THE SATURATION DRIVE: A MASS ARREST OF CONSTITUTIONAL PROTECTION

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> "Experience should teach us to be most on our guard when the government's efforts are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."
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> (taken from the dissent of JUSTICE LOUIS BRANDEIS in *Olmstead v. U.S.*, 277 U.S. 438)

In early November of 1987, police and military operatives conducted a series of saturation drives in Metro Manila. The raids — two on slum areas and two on the same state-university campus — produced the round-up of more than 800 individuals whom police authorities claimed to be communist guerrillas.[1] The drives created quite a furor, stirring a bitter debate betweeen law enforcers and civil libertarians. Certainly, the drives claimed much media attention. It was perhaps the first time that ordinary Metro Manila residents were hearing so much of the dreaded police practice.

Unknown to most, however, the saturation drive is not a new creation of the government; its current notoriety may be attributed to the fact that it has only recently reached Metro-Manila, the seat of media power in the Philippines. But during the Marcos years, the saturation drive was used extensively in the provinces, most notably in the southern city of Davao in the early- to mid-1980's. Older Filipinos can still remember the use of the so-called "zona" by the Japanese during the Occupation in World War II. And if we are to go even further back in the history of tyranny in the Philippines, there are indications that the U.S. colonial government used the drive (or at least its prototype) in quelling the guerrilla insurrection in the early 1900's.[2] As will be noted shortly, there are some striking parallels between the drive as practiced then and now.

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* Chairman, Student Editorial Board, Philippine Law Journal, SY 1987-88.

1 See Manila Bulletin, Nov. 2, 1987, p. 1, col. 5; Nov. 5, 1987, p. 1, col. 7; Nov. 6, p. 1, col. 5. Philippine Daily Inquirer, Nov. 2, 1987, p. 1, col. 5; Nov. 5, col. 6.

2 See G. May, *Private Presher and Sergeant Vergara: The Underside of the Philippine-American War* in REAPPRAISING AN EMPIRE: NEW PERSPECTIVES ON PHILIPPINE-AMERICAN HISTORY (1984).

Definition and Nature

"Saturation drive", "zoning", or "zona" (as used in the vernacular) are unofficial terms describing the military or police operation in which an area is cordoned off while the homes within are searched and suspects arrested. The terms may be used interchangeably, although, for our purposes, they must not be confused with the "dragnet" operation. The latter term describes a normally legitimate police operation in which officers in "hot pursuit" of a previously identified suspect block off his possible escape routes.[3]

To clear up the "confusion and prevarication" in the use of terms, Ann Alexander defines separately three types of military operations which have been called "zoning":[4]

(1) *Post-encounter zoning* — This refers to the search for suspects conducted by large numbers of troops immediately following a violent incident. Use of the term to describe this sort of operation is accurate only when the military actually cordons off the "scene-of-the-crime" area.

(2) *Point-target zoning* — A military operation in which one specific house is pinpointed as the target before the operation begins. Except in situations where the military enters and searches the other homes in the area as well, this sort of operation could more accurately be referred to as a "raid".

(3) *Area-target zoning* — This occurs when the military, having no specific target house in mind, cordons off an area of more than one residence and sets out on a "fishing expedition" for suspects within.

Our present inquiry shall refer to the third type of zoning operation.

The saturation drive was and still is essentially an anti-insurgency tactic, the insurgents being the *indios* (to the Americans in the early part of this century) and the communists (to the Philippine government today). The effect on the insurgents themselves is, however, indirect; the civilian populace bears the brunt of the practice[5] since it can offer no positive resistance. At its worst, zoning operations can be summary, if not downright arbitrary, since they are directed against areas on the mere suspicion of their being insurgent lairs. This brief inquiry looks into the legal issues raised by the practice.

Procedure

The steps/components of a saturation drive as practiced today are generally as follows:

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[3] A. ALEXANDER, Primer on Zoning Operations (Submitted for the use of the Free Legal Assistance Group [FLAG]).

[4] *Id.*

[5] See G. May, *op. cit. supra*, note 2 at 45 and 55.

(1) The authorities cordon off an area (usually urban poor) and enter it at dark. The occupants of houses within the area are ordered to come out into the street. The houses are searched.

(2) Meanwhile, the residents are lined up and questioned as to their identity and/or any particular crime that may have been committed in the vicinity shortly before.

(3) Men are made to remove their clothing so that the police may look for tattoos or marks of gang affiliations. In recent zoning operations, police paid particular attention to facial moles since these are allegedly the identifying features of New People's Army (NPA) partisans.

(4) A hooded informer ("spotter") points to alleged NPA guerrillas.

(5) Suspects are brought to the police station for interrogation.

(6) Those who appear to be innocent of any crime and against whom no charges can be filed are released after questioning. Some are charged or formally arrested (as when there are warrants outstanding for their arrest). Those against whom no charges can be filed but whom the police want to hold for further questioning are charged with vagrancy.[6]

The Constitution

The 1987 Philippine Constitution provides:

> "No person shall be deprived of life, liberty or property without due process of law."[7]

Furthermore,

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce and particularly describing the place to be searched and the persons or things to be seized."[8]

The phrase "a man's home is his castle", while almost trite in ordinary speech, embodies the basis for the legal protection afforded the ordinary citizen. Indeed, "(t)he inviolability of the home is one of the most fundamental of all the individual rights declared and recognized in the political codes of civilized nations . . . The privacy of the home — the place of abode, the place where a man with his family may dwell in peace and enjoy the companionship of his wife and children unmolested by anyone, even the King, except in rare cases — has always been regarded by civilized

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6 REV. PEN. CODE, Art. 202.

7 CONST., art. III, sec. 1.

8 CONST., art. III, sec. 2. In Gutierrez, *The Unsatisfactory Status of the Law on Arrest and Detention*, 46 PHIL. L. J. 669, 676-677 (1971), the U.S. Supreme Court's use of the due process clause in the areas of arrest, search, seizure and detention is examined and compared with Philippine methodology on the matter.

nations as one of the most sacred personal rights to which men are entitled."[9]

The constitutional prohibition against unreasonable searches and seizures is essentially directed against any and all state intrusions which fail to satisfy the requirement of reasonableness. Generally, a search is reasonable when it is authorized by the court as evidenced by a search warrant issued in compliance with the Constitution and the Rules of Court.[10] Warrantless searches are viewed as being presumptively unreasonable, subject only to a few specifically established and well-delineated exceptions.[11] A warrantless search may be deemed reasonable when executed incident to a lawful arrest,[12] in such a case, however, "the lawful arrest being the sole justification for the validity of the warrantless search . . . the same must be limited to and circumscribed by the subject, time and place of said arrest."[13]

Houses Emptied; Homes Searched.

The typical saturation drive is unsupported by a search warrant. Indeed, it would be difficult to imagine a warrant validly issued for the search of a *whole* community; in this instance, the requirement of the warrant's "particularity" as to the place to be searched would not be satisfied.[14] Thus, when the occupants of a dwelling are ordered out into the street by the police, the lack of a warrant constitutes a violation of Article III, Section 2. For if "a man's home is his castle" it must follow that requiring a man to leave that castle without satisfying constitutional and statutory requisites violates his right to be let alone therein.

The houses having been emptied, the police proceed to conduct their searches. The following situations (which allow public authorities to enter the houses of private citizens) must be considered:

(a) To arrest any person against whom a warrant of arrest has been issued.

(b) To capture the person of any known criminal, either because of his having been caught in *flagrante delicto* or because there is reasonable ground to believe that he is guilty, although no warrant for his arrest has been actually issued.

(c) To prevent the consummation of a crime the commission of which is being planned or has already commenced.

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[9] U.S. v. Arceo, 3 Phil. 381, 384 (1904).
[10] See 1985 RULES ON CRIMINAL PROCEDURE, Rule 126, Secs. 3-5.
[11] See Mincey v. Arizona, 437 U.S. 385, 390 (1978).
[12] See 1985 RULES ON CRIMINAL PROCEDURE, Rule 126, Sec. 12.
[13] Dissenting opinion of Justice Cuevas in *Nolasco v. Paño*, 139 SCRA 152 (1985). See also the separate dissent of Justice Teehankee. In *Nolasco v. Paño*, 147 SCRA 509 (1987), the Supreme Court reconsidered its earlier holding on the scope of the warrantless search incident to a lawful arrest and adopted the view of the dissenters in the earlier decision.
[14] See 1985 RULES ON CRIMINAL PROCEDURE, Rule 126, sec. 3.

(d) To search for and seize the effects of the crime or the evidence of the commission of the same and of the identity of the guilty parties.

(e) To detect and seize all contraband articles which are the subject of state monopolies.

(f) For the purpose of attaching property.[15]

(g) To effect a search to which the occupant has given his consent.

With regard to the first case, there can hardly be any application in a typical zoning operation. Again, the requirement as to the warrant's "particularity" would have to be satisfied. Assuming that a valid warrant of arrest is issued, then the proper police procedure is the normal execution of the warrant instead of the intrusion upon more than one house in the community. Similarly, with regard to the next five cases, reasonable grounds must exist for their application. Logically, should such reasonable grounds exist, there would be no need to search every house. But precisely, the police enter every house (or at least more than just one) because they are not sure *which house or houses* fall under the cases enumerated. This creates a hit-or-miss situation wherein each individual incursion may be deemed unreasonable.

The best justification which the police may offer is the alleged consent of the occupant; this however, is unavailing. No one can enter the dwelling house of another without rendering himself liable under the law unless he has the *express consent* of the owner and unless the one seeking entrance comes within some of the exceptions dictated by law or by a sound public policy.[16] Neither can a waiver on the part of the occupant be inferred because:

> "As the constitutional guaranty is not dependent upon any affirmative act of the citizen, the courts do not place the citizen in the position of of either contesting an officer's authority by force, or waiving his constitutional rights; but instead, they hold that a peaceful submission to a search and seizure is not a consent or an invitation thereto, but is merely a demonstration of regard for the supremacy of law."[17]

Furthermore, it has been held that when a subject of a search is not in custody and the State would justify a search on the basis of consent, the Constitution requires that it demonstrate that the consent was in fact voluntary; voluntariness is to be determined from the totality of the surrounding circumstances.[18] During a saturation drive, a slum dweller, roused from his sleep in the dead of night and surrounded by numerous heavily-

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[15] U.S. v. De Los Reyes and Esguerra, 467, 483 (1911).

[16] U.S. v. Arceo, *supra* at 385 (emphasis supplied).

[17] Pasion Vda. de Garcia v. Locsin, 65 Phil. 689, 695 (1938).

[18] See Schneckloth v. Bustamante ,412 U.S. 218. In *State v. Johnson*, 68 N.J. 349, the New Jersey Supreme Court employed an even stricter waiver test (See Levin, *Constitutional Law — Consent Search — Knowing Waiver Required for Non-Custodial Search under the New Jersey Constitution.* 21 VILL. L. REV. 950 [1976]).

armed men of authority, is not likely to contest any "request" from such men. Even Justice Laurel's formulation of a "demonstration of regard for the supremacy of law" comes across as naively inappropriate in this situation. With less reason then may consent be invoked.

Questioning on the Street

Meanwhile, the residents are lined up and questioned. A legal ambiguity arises — has the individual been arrested? The question may seem trivial at first glance, but it proves crucial since it determines whether or not the individual acquires the protection of the law on arrests.

It has been held that the forcible seizure and search of another person is an "arrest."[19] Any deprivation of liberty or detention for however short a time without consent and against the other's will, whether it is by actual violence, threats or otherwise, constitutes an "arrest", the element of time being insignificant.[20]

Decisions to the contrary have been promulgated. A police officer who is merely attempting to routinely question persons under suspicious circumstances to ascertain their identity and actions is executing permissible police procedure to safeguard the community against criminal activity and is not making an "arrest."[21]

In any event, it may be that technically, no arrest has been made. Since an arrest is the taking of a person into custody in order that he may be bound to answer for the commission of an offense,[22] and at this point, there is presumably no pretense that each resident questioned is being held to answer for the commission of an offense (as contrasted with general questioning regarding the same), the residents cannot be considered as arrested within the strict meaning of the rule.

Conceding such a proposition for the moment, still, there is undoubtedly a "street detention" at this point. In *Terry v. Ohio*,[23] the U.S. Supreme Court held that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.[24] That such restraint is not technically an arrest or that such "stop and frisk" measures are but "minor inconveniences" visited upon the citizen does not remove it from the constitutional prohibition against unreasonable searches and seizures. *The requirement of reasonableness must still be satisfied.*

In *Terry v. Ohio,* the Court allowed a standard less than that of the legal touchstone of probable cause. In permitting a "seizure" of a person based on "reasonable suspicion", the Court held that:

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19 U.S. v. Clark, 29 F. Supp. 138, 140 (1939).
20 Hundley v. Milner Hotel Management Co., 114 F. Supp. 206, 209 (1953).
21 Schook v. U.S., 337 F. 2d 563, 566 (1964).
22 See 1985 RULES ON CRIMINAL PROCEDURE, Rule 113, Sec. 1.
23 392 U.S. 1 (1968).
24 *Id.* at 16.

> "In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[25]

The police officer in *Terry* had — after observing two of the suspects walk up and down the street, look into shop windows and return to talk to the third suspect — stopped and frisked the suspects, and had found in their possession an unlicensed firearm. The firearm was declared admissible in evidence because the search had been permissible, based on the standard of "reasonable suspicion."[26]

The questioning in this component of the saturation drive cannot be said to satisfy even the less-stringent "reasonable suspicion" test. Since, as noted earlier, the indiscriminate removal of residents from their houses had no legal justification, it is highly improbable that "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion" should arise from the time of such removal to the questioning on the street. Granting, without conceding, that such "specific and articulable facts" may and do arise in the interim such as would "reasonably warrant the intrusion", still, the street-questioning should be directed only to those against whom the tell-tale "specific and articulable facts" apply. Otherwise, the other residents would be unreasonably "seized." Again, a hit-or-miss situation arises.

Identifying suspects; "Spotters"; Interrogation at Station House

Usually, the men are then ordered to remove their clothing to see if they bear any tattoos or marks of gang affiliation. Moles on certain parts of the face are considered the identifying marks of NPA guerrillas. A masked informer is brought out to "spot" alleged rebels. The suspects are then brought to the police station for interrogation.

At this point, the question again arises: have arrests been made?

To begin with, unlike the previous stage, this component of the saturation drive is not a mere street detention such as was contemplated in *Terry*. This is so because the police officers go beyond the ordinary "stop and frisk" motions; the suspects are actually removed from the street context and brought to the station house for more than just cursory or routine questioning. Consequently, *Terry's* less rigorous "reasonable suspicion" standard may no longer be applied. If at this stage there are any arrests at all, such arrests must satisfy the probable cause standard.

Assuming that arrests have indeed been made, a close examination of these components will reveal that the probable cause required to establish the reasonableness thereof is lacking.

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[25] *Id.* at 21.

[26] However, the court did not authorize a full search. The "frisk" allowed was limited only to a brief patting of outer clothing to search for deadly weapons and not for general evidence of criminal activity.

The probable cause standard has been formulated in many ways. It has been held that "probable cause" for an arrest is a reasonable ground of suspicion, supported by circumstances *sufficiently strong in themselves* to warrant a cautious man in believing the accused to be guilty.[27] Our Supreme Court has defined probable cause as such facts and circumstances antecedent to the issuance of the warrant that are in themselves sufficient to induce a cautious man to rely upon them and act in pursuance thereof.[28] It is to be noted that probable cause must be established at the time the arrest or search is made; arrest and search cannot acquire retroactive legality by what is uncovered later on.[29] Summary arrests and searches on general suspicion, without warrants or probable cause are intolerable even if, in a particular instance, such police behavior proves fruitful.[30]

The warrant requirement is precisely a method of ensuring that an accurate finding of probable cause is made *before* police action infringing on individual rights is undertaken.[31] An officer who makes an arrest without a warrant thus substitutes his own judgment in place of the court's as regards the determination of the existence of probable cause. The law allows this,[32] but the officer's decision is subject to judicial review. And when arrests are made without a warrant, requirements as to the sufficiency of information before the officer may act *are not less stringent* than when an arrest warrant is obtained.[33]

Set against these formulations, the police method of picking out the suspects to be brought to headquarters proves deficient.

The purpose of checking individuals for tattoos is primarily to ascertain whether or not they have any gang affiliations. Also, ex-convicts are more likely to bear the marks of whatever gangs they belonged to in prison. The rationale for picking up those so marked is that if anyone is to be questioned for the commission of a crime, a gang member or ex-convict should be it.

In *Hughes v. Rizzo*,[34] hippies who customarily congregated in a Philadelphia public square were rounded up by police, herded to headquarters and there questioned as to their beliefs. No complaints were lodged as no criminal conduct could be alleged. In invalidating such police action, the district courts noted that criminal laws are directed towards actions and not status.[35] It was held therein that mass arrests without legal justification go far beyond the permissible limits of police conduct.

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27 Kalkanes v. Willestoft, 124 P. 2d 219, 220 (1942) (emphasis supplied).
28 People v. Syjuco, 64 Phil. 667, 674 (1937).
29 J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION, 97 (1966).
30 Jones v. Peyton, 411 F. 2d 857, 862 (1969).
31 Gordon, *The Constitutionality of Warrantless Home Arrests*, 78 COLUM. L. REV. 1550, 1556 (1978).
32 See 1985 RULES ON CRIMINAL PROCEDURE, Rule 113, Sec. 5.
33 Barnett v. D'Artois, 331 F. Supp. 1310, 1318 (1971) (emphasis supplied).
34 282 F. Supp. 881 (1968).
35 *Id.* at 884.

Picking out gang members and ex-convicts to be brought en masse to the police station for questioning cannot be deemed grounded on probable cause. Such official action is directed towards the status of individuals and, as a result, a reformed ex-convict is just as likely to suffer from arbitrariness as is an unrepentant recidivist. Without probable cause, both are victims in equal measure of unreasonable police action. Proof of general reputation does not constitute probable cause for arrest without a warrant.[36]

If a round-up on the bases of affiliation and status is a gross injustice, then an arrest on the ground of facial moles is a patent absurdity. It reduces constitutional protection to a matter of — quite literally — complexion. As a recent editorial dryly put it, by the current logic of the police, "a large hooked nose or a circumcised penis betrays a Jew or the epicanthic fold in the eyelids marks a full-blooded oriental."[37]

The Rules of Court permit a peace officer or a private person, without a warrant, to arrest a person:

(a) When in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another . . .[38]

During zoning operations, the warrantless arrests made by the police on the basis of an informer's direct revelation cannot satisfy the above-mentioned rule (except perhaps letter c, which is not material to the present inquiry). In the first situation, if the person to be arrested actually commits or attempts to commit an offense in the presence of the policeman, the latter is authorized and even duty-bound to arrest the former: there is no controversy there. But the situation usually contemplated by a saturation drive is one wherein the *previous* commission of an offense gives rise to what the police perceive as the necessity for the drive in the first place. In such a case, if the person to be arrested previously committed an offense in the policeman's presence, then the latter may make the arrest on his own steam; the informer's revelation is redundant.

In letter (b), the arresting officer is required to have *personal knowledge* of facts indicating that the person to be arrested is the perpetrator of the offense that has just been committed. Indeed, the new phraseology of Sec. 5(b), Rule 113 was meant to minimize arrests based on mere suspicion

[36] State v. Mulroney, 16 P. 2d 407, 409 (1932).
[37] Philippine Daily Inquirer, November 4, 1987, p. 4, col. 1.
[38] See 1985 RULES ON CRIMINAL PROCEDURE, Rule 113, Sec. 5.

or hearsay.[39] The informant's knowledge, even if true and made known to the police officer, is not personal to the latter, and thus cannot form the basis for the second exception to the general rule regarding warrantless arrests.

Of course, since Rule 113, Sec. 5 allows the warrantless arrest to be made by a private person, the hooded informer himself (assuming that he has the requisite personal knowledge) can make the arrest. But certainly such an arrest cannot be made against the backdrop of a saturation drive and its attendant legal defects. The best alternative then is for the peace officer to present his informer — *sans* hood, of course — to the court and apply for the warrant.

Again, as in the previous component, it can be argued that, technically. no arrest is made. Instead, an "invitation" is extended to the suspect. Of such "invitations", Professor (now Justice) Hugo Gutierrez, Jr. writes:

> "The 'invitations' highlight a common practice of police agencies. Police officers who suspect a certain individual as having committed a crime but who have no evidence to support a request for the issuance of a warrant of arrest may decide to simply 'invite' him for questioning. The 'invitation' is a convenient way of fishing for evidence and avoiding the delay and difficulties attendant to securing a warrant of arrest. . . . .
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> "When a person accepts an 'invitation', he waives the protection which the law on warrants of arrest provides. There is no violation of a constitutional right when the 'invited' person voluntarily consents to give a statement at the police station. No responsible police officer can, however, assert that acceptance of invitations is indeed voluntary. An ex-convict, for instance, has no other choice but to accept an invitation. Only those who have the means to hire a lawyer really refuse to honor 'invitations'. . ."[40]

Charging; Release

At headquarters, some of the suspects are charged. Most are released without the filing of charges,[41] while still others are charged with vagrancy in order that they may be held for further questioning without the police incurring liability for delay in the delivery of detained persons to the proper judicial authorities.[42] Apparently, the vagrancy charge filed in this context is not peculiar to this jurisdiction:

> "The crime of vagrancy, a relic of the common law, is, like the arrest for investigation, a prime weapon for harassing indigents whom the police consider 'undesirable' or for keeping suspects in custody while an investigation is underway . . . Many of those arrested were probably released for lack of evidence and never brought to court."[43]

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[39] FERIA, 1985 RULES ON CRIMINAL PROCEDURE, 20 (1987).

[40] Gutierrez, *The Unsatisfactory Status of the Law on Arrest and Detention*, 46 PHIL. L.J. 669, 693 (1971).

[41] For example, in the raid on the Polytechnic University of the Philippines (PUP) on Nov. 1, 1987, only one of the 39 individuals brought to the police station was charged. See Manila Bulletin, Nov. 4, 1987, p. 1, col. 1.

[42] REV. PEN. CODE, Art. 125.

[43] LANDYNSKI, *op. cit. supra*, note 29 at 179.

Implications

As demonstrated earlier, saturation drives are illegal, with constitutional infirmities attending every component of the process. This illegality stems from the unreasonableness of, or deviation from the probable cause standard by, the law-enforcement practice. J. Shane Creamer neatly encapsulates the argument against state actions such as zoning operations, thus:

> "The concept of probable cause unequivocally demands that an arrest be made for cause, not for suspicion. A police officer may not arrest on a hunch or a guess, or a mere suspicion. A police officer may arrest only if he has a reasonable belief, based on the facts confronting him, that someone has committed a crime. Consequently, under the constitutional standard of probable cause, the dragnet arrest, the arrest for suspicion, the arrest for investigation, the arrest on an open charge, and the arrest for protective custody, are all illegal and unconstitutional. *This standard of probable cause prevents the police officer from arresting now and finding the crime later.*[44]

We conclude with three implications of the illegality of saturation drives.

A. *The Role of the Police*

According to Jacob W. Landynski:

> "Illegal search must be viewed in the context of the total criminal law process — arrest, search and seizure, interrogation, arraignment. Poor police performance in one of those areas is likely to mean poor performance in all. Illegal searches are therefore only part of the general problem of police lawlessness, which includes illegal arrest, brutality towards suspects, subtler forms of coercion, and illegal detention without arraignment. These illegal acts tend to be interrelated. Many of the illegal searches take place in conjunction with unauthorized arrests, which, in turn, are made for the purpose of keeping the suspect in confinement and if possible, extracting a confession from him."[45]

Undoubtedly, the dilemma of the law-enforcer is neither simple nor easily solved. On one hand, he is threatened by the heightening aggressiveness of rebel assassins, and on the other, he is confronted by the clamour of civil libertarians for him to keep within the bounds of the Constitution. To be sure, law-enforcers are called upon to walk the finest of lines dividing physical self-preservation and constitutional self-immolation. Nevertheless, in an ostensibly democratic society with built-in restraints upon state actions, walking that fine line is a duty strictly imposed upon police officials. Because between the state and its legal monopoly on the use of force and

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[44] CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE (cited in Martinez, *The Supreme Court Report: The Police, the Community and the Power of Arrest*, 3 CRIM. JUST. J. 70, 76-77 (1983)).

[45] LANDYNSKI, *op. cit. supra*, note 29 at 177.

the armed communist movement, the innocent citizen is caught unprotected in the crossfire — in the countryside, in the street, and now, even in his home.

Part of the problem seems to be in the orientation of the police. The Constitution is oftentimes seen as an adversary, an inflexible restraint that overlooks emergencies, and a needless obstacle to a job well done. This should not be the case, for the Constitution also seeks to protect the government's legitimate interest in effective law-enforcement.[46]

Justice Gutierrez proposes the continuing legal education of the police on the Constitution. Writers note that most illegally obtained evidence could have been obtained legally.[47] Our Supreme Court has time and again decried the haste of the lawman in having made the warrantless search or arrest when there was ample opportunity to procure a valid warrant.[48] The implication is that the police either did not know of the procedure to observe or simply chose to take the easy way out. In either case, a periodic seminar on criminal procedure and the fundamentals of constitutional law would hopefully help to keep police action at once legal and effective.

B. *The Duty of the Court*

An American author notes that by and large, the constant attention to Fourth Amendment issues by the Appellate Courts has contributed substantially to the development of sound and clear standards of police conduct.[49] Our Supreme Court is similarly challenged.

There is a need for the Court to rule directly and unequivocally on the issue of the saturation drive's validity.[50] As of this writing in mid-1988, no such ruling has been handed down[51] although one is forthcoming.[52]

Justice Gutierrez notes the absence of definitive Supreme Court rulings on the *kinds* of physical holding by law enforcers. As shown earlier, much

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[46] Gordon, *op. cit.* supra, note 31 at 1559.

[47] *Id.*, at 1565.

[48] *E.g.*, Alih v. Castro, 151 SCRA 281, 286 (1987); People v. Burgos, 144 SCRA 1, 15 (1986).

[49] La Fave, *Probable Cause From Informants: The Effects of Murphy's Law in Fourth Amendment Adjudication*, 1977 U. ILL. F.1.

[50] Although in *Alih v. Castro*, 151 SCRA 281 (1987), the Supreme Court referred to the contested military action as a "zona," the records of the case and the ponencia itself show that it was not a saturation drive as contemplated in this inquiry. It was more in the nature of a "raid" ("point target zoning") since the place targetted was a single compound.

[51] The November, 1987 drives were made the subject of a Petition for Prohibition with Preliminary Injunction/Restraining Order filed by an association of lawyers and its officers (Union Lawyers and Advocates for People's Rights (ULAP), et al. v. Integrated National Police, G.R. No. 80432). In a resolution dated March 8, 1988, the Supreme Court *en banc* denied the petition for lack of merit and insufficiency of cause of action, ruling that the petitioners were not real parties in interest. The substantive issues were not touched upon.

[52] Guazon v. de Villa, G.R. No. 80508, An Urgent Petition for Prohibition with Preliminary Injunction was filed on November 13, 1987. The case has been submitted for decision.

of the saturation drive's illegality stems from the legal uncertainty of just where and when an "arrest" — with all the concomitant protections afforded the accused — begins. The fact that the degree of coercion involved in an "invitation" may generally be less than that of formal arrests or searches does not lessen the deteriorative impact such detentive intrusions have upon constitutional rights.[53]

The challenge laid out before the Court is thus to subject every component of the operation to the most meticulous scrutiny. The absence of a technical arrest should not deter the Court from testing whether or not the intrusion satisfies the reasonableness standard.

The use of hooded informers or "spotters" should likewise be examined carefully. In the U.S., the Supreme Court weighed the alleged probable cause used to rely upon an informer by employing the so-called "two-pronged" test;[54] this was later abandoned for a less rigorous "totality of circumstances" standard.[55] We must note that these tests were used to examine the sufficiency of *applications for warrants*. If the law closely scrutinizes the informer brought before the magistrate, then it will not be any less exacting with respect to the "spotter" brought directly before the "suspect." Whatever test our Supreme Court chooses to employ, we can expect it to be strict. In the first place, the police officer in a saturation drive relies upon the direct revelation of the informer which the alleged criminal is given no opportunity to rebut until he reaches the station house. By that time, the violation of the citizen's right has already taken place. Second, the constitutional provisions on arrest, search and seizure must be construed liberally in favor of the individual and strictly against the state.[56]

The Balance of Interests

As in all Bill of Rights cases, the court will be called upon to adopt the "balancing of interests test"; the permissibility of the saturation drive will be judged by balancing its intrusion on the individual's right (against unreasonable searches and seizures) against its promotion of legitimate governmental interests.[57] In this case, the state interest sought to be promoted is nothing less than "national security."

It would do well to discredit "national security" as a catch-all phrase to justify every government intrusion visited upon the individual. The

[53] Leslie, *The Gradation of Fourth Amendment Doctrine in the Context of Street Detentions*, 38 OHIO ST. L. J. 409, 413 (1977).

[54] See Aguilar v. Texas, 378 U.S. 108 (1964). See La Fave, *op. cit. supra*, note 49 for an examination of this test.

[55] Illinois v. Gates, 462 U.S. 213 (1983).

[56] See Alvarez v. CFI, Tayabas, 64 Phil. 33 (1937).

[57] See Delaware v. Prouse, 440 U.S. 648, 654 (1979).

Martial Law years should serve as a stern enough warning. As was remembered recently:[58]

> "No individual right, freedom or liberty was large enough or precious enough not to be cast into the sacrificial flames of the most capricious of all authoritarian gods — that of national security. Every excess and abuse of power — every corruption of public office — every suppression of free expression — was premised on national security."

Indeed, in a sense, "national security" is a compelling reason for a democracy to be even more zealous in the protection of its Bill of Rights. In times of emergency, the basic freedoms are, if anything, even more essential than usual to the welfare of the community.[59] For the Bill of Rights is meant to endure in all situations and under any exigency. In the words of Justice Jackson:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[60]

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[58] Address by Chief Justice Claudio Teehankee at the Symposium on the Rule and Spirit of Law of the Association of Law Journal Editors of the Philippines (ALJEP) on November 22, 1986, at the MLQU Auditorium.

[59] LAMONT, FREEDOM IS AS FREEDOM DOES: CIVIL LIBERTIES TODAY 11 (1956).

[60] West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).