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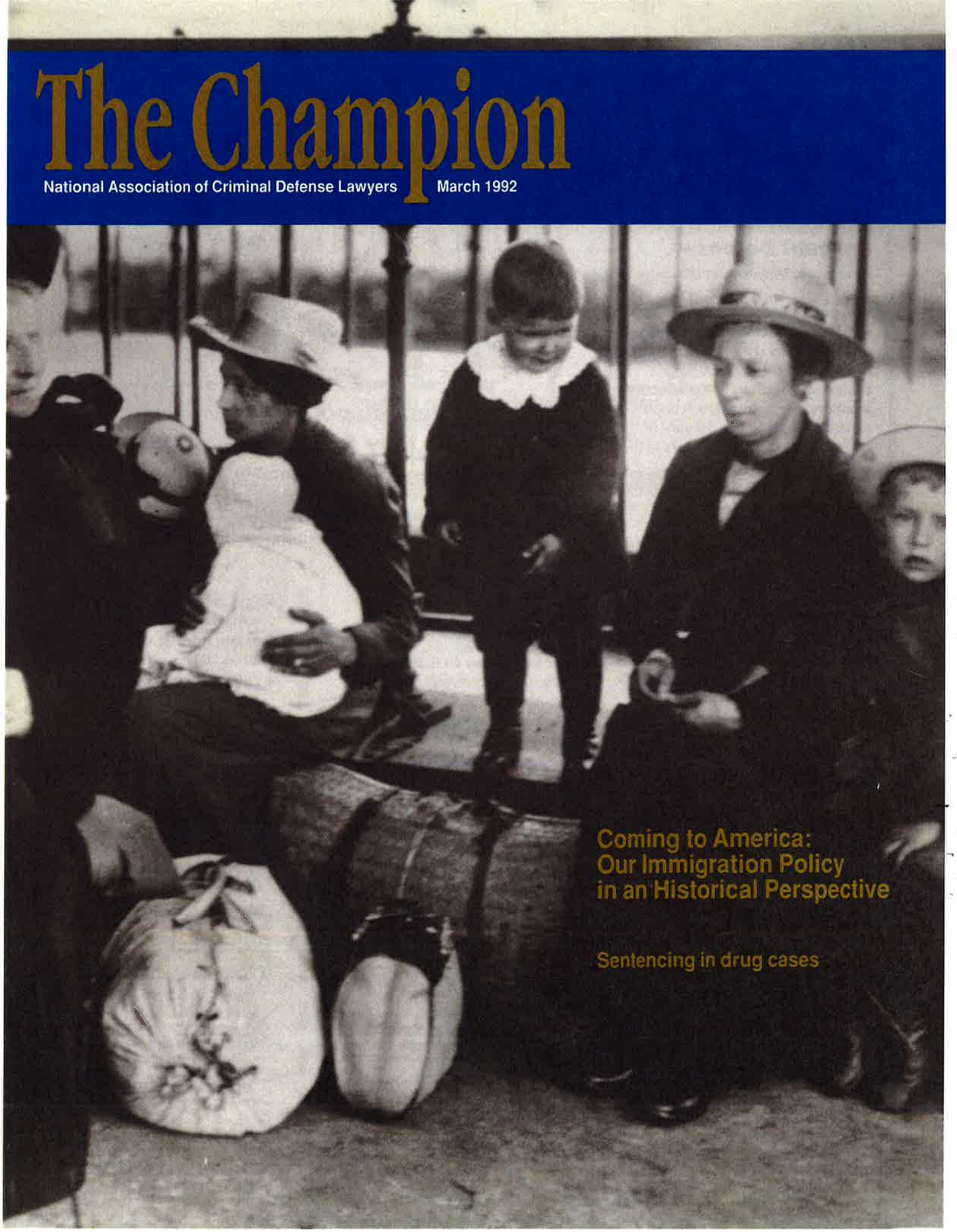

Coming to America: Our Immigration Policy in an Historical Perspective

Sentencing in drug cases

Is A Man's Cardboard Box His Castle?

By Howard M. Srebnick and Scott A. Srebnick

Twenty-five years ago, the Supreme Court expressly rejected the idea that the scope of Fourth Amendment protection afforded a person in a particular place depends solely on the property rights or interests that the person can assert in that area. Rather, the Court held in *Katz v. United States*[2] that a person can claim Fourth Amendment protection from a search so long as he can assert a reasonable and legitimate expectation of privacy in the particular physical space being searched. The person need not be the lawful owner of the physical space for his or her expectation of privacy to be both legitimate and reasonable.

> *Give me your tired, your poor,*
> *Your huddled masses*
> *yearning to breathe free*
> *The wretched refuse*
> *of your teeming shore,*
> *Send these, the homeless,*
> *tempest-tossed, to me:*
> *I lift my lamp beside*
> *the golden door.*[1]

Relying on the oft-repeated principle that the Fourth Amendment "protects people, not places," courts since *Katz* have extended the protection of the Fourth Amendment to searches of a person's business premises[3] and his desk and file cabinets at work[4] even if in a government office. Protection also extends to a person in his fraternity residence,[5] to an overnight guest at a friend's apartment,[6] and to a hotel guest[7] unless, of course, the rental period has lapsed.[8] The interception of oral communications by electronic eavesdropping is subject to the strictures of the Fourth Amendment.[9] A sealed package entrusted to a private parcel service is also protected by the Fourth Amendment.[10]

Plainly, the property rights asserted in the area or place being searched is but one relevant factor in assessing whether Fourth Amendment protection extends to that area.[11] The guiding principle underlying the courts' decisions in this arena is the reasonableness of the expectation of privacy that the person has in the area or item being searched. Against this impressive backdrop of cases rejecting property rights as the sole linchpin of Fourth Amendment analysis, an interesting controversy has emerged.

The particular controversy concerns the Fourth Amendment rights of homeless people who have established for themselves makeshift homes in secluded areas under bridges and highway overpasses, and who have placed their belongings in these areas. The relevant legal issue is whether the courts should treat a homeless person's expectation of privacy in such a public area as reasonable.

In *State v. Mooney*,[12] the Connecticut Supreme Court was faced with this very question. In *Mooney*, the defendant was arrested in connection with a drug-related murder and robbery, and was subsequently convicted after the trial court denied his motion to suppress evidence that was obtained from his closed duffel bag and cardboard box. The police had searched those items, without a warrant, after they found them in a bridge abutment located underneath a highway overpass by an entrance ramp to route I-91 in New Haven, Connecticut. The police had been directed to the area by the defendant's girlfriend.

The bridge abutment was separated from the entrance ramp roadway by a steep embankment that was covered by crushed stone and heavy underbrush. In this area, the defendant kept a suitcase, a sleeping bag, a blanket which he used as a mattress, and a small closed duffel bag. In addition, the defendant used the metal and cement beams of the highway support structure as shelves, on which he placed much of his belongings.

The defendant had been living in this area for one month. Each day, he would secure his belongings so that they could not be seen from the bottom of the embankment. At night, he slept there behind a bush. The defendant was aware that the property involved was owned by the state department of transportation.

On appeal, the Connecticut Supreme Court reversed the trial court's denial of the motion to suppress, holding that the homeless defendant had a reasonable expectation of privacy in the duffel bag

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and closed cardboard box which were searched without a warrant. In so doing, however, the court did not decide whether the defendant had a reasonable expectation of privacy in the bridge abutment area, but rather, assumed for purposes of its decision that the defendant's "broad claim of Fourth Amendment protection in the area involved must fail."[13]

Should the protection of the Fourth Amendment extend to a clearly delineated public area which a homeless person calls his home? That question, under Fourth Amendment jurisprudence since *Katz,* necessarily turns on the second prong of the *Katz* test—whether society is prepared to recognize as reasonable a homeless person's expectation of privacy in a makeshift home which is freely accessible to the public.[14]

Property Rights

A homeless person's expectation of privacy in an area which, by law, is freely accessible to the public does not seem reasonable primarily because the homeless person may not assert any property rights in the area. Clearly, this public land may not be used for other private activities traditionally associated with the home—such as having sex or taking a shower. Equally important, the homeless person does not have the right to exclude any member of the public from his "home." Given these factors, what legal argument could possibly justify the recognition of a homeless person's expectation of privacy in his "home" established in a public area as reasonable?

The doctrinal argument necessarily finds its roots in the various cases, since *Katz,* that have applied the "people, not places" principle, and seems most persuasive if made by negative implication. Specifically, it is difficult to articulate a coherent principle by which to distinguish the homeless person's expectation of privacy in this "area" from other expectations already recognized by the courts as reasonable. The controlling principle certainly cannot be the notion that Fourth Amendment protection depends on the person's "right to exclude others" since a hotel guest or an overnight guest at a friend's home are entitled to Fourth Amendment protection despite the fact that the host retains the right to enter at any time.[15]

Nor can it turn solely on whether the area is accessible to other members of the public including "children, scavengers, [and] snoops."[16] For if that were the governing principle, then no one could expect any privacy while placing a phone call in a public phone booth, *(Katz),* while using a public restroom,[17] while camping in a national park,[18] or while spending the night in a homeless shelter.

Similarly, Fourth Amendment protection for the homeless person's "area" cannot be denied simply because the area is not enclosed by a traditional house structure consisting of four walls and a roof since even oral communications in a phone booth are protected by the Fourth Amendment.[19] Nevertheless, in *United States v. Ruckman,*[20] the Tenth Circuit rejected as irrelevant the comparison between the "telephone booth" and "public restroom"[21] searches and the search of a "home" on public land.

In *Ruckman,* the defendant had lived in a cave located in a remote area in Utah, on land owned by the United States. The defendant had constructed a wall and door to the cave with wooden boards and other material, and had installed the rudimentary comforts of home, including a bed, camp stove, and lantern.[22] Moreover, the cave was the defendant's sole living quarters. In upholding the denial of defendant's motion to suppress antipersonnel booby traps that were found in the cave, the Tenth Circuit held that this cave did not come within the ambit of the Fourth Amendment's protection. The court reasoned that where the defendant "had no legal right to occupy the land and build structures on it, those *faits accomplis* could give rise to no reasonable expectation of privacy even if the plaintiffs did own the resulting structures."[23]

The dissent, on the other hand, wrote that while the government certainly has recourse to remove the defendant, that fact does not mean that his expectation of privacy was not reasonable. That is, the defendant may not have been entitled to live in the cave; but because he took normal precautions to maintain his privacy, it was perfectly legitimate for him to expect to be free from a warrantless search of the dwelling in which he lived for eight months.[24] The dissent wrote that it was worrisome that the determination of whether the defendant had a legitimate expectation of privacy in his dwelling hinged on whether or not he was a "trespasser" on government land.

Commonwealth v. Peterson[25] involved the search of a structure known as an "abandominium," an abandoned, decrepit building often used to facilitate drug deals. Following a drug exchange, the police gained entry by breaking down a door which was secured by heavy bolts and braced from the inside. Inside, there was a makeshift bed, but no toilet facilities (there was a five gallon bucket containing human waste). The police found the defendant in a bed with a woman.

The Pennsylvania Superior Court affirmed the denial of the defendant's motion to suppress, but two of the three judges concluded that the defendant maintained a legitimate expectation of privacy in the premises. Judge Beck, however, found that the defendant did not have an expectation of privacy in the area because the premises were barely habitable. Judge Beck wrote that "it would demean the 'sanctity of the home' to find that an individual [had] a legitimate expectation of privacy in this structure."[26]

According to Judge Beck, the premises did not function as the citizen's home, and therefore, the defendant could not harbor an objectively reasonable expectation of privacy in it. Judge Popovich, in a dissenting opinion, quarreled with this conclusion, stating that "the quality of one's living quarters has nothing to do with one's right of privacy."[27] Judge Hoffman, in an opinion concurring in the result, agreed with the dissenting opinion of Judge Popovich insofar as it concluded that the defendant had a reasonable expectation of privacy in the premises; like Judge Beck, however, Judge Hoffman concluded that exigent circumstances excused the warrant requirement.

Peterson is important not for its result (it affirmed the denial of a motion to suppress), but for the proposition that a citizen can maintain a legitimate expectation of privacy in a structure serving as a home, even though the citizen has no possessory rights, no right to use the premises, and no right to exclude others. Moreover, Peterson reaffirms that a home need not conform to the traditional middle/upper class notion of a residence. The presence or absence of "essential" housewares is not dispositive.

Finding A Coherent Principle

Except for the gut feeling that the homeless person's expectation of privacy is not reasonable, why, in principle, is this

expectation any less reasonable than a hotel guest's or a person conversing in a public phone booth? Stated plainly, there is no distinguishing principle. The question of reasonableness is one of degree, and it simply seems inconceivable and impractical to recognize, as reasonable, a homeless person's expectation of privacy in an area owned by, and freely accessible to, the public.

To refuse to recognize such an expectation of privacy as reasonable now, however, is to suggest that homeless persons can never have a reasonable expectation of privacy in their living areas. To be sure, the more prevalent the homeless problem becomes, the less willing society will be to treat the expectation as reasonable because of the fear that such recognition might foreclose many public areas from warrantless police supervision and patrol and thereby limit the ability of police officers to effectively safeguard the streets from crime. Thus, the homeless are in a Catch-22 situation—as the homeless problem increases and society's sensitivities likewise grow, the less likely that society will view this expectation of privacy as reasonable because of the fear of "losing the streets" to the homeless.

Perhaps this need for supervision and patrol (traditional caretaking functions) should inform the question of whether the search is reasonable, not whether the expectation of privacy is reasonable.[28] In other words, we might be prepared to acknowledge as legitimate a homeless person's expectation of privacy in the area which he maintains as his residence yet find that the societal interest in allowing police to enter, and even search, public areas renders a warrantless search reasonable and therefore permissible under the Fourth Amendment. Akin to the inventory search exception to the warrant requirement,[29] the warrantless search of a homeless person's "home" for traditional caretaking purposes might be deemed a reasonable search, but a search nonetheless.

Of course, the search "must not be a ruse for a general rummaging in order to discover incriminating evidence."[30] Any search of this nature, to be consistent with the inventory exception principles, would have to be designed to allow the officers to patrol public areas and to collect for preservation items and belongings which might otherwise appear abandoned, but not to allow "so much latitude that [these] searches are turned into a 'purposeful and general means of discovering evidence of crime.'"[31] The intent of the officers on the question of the reasonableness of the search would be critical.

Or perhaps the controlling principle should depend on whether the expectation of privacy is asserted in public or private space, and whether the person is occupying that space. Where private property is concerned, the expectation of privacy transcends the citizen's presence. To be sure, the Fourth Amendment protects a citizen's "house" even when the citizen is not there. But in public places, the expectation of privacy may extend only to the personal space that the individual physically occupies. One cannot stake out a public area and assert an expectation of privacy in absentia. One's expectation of privacy in a phone booth, public bathroom, and in a public park, leaves with him.

To the extent that the individual is occupying the area, however, he enjoys an expectation of privacy, at least for that moment. But as the dissent in *Ruckman* observed, this does not mean that a citizen is entitled to live in that area:

> It does not mean that the government has no recourse to remove him; the government is free to prosecute him for any laws he may have violated. It simply means that the government may not search his dwelling without a search warrant as prescribed by the Fourth Amendment, or without sufficient justification excusing the warrant.[32]

Of course, such a rule might invite pretextual arrests for "loitering" or "trespass" for the sole purpose of effectuating a full scale search of the area. The courts can deal with those cases as they arise. ■

Notes

1. Emma Lazarus, The New Colossus: Inscription for the Statue of Liberty, New York Harbor.
2. 389 U.S. 347 (1967).
3. *Dow Chemical Co. v. U.S.*, 106 S.Ct. 1819 (1986); *U.S. v. Driver*, 776 F.2d 807 (9th Cir. 1985).
4. *O'Connor v. Ortega*, 480 U.S. 709 (1987).
5. *Reardon v. Wroan*, 811 F.2d 1025 (7th Cir. 1987).
6. *Minnesota v. Olson*, 110 S.Ct. 1684 (1990).
7. *U.S. v. Halliman*, 923 F.2d. 873 (D.C. Cir. 1991); *U.S. v. Forker*, 928 F.2d. 365 (11th Cir. 1991).
8. *U.S. v. Blankenship*, 923 F.2d 1110 (5th Cir. 1991); *U.S. v. Rahme*, 813 F.2d. 31 (2nd Cir. 1987).
9. *Katz v. United States*, 389 U.S. 347 (1967); *U.S. v. Ford*, 553 F.2d 146 (D.C. Cir. 1977).
10. *U.S. v. LaFrance*, 879 F.2d 1 (1st Cir. 1989).
11. *Minnesota v. Olson*, 110 S.Ct. 1684 (1990); *U.S. v. Rahme*, 813 F.2d 31 (2nd Cir. 1987).
12. 588 A.2d 145 (Conn. 1991).
13. *Id.* at 152.
14. This article assumes, safely we believe, that the first prong of the test—whether the homeless person manifests a subjective expectation of privacy in the area and in the items—can be easily met.
15. *See* notes 4-6, *supra*.
16. *Mooney*, 588 A.2d 153 (quoting *California v. Greenwood*, 108 S.Ct. 1625, 1628-29 (1988)).
17. *See People v. Triggs*, 506 P. 2d 232 (Nev. 1973).
18. *See United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (McKay, J. dissenting).
19. *See* note 9, *supra*.
20. 806 F.2d 1471 (10th Cir. 1986).
21. *See People v. Triggs*, 506 P.2d 232 (Nev. 1973).
22. *Ruckman*, 806 F.2d at 1475.
23. *Id.* at 1474 (quoting and adopting *Almezquita v. Hernandez-Colon*, 518 F.2d 8, 12 (1st Cir. 1975)).
24. *Id.* at 1478 (McKay, J. dissenting).
25. 596 A.2d 172 (Pa. Super. Ct. 1991).
26. *Id.* at 178 n.11.
27. *Id.* at 184.
28. *Mooney*, 588 A.2d at 174.
29. *See South Dakota v. Opperman*, 96 S.Ct. 3092 (1976); *Florida v. Wells*, 110 S.Ct. 1632 (1990).
30. *Wells*, 110 S.Ct. at 1635.
31. *Id.* (citation omitted).
32. *Ruckman*, 806 F.2d at 1478 (McKay, J. dissenting).