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Police Surveillance Of Public Toilets

more accurate than any other evidence of nonpaternity, they will discover that they have not changed the quantum of proof necessary to overcome the presumption of legitimacy; blood grouping exclusion shows impossibility.

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POLICE SURVEILLANCE OF PUBLIC TOILETS

Clandestine police surveillance of public toilets as a means of detecting consensual homosexuality has raised Fourth Amendment problems concerning the right of privacy and freedom from unreasonable searches. Public toilets are known to provide an environment for criminal activities,[1] and observation by hidden parties provides an effective means of apprehending the participants. The most recent decisions have approved systematic and continuous surveillance through air vents,[2] peepholes,[3] and even a 2-way mirror,[4] with the result that the privacy apparently offered the public is deceptive. The result of such decisions is a balancing of the individual's Fourth Amendment right of freedom from unreasonable search and seizure against the exigencies of law enforcement. The problem is far-reaching: such searches may affect every citizen who uses public facilities, not just the few who are suspected of violations. The United States Supreme Court has not yet considered the problem, but has denied certiorari in 3 cases decided in 1965.[5]

In *Smayda v. United States*,[6] the 9th Circuit refused to apply the Fourth Amendment restrictions to peephole observation of a public toilet in a national park campsite. The manager of the campsite had received several complaints of homosexual activity in a particular

[1]"Judges can take judicial knowledge from the case files in their own courts that public toilets in metropolitan parks, terminals, theaters, department stores and in similar places, frequented daily by masses of people, are often the locale of vice of many kinds such as sexual perversion, sale of narcotics, petty thefts, robbery and assaults." People v. Young, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492, 494 (Dist. Ct. App. 1963).

[2]*Id.* at 494.

[3]People v. Norton, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (Dist. Ct. App. 1962).

[4]State *ex rel.* Poore v. Mayer, 176 Ohio St. 78, 197 N.E. 2d 577, *cert. denied*, 379 U.S. 928 (1964).

[5]In addition to the principal case, see People v. Hensel, 233 Cal. App. 2d 834, 43 Cal. Rptr. 865 (Dist. Ct. App.), *cert. denied*, 382 U.S. 942 (1965). Cf. State *ex rel.* Poore v. Mayer, 176 Ohio St. 78, 197 N.E.2d 557, *cert. denied*, 379 U.S. 928 (1964), petition for removal denied, 243 F. Supp. 777 (N.D. Ohio 1965).

[6]352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

restroom. The restroom toilets were open to the public, and not elaborately constructed: board partitions between the 3 stalls were 18 inches above the floor, and the doors had no latches, thereby affording only a minimum of privacy. The manager, with the help of park police, constructed observation windows, disguised as air vents, in the ceiling of the restroom. Surveillance was conducted after 11 p.m. on successive Saturdays. After the officers had observed some 40 persons using the facility, they photographed the defendants committing a criminal homosexual act.[7] They were arrested and prosecuted for violating the Assimilative Crimes Act; violation of the pertinent California statute thus became a federal offense.[8] The district court denied the defendants' motion to suppress the evidence procured by the surveillance.

The Court of Appeals affirmed on 2, possibly 3, grounds: (1) the defendants waived any right of privacy they might have had;[9] (2) the search was not unreasonable within the meaning of the Fourth Amendment,[10] because it was undertaken upon reasonable cause,[11] and (3) possibly because a public toilet is not a "house" as defined by the Fourth Amendment,[12] hence there was no search.

The concurring opinion found that there was no " 'intrusion into a constitutionally protected area,' " [13] that the actions of the manager as a private individual were not within the Fourth Amendment prohibitions,[14] and that there was no right of privacy per se.[15]

A strong dissent emphasized that the purpose of the Fourth Amendment is to protect the *partial* right of privacy which a person might

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[7]Cal. Pen. Code § 288a.

[8]18 U.S.C. § 13 (1950). "The Assimilative Crimes Act creates a federal offense; it refers to the California statutes for its definition and its penalty, but it does not incorporate the whole criminal and constitutional law of California .... We look, then, to the Constitution of the United States, not that of California." Smayda v. United States, *supra* note 6, at 253.

[9]*Id.* at 255, citing People v. Norton, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676, 678 (Dist. Ct. App. 1962).

[10]Smayda v. United States, *supra* note 6, at 255.

[11]*Id.* at 257. The term "reasonable cause" is used throughout the opinion, apparently in preference to "probable cause." "Reasonable cause has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that *the person* is guilty of a crime." People v. Ingle, 53 Cal. 2d 407, 412-13, 348 P.2d 577, 580, 2 Cal. Rptr. 14, 17 (1960). (Emphasis added.)

[12]Smayda v. United States, *supra* note 6, at 256.

[13]*Id.* at 257; see Manwaring, California and the Fourth Amendment, 16 Stan. L. Rev. 318, 329 (1964) (search requires a physical intrusion).

[14]Smayda v. United States, *supra* note 6, at 257, citing Burdeau v. McDowell, 256 U.S. 465 (1921) (leading case).

[15]Smayda v. United States, *supra* note 6, at 258.

reasonably expect in a given situation.[16] The dissenter rejected the theory that the defendants waived their rights,[17] indicated that cutting the holes in the ceiling was a physical intrusion,[18] and concluded that no similar search had ever been held reasonable.[19] Finally, he termed the search a general exploratory search, "reminiscent of the abusive writs of assistance and general warrants which motivated the adoption of the Fourth Amendment." [20]

Waiver of Fourth Amendment rights, the first ground of decision, should not have been inferred from the present fact situation. Federal and state decisions make it overwhelmingly clear that the right of freedom from unreasonable searches can be waived by consent,[21] but that the consent must be unequivocal, specific, and intelligently given.[22] Some courts say they " 'indulge every reasonable presumption against waiver' " of fundamental rights.[23] *People v. Norton*[24] found a waiver of rights where the act was committed in the open area of the restroom, but recognized that this waiver would not extend to acts committed in the stalls.[25] Thus assuming a search, if the search in the present case is to stand it must do so on the strength of the determination of its reasonableness.

Smayda's discussion of the reasonableness of the search was similar to that in the 5 previous toilet surveillance cases which California appellate courts have decided to date,[26] and which are now the basic

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[16]*Id.* at 259. The majority conceded there was a protected right of privacy in a public toilet. *Id.* at 257.

[17]*Id.* at 260.

[18]*Id.* at 261, citing Silverman v. United States, 365 U.S. 505, 512 (1961).

[19]Smayda v. United States, *supra* note 6, at 261, citing Manwaring, *supra* note 13, at 350 (search merely a substitute for less intrusive methods).

[20]Smayda v. United States, *supra* note 6, at 262.

[21]See, *e.g.*, Chapman v. United States, 346 F.2d 383, 387 (9th Cir. 1965); Shafer v. State, 214 Tenn. 416, 381 S.W.2d 254, 258-59 (1964); Simmons v. State, 210 Tenn. 443, 360 S.W.2d 10, 11 (1962).

[22]United States v. Como, 340 F.2d 891, 893 (2d Cir. 1965); Montana v. Tomich, 332 F.2d 987, 989 (9th Cir. 1964); United States v. Katz, 238 F. Supp. 689, 694-95 (S.D.N.Y. 1965); State v. King, 44 N.J. 346, 209 A.2d 110, 113 (1965).

[23]See Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Royster, 204 F. Supp. 760, 763 (N.D. Ohio 1961); People v. Cangione, 33 Misc. 2d 23, 224 N.Y.S.2d 549, 552 (Queen's County Ct. 1962).

[24]209 Cal. App. 2d 173, 25 Cal. Reptr. 676 (Dist. Ct. App. 1962).

[25]*Id.* at 678.

[26]See Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962) (stalls held to offer maximum privacy); Britt v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962) (stalls held to offer maximum privacy); People v. Hensel, *supra* note 5 (act done in open area of restroom); People v. Young, *supra* note 1 (no partitions); People v. Norton, *supra* note 6 (no doors). Of these, the first two, Bielicki and Britt excluded the evidence as an unreasonable

source of case law on the subject.[27] All 5 cases have spoken strictly in Fourth Amendment terms, although there have been suggestions that due process[28] and Fifth Amendment self-incrimination[29] considerations may also apply. All 5 cases have approached the problem in a way common to search and seizure, by considering 3 separate grounds:[30] (1) whether the particular activity constituted a search; (2) whether the place investigated was within the Fourth Amendment protection of "persons, houses, papers, or effects;" [31] (3) whether the search was reasonable. In *Smayda*, the holding of reasonableness was of paramount importance, and the contentions that there was no search and that the toilet was not a "house" were only summarily considered.

(1) *Smayda* recognized that "both the eye and the ear as well as the hand, can 'search'. . . ." [32] This is the general rule,[33] and it was first applied to peephole surveillance in *Bielicki v. Superior Court*.[34] The later California decisions,[35] however, have been prone to take peephole surveillance cases out of the rule by following the principle that there is no search in observing that which is open to public view.[36] Activities which are considered open to public view fall into

invasion of privacy, but the later three refused to follow them by finding that the acts were open to public view.

[27]In addition to United States v. Smayda, see State *ex rel.* Poore v. Mayer, 243 F. Supp. 777 (N.D. Ohio 1965), which adopted the reasoning of the three later California cases, on similar fact situations. Craft v. State, 181 So. 2d 140 (Miss. 1965), did not cite the California cases, but relied instead on a trespass theory to admit the evidence obtained by a peephole search.

[28]Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Supreme Court Rev. 212, 247-48.

[29]King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 Geo. Wash. L. Rev. 240 (1964).

[30]63 Colum. L. Rev. 955, 956 (1963).

[31]"[E]very person who enters an enclosed stall in a public toilet is entitled to believe that, while there, he will have at least the modicum of privacy that its design affords." Smadya v. United States, *supra* note 6, at 257.

[32]*Id.* at 255.

[33]See, *e.g.*, People v. Kramer, 38 Misc. 2d 889, 239 N.Y.S.2d 303, 307 (Sup. Ct. 1963) (observation of premises from wall held to be a search); People v. Sheridan, 236 Cal. App. 2d 756, 46 Cal. Rptr. 295, 297 (Dist. Ct. App. 1965) (searching held to be a function of sight); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855, 858 (1955) (looking through window held not to be unreasonable search); Craft v. Mississippi, *supra* note 24 (peephole view held to be a lawful search).

[34]"'[T]he term implies some exploratory investigation or an invasion and quest . . . or seeking out . . . .'" Bielicki v. Superior Court, *supra* note 26, at 553-54.

[35]People v. Hensel, *supra* note 5, People v. Young, *supra* note 1, People v. Norton, *supra* note 24.

[36]"Merely to observe what is perfectly apparent to any member of the

2 categories: acts observable in or from an area open to the public in plain view of police as well as to any member of the public,[37] and acts observable by looking through an open window.[38]

(2) The contention that the stalls were private places analogous to houses and therefore covered by the Fourth Amendment was rejected in *Smayda*.[39] But that point was unimportant to the outcome since the court conceded, as did generally the earlier cases,[40] that there was a protected right of privacy in a public toilet.[41] The protection from unreasonable searches of houses has been extended to include a taxicab,[42] an automobile,[43] an office,[44] a store,[45] and a temporarily unoccupied dwelling.[46] Thus there is no reason why, upon recognition of a right of privacy in *Smayda* circumstances, the toilet could not be considered a house for Fourth Amendment purposes. It was unfortunate that the court relied on the theory that visual observation of a house without a trespass is not a search,[47] for there is a growing awareness of the inadequacies of the trespass test in this context.[48] Peephole surveillance cases are regarded as out of the "mainstream of search-and-seizure jurisprudence," [49] and it is for this reason that reliance on analogy to search for tangible objects is not appropriate in a peephole surveillance case.[50] *Silverman v.*

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general public who might happen on the premises is not a search." People v. Young, *supra* note 1, at 494. The rule is well established, see, *e.g.*, Trujillo v. United States, 294 F.2d 583 (10th Cir. 1961); Petteway v. United States, 261 F.2d 53, 54 (4th Cir. 1958). The extension of this rule to activities in enclosed areas of toilet stalls does not necessarily follow. No such mechanical approach should be used. Lanza v. New York, 370 U.S. 139 (1962); Nelson v. Hancock, 239 F. Supp. 857 (D.N.H. 1965).

[37]People v. Rayson, 197 Cal. App. 2d 33, 17 Cal. Rptr. 243 (Dist. Ct. App. 1961) (observation of shoe shine parlor from street).

[38]People v. Martin, *supra* note 33 (a leading case).

[39]Smayda v. United States, *supra* note 6, at 256.

[40]See Bielicki v. Superior Court, *supra* note 26, at 556; Britt v. Superior Court, *supra* note 26, at 851.

[41]Smayda v. United States, *supra* note 6, at 257.

[42]Rios v. United States, 364 U.S. 253 (1960).

[43]Gambino v. United States, 275 U.S. 310 (1927) (car treated as extension of person).

[44]Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[45]Amos v. United States, 255 U.S. 313 (1921) (store adjoining house).

[46]Roberson v. United States, 165 F.2d 752, 754-55 (6th Cir. 1948).

[47]Smayda v. United States, *supra* note 6, at 256.

[48]*Infra* note 50.

[49]Manwaring, *supra* note 12, at 347.

[50]Similar analogy was tried in early electronic surveillance cases, such as Olmstead v. United States, 277 U.S. 438 (1928), where it was held that there could be no seizure of a voice which is intangible. King, *supra* note 29, discusses the disadvantages of such techniques, and Beaney, *supra* note 28, discusses the right

United States,[51] held that insertion of a spike microphone into a wall was an intrusion into a constitutionally protected area, but stressed that the intrusion was not to be determined by local trespass law. Subtle distinctions based on property law were rejected more recently in *Stoner v. California*.[52]

(3) The holding that the search was reasonable is certainly the significant holding of *Smayda*. It is here that *Smayda* differs from California precedents, which had admitted the evidence acquired by surveillance by factually distinguishing the *Bielicki* land mark.[53] The *Smayda* holding of reasonableness is in direct conflict with *Bielicki*, which held the search unreasonable for lack of probable cause.[54] If observation of the toilet can be considered a reasonable search, it would not be prohibited by the Fourth Amendment, which applies only to unreasonable searches and seizures.[55] In order to find the *Smayda* search reasonable, it is necessary, as the concurring opinion recognizes, that "a somewhat less strict view of what constitutes adequate proof of probable cause for search must be taken" [56]—"somewhat less strict" because focus on a particular suspect is generally required to constitute reasonable cause.[57] Because there is not a particular suspect, it becomes extremely difficult to distinguish a peephole

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of privacy in this area. That mechanical analysis fails to consider the nature of the freedom protected is reflected in Justice Douglas's statement that

> My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to Goldman v. United States . . . while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other.
> Silverman v. United States, 365 U.S. 505, 512-13 (1961) (concurring opinion).

This was at least tacitly recognized in an earlier case, Brock v United States, 223 F.2d 681, 685 (5th Cir. 1955) which held that suggestive questioning through a window to a person talking in his sleep violated the "right to be left alone."

A visual search may be illegal even without a trespass. People v. Regalado, 224 Cal. App. 2d 586, 36 Cal. Rptr. 795 (Dist. Ct. App. 1964) (observation of hotel room through peephole in door); McDonald v. United States, 335 U.S. 451 (1948) (looking through transom of rooming house). Moreover, a trespass may not of itself render a search illegal. United States v. Young, 322 F.2d 443 (4th Cir. 1963) (trespass on grounds surrounding building is not per se an illegal search); "[A] simple trespass without more does not invalidate a subsequent seizure." United States v. Lewis, 227 F. Supp. 433, 436 (S.D.N.Y. 1964).

[51]365 U.S. 505 (1961).

[52]376 U.S. 483 (1964).

[53]Smayda v. United States, *supra* note 6, at 253.

[54]*Ibid.*; Bielicki v. Superior Court, *supra* note 26.

[55]See, *e.g.*, United States v. Abel, 258 F.2d 485 (2d Cir. 1958), *aff'd* 362 U.S. 217 (1960).

[56]Smayda v. United States, *supra* note 6, at 259.

[57]*Id.* at 257.

surveillance from a general exploratory search for evidence. The usual rule is that *no* such general exploratory search can be justified even with a warrant.[58] This rule is the most significant obstacle to sustaining the reasonableness of a toilet surveillance. Since the sole purpose of the general surveillance is to obtain evidence of guilt, both *Bielicki v. Superior Court*[59] and *Britt v. Superior Court*[60] considered such surveillance a general exploratory search. *Smayda* attempted a distinction, saying that other exploratory searches involved "physical invasion of private premises, an arrest, and then a general exploratory search of the premises for evidence of crime." [61] Such a distinction seems to overlook the obvious, for persons and effects may be searched without an invasion of premises and without an arrest; and premises may be searched without a physical invasion.[62] More significant is *Smayda's* holding that

> when, as here, the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when, as here, they confine their activities to the times when such crimes are most likely to occur, they are entitled to institute clandestine surveillance . . . . The public interest in its privacy, we think, must, to that extent, be subordinated to the public interest in law enforcement.[63]

This reemphasizes the importance of the holding of the reasonableness of the search, and makes it even more apparent that the validity of the decision is highly, even entirely, dependent on the wisdom of the determination of reasonableness.

There are doubts as to the wisdom of the determination that, even under the restrictive circumstances just mentioned, a peephole surveillance should be allowed to compromise the right of privacy.[64] But there is authority indicating that there are situations where the

[58]See, *e.g.*, United States v. Lefkowitz, 285 U.S. 452, 465 (1932); "Whatever reason law enforcement officials may have to believe that illegal activities are being conducted within a house, they may not, without a warrant, invade the house for the purpose of searching for and seizing evidence of criminal acts.", United States v. Young, *supra* note 50, at 444; Drayton v. United States, 205 F.2d 35, 37 (5th Cir. 1953) (fact premises had an unsavory reputation did not authorize a general search); United States v. Bayley, 240 F. Supp. 649, 658 (S.D.N.Y. 1965) "[s]earches for and seizures of mere evidence are always unreasonable"; 2 Underhill, Criminal Evidence § 410, at 1055 (5th ed. 1956).

[59]*Supra* note 26, at 554.

[60]*Supra* note 26, at 850.

[61]Smayda v. United States, *supra* note 6, at 256.

[62]Cases cited note 50, *supra.*

[63]Smayda v. United States, *supra* note 6, at 257.

[64]*Infra* notes 84-88 and accompanying text.

usual standards of reasonableness can be relaxed.[65] The United States Supreme Court has repeatedly and emphatically stated that "there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." [66] This was recently reemphasized in *Ker v. California*,[67] which was taken on certiorari after *Mapp v. Ohio*[68] for the express purpose of further explication of "the standard by which state searches and seizures must be evaluated." [69] *Ker* stated that the "standards of reasonableness . . . are not susceptible of procrustean application." [70] This is very much in accord with the abovementioned disapproval of the use of improper analogy, such as trespass, in search and seizure cases.[71] The test of reasonableness of a search is usually stated in broad terms, typically,

> whether the thing done, in sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected.[72]

The determination of reasonableness involves a balancing of interests,[73] or an examination of the total fact situation with regard to the constitutional right of privacy.[74] Reasonableness has been called the fundamental requirement of the Fourth Amendment.[75]

Despite such broad views of what constitutes reasonableness, *Smayda* is still an extension of traditional concepts. There are several ways in which the more traditional concepts may be asserted in a case of this type: Courts have held that reasonableness depends on the existence of probable cause,[76] or even on whether there was a trespass.[77]

[65]See Carroll v. United States, 267 U.S. 132, 156 (1925) (a leading case holding that where impracticable a warrant is not necessary for search of an automobile); Comment, 22 Wash. & Lee L. Rev. 221, 222 (1965).

[66]Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). See Rios v. United States, *supra* note 42, at 255; United States v. Rabinowitz, 339 U.S. 56, 63 (1950).

[67]374 U.S. 23 (1963).

[68]367 U.S. 643 (1961).

[69]Ker v. California, *supra* note 67, at 24.

[70]*Id.* at 33.

[71]See note 50 *supra* and accompanying text.

[72]United States v. Cook, 213 F. Supp. 568, 571 (E.D. Tenn. 1962).

[73]See People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 177, 255 N.Y.S.2d 833, 835 (1964).

[74]State v. Chinn, 231 Ore. 259, 373 P.2d 392, 396 (1962).

[75]State v. Romeo, 43 N.J. 188, 203 A.2d 23, 32 (1964).

[76]See, *e.g.*, United States *ex rel.* Holloway v. Reincke, 229 F. Supp. 132, 136 (D. Conn. 1964); United States v. O'Leary, 201 F. Supp. 926, 929 (E.D. Tenn. 1961).

[77]See Jones v. United States, 339 F.2d 419, 420 (5th Cir. 1964) (equates physical intrusion with encroachment).

There are suggestions that the seriousness of the crime is to be considered, with greater constitutional scrutiny afforded methods of search in less serious crimes such as gambling or obscenity, and less exacting standards in more serious crimes such as burglary, robbery, or crimes involving a dangerous weapon.[78] Consensual homosexuality would presumably fall into the category of lesser crimes, so that it would be inappropriate to justify the surveillance by reference to the comparatively relaxed standards of reasonableness encountered in dealing with dangerous crimes. Also, it is frequently recognized that a warrantless search may be reasonable, hence justified, in exceptional circumstances.[79] But it would require a substantial extension to apply the exceptional circumstances principle to toilet surveillance cases. For the exceptional circumstances principle has been applied rarely, and if at all,[80] to the necessitous circumstances of some military searches,[81] or more traditionally to instances of a crime committed in the officer's presence,[82] or to threatened imminent destruction of evidence.[83]

Even if such a search might be considered reasonable, the wisdom of such a determination is still doubtful. Most courts would find it distasteful that such a search entails widespread observation of innocent parties.[84] There is a basic objection to any systematic clandestine surveillance where privacy is apparently offered. Such surveillance violates the recognized right to be left alone,[85] and is probably a tortious invasion of privacy.[86] There is only a fine line between it and the drilling of peepholes in every door of a hotel, a practice condemned in *People v. Regalado*.[87] There is opinion to the effect

[78]See, *e.g.*, Nueslein v. District of Columbia, 115 F.2d 690, 696 (D.C. Cir. 1940); People v. Salerno, 38 Misc. 2d 467, 235 N.Y.S.2d 879, 884 (Sup. Ct. 1962); 63 Colum. L. Rev. 955, 958 (1963).

[79]See, *e.g.*, Johnson v. United States, 333 U.S. 10, 14-15 (1948); McDonald v. United States, *supra* note 50, at 456.

[80]"It is of interest that no federal or New Jersey appellate decision has been found actually sustaining a search without a warrant, not incidental to an arrest, on the express basis of the exceptional circumstances rule." State v. Naturile, 83 N.J. Super. 563, 200 A.2d 617, 619 (Super. Ct. 1964). But see Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963) (abortion case where likelihood of death justified an otherwise unlawful entry).

[81]United States v. Grisby, 335 F.2d 652 (4th Cir. 1964).

[82]United States v. Rabinowitz, 339 U.S. 56 (1950).

[83]See Chapman v. United States, *supra* note 21.

[84]See, *e.g.*, Smayda v. United States, *supra* note 6, at 257.

[85]See United States v. Brock, *supra* note 50.

[86]Prosser defines the tort, as pertinent here, as an "intrusion upon the plaintiff's physical solitude or seclusion" which extends beyond physical intrusion to eavesdropping and even to peering in the windows of a home. Prosser, Torts § 112, at 833 (3d ed. 1964).

[87]*Supra* note 50.