Cornell Law Review

Volume 58
Issue 3 *March 1973*

Article 6

Constitutional Law-Fourth Amendment-the Search All Persons Power-Does Presence Really Equal Probable Cause

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Constitutional Law—Fourth Amendment—The "Search All Persons" Power—Does Presence Really Equal Probable Cause?

State v. De Simone, 60 N.J. 319, 288 A.2d 849 (1972)

Eleven states empower their police, when executing a search warrant, to search all persons found on the premises described therein.[1] As a general rule, this authorization[2] reflects an attempt by the various state legislatures to increase the efficacy of law enforcement in the areas of illegal gambling and drug control.[3] The instrumentalities of these crimes are small and easily concealable, making it a simple task for offenders to frustrate the purpose of an ordinary warrant. Proponents of the "search all persons" rule argue that in the absence of this power, crime control can be thwarted by quick transfer of contraband to a person not named in the warrant.

Notwithstanding the undeniable existence of this problem, several courts[4] have found the search all persons solution unconstitutional.[5]

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1 Three states grant this power through a specified form of warrant. Del. Code Ann tit. 11, § 2310 (Supp. 1970); Mass. Gen. Laws Ann. ch. 276, § 2A (1968); N.H. Rev. Stat. Ann. § 595-A:3 (Supp. 1972). The remaining eight states authorize this police action without setting forth an "approved" warrant. Conn. Gen. Stat. Rev. § 54-33b (1968); Ga. Code Ann. § 27-309 (Supp. 1970); Ill. Ann. Stat. ch. 38, § 108-9 (Smith-Hurd 1970); Kan. Stat. Ann. § 22-2509 (Supp. 1971); Mont. Rev. Codes Ann. § 95-710 (1969); Nev. Rev. Stat. § 179.055 (1971); N.Y. Crim. Pro. Law § 690.15 (McKinney 1971); Wis. Stat. Ann. § 968.16 (1971).

2 *E.g.*, Ill. Ann. Stat. ch. 38, § 108-9 (Smith-Hurd 1970) provides:

> In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
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> (a) To protect himself from attack, or
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> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

3 *See* Revision Committee Comments to Ill. Ann. Stat. ch. 38, § 108-9 (Smith-Hurd 1970), where it is stated that "[t]he need for this power arises most often in the narcotics cases where disposition is most easily effected."

4 There are only a few reported cases dealing directly with this subject. Two reasons may explain this dearth of cases. First, an exercise of the power, whether constitutional or not, presents a prima facie case for the validity of the search. A poor person may lack the resources to mount a constitutional attack. A decision not to contest the search is even more likely if the defendant is offered an attractive plea bargain. In such a case, the search all persons power serves its purpose without challenge. Needless to say, a conviction like this is not reported. Second, when the police enter a premises with the power to search all people present, and they begin to do so, suspicious activity on the part of those waiting their turn to be searched will often be induced. *See, e.g.*, Johnson v. State, 440 S.W.2d 308 (Tex. Crim. App. 1969). Once this occurs, the police do not have to base their subsequent arrest and search of such "suspicious" people on their statutory power but can rely on the activity of those people in the presence of the police. The search all persons power is clearly, however, the triggering mechanism for the entire scenario.

5 United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960); State v. Wise, 284 A.2d 292

The fourth amendment requires a judicial finding of probable cause as a condition precedent to the issuance of a search warrant.[6] Moreover, the warrant must particularly describe the person or place to be searched.[7] Under the search all persons doctrine neither the magistrate issuing the warrant nor the police requesting it know who will be present at the time of search. Consequently, with respect to the person searched, the warrant meets neither of the conditions required for issuance.

These constitutional doubts have haunted courts which have upheld the search all persons procedure.[8] Several courts have resorted to analysis of the facts of the particular search in order to fit the case into a constitutional mold. For example, one case imposed a reasonableness test on the activity of the police.[9] The court stated that its decision to sustain the validity of the search under the facts of the case before it did not mean that such an all persons search would be valid under all circumstances.[10] It would be up to the police to show the reasonableness of their search in each instance.[11]

Other courts have cast their holdings in terms so broad as virtually to emasculate the language of the warrant or the relevant statute. One case held that the executing officer had the power to search a person, unnamed in the warrant, if circumstances observed by the officer gave him probable cause to believe that a crime was being committed.[12] Under this formulation, even in the absence of any special statutory power, it would be the policeman's right, in fact his duty, to search the subject. In another case upholding the power of the police to search

(Del. Super. Ct. 1971); Purkey v. Mabey, 33 Idaho 281, 193 P. 79 (1920); Garrett v. State, 270 P.2d 1101 (Okla. Crim. App. 1954); Crossland v. State, 266 P.2d 649 (Okla. Crim. App. 1954); State v. Massie, 95 W. Va. 233, 120 S.E. 514 (1923). A survey of the cases cited in this footnote and in note 8 *infra* will reveal that the search all persons theory has been litigated in jurisdictions which have not granted this power by statute. It appears that unless there is a direct prohibition against the doctrine, magistrates feel free to issue warrants which include a directive to the police to search all persons present. The relevancy of this discussion is thns not confined to the 11 states listed in note 1 *supra*.

6 U.S. CONST. amend. IV.

7 *Id.*

8 *See, e.g.*, State v. Procce, 5 Conn. Cir. 637, 260 A.2d 413 (1969); Samuel v. State, 222 So. 2d 3 (Fla. 1969); Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970); State v. Pugh, 69 Ill. App. 2d 312, 217 N.E.2d 557 (1966); People v. Nicoletti, 60 Misc. 2d 108, 302 N.Y.S.2d 618 (Niagara County Ct. 1969); Johnson v. State, 440 S.W.2d 308 (Tex. Crim. App. 1969).

9 Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

10 *Id.* at 459, 177 S.E.2d at 489.

11 *Id.*, 177 S.E.2d at 489-90.

12 State v. Procce, 5 Conn. Cir. 637, 645, 260 A.2d 413, 418 (1969).

an unnamed party,[13] the court supported its decision by noting that the suspicious action of the subject in the presence of an officer in itself provided probable cause for a search of his person.[14]

These cases suggest that even courts upholding the search all persons doctrine recognize its constitutional difficulties and, whenever possible, attempt to justify the police activity on other grounds. Thus, although the search all persons power may have great practical value, most courts consider it legally suspect.

I

State v. De Simone

Chief Justice Weintraub of New Jersey, in the most sweeping and forceful opinion yet written in favor of this police practice, recently held the search all persons investigation a valid and necessary tool of law enforcement.[15] *State v. De Simone* involved a police investigation of a lottery operation which used an unattended automobile as a "drop" for the participants in the illegal scheme.[16] Some of these individuals would come to the "drop" area in cars; others would arrive on foot. By checking motor vehicle registrations, the police discovered that several of those involved had past connections with illegal gambling. Warrants were obtained to search six automobiles observed at the "drop";[17] the defendant, De Simone, was a passenger in one of them. Pursuant to the warrant directing a search of the vehicle and "persons found therein,"[18] De Simone was searched. The police found lottery slips and other paraphernalia which were critical evidence in the ultimate conviction of De Simone. The appellate division reversed the conviction, finding no basis upon which to include unnamed passengers in the search warrant.[19] The state appealed to the New Jersey Supreme Court.

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13 Johnson v. State, 440 S.W.2d 308 (Tex. Crim. App. 1969).

14 *Id.* at 310. During a search for marihuana, the police considered it "suspicious" that one individual reached into his pocket, put something in his mouth, and apparently swallowed it.

15 State v. De Simone, 60 N.J. 319, 288 A.2d 849 (1972).

16 *Id.* at 323, 288 A.2d at 851.

17 *Id.*

18 *Id.*

19 *See id.* at 321, 288 A.2d at 850. The decision of the New Jersey Superior Court, Appellate Division, is unreported.

One of the appellate division judges dissented. Although he felt that the "all persons" clause in the warrant did not meet the description requirements of the fourth amend-

In sustaining De Simone's conviction, Weintraub devised a two-pronged test for determining the constitutional validity of the search all persons approach in any particular fact situation. First, there must be a showing of probable cause concerning the premises to be searched.[20] Second, there must be reasonable grounds for believing that all persons on the premises will be participants in the criminal activity.[21] In *De Simone*, Chief Justice Weintraub found both parts of the test satisfied.[22] He was convinced that it was reasonable to suspect that every person in a car at the time of a "drop" would be involved in the illicit operation.[23] Therefore, in his view, the search of De Simone was reasonable.[24]

Clearly, Weintraub does not envision his test being confined to automobile cases.[25] Several decisions dealing with a variety of premises —stores, restaurants, and apartments—are cited as authority for his formulation.[26] Before *De Simone*, the search all persons procedure, although formally approved by only a small number of states, was widely used because of its practical value and despite its questionable

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ment, he would have remanded the case in order to determine whether, apart from the warrant, there was probable cause to make the search. *Id.*

20 *Id.* at 322, 288 A.2d at 850.

21 "So long as there is good reason to suspect or believe that anyone present at the anticipated scene will probably be a participant, presence becomes the descriptive fact satisfying the aim of the Fourth Amendment." *Id.*

Weintraub does not require that the authorities allege satisfaction of the second part of this test in their application for a search warrant. He approved the search in *De Simone* notwithstanding that the affidavits for the warrants made no mention of passengers. *Id.* at 325, 288 A.2d at 852. Thus, there will be no pre-search judicial decision explicitly concerned with the reasonableness of believing that all persons found on the premises will be engaged in criminal activity.

In addition to the idea that an individual's privacy probably deserves the protection of such a pre-search ruling, there is a procedural aspect to consider. Once a search has revealed incriminating evidence, courts are reluctant to find the search invalid. Weintraub phrases the issue in *De Simone* as "whether the truth revealed by the search shall be suppressed and a false judgment of not guilty entered." *Id.* at 323, 288 A.2d at 851.

22 *Id.* at 325, 288 A.2d at 852.

23 *Id.*

24 [W]ith regard to the Fourth Amendment demand for specificity as to the subject to be searched, there is none of the vice of a general warrant if the individual is thus identified by physical nexus to the on-going criminal event itself.

Id. at 322, 288 A.2d at 850.

25 [A] showing that a dice game is operated in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense.

Id.

26 Weintraub cites, *inter alia*, United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960) (bargain shoe store), Samuel v. State, 222 So. 2d 3 (Fla. 1969) (apartment), Garrett v. State, 270 P.2d 1101 (Okla. Crim. App. 1954) (filling station and beer hall), and State v. Massie, 95 W. Va. 233, 120 S.E. 514 (1923) (poolroom). 60 N.J. at 327-28, 288 A.2d at 853-54.

legality. Now, with Chief Justice Weintraub giving the doctrine a measure of legitimacy, many states may hasten to add this weapon to their law enforcement arsenal and openly begin to encourage its use.

II

REMAINING CONSTITUTIONAL DOUBTS

Notwithstanding the likelihood that Chief Justice Weintraub's arguments will influence other courts and state legislatures, fundamental questions concerning the constitutionality of the search all persons practice persist.[27] In situations in which his two-pronged test is met, the Chief Justice is willing to construe presence at a specified location where criminal activity is suspected as conforming to the description requirements of the fourth amendment.[28] But under his theory, the only description given is that of the premises to be searched. No designation of the person eventually searched, either by name or by physical description, is possible; neither the police nor the magistrate know who will be present at the suspected location.

In the *De Simone* situation, the authorities seek to invade two areas of privacy—the premises and the person of the unnamed occupant. Weintraub's opinion would allow them to accomplish this two-tiered invasion by meeting the description requirements for only the first tier, the premises.[29] Two substantial incursions into the right of privacy are

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27 The protections afforded private citizens by the fourth amendment are the result of a passionate contempt which the colonists had for the British methods of search and seizure. The English would routinely issue general warrants or sanction warrantless searches. *See* Chimel v. California, 395 U.S. 752, 761 (1969). The decision to invade a person's privacy was summarily made by the invaders without the necessity or provision for a judicial review. By placing a citizen's privacy at the mercy of police discretion, the right to privacy was in reality made the privilege of privacy. In order to preclude such summary procedure, the fourth amendment requires in all but the most urgent cases that an impartial magistrate pass on the requests of the police to search. Minimal discretion is to be left in the hands of the police. "[P]robable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.'" Spinelli v. United States, 393 U.S. 410, 415 (1969) (citation omitted); *see* note 41 *infra*.

28 *See* notes 21 & 24 and accompanying text *supra*.

29 The ambiguity inherent in the term "presence" indicates that *De Simone*'s emphasis may be misplaced. If a warrant issues for a particular building, whether a person standing outside the building but within the property limits would be subject to search is open to question. Traditionally, fourth amendment protection as applied to houses extends to open areas immediately adjacent to the house. *See, e.g.*, Wattenberg v. United States, 388 F.2d 853, 857 (9th Cir. 1968). Under this theory, a person standing near the doorway to the house would be within the protected area and therefore would be considered on the premises for which the warrant had issued. He would thus be subject to

allowed for the price normally exacted from the authorities for just one. Such a bargain necessarily raises doubts concerning the constitutional quality of the goods.

In both *Katz v. United States*[30] and *Terry v. Ohio*,[31] the Supreme Court clearly stated that the protection of the fourth amendment runs to people, not to places. Indeed, no matter where an individual is, he carries with him the protective cloak of the fourth amendment.[32] To remove that cloak would seem to require a more personal description than a mere designation of the premises where the individual happens to be found.[33]

Similar problems are presented by Weintraub's "presence equals probable cause" framework. In *United States v. Di Re*,[34] the Supreme Court decided a case with a fact situation very similar to that of *De Simone*. The authorities had stopped a car, suspecting the driver of selling counterfeit gasoline ration coupons. When a police informant in the car told the police that the driver had just sold him counterfeit tickets, the police searched and arrested the driver and then searched

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search under *De Simone*. A newer theory posits that whatever area the owner or occupant of the premises wishes to keep private is deserving of the fourth amendment's protection. *See, e.g.*, United States v. Freeman, 426 F.2d 1351, 1354 (9th Cir. 1970); Wattenberg v. United States, *supra* at 857. Under this theory a person standing near the doorway would not be within a protected area because any person could openly and peacefully go up to the doorway of a residence for business, political, or other purposes. *See, e.g.*, Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964). This area is not meant to be kept private by the resident. Therefore, it is not entitled to fourth amendment protection and is not a part of the premises for which a warrant is required prior to search. It is conceivable that in a future case under *De Simone* an individual's fourth amendment rights will not hinge on specific description or probable cause but rather on which of the two theories is used or exactly where on the premises the defendant was standing.

30 389 U.S. 347, 351 (1967).

31 392 U.S. 1, 9 (1968).

32 [The defendant] did not shed his right to [privacy] . . . simply because he made his calls from a place where he might be seen. No less than an individual in a business office, *in a friend's apartment*, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment.

Katz v. United States, 389 U.S. 347, 352 (1967) (footnotes omitted) (emphasis added).

33 In ruling that the inclusion of the "all persons" clause in a search warrant did not meet the constitutional requirement of particular description when applied to a person unnamed in the warrant, the Delaware Superior Court in State v. Wise, 284 A.2d 292, 294 (1971) stated:

> It would seem that the Constitutional provisions are sufficiently clear. They require specificity. The only specificity found in the instant warrant, the application therefor and the affidavit, directly apply to one person only, i.e., [the proprietor of the premises].

The search of the defendant, who was found on the premises when the police made their search, was held unconstitutional even though the description of the premises themselves was sufficient.

34 332 U.S. 581 (1948).

Di Re, the third occupant of the car. The government argued that when the contraband sought was so small, common sense dictated a right to search all passengers in the automobile.[35] Emphatic in holding the search unconstitutional, the Court responded, "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."[36]

Sibron v. New York[37] involved similar legal issues. The police had observed the defendant conversing with six to eight known narcotic addicts over an eight-hour period. The Supreme Court held that the subsequent search of the defendant could not be supported merely by his observed association with the addicts. The search was therefore declared unconstitutional.[38] If, in *Sibron*, the defendant's association with known narcotic addicts was not sufficient probable cause to validate a search of his person, it is difficult to see how presence at a premises *merely suspected* of harboring narcotics activities would provide sufficient probable cause for a similar invasion.

A related problem under *De Simone* exists in police determination of whom to search upon entering a premises and being confronted with several individuals unnamed in the warrant. In this situation, the fourth amendment guarantee that all people shall be "secure in their persons" hinges upon the whims of the police. *State v. Wise*,[39] a Delaware case, presented this very situation. When the police arrived at the designated building, alleged to house an illegal gambling operation, several people unnamed in the warrant were present. The defendant made no move to flee or resist, yet he was the only unnamed person

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35 *Id.* at 586.

36 *Id.* at 587. The Court expanded on its reasoning in a way that applies even more directly to the present discussion:

> The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

Id.

37 392 U.S. 40 (1968).

38 "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." *Id.* at 62.

39 284 A.2d 292 (Del. Super. Ct. 1971).

searched.[40] This arbitrary power to determine whom to search which the search all persons doctrine grants to law enforcement officials runs notoriously afoul of the constitutional guarantees desigued to strip authorities of this ability.[41] In *Wise*, the court held that the addition of an "all persons" clause to a warrant directing the search of a premises did not meet the fourth amendment requirements of specific description as applied to the defendant. The search was therefore ruled invalid.[42]

De Simone does not require that the application, affidavit, or warrant include a showing of probable cause for belief that all persons present at the suspected premises will be involved in the crime.[43] Under Weintraub's formulation, the reasonableness of this belief, the second part of his test, is a question properly held for judicial review after the search.[44] Arguably, since there is no pre-search judicial finding of probable cause to substantiate the invasion of the unnamed occupant's privacy, that invasion is really no more than a warrantless search. Its validity thus hinges upon the existence of a compelling police need to make this type of warrantless search.[45] Proponents of the search all persons doctrine feel that the government needs this power[46] to ensure successful execution of searches for small contraband.[47] If, however, this purpose can be effected by a procedure more harmonious with the

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40 The operator of the premises was the only individual named in the warrant. He was searched along with the defendant, Eugene Wise. *Id.* at 293.

41 The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

McDonald v. United States, 335 U.S. 451, 455-56 (1948).

42 284 A.2d at 294.

43 In *De Simone*, the affidavits for the search warrants made no mention of passengers in the suspected cars. 60 N.J. at 325, 288 A.2d at 852.

44 This discussion assumes that the warrant has an "all persons" clause. In a state which grants this power by statute, the warrant would probably not contain even this cryptic allusion to the underlying ability which the police possess. A judicial pre-search determination of reasonableness as to the search all persons power is even less likely in these jurisdictions than in a *De Simone* situation.

45 We cannot be true to that constitutional requirement [for a warrant] and excnse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 45I, 456 (1948).

46 *See* State v. De Simone, 60 N.J. 319, 322, 288 A.2d 849, 851 (1972); notes 1-3 and accompanying text *supra*.

47 *See* note 3 and accompanying text *supra*.

essential safeguards found in the fourth amendment, the search all persons method should be rejected.[48]

III

AVAILABLE ALTERNATIVES

One possible alternative to Weintraub's formulation would be to require that an application for a search warrant include an allegation of probable cause concerning unknown people the police might find at the designated premises. This would at least ensure an advance judicial determination of the reasonableness of believing that everyone present would be involved in the wrongdoing. Unfortunately, this approach does not escape the inherent problem of the *De Simone* rationale. Search of an individual would still be authorized without meeting the specific constitutional requirements as to that individual.[49]

Section two of the Uniform Arrest Act,[50] now the law in several states,[51] offers a more acceptable solution. Under this provision, the police, if justifiably suspicious of the circumstances surrounding a person's presence at a suspected premises, may detain the individual for questioning.[52] If his answers do not satisfy the police, they may further detain and question the suspect for a period not to exceed two hours.[53] Meanwhile, the police may attempt to obtain a warrant to

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48 "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" Terry v. Ohio, 392 U.S. 1, 21 (1968), *quoting* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

49 *See* notes 20-24 and accompanying text *supra*.

50 (1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad, and whither he is going.
(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

UNIFORM ARREST ACT § 2. For the full text of the Act, see Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942).

51 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1902 (Supp. 1970); N.H. REV. STAT. ANN. § 594:2 (Supp. 1972).

52 UNIFORM ARREST ACT § 2; *see, e.g.*, State v. Wise, 284 A.2d 292, 294 (Del. Super. Ct. 1971).

53 UNIFORM ARREST ACT § 2.

search the suspect by laying all of the information gained in their investigation before a magistrate.[54]

Although under the Uniform Arrest Act an individual may be detained for up to two hours, he will not be searched[55] without a warrant. Such warrant will issue only after the police have questioned the suspect and presented the facts for a judicial determination of probable cause. The Uniform Arrest Act procedure still allows the authorities to conduct an effective search of the premises under the initial warrant; when applied to the individual, it adheres to the warrant, probable cause, and specific description requirements of the fourth amendment, in contrast to the search all persons practice. It provides an innocent person who happens to be on the premises for legitimate purposes the opportunity to explain his presence to the police. Having done so to their satisfaction, he would not be further detained. Under the search all persons rationale, however, he could be—and most likely would be—exposed to an immediate search of his person.

Although detention under the Uniform Arrest Act is still a "seizure" of the suspect,[56] its reasonableness, and therefore its constitutionality, must be determined in light of all the surrounding circumstances.[57] Weighed against this partial deprivation of personal liberty would be the government's interest in crime prevention and detection.[58] In any individual case the constitutionality of the search or seizure

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54 *See* State v. Wise, 284 A.2d 292, 294 (Del. Super. Ct. 1971).

55 Chief Justice Warren laid to rest the idea that a search, even a "frisk-type" search, was a mere petty indignity by calling such a notion "fantastic" and footnoting a description of such a search.

> [T]he officer must feel with seusitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.

Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968), *citing* Priar & Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481 (1954).

56 "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16 (1968).

57 The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must *evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.*

Id. at 21 (emphasis added).

58 [I]t is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.

Id. at 22.

necessarily depends on its fidelity to the fourth amendment. This is true no matter what procedure is authorized by the state.[59] The argument is not that the Uniform Arrest Act is constitutional per se, but rather that as a procedural standard it is less offensive to those safeguards than is the search all persons method.[60]

CONCLUSION

The search all persons power is undeniably a potent method for ensuring the successful execution of warrants issued to search a specified premises. Fourth amendment considerations, however, point to a tension between the efficiency of this technique and its constitutionality. The substantial pre-*De Simone* doubt concerning the validity of the search all persons technique must be viewed as the main reason for its statutory adoption in only eleven states. *De Simone*, however, has presented a persuasive argument for the validity of such a search in certain situations, and may precipitate a trend toward its universal acceptance and inspire its broader application. Hopefully, before other states rush to legitimate the search all persons approach under the *De Simone* aegis, they will consider the applicability of Uniform Arrest Act section two, which accomplishes the same practical purpose but appears more faithful to the requirements and philosophy of the Constitution.

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[59] In Sibron v. New York, 392 U.S. 40, 60-61 (1968), the Court, alluding to the Uniform Arrest Act as adopted in New York, stated:

> New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure "is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." (Citations omitted.)

[60] For a discussion of the constitutionality of Uniform Arrest Act § 2, see Warner, *supra* note 50, at 317-24.