NOTES

Fishing for Evidence: The Expansive Warrantless Search Powers of Fish and Game Wardens

Introduction

Fish and game wardens[1] are unique among law enforcement officers. They are hybrids, at once police officers and administrative inspectors. Because of this dual role, they combine the Fourth Amendment search powers of police departments and of regulatory agencies. While this combination gives wardens greater ability to conduct warrantless searches than either the police or administrative inspectors, it may also erode the constitutional protections of those subject to wardens' searches. The result is a constitutional dilemma—a tension between the individual's right to privacy and the state's interest in law enforcement and in protecting the environment.

States have taken a variety of approaches in an effort to resolve these conflicting interests. Some states favor the individual, either by completely eliminating game wardens' statutory search authority,[2] or by holding warrantless game searches to the same probable cause standard which applies to the traditional exceptions to the Fourth Amendment warrant requirement.[3] This approach frustrates state efforts to control

1. The states use a variety of terms to describe game wardens. Whether they are called "conservation rangers," as in Georgia, "wildlife agents," as in Washington, or more traditionally "fish and game wardens," as in California and Alabama, their function is essentially the same: to enforce state laws protecting wildlife. GA. CODE ANN. § 45-116 (Supp. 1985); WASH. REV. CODE ANN. § 77.12.070 (West Supp. 1984); CAL. FISH & GAME CODE § 854 (Deering 1976); ALA. CODE § 39-2-65 (1980). This Note uses the term "game warden" to encompass all such officers.

2. For example, the Michigan Supreme Court has held that statutes authorizing warrantless game searches violate the Michigan Constitution. People v. Younger, 327 Mich. 410, 42 N.W.2d 120 (1950).

3. *E.g.*, Hill v. State, 238 So. 2d 608 (Fla. 1970); *see also* LA. REV. STAT. ANN. § 56:55 (West Supp. 1985). *Cf.* State v. Marshall, 147 Mont. 278, 570 P.2d 909 (1977) (reversing conviction because warden's observations did not give probable cause to search). For the traditional exceptions to the warrant requirement, see *infra* text accompanying notes 71-144.

fish and game violations.[4] Undetected violations could cost the states millions of dollars and cause incalculable damage to wildlife and natural resources.[5]

Recognizing the importance of warrantless game searches, some states attempt a compromise between state and individual interests: they grant the wardens power to search but protect the individual by restricting that power. Some limit search powers by restricting wardens' jurisdiction to the enforcement of fish and game law.[6] This compartmentalization of authority, however, hampers law enforcement in the rural and wilderness areas that game wardens generally patrol[7]—the areas which most need law enforcement assistance.[8] Furthermore, many ostensibly nongame crimes harm the environment.[9] Another method of limiting game wardens' powers is to provide civil remedies against wardens who exceed constitutional limits while conducting searches.[10] Yet the effectiveness of civil suits is doubtful. In the jurisdictions permitting suit, courts are often unwilling to hold game wardens' actions unreasonable.[11]

Those jurisdictions which neither eliminate nor restrict game wardens' search powers have not established a satisfactory constitutional basis for those powers. Some courts have relied on implied consent,[12] but this notion of consent may be fictional rather than factual.[13] Some courts

4. W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 14.3(b), at 14-16 (2d ed. 1984).

5. *See Twenty-four Arrested for Illegal Sales of Fish,* San Francisco Chron., Feb. 26, 1985, at 1, 20, col. 6; *see also* United States v. Greenhead, Inc., 256 F. Supp. 890 (N.D. Cal. 1966) (lamenting the passing of the passenger pigeon and "the ever decreasing call of the wild duck").

6. *See* W. RINGEL, *supra* note 4, § 14.4(d), at 14-30; *see also* Department of Natural Resources v. Padgett, 146 Ga. App. 121, 245 S.E.2d 480 (1978); Note, *Search and Seizure: Statutory Authorization of Searches for Game,* 14 S.D.L. REV. 388, 393-94 (1969) (proposing that wardens' authority be entirely civil).

7. Betchart v. Department of Fish and Game, 158 Cal. App. 3d 1104, 1109-10, 205 Cal. Rptr. 135, 138 (1984); State v. Tourtillott, 289 Or. 835, 858, 618 P.2d 423, 430 (1980).

8. CALIFORNIA STATE ATTORNEY GENERAL'S OFFICE, ATTORNEY GENERAL'S COMMISSION ON NARCOTICS, FINAL REPORT 16 (1984) [hereinafter cited as NARCOTICS REPORT].

9. *Id.* at 13.

10. *See, e.g.,* Davis v. Reynolds, 319 F. Supp. 20 (N.D. Fla. 1970); Dickens v. Debolt, 288 Or. 3, 602 P.2d 246 (1979).

11. *See, e.g.,* Prochaska v. Marcoux, 632 F.2d 848 (10th Cir. 1980); Davis v. Reynolds, 319 F. Supp. 20 (N.D. Fla. 1970); Betchart v. Department of Fish and Game, 158 Cal. App. 3d 1104, 205 Cal. Rptr. 135 (1984).

12. *See* W. RINGEL, *supra* note 4, § 14.4(d), at 14-31.

13. *Cf.* Note, *The Assumption of Risk Doctrine: Erosion of Fourth Amendment Protection Through Fictitious Consent to Search and Seizure,* 22 SANTA CLARA L. REV. 1051, 1083 (1982). The author criticizes the notion that persons speaking to electronically monitored informers "consent" to such surveillance. Noting that many persons are unaware of the risk

have theorized that hunters waive their Fourth Amendment rights while hunting;[14] commentators have found this argument similarly unpersuasive.[15]

This Note explores the unresolved tension between state and private interests resulting from the enhanced search powers of game wardens. The note begins by examining the administrative component of the game warden's search powers. It then discusses the traditional law enforcement bases for game searches, demonstrating the potential for abuse which results from the combination of the two search areas. Finally, the Note considers a possible resolution of the constitutional dilemma: it proposes that the reasonableness standard of the recent Supreme Court case, *New Jersey v. T.L.O.*,[16] be applied to fish and game related searches. In analyzing the *T.L.O.* standard, the Note extracts guidelines that might provide suitable standards for balancing the state's interests in environmental protection and law enforcement against the individual's interest in freedom from unreasonable searches.

I. The Role of State Game Wardens in Law Enforcement

Game wardens have been a fixture of American wildlife management since the mid-1800's.[17] There are more than 5,000 state game wardens exercising authority over vast expanses of land throughout the United States.[18] Although all game wardens are charged with administering and enforcing wildlife protection law, the extent of their additional authority differs from state to state. Some states view game wardens as administrative officials whose powers are limited to enforcement of wildlife law.[19] Others allow wardens to enforce not only wildlife laws, but also any state laws violated on state-managed land or in the presence of a warden.[20] Some states make the warden a full peace officer, empowered

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that the words are recorded, the commentator called such consent "fictitious." *Id.* at 1067. Since many wilderness users are unaware of the possibility that they may be searched, their consent may be equally fictitious.

14. *See* People v. Younger, 327 Mich. 410, 42 N.W.2d 120 (1950).

15. *See Statutory Authorization for Searches for Game, supra* note 6, at 390-91.

16. 105 S. Ct. 733 (1985).

17. Coggins & Ward, *The Law of Wildlife Management on the Federal Public Lands,* 60 OR. L. REV. 59, 62 (1981).

18. *Id.* at 115. In California alone, the State Department of Fish and Game manages over 100 million acres of land, 5,000 lakes, 30,000 miles of streams and rivers, and a 1,100 mile coast. 3 CAL. REGULATORY L. REP. 91 (Spring 1983).

19. *See, e.g.,* ALA. CODE § 9-2-65 (1980); WASH. REV. CODE ANN. § 77.12.070 (West Supp. 1984).

20. GA. CODE ANN. § 45-120 (Supp. 1984); IND. CODE ANN. § 14-3-4-9 (West 1983).

to enforce all laws throughout the state.[21] Finally, a state may not have game wardens, but may charge its state police with enforcement of wildlife law.[22] Thus, in many states, game wardens are both administrators and police officers.

With this combination of roles, game wardens will inevitably expand their law enforcement activities beyond the narrow scope of fish and game law. As the Florida Court of Appeal has noted:

> There can be no doubt that the preservation of Florida's most precious Everglades, and its animal, aquatic and plant life, is not assisted by the presence of an ever increasing swarm of criminals, in airplanes, motor vehicles and boats going about their dirty business and disturbing, for profit, the very peace and solitude which the [Fish and Game] Commission seeks to uphold.[23]

To combat this "swarm of criminals" which may operate in rural areas or public parks, state courts and legislatures have willingly extended game wardens' authority to nongame regions and nongame law.[24]

Drug law enforcement is a natural extension of game wardens' duties. Drug production is an increasingly difficult problem for law enforcement officials.[25] Large rural areas are most susceptible to clandestine drug producing operations, but are ill-equipped to cope with the problem.[26] Furthermore, drug production, especially marijuana growing, is an "environmental crime" which results in pollution, clear-cutting, reduction in the size of wildlife habitats, and restriction of public

21. *See, e.g.,* ME. REV. STAT. ANN. tit. 12, § 7053(G)(3) (1980); W. VA. CODE § 20-7-4(1) (1981). Some states may require additional training. In California, for example, there are both fish and game wardens, responsible primarily for enforcement of the fish and game laws, and officers of the Wildlife Protection Branch, who are empowered to enforce general state law if properly trained. CAL. FISH & GAME CODE §§ 856, 878 (Deering 1976). *See also* LA. REV. STAT. ANN. § 56:108(H) (West Supp. 1984).

22. OR. REV. STAT. ANN. § 496.605 (1973).

23. State v. Howard, 411 So. 2d 372, 375 (Fla. Dist. Ct. App. 1982).

24. The following are but a few examples in which courts have upheld game wardens' authority to police nongame laws: State v. Howard, 411 So. 2d 372 (Fla. Dist. Ct. App. 1982) (smuggling); Anderson v. State, 133 Ga. App. 45, 209 S.E.2d 665 (1974) (drugs); Christopher v. State, 639 S.W.2d 932 (Tex. Crim. App. 1982) (drugs); State v. Boggess, 309 S.E.2d 118 (W. Va. 1983) (drugs). *See also* CAL. FISH & GAME CODE § 856; IND. CODE ANN. 14-3-4-9 (West 1983); ME. REV. STAT. ANN. tit. 12, 7053 (1983). *But cf.* ALA. CODE § 9-2-65 (1980) (fish and game wardens are limited to enforcement of fish and game law); MINN. STAT. ANN. § 97.50(2) (West Supp. 1984); WYO. STAT. ANN. § 23-7-101 (1977). In Louisiana, the state supreme court declared that wildlife agents (game wardens) could not enforce drug laws. It restricted the agents' authority to game-related law. State v. Longlois, 374 So. 2d 1208 (La. 1979). The legislature responded by passing a statute which expanded the agents' powers to those of full peace officers, provided that the agents were trained. LA. REV. STAT. ANN. § 56:108(H) (West Supp. 1984).

25. NARCOTICS REPORT, *supra* note 8, at 9.

26. *Id.* at 16.

access to wilderness areas.[27]

Game wardens patrol the rural areas and state-managed lands which are plagued by drug-related problems. They can search areas normally inaccessible to regular law enforcement officials.[28] Wardens have already come under indirect pressure to cooperate in drug-related law enforcement.[29] Indeed, game wardens already have proved successful in making drug-related arrests.[30]

Smuggling is another crime that game wardens might combat. Smugglers enter the United States in a variety of ways. They may come by sea,[31] straining the resources of the Coast Guard.[32] They may come over land, through unpopulated areas where the United States Border Patrol is thinly spread.[33] Latin American drug smugglers often come by air, landing on isolated rural airstrips as far inland as Kentucky, Tennessee, and the Colorado Rockies.[34]

Because game wardens patrol both coastal and isolated areas,[35] they are well positioned to observe smugglers in action. Under their warrantless search authority, wardens can search suspected smugglers more easily than can conventional law enforcement officers.[36] In fact, game wardens have already demonstrated their ability to combat smuggling.[37]

There are a number of law enforcement areas in which game wardens could be effective. Whether by virtue of their presence in otherwise unpoliced areas, or because of their expanded search powers, they can be effective in the enforcement of such diverse fields as litter law, motor vehicle regulation, immigration, and firearm abuse.[38]

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27. *Id.* at 13.

28. *See infra* notes 71-159 and accompanying text.

29. NARCOTICS REPORT, *supra* note 8, at 17. The Commission has called for increased participation by all law enforcement agencies to combat California's increasing drug problems. *Id.*

30. *See, e.g.,* United States v. Stricklin, 534 F.2d 1386 (10th Cir. 1976); Brown v. State, 5 Ark. App. 181, 636 S.W.2d 286 (1982); State v. Howard, 411 So. 2d 372 (Fla. Dist. Ct. App. 1982); Anderson v. State, 133 Ga. App. 45, 209 S.E.2d 665 (1974); Christopher v. State, 639 S.W.2d 932 (Tex. Crim. App. 1982); State v. Boggess, 309 S.E.2d 118 (W. Va. 1983).

31. *Feeding America's Habit,* NEWSWEEK 22 (Feb. 25, 1985).

32. NARCOTICS REPORT, *supra* note 8, at 18.

33. Comment, *Immigration Roving Border Patrols: The Less Than Probable Cause Standard for a Stop,* 10 AM. J. CRIM. L. 245 (1982). *See also* NEWSWEEK, *supra* note 31, at 22.

34. NEWSWEEK, *supra* note 31, at 22.

35. *See* 3 CAL. REGULATORY L. REP. 91 (Spring 1985).

36. *See* notes 71-159 and accompanying text.

37. *E.g.,* Call v. United States, 417 F.2d 462 (9th Cir. 1969); Dodds v. State, 434 So. 2d 940 (Fla. Dist. Ct. App. 1983).

38. There are, however, obstacles to this expansion. One problem is financial: often, funds are unavailable even for fish and game operations. *See* San Francisco Chron., *supra* note 5, at 1, col. 1.

II. Fourth Amendment Analysis of Game Warden Searches

A. Administrative Component

Wildlife management is largely a matter of administration.[39] It involves not only hunting and fishing regulation, but political considerations, economic analysis, land management and habitat manipulation.[40] It is therefore not surprising that some courts have said that the field of wildlife protection is regulatory and administrative in nature.[41]

The Supreme Court has recognized the need for flexibility in administrative searches, subjecting these searches to a relaxed standard of Fourth Amendment review. In *Marshall v. Barlow's, Inc.*[42] the Court held that the level of probable cause needed to obtain an administrative search warrant is lower than the level of probable cause needed for a criminal search warrant.[43] In effect *Marshall* and related Supreme Court decisions have created a new standard of probable cause for administrative searches, a standard lower than the traditional criminal standard.[44]

In addition to lowering the standard of probable cause for administrative warrants, the Supreme Court has dispensed with the warrant requirement altogether for some administrative searches. In *United States v. Biswell*[45] and *Colonnade Corp. v. United States,*[46] the Court ruled that searches of the premises of pervasively regulated industries are exempt from the warrant requirement in some instances. The *Biswell-Colonnade* exception has three elements. First, the exception applies only to heavily regulated enterprises, such as mining,[47] firearms sales,[48] and liquor sales.[49] The warrantless intrusion is justified in part by the reduced expectation of privacy of those participating in closely regulated industries.[50]

39. Coggins & Ward, *supra* note 17, at 71.

40. *See generally id.*

41. People v. Di Bernardo, 79 Cal. App. 3d Supp. 5, 144 Cal. Rptr. 902 (1978); State v. Tourtillott, 289 Or. 835, 865-66, 618 P.2d 423, 434 (1980).

42. 436 U.S. 307 (1978).

43. *Id.* at 320.

44. Comment, *The Warrant Requirement for OSHA Inspections: The Supreme Court Establishes a Two-Tiered Test for Probable Cause,* 15 WILLAMETTE L.J. 61 (1978); *see also* Comment, *OSHA Inspections and the Fourth Amendment: The Uncertainties Continue,* 32 U. KAN. L. REV. 457, 461-62 (1984).

45. 406 U.S. 311 (1972).

46. 397 U.S. 72 (1970).

47. Donovan v. Dewey, 452 U.S. 594 (1981).

48. *Biswell,* 406 U.S. 311.

49. *Colonnade,* 397 U.S. 72.

50. *Dewey,* 452 U.S. at 608 (Rehnquist, J., concurring); *Biswell,* 406 U.S. at 316.

Second, *Biswell-Colonnade* requires the balancing of a participant's expectation of privacy against the importance of the governmental interest involved.[51] The administrative agency must justify its search not only by showing that the competing interests weigh in favor of the search, but also that a warrant requirement would frustrate the fulfillment of the asserted interest.[52]

Finally, the search must be conducted under the authority of a valid statute.[53] The statute must be carefully drawn to provide notice to those likely to be searched and to control officials conducting the searches.[54] It must serve as a constitutionally adequate substitute for a warrant.[55]

Fish and game searches appear to fulfill the three *Biswell-Colonnade* requirements. First, hunting and fishing are highly regulated and have been so for over a century.[56] Because this regulation reduces the outdoorsman's reasonable expectation of privacy, administrative interference with hunting and fishing has been found "relatively unobtrusive."[57] Second, the state interest in protecting the environment weighs heavily against the individual privacy expectations of hunters and fishermen.[58] Finally, most state statutory schemes authorize game wardens to search without a warrant for evidence of game violations.[59]

Although courts have used the *Biswell-Colonnade* exception to justify game searches,[60] this analysis does not settle the constitutional issue. Courts have used the exception primarily for commercial industries, such as commercial fishing companies[61] and private hunting clubs.[62] Courts may be more reluctant to uphold warrantless searches of individuals.[63]

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51. *Dewey,* 452 U.S. at 601-02.

52. *Id.* at 603. Thus, a strong federal interest in mine safety was substantial enough to justify warrantless inspections in *Dewey*. *Id.* at 602.

53. *Biswell,* 406 U.S. at 315.

54. *Id.* at 317.

55. *Dewey,* 452 U.S. at 603. The statute must reduce the discretion vested in officers, thereby minimizing any possibility of abuse. *Id.* at 599; *Biswell,* 406 U.S. at 317.

56. Coggins & Ward, *supra* note 17, at 62.

57. W. RINGEL, *supra* note 4, § 14.4(d), at 14-31.

58. *See* Baldwin v. Fish and Game Comm'n, 436 U.S. 371, 391 (1978). *See also* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); Note, *Constitutional Law—The End of a Wildlife Era: Hughes v. Oklahoma,* 60 OR. L. REV. 413, 426 (1981).

59. *See* 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 643 (2d ed. 1974).

60. *See, e.g.,* United States v. Raub, 637 F.2d 1205 (9th Cir. 1980); People v. Di Bernardo, 79 Cal. App. 3d Supp. 5, 144 Cal. Rptr. 902 (1978).

61. United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983); United States v. Raub, 637 F.2d 1205 (9th Cir. 1980).

62. United States v. Greenhead, Inc., 256 F. Supp. 890 (N.D. Cal. 1966).

63. *See* Camara v. Municipal Court, 387 U.S. 523 (1967) (housing inspector has no authority to make warrantless inspection of private residence).

Thus, the *Biswell-Colonnade* exception may not apply to the private hunter or fisherman.

There is another difficulty in applying the exception to commercial fish or game searches. Typically, game statutes authorize searches when the warden has reason to believe that game laws have been violated.[64] This allows the warden considerable discretion in deciding when to search. *Biswell-Colonnade*, however, requires that administrative search statutes be structured to minimize discretion and abuse by officers and to maximize notice to potential subjects of searches.[65] Nevertheless, this requirement may not be fatal to warrantless game searches. The Supreme Court has tolerated the use of discretion in some recent search and seizure cases, leaving disturbingly vague standards for searches conducted under the *Biswell-Colonnade* exception.[66]

B. Criminal Law Enforcement Search Analysis

In many jurisdictions, game wardens have the power to enforce criminal laws as well as fish and game laws.[67] Accordingly, many fish and game wardens have the search powers of police officers in addition to their administrative search powers,[68] including the power to search without a warrant under some circumstances.[69] This combination of powers gives game wardens greater search and seizure capabilities than either police officers or administrative inspectors. Game wardens' powers are used to great advantage under four of the traditional warrant exceptions: post-arrest, investigative, automobile, and plain view searches.[70] Game wardens also have great search powers in two physical areas not normally within the province of the police: containers and vessels.

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64. *See, e.g.*, W. VA. CODE § 20-7-4(3) (1981).

65. *Dewey*, 452 U.S. at 599.

66. *See* United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (affirming right of customs officials to board vessels at random). *See also* New Jersey v. T.L.O., 105 S. Ct. 733, 743-44 (1985) (upholding teacher's discretion to search students). *But see Camara*, 387 U.S. 523 (restricting administrative authority to conduct warrantless searches of individual's home).

67. *See supra* notes 20-22 and accompanying text.

68. *See supra* notes 56-59 and accompanying text.

69. *See infra* notes 71-160 and accompanying text.

70. Traditional exceptions to the warrant requirement also include consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and exigent circumstances searches, United States v. Santana, 427 U.S. 38 (1976); Schmerber v. California, 384 U.S. 757 (1966). Since wardens' administrative authority gives them no special advantage in the use of these exceptions, they are not discussed extensively in this Note.

1. Traditional Warrant Exceptions

a. Search Incident to Arrest

The most common type of warrantless search occurs incident to arrest.[71] The Supreme Court clearly enunciated the doctrine in *Chimel v. California.*[72] The Court held that officers may conduct warrantless searches of arrestees in order to ensure the safety of arresting officers and to prevent the destruction of evidence.[73]

The doctrine has two requirements. First, the search must be incident to lawful arrest.[74] The grounds for arrest can be minor as long as the arrest is lawful.[75] "Incident to arrest" means contemporaneous with arrest: the police may not first search a suspect and then arrest her on the basis of evidence discovered during the search.[76] If, however, probable cause to arrest exists before the search, the search is constitutional even when the suspect has not been formally arrested.[77]

The second requirement is that searches incident to arrest be limited to the arrestee's person and the area within her immediate control.[78] Officers cannot use the exception to search an entire home, even if the arrest takes place pursuant to an arrest warrant.[79] The search, however, need not take place at the arrest scene.[80]

The *Chimel* exception is especially useful in expanding game wardens' search powers. While the police generally make arrests only for criminal or, in some instances, traffic violations,[81] game wardens can also make arrests for any of a great number of minor fish and game infractions.[82] By lawfully arresting someone for a minor game violation, game wardens can conduct an otherwise unlawful search for evidence of a more serious crime.[83]

Game wardens have made good use of the search incident to arrest.

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71. 2 W. LAFAVE, SEARCH AND SEIZURE § 5.2(c), at 275 (1978).

72. 395 U.S. 752 (1969).

73. *Id.* at 762-63.

74. United States v. Robinson, 414 U.S. 218, 235 (1973).

75. *E.g.,* Gustafson v. Florida, 414 U.S. 260, 266 (1973) (upholding search pursuant to arrest for driving without a license).

76. Sibron v. New York, 392 U.S. 40, 62-63 (1968).

77. Rawlings v. Kentucky, 448 U.S. 98, 110-11 (1980).

78. *Chimel,* 395 U.S. at 762-63.

79. *Id.* at 763.

80. *See* Illinois v. Lafayette, 462 U.S. 640, 646 (1983) (upholding post-arrest search conducted at police station).

81. *See* Gustafson v. Florida, 414 U.S. 260, 266 (1973).

82. *See, e.g.,* CAL. FISH & GAME CODE §§ 851, 856, 878, 1006 (West 1984).

83. *Cf.* 2 W. LAFAVE, *supra* note 71, § 5.2(e), at 281-87 (explaining police use of arrests for minor crimes as subterfuge to conduct otherwise illegal searches for evidence of serious crimes).

In *Call v. United States,*[84] a game warden saw two men landing a boat on a beach late at night. He arrested one defendant on suspicion of illegal lobster fishing. His subsequent search of the defendant and his accomplice uncovered a large amount of marijuana. The Ninth Circuit Court of Appeals upheld the search as incident to lawful arrest. Similarly, in *United States v. Stricklin*[85] a game warden detained defendants for night hunting.[86] An incident search of the defendants revealed marijuana in a sleeping bag. The Tenth Circuit Court of Appeals upheld the search and resulting conviction.[87]

b. Protective or Investigative Search

A common search technique employed by the police is to "stop and frisk" suspicious individuals for carefully defined investigative or protective purposes.[88] In *Terry v. Ohio,*[89] the Supreme Court upheld the constitutionality of investigative searches. The *Terry* stop permits two levels of investigation. First, an officer may briefly detain and question persons acting in a suspicious manner.[90] Second, an officer may conduct a limited search if there is reason to believe that the suspect is armed.[91]

An investigative stop need not be supported by probable cause. An officer may detain a suspect if there is some "objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[92] To find an "objective manifestation" of criminal activity, an officer must make an assessment of likely criminal activity based on all the circumstances,[93] and she must have particularized suspicion that the subject is engaged in wrongdoing.[94]

84. 417 F.2d 462, 463-64 (9th Cir. 1969).

85. 534 F.2d 1386 (10th Cir. 1976), *cert. denied,* 429 U.S. 831 (1977).

86. Night hunting is prohibited in many states. Any indicia of night hunting, such as the use of car headlights to illuminate fields along a road, possession of infrared rifle scopes, presence of a person in an area where gunshots were heard at night, or other suspicious activity, can provide grounds for a warden to stop or arrest a suspect for night hunting violations. Schultz v. State, 437 So. 2d 670 (Ala. Crim. App. 1983); State v. Hillock, 384 A.2d 437 (Me. 1978); State v. Cowperthwaite, 354 A.2d 173 (Me. 1976); State v. Hermandson, 84 S.D. 208, 169 N.W.2d 255 (1969).

87. *See also* Anderson v. State, 133 Ga. App. 45, 209 S.E.2d 665 (1974) (sustaining conviction for possession of marijuana discovered following arrest by game wardens for boating and fishing license violations).

88. 3 W. LAFAVE, *supra* note 71, § 9.2(f), at 36.

89. 392 U.S. 1 (1968).

90. *Id.* at 30.

91. *Id.* at 29-30.

92. United States v. Cortez, 449 U.S. 411, 417 (1981).

93. *Id.* at 418.

94. *Id.* Suspicion may arise as a result of direct police observation, *Terry,* 392 U.S. at 30; on information from an informant, Adams v. Williams, 407 U.S. 143, 146-47 (1972); on detec-

The officer's initial suspicions only justify her questioning a suspect. Under *Terry,* an officer may conduct a search only if she reasonably believes that the detainee may be dangerous.[95] The search is restricted to a "pat down"—a limited search of the detainee's outer clothing designed to discover weapons.[96]

As with post-arrest searches, game wardens are in a better position to take advantage of the *Terry* exception than their urban police counterparts. Many activities that would not normally manifest "criminal activity . . . afoot"[97] in urban settings may be signs of fish or game violations in the wild. As a result, game wardens might make *Terry* stops of persons whose activites might not be suspicious at all when "viewed through the eyes of an experienced [urban] police officer."[98]

The courts have upheld game wardens' use of investigative searches and stops. In *Anderson v. State,*[99] game officials detained persons for investigation of possible fishing and boating violations. During the detention, the officials discovered marijuana. The court upheld the detention and the subsequent admission of the marijuana into evidence.[100] In *State v. Hillock,*[101] a warden detained the occupants of a car on suspicion of illegal night hunting. The court upheld the warden's suspicions because the car was travelling after midnight on a little used road in an area where deer were known to abound.[102] The stop led to the seizure of evidence of night hunting which was admitted in the prosecution.[103] In *Dodds v. State,*[104] game wardens stopped the defendants on suspicion that they had committed game violations. Because the wardens' observations gave them probable cause, the court upheld the subsequent search which uncovered smuggled cocaine.[105]

c. Automobile Searches

It is generally recognized that searches of automobiles are not sub-

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tion of a person at the scene of a crime, 3 W. LAFAVE, *supra* note 71, § 9.3(c), at 69; or on the basis of information received from police bulletins, *id. See generally id.* at 58-69.

95. *Terry,* 392 U.S. at 23-24.
96. *Id.* at 30-31.
97. *Id.* at 30.
98. J. CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE 9 (3d ed. 1980).
99. 133 Ga. App. 45, 209 S.E.2d 665 (1974).
100. *Id.* at 47-48, 209 S.E.2d at 667.
101. 384 A.2d 437 (Me. 1978).
102. *Id.* at 441.
103. *Id.*
104. 434 So. 2d 940, 942 (Fla. Dist. Ct. App. 1983).
105. *Id.*

ject to the Fourth Amendment warrant requirement.[106] The Supreme Court has recognized the exception because the individual's reasonable expectation of privacy is reduced while she is in an automobile.[107] The exception, however, does not give the police unqualified license to search automobiles. The officer must have a reasonable suspicion to justify a vehicle stop.[108] She may not stop cars at random.[109] Even after lawfully stopping a car, the officer may conduct a search only if she has probable cause to believe that the car contains evidence[110] or weapons.[111] The officer may search the passenger compartment and any containers within the car only if she has probable cause to believe that they contain evidence.[112]

Although the police must rely on case law to justify an automobile search, game wardens often have statutory blessing. In many states, fish and game enforcement statutes specifically permit game wardens to inspect vehicles without a warrant.[113] Some states require a showing of probable cause that the search will reveal evidence of a game violation.[114] Others permit the search if the warden has "reason to believe" she will

106. Professor Moylan has criticized treatment of the automobile search as a separate category of Fourth Amendment exception. "[T]he mere testimonial mention of the word 'automobile' frequently provokes the judicial knee-jerk of all knee-jerks. . . . [Many judges] refuse to grasp that the review of every search of an automobile and every seizure from an automobile need not proceed under the so-called 'automobile exception.' " Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle,* 26 MERCER L. REV. 1047, 1089 (1975). Nevertheless, as Justice Powell has remarked, "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. This court 'has long distinguished between an automobile and a home or office.' " Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring) (citations omitted). Cases from Carroll v. United States, 267 U.S. 132 (1925), to Michigan v. Long, 463 U.S. 1032 (1983), reinforce the validity of the automobile exception. *See also* United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981); Chambers v. Maroney, 399 U.S. 42 (1970).

107. Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

108. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

109. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

110. *Almeida-Sanchez,* 413 U.S. at 274-75.

111. Michigan v. Long, 463 U.S. at 1051.

112. *Id.* The constitutionality of a warrantless search of a vehicle's trunk is still unsettled. *See* Michigan v. Long, 463 U.S. at 1053 (specifically declining to decide whether police can search trunks without a warrant). *See generally* Comment, *Constitutional Law—Search and Seizure—Containers Within Automobiles—United States v. Ross,* 29 N.Y.L. SCH. L. REV. 153 (1984).

113. *E.g.,* ME. REV. STAT. ANN. tit. 12 § 7053(2)D (1981); W. VA. CODE § 20-7-4(3) (1981); WYO. STAT. § 23-6-109 (1977). Note also that if there is no statutory authority, the warden may be able to rely on the automobile exception in some instances.

114. *E.g.,* LA. REV. STAT. ANN. § 56:55 (West Supp. 1984).

find such evidence.[115]

In *State v. Tourtillott,*[116] the Oregon Supreme Court upheld a checkpoint vehicle stop designed to detect game violations. The stop instead revealed evidence of a criminal violation.[117] The court acknowledged "that a roadblock created for the sole purpose of 'locating people [on whom could be served] papers or warrants' is impermissible . . . ."[118] Nevertheless, the court upheld the search and the defendant's conviction, relying on fish and game statutes and on the state's interest in environmental protection.[119] In *People v. Johnson,*[120] a game warden stopped a car to determine whether rifles that were visible in the vehicle were loaded. The court upheld the search under a fish and game statute prohibiting possession of loaded guns in vehicles.[121]

d. Plain View Observations

The Supreme Court has described the plain view doctrine as "an extension of whatever the prior justification for an officer's 'access to an object' may be" rather than as an independent exception to the warrant requirement.[122] The doctrine permits the escalation of otherwise limited searches under other exceptions. In general, the plain view doctrine applies when an officer "is able to detect something by utilization of one or more of his senses . . . ."[123]

Plain view observations may be divided into three categories: "nonintrusive" observations, when an officer has an open view of the evidence in a public or constitutionally unprotected area;[124] "pre-intrusive" observations, when an officer outside a constitutionally protected area sees evidence within;[125] and "post-intrusive" observations of an officer

115. *E.g.,* N.J. STAT. ANN. § 23-10-20 (West Supp. 1984); WASH. REV. CODE ANN. § 77.12.090 (1984).

116. 289 Or. 845, 618 P.2d 423 (1980), *cert. denied,* 451 U.S. 972 (1981).

117. The driver was driving on a revoked license. *Id.* at 847, 618 P.2d at 424.

118. *Id.* at 868, 618 P.2d at 435 (citations omitted).

119. *Id.* at 853-59, 618 P.2d at 427-30.

120. 108 Cal. App. 3d 175, 178-79, 166 Cal. Rptr. 419, 420-21 (1980).

121. *Id. See* CAL. FISH & GAME CODE § 2006 (Deering Supp. 1984). *See also* Davis v. Reynolds, 319 F. Supp. 20 (N.D. Fla. 1970) (no violation of Fourth Amendment for game warden to conduct warrantless search of automobile for hunting dogs and guns pursuant to statute); State v. Engels, 2 N.J. Super. 126, 64 A.2d 897 (N.J. Super. Ct. App. Div. 1949) (pursuant to statute, game warden with reason to believe game violation had occurred allowed to search automobile without warrant).

122. Texas v. Brown, 460 U.S. 730, 738-39 (1983) (plurality opinion).

123. 1 W. LAFAVE, *supra* note 71, § 2.2, at 240.

124. Moylan, *supra* note 106, at 1097-98. "If [the officer] is on the outside [of a constitutionally protected area] looking outside, nobody gives a constitutional damn." *Id.*

125. *Id.* at 1098. "If [the officer] is on the outside looking inside, he needs something extra going for him." *Id.* at 1097.

after she is legitimately inside a constitutionally protected area.[126] Pre-intrusive observations generally require an officer to get a warrant before she can seize any evidence.[127] Because this note is primarily concerned with warrantless searches, only the post-intrusive and the nonintrusive observation are discussed.

The post-intrusive plain view doctrine has three requirements. First, an observing officer must have justifiably intruded into a constitutionally protected sphere.[128] Second, the officer must have probable cause to associate the property with criminal activity.[129] Finally, discovery of the evidence must be "inadvertent."[130]

Game wardens' search powers are enhanced by the plain view doctrine because they have broader authority to intrude on otherwise constitutionally protected areas. Their statutory authority to search for game violations may justify an investigative stop that an urban police officer might not make.[131] As a result of such stops, wardens might be in legitimate positions to observe evidence of nongame violations. In both *Schultz v. State*[132] and *United States v. Stricklin*,[133] wardens stopped automobiles for suspected violations of night hunting laws. In each case the court upheld the warden's plain view observation and seizure of marijuana.[134]

Nonintrusive observations also aid game wardens, most often under the name of the open fields doctrine. The Supreme Court has ruled that there is no reasonable expectation of privacy in open fields.[135] Open fields include all outdoor land beyond the curtilage of a home.[136] The

126. *Id.* at 1097. *See also* Note, *Criminal Procedure—Fourth Amendment Searches and Seizures—Plain View Doctrine—Texas v. Brown*, 67 MARQ. L. REV. 366, 368 n.4 (1984).

127. Moylan, *supra* note 106, at 1098.

128. An officer may justify her presence while executing a warrant, Coolidge v. New Hampshire, 403 U.S. 443, 465 (1970), accompanying a person arrested without a warrant, Washington v. Chrisman, 455 U.S. 1 (1982), stopping someone for minor infractions, Colorado v. Bannister, 449 U.S. 1 (1980), or while she is legitimately on the premises under any of the warrant exceptions. *See generally* 1 W. LAFAVE, *supra* note 71, § 2.2, at 242-43.

129. Texas v. Brown, 460 U.S. at 724. *Brown*'s "probable cause to associate the property with criminal activity" appears to replace the *Coolidge* requirement that it be "immediately apparent" that an item is contraband. *Compare id. with Coolidge*, 403 U.S. at 446.

130. *Coolidge*, 403 U.S. at 469. "Inadvertant" refers to those instances when "the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it" before any stop or inspection takes place. *Id.* at 470.

131. *See supra* notes 42-59 and accompanying text.

132. 437 So. 2d 670 (Ala. Crim. App. 1983), *cert. denied*, 464 U.S. 1070 (1984).

133. 534 F.2d 1386 (10th Cir.), *cert. denied*, 429 U.S. 831 (1976).

134. *Id.* at 1390; 437 So. 2d at 674.

135. United States v. Oliver, 104 S. Ct. 1735, 1742 (1984).

136. *Id.* "Curtilage" means the land and buildings just next to a house. The term has been variously explained. The Supreme Court of North Dakota has defined it as "that area near a

doctrine applies to both private and public lands,[137] including fenced areas, wooded areas, beaches, waterways, and deserts.[138] The exception applies regardless of whether an officer's presence constitutes a technical trespass.[139] An individual's attempts to secure privacy, whether by enclosure, fencing, or sign-posting, create no legitimate privacy expectation.[140]

The open fields doctrine enhances the search powers of game wardens. Because their authority extends over predominantly rural or wilderness lands, the majority of their observations take place in open field lands. Game wardens have made good use of the doctrine. In *Betchart v. California State Department of Fish and Game,*[141] a game warden made periodic warrantless inspections of private lands for evidence of game violations. While patrolling, the warden climbed fences and ignored the owner's protests. Relying on the open fields doctrine, the California Court of Appeal upheld the warden's authority to search and dismissed the landowner's suit against the warden.[142] Similarly, in *Brown v. State,*[143] a warden climbed fences and crossed private lands in search of game violations. Instead of game violations, he found marijuana plants. The court upheld his seizure of the plants under the open fields doctrine.[144]

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dwelling, not necessarily enclosed, that generally includes buildings or other adjuncts used for domestic purposes." State v. Larson, 343 N.W.2d 361, 363 (N.D. 1984). The Fifth Circuit Court of Appeals has held that "the outer limits of the curtilage are defined by the walls of the remote outbuildings" on unfenced residential land. United States v. Williams, 581 F.2d 451, 454 (5th Cir. 1978), *cert. denied,* 440 U.S. 972 (1979).

137. *Oliver,* 104 S. Ct. at 1741 n.10.

138. *See* 1 W. LAFAVE, *supra* note 71, § 2.4(a), at 332.

139. *Oliver,* 104 S. Ct. at 1743-44.

140. *Id.*

141. 158 Cal. App. 3d 1104, 1107-08, 205 Cal. Rptr. 135, 136-37 (1984). *Betchart* is not a criminal case, and wardens found no evidence of violations or crimes committed. The action was maintained by plaintiff landowner for declaratory relief to determine the right of game wardens to enter and inspect the plaintiff's property without a warrant. *Id.*

142. *Id.* at 1107-08, 205 Cal. Rptr. at 136-37.

143. 5 Ark. App. 181, 636 S.W.2d 286 (1982).

144. *Id.* at 288-89. *See also* United States v. Swann, 377 F. Supp. 1305 (D. Md. 1974) (in action for attempted illegal taking of migratory birds, court used open fields doctrine to admit evidence that defendant was baiting waterfowl when the evidence was seized near a pond several hundred yards from outbuildings).

Like the police officer, the game warden cannot search a home or its curtilage without a warrant. *See* Langle v. Bingham, 447 F. Supp. 934 (D. Vt. 1978) (invalidating warden's search of freezer in barn); Gonzalez v. State, 588 S.W.2d 355 (Tex. Crim. App. 1979) (invalidating warden's search of outbuilding).

2. *Physical Areas of Game Warden Searches*

a. Container Searches

Police officers have only limited power to search containers. The Supreme Court has stated that "a person's expectations of privacy in personal luggage are substantially greater than [for example] in an automobile."[145] It is unclear what, if any, constitutional protection containers will retain,[146] but it is clear that game wardens need be less concerned than police officers with limitations on container searches.

Many states authorize game wardens to inspect, without warrants, receptacles that may contain fish or game.[147] Some states require probable cause,[148] while others require a reasonable belief that containers hold evidence of game violations before search is permitted.[149] California requires no suspicion whatsoever, permitting inspection of "all receptacles, except the clothing actually worn by a person at the time of inspection, where [fish or game] may be stored . . . ."[150] Under the California statute, fish and game wardens in *People v. Maxwell* were allowed to search sacks carried by passengers getting off a boat, without a showing of probable cause or reasonable suspicion.[151]

145. United States v. Chadwick, 433 U.S. 1, 13 (1977); *accord* Arkansas v. Sanders, 442 U.S. 753 (1979).

146. Many commentators, relying on United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), argue that containers, particularly luggage, should be exempt from warrantless search. *See* 3 W. LAFAVE, *supra* note 71, § 9.4(e), at 133. United States v. Ross, 456 U.S. 798 (1982), casts some doubt on the continued viability of the doctrine.

Ross upheld a warrantless search of containers inside an automobile. The Court noted that the search was conducted pursuant to the driver's lawful arrest, and that the officers had probable cause to believe that the luggage contained contraband. The Court characterized the search as an automobile search, carefully distinguishing the *Chadwick* and *Sanders* searches as luggage searches. *Id.* at 815.

Apparently, *Ross* leaves intact the Fourth Amendment protection of containers which are outside an automobile. Professor LaFave contends that the Supreme Court will restrict the protections of luggage should any relevant case come before it. 2 W. LAFAVE, *supra* note 71, § 9.3, at 67-68 (Supp. 1984). Professor LaFave expects the Court to adopt a new rule which would continue to require warrants for searches of containers outside an arrestee's possession, but would authorize the search of any container in the arrestee's possession during the arrest. It would not be necessary to show that the arrestee could readily reach the contents of the container or that any weapons might be in the container. It would make no difference if the container were locked. *Id.* at 106-07.

147. ALA. CODE § 9-2-65 (1980); CAL. FISH & GAME CODE § 1006 (Deering 1976); IND. CODE ANN. § 14-3-4-9 (West 1983); VT. STAT. ANN. tit. 10, § 4194 (1983); WYO. STAT. § 23-6-109 (1977).

148. *E.g.*, LA. REV. STAT. ANN. § 56:55 (West Supp. 1984).

149. *E.g.*, N.J. REV. STAT. § 23:10-20 (Supp. 1984); W. VA. CODE § 20-7-4(3) (1981).

150. CAL. FISH & GAME CODE § 1006 (Deering 1976).

151. 275 Cal. App. 2d Supp. 1026, 1027-29, 80 Cal. Rptr. 86, 87-88 (1969).

b. Searches of Vessels

Like containers, vessels are also more accessible to game wardens than to police officers. Many states give game wardens statutory authority to search vessels for evidence of fishing or hunting violations.[152] This authority extends to boats on inland waterways and along the state's coast, if any.[153]

Generally, wardens need little justification to stop vessels. Some jurisdictions permit stops of improperly registered vessels in inland waters.[154] In coastal waters there may be no need to satisfy any standard of suspicion. In *United States v. Villamonte-Marquez,*[155] the Supreme Court noted the impossibility of establishing fixed checkpoints at sea and the great variety of registration procedures used by seagoing vessels. Accordingly, the Court permitted customs officers to board ships at random in order to accomplish the important governmental interest of license and registration inspection.[156]

The scope of a vessel search is often limited.[157] Wardens are permitted to board to check registration and licences.[158] Once aboard, however, the warden is in a position to make plain view observations which may give her probable cause to search the entire ship.[159] If the boat is a commercial fishing vessel, the warden can conduct a full, warrantless inspection to discover fishing violations.[160]

III. A Reasonableness Standard for Game Searches

Their combined administrative and police search powers make game wardens effective law enforcement officers. Although these expanded powers advance the state's interests, they may also intrude on the privacy interests of the individual. The effect of this expansion of power may be

152. *E.g.,* CAL. FISH & GAME CODE § 1006 (Deering 1976); ME. REV. STAT. ANN. tit. 12, 7053 (1984); W. VA. CODE § 20-7-4(3) (1981).

153. A state's authority over ocean waters extends three miles from its coast. People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, *cert. denied,* 449 U.S. 839 (1980); *accord* Shipman v. Dupre, 88 F. Supp. 482 (D.S.C. 1950).

154. *See, e.g.,* Prochaska v. Marcoux, 632 F.2d 648 (10th Cir. 1980), *cert. denied,* 451 U.S. 984 (1981).

155. 462 U.S. 579, 589 (1983).

156. *Id.*

157. Some states may, however, permit full warrantless inspection of even noncommercial crafts without probable cause. *See, e.g.,* CAL. FISH & GAME CODE § 1006 (Deering 1976).

158. *See, e.g.,* Hill v. State, 238 So. 2d 608, 611 (Fla. 1970).

159. *E.g., Hill,* 238 So. 2d at 611; *see also* United States v. Raub, 637 F.2d 1205 (9th Cir.), *cert. denied,* 449 U.S. 922 (1980).

160. *See, e.g.,* United States v. Kaiyomaru No. 53, 699 F.2d 989 (9th Cir. 1983); *Raub,* 637 F.2d at 1210; People v. Di Bernardo, 79 Cal. App. 3d Supp. 5, 144 Cal. Rptr. 902 (1978).

to give the individual greater constitutional protection from the police than from game wardens. The individual could be left with a greater privacy expectation in a crowded city than in the solitude of the wild. This ironic result underscores the need for constitutional analysis and definition of game wardens' expanded search powers.

In *New Jersey v. T.L.O.*,[161] the Supreme Court articulated a search and seizure standard which provides a framework well suited for constitutional analysis of game searches: the reasonableness standard. "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness, [this Court has] not hesitated to adopt such a standard."[162] Although *T.L.O.* is thus far limited to school searches,[163] its reasonableness standard lends itself to game wardens' searches. Adoption of the *T.L.O.* rationale would provide a sound constitutional framework for game searches.

Application of the *T.L.O.* reasonableness standard to a particular search requires two levels of inquiry. The first question is whether the standard applies to a particular search. The reasonableness standard applies only to those warrantless searches in which the government interests outweigh the individual interests involved.[164] The second question is whether the search was executed in a reasonable manner.[165] The search is reasonably executed if it is justified at inception and reasonably related in scope to the circumstances which initially justified the search.[166]

161. 105 S. Ct. 733 (1985). At issue in *T.L.O.* was the authority of school officials to search students. A school official, suspecting that a student had been smoking in violation of school rules, searched a student's purse for cigarettes. The search revealed marijuana and evidence of the student's involvement in drug sales. *Id.* at 737. The New Jersey Supreme Court ruled that the search was unreasonable because the contents of the student's purse were unrelated to the accusation that she was smoking, that the official had no reasonable suspicions, and that the evidence found did not justify the extensiveness of the search. *Id.* at 738 (citing State *ex rel.* T.L.O., 94 N.J. 331, 347, 463 A.2d 934, 942-43 (1983)). The state appealed on the grounds that the exclusionary remedy applied by the state court should not be available against public officials not engaged primarily in law enforcement. The Supreme Court did not reach this question. *Id.* at 738-39. The Court held the Fourth Amendment applicable to school officials, *id.* at 741, but it held that the important state interests in education and academic discipline justified abandonment of the probable cause standard in favor of a reasonableness standard, *id.* at 743-44. Under this standard, a search is reasonable if based on reasonable suspicion and conducted in a reasonable manner. *Id.* Finding the search at issue reasonable both at inception and in execution, the Court reversed the state court's decision. *Id.* at 746-47.

162. *Id.* at 748-49 (Blackmun, J., concurring).

163. *Id.* at 736, 744 n.7.

164. *Id.* at 742-43.

165. *Id.*

166. *Id.* at 744.

A. Applying the Reasonableness Standard to Game Searches

1. Does the Reasonableness Standard Apply?

To determine whether the reasonableness standard applies to game searches, it is necessary to consider the competing interests involved. A state has a strong interest in preserving wilderness areas and the wildlife that thrives there.[167] Many species of wildlife are in danger of extinction.[168] Wildlife habitats are under ever increasing threat.[169] Much of the damage to natural resources is caused by those who violate fish and game statutes as well as other laws.[170] Fish and game law enforcement is therefore an essential element in combatting the threat to the wild.

Balanced against the state interests are the individual's Fourth Amendment right to privacy and her interest in using wildlife areas.[171] Authorities differ as to how much privacy an individual can reasonably expect in wilderness areas. Some consider the game search a "minimal intrusion," placing little importance on the outdoorsman's expectation of privacy.[172] Others argue that an individual does not surrender her privacy expectations merely because she enters a government park.[173] Still others contend that an individual's expectation of privacy is increased by the isolation afforded by nature.[174] Any search of the person or effects of an individual is a severe violation of the subjective expectation of privacy.[175] Yet hunters and fishermen themselves implicitly accept the no-

167. Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 392 (1978) (Burger, C.J., concurring). *See also* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); United States v. Greenhead, Inc., 256 F. Supp. 890, 893-94 (N.D. Cal. 1966); Betchart v. Department of Fish and Game, 158 Cal. App. 3d 1104, 1106-07, 205 Cal. Rptr. 135, 136 (1984).

168. In 1971, forty-three species were on the endangered species list of the California Department of Fish and Game. By 1980 the number had grown to sixty-three. CALIFORNIA STATE DEPARTMENT OF FISH AND GAME, AT THE CROSSROADS: A REPORT ON CALIFORNIA'S ENDANGERED AND RARE FISH AND WILDLIFE 2, 6 (1980).

169. *Id.* at 4.

170. State v. Howard, 411 So. 2d 372, 375 (Fla. Dist. Ct. App. 1982). *See also* NARCOTICS REPORT, *supra* note 8, at 13.

171. United States v. Munoz, 701 F.2d 1293, 1298 (9th Cir. 1983).

172. *Tourtillott,* 289 Or. at 859, 618 P.2d at 430. *See also* W. RINGEL, *supra* note 4, § 14.3(d), at 14-30.

173. *Munoz,* 701 F.2d at 1298. *See also* State v. Odam, 40 Or. App. 551, 595 P.2d 1277 (1979) (where no checkpoint had been established, officer's detention of automobile without a "reason to believe" there was game violation violated detainee's Fourth Amendment privacy expectation).

174. *See* Note, *United States v. Villamonte-Marquez: Administrative Customs Stops—Randomness Is Reasonable on Inland Waters,* 4 PACE L. REV. 753, 776-77 (1984) (greater expectation of privacy on boats because of greater isolation). Note, *Search and Seizure—Limitations on Closed Container Searches in Open Fields—United States v. Ramapuram,* 17 WAKE FOREST L. REV. 478, 493-94 (1981) (greater expectation of privacy in a rural area than in an urban area).

175. *T.L.O.,* 105 S. Ct. at 741-42.

tion that they have a lesser expectation of privacy. By fulfilling the longstanding requirement of obtaining licenses, they acknowledge the prospect of at least some governmental intrusion into their activities.[176]

There remains the question of how to "strike the balance"[177] between the legitimate interests of citizen and state. *T.L.O.* found the warrant requirement unsuited to the school environment because its application would interfere with essential disciplinary measures.[178] The requirement may also be unsuited to fish and game law enforcement. As education depends on discipline and compliance with academic rules, so conservation depends on compliance with fish and game law. Fish and game wardens are charged with ensuring compliance. The game inspection is an important aspect of fish and game law enforcement.[179] A search warrant requirement would frustrate wardens' inspection powers.[180] Game wardens, like teachers, must act swiftly to enforce the rules. The nature of the wilderness environment—the brevity of warden/suspect contact, the absence of fixed routes over which offenders might travel, the distances over which observations must be made, and the remoteness from conventional law enforcement facilities and magistrates who could issue warrants—would hamper wardens' efforts to obtain warrants before investigating possible game violations. Accordingly, the strict warrant requirement should not apply to game searches. Because the state interest in environmental protection weighs so heavily against individual privacy interests, game searches, like school searches, require "easing of the restrictions"[181] which ordinarily govern searches by the state.

A number of factors suggest that the reasonableness standard should not apply to game searches. The Court was careful to limit the *T.L.O.* standard to school searches.[182] Furthermore, in each of the separate opinions, the majority,[183] Justice Powell,[184] Justice Blackmun,[185] and Justice Brennan[186] were careful to distinguish between a teacher,

176. *Betchart,* 158 Cal. App. 3d at 1110, 205 Cal. Rptr. at 138.

177. *T.L.O.,* 105 S. Ct. at 743.

178. *Id.*

179. *Betchart,* 158 Cal. App. 3d at 1109-10, 205 Cal. Rptr. at 138. *See also Tourtillott,* 289 Or. at 858, 618 P.2d at 430.

180. *Tourtillott,* 289 Or. at 858, 618 P.2d at 430. *See also* W. RINGEL, *supra* note 4, § 14.3(b)(1), at 14-14.

181. *T.L.O.,* 105 S. Ct. at 743.

182. *Id.* at 744 n.7.

183. *Id.* at 740.

184. *Id.* at 748 (Powell, J., concurring).

185. *Id.* at 749-50 (Blackmun, J., concurring).

186. *Id.* at 751 (Brennan, J., dissenting).

whose "focus is, and should be, on teaching and helping students," and a police officer, who has "the training [and] the day-to-day experience in the complexities of probable cause."[187] Wardens, like police officers, are often trained and experienced:[188] one cannot justify a lower probable cause standard for game searches on the grounds that wardens are unfamiliar with law enforcement. Yet game wardens can be distinguished from police officers because of the special state interest they serve—environmental protection. As Justice Brennan pointed out: "The undifferentiated governmental interest in law enforcement is insufficient to justify an exception to the warrant requirement. Rather some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement."[189] Environmental protection is just such an interest. Thus, when wardens act in the interests of the environment they should be held to a lower probable cause standard. At times, however, the warden acts in the interests of general rather than environmental law enforcement.[190] At these times, wardens should be held to the more conventional search standard.[191]

Some authorities have supported application of a reasonableness standard to game searches by analogizing them to another type of search to which the reasonableness standard has been applied—the border search.[192] Border Patrol officers are thinly spread over unpopulated areas and are faced with many difficulties in policing immigration violations.[193] These difficulties have been used to justify stops based on a suspicion standard rather than on a probable cause standard.[194] Game wardens operate in similarly unpopulated areas and face similar enforcement difficulties.[195]

Whatever the individual's privacy interests, the state interest in envi-

187. *Id.* at 750 (Blackmun, J., concurring).

188. *See, e.g.,* CAL. FISH & GAME CODE §§ 856, 878 (Deering 1984); LA. REV. STAT. ANN. § 56:108H (West Supp. 1984).

189. *T.L.O.,* 105 S. Ct. at 751 (Brennan, J., dissenting).

190. *See supra* notes 20-22 and accompanying text.

191. *See infra* text accompanying note 215 (proposing guidelines for enforcing nongame law).

192. *E.g., Tourtillott,* 289 Or. at 854-58, 618 P.2d at 428. *See also* United States v. Cortez, 449 U.S. 411, 417 (1981) (roving stop by Border Patrol justified by "particularized" suspicion); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (upholding right of Border Patrol to make stops at fixed checkpoints without any showing of suspicion).

193. Comment, *Immigration Roving Border Patrols: The Less Than Probable Cause Standard for a Stop,* 10 AM. J. CRIM. L. 245 (1982).

194. *Cortez,* 449 U.S. at 417-19.

195. *Tourtillott,* 289 Or. at 866, 618 P.2d at 434.

ronmental preservation, like the state interests in favor of education[196] and border security,[197] should prevail. To abuse the privilege of using the wilderness is to degrade and destroy it. The abuser destroys not only her own ability, but every person's ability to enjoy the privacy of the outdoors. To protect the solitude of the wild, the outdoorsman must be prepared to suffer the minor privacy intrusions occasioned by game searches. If today's grasslands are to know the footsteps of tomorrow's children, the states must take strong measures to counter the threats posed by criminal activity in the wilderness.

2. Is the Search Reasonably Executed?

If the reasonableness standard is to be applied to game searches, then the execution of those searches must be reasonable under the *T.L.O.* standard. Two factors determine whether a search is reasonably executed: first, the action must be justified at inception; second, the search must be reasonably related in scope to the circumstances which justified it.[198]

The reasonable search must be justified at inception.[199] Because the need of educators to maintain order outweighs the privacy interests of students, the *T.L.O.* search need only be justified on a showing of reasonableness rather than probable cause.[200] In the school search context, the reasonableness standard is met when there are reasonable grounds to believe that the search will reveal evidence that the student is or has been violating the law or school rules.[201] A game search would be justified at its inception if the warden had a reasonable suspicion that her search would discover evidence of a game violation.

Even the suspicion requirement may not be absolute when applied to game wardens.[202] In *United States v. Villamonte-Marquez,*[203] the Supreme Court held that customs officials could stop and board ocean-going vessels at random to inspect registration and licenses. The Court justified its suspension of the suspicion requirement by pointing out the problems of law enforcement at sea: it is difficult to check the registration of sea-going vessels without boarding them, and it is still more difficult to monitor these ships because of their freedom of movement and the

196. *See T.L.O.,* 105 S. Ct. at 743.
197. United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975).
198. *T.L.O.,* 105 S. Ct. at 744.
199. *Id.*
200. *Id.* at 743-44.
201. *Id.* at 744.
202. *Id.* at 744 n.8.
203. 462 U.S. 579 (1983). *See supra* notes 155-156 and accompanying text.

absence of fixed routes.[204] Consequently, the Court sacrificed the privacy interests of shipowners and crews in favor of the important state interest in fighting smugglers.[205]

By analogy with *Villamonte-Marquez,* game wardens may also be able to justify random stops. As with ships, it is difficult without inspection to tell whether a hunter is licensed. Movement in the wilderness is nearly as unrestricted as movement at sea; the hunter is not physically confined to specific routes or roadways. The difficulties of effective game law enforcement justify suspension of the suspicion requirement in game searches. The state interest in permitting the warden to inspect licenses and game containers without reference to artificial standards of suspicion may outweigh the hunter's interests in hunting and in privacy.

Wardens' inspection powers are further analogous to those of the Border Patrol. Border Patrol officers, like game wardens, can make stops based on articulable suspicion rather than probable cause.[206] The Border Patrol's "roving" stops may not be conducted at random but must be supported by reasonable suspicion.[207] At fixed checkpoints, however, the privacy expectation of the driver is reduced so that random stops are permissible.[208] Similar standards have been applied to game wardens.[209]

The second *T.L.O.* factor for determining whether a search is reasonably executed is scope. The search must be reasonably related in scope to the circumstances which initially justified the stop.[210] The Supreme Court has not applied this limitation strictly. In *T.L.O.,* a school official checked a girl's purse for cigarettes. Even though he found the cigarettes, he continued the search, ultimately discovering marijuana and evidence that the student was involved in drug selling.[211] Even though a search designed to uncover evidence of smoking at recess revealed evidence of narcotics trafficking, the Supreme Court found the search reasonably related in scope to the circumstances justifying the

204. 462 U.S. at 589-90.

205. *Id. See also Martinez-Fuerte,* 428 U.S. at 562 (no suspicion required for immigration searches at fixed checkpoints).

206. *Cortez,* 449 U.S. at 417.

207. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

208. United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

209. Random stops by game wardens have been overturned in roving patrol situations. United States v. Munoz, 701 F.2d 1293 (9th Cir. 1983). On the other hand, wardens have been permitted to make random stops at fixed checkpoints. *Tourtillott,* 289 Or. at 845, 618 P.2d at 423.

210. *T.L.O.,* 105 S. Ct. at 744.

211. *Id.* at 745-47.

investigation.[212]

The result in *T.L.O.* suggests that courts applying the reasonableness standard may validate game searches which uncover nongame violations. This result would further another important state interest—the need for general law enforcement in rural or wilderness areas. Since these areas are often under-policed, law enforcement by game wardens would be valuable.[213] Furthermore, criminal violations can be as environmentally destructive as game violations.[214] Consequently, extension of game searches promotes the twin state interests of wilderness preservation and general law enforcement.

Although the reasonableness standard can be an invaluable tool for fish and game wardens, like any tool, it is susceptible to misuse. The reasonableness standard should therefore be carefully circumscribed in the fish and game context in order to prevent abuse. Accordingly, the following section proposes a set of guidelines designed to promote the efficiency of the fish and game searches while preserving, as much as possible, the privacy interests of the outdoorsman.

B. Proposed Guidelines for Reasonableness in Game Searches

Applying the *T.L.O.* reasonableness standard to game searches gives wardens the flexibility needed to protect the environment and enforce the law. The reasonableness standard should not, however, become a talisman, enabling wardens to circumvent individual constitutional rights. States should take care to define wardens' search powers so as to give the wardens needed flexibility in law enforcement with minimal intrusion into the privacy interests of individuals. Standards for game searches should encompass the following points.

1. Enforcing Nongame Law

Wardens must be able to enforce nongame law. Protection of the environment requires enforcement of all law. Further, many of the areas patrolled by game wardens need general law enforcement officers.[215] In enforcing nongame law, however, wardens should be subject to the same limitations as other peace officers. The rationale for expanded warden

212. *Id.* The Burger Court reads this exception more broadly than the Warren Court. In *Terry,* for instance, the purpose of the search was to discover weapons. Accordingly, the scope of the search was limited to a pat down of the outer garments. *Terry,* 392 U.S. at 30. Although the *Terry* approach suggests that the game search should be limited to discovery of game law violations, the *T.L.O.* approach does not imply such a limitation.

213. *See* NARCOTICS REPORT, *supra* note 8, at 16.

214. *Id.* at 13. *See supra* notes 27, 170 and accompanying text.

215. *See supra* note 213 and accompanying text.

search power is the state interest in environmental protection. Since policing nongame law advances that interest indirectly, there is less justification for using these expanded inspection powers in nongame contexts.

Wardens should apply these powers only to searches of hunters, fishermen, and those whom they genuinely and reasonably suspect of game violations; they should not be able to use these powers to conduct searches for evidence of nongame violations. Where wardens suspect criminal violations, they must conduct any investigation under the traditional, more stringent Fourth Amendment standards. To permit unrestrained use of the wardens' inspection powers in nongame situations is to invite abuse. Wardens might otherwise be tempted to use an alleged game violation as a pretext for an otherwise unlawful search for evidence of more traditional criminal violations.

2. *Licensing*

Fish and game laws should require that those engaged in hunting or fishing be licensed. This requirement is neither burdensome nor novel; fish and game licensing is a longstanding practice.[216] The licensing process gives sportsmen notice of state regulation and the likelihood of inspection. Thus, while engaging in hunting or fishing, the sportsman should expect some privacy infringement.

3. *License Inspection*

Wardens need the power to stop any hunter or fisherman at random. Wardens should be authorized to examine licenses and to conduct a limited game inspection. Like the officials in *Villamonte-Marquez,*[217] wardens need this ability because it is not readily apparent whether hunters or fishermen are licensed. It is only the hunter or fisherman who should be subject to this requirement, not people who are simply out to enjoy the wilderness. Hunters and fishermen have more limited privacy expectations, not only because they have surrendered some of their privacy expectations by obtaining licenses,[218] but also because they are engaged in the "high privilege" of hunting or fishing.[219] Furthermore, hunters and fishermen are readily identifiable by the equipment they carry.

216. *Betchart,* 158 Cal. App. 3d at 1110, 205 Cal. Rptr. at 138.

217. 462 U.S. at 579. *See supra* notes 155-156, 179-181 and accompanying text.

218. *See supra* note 176 and accompanying text.

219. United States v. Greenhead, Inc., 256 F. Supp. 890, 893 (N.D. Cal. 1966).

4. Inspection on Reasonable Belief

As in *United States v. Cortez,*[220] wardens should be able to conduct a limited game "stop" without the necessity of demonstrating probable cause. Wardens should be able to stop anyone, not only hunters and fishermen, if they reasonably believe that the suspect has committed a game violation. They should be able to conduct limited game inspections if they reasonably believe they will uncover evidence of a game violation. As in *Cortez,* wardens should show some objective grounds to justify their suspicions. Although this ability would intrude somewhat on individual privacy interests, it is an important tool for environmental protection. The gravity of the threat of environmental abuse and the difficulty of game law enforcement weigh in favor of this standard.

5. Limited Scope of the Initial Game Inspection

The initial game inspection must be limited in scope. It must be designed to uncover evidence of game violations. For the initial inspection, wardens should be allowed to search anything likely to contain fish or game: game bags, sacks, buckets, ice chests, vehicle trunks, and the like. They should not be allowed to inspect areas unlikely to hold evidence of game violations, for example, glove compartments, clothing, or handbags, without showing probable cause. Limiting the areas searched in an initial game inspection ensures that these inspections will meet the *T.L.O.* requirement that warrantless searches be reasonably related in scope to the circumstances which justify the inquiry.[221]

6. Expanding the Game Inspection

Wardens should be able to expand their limited game inspections to full searches under some conditions. If, during the course of a limited game inspection, a warden discovers evidence which gives her probable cause to believe that a criminal or game-related violation has occurred, she will be justified in expanding her search. The search would not violate individual rights because it meets the Fourth Amendment requirement of probable cause.[222]

220. 449 U.S. 411 (1981). *See supra* notes 192-195 and accompanying text.

221. *T.L.O.,* 105 S. Ct. at 744.

222. *See* Texas v. Brown, 460 U.S. 730 (1983) (plurality opinion); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1970). *See supra* notes 128-134 and accompanying text (discussing plain view doctrine).

Conclusion

Because of their dual roles as policemen and administrators, fish and game wardens have extensive warrantless search powers. These expansive search powers favor the interests of the state over the interests of the individual. Game searches subordinate the individual's right of privacy to the interests of wilderness preservation. This is not as intrusive as it may seem. The wilderness affords the solitude in which privacy thrives. Abuse of the wilderness threatens its very existence. Game searches are designed to curb this abuse. The game warden's powers permit limited encroachment on a particular privacy interest to protect the greater privacy interests afforded by nature herself.

Nature, however, is not alone in being subject to abuse. A game warden's search power is an important and powerful tool in the struggle to protect the environment, but like all tools it is subject to abuse. There is a danger that game searches will be used as pretexts for otherwise impermissible investigations of nongame crimes. The *T.L.O.* reasonableness standard, if applied to game wardens, would give wardens necessary flexibility in protecting the environment, while simultaneously limiting their authority in other contexts. If the states are to make use of the reasonableness standard, they must define the warden's search powers to maximize search efficiency while minimizing the potential for abuse.

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