar, LaFave & Israel, Modern Criminal Procedure} 295-97 (3d ed. 1969). The editors there suggest that the two theories yield different results in those cases where it can be presumed that the authority was revoked (\textit{e.g.}, where the wife calls in the police to complain against the husband's illegal activities).

\textsuperscript{65} 255 U.S. 313 (1921).

\textsuperscript{66} 387 U.S. 294 (1967). For a more complete statement of facts, see p. 23 infra.
police asked to search the house but the Court did not rely upon that consent—implied coercion might again have been a problem in that context—but upon the specified *exigent circumstances*.

The Court has given more direct attention to searches in which the formal titleholder who did not share the defendant's possessory right purported to consent without authorization from the defendant. In these cases, the heart of the argument supporting the effectiveness of the consent is the owner's paramount property interest in the premises. The cases reflect, however, a deeper reluctance to validate that type of consent.

In 1961, in *Chapman v. United States*, the Court barred the use of evidence secured through a search of a house rented to the defendant. The landlord, who had detected the odor of fermenting mash emanating from the structure when he arrived there for a social call, consented to a warrantless entry by law enforcement agents through the bathroom window. The Court rejected the argument that where a landlord reasonably believes that waste is occurring on his premises he has authority to enter to view that waste and to delegate that right to law officers. No Georgia case—or any other—noted the Court, was cited for that proposition.

*Stoner v. California* presented an even more challenging situation due to the fact that the petitioners' interest, unlike Chapman's, was not a tenancy but a mere license. The police, having uncovered leads near the scene of a robbery, went to a hotel where, in his absence and without a warrant, they secured access to the petitioner's room from the desk clerk. The Court held that a hotel room guest is entitled to protection against unreasonable searches and seizures "no less" than a house tenant or the occupant of a boarding house room. The Court insisted that the fourth amendment not be eroded by strained

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68. The government also urged that under Georgia law the tenant's conduct forfeited his interest. See note 79 infra. See Lustig v. United States, 338 U.S. 74 (1949), where the likely consent of the hotel manager failed to get attention due to the purported search warrant.
69. *But see Trupiano v. United States*, 334 U.S. 699 (1948), where the Court, without extended discussion, seems to assume the efficacy of landlord consent to entry by government agents upon the premises. In that case, only part of the premises was leased to the suspects, and it is not entirely clear when the tenants left the portion retained by the landlord and entered those leased to the suspects.
70. 376 U.S. 483 (1964).
71. In support of the boarding house situation, the Court cited McDonald v. United States, 335 U.S. 451 (1948). That case, however, is not wholly parallel. After a long period of surveillance of the defendant, a police officer, hearing a suspicious sound from within, climbed through the landlady's window, identified himself and let others in. After searching rooms on the ground floor, they went to the second floor, stood on a chair, and saw, through the transom above the door to the defendant's room, the lottery equipment in question. Here, then, no consent—valid or otherwise—was secured prior to the entry to the landlady's room. Although the Court found that "each tenant of a building . . . does have a personal and constitutionally protected interest in the
application of agency rules nor by technical refinements of common law private property rules. Agency and private property doctrines, however, might buttress the very result sought by the Court in *Chapman* and *Stoner*.

The agency point is that authority to view waste, repair plumbing, and the like in the Chapman case or to make the bed, clean the room, wash the windows and the like in the Stoner case cannot be transformed into authority to invite into the premises others not concerned with these objectives. There is no inferable authority granted to the titleholder in either case to invite people in at his discretion. This conclusion may not be justifiable in the husband-wife situation where one spouse might well have an implicit delegation of authority even in the absence of separate title.

The property point, not totally separate, is that formal title in either the Chapman or Stoner circumstances carries no right to actual possession or use once a lease or Chapman-type license has been granted. Any authority, then, to go onto the premises, aside from the agency possibility noted above, must be reserved to the titleholder by the lease or license agreement, or by implication of law or fact. Further, even where such authority exists, its general scope—what might be done while on those premises—must also be determined by that reservation or by that implication. From this point of view, the typical husband-wife situation again differs. Where the wife does have “part” of the title, through a tenancy by the entireties, joint tenancy or tenancy in common, her interest, not having been leased out, carries the right of possession and, therefore, an incidental right to invite others onto the premises at her discretion. Her spouse may not have the authority to withdraw that power. Similarly, legal right exists for the spouse who shares the tenancy benefits of a lease.

In third-party consent cases, then, it is precisely the agency and property points which the Court should bear in mind. These considerations present the most predictable and ascertainable standards consistent with safeguarding justifiable expectations of privacy. Faced with a third-party consent allegation, the Court should inquire as to whether the third party had sufficient authority to allow the entry from the point of view of either the third-party’s property interest or his express or implied delegation of power from another with such

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integrity and security of the entire building against unlawful breaking and entry.” *Id.* at 458. The Court conceded that the search would have been valid had a tenant or some other person legitimately admitted the police officer, who subsequently saw contraband through the transom. *McDonald*, then, does not stand for the proposition that the landlady’s consent to a search of a room in the house is invalid. It holds rather that the occupant’s interest may extend beyond the door of his room.

Another explanation for the *McDonald* result is that the evidence uncovered constituted the fruit of the poisonous tree under Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385 (1919), *i.e.*, the entry was unreasonable under the fourth amendment and the knowledge of the existence of the evidence secured flowed directly from that entry.
power. Such an approach would be possible whether the third-party consent situation concerns landlord-tenant, innkeeper-guest, wife-husband, child-parent, teacher-student or any other.

**Interest of the Sovereign in the Chattel Searched.**

Two principal cases, *Preston v. United States* and *Cooper v. California*, both involving automobile searches, are of interest in this connection. In *Preston*, decided in 1964, the Supreme Court reversed conviction of conspiracy to rob a federally insured bank. The evidence showed that, a complaint was phoned to the Newport, Kentucky police stating that three suspicious men had been seated in a parked car for five hours in the middle of the night. The police went to the car, asked the occupants why they were there and received unsatisfactory and evasive answers. Following admissions by the occupants that they were unemployed and had only twenty-five cents among them, they were placed under arrest for vagrancy, searched, and transported to the police station. The car was driven to the station by an officer and then towed to a garage. Shortly thereafter, police officers, with no warrant, searched it and uncovered incriminating evidence in the glove compartment and trunk. The Court found that the search could not be considered incident to the arrest.

We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible.

In *Cooper*, the Court was presented with the warrantless search of an automobile, one week after the arrest of its occupant on narcotics charges. The search yielded evidence used to convict him. It occurred while the car was impounded, pending forfeiture proceedings, pursuant to a state statutory

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72. In *People v. Overton*, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967), evidence against the defendant, a public school student, was obtained by means of a search of the student's locker, "consented to" by a school official. The state court approved the search on the grounds that the institution had a disciplinary function and that the student's control over the locker was not exclusive since the school officials also held the combination to the locker. The Supreme Court granted certiorari, vacated the judgment below and remanded, in light of *Bumper v. North Carolina*, 391 U.S. 543 (1968), for further consideration. *Overton v. New York*, 393 U.S. 85 (1968); on rearg., dec. adhered to 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

73. 376 U.S. 364 (1964).

74. 386 U.S. 58 (1967).

75. This holding foreshadowed *Chimel v. California*, 395 U.S. 752 (1969), which restricted the scope of searches incident to arrest to those areas in which the accused might secure a weapon or destroy evidence, thus substantially overruling the broad mandate of *United States v. Rabinowitz*, 339 U.S. 56 (1950). See pp. 19-20 infra.

76. 376 U.S. at 368.
provision. The state appellate court deemed *Preston* controlling, but held that while the search was unreasonable, the introduction of evidence at trial constituted harmless error. Despite the Court's statement one year earlier in *Warden v. Hayden*, 77 that property interests no longer control the right of the sovereign to search and seize, 78 the *Cooper* situation was distinguished on the ground that due to the forfeiture statute the sovereign in *Cooper* had a larger actual or potential interest in the searched automobile than it had in *Preston*. 79 Conceding that lawful custody of a car does not in itself exempt searches from constitutional requirements the Court stated that "the reason for and nature of the custody may constitutionally justify the search." 80 While the Court attached some importance to the fact that the "subsequent search of the car . . . was closely related to the reason petitioner was arrested," 81 it seems reasonably clear that this connection need be only a minor one. Otherwise the application of *Preston* would be restricted to those cases in which the arrest of the occupant involved a charge (like vagrancy) with respect to which no tangible evidence could foreseeably be found in the automobile. There must have been some magic, then, in the status of the car in *Cooper*—impounded under a forfeiture statute—as opposed to that of the car in *Preston*. That magic must relate to the state's interest in the car. 82 The fact that the car in *Cooper* was "validly held" 83 cannot be controlling since certainly at least that much can be said for the *Preston* vehicle. Yet the Court fails to deal with the property interest issue precisely. It allows that some kinds of custody will justify such searches but avoids considering who has what property interests in the automobile. 84 The Court should have asserted that the impending forfeiture proceedings created a possessory right in the state, even though the legal title determination must await conclusion of the forfeiture proceedings. The possession thus gained would carry with it, one might reasonably expect, the

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77. 387 U.S. 294 (1967).
78. See p. 20 infra.
79. In Chapman v. United States, 365 U.S. 610 (1961), the government sought to justify the warrantless search of a rented house on the ground that the tenant's interest in the premises had been forfeited under a Georgia statute. (Mr. Justice Clark, in dissent, agreed). The Court did not reject the argument, but found that the appropriate procedures for forfeiture had not been followed.
80. 386 U.S. 58, 61 (1967).
81. Id.
82. Mr. Justice Douglas recognized this when he faulted the Court's reasoning. He argued that the state's interest should not have been thought enough to justify the warrantless search: "The state court realistically noted that the State's title could not relate back to the time of the seizure until after a judicial declaration of forfeiture." Id. at 63. (dissenting opinion). Although he fails to recognize that lesser interests than full title might support the state's right to search, e.g., its interest in a leased automobile, nonetheless he is prepared to deal squarely with the property interest issue.
83. 386 U.S. 58, 67 (1967).
84. This is indicated by the Court's reference to the "search of the car—whether the state had 'legal title' to it or not. . . ." Id. at 61.
right to search. The status of the car under such a rationale would be, impending the forfeiture proceedings, analogous to that of the person under arrest pending his trial. While we do not allow the state to exercise the fairly complete dominion over him that it will should he be convicted and sentenced to prison, still we recognize the right of the state to search him in its own interest. The status of the car in *Preston*, on the other hand, would be analogous to that of a child accompanying the arrested person. We would not want the police to abandon the child in the middle of the city when his father is taken into custody. We would expect the police to exercise some temporary and limited custody (a search of the child in such a case might not be justified) over the child for its own safety just as, in *Preston*, the police exercised custody over the car for its own protection. In the *Preston* case and its analogue, police act as agents of the arrested person, whereas in the *Cooper* case and its analogue, the state has moved against that vehicle or that person, respectively. Such reasoning would have avoided the vagueness of the *Cooper*-*Preston* distinction.\(^5\)

**Property Interest As It Bears Upon the Scope of a Search.**

The United States Supreme Court has alluded to property concepts in determining the scope of a search of a person. The heart of the problem is reflected in analysis found in *United States v. Rabinowitz*.\(^6\) Armed with a valid arrest warrant, officers went to the defendant's one-room office, placed him under arrest, and purportedly incident to that arrest searched his desk, safe, and file cabinets for about an hour and a half. The Court upheld the search, stating:

Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required.\(^7\)

The Court's thesis seems to be that if some search is constitutionally permissible as incident to an arrest no particular purpose is served by limiting that search

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85. It is interesting to note that Mr. Justice Douglas himself suggests that *Cooper* overrules *Preston* sub silentio *Id.* at 65.

To compound the confusion, the Court, in *Chambers v. Maroney*, 399 U.S. 42 (1970), validated a stationhouse search of a car without a search warrant. The *Preston* case was distinguished on the ground that there was probable cause, in *Chambers*, to believe that the automobile contained contraband or illegal merchandise, and that the search, therefore, could be justified not as incident to the earlier arrests (the asserted basis in *Preston*) but on an exigency basis, due to the mobile nature of a motor vehicle. See *Carroll v. United States*, 267 U.S. 132 (1925).


87. *Id.* at 65-66.
to anything narrower than the searched person's possession or control. "What is a reasonable search is not to be determined by any fixed formula." A large part of the problem here, as elsewhere, involves the failure to define terms specifically. As Mr. Justice Frankfurter points out in dissent:

Such a claim (the Court's) can only be made by sliding from a search of the person to a search for things in his "possession" or "in his immediate control," without regard to the treacherous ambiguity of these terms. . . .

Justice Frankfurter argued that the Court should examine the rationale behind the search incident to arrest and limit such searches to the scope suggested by the rationale. Such searches are justified to protect the arresting officer, to deprive the prisoner of escape means and to foreclose his destruction of evidence. Hence, concludes Justice Frankfurter, searches incident to arrest may not constitutionally go beyond the area in which the arrested person might seize or use a weapon or implement of escape or in which he might destroy evidence. In this area the use of a property term will not do, for it is not interchangeable with—or germane to—the scope suggested by the rationale.

Such a view ultimately prevailed. In Chimel v. California, the Court overruled Rabinowitz. "The only reasoned distinction", observed Mr. Justice Stewart for the majority, "is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other." Appropriately, the scope of the search incident to arrest will no longer be controlled by a property concept.

Interest of the Sovereign in the Article Seized.

For many years, seizures under the fourth amendment required an inquiry into the government's interest in the chattel seized. To validate a seizure that interest

88. Id. at 63.
89. Id. at 78. Frankfurter here echoed his earlier statement in Davis v. United States, 328 U.S. 582 (1946):

In cases dealing with the search of the person, it is natural to speak of the right to search and seize things "in his possession" without strict regard to the ambiguous scope of a man's "possession." From that, opinions slide readily to, including the right to search and seize things "within the immediate control" of the arrested person, language appropriate enough when applied to goods which the arrested person was transporting at the time. Taken out of their original context, these phrases are used until they are made to include the entire premises in which the arrest takes place.

Id. at 611-12. For a case sustaining a search of "the entire premises" (a four-room apartment), see Harris v. United States, 331 U.S. 145 (1947).

91. 395 U.S. at 766.
had to be something more than that the chattel may help in securing a conviction. The oldest landmark is *Boyd v. United States*, a forfeiture proceeding decided in 1886. A revenue law required Boyd to produce certain books or be deemed to have conceded as true the government allegations. The Court held that this constituted a compulsory production under the fourth amendment, equivalent to a search and seizure that was unconstitutional.

The search for and seizure of stolen goods liable to duties and concealed to avoid payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not.

This "mere evidence" rule became crystallized in *Gouled v. United States*, as the Court reversed a two-court conviction involving mail fraud. The evidence in issue had been secured by a government agent who gained admission to Gouled's office by feigning friendliness. During this visit, and while Gouled was absent from the room, the agent made a search and uncovered papers later used at trial. The Court rested its decision on *Boyd* and *Weeks v. United States*:

> [I]t is clear that, at common law and as a result of the Boyd and Weeks Cases, they [search warrants] may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

Thus developed the doctrine restricting the harvest of any search however lawful might otherwise be to the fruits of crime, its instrumentalities or contraband. The doctrine was written into the Federal Rules of Criminal Procedure and became a factor in state prosecutions following the Supreme Court's applica-
tion of the fourth amendment and the exclusionary rule to the states. However, on at least two points the Boyd-Weeks-Gouled opinions need not be read to exclude all "mere evidence" from official reach. Each of these cases presented not only the question of what might be secured but also some question of the means of acquisition, an inquiry presumably independent of the "mere evidence" one. Boyd involved the peculiar revenue legislation which in effect compelled one to surrender private papers or suffer a confession to the government's allegations. Weeks presented two searches whose legality was not totally explored. Entrance to the defendant's house was secured, by a key whose location was furnished to the police by a neighbor and, second, by the act of someone in the house, probably a boarder. In Gouled admission was by invitation, but the invitation resulted from a ruse and the subsequent search went beyond the terms of the invitation. None of the three involved a search warrant or some other clearly justifiable mode of acquisition. The Court therefore could have rested its decision as heavily on this aspect of the cases as on any other.

Further, in all three cases, the "seized" materials were papers rather than bloodied shirts or tell-tale shoe-heels. Papers present peculiar problems in fourth amendment cases because of their testimonial nature. The Boyd Court recognized the unique status of such quarry when it protested that "our law has provided no paper-search in these cases to help forward the conviction," and, as grounds for the result, the fifth amendment as well as the fourth was cited. The rationale for the "mere evidence" rule, then, did not receive its most

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a criminal offense; or (3) possessed, controlled or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

Following the change in the "mere evidence" rule wrought by Warden v. Hayden, 387 U.S. 294 (1966), Congress provided for "mere evidence" search warrants in the "Omnibus Crime Control and Safe Streets Act of 1968":

In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States.


100. But see Lewis v. United States, 385 U.S. 206 (1966), in which the narcotics agent, pretending to be an addict, secured an invitation to Lewis' home, and from him bought drugs introduced into evidence. The Court in Lewis distinguished Gouled on the fact that in Lewis, "[d]uring neither of his visits to petitioner's home did the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business." Id. at 210.

101. "The items of clothing involved in this case are not testimonial' or 'communicative' in nature and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment." Warden v. Hayden, 387 U.S. 294, 302-03 (1967).

102. 116 U.S. at 629.
clinical test in these cases due to the dilution presented by the manner in which the material was secured and by the superimposition of the fifth amendment issue.

In *Warden v. Hayden*, the "mere evidence" issue was more squarely presented since the search was otherwise valid and did not involve items arguably testimonial in the same sense that documents might be. There the Baltimore police, informed of a robbery, arrived quickly at the house into which the culprit was said to have run. Hayden's wife stated she had no objection to a search of the house. Some of the officers arrested Hayden in an upstairs room when it appeared that he was the only man on the premises. Meanwhile, other officers, searching the first floor and the cellar, discovered weapons in a flush tank and some clothing of the type allegedly worn by the robber in a washing machine. After Hayden's conviction his habeas corpus writ was denied by the United States district court. The Fourth Circuit reversed on the basis of the "mere evidence" rule. The Supreme Court in turn reversed the appellate court, holding that the "dual, related premises" of the "mere evidence" rule—that (1) the government must have a superior property interest in any items seized and that (2) use for the conviction of the defendant did not alone present a sufficient purpose for a search and seizure—were no longer valid. "The premise," said the Court, "that property interests control the right of the Government to search and seize has been discredited." As support the Court enlisted the fact that searches and seizures might well be unreasonable within the fourth amendment even though the government asserts a superior property interest at common law. Not even *Boyd, Weeks, or Gouled* denied that. To state that the government must have a certain interest in a chattel to warrant seizure does not preclude barring seizure on unrelated grounds despite the presence of that governmental interest. The precept that the sovereign must have a certain property relationship with a chattel in order to seize it does not prevent the sovereign from being denied some of the benefits (seizure) of that relationship when his conduct falls short of that required by the fourth amendment.

104. *Id.* at 304. The Court provided a concise description of the former situation:

"[I]t was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized." *Id.* at 303-04.

The Court further points out that in order for the government to seize stolen goods it was formerly required that the true owner swear that his goods had been taken. *Id.* at 306, n.11. That this procedural practice no longer exists, however, is not a conclusive showing that the property interest basis for the seizure has disappeared.
The crux of the problem, however, was in the premise that intended use of evidence sought for conviction purposes did not in itself justify governmental seizure. The *Boyd*, *Weeks*, and *Gouled* cases reached the wrong result on the "mere evidence" issue, at least, because they failed to recognize that the very interest of the government in prosecuting crime might well provide the basis for its asserting a genuine property interest in the item seized for use as evidence, which property interest need not, of course, amount to full ownership. Here, the *Hayden* Court reaches the right result but arguably for the wrong reason. *Hayden* did not require a lengthy discussion aimed at discrediting the role of the superior property interest in the seizure of evidence to vindicate the right of the state to seize the controverted items. Since the Court supported the seizure, it is clear that it attributed to the State of Maryland a superior property interest—at least insofar as the right to present possession was concerned. The problem with the common law situation, which the *Hayden* Court sought to remedy, was not that property concepts control seizure by government, rather that, due to the interpretation given the *Boyd-Weeks-Gouled* authority, the government’s interest in solving crime was not rated as strong enough to position a superior property interest with respect to evidence needed for prosecution. As *Hayden* implies, this may in part be due to a notion that a superior property interest would require the right permanently to retain. In arguing against the superior interest doctrine, the Court stated that "just as the suppression of evidence does not in itself necessarily entitle the aggrieved person to its return (as, for example, with contraband), the introduction of 'mere evidence' does not in itself entitle the State to its retention." The *Hayden* Court should have recognized the continuing vitality of the "superior property interest" doctrine but should have extended it to include the right to possession for whatever period of time the course of prosecution makes necessary. Such indeterminate possessory interests are not, of course, unknown to the law—witness life estates and tenancies at will. Nor should one tremble at the idea of the law declaring a property interest itself, for this too is not uncommon either in civil law (e.g., eminent domain) or on the criminal side (e.g., forfeiture statutes). The Court in effect did this. But acknowledgement that in securing evidence the sovereign exercised a superior property right—

105. It could be argued that, once it was clear that no one in the house was in danger and that no escape from the house by the alleged robbery was possible, the search of the washing machine and of the flush tank might have awaited the securing of a warrant, *i.e.*, the emergency might well have been over.


107. To be sure a forfeiture proceeding is in form civil. But courts have recognized that in purpose, at least, it is remarkably criminal. As the United States Supreme Court stated, in holding that the *Weeks-Mapp* exclusionary rule applies to such a proceeding, "Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).
albeit limited in time and extent—would have obviated the necessity for the Court's lengthy disparagement of the use of property concepts in search and seizure cases. Furthermore, the law would have been spared the paradox deducible from Hayden, i.e., that the sovereign may take a chattel from A even though it conceivably has no property interest entitling it thereto.

With Respect to the Reasonableness of the Search.

To this point we have discussed the sovereign's property interest in chattels as it relates to whether they can be seized given an otherwise lawful search. The sovereign's interest has found additional application in determining the reasonableness of the means by which a particular search and seizure was carried out. In Davis v. United States, the government suspected the accused of violating the gasoline rationing provisions during World War II. After purchasing gasoline from the defendant's service station without the appropriate coupons, and at a higher price than allowed by law, government agents, who had no search or arrest warrant, demanded that Davis turn over gasoline coupons which they suspected he illegally possessed. Davis acceded, handing over evidence later used to convict him of unlawful possessions of gasoline ration coupons. Mr. Justice Douglas, speaking for the Court, found that Davis had consented to the seizure. The Court indicated, however, that the government's property interest in the coupons was decisive, even on this issue:

We are dealing here not with private papers or documents, but with gasoline ration coupons which never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it.

The Court found a critical distinction between "property to which the government is entitled to possession and property to which it is not," and asserted the necessity for a higher degree of persuasion in the latter type of case. This conclusion was felt to flow from the recognized principle allowing any property owner greater leeway in taking his property from one unlawfully in possession than that owner would have absent the possessory right. It is true, as the Court states, that the "... claim of ownership will even justify a trespass and warrant steps otherwise unlawful." But to apply such a principle, developed with respect to private parties, to a sovereign subject to

108. 328 U.S. 582 (1946).
109. Id. at 588.
110. Id. at 590.
111. It is interesting to note in Davis the lack of precision in speaking of "ownership" and "right to possession". Neither must necessarily accompany the other.
112. 328 U.S. at 591.
the constraints of the fourth amendment is to miss the point of the amendment. Surely it was foreseen that the Bill of Rights might restrict government from certain conduct which might otherwise be open to it. Conceding that the permissible mode of securing items is broader when the government has such a superior property interest, of what possible relevance is that interest to consent? Can the presence or absence of consent, even as seen by the courts, reflect interest? It is submitted that consent, even as seen by the courts, reflects choice, and choice in this context might well be unrelated to the property interest of the sovereign. The rationale put forth in Davis could well support the proposition that the reasonableness of a search can depend, at least in part, on what it turns up. The amendment was not written solely to protect those who in fact are found to be sheltering incriminating evidence. It was enacted for the security of us all. However, it will not always—if ever—be prospectively and decisively determinable that only particular search will necessarily yield an item in which the sovereign has this particular interest.

Zap v. United States, decided during the same term as Davis, provides an interesting comparison. The Court there affirmed a conviction for defrauding the government. Introduced at trial was a cancelled check which Federal Bureau of Investigation agents obtained from one of the defendant's employees during an inspection of the defendant's business books. The Court found the check admissible on the grounds that the defendant had consented to inspection in advance in order to get the government's business and that the scope of that consent had not been surpassed by the agents. Certainly, one might quarrel with the validity of consent so secured, but at least the factor treated in Zap related to the existence of consent. The Court in Zap, unlike Davis, does not emphasize the right to possession of the article as bearing upon the method of securing it. Interestingly, Mr. Justice Frankfurter, in dissent, argued a Davis-type philosophy in finding the right to possession critical: "Petitioner's right to possession was clearly recognized by the agents when they sought a warrant, for the purpose of securing the evidence." The application for the warrant is not relevant to the reasonableness of the search

113. Surely the Davis Court would not argue that the police might lawfully break into a home without a warrant merely because the objective is to recover a stolen phonograph on behalf of the true owner even if that true owner might do so with impunity. Presumably, the position of the police is not improved if the object of the search is an item belonging to the government itself. In short, the critical factor is not whose property is sought, but the nature of the party searching and seizing. That that party must conform his conduct to the fourth amendment is controlling. Yet it is clear that the demands of the agents in Davis constituted as much of a search as if they themselves had rummaged through the room in which the coupons were kept. Fortunately the Davis Court conceded that, even with regard to such items as those involved, some restraints remained. 328 U.S. at 591.

114. 328 U.S. 624 (1946).

115. Id. at 633.
if its significance consists only in supporting a finding of a possessory right in the defendant. That type of reasoning fails for the reasons set forth earlier in connection with Davis. The warrant application may be relevant insofar as it reflects on the government’s understanding of the alleged consent agreement. That is, the fact that government representatives saw the desirability of getting a warrant suggests that the parties themselves did not presume the consent found by the Court.

Property Interest As It Bears Upon Standing An Unlawful Search and Seizure.

One is not entitled to the suppression of evidence merely because it was secured through a fourth amendment violation. He must have standing to assert the search’s illegality—that is, he must show a transgression of his fourth amendment right of security with respect to his person, his premises or his chattels.\textsuperscript{116} United States v. Jeffers,\textsuperscript{117} involved a warrantless search of hotel room, rented by respondent’s aunts but which he had permission to use—indeed they gave him a key. The Supreme Court upheld his standing to assert the illegal search not on the basis of respondent’s interest in the premises, but rather of his interest in the personal property seized. “It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.”\textsuperscript{118}

\begin{footnotes}

\item[116.] See Wong Sun v. United States, 371 U.S. 471, 492 (1963): “The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.” But see Wilson v. United States, 221 U.S. 361 (1911), where the ability of a corporation president to assert a fifth amendment privilege against self-incrimination with respect to subpoenaed books was held to turn on whether they belonged to the corporation or the president. Mr. Justice McKenna entered a strong dissent:

\begin{quote}
Upon what ground was the privilege denied? Upon the ground that the books were not his property but that of the corporation. . . . How far, as effecting the privilege, is the rule of title to property to be carried? Every rule may be tested by what can be done under it. Whenever a privilege is claimed against the production of books, or, of course other property, may an issue be raised as to title and upon its decision by the Court the right to the privilege be determined, or shall the rule only be applied when such issue is not made? And what of partnership property, or property otherwise owned in common? Does the degree of interest affect the rule?
\end{quote}

\textit{Id.} at 387-88.

\item[117.] 342 U.S. 48 (1951).

\item[118.] \textit{Id.} at 54. The Narcotic Drugs Import and Export Act 21 U.S.C. § 171 (1964), declared that “no property rights shall exist in any . . . liquor or property [possessed in violation of stated provisions].” Yet, said the Court:

\begin{quote}
We are of the opinion that Congress, in abrogating property rights in such goods merely intended to aid in their forfeiture and thereby prevent the spread of traffic in drugs rather than to abolish the exclusionary rule. . . .
\end{quote}

\textit{Id.} at 53-54.

In McDonald v. United States, 335 U.S. 451 (1948), the government urged that since the trespass was against a third person, not the defendant, that defendant could not complain. That argument
\end{footnotes}
In *Jones v. United States*, the Supreme Court expanded the doctrine of standing. The government sought to reject the petitioner's standing on the grounds that he alleged neither ownership of the seized narcotics articles nor an interest in the premises searched greater than that of an "invitee or guest." Concluding that federal appellate courts had generally required ownership or possession of the seized property or a "substantial possessory interest" in the premises searched, the Court nonetheless held that Jones had standing on two separate grounds: (1) since the crux of the charge against him concerned in fact an allegation of possession, the government could not deny that possession at the pre-trial stage; (2) even where possession is not central to the charge, it suffices for standing purposes that the person seeking suppression was lawfully on the premises when the search was made. This second ground, curious at first blush, presumably is not some arbitrary notion designed to broaden standing. The Court gave no extended rationale for including people lawfully on the premises among those with standing. However, the principle must reflect the view that one's security is invaded whenever he is legitimately present during a search, even though the premises or the articles ultimately seized are not his. It is clear that the *Jones* criteria, applicable in federal and state proceedings, are additional, not substitutional, *i.e.*, one who has a substantial possessory interest in the premises, or ownership of the seized goods still has standing without being present, even if possession is not the heart of the government's charge.

Interestingly, the Court assails dependence on property concepts:

Distinctions such as those between "lessee", "licensee", "invitee" and "guest", often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

The crux of the matter in a standing case, however, is the enforcement of a constitutional safeguard, rather than the safeguard itself. The Court was right, in this case, in down playing technical property interests. But the principles that emerged in *Jones* were not significantly more appropriate.
Standing tells us not which searches were illegal but which parties may assert their illegality for purposes of the exclusionary rule. The Court should have squarely faced the issue presented: If, as Mapp v. Ohio\textsuperscript{123} presumes, excluding evidence deters unconstitutional searches, what limits might be put on such exclusion to meaningfully balance the possible deterrence against the benefit realized from the use of the evidence? If the property concepts involved in standing (and in the other criteria set out in Jones) are meant only to curb the number of cases in which the exclusionary rule would be used, that purpose could be served equally well to paraphrase a remark quoted by Mr. Justice Brennan in a different context,\textsuperscript{124} by restricting the application of the exclusionary rule to searches occurring on even-numbered days of the month. The real question is whether the exclusionary rule in the given case serves to deter similar illegal searches. This may boil down to asking whether law enforcement might willfully commit unlawful searches in relying upon the admissibility of the evidence to be turned up. Neither the defendant’s presence during the search, nor his interest in the premises searched or the articles seized is related to that deterrence question.\textsuperscript{125}

In the area of standing, just as in the determination of whether there has been a search,\textsuperscript{126} electronic surveillance cases have been troublesome. The Court decided Berger v. New York\textsuperscript{127} not on standing but on the unconstitutionality of the eavesdropping statute. Both Mr. Justice Harlan and Mr. Justice White, however, raise the standing issue in their separate dissents. According to Justice Harlan, the Court erred in allowing petitioner to challenge the constitutionality of the statute on the mere showing that he was “affected” by it. He approaches the standing question from the criteria set out in Jones, noting that the petitioner was never present in the bugged office during the eavesdropping pursuant to the first order nor had he any demonstrated property interest in the premises. Nonetheless, asserts Justice Harlan, the fact that

\textsuperscript{123} Id.
\textsuperscript{125} Simmons v. United States, 390 U.S. 377 (1968), had it been decided before Jones, might have made the Jones principle unnecessary. One of the great concerns of the Court in Jones was that the defendant’s testimony to support his suppression motion tended strongly to concede guilt on the merits with no guarantee that the testimony would not be admissible. In Simmons, the Court held the defendant’s testimony in support of a suppression motion inadmissible on the issue of guilt unless no objection was made. At issue was evidence seized from a suitcase. “The only, or at least the most natural, way in which he could find standing to object to the admission of the suitcase was to testify that he was its owner.” Id. at 391. Yet to do so, observed the Court, would convict him of the crime charged. To hold the testimony admissible would result in many fourth amendment claims not being asserted for fear of an adverse ruling on the suppression motion and consequent admissibility of the testimony in support thereof.
\textsuperscript{126} See p. 4 supra.
\textsuperscript{127} 388 U.S. 41 (1967).
It is surely without significance in these circumstances that petitioner did not conduct the conversation from a position physically within the room in which the device was placed; the fortuitousness of his location can matter no more than if he had been present for a conference in Neyer's office, but had not spoken, or had been seated beyond the limits of the device's hearing.\textsuperscript{128}

While much is to be said for Justice Harlan's emphasis upon privacy, perhaps it misses the central point—the extent to which application of the exclusionary rule in such cases might deter unlawful searches.\textsuperscript{129} It is conceivable that if standing were denied in such a case, law enforcement personnel might rely on such a holding to eavesdrop electronically—however illegally—whenever the evidence expected is thought to be primarily of use against the party not on the premises. While the property interest in the premises is relevant in ascertaining whether there was a search, it is not as useful in evaluating the scope of the exclusionary rule.

Mr. Justice White also applies the Jones standards and, speaking of the execution of the second eavesdrop order, stated that Berger's rightful presence on the premises during the recording entitled him to exclusion of the evidence so gathered if unconstitutionally obtained. He therefore concluded that there was no unconstitutional search and seizure.

\textit{Alderman v. United States}\textsuperscript{130} squarely tackles the standing issue in electronic surveillance cases. The Court held that one had standing to assert the unlawfulness of a search if his conversation was overheard or if the conversation overheard occurred on his premises, "whether or not he was present or participated in those conversations."\textsuperscript{131} (These criteria conform to those set out by Mr. Justice Harlan in \textit{Berger}). The person whose premises are searched gains standing despite his absence at the time, in the same way that the absent homeowner is entitled to assert the unlawfulness of a search of his home yielding evidence belonging to a third-party. Nor does the protection accorded private conversations by \textit{Katz} affect that result, the \textit{Katz} search standard is cumulative not substitutional:

So also we do not distinguish between electronic surveillance which is carried out by means of a physical entry and surveillance which penetrates a private area without a technical trespass. This much,

\textsuperscript{128} \textit{Id.} at 103. Harlan ultimately finds, however, that Berger's standing to challenge the first eavesdropping order coupled with the lack of probable cause for the issuance of that order do not preclude the use of evidence thus secured as probable cause for the second order.

\textsuperscript{129} As Mr. Justice Fortas has pointed out, standing requirements yield judicial tolerance of fourth amendment violations. \textit{Alderman v. United States}, 394 U.S. 165, 201 (1969).

\textsuperscript{130} 394 U.S. 165 (1969).

\textsuperscript{131} \textit{Id.} at 176.
we think, *Katz* makes quite clear. In either case, officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated but because his own were.\textsuperscript{122}

Citing *Hoffa*, the Court noted that those who converse although otherwise protected, assume the risk that the homeowner might have consented to the surveillance. Mr. Justice Harlan, concurring in part and dissenting in part, argued that the traditional rationale for protecting the absent homeowner with respect to seized goods belonging to third parties rested on the idea that he was in possession of those goods—an idea inapplicable to conversation cases. "The words that were spoken are gone beyond recall."\textsuperscript{123} Charging that the Court's theory depends entirely on a technical trespass doctrine Justice Harlan calls for a complete reconsideration of the theoretical basis of standing law in conversation cases and concomitant rejection of traditional property concepts in accordance with the *Katz* mandate: "Standing should be granted to every person who participates in a conversation he legitimately expects will remain private. . . ."\textsuperscript{124} The difficulty with Harlan's theory is its failure to recognize that an illegal entry, into one's home for example, can be a significant invasion of the homeowner's privacy even if he happened not to participate in the conversation so seized. It protects only those aggrieved by the seizure rather than by the search itself. If a law enforcement officer uses an axe to break into a person's house in order to install a transmitter, Justice Harlan would deny the owner standing to assert the illegality of the search unless he suffered the added indignity of participating in the seized conversation. Furthermore, one may have a significant interest (though not strictly a property interest) in conversations occurring on his premises precisely because they are his premises. He himself, or matters with which he is concerned, may well be involved in the conversation. He may have directed an employee or relative to take part in the conversation. Or he may have wished to afford others the security of his home for their conversations. From the point of view of the fourth amendment's protection of security, all of these create in him an interest essentially indistinguishable from those aggrieved by the seizure of the conversation. All of them are intimately related to him because his interest in the premises provides a nexus calling for protection of his interest in the security of the conversations. More valid is his assertion that the Court never fully examines the extent of the interest protected by the phrase "his premises."\textsuperscript{125}

\textsuperscript{122} Id. at 179, n.11.
\textsuperscript{123} Id. at 190.
\textsuperscript{124} Id. at 191.
\textsuperscript{125} This is so despite the fact that the question was apparently crucial to the very case under consideration. Id. at 168, n.1.
Does this include owner, landlord, lessee, licensee? The complete answer awaits future cases.

The most fascinating non-electronic surveillance case recently emanating from the Supreme Court is *Mancusi v. Deforte.*\(^{138}\) It involved a search for and seizure of labor union records called for by a subpoena *duces tecum* which the union had failed to honor. The search, while DeForte was present, occurred in an office shared by DeForte and other union officials. Since neither the premises nor the seized papers "belonged" to DeForte, a major issue in the case concerned his standing to assert the illegality of the search. The Court, finding that DeForte indeed had requisite standing, noted that even before *Jones,* it was settled that a possessory interest sufficed to assert standing. *Jones* brought a loosening of that requirement, holding that anyone legitimately on the searched premises might challenge the legality of a search whose fruits are sought to be used against him. Further, continued the Court, the

> [R]ecent decision in *Katz v. United States* also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.\(^ {137}\)

After an analysis of DeForte's office in this light, the Court concluded that DeForte had such a reasonable expectation of privacy.

Thus, like DeForte, Jones was not the owner of the searched premises. Like DeForte, Jones had little expectation of absolute privacy, since the owner and those authorized by him were free to enter. There was no indication that the area of the apartment near the bird's nest (where the narcotics were found) had been set off for Jones' personal use, so that he might have expected more privacy there than in the rest of the apartment; in this it was like the part of DeForte's office where the union records were kept.\(^ {134}\)

Mr. Justice Black, dissenting, faults the Court for what he sees as its possible preparation for the abolition of all standing requirements. He disagrees with the contention that *Jones* automatically accords standing to anyone legitimately on the premises, arguing that what the *Jones* Court actually held was that a guest had the legally requisite interest in the premises. Black is concerned lest a janitor or others with the like tenuous connection with the premises be said to have standing. In any event discussion in terms of "expectations" makes "presence" irrelevant, a strange result in light of *Jones.* The disappointing

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137. *Id.* at 368.
138. *Id.* at 370.
aspect of *Mancusi* is the lack of consideration given to standing in terms of deterring unlawful searches and seizures, the central thrust of the exclusionary rule. Since presumably most searches and seizures present no real standing problem under traditional principles, the issue becomes: in the class of cases where standing is absent or questionable under those principles, to what extent would the disadvantage of outlawing the use of the tainted evidence be countervailed by consequent increased effectuation of the fourth amendment. Again, we are dealing not with the legality of the search or seize but rather with the class of cases in which the fruits of illegal searches might be used.

**Conclusion**

The intent here has been to point out the important areas of fourth amendment search and seizure cases in which the Supreme Court has discussed property terms and to assess the validity of the use of such terms in those areas.

Much progress has been made in reducing their use where irrelevant. *Chimel v. California*\(^ {139} \) redefined the scope of a search incident to arrest, excluding consideration of "possession" or "control" in favor of a standard germane to the rationale for the search itself. *Warden v. Hayden*\(^ {140} \) did away with the "mere evidence" rule, laying to rest all that remained of the principle requiring the sovereign to assert a superior property interest in seized evidentiary items, although, the problem might have been more easily met by recognizing just such a superior governmental interest by virtue of the very fact that the item has evidentiary value. How else can the sovereign's right to assert dominion over it be explained? No lessening of security would result, since probable cause and all other requirements remain.

Much remains to be done. The Court has failed to acknowledge the extent to which property concepts have been overemphasized in determining standing, a status that should be evaluated in terms relating to the purpose behind the exclusionary rule—deterrence of unconstitutional searches. Where the property concept has a true role—in delimiting when a search has taken place—the Court has sought to de-emphasize it in favor of a less predictable and therefore less reassuring standard, *i.e.*, one's justifiable expectation of privacy. But that very standard itself is in so many cases a function of a property relationship.

Further clarification is in order not only in the area of the relationship between the interest of the sovereign in the chattel searched or seized and the reasonableness of the search or the existence of consent, but also, whenever property concepts are used, with respect to the precise nature of the interest

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\(^{140}\) 387 U.S. 294 (1967).
referred to. Too often, we have seen, the Court has intoned words relating to ownership, possession and license with little attempt to specify their exact meanings in a fourth amendment context.

Finally, the Court must resign itself to the fact that it need not embrace the importance of property concepts in all fourth amendment areas or in none, but rather must carefully select those in which property relationships have a meaningful note.

By meeting the challenge in this area, the Court could grant to these "property" concepts their proper role in preserving the citizen's "human" rights.