Notes

WARRANTLESS SEARCHES IN LIGHT OF *CHIMEL*: A RETURN TO THE ORIGINAL UNDERSTANDING

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In recent years, the substantive law governing warrantless searches under the fourth amendment has been the subject of intense Supreme Court consideration and has resulted in several striking reversals.[1] Moreover, this is an area which has witnessed the development of conflicting precedents, with only meager attempts having been made at reconciliation.[2] *Chimel v. California*,[3] the Warren Court's final edict on searches and seizures, has clarified this area of the law which had been in a continuing state of flux and, in doing so, reaffirmed the individual's "right to be left alone,"[4] at the expense of limiting police investigative practices.

The expansiveness of the searches previously sanctioned by the Court can be demonstrated by reference to two recent decisions. In 1967, the Court, in *Warden v. Hayden*,[5] repudiated the "mere evidence rule"[6]

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[1] Trupiano v. United States, 334 U.S. 699 (1948), was overruled by United States v. Rabinowitz, 339 U.S. 56 (1950), which was, in turn, overruled by Chimel v. California, 395 U.S. 752 (1969). Similarly, the administrative searches sanctioned in Frank v. Maryland, 359 U.S. 360 (1959), and Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (equally divided Court), lasted only eight years before the practice was overruled in Camara v. Municipal Court, 387 U.S. 523 (1967).

[2] In Marron v. United States, 275 U.S. 192, 199 (1927), the Supreme Court upheld the seizure of "bills for gas, electric light, water and telephone services" despite the prohibition of Gouled v. United States, 255 U.S. 298 (1921), which supposedly prevented the seizure of "mere evidence" of a crime. The fuzziness of the distinction between what may and may not be seized was further demonstrated in United States v. Lefkowitz, 285 U.S. 452 (1932), where the Court struck down the admission of papers similar to those admitted in *Marron* and said, "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant . . . ." *Id.* at 464.

[3] 395 U.S. 752 (1969), *noted in* 55 A.B.A.J. 987 (1969).

[4] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[5] 387 U.S. 294 (1967). *Hayden* did not deal with the seizure of private, inculpatory papers. Such a practice is, presumably, still forbidden despite the abolition of the mere evidence rule. *Compare* Boyd v. United States, 116 U.S. 616 (1886), *with* Davis v. United States, 328 U.S. 582 (1946). *See also* Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P. 1765).

[6] The "mere evidence rule" originated in Gouled v. United States, 255 U.S. 298 (1921), and would preclude the seizure of mere evidence of a crime which was not also an instrumentality or fruit of the crime or contraband to which the person searched was not legally entitled to possession.

For discussions of the mere evidence rule, see People v. Thayer, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1965); State v. Chinn, 231 Ore. 259, 373 P.2d 392 (1962). *See generally* Note, *Mere Evidence Rule: Limitations on Seizure under the Fourth Amendment*, 54 CALIF. L. REV. 2099 (1966).

which had previously limited the scope of police seizures. The Court held that the legality of a seizure depends upon the legality of the supporting search rather than the nature of the goods seized. The next year, in *Terry v. Ohio*,[7] the Court further expanded the police power of search and seizure by condoning the practice of stopping an individual with less than probable cause and frisking him for weapons.

These two cases demonstrate the extent to which police power to search without a warrant has been accepted in recent years.[8] *Chimel v. California*, however, sharply curtails the power of search incident to an arrest. Along with Mr. Justice Stewart's concurring opinion in *Stanley v. Georgia*[9] which would prohibit seizures of items not specified in warrants, it will serve to circumscribe police searches and, thus, reestablish the protection from exploratory searches previously afforded by doctrines such as the mere evidence rule.[10]

Although *Chimel* deals with a relatively narrow factual and legal situation, it will undoubtedly have a significant impact on all searches which are not supported by valid search warrants. Indeed, the Court seemed intent upon giving *Chimel* this broad impact by refusing an opportunity to distinguish it from contrary decisions and, instead, overruled them outright.[11] In *Chimel*, petitioner was arrested at his home for burglary and, incident to this arrest, but without the benefit of a search warrant, the police conducted an extensive search of "the entire three-bedroom house, including the attic, the garage, and a small workshop."[12] Several stolen coins were discovered which were later admitted into evidence to obtain the petitioner's conviction for burglary.

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[7] 392 U.S. 1 (1968). *See* Note, *The Limits of Stop and Frisk—Questions Unanswered by Terry*, 10 ARIZ. L. REV. 419 (1968).

[8] The Supreme Court of Arizona has gone so far as to construe *Terry* to allow a two-hour interrogation of a suspect at a police station. State v. Miranda, 104 Ariz. 174, 450 P.2d 364, *cert. denied*, 90 S. Ct. 140 (1969), *aff'g after remand* 384 U.S. 436 (1966). This decision by the court is criticized in *The Arizona Supreme Court 1968-69*, 11 ARIZ. L. REV. 61, 85 (1969).

[9] 394 U.S. 557, 569 (1969). In reaching this conclusion, Justice Stewart considered an *obiter dicta* from Marron v. United States, 275 U.S. 192, 196 (1927), to be the "controlling constitutional principle":

> 'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' 394 U.S. at 571.

The highly significant first amendment issues raised by Mr. Justice Marshall's majority opinion in *Stanley* will be the subject of detailed analysis in a future issue of the *Arizona Law Review*.

[10] Indeed, the Court of Appeals of New Mexico has reached such a result in State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), *cert. denied*, — N.M. —, 461 P.2d 229 (1969), by excluding evidence seized pursuant to a search supported by a valid search warrant when the evidence seized was not specified in the warrant. The court relied primarily upon Justice Stewart's opinions in *Chimel* and *Stanley* in reaching its conclusion.

[11] 395 U.S. at 766-68.

[12] *Id.* at 754.

Mr. Justice Stewart, speaking for the Court, reversed the convicton, holding that a search incident to an arrest must be limited to the area within the arrestee's immediate control, "construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[13] Justice Stewart, rejecting the notion of control which had supported earlier contrary decisions,[14] based his conclusion upon a reevaluation of the justifications for a search incident to an arrest,[15] and consequently overruled two decisions which had allowed searches of an entire room[16] and a four-room apartment.[17]

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[13] *Id.* at 763.

[14] Earlier decisions had adopted a notion of control which was better suited to property law. Consequently, searches incident to arrest were allowed for those areas under the *constructive control* of the arrestee. For an early expression of this broad notion of possession, see Banks v. Farwell, 38 Mass. (21 Pick.) 156 (1839). *See also* Abel v. United States, 362 U.S. 217 (1960); Marron v. United States, 275 U.S. 192 (1927). *But see* James v. Louisiana, 382 U.S. 36 (1965); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925).

[15] The earlier, more general justification for allowing a search incident to an arrest was stated in Agnello v. United States, 269 U.S. 20, 30 (1925):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

In *Chimel*, Justice Stewart used a narrower justification for the search incident to an arrest and consequently limited the permissible scope of such a search.

> When an arrest is made, it is reasonable for the arresting officer to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person *in order to prevent its concealment or destruction.* 395 U.S. at 762-63. (emphasis added).

[16] United States v. Rabinowitz, 339 U.S. 56 (1950) (business office). Interestingly, Justice Stewart referred to the case of Abel v. United States, 362 U.S. 217 (1960), wherein a search of the defendant's hotel room was upheld, *inter alia*, as being incident to an arrest. 395 U.S. at 768 n.15. Because one of the seizures in *Abel* followed an attempt by the defendant to destroy evidence, Justice Stewart apparently felt that that case was consistent with the *Chimel* holding and did not need to be overruled. *But see* Brewer v. State, — Miss. —, 228 So. 2d 582 (1969), where, in light of *Chimel*, the court nonetheless upheld the search of an entire room, relying upon *Rabinowitz*.

[17] Harris v. United States, 331 U.S. 145 (1947).

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THE FOURTH AMENDMENT IN HISTORICAL PERSPECTIVE

A complete understanding of the impact of *Chimel* requires an investigation into the antecedent fourth amendment law of searches and seizures. While an historical interpretation of this amendment may be laden with pitfalls,[18] it should nonetheless prove valuable to review the background against which James Madison penned the fourth amendment in order to understand the specific evils which it was designed to remedy. Consequently, the English practices of general warrants and writs of assistance will first be examined in order to define the fourth amendment's proscription of "unreasonable searches and seizures."[19]

[18] For an example of the limitations which may be imposed when an historical analysis of the fourth amendment is narrowly used, see Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting). Justice Frankfurter, on the other hand, used this historical approach to obtain a more expansive interpretation of this amendment. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting). *See also* Handler, *The Fourth Amendment, Federalism, and Mr. Justice Frankfurter*, 8 SYRACUSE L. REV. 166 (1957). For a refutation of the historical approach as a means of limiting fourth amendment guarantees, see Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

[19] The sometimes inconsistent opinions of the Court with regard to searches and seizures can perhaps be traced to the fact that the fourth amendment is couched in terms of reasonableness as opposed to the more absolute strictures of the first or

I. BRITISH ANTECEDENTS TO THE FOURTH AMENDMENT

Like other aberrations in our criminal law, the practice of general warrants can be traced back to the infamous Star Chamber,[20] the first of several special courts established by the Tudors[21] for the purpose of suppressing the press and political dissent.[22] The Star Chamber "was concerned mainly with sedition, particularly with actions for seditious libel against authors and printers."[23] "[F]rom this jurisdiction [it] presently usurped a general superintendence over the press, and exercised a legislative power in all matters relating to the subject. They . . . among other things enacted this [general] warrant of search."[24]

The general warrants utilized by the Star Chamber were issued without the normal judicial restraints and allowed government officials to arrest indiscriminately and to ransack a man's home in search of papers which would form the basis of a prosecution for criminal libel. No showing of probable cause was required, nor was there a need for specificity in describing who or what was to be searched. "[A] discretionary power [was] given to messengers to search wherever their suspicions may chance to fall."[25] Abuse of its broad powers led Parliament to abolish the Star Chamber in 1640,[26] and with its demise England was spared the intrusions of the general warrants for a short time.

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fifth amendments. "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test." United States v. Rabinowitz, 339 U.S. 56, 63 (1950).

Quite understandably, the justices of the Court have differed over the limits of reasonableness. *Compare* McDonald v. United States, 335 U.S. 451 (1948) (forcible entry through window without notice of purpose held unreasonable), *with* Ker v. California, 374 U.S. 23 (1963) (clandestine entry with passkey upheld as reasonable).

The Arizona courts have frequently relied upon ex post facto determinations of reasonableness and, in doing so, have evidenced something less than a convincing regard for the constitutional protections extended to arrestees. *See, e.g.*, State v. Cofhlin, 3 Ariz. App. 182, 412 P.2d 864 (1966); State v. Taylor, 2 Ariz. App. 314, 408 P.2d 418 (1965), *reaffirmed* 3 Ariz. App. 157, 412 P.2d 726 (1966).

[20] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 458-60 (1966) (Warren, C.J.) (antecedents of compulsory self-incrimination in the Star Chamber); Brown v. Walker, 161 U.S. 591, 596-97 (1896); E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 77-82 (1957).

[21] W. HALL, R. ALBION & J. POPE, A HISTORY OF ENGLAND AND THE EMPIRE COMMONWEALTH 166 (1961).

[22] *See* Entick v. Carrington, 19 How. St. Tr. 1029, 1069 (C.P. 1765). It is interesting to note that the law of search and seizure and freedom of the press are still intimately interrelated. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Stanford v. Texas, 379 U.S. 476 (1965); Mapp v. Ohio, 367 U.S. 643 (1961).

See also Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 485-86 (1964), for an argument that search for and seizure of printed political material constitutes a prior restraint on free speech within the context of Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[23] D. FELLMAN, THE DEFENDANT'S RIGHTS UNDER ENGLISH LAW 52 (1966).

[24] Entick v. Carrington, 19 How. St. Tr. 1029, 1069 (C.P. 1765).

[25] Wilkes v. Wood, 19 How. St. Tr. 1153, 1167 (C.P. 1763).

[26] The Habeas Corpus Act of 1640, 16 Car. 1, c. 10, § 2:

> [T]he Court commonly called the *Star-chamber* . . . [has] by Experience been found to be an intolerable Burthen to the Subjects, and the Means to

The relief from broad exploratory searches carried on beyond the scrutiny of the judiciary was short lived, however, and within a few years the King's messengers were once again empowered to conduct unrestrained searches for supposedly seditious material.[27] The Licensing Act of 1662[28] further aggravated the situation as Parliament, for the first time, granted administrative officials the power to issue search warrants without antecedent judicial restraint in order to suppress unlicensed books which contained "matters . . . contrary to the Doctrine or Discipline of the Church of *England*, or against the State and Government."[29]

In the same year, Parliament expanded the scope of permissible searches which could be based upon administrative action by authorizing, in the Navigation Act of 1662,[30] the writ of assistance for use in enforcing customs laws. This act permitted an official to

> go into any House, Shop, Cellar, Warehouse, or Room . . . and in case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandise whatsoever, prohibited and uncustomed.[31]

While the writs of assistance, unlike the general warrants, were issued originally by the courts, in their actual use they were totally lacking in any degree of judicial supervision. There was no requirement for a showing of probable cause before a given search might be initiated, nor was there any limitation on the scope of what might be searched.[32] The person to whom the writ was granted was empowered with virtually unlimited discretion to search for smuggled goods.[33] Moreover, the writ, once

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introduce an arbitrary Power and Government . . . by which great and manifold Mischiefs and Inconveniences have arisen and happened.

[27] Entick v. Carrington, 19 How. St. Tr. 1029, 1069 (C.P. 1765):

> After that court was abolished, the press became free, but enjoyed its liberty not above two or three years; for the Long Parliament thought fit to restrain it again by ordinance. . . . This parliament, therefore, did by ordinance restore the Star-Chamber practice; they recalled the licences, and sent forth again the messenger. It was against the ordinance that Milton wrote that famous pamphlet called Aroepagitica [sic].

Milton characterized the act as "a servitude like that imposed by the Philistines" and went on to condemn the licensing provisions as unneeded and unwanted infringements upon the freedom of thought and belief. Milton, *Areopagitica* in 1 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1 (Student ed. 1967).

[28] 13 & 14 Car. 2, c. 33.

[29] *Id.* § 15.

[30] 13 & 14 Car. 2, c. 11. *See also* 13 & 14 Car. 2, c. 10, § 3 (1662), which authorized revenue officials to enter houses in the daytime without warrants in order to collect a tax known as "hearth money." This tax was personally abolished by King William after the Glorious Revolution of 1688. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, in 55 THE JOHN HOPKINS STUDIES IN HISTORICAL AND POLITICAL SCIENCE (Part 2) 1, 39-40 (1937).

[31] 13 & 14 Car. 2, c. 11, § 5 (1662).

[32] Justice Horace Gray, writing in an appendix to *Quincy's Massachusetts Reports (1761-1772)* [hereinafter cited as Quincy], has provided an excellent analysis of the early use of the writs of assistance. Quincy, app. I, at 397 *et seq.*

[33] The degree of discretion allowed under these writs is demonstrated by a writ

issued, did not expire until six months after the death of the sovereign.[34] Quite surprisingly, this practice is extant in the Commonwealth today with no substantial changes.[35]

Parliamentary sanction of the issuance of general warrants finally expired during the Glorious Revolution,[36] although the practice apparently continued for some time through the sheer force of administrative inertia.[37] It remained for a series of decisions between 1763 and 1765 to put the general warrant to rest. Prompted by these cases, Parliament, in 1766, declared the general warrant to be illegal.[38]

The first of these cases to come before the courts involved the irreverent radical John Wilkes.[39] Wilkes rose from humble origins to be elected to Parliament from Aylesbury in 1757. The conventional values of the times left him unimpressed and in 1762, in response to Tobias Smollett's journal, *The Briton*, Wilkes and Charles Churchill began the publication of a weekly journal, *The North Briton*, which contained a series of virulent satirical attacks upon the Crown and the government of Lord Bute.

The antagonism between Wilkes and Lord Bute's administration fin-

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which issued to a Commissioner of Customs which allowed him "in the day time to enter and go into the Houses Shops Cellars Warehouses Rooms and other places where any Goods Wares or Merchandizes lye concealed *or are suspected to be concealed* which are prohibited or for which the Duties of Customs . . . [have not been] duly paid." *Id.* at 399-400 n.11 (emphasis added).

[34] Lasson, *supra* note 30, at 57.

[35] For a discussion of the contemporary use of writs of assistance in Canada, see Parker, *The Extraordinary Power to Search and Seize and the Writ of Assistance*, 1 U.B.C.L. REV. 688 (1963); Trasewick, *Search Warrants and Writs of Assistance*, 5 CRIM. L.Q. 341 (1962).

[36] *See* Lasson, *supra* note 30, at 38.

[37] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 679 (1858):

> [A] practice had obtained in the secretaries' office ever since the restoration, (grounded on some clauses in the acts for regulating the press,) of issuing general warrants to take up, without naming any persons in particular, the authors, printers, and publishers of such obscene, or seditious libels, as were particularly specified in the warrant. When these acts expired, in 1694, the same practice was continued in every reign, and under every administration, except the last four years of Queen Anne's reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming or describing any person in special.

See also, Entick v. Carrington, 19 How. St. Tr. 1029, 1038, 1069-70 (C.P. 1765) where the jury found, by special verdict, that the practice of general warrants had been followed after the Restoration. Lord Chief Justice Camden, however, questioned the validity of this finding.

[38] *See* Boyd v. United States, 116 U.S. 616, 625 (1886). The parliamentary disapproval was limited to those cases wherein it had not specifically approved the use of general warrants.

[39] The better biographies of Wilkes include R. POSTGATE, THAT DEVIL WILKES (1929); G. RUDE, WILKES AND LIBERTY (1962); W. TRELOAR, WILKES AND THE CITY (1917); J. WATSON, BIOGRAPHIES OF JOHN WILKES AND WILLIAM COBBETT (1870). *See also* 1 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 612-15 n.1 (8th ed. 1927) and authorities collected therein; 10 W. DURANT & A. DURANT, THE STORY OF CIVILIZATION 701-08 (1967); W. HALL, *et al.*, *supra* note 21, at 318-19; Lasson, *supra* note 30, at 43-50.

ally came to a head following the Peace of Paris in 1763. On April 19, 1763, John Stuart Bute delivered a speech to Parliament in an attempt to explain England's signing of a separate peace with France. In *The North Briton* No. 45, published on April 23, Wilkes condemned this treaty and the speech supporting it as "the most abandoned instance of ministerial effrontery ever attempted . . . on mankind."[40] King George became so incensed at Wilkes' attack that he ordered Lord Halifax, Secretary of State and Privy Counselor, to issue a general warrant for the persons who were responsible for the publication.[41]

A series of 49 arrests and searches were made over a period of three days under the authority of this general warrant.[42] Among those arrested were Wilkes and Dryden Leach, the printer of earlier editions of *The North Briton*.[43] Both Wilkes and Leach promptly brought civil actions for damages against the arresting officer.[44] Leach recovered a judgment for false

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40 Quoted in W. DURANT & A. DURANT, *supra* note 39, at 702.

41 The text of the warrant is set out in The Case of John Wilkes, 19 How. St. Tr. 981 (C.P. 1763):

> [T]hese are in his majesty's name to authorize and require you . . . to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intitled, The North Briton, N° 45, Saturday April 23, 1763, printed for G. Kearsley in Ludgate-street, London, and them, or any of them, having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premisses, and further dealt with according to law: and in due execution thereof, all . . . loving subject whom it may concern, are to be aiding and assisting to you, as there shall be occasion; and for so doing this shall be your warrant. . . .
>
> S/DUNK HALIFAX

42 "The first person that they seized . . . [was] Leech [sic] . . . though there was no grounds for suspecting him of connection with the paper except that Wilkes had been seen going into his house." J. WATSON, *supra* note 39, at 21-22. Churchill was able to escape arrest from the hands of the King's messengers through the use of a humorous subterfuge. R. POSTGATE, *supra* note 39, at 55.

43 Wilkes' claim of parliamentary immunity had been ignored by the arresting officers, although it later formed the basis for his successful petition for habeas corpus. The Case of John Wilkes, 19 How. St. Tr. 981, 989 (C.P. 1763). The extent of parliamentary immunity was, apparently, still subject to some question even though a private bill first enacted in 1512 (4 Hen. 8, c. 8 (1512)) had, in 1667, been used by the House of Commons to establish a general grant of parliamentary immunity. *See generally* Sir John Elliot, 3 How. St. Tr. 293, 314-15 (K.B. 1629).

44 The suppression of illegally obtained evidence has never been an accepted remedy in Great Britain and a civil action for damages was the only possible means of redress (*see* D. FELLMAN, *supra* note 23, at 57-58; D. KARLEN, G. SAWYER & E. WISE, ANGLO-AMERICAN CRIMINAL JUSTICE 130-31 (1967)), although the exclusionary rule was, of course, adopted in the United States by Weeks v. United States, 232 U.S. 383 (1914), and applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961). *See also* State v. Quintana, 92 Ariz. 267, 376 P.2d 130 (1962). For an early expression of the now outdated view that evidence will be admissible even though illegally obtained, see Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337-38 (1841).

Surprisingly, as recently as 1965, the Arizona Court of Appeals expressed sympathy with this view, criticizing "defenses which seek the suppression rather than the relevation [sic] of truth." The court went on to say: "The constitutional law invoked has a high purpose, to discourage encroachment upon the rights of individuals by overzealous police officers. Among its side effects, however, is the generation of vast amounts of litigation." State v. Taylor, 2 Ariz. App. 314, 320, 408 P.2d 418, 424 (1965). The same court later repudiated this view, however. State v. Taylor, 3 Ariz. App. 157, 162, 412 P.2d 726, 731 (1966).

imprisonment which was affirmed by the King's Bench although the question of the legality of the general warrant was never answered.[45] Wilkes brought a similar action in trespass against the Under Secretary of State who had supervised the search of his house and papers.[46] In this case, Lord Chief Justice Pratt instructed the jury that the general warrant was "totally subversive of the liberty of the subject,"[47] and the jury accordingly returned a verdict for Wilkes. However, the judgment entered thereon was never satisfied because Wilkes soon fled to France to escape prosecution for another satire which he had written and subsequently was declared an outlaw.[48] Nevertheless, upon returning to England, the outlawry was overturned[49] and Wilkes was reelected to Parliament where he remained until 1790.[50]

It was not until 1765, however, that general warrants were actually declared to be illegal by the Court of Common Pleas. The home of John Entick, author of "seditious papers, intitled the Monitor, or British Freeholder,"[51] was searched under the authority of a warrant issued by Lord Halifax. This warrant differed from the one used against Wilkes and Leach in that it stated the name of the person against whom it was to be executed. The warrant failed, however, to specify the items which were to be seized and it was upon this basis that the court sustained Entick's claim for damages and established the illegality of general warrants.[52]

Lord Chief Justice Camden's opinion on the illegality of the four-hour search of Entick's home has become the leading case condemning broad exploratory searches[53] and after more than two centuries still retains contemporary flavor. First denouncing the extreme degree of administrative discretion and the total absence of judicial supervision, Lord Camden proceeded to distinguish the search of Entick's home from cases wherein a search might be permissible.

> But though [the practice of general warrants] . . . cannot

[45] Leach v. Money, 19 How. St. Tr. 1002 (K.B. 1765). Dryden Leach had printed earlier issues of *The North Briton*, but he was not responsible for printing No. 45. Consequently, he was not within the class of persons who might have been arrested under the general warrant and his judgment for false imprisonment was affirmed without reaching the question of whether the warrant itself was valid.

[46] Wilkes v. Wood, 19 How. St. Tr. 1153 (C.P. 1763).

[47] *Id.* at 1167.

[48] The Case of John Wilkes, 19 How. St. Tr. 1075 (K.B. & H.L. 1763-1770).

[49] *Id.*

[50] *See* authorities cited note 39 *supra.*

[51] Entick v. Carrington, 19 How. St. Tr. 1029, 1034 (C.P. 1765).

[52] Despite the passage of more than 200 years, the issues which had apparently been settled by Lord Camden in *Entick v. Carrington* are still before our courts. *See* notes 9 & 10 and accompanying text *supra.*

[53] *Entick* has generally been regarded by the courts as an expression of the law of search and seizure which the fourth amendment was designed to incorporate. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886); Grumon v. Raymond & Betts, 1 Conn. 39 (1814); Robinson v. Richardson, 79 Mass. (13 Gray) 454 (1859); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841); Wakely v. Hart, 15 Pa. 316 (1814).

> be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.
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> I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.
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> . . . .
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> Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description. . . .
>
> On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select . . . .[54]

The different themes emerging from Lord Camden's opinion have formed much of the basis for the substantive American law of search and seizure.[55] His concern with the lack of judicial restraint[56] and the possibility of the abuse of administrative discretion[57] is reflected in the general requirement that "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers."[58] Lord Camden's concern over the unlimited scope of the general search[59] is demonstrated in the American prohibition of searches of entire buildings in the course of criminal investigations absent specific

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[54] 19 How. St. Tr. at 1066-67.

[55] The Supreme Court, in Boyd v. United States, 116 U.S. 616 (1886), reasoned that the *Entick* decision was relied upon in drafting both the fourth and fifth amendments.

> Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine of the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? *Id.* at 630.

[56] This power so assumed by the secretary of state is an execution upon all the party's paper . . . before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper. 19 How. St. Tr. at 1064.

[57] *Id. See also* Leachinsky v. Christie, [1945] 2 All E.R. 395 (C.A.).

[58] United States v. Lefkowitz, 285 U.S. 452, 464 (1932); *accord*, Katz v. United States, 389 U.S. 347, 356-57 (1967). *But see* United States v. Rabinowitz, 339 U.S. 56, 65 (1950) where the Court said

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search.

[59] 19 How. St. Tr. at 1065.

judicial authorization,[60] the limitation on seizures to those items specified in a search warrant,[61] and the now discarded "mere evidence rule."[62] Finally, Lord Camden's condemnation of the seizure of a man's private papers as a "means of compelling self-incrimination"[63] was accepted by the United States Supreme Court as the necessary corollary of the fourth and fifth amendments.[64]

Parliament's eventual prohibition of general warrants in 1766 did not, however, completely insure the sanctity of an individual's home or place of business. As Lord Camden himself recognized, searches could be made for stolen goods providing there was a warrant issued upon sufficient probable cause and with the requisite specificity.[65] Moreover, the ominous writs of assistance might still be issued.

Perhaps the most significant inroad still permitted upon the sanctity of one's home was a practice known as *hutesium et clamor* or the hue and cry.[66] The process of the hue and cry provided that, upon the discovery of a felony "[t]he neighbours should turn out with the[ir] bows, arrows, knives"[67] and pursue the felon until he was apprehended. "[I]f the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant . . . ."[68] The practice can, thus, be seen as the predecessor of the doctrine of hot pursuit which similarly allows a search for a suspected felon with neither an arrest nor a search warrant.[69]

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[60] Von Cleef v. New Jersey, 395 U.S. 814 (1969) (seizure of "several thousand articles" from building); Stanford v. Texas, 379 U.S. 476 (1965) (seizure of 14 cartons of books and personal papers); Kremen v. United States, 353 U.S. 346 (1957) (seizure of entire contents of house).

[61] Stanley v. Georgia, 394 U.S. 557, 569 (1969) (Stewart, J., concurring); Marron v. United States, 275 U.S. 192 (1927) (dicta). *But see* State v. McMann, 3 Ariz. App. 111, 412 P.2d 286 (1966).

[62] Gouled v. United States, 255 U.S. 298 (1921). *See* note 6 *supra.*

[63] 19 How. St. Tr. at 1073. *But see* Trial of Henry and John Sheares, 27 How. St. Tr. 255 (O. & T. 1798).

[64] Boyd v. United States, 116 U.S. 616, 634-35 (1886), quoted *infra* at text accompanying note 125. *See also* Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring). The Supreme Court of Arizona, however, has not found this argument to be wholly persuasive. *See* State v. Frye, 58 Ariz. 409, 120 P.2d 793 (1942).

[65] Lord Coke, on the other hand, apparently questioned the legality of search warrants even when used for this narrow purpose. *See* Lasson, *supra* note 30, at 36.

[66] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 578-79 (2d ed. 1923). The hue and cry is significant from its historical position as antecedent to the rule of hot pursuit (*see* notes 228-36 and accompanying text *infra*) and because of the limits on the substantive right of privacy which it represented. *See* Lasson, *supra* note 30, at 36 n.86.

[67] F. POLLOCK & F. MAITLAND, *supra* note 66, at 579.

[68] 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 92 (1847). *See* Ker v. California, 374 U.S. 23 (1963); State v. Parker, — Minn. —, 166 N.W.2d 347 (1969), for contemporary expressions of the need for notice before entry. *See also* Miller v. United States, 357 U.S. 301, 309 (1958) (exception for "exigent circumstances").

[69] *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) where the Court upheld a police search of a house without a warrant in pursuit of a suspected felon who had

II. EARLY EXPERIENCES IN THE COLONIES

The arbitrary power of the writ of assistance made itself felt in the American Colonies about the same time that the general warrants were coming under attack in Great Britain. The death of King George II in 1760 meant that the writs which had been issued during his reign would soon expire and new writs would have to be granted under George III.[70] Moreover, since the heavy American trade with Spanish and French colonies aided Britain's enemies in the Seven Years' War and since it reduced English tax revenues,[71] William Pitt, on August 23, 1760,[72] ordered the Sugar Act of 1733[73] to be enforced in the Colonies in an attempt to put an end to this detrimental commerce.[74]

> [The Sugar Act] put a prohibitive duty on molasses entering English colonies from the foreign West Indies. Since the Americans depended upon molasses from French and Spanish islands to feed their rum distilleries, the Sugar Act had been consistently evaded, usually by purchasing in Jamaica a false declaration that the molasses had been produced there.[75]

In order to enforce this revenue measure effectively, it was necessary to rely upon the Navigation Act of 1662[76] which had originally created the writs of assistance. This act gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws."[77] Private homes could be entered by these officials in search of contraband goods on mere suspicion and without the need for a judicial warrant.

Widespread opposition to the use of the writs was quick in developing. "The quiet of the domestic fireside was no longer to be held sacred. These Writs, first used in Massachusetts, caused great excitement and opposition."[78] The fortuity of the death of King George II and the need for reissuance of the writs under King George III, provided the opportunity to attack their validity. The prospect of increased use of the writs under Pitt's order provided whatever additional incentive was necessary. Consequently, a number of Boston merchants banded together to protest the issuance of any further writs under George III.

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entered the house a few minutes earlier. The pursuit must, indeed, be "hot" and mere "probable cause to arrest, and reasonable belief that the suspect might be at home . . . cannot be the basis for entry into a home without a warrant." Jones v. United States, 5 CRIM. L. RPTR. 2124, 2125 (D.C. Cir. May 5, 1969).

70 *See* note 34 and accompanying text *supra*.

71 For other justifications of this action, see W. DURANT & A. DURANT, *supra* note 39, at 709.

72 Pitt's letter to the governors of the American Colonies is reprinted in Quincy, *supra* note 32, app. I, at 407-08.

73 6 Geo. 2, c. 13.

74 S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 183 (1965).

75 *Id.*

76 13 & 14 Car. 2, c. 11, § 5, quoted at text accompanying note 31 *supra*.

77 Stanford v. Texas, 379 U.S. 476, 481 (1965).

78 2 W. JACKMAN, HISTORY OF THE AMERICAN NATION 328 (1913).

They chose as their spokesman James Otis, a man who was to become the most vocal opponent of the writs of assistance. In 1761, Otis resigned from his position as attorney with the King's Admiralty in order to argue against the issuance of a writ to Charles Paxton.

The case was first presented to the court on Feburary 24, 1761.[79] Otis used many of the same arguments which were later to be used by Lord Camden in condemning general warrants: he attacked the tyrannical nature of the writs, the absence of judicial supervision, and finally opposed their unlimited scope declaring that they infringed upon "one of the most essential branches of English liberty . . . the freedom of one's house."[80] Otis concluded that "[n]o Acts of parliament can establish such a writ" because "[a]n act against the constitution is void."[81]

Despite Otis' fervent appeal to the court, the writ was issued on December 2, 1761.[82] However, as the first instance of American opposition to the Crown, his plea was hardly in vain and John Adams later wrote that "American independence was then and there born."[83] Otis' argument received acceptance in some colonial courts,[84] but for the most part the issuance of the writs continued unabated[85] and in 1767 the practice was reaffirmed[86] by the same Parliament which had previously condemned the use of general warrants.[87]

Notwithstanding this renewed parliamentary ratification, opposition to the writs in the colonies continued to mount.[88] In 1772, for example, Otis, Samuel Adams and Joseph Warren, writing for the Boston town meeting committee of correspondence, denounced the writs as "altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy."[89] It is little wonder that when the first states adopted

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79 Paxton's Case, Quincy, *supra* note 32, at 51 (1761).

80 H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 46 (6th ed. 1958) (Adams' revision of Minot version).

81 *Id.* at 47.

82 Paxton's Case, Quincy, *supra* note 32, at 51, 57 n.28 (1761).

83 Quoted in Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting).

84 The English Attorney General De Grey, in an opinion dated August 20, 1768, indicated that some of the colonial courts refused to issue the writs of assistance because of the discretionary power they vested in officers. De Grey did, however, conclude that the writs were valid. *See* Quincy, *supra* note 32, app. I, at 453, where this opinion is reprinted.

85 *See* Lasson, *supra* note 30, at 51 *et seq.*

86 7 Geo. 3, c. 46, § 10 (1767).

87 *See* note 38 *supra.*

88 The Massachusetts legislature had, in 1762, attempted to abolish the writ of assistance by providing for a special writ to be issued only upon a showing of probable cause. However, this act was vetoed by the governor. Lasson, *supra* note 30, at 66-67.

"In the Boston Gazette of September 5, 1768, under the date of London, June 20, 1768, it is reported that 'more than one very eminent Lawyer have publickly declared that [the writ of assistance] . . . appears to them equally as unconstitutional as general warrants.'" Quincy, *supra* note 32, app. I, at 452.

89 Quincy, *supra* note 32, app. I, at 466-67. The committee's report of November 20 was largely a reiteration of Otis' argument of February 24, 1761.

their constitutions, the use of general warrants and writs of assistance was strictly prohibited.[90]

III. THE EMERGENCE OF THE FOURTH AMENDMENT

Against this background of opposition to writs of assistance and general warrants, James Madison included a strict limitation on searches and seizures in the list of amendments which he proposed to Congress in 1789.[91] Unlike his fellow Federalist Alexander Hamiltion,[92] Madison felt strongly that a specific limitation on federal power was required in order to prevent a recurrence of these writs and warrants.[93]

The amendment which Madison put before the House of Representatives on June 8, 1789 was designed to eliminate these practices and regulate the use of warrants.[94] As originally proposed, however, its impact

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[90] The search and seizure limitations of the early state constitutions are discussed in Lasson, *supra* note 30, at 80-82. For a more comprehensive list of search and seizure provisions in state constitutions, see Harris v. United States, 331 U.S. 145, 160 n.5 (1947) (Frankfurter, J., dissenting). Interestingly, New York is unique among the states in that its state constitution did not contain such a protection until 1938. Prior to that time, it had relied upon a statutory provision.

Arizona's constitutional protection is contained in ARIZ. CONST. art. 2, § 8: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Prior to the application of the fourth amendment exclusionary rule to the states by Mapp v. Ohio, 367 U.S. 643 (1961), the broad terms of the Arizona constitutional provision might arguably have sustained practices such as the general warrant or writ of assistance which might be said to be under "authority of law." Any such argument is, of course, now moot inasmuch as the state constitutional protection, as it applies to governmental searches, is coterminous with the fourth amendment. *Cf.* State v. Baca, 1 Ariz. App. 16, 398 P.2d 924 (1965).

[91] For general discussions of Madison's proposed amendments, see S. BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 294-313 (1941), and E. DUMBAULD, *supra* note 20, at 3-56.

[92] Hamilton had argued that since the federal government was one of delegated powers, and since it had not been given the power to regulate the press, for example, there was no need to deny this power to the government in a bill of rights. Moreover, Hamilton felt that the enumeration of certain rights might, by way of a negative pregnant, be interpreted to deny other rights not enumerated. THE FEDERALIST No. 84 (A. Hamilton). In fairness to Hamilton, it should be remembered that he was advocating the adoption of the Constitution without a bill of rights and, consequently, he was deemphasizing its potential defects.

[93] Madison recognized the potential significance of the "necessary and proper" clause. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In arguing for the need of a bill of rights, he pointed to the congressional power to levy taxes and to the additional power granted by the necessary and proper clause. He felt that general warrants or writs of assistance might be authorized to implement the revenue laws, and stated that the prohibition against unreasonable searches and seizures was needed to prevent this occurrence. 1 GALES AND SEATONS' HISTORY OF DEBATES IN CONGRESS 455-56 (1879) [hereinafter DEBATES IN CONGRESS]. *See also id.* at 758, where Madison makes the same argument with regard to the need for the establishment clause of the first amendment.

[94] Justice Frankfurter has suggested that "[w]hen Madison came to deal with safeguards against searches and seizures . . . he did not draw on the [relatively narrow] Virginia model but based his proposal on the [more liberal] Massachusetts form." Harris v. United States, 331 U.S. 145, 158 (1947) (dissenting) (the Massachusetts and Virginia provisions are reprinted therein). While the final form of the fourth amendment is certainly closer to the Massachusetts provision in that it both limits warrants and recognizes a right of privacy from governmental intrusion, Madison's original suggestion was limited to proscriptions on the use of warrants as was the case under the Virginia Bill of Rights. *See generally* Draper v.

would have been limited:

> The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched or the persons or things to be seized.[95]

As proposed, the amendment arguably would have been little more than a statement of the requirements for the issuance of a search warrant. The prohibition against "unreasonable searches and seizures" was phrased solely in terms of the conditions for a warrant and did not necessarily embody a more comprehensive sanction against governmental intrusions. The changes which were later made to this proposal greatly increased its impact and indicate that the framers intended the amendment to have a much wider effect than was originally envisaged by Madison.

On August 17, the Committee of the Eleven[96] reported to the Committee of the Whole House on Madison's suggested amendments. In addition to eliminating verbiage from the first clause and changing the list of conditions for a valid warrant to the present conjunctive form, the Committee of the Eleven had completely deleted any mention of "unreasonable searches and seizures."[97] As thus reported, the singular import of the proposed amendment was inescapable: it delineated the requirements for a warrant, but failed to establish an independent protection from governmental intrusions.[98] Representative Elbridge Gerry of Massachusetts felt that "the right of the people to be secure . . . against unreasonable searches and seizures" required more explicit protection than was afforded by the report of the Committee of the Eleven and accordingly made a motion to reinstate the prohibition of "unreasonable searches and seizures."[99] The proposed amendment, incorporating Gerry's motion, was then adopted by the Committee of the Whole,[100] but to Representative Egbert Benson of New York even this was insufficient. Benson proposed a further change to the amendment's present form of two separate and independent clauses,[101] one recognizing the absolute right to be free from

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United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting); E. DUMBAULD, *supra* note 20, at 52.

95 1 DEBATES IN CONGRESS, *supra* note 93, at 452.

96 On July 21, 1789, James Madison suggested to the House that a select committee be formed of one representative from each of the then 11 states to consider his proposed amendments. *Id.* at 685-91. The committee so formed was known as the Committee of the Eleven.

97 The right of the people to be secured [sic] in their persons, houses, papers, and effects, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized. *Id.* at 783.

98 *See* Lasson, *supra* note 30, at 103.

99 1 DEBATES IN CONGRESS, *supra* note 93, at 783.

100 *Id.*

101 MR. BENSON objected to the words 'by warrants issuing.' This declara-

"unreasonable searches and seizures" and the other setting forth the requirements for the issuance of a warrant.

Benson's recommendation was initially rejected by the House "by a considerable majority."[102] Apparently Benson was not one to accept such a defeat gracefully and, when he was later serving as chairman of the Committee of Three,[103] he included his modification, already disapproved by the Committee of the Whole, in the form of the bill which was returned to the House.[104] The reasons underlying the change by the Committee of Three do not appear from the record, but the amendment, in the two-part form advocated by Benson, was ratified by the House and sent to the Senate for approval.[105] The Benson modificaton was ultimately adopted by both houses after the conference committee meeting.[106]

It can be seen, therefore, that the fourth amendment was intended not only to establish the conditions for the validity of a warrant, but also to recognize an independent right of privacy from unreasonable searches and seizures.[107] Justice Frankfurter, dissenting from the Court's decision in *Harris v. United States*,[108] interpreted "[t]he plain import of this [to be] . . . that searches are 'unreasonable' unless authorized by a warrant, and a warrant hedged about by adequate safeguards."[109] Moreover, the recognition of an independent right of privacy meant that any other intrusions upon this right must be justified as exceptions to this general rule. An a priori corollary of this proposition is that if the reason for

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tory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read 'and no warrant shall issue.' *Id.*

102 *Id.*

103 On Saturday, August 22, after the Committee of the Whole had completed its deliberations on the proposed amendments, the Committee of Three was appointed "to arrange the said amendments and make report thereof." *Id.* at 808. This report, containing the previously rejected Benson proposal, H.R. JOUR. 112 (Aug. 24, 1789), was placed before the House the following Monday, approved, and sent to the Senate. 1 DEBATES IN CONGRESS, *supra* note 93, at 809. *See generally* E. DUMBAULD, *supra* note 20, at 40-41 n.25, 44; Lasson, *supra* note 30, at 101.

104 H.R. JOUR. 112 (Aug. 24, 1789).

105 The First Congress met in New York City until August 12, 1790, and, during this time, the Senate met behind closed doors and no transcripts were made of its proceedings. 1 DEBATES IN CONGRESS, *supra* note 93, at 15-16; S. BLOOM, *supra* note 91, at 313. Consequently, a determination of its motives in approving the modification put forward by Benson is only conjectural.

106 Act of Sept. 24, 1789, 1 Stat. 97-98:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; *and* no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis added).

107 Professor Lasson, in discussing this change of the fourth amendment to its present form, said, "[T]hat the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." Lasson, *supra* note 30, at 103.

108 331 U.S. 145, 155 (1947).

109 *Id.* at 161-62.

the contemplated invasion may be satisfied by other means then such means should be used and the failure to do so would constitute an unreasonable search and seizure.

The "plain import" of the standards of reasonableness intended by the First Congress can be further inferred by an investigation of the legislation which it enacted concerning searches and seizures.[110] In the Act of July 31, 1789,[111] for example, Congress included a provision akin to the earlier English statutes creating writs of assistance,[112] in that customs officials were allowed "to enter any *ship* or *vessel*, in which they shall have reason to suspect any goods . . . subject to duty shall be concealed; and therein to search for, seize, and secure any such goods."[113] While this act provides the basis upon which warrantless border searches may be justified,[114] it has much greater significance because of the limitations which it imposes upon the power to search houses and other buildings. A search of "any House, Shop, Cellar, Warehouse, or Room"[115] was allowed under a writ of assistance without a requirement for a showing of probable cause before a magistrate.[116] The Act of July 31, 1789, however, permitted such searches only when supported by a warrant issued by a justice of the peace after a showing of probable cause.[117] This act is also important because the requirement for a warrant is extended to searches of commercial buildings as well as to those of houses. Apparently the First Congress intended to give the word "houses" in the fourth amendment a broad interpretation.[118] This fact is hardly surprising when it is remembered that the fourth amendment was intended to prevent a recurrence of the writs of assistance and such writs were primarily used to find smuggled goods hidden in merchants' shops.

Section 15 of the Judiciary Act of 1789[119] casts additional light upon

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110 *Compare* Carroll v. United States, 267 U.S. 132 (1925), *with* Boyd v. United States, 116 U.S. 616 (1886), where this rationale was applied to obtain contrary results.

111 Ch. 5, § 24, 1 Stat. 43. *See also* Act of August 4, 1790, ch. 35, §§ 48-51, 1 Stat. 170.

112 7 Geo. 3, c. 46, § 10 (1767); 13 & 14 Car. 2, c. 11, § 5 (1662).

113 Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43 (emphasis added).

114 *See* Note, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968) where, without consideration of this act, it is argued that the fourth amendment need not apply to border searches but that limitations should be imposed by the due process clause of the fifth amendment.

115 13 & 14 Car. 2, c. 11, § 5 (1662).

116 *E.g.*, Paxton's Case, Quincy, *supra* note 32, at 51 (1761). *See generally* Carden, *Federal Power to Seize and Search Without Warrant*, 18 VAND. L. REV. 1 (1964).

117 Ch. 5, § 24, 1 Stat. 43:

> [E]very collector, naval officer and surveyor . . . [who] shall have cause to suspect a concealment [of goods subject to duty] . . . in any particular dwelling-house, store, building, or other place . . . shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial . . . .

118 *See* Carden, *supra* note 116, at 32.

119 Ch. 19, § 15, 1 Stat. 82:

searches and seizures which were deemed to be reasonable by the First Congress. This act empowered federal courts in the trial of civil or criminal actions to compel the disclosure of private books or papers, but only under circumstances where a court of equity would have required such disclosure. This restriction is significant because chancery would not require the disclosure of papers from someone if such disclosure tended to incriminate that person or subjected him to a penalty or forfeiture.[120]

This enactment has been interpreted to preclude the compulsory disclosure of private books,[121] and even evidentiary objects[122] and, in the leading case of *Boyd v. United States*,[123] the Supreme Court construed this statute to embody a constitutional mandate:[124]

> [W]e are further of opinion that a compulsory production of private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment . . . and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.[125]

The First Congress, therefore, was willing to recognize warrantless customs searches, and seizures judicially authorized under the aegis of section 15 of the Judiciary Act only in the narrowest of circumstances.[126]

> [A]ll the . . . courts of the United States, shall have power in the trial of actions at law . . . to require the parties to produce books or writings in their possession or power . . . *where they might be compelled to produce the same by the ordinary rules of proceedings in chancery* . . . . (emphasis added).

120 *See* Brown v. Walker, 161 U.S. 591, 610 (1896) (Shiras, J., dissenting); Boyd v. United States, 116 U.S. 616 (1886).

121 United States v. National Lead Co., 75 F. 94 (C.C.N.J. 1896); Johnson v. Donaldson, 3 F. 22 (C.C.S.D.N.Y. 1880); United States v. Twenty-Eight Packages of Pins, 28 F. Cas. 244 (No. 16,561) (E.D. Pa. 1832 & 1833).

In the flurry of litigation that arose under the Civil War and Reconstruction Era revenue laws, compulsory disclosure of private papers was upheld because the Act of February 25, 1868, ch. 13, 15 Stat. 37, provided that evidence obtained in this manner could not be used in a criminal proceeding. *E.g., In re* Strouse, 23 F. Cas. 261 (No. 13,548) (D. Nev. 1871); Stanwood v. Green, 22 F. Cas. 1077 (No. 13,301) (S.D. Miss. 1870) (disclosure of bank records upheld as being public papers); *In re* Meador, 16 F. Cas. 1294 (No. 9375) (N.D. Ga. 1869) (disclosure upheld as civil action to which fourth amendment was inapplicable).

122 Johnson v. Donaldson, 3 F. 22 (C.C.S.D.N.Y. 1880) (photographic plates).

123 116 U.S. 616 (1886). In *Boyd*, the government sought compulsory disclosure of allegedly fraudulent shipping invoices for 35 cases of plate glass against which a forfeiture proceeding was in process. Justice Bradley, speaking for the Court, ruled that this forfeiture proceeding was criminal within the context of the fourth and fifth amendments and therefore the Act of June 22, 1874, ch. 391, 18 Stat. 186, which allowed compulsory disclosure, was unconstitutional.

124 *See* note 93 *supra*, where Madison argued that the fourth amendment was needed to preclude broad exploratory searches in support of revenue laws.

125 116 U.S. at 634-35.

126 The protection from compulsory disclosure of papers has not generally been applied to corporate defendants. *E.g.*, Esgee Co. of China v. United States, 262 U.S. 151 (1923); Hale v. Henkel, 201 U.S. 43 (1906). *But see* United States v. National Lead Co., 75 F. 94 (C.C.N.J. 1896). The rationale supporting this conclusion has been that since the protection from disclosure is the result of an in pari materia interpretation of the fourth and fifth amendments, and since the fifth amendment is not applicable to corporations, then this protection is not to be extended to corporations. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186

It predicated its actions upon the principle that "[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."[127] Moreover, in guarding against the writs of assistance, the First Congress saw fit to establish a broad right of privacy from governmental intrusion.[128] "The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[129]

IV. A RETURN TO THE ORIGINAL UNDERSTANDING?

Justice Stewart, much like Justice Frankfurter before him,[130] has repeatedly construed the fourth amendment in terms of the historical context in which it was written.[131] In doing so he has rejected the somewhat nebulous concept of reasonableness which has characterized decisions by other justices.[132] It is not surprising, therefore, that his opinion for the Court in *Chimel* and his concurring opinion in *Stanley* are historically oriented decisions.

In *Chimel*, for example, Justice Stewart quoted with approval Justice Frankfurter's argument that the "proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words'—a history of 'abuses so deeply felt by the Colonies as to be one of

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(1946). Corporations may, however, be protected solely by the fourth amendment when the scope of the required disclosure is so broad as to be unreasonable. Hale v. Henkel, *supra* (dicta).

This result may be changed by allowing the corporate officers to assert their own fifth amendment privilege against self-incrimination. *See* Communist Party of the United States v. United States, 384 F.2d 957 (D.C. Cir. 1967), *noted in* 1968 DUKE L.J. 134. *See also* Note, *The Constitutional Right of Associations to Assert the Privilege Against Self-Incrimination*, 112 U. PA. L. REV. 394 (1964).

The required records doctrine will be given extensive treatment in light of fourth and fifth amendment considerations in a future issue of the *Arizona Law Review*.

127 Agnello v. United States, 269 U.S. 20, 32 (1925).

128 This right of privacy as against the government is reflected, of course, in other provisions of the Bill of Rights. The third amendment, for example, provides for the privacy of one's home against the quartering of soldiers except "in time of war . . . in a manner to be prescribed by law." U.S. CONST. amend. III. *See also* Stanley v. Georgia, 394 U.S. 557 (1969) (privacy of thought); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Massiah v. United States, 377 U.S. 201 (1964) (privacy reflected in prohibition against self-incrimination); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (associational right of privacy). *See generally* A. WESTIN, PRIVACY AND FREEDOM (1967); Bishop, *Privacy vs. Protection—The Bugged Society*, N.Y. Times, June 8, 1969, § 6 (Magazine), at 30 *et seq.*

129 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

130 *See, e.g.*, Justice Frankfurter's dissenting opinions in United States v. Rabinowitz, 339 U.S. 56, 68 (1950); Harris v. United States, 331 U.S. 145, 155 (1947); Davis v. United States, 328 U.S. 582, 594 (1946). *See also* Handler, *supra* note 18.

131 *E.g.*, Katz v. United States, 389 U.S. 347 (1967) (by implication); Stanford v. Texas, 379 U.S. 476 (1965).

132 *E.g.*, Kremen v. United States, 353 U.S. 346 (1957) (per curiam); United States v. Rabinowitz, 339 U.S. 56 (1950) (Minton, J.); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (Butler, J.); Carroll v. United States, 267 U.S. 132 (1925) (Taft, C.J.). *See also* note 19 *supra*.

the potent causes of the Revolution.' "[133] In *Stanley*, where a film, assumed by the Court to be obscene, had been seized from appellant's bedroom in the course of a search for gambling material, the majority of the Court based its decision upon first amendment issues.[134] Joined by two other justices, however, Justice Stewart argued that because the item seized was not specified in the supporting search warrant, the fourth amendment's requirement for particularity precluded its admission into evidence.[135]

The *Stanley* opinion's requirement of particularity is a proscription which arose in response to the broad exploratory searches sanctioned under the general warrants and writs of assistance[136] and which was reflected in the early search and seizure decisions of American courts.[137] The fourth amendment's requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized" was designed to protect individual privacy from governmental fishing expeditions.[138] Thus, the seizure of an item not specified in a warrant,[139] or any seizure under a warrant the terms of which are vague or general[140] is constitutionally insupportable because that seizure has not been subjected to the requisite antecedent judicial scrutiny and hinges instead upon the whim or discretion of the searching officer.[141]

The *Chimel* decision imposes an analogous limitation on the area which may be searched without a warrant. If an officer were allowed to

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133 395 U.S. at 760-61, *quoting* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

134 It is interesting to compare Justice Stewart's opinions in *Stanley* and Mapp v. Ohio, 367 U.S. 643 (1961), since both cases dealt with parallel factual situations: the seizure of "obscene" materials from a dwelling house. In *Mapp*, which was decided on fourth amendment grounds, Justice Stewart urged that the determination be based upon " 'the rights of free thought and expression.' " 367 U.S. at 672. Interestingly, when the Court was confronted with *Stanley* and based its decision upon "the right to satisfy . . . intellectual and emotional needs" (394 U.S. at 565), Justice Stewart criticized the Court for "its hurry to move on to newer constitutional frontiers" (*id.* at 569) and would instead have decided the case on fourth amendment grounds. *See also* Stanford v. Texas, 379 U.S. 476 (1965).

135 *See* note 9 *supra.*

136 *See, e.g., In re* Meador, 16 F. Cas. 1294 (No. 9375) (N.D. Ga. 1869); Wakely v. Hart, 15 Pa. 316 (1814) (construing state constitution search and seizure provision).

137 Grumon v. Raymond & Betts, 1 Conn. 39 (1814); Frisbie v. Butler, 1 Kirby 213 (Conn. 1787); Fisher v. McGirr, 67 Mass. (1 Gray) 1 (1854); Sandford v. Nichols, 13 Mass. 285 (1816).

138 Hale v. Henkel, 201 U.S. 43, 77 (1906) (dicta); Sandford v. Nichols, 13 Mass. 285 (1816); Wakely v. Hart, 15 Pa. 316 (1814).

139 Stanley v. Georgia, 394 U.S. 557 (1969) (Stewart, J., concurring); Marron v. United States, 275 U.S. 192 (1927) (dicta); State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), *cert. denied*, — N.M. —, 461 P.2d 228 (1969).

140 *See* cases cited in note 137 *supra.*

141 McDonald v. United States, 335 U.S. 451, 455 (1948):

> The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

See also Katz v. United States, 389 U.S. 347, 356-57 (1967).

select the place of arrest and consequently be enabled to search that place incident to the arrest, he would be able to accomplish that which the fourth amendment was designed to prohibit.[142] Similarly, a warrant which broadly describes the area to be searched would be void because it would effectually empower the officer with a general warrant not unlike the one used against John Wilkes.[143] Thus, *Chimel* reaffirms the fundamental prohibition against determining the scope of search outside of the judicial process.[144]

Justice Stewart, in these two decisions, has recognized and adopted the premise implicit in Egbert Benson's revision of the fourth amendment. There is a guarantee of privacy which may be infringed upon only under the protection of adequate judicial safeguards or under the authority of narrowly construed exceptions to the warrant requirement.[145] To the extent that these opinions by Justice Stewart break with more recent lines of authority allowing an expansive police power to search,[146] they also reflect a return to the original meaning of the fourth amendment. Consequently, the exceptions to the warrant requirement which have been created primarily by judicial fiat[147] since the adoption of the fourth amendment must now be reconsidered in light of *Chimel* and *Stanley* in order to determine their continued validity.

CHIMEL AND EXCEPTIONS TO THE REQUIREMENT FOR A WARRANT

The law of searches and seizures, after having undergone a litigious

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142 Justice Murphy, dissenting from the Court's decision in Harris v. United States, 331 U.S. 145 (1947), upholding the validity of a search of a four-room house incident to an arrest, entered this eloquent plea against such searches:

> The Court today has resurrected and approved, in effect, the use of the odious general warrants or writ of assistance, presumably outlawed forever from our society by the Fourth Amendment. A warrant of arrest, without more, is now sufficient to justify an unlimited search of a man's home from cellar to garret for evidence of any crime, provided only that he is arrested in his home. Probable cause for the search need not be shown; an oath or affirmation is unnecessary; no description of the place to be searched or the things to be seized need be given; and the magistrate's judgment that these requirements have been satisfied is now dispensed with. In short, all the restrictions put upon the issuance and execution of search warrants by the Fourth Amendment are now dead letters as to those who are arrested in their homes. *Id.* at 183.

See also United States v. Sohnen, 298 F. Supp. 51 (E.D.N.Y. 1969).

143 Frisbie v. Butler, 1 Kirby 213 (Conn. 1787); Sandford v. Nichols, 13 Mass. 285 (1816); Ashley v. Peterson, 25 Wis. 621 (1870).

144 United States v. Jeffers, 342 U.S. 48 (1951).

145 Justice Stewart has indicated elsewhere, however, that the fourth amendment does not establish an all-inclusive right of privacy and that it is subject to certain conceptual limitations. Katz v. United States, 389 U.S. 347, 350 (1967). *See also* Commonwealth v. Laris, 213 Pa. Super. 411, 249 A.2d 573 (Hoffman, J., dissenting), *cert. denied*, 90 S. Ct. 60 (1969).

146 *E.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967) (broad administrative searches allowable under system of mass warrants). *See also* notes 5-7 and accompanying text *supra*.

147 *See* Carden *supra* note 116.

period during the 1770's, was for the most part well settled after the passage of the fourth amendment. Warrantless searches were permissible in only a limited number of circumstances: searches while in hot pursuit of a felon,[148] of vessels suspected of carrying contraband,[149] and presumably those made incident to an arrest.[150] The scope of permissible seizures was similarly limited.[151]

The limited federal criminal jurisdiction during the nineteenth century and the continued validity of *Barron v. Baltimore*[152] militated against any significant development in the federal law of search and seizure. Now, almost two centuries after the adoption of the fourth amendment, the exigencies of twentieth century life[153] and new interpretations of the concept of probable cause[154] have created additional categories of constitutionally permissible searches and seizures without warrants.[155] Although the Court had continued to pay lip service to the notion that the fourth amendment is to be construed in its original historical context,[156] results certainly unforeseen by James Madison or Egbert Benson were achieved.[157] It is necessary to examine these exceptions in light of the new attitude evidenced by the Court in *Chimel.*

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148 2 M. HALE, *supra* note 68, at 92, 102; F. POLLOCK & F. MAITLAND, *supra* note 66, at 578 *et seq.*; Carden, *supra* note 116, at 31. *See also* Dougherty v. Gilbert, Tapp. 6 (Ohio C.P. 5th Cir. 1816).

149 Act of July 31, 1789, ch. 5, §§ 24-27, 1 Stat. 43.

150 Marron v. United States, 275 U.S. 192, 199 (1927); Weeks v. United States, 232 U.S. 383, 392 (1914) (dictum); Banks v. Farwell, 38 Mass. (21 Pick.) 156 (1838). Somewhat surprisingly, the police power to conduct a search incident to arrest was not acknowledged by the United States Supreme Court until the twentieth century. For an argument which questions the historical validity of this type of warrantless search, see Carden, *supra* note 116.

151 *See* Gouled v. United States, 255 U.S. 298, 308-09 (1921).

152 32 U.S. (7 Pet.) 243 (1833). *Barron*, which was decided prior to the enactment of the fourteenth amendment, held that the fifth amendment—and consequently the first eight amendments—applied only to the federal government and did not restrict state action. The enactment of the fourteenth amendment led to the "absorption" or "selective incorporation" of certain provisions of the Bill of Rights to the states. *See generally* Lacy, *The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine*, 23 WASH. & LEE L. REV. 37 (1966).

153 *E.g.*, Schmerber v. California, 384 U.S. 757 (1966); Carroll v. United States, 267 U.S. 132 (1925).

154 *E.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967); Schmerber v. California, 384 U.S. 757 (1966); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). For an elaboration upon this theme of "variable probable cause," see Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433, 438-39 (1969). *See also* Schaefer, *The Fourteenth Amendment and Sanctity of the Person*, 64 NW. U.L. REV. 1 (1969).

155 *See generally* R. DAVIS, FEDERAL SEARCHES AND SEIZURES (1964); P. GAY & R. PRUNIER, THE POLICEMAN AND THE ACCUSED—SEARCH AND SEIZURE AND RIGHTS OF THE ACCUSED (1965) (emphasis on Massachusetts and federal law); L. KOLBREK & G. PORTER, THE LAW OF ARREST SEARCH AND SEIZURE (1965) (California); W. RINGEL, ARRESTS, SEARCHES, CONFESSIONS (1966) (New York and federal law); J. VARON, SEARCHES, SEIZURES AND IMMUNITIES (1961).

156 *E.g.*, Carroll v. United States, 267 U.S. 132 (1925).

157 *E.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United

I. SEARCHES INCIDENT TO ARRESTS

Without doubt, the most important exception to the warrant requirement is the one which has been recognized as incident to an arrest. To sustain a search incident to an arrest, two basic requirements must first be met. The arrest itself must be valid[158] and, under *Chimel*, the search must be strictly limited in its scope.[159] Moreover, it is clear that the search must be truly incident to the arrest,[160] and if the arrest is used merely as a pretext to justify the search,[161] then the search will most certainly be invalid.[162] While *Chimel* clearly limits the previously allowed physical scope of searches incident to arrests,[163] it leaves a variety of other questions — including its potential retroactive application[164] — unan-

States, 331 U.S. 145 (1947).

158 The legality of an arrest made under a warrant will depend initially upon the validity of the warrant. *E.g.*, Giordenello v. United States, 357 U.S. 480 (1958). When the arrest warrant is invalid, *e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), or when no warrant has been obtained, *e.g.*, Draper v. United States, 358 U.S. 307 (1959), the arrest may nonetheless be upheld if it is for a misdemeanor committed in the officer's presence or a felony for which there is probable cause to suspect the arrestee. *See* Beck v. Ohio, 379 U.S. 89 (1964); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, *supra*. *See generally* ARIZ. REV. STAT. ANN. § 13-1403 (Supp. 1969) (power of officer to arrest without warrant).

159 *See* notes 12-17, *supra*, and accompanying text. Prior to *Chimel*, the major limitation on the area which might be subjected to search incident to an arrest was that it could not extend beyond the premises upon which the arrest was made. James v. Louisiana, 382 U.S. 36 (1965); Agnello v. United States, 269 U.S. 20 (1925). *See also* United States v. Baca, 417 F.2d 103 (10th Cir. 1969), where the court, applying pre-*Chimel* standards, declared an extensive search of areas of a home not within the arrestee's control to be invalid.

160 1 J. VARON, *supra* note 155, at 106, 201-03. *Accord*, Mitchell v. State, — Minn. —, 171 N.W.2d 66 (1969).

161 *See* State v. Moody, 443 S.W.2d 802 (Mo. 1969).

162 *E.g.*, Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961). In *Taglavore*, a warrant was issued for the defendant's arrest for a traffic violation, although it appeared at the trial that defendant was also suspected of a narcotics violation and that the purpose of the arrest was to justify a search for narcotics. When presented with the warrant, the defendant attempted to swallow a marijuana cigarette which had been in his possession. The officers prevented him from doing so and seized the cigarette. On appeal, the circuit court reversed and held the marijuana inadmissible. The "sham arrest" precluded the admission of the cigarette even though it was visible to the officers and the defendant tried to destroy it.

See also Mills v. Wainwright, 415 F.2d 787 (5th Cir. 1969); United States v. Sohnen, 298 F. Supp. 51 (E.D.N.Y. 1969).

163 *See* notes 12-17 and accompanying text *supra*.

164 The Court pointedly avoided the opportunity to determine the retroactivity of *Chimel*. *See* Shipley v. California, 395 U.S. 818 (1969). Only Justice Harlan considered the question and he determined that *Chimel* should be applied to all cases still on direct appeal at the time the decision was handed down. Von Cleef v. New Jersey, 395 U.S. 814 (1969) (Harlan, J., concurring).

Those courts which have addressed themselves to the retroactivity of *Chimel* have generally considered Desist v. United States, 394 U.S. 244 (1969), to be controlling. Noting that *Desist* limited Katz v. United States, 389 U.S. 347 (1967), to prospective application because *Katz* was interpreted to be a clear break from earlier decisions, these courts have reasoned that *Chimel* should likewise be given only prospective application because of *Chimel's* clear break with the recent past. Williams v. United States, 6 CRIM. L. RPTR. 2188 (9th Cir. Nov. 3, 1969) (relies on *Desist*); Lyon v. United States, 416 F.2d 91 (5th Cir. 1969); People *ex rel.* Muhammad v. Mancusi, 301 F. Supp. 1100 (S.D.N.Y. 1969); People v. Edwards, 71 A.C. 1141, 458 P.2d 713, 80 Cal. Rptr. 633 (1969); People v. Castillo, 274 A.C.A. 549, 80

swered.[165]

It would be easy to characterize the physical limits of permissible search under *Chimel* by the catch phrase "arm's reach." Such an approach should be avoided, however, as one court, in interpreting *Chimel*, has already pointed out.[166]

> [W]e cannot construe *Chimel* . . . to mean that the area is confined to that precise spot which is at arm length from the arrestee at the moment of arrest. He may well lunge forward or move backward or to the side and thus into an area in which he *might* grab a weapon or evidentiary items . . . .[167]

However, in a footnote, the court added:

> It would seem that a seizure of a weapon or destructible evidence in a locked drawer in the immediate presence of the arrestee in the literal sense would be beyond the permissible scope of a search.[168]

The scope as well as the intensity of a search incident to arrest cannot be ascertained by reference to any pat formula, but must instead be determined by the justifications which exist for that search. At the outset, it should be recognized that if the arrestee attempts to gain access to a weapon, the physical scope of the search may be expanded, while, on the other hand, if no weapons or destructible evidence could be reached by the arrestee then the search should be limited to his person. Thus, once an arrestee has been handcuffed he is presumably rendered incapable of reaching for a weapon or destroying evidence and no search extending beyond his person should be allowed.[169] By the same analysis, the permissible intensity of a search incident to arrest is variable with the circumstances: an arrest for passing counterfeit money may allow a more intensive search of the person because the desired evidence is more readily concealed than the case where the arrest is for auto theft where the only evidence might be the automobile itself.

Cal. Rptr. 211 (Ct. App. 1969); Scott v. State, 7 Md. App. 505, 256 A.2d 384 (1969); Mitchell v. State, — Minn. —, 171 N.W.2d 66 (1969) (dicta); Derouen v. Sheriff, 6 CRIM. L. RPTR. 2246 (Nev. Nov. 26, 1969). The Second Circuit, on the other hand, initially avoided the question of *Chimel's* retroactivity, United States *ex rel.* Lundergan v. McMann, 417 F.2d 519 (2d Cir. 1969); Gonzales v. Follette, 414 F.2d 788 (2d Cir. 1969), but eventually gave it only prospective effect. United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969).

At least three courts have adopted Justice Harlan's reasoning and have given *Chimel* limited retroactive application to those cases on direct review on the date of the *Chimel* decision. Fresneda v. State, 458 P.2d 134, 143 n.28 (Alas. 1969); Ashby v. State, 228 So. 2d 400 (Ct. App. Fla. 1969) (sub silentio); State v. Reyes, 6 CRIM. L. RPTR. 2220 (N.M. Dec. 1, 1969). The United States District Court for the Eastern District of Pennsylvania has adopted a novel approach by applying *Chimel* to cases where the search but not the trial predated *Chimel*. United States v. Burruss, 6 CRIM. L. RPTR. 2207 (E.D. Pa. Nov. 19, 1969).

165 *See generally* Note, *Scope Limitations for Searches Incident to Arrests*, 78 YALE L.J. 433 (1969).

166 Scott v. State, 7 Md. App. 505, 256 A.2d 384 (1969).

167 *Id.* at 389.

168 *Id.* n.6.

169 *Cf.* United States v. Baca, 417 F.2d 103 (10th Cir. 1969).

Moreover, inasmuch as any search is an exception to the arrestee's right of privacy, if the reasons for the search can be satisfied without invading that privacy, then that alternative course of action should be followed.[170] For example, a search of the contents of a suitcase in the possession of the arrestee at the time of the arrest should not be allowed without a warrant because the suitcase could be removed from the possession of the arrestee thereby preventing the destruction of any evidence in it or its use as a weapon.[171] Similarly, if the reasons for searching a particular place no longer exist, then that place should not be subjected to a warrantless search. If, for example, an arrest is made while the arrestee is sitting at a desk, the desk drawers might arguably come within the scope of a permissible search under *Chimel* as an area from which a weapon or destructible evidence might be obtained. If, however, the arrestee were to move away from the desk, the drawers would no longer be within his reach and thus any search of the desk would be too remote, under *Chimel*, to be upheld as incident to arrest.[172]

The rationale used by Justice Stewart to support a search incident to arrest may, in certain circumstances, preclude a search altogether. An officer may search the arrestee when "the officer's safety might [otherwise] . . . be endangered" or "in order to prevent [the] . . . concealment or destruction of evidence."[173] When the offense for which the arrest is made does not involve destructible evidence and there is no reason to suspect that the arrestee poses a threat of harm to the officer,[174] then the reasons for allowing the search are missing. Under such circumstances, the police would be unable to justify the invasion of the arrestee's privacy[175] and no search of the person should be allowed.[176]

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170 *See* text accompanying note 109 *supra*.

171 The problems arising in such an instance might be analogous to those involved in sham arrests where the arrest is made at a certain time or place in order to justify a search. *See* note 162 *supra*.

172 *See* United States v. Baca, 6 CRIM. L. RPTR. 2085 (10th Cir. Sept. 30, 1969).

173 Chimel v. California, 395 U.S. 752, 763 (1969).

174 Searches incident to traffic violations would frequently be prime examples of this category. The number of cases raising this point is so great that searches incident to traffic arrests require separate treatment. *See* notes 196-211 and accompanying text *infra*.

175 The general rule embodied in the fourth amendment is that searches and seizures must be subjected to judicial scrutiny and authorized under warrants. Absent compliance with this rule, the police must be prepared to demonstrate that their actions come within one of the recognized exceptions. *See* 1 J. VARON, *supra* note 155, at 224-25.

176 Assuming that a search incident to an arrest may not be justified in a given situation, an interesting question is presented if the arrestee is later incarcerated and the police seek to inventory and hold his personal effects during the period of incarceration. The problem is the extent to which this procedure is limited by the fourth amendment.

On the one hand, it might be argued that the jail house setting is not protected by the fourth amendment and that the search, ipso facto, would be reasonable. *See* Lanza v. New York, 370 U.S. 139 (1962). To the same effect would be an argument that these police activities are designed for the arrestee's protection and no search and seizure was actually intended. *See* Harris v. United States, 390 U.S. 234 (1968). On the other hand, the defense might argue that Preston v. United States,

Two closely allied questions are presented by the seizure of evidence unrelated to the crime for which the arrest is made. Initially, it must be determined whether the police may conduct a search of the defendant's person solely for the purpose of discovering evidence of a crime other than the one for which the arrest was made, assuming, of course, that the arrest is valid[177] and not a pretext for conducting a search.[178] While the Court has previously sanctioned the seizure of evidence unrelated to the crime for which the arrest was made,[179] it has not yet approved a warrantless search made *solely* for such evidence.[180]

Justice Stewart's narrow justification for searches incident to arrests[181] and the underlying right of privacy implicit in the fourth amendment would seemingly indicate that a search incident to an arrest made solely to find evidence of unrelated crimes could not withstand constitutional attack.[182] Indeed, condoning such a practice would serve to invest the police with the same discretionary power to search which was present under the writs of assistance and general warrants—the very practice which the fourth amendment was designed to end. Police may not search an individual on the mere suspicion that they will discover contraband or incriminating evidence.[183] Moreover, the mere existence of a departmental policy of searching arrestees should not be substituted for the requisite constitutional justifications for conducting such a search.[184] Therefore, in the case of the arrest of a suspect for a crime for which there is no concealable or destructible evidence and when the suspect does not pose a threat of harm to the arresting officer, no search could be justified on the

376 U.S. 364 (1964), controlled and that no search could be sanctioned under these circumstances.

177 *See* note 158 *supra.*

178 *See* note 162 *supra.*

179 Abel v. United States, 362 U.S. 217 (1960) (administrative deportation arrest and seizure of espionage materials); Harris v. United States, 331 U.S. 145 (1947) (arrest for forgery and use of mails to defraud, seizure of draft cards not related). *See also* United States v. Baca, 417 F.2d 103 (10th Cir. 1969) (arrest for parole violation, seizure of narcotics upheld under open view doctrine).

180 In United States v. Lefkowitz, 285 U.S. 452, 465 (1932), for example, the Court condemned "searches [which] were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime."

181 One additional factor implicit in upholding a search incident to arrest is the necessary presence of probable cause to believe that the arrestee committed a crime. This factor would tend to support a search for evidence of the crime for which the arrest is made, but would lend no such support to a search made for other evidence.

182 For a view that searches are judged by more stringent standards than are arrests, see Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* 1960 SUP. CT. REV. 46.

183 *E.g.,* Sibron v. New York, 392 U.S. 40 (1968). *Cf.* Terry v. Ohio, 392 U.S. 1 (1968).

After it was first handed down, *Terry* might well have been interpreted as allowing an expansive police power to search and seize. The restrictive interpretation given *Terry* by the *Chimel* Court, however, might well portend a time when *Terry* represents a bane, rather than a boon, to police investigative procedures. Thus, *Terry* could well support the proposition that a warrantless police search is impermissible except when directed towards discovering weapons which threaten the life or safety of an officer.

184 *See* Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953).

basis of the crime for which the arrest was made.[184a] Any search of the arrestee in these circumstances would have to be predicated upon departmental policy or the mere suspicion that evidence of an unrelated crime might be found. Since these reasons would not by themselves be sufficient to justify the invasion of the individual's privacy, a search of this nature should not be sustained.

The second question raised is whether evidence of an unrelated crime may even be seized during the course of an otherwise permissible search incident to arrest. Justice Stewart's *Stanley* opinion indicates that the scope of permissible seizures extends no further than the reasons giving rise to the initial search, a premise in keeping with the original purpose of the fourth amendment to prevent exploratory searches. Justice Stewart's rationale evinces a willingness to deny the police the use of windfall evidence seized during the course of a legitimate search undertaken to find other evidence. When applied to the case of a warrantless search incident to an arrest, this reasoning would preclude any seizure not of a weapon or evidence related to the crime for which the arrest was made.[185]

II. SEARCHES WHERE WARRANT CANNOT PRACTICALLY BE OBTAINED

Warrantless searches incident to arrest have normally been justified by the practical necessity for conducting such searches. This consideration for the practicalities of differing situations also underlies other exceptions to the general requirement for warrants.

A. *Automobile Searches*

If searches incident to arrest are one of the most important exceptions to the requirement for a warrant, warrantless searches of automobiles are the most litigious.[186] The inevitable delay attendant to appearing before a magistrate and making a showing of probable cause to obtain a warrant would, if required, effectively prevent an officer from ever searching an automobile suspected of containing contraband or seizable evidence. Consequently, the rule has developed "that contraband goods concealed and illegally transported in an automobile or other vehicle may be

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184a Machroli v. State, 6 CRIM. L. RPTR. (Ill. Nov. 26, 1969).

185 Conceivably, the seizure of contraband goods might still be sustained in such circumstances because of the arrestee's inferior property interest even though the contraband was unrelated to the purpose of the arrest. In this case, however, Justice Stewart's argument would go to the admissibility of the contraband rather than its seizability. *But see* United States v. Eagleston, 417 F.2d 11, 16 (10th Cir. 1969) (seizure of contraband in open view).

186 The United States Supreme Court cases dealing with automobile searches include Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967); Beck v. Ohio, 379 U.S. 89 (1964); Preston v. United States, 376 U.S. 364 (1964); Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

searched for without a warrant."[187] In addition to this "moving vehicle exception,"[188] warrantless searches of automobiles have been sustained on a variety of other grounds[189] including those made incident to arrest[190] and those made when the automobile is properly within police custody.[191]

1. Moving Vehicle Exception. Warrantless automobile searches were first approved by the Supreme Court in *Carroll v. United States.*[192] There, federal agents had probable cause to believe that the defendants had illicit whisky in their car.[193] Unable to obtain a search warrant without allowing the defendants to escape, the agents stopped the defendants' car, searched it, and seized the whisky. Chief Justice Taft, speaking for the Court, upheld this practice, reasoning that the mobility of an automobile, the existence of antecedent probable cause, and the impractical-

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187 Carroll v. United States, 267 U.S. 132, 153 (1925).

188 Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925); State v. Gunter, 100 Ariz. 356, 414 P.2d 734 (1966). *But see* Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968).

189 Additional bases upon which such searches have been approved include the consent of the driver of the car, State v. Taylor, 2 Ariz. App. 314, 408 P.2d 418 (1965), *aff'd*, 3 Ariz. App. 157, 412 P.2d 726 (1966), or because the police were investigating an apparently abandoned car, State v. Smith, 184 Neb. 363, 167 N.W.2d 568 (1969).

The seizure of items from automobiles has also been upheld by finding that there was no search within the technical meaning of the term. Harris v. United States, 390 U.S. 234 (1968) (evidence in open view on front seat); United States *ex rel.* Williams v. LaVallee, 415 F.2d 643 (2d Cir. 1969) (same); United States v. Johnson, 413 F.2d 1396 (5th Cir. 1969) (opening door of car does not constitute search); United States *ex rel.* Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969) (evidence in open view on front seat); State v. Gunter, 100 Ariz. 356, 414 P.2d 734 (1966) (shotgun visible from outside of car); Sheridan v. State, 187 So. 2d 294 (Ala. Ct. App. 1966) (pistol in open view); State v. Smith, *supra* (marijuana in plain sight). *But see* People v. Clark Memorial Home, — Ill. 2d —, 252 N.E.2d 546 (Ct. App. 1969) (open view doctrine inapplicable when police entry on premises illegal ab initio).

190 United States v. Barnett, 407 F.2d 1114 (6th Cir. 1969); State v. Navallez, 10 Ariz. App. 135, 457 P.2d 297 (1969); State v. Tellez, 6 Ariz. App. 251, 431 P.2d 691 (1967); Taylor v. Superior Court, 275 A.C.A. 166, 79 Cal. Rptr. 677 (Ct. App. 1969); Neely v. State, 240 Ind. 362, 164 N.E.2d 110 (1960); Commonwealth v. Lewis, 309 Ky. 276, 217 S.W.2d 625 (1949); Gaston v. State, 457 P.2d 807 (Okla. Crim. 1969); Piland v. State, 162 Tex. Crim. 362, 285 S.W.2d 230 (1955). *But see* People v. Molarius, 146 Cal. App. 2d 129, 303 P.2d 350 (1956); People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); People v. Greene, 5 CRIM. L. RPTR. 2059 (N.Y. Sup. Ct. Apr. 11, 1969).

191 Cooper v. California, 386 U.S. 58 (1967); United States *ex rel.* Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969). *But see* Preston v. United States, 376 U.S. 364 (1964). *See generally* Williams v. United States, 412 F.2d 729 (5th Cir. 1969); Commonwealth v. Togo, — Mass. —, 248 N.E.2d 285 (1969).

192 267 U.S. 132 (1925).

193 Probable cause would, most likely, no longer be found upon the facts presented in *Carroll.* In September, the defendant had agreed to sell liquor to a federal undercover agent in violation of the prohibition laws, but he failed to do so. In December, the same federal agent noticed the defendant driving from Detroit to Grand Rapids, a route frequently used by bootleggers. With no additional information, the car was stopped and searched, yielding the illegal whisky. Considering that "common rumor or report, suspicion, or even 'strong reason to suspect' [are] not adequate to support a warrant for arrest," Henry v. United States, 361 U.S. 98, 101 (1959), these facts would no longer constitute probable cause. *Carroll,* however, has continuing validity for the proposition that an automobile may be searched without a warrant when there is probable cause to justify the search.

ity of first obtaining a warrant combined to render the search reasonable within the meaning of the fourth amendment.[194]

Carroll clearly stands for the proposition that a warrantless search of an automobile may be upheld if there is probable cause to believe that it contains contraband.[195] The limitations imposed by *Chimel* should, however, serve to define more precisely the scope and intensity of permissible searches under *Carroll*. Thus, if an automobile is stopped because there is probable cause to believe that it contains contraband whisky, the ensuing search should be limited to those areas of the car wherein such whisky might be found. In such an instance, the seizure of narcotics, for example, from a receptacle too small to contain whisky would be constitutionally impermissible absent an additional showing of probable cause that the automobile was suspected of carrying such narcotics.

2. Automobile Searches Incident to Arrest. The *Carroll* decision did not eliminate the requirement for probable cause. Thus, the increasingly stringent standards which have arisen in recent years for measuring probable cause[196] have changed *Carroll* into an insurmountable barrier to police investigation when this criterion cannot be satisfied. However, under the broad view of searches incident to arrest which had existed prior to *Chimel*, searches of an entire automobile were sustained as being incident to arrest.[197] This could clearly give rise to abusive police practices. For example, the police, not having probable cause to justify the issuance of a warrant or to support a search under *Carroll*, might elect to follow a suspected narcotics trafficker until he committed some minor traffic violation,[198] arrest him for that violation and search his car incident to arrest.[199]

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194 Justice McReynolds, joined by Justice Sutherland in dissent, argued that the arrest preceded the search and that since the arrest was illegal the search was consequently rendered illegal and the evidence seized should be excluded as the fruit of that illegality.

195 Lower courts, in applying the *Carroll* standard, have emphasized the absence of need for a warrant, but have often neglected to consider the reasons why a warrant is not required. Thus, the mere existence of probable cause has been held to be sufficient to sustain the search of an automobile, without the consideration of whether there is a danger that the car might be removed before a warrant could be obtained. Such a result seems to be stretching the *Carroll* rationale beyond the breaking point.

United States v. Lewis, 303 F. Supp. 1394 (S.D.N.Y. 1969) is indicative of this line of cases and, perhaps, exemplifies an approach which some courts may decide to follow in an attempt to evade the effect of *Chimel*. The defendant had been arrested in an apartment for the sale of narcotics. Upon a search of his person, the registration of and the keys to his car which was parked outside were found. A search of the defendant's car resulted in the discovery of narcotics. In denying defendant's motion to suppress, the court relied upon *Carroll* and upheld the search "because there was probable cause to believe the vehicle subject to seizure and forfeiture as a carrier of contraband." *Id.* at 1396. *But see* State v. Reyes, 6 CRIM. L. RPTR. 2220 (N.M. Dec. 1, 1969).

196 *See, e.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); Henry v. United States, 361 U.S. 98 (1959).

197 *See, e.g.*, cases cited in note 190 *supra*. *See also* Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347.

198 *Cf.* Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953).

199 This example would, of course, be open to defense objection on the basis that the original arrest was a sham. *See* note 162 *supra*. The difficulties of

Alternatively, the police might simply take the opportunity of a traffic arrest to conduct routine searches of automobiles for incriminating evidence of other crimes.

The physical scope limitations set forth in *Chimel* seem to indicate that the search must be limited to that "area into which an arrestee might reach in order to grab a weapon or evidentiary items."[200] This rationale would preclude a search of the car's trunk[201] and probably would also deny an extensive search of the car's interior[202] as an incident to arrest.[203] To be sure, if the defendant is arrested after leaving the automobile, no search of the car can be sustained as incident to the arrest unless it can somehow be shown that the arrestee was attempting to reach for a weapon or destroy evidence within the car.

While *Chimel* can be seen, therefore, to limit the physical scope of an automobile search incident to an arrest, the question of whether any search may be justified at all incident to an arrest for a traffic violation apparently remains unanswered.[204] While this question has been given increasing consideration in recent years, no clear cut answer has yet emerged.[205] The limited bases on which the *Chimel* Court sustained searches incident to arrests would indicate, however, that in the case of a traffic violation "any search which was incident to such an arrest would [be] . . . unlawful since there could be no fruits or instrumentalities of these crimes"[206] and consequently no danger of the defendant attempting to

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proof in sustaining such an objection might, however, render this argument academic from the defense standpoint.

200 395 U.S. at 763.

201 United States v. Allah, 5 CRIM. L. RPTR. 2462 (N.D. Tex. Sept. 9, 1969). Prior to *Chimel*, however, the weight of authority would have sustained a search of a trunk incident to arrest. United States v. Barnett, 407 F.2d 1114 (6th Cir. 1969); People v. Hanna, 42 Ill. 2d 323, 247 N.E.2d 610 (1969), *petition for cert. filed*, 38 U.S.L.W. 3085 (U.S. Aug. 25, 1969) (No. 508); Gaston v. State, 457 P.2d 807 (Okla. Crim. 1969); State v. Cloman, — Ore. —, 456 P.2d 67 (1969).

202 *E.g.*, United States v. Martinez, 6 CRIM. L. RPTR. 2027 (Army Sept. 10, 1969). Searches of automobile interiors could clearly be sustained prior to *Chimel*. *E.g.*, United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969) (seizure of gun from beneath seat after defendant had left car); Garcia v. State, 440 S.W.2d 295 (Tex. Crim. App. 1969) (seizure of marijuana from beneath blanket in back seat after defendants had been removed from car).

203 The difficulty of placing absolute limits on the portion of a car which may be searched for weapons is demonstrated in Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347, 351 n.27.

204 The question of "[w]hether or not a car may constitutionally be searched 'incident' to arrest for a traffic offense" was before the Court in Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 220 (1968). The Court did not answer this question because it determined that "the search . . . did not take place until Petitioners were in custody inside the courthouse and the car was parked on the street outside," *id.*, and, thus, based its decision to exclude the evidence upon Preston v. United States, 376 U.S. 364 (1964), and the absence of probable cause to sustain a search under *Carroll*.

205 *See, e.g.*, cases cited in note 190 *supra*.

206 People v. Greene, 5 CRIM. L. RPTR. 2059, 2060 (N.Y. Sup. Ct. Apr. 11, 1969).

There are, of course, exceptions. Driving while under the influence of a narcotic or of alcohol could quite easily involve tangible evidence. In such a case,

destroy evidence. Moreover, most traffic offenders are neither dangerous nor will they attempt to escape.[207] Consequently, the basis upon which a search incident to a traffic offense might otherwise be sustained is generally missing, and searches in these situations should not be approved.

Moreover, once the suspect has been placed under arrest, the *Carroll* doctrine[208] should not be available to support a warrantless search.[209] *Carroll* is founded on the assumption that if a warrantless search may not be made, the automobile would be able to escape the jurisdiction before a warrant could be issued, and the opportunity for the search therefore would be frustrated. Once the arrest has been made and the police intend to take the suspect into custody, the police have the car within their control,[210] there is no danger of its removal, and there is time available to obtain a warrant. Inasmuch as the "moving vehicle" rationale for allowing a warrantless search would then be missing, the general rule requiring a warrant to validate a search would apply, and any search made without a warrant would be insupportable.[211]

3. Search When Automobile in Police Custody. When the police legally have possession of an arrestee's car and the reason for the possession is directly related to the reason for the arrest, a warrantless search of the automobile has been held to be permissible.[212] The absence of uniformity in the decisions of lower courts considering such searches[213] can be traced, at least in part, to two Supreme Court cases which have

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however, *Chimel* should be applied to determine whether there is a danger of the loss or destruction of evidence.

[207] For possible exceptions to this view, see Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347, 350-51.

[208] The *Chimel* Court approved and reaffirmed warrantless automobile searches upon antecedent probable cause previously sanctioned in *Carroll*. 395 U.S. at 764 n.9.

[209] Conti v. Morgenthau, 232 F. Supp. 1004 (D.D.C. 1964); United States v. Kidd, 153 F. Supp. 605 (D.D.C. 1957). *But see* Gaston v. State, 457 P.2d 807 (Okla. Crim. 1969).

[210] In some circumstances, specific statutory authority may empower the arresting officers to seize a vehicle pursuant to arrest. ARIZ. REV. STAT. ANN. §§ 36-1041 to -1048 (1956) (seizure of automobile used in naroctics violation). In such cases the automobile may be subjected to forfeiture proceedings. ARIZ. REV. STAT. ANN. §§ 28-1401 to -1408 (Supp. 1969). *But see* State v. Lewis, No. 9802-PR (Ariz. Sup. Ct. Jan. 15, 1970) (application of forfeiture statute requires that owner of car had criminal intent). In other cases the automobile itself may be an instrumentality of the crime, *see* ARIZ. REV. STAT. ANN. § 28-1052 (1956), and thus subject to seizure. In the event the police are not empowered to seize a vehicle upon arrest, the *Carroll* rule may provide them with the means to conduct a warrantless search providing the car will likely be moved.

[211] *But see* cases cited in note 189 *supra*.

[212] Cooper v. California, 386 U.S. 58 (1967); Gordon v. State, — Miss. —, 222 So. 2d 141 (1969). *But see* Commonwealth v. Togo, — Mass. —, 248 N.E.2d 285 (1969).

[213] *Compare* Williams v. United States, 412 F.2d 729 (5th Cir. 1969), *and* Commonwealth v. Togo, — Mass. —, 248 N.E.2d 285 (1969), *with* United States *ex rel.* Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969); People v. Hanna, 42 Ill. 2d 323, 247 N.E.2d 610 (1969), *petition for cert. filed*, 38 U.S.L.W. 3085 (U.S. Aug. 25, 1969) (No. 508); Tierney v. State, 7 Md. App. 56, 253 A.2d 528 (1969). *See generally* Gaston v. State, 457 P.2d 807 (Okla. Crim. 1969) and cases collected therein.

reached different results:[214] *Preston v. United States*[215] and *Cooper v. California.*[216]

In *Preston*, the police had arrested the petitioner for vagrancy and had taken him and his car to the police station. After booking the petitioner, the police made a thorough search of the car, including its glove compartment and trunk, seizing two weapons and evidence which was later used in obtaining a conviction for conspiracy to commit robbery. On appeal, Justice Black, speaking for a unanimous Court, rejected the government's contention that the search could be sustained as incident to arrest and held that the evidence was inadmissible.[217] The situation before the Court in *Cooper* was sufficiently different, however, to require a contrary result. In *Cooper*, the petitioner had been arrested for the sale of narcotics and his car was seized pending forfeiture proceedings, as required by state law. To Justice Black, this time speaking for a sharply divided Court, the distinction was sufficient to sustain the validity of a warrantless search. Relying exclusively on the now discredited *United States v. Rabinowitz*,[218] Justice Black reasoned that the fact that the car was in police possession pending forfeiture proceedings rendered the search reasonable, thus satisfying the requirements of the fourth amendment.

Because of the scope limitations recently imposed by *Chimel* and with the underpinnings of *Cooper* washed away, the validity of warrantless police searches of automobiles in their custody should be reevaluated.[219] It would, indeed, be an anomalous result if the police were precluded from searching an arrestee's automobile at the scene of an arrest, but could obtain the right to search merely because a statute allows the

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214 In Harris v. United States, 390 U.S. 234 (1968), the defendant's car was in police possession but there was no search within the technical meaning. An officer had opened the car door in order to roll up the windows and lock the doors when he discovered evidence in plain sight on the front seat.

215 376 U.S. 364 (1964).

216 386 U.S. 58 (1967).

217 376 U.S. at 368:

> We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible.

218 339 U.S. 56 (1950). Interestingly, Justice Black had dissented in *Rabinowitz*, arguing the need for the use of search warrants.

219 *See* Williams v. United States, 412 F.2d 729 (5th Cir. 1969), where the court reasons that *Preston* established a general rule prohibiting warrantless searches of automobiles in police custody and that *Cooper* merely created a narrow exception to this rule. *Accord*, Commonwealth v. Togo, — Mass. —, 248 N.E.2d 285 (1969); State v. Reyes, 6 CRIM. L. RPTR. 2220 (N.M. Dec. 1, 1969).

Other courts, however, have ignored the application of *Preston* and upheld the validity of station house searches of automobiles as being incident to arrest. *See, e.g.*, United States *ex rel.* Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969); State v. Taylor, 2 Ariz. App. 314, 408 P.2d 418 (1965), *aff'd*, 3 Ariz. App. 157, 412 P.2d 726 (1966); Tierney v. State, 7 Md. App. 56, 253 A.2d 528 (1969). These cases are clearly no longer tenable in light of *Chimel* insofar as the searches were justified as being incident to arrest. *See generally* Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969).

taking of the arrestee and his automobile to the station house.

The Supreme Court's recent decision in *Dyke v. Taylor Implement Manufacturing Co.*[220] casts some light on the various problems involved in this area of warrantless searches of automobiles. There, the petitioner's car was parked in front of the courthouse following his arrest for reckless driving. While the petitioner was in police custody, the car was searched for evidence of another crime of which the petitioner was suspected and a rifle was seized from beneath the front seat. In holding the search, and consequently the seizure, to be illegal, the Court reasoned that the search was " 'too remote in time or place to [be incidental] to the arrest' "[221] and that there was no probable cause to justify a search under *Carroll.* In considering *Preston* rather than *Cooper* to be controlling, the Court noted that there was "no indication that the police had purported to impound or to hold the car, that they were authorized by any state law to do so, or that their search of the car was intended to implement the purpose of such custody."[222]

At best, *Cooper* has limited viability. *Chimel's* emphasis on the need for judicial approval of searches when possible casts doubt on a practice which would allow police to conduct warrantless searches when the only factor which might prevent the issuance of a warrant would be the absence of probable cause. Moreover, the fact that the only authority cited in *Cooper* has since been overruled indicates that *Cooper's* continued validity is questionable. It would seem, therefore, that warrantless searches of automobiles should no longer be sustained even when the car is lawfully in police possession.

Indeed, this is the position adopted by the Sixth Circuit in *Colosimo v. Perini.*[223] There, the police made a warrantless search of the defendants' automobile after the defendants were arrested and taken to the police station. Without determining the retroactivity of *Chimel,* the court reasoned that the *Chimel* interpretation of *Preston*[224] required that *Preston,* rather than *Cooper,* should control. Consequently, the court ruled that "where there was sufficient opportunity to procure a search warrant after the defendant was arrested and taken to the police station and while the automobile to be searched remained in police custody, the search of an automobile without a warrant . . . cannot stand Fourth Amendment attack."[225] The dictum from *Rabinowitz*[226] which had previously

220 391 U.S. 216 (1968).

221 *Id.* at 220, *quoting* Preston v. United States, 376 U.S. 364, 368 (1964). By reaching this conclusion, the Court avoided the question of whether a search of an automobile could be upheld as being incident to a traffic arrest.

222 391 U.S. at 221.

223 415 F.2d 804 (6th Cir. 1969).

224 395 U.S. at 764.

225 415 F.2d at 805-06.

226 "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." 339 U.S. at 66.

sanctioned such searches is no longer viable and warrantless automobile searches can no longer be sustained when the police fail to take advantage of an opportunity first to obtain a warrant.[227]

B. *Hot Pursuit*

The search of a building into which a suspect has fled can be justified both historically and logically. The process of the hue and cry has been known since the earliest days of English criminal law.[228] This process enabled an officer forcibly to enter a home without a warrant in order to arrest a felon who had fled there, provided, however, that the officer first announced his purpose and was refused admission.[229] Because of the established and accepted nature of this practice, the drafters of the fourth amendment no doubt considered this type of search to be reasonable and thus permissible under the proscriptions of this amendment.

Hot pursuit can be further justified by the need for preventing a suspect's escape. In this sense, its justification is analogous to the warrantless searches of automobiles sanctioned in *Carroll.* A fleeing criminal would quite likely escape capture if the police are first required to obtain a warrant before entering a building to arrest a suspect. Thus, a warrantless search of a building while in hot pursuit must be sustained if the criminal is to be arrested. The Supreme Court, in *McDonald v. United States,*[230] recognized this with the observation that an emergency situation may justify an exception to the general requirement for a warrant. There, the Court sanctioned, albeit by way of dicta, "a case where officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law."[231]

In *Warden v. Hayden*[232] the Supreme Court gave its explicit approval to this practice although the broad character of the search which was sanctioned in that case must be reconsidered in light of *Chimel.* The police legally entered petitioner's house shortly after an armed robbery suspect had reportedly entered there. The officers proceeded to conduct a search of the three floors of the house for the suspect. During the course of the search and after the petitioner had been arrested, clothes worn by the petitioner in the robbery were seized from a washing machine in the basement, a shotgun and pistol were taken from a flush tank in a bathroom, and ammunition was seized from beneath a mattress and from a bureau

227 "With the person, or persons, suspected of crime and the automobile to be searched both in police custody, the precipitous action of a warrantless search is no longer justified." Colosimo v. Perini, 415 F.2d 804, 806 (6th Cir. 1969).

228 *See* notes 66-69 and accompanying text *supra.*

229 *See* State v. Parker, — Minn. —, 166 N.W.2d 347 (1969), for an interesting history of the notification requirement.

230 335 U.S. 451 (1948).

231 *Id.* at 454.

232 387 U.S. 294 (1967). Other aspects of *Hayden* are discussed at notes 5 & 6 and accompanying text *supra.*

drawer. The Supreme Court upheld this broad search and the resultant seizures saying, "The permissible scope of search must . . . be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape."[233]

The warrantless search of a house for a fleeing criminal may well be allowed under the exception provided by hot pursuit. This exception does not, however, give the police an unlimited license to enter a suspect's home in order to effect an arrest. Indeed, the "exigent circumstances" which give rise to the hot pursuit exception must be more than the probable cause needed to justify the arrest.[234] Moreover, an application of the *Chimel* rationale could very well act to preclude the broad evidentiary searches which were sanctioned in *Hayden*. *Chimel* stands for the proposition that the scope of a search must be limited by the reasons giving rise to its justification. Thus, a house might be searched for a fleeing suspect, but areas within the house—such as the flush tank of a toilet or a washing machine—in which the suspect could not possibly hide could no longer be invaded without a showing that the defendant was attempting to destroy evidence therein or was seeking to obtain a weapon.[235] There is "no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."[236]

C. *Body Searches*

A narrowly construed exception to the warrant requirement has also been recognized where a suspect's body must be invaded in order to obtain evidence which would be lost to the police if a warrant first had to be obtained.[237] Thus, when the police need to ascertain the alcohol content of an arrestee's blood and the delay attendant to going before a magistrate to obtain a warrant would preclude their doing so,[238] a blood sample

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233 387 U.S. at 299.

234 Jones v. United States, 5 CRIM. L. RPTR. 2124 (D.C. Cir. May 5, 1969).

235 The Court in *Chimel* clearly recognized that a search incident to an arrest could extend into closed areas within the arrestee's reach. "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." 395 U.S. at 763. The Court indicated, however, that this was a narrow exception which it was creating. "There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in the room itself." *Id.*

236 *Id.* at 766-67 n.12.

237 *E.g.*, Schmerber v. California, 384 U.S. 757 (1966), *noted in* 41 TULANE L. REV. 132 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957). *But see* Rochin v. California, 342 U.S. 165 (1952); Thompson v. United States, 411 F.2d 946 (9th Cir. 1969) (Ely, J., dissenting).

238 An interesting question, under the *McNabb-Mallory* rule, would be posed if the need for a blood alcohol test arose in a federal jurisdiction. McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449

of the arrestee may be taken by competent medical personnel providing there is "a clear indication that in fact such evidence will be found."[239] Since this type of search has been justified as being an outgrowth of a search incident to an arrest,[240] it must be reevaluated in light of *Chimel.*

The leading case upholding this category of search is *Schmerber v. California.*[241] In *Schmerber,* the petitioner was arrested at a hospital where he was receiving treatment for injuries sustained in an automobile accident. At the request of the arresting officer and over the objections of the petitioner and his counsel, an attending physician took a blood sample from the petitioner, the alcohol content of which was used as evidence in the subsequent trial for driving while intoxicated. After disposing of various secondary arguments raised by the petitioner,[242] the Supreme Court determined the search to be in conformity with the mandates of the fourth amendment.

The Court recognized that a bodily intrusion could not normally be sanctioned solely as being incident to an arrest, holding that a more substantial justification was required in order to uphold such searches.[243]

(1957), prevent the admission or use, in federal prosecutions, of any confession obtained during an unnecessary delay after arrest before bringing a defendant before a magistrate, even if the confession otherwise satisfied the constitutional voluntariness standards. *See also* FED. R. CRIM. P. 5(a). The *McNabb-Mallory* rule has been extended beyond the strict confines of the area of confessions, *see* Williams v. United States, 4 CRIM. L. RPTR. 3059 (D.C. Cir. Dec. 20, 1968) (line up), and might well be used to exclude results of a blood test taken when the arrestee could have been taken before a magistrate first without risking a loss of the evidence of blood alcohol content. For an analysis of permissible delays under the *McNabb-Mallory* rule, see Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1 (1958).

239 Schmerber v. California, 384 U.S. 757, 770 (1966). The so-called "clear indication" test requires a showing of more than mere probable cause. The existence of this clear indication, however, will not save a search from a due process attack when the means utilized in the search are offensive. Rochin v. California, 342 U.S. 165 (1952); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).

240 "[T]he attempt to secure evidence of blood-alcohol content . . . was an appropriate incident to petitioner's arrest." Schmerber v. California, 384 U.S. 757, 771 (1966).

241 384 U.S. 757 (1966). The Court had previously been confronted with a similar set of facts in Breithaupt v. Abram, 352 U.S. 432 (1957). *Breithaupt* was decided before Mapp v. Ohio, 367 U.S. 643 (1961), had applied the fourth amendment exclusionary rule to the states and the decision had been based solely upon the due process clause of the fourteenth amendment without reaching the fourth amendment question.

242 Because the blood test was a commonly used and relatively inoffensive medical technique and since it was performed by competent medical personnel in appropriate surroundings, the Court reasoned that due process requirements had been satisfied. The Court also determined that the fifth amendment self-incrimination claim of the petitioner was inapplicable and then summarily rejected his right to counsel argument.

243 384 U.S. at 769-70:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Finding sufficient evidence to support this "clear indication" test,[244] and noting the likelihood that the evidence would soon disappear was sufficient to justify an exception to the normal warrant requirement,[245] the Court went on to support the search in these narrow circumstances.[246]

Inasmuch as the standards for a search set forth in *Schmerber* are far more stringent than those of *Chimel*, *Chimel* is unlikely to have any direct effect on searches made with the same or similar justificiations. However, the underlying respect for an individual's privacy, which is inherent in *Chimel*, and its preference for searches conducted under warrants should serve to limit those warrantless body cavity searches, frequently made at international borders in search of narcotics,[247] which have constituted the most frequent application of *Schmerber* by the lower courts.[248] The continued validity of these searches merits further scrutiny on at least three grounds.[249]

Initially, body cavity searches made at borders can be questioned as being beyond the scope of the border search exception sanctioned by the First Congress.[250] The Act of July 31, 1789,[251] allowed warrantless cus-

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244 The arresting officer had observed the defendant at various times over a two-hour period, had smelled liquor on his breath and had observed other symptoms of inebriation. There was, therefore, *unequivocal* evidence to support the conclusion that the petitioner was drunk and that a blood alcohol test would reveal a high alcohol content.

245 384 U.S. at 770:

> The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.
>
> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of the evidence.'

246 Satisfaction of the "clear indication" test and the presence of emergency conditions necessary to conduct a warrantless search will not justify a bodily intrusion if the search is offensive to notions of due process. Rochin v. California, 342 U.S. 165 (1952).

247 *See* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); United States v. Michel, 158 F. Supp. 34 (S.D. Tex. 1957). *See generally* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968); Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968); Comment, *Intrusive Border Searches—Is Judicial Control Desirable*, 115 U. PA. L. REV. 276 (1966).

Surprisingly, the Supreme Court has yet to rule on the matter of border searches despite the great volume of litigation in the circuit courts.

248 *E.g.*, Thompson v. United States, 411 F.2d 946 (9th Cir. 1969) (rectal search); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (vaginal search); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967) (rectal search). *But see* Morales v. United States, 406 F.2d 1298 (9th Cir. 1969) ("clear indication" test not satisfied and evidence obtained by vaginal search inadmissible); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (conditions of rectal search rendered evidence inadmissible).

249 The fruits of such a search might also be excludable if the search were conducted in a manner which "shocked the conscience." Rochin v. United States, 342 U.S. 165 (1952). This exclusionary rule is, however, to be narrowly construed. *See* Irvine v. California, 347 U.S. 128 (1954).

250 *See generally* notes 111-18 *supra* and accompanying text. For a Treasury Department memorandum outlining its view of its authority to conduct body cavity searches incident to border crossings, see 115 CONG. REC. S8176-77 (daily ed. July 16, 1969).

251 Ch. 5, § 24, 1 Stat. 43.

toms searches of ships on mere suspicion; searches of buildings, however, could only be made upon a showing of probable cause and after the issuance of a warrant. The Congress recognized that different safeguards were required depending upon the area which was to be protected—a vessel might be searched without a warrant as a matter of course, but the privacy of a person's home and even that of commercial buildings could not be breached without judicial sanction.[252] In making this distinction, the Congress which enacted the fourth amendment established its notions of reasonableness.

Into which of these two categories should a body cavity search be placed?[253] Certainly the intrusion upon an individual's privacy and personal dignity is at least as great in a body cavity search as it would be for a search of that person's home, for which the First Congress required the issuance of a warrant. "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned."[254] This elusive factor of emergency aside, the intrusion occasioned by a body cavity search is much greater than that of the searches for which the First Congress felt it necessary to require a warrant and, consequently, a warrant should be required for this type of search.

The emergency justification for a warrantless search raises the second objection to body cavity searches. The extraction of a blood sample in *Schmerber* was sanctioned because the failure to do so would have resulted in the loss of the evidence before a warrant could have been obtained.[255] *Chimel* would allow a search of "the arrestee's person in order to prevent [the] . . . concealment or destruction"[256] of evidence. The additional time required to obtain a warrant would not increase the danger of the loss or destruction of evidence and, absent a showing of possible harm to the arrestee caused by secreting of narcotics in a body cavity,[257] the justi-

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252 *See* notes 111-18 *supra* and accompanying text.

253 The distinction drawn by the First Congress might be viewed in at least two ways. On the one hand, the Congress might have been establishing different safeguards depending upon the degree of potential invasion of privacy. In this case, a body search would clearly fall within the category requiring antecedent judicial justification through the warrant procedure. On the other hand, Congress may have been lessening the requirements for a warrant in those cases which made up the bulk of the customs searches, where items to be searched were not yet on the mainland and were susceptible to easy removal from the jurisdiction. Even with this basis for a distinction, a warrant might well be required for a body cavity search because of the infrequency with which such searches are conducted and the great potential for abuse of human dignity.

254 Schmerber v. California, 384 U.S. 757, 770 (1966).

255 *Id.* at 770-71.

256 395 U.S. at 763.

257 Before being concealed in a body cavity, narcotics are normally first placed inside some sort of container, frequently a balloon or polyethylene bag. After a period of time, the container will deteriorate and thus subject the carrier to the danger of death from a massive overdose of narcotics. Generally speaking, however, there would normally be sufficient time available to obtain a warrant without en-

fications for a warrantless search are missing,[258] and since the underlying requirements of *Schmerber* and *Chimel* have not been satisfied a warrantless body cavity search cannot be sanctioned on this basis.

Third, any intrusion into an individual's body must be predicated upon a clear indication that the sought after evidence will be found; this is a quantum of certainty somewhat in excess of probable cause. There are indications, however, that customs officials subject individuals to strip searches[259] and body cavity searches by reference to much more lenient standards.[260] Thus, Dr. Paul R. Salerno, a government physician employed to conduct body cavity searches,[261] noted that 80 to 85 percent of some 300 body cavity searches he had conducted in the previous year had proved to be fruitless.[262] To the same effect is *Thompson v. United States*,[263] where there allegedly was a clear indication to conduct rectal searches of three members of a party crossing the border, although only one of the searches proved fruitful.

The fourth amendment was created in order to curb abuses of administrative discretion in the conduct of searches. The fact that such a great percentage of body cavity searches prove fruitless indicates that customs officials are abusing this discretion and are conducting such searches with much less than the "clear indication" required by *Schmerber*. The assault on human dignity occasioned by body cavity searches requires that such searches be approved " 'by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' "[264] Together with the evidence of apparent abuse of discretion by customs officers, this fundamental requirement for judicial safeguards demands that the present practices of body cavity searches be discontinued.

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dangering the life of the arrestee or risking the loss of the evidence. For a discussion of the relevance of such factors in determining whether a body cavity search should be sanctioned, see Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).

Because of the relative infrequency with which body cavity searches are made, the requirement of a warrant in such circumstances would not seem to place an undue administrative burden upon the customs officials. In 1967, for example, of the 212 million persons entering the United States, only 125—according to Treasury Department statistics—were subjected to body cavity searches. Letter from Joseph M. Bowman to Senator Sam J. Erwin, August 16, 1968, in 115 CONG. REC. S8175 (daily ed. July 16, 1969). The accuracy of these figures may be subject to question (*see* text accompanying note 262 *infra*), but, in any event, the number is low enough so that the requirement for a warrant would not unduly interfere with judicial or administrative procedure.

258 *See* note 245 *supra*.

259 115 CONG. REC. S8173 (daily ed. July 16, 1969).

260 Morales v. United States, 406 F.2d 1298 (9th Cir. 1969).

261 Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).

262 Morales v. United States, 406 F.2d 1298, 1300 n.2 (9th Cir. 1969).

263 411 F.2d 946 (9th Cir. 1969) (Ely, J., dissenting).

264 Schmerber v. California, 384 U.S. 757, 770 (1966), *quoting* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

D. *Stop and Frisk*

In 1968, the Supreme Court in *Terry v. Ohio*[265] endorsed stopping an individual on a street with less than probable cause and frisking him for weapons, a practice which had received growing support in the lower courts[266] and which had been adopted in the *Uniform Arrest Act*.[267] In *Terry*, a police officer, observing the defendant behaving suspiciously, approached him for further investigation. The officer initiated a "pat down" for weapons and discovered a .38 caliber revolver. Chief Justice Warren, speaking for the Court, upheld the petitioner's conviction for possession of a concealed weapon, reasoning that "[u]pon suspicion that the person be armed, the police should have the power to 'frisk' him for weapons."[268] Although the Court pointedly[269] refused two opportunities to give *Terry* a more expansive application than merely a search for weapons,[270] lower courts have read it to permit a much broader range of police activity.[271]

The *Chimel* decision will clearly serve to limit the application of *Terry* to the context in which it was originally presented to the Court. Indeed, such a result is virtually mandatory in order to avoid the anomaly of allowing a more extensive search in a stop and frisk situation, where there is only suspicion to support the search, than in a search incident to arrest supported by probable cause. Thus, Justice Stewart, writing for the Court in *Chimel*, read *Terry* to apply only to those searches which are undertaken to find weapons.[272] Absent a reasonable apprehension of harm,

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265 392 U.S. 1 (1968).

266 *E.g.*, United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960); People v. Hennenman, 367 Ill. 151, 10 N.E.2d 649 (1937); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965).

267 UNIFORM ARREST ACT §§ 2-3 (1965).

268 392 U.S. at 10.

269 *See* Terry v. Ohio, 392 U.S. 1 (1968) (Harlan, J., concurring).

270 In two companion cases to *Terry*, Sibron v. New York and Peters v. New York, 392 U.S. 40 (1968), the Supreme Court declined to expand upon the doctrine of *Terry*. The Court upheld the conviction of Peters for possession of burglar's tools, holding that the seizure had been made incident to a valid arrest, thus avoiding the question of whether *Terry* would allow the admission of evidence other than weapons. This question was likewise avoided in *Sibron* where the Court excluded heroin which had been seized from the defendant's pocket when it was not shown that the search was motivated by a search for weapons.

271 *E.g.*, United States v. Gazaway, 297 F. Supp. 67 (N.D. Ga. 1969) (stop of automobile for investigation); State v. Miranda, 104 Ariz. 174, 450 P.2d 364, *cert. denied*, 90 S. Ct. 140 (1969) (two-hour interrogation at police station).

272 395 U.S. at 762:

> [I]n Terry v. Ohio . . . we emphasized that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure' . . . and that '[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.' The search undertaken by the officer in that 'stop and frisk' case was sustained under that test because it was no more than a 'protective . . . search for weapons.' (citations omitted; brackets original).

the policeman will be precluded from conducting a frisk under *Terry*.[273]

Inasmuch as the rationale underlying the search for weapons is the same in *Terry* as it is in *Chimel*, the scope of the search should be the same in each case. *Chimel's* limitation on the area of permissible search to "the arrestee's person and the 'area within his immediate control' "[274] should also be read as defining the maximum physical limits of a permissible frisk under *Terry*.[275] Thus, a briefcase or package in the possession of a person stopped should not be searched by the police for weapons if it is feasible to remove it from the suspect's reach or if the suspect is otherwise unable to gain access to its contents.[276]

III. CONSENT SEARCHES

The scope limitations which *Chimel* imposes upon warrantless searches will impose strict boundaries upon police investigative procedures. Thus, lacking probable cause to justify the issuance of a search warrant and unable to come within one of the recognized exceptions to the warrant requirement, the police—if desirous of conducting a search—will first be required to seek a waiver of the fourth amendment's protection. It can be seen, therefore, that consent will likely become the principal basis for warrantless police searches.

Surprisingly, courts have differed over the basic question of whether the fourth amendment is even applicable once consent to search has been given.[277] This distinction is significant because if the fourth amendment is not relevant, limitations which might otherwise define the scope of permissible searches[278] will not be applicable.[279] The better approach seemingly would be one recognizing that any intrusion into an individual's privacy would be restricted by the fourth amendment, but that such consent to search would be viewed as rendering the intiation of the search reasonable or constituting a limited waiver of fourth amendment guarantees. Under this view, consent to search one's house would allow

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273 Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

274 395 U.S. at 763.

275 *See* Note, *The Limits of Stop and Frisk—Questions Unanswered by Terry*, 10 ARIZ. L. REV. 419, 428-33 (1968).

276 *See* People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1965), where, in this situation, a result contrary to the one suggested was reached over the strong dissent of Judge Fuld.

277 *Compare* State v. Williams, — Mont. —, 455 P.2d 634 (1969) (no search and seizure when consent given), *with* Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969) (search and seizure within fourth amendment even though consent given).

278 *E.g.*, Kremen v. United States, 353 U.S. 346 (1957) (per curiam) (search and seizure which was reasonable at its inception rendered unreasonable by subsequent police conduct).

279 Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 152 (1967). *See also* People v. Superior Court, 71 A.C. 281, 455 P.2d 146, 78 Cal. Rptr. 210 (1969) (consent to search automobile includes consent to search items found therein).

a relatively brief examination of the various rooms, but would not, by itself, sustain a lengthy and detailed perusal of the contents of drawers and private files.

Regardless of the analysis which is utilized, the validity of a consent search must ultimately hinge upon the validity of the underlying consent or waiver.[280] This requires a showing that the consent was both voluntary and intelligently made.[281] Because of the strong feelings against upholding a waiver of constitutional protections,[282] courts have frequently questioned the voluntariness of consent.[283] For example, consent which has been made by an unauthorized third person,[284] or made under the threat of legal process[285] has been held to be involuntary and consequently invalid, just as the simpler case of consent under duress has been struck down.[286]

Because of the intimate interrelationship of the fourth and fifth amendments[287] and the strict standards for measuring waiver of fifth amendment protections established by *Miranda*,[288] some writers have suggested that any consent search must first be predicated upon a warning of applicable fourth amendment rights.[289] One court has stated that "[l]acking an explicit warning as to his rights under the Fourth Amendment, it can never be known with certainty whether a defendant voluntarily waived those rights."[290] Despite the initial appeal which this argument may have, the state courts which have considered this question have unanimously refused to institute any warning requirement as a condition to the validity of a consent search,[291] although the federal courts are

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280 *See generally* Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964).

281 "It is apparent that where consent is relied upon to validate a warrantless search, the Government must prove that the consent was (a) intelligent and (b) voluntary." United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966).

282 *See, e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938).

283 *See, e.g.*, Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

284 Stoner v. California, 376 U.S. 483 (1964); United States v. Jeffers, 342 U.S. 48 (1951).

285 Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Baldocci, 42 F.2d 567 (S.D. Cal. 1930).

286 Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

287 Boyd v. United States, 116 U.S. 616 (1886). *See* note 55 *supra*.

288 Miranda v. Arizona, 384 U.S. 436 (1966).

289 Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967); Comment, *Constitutional Law—Miranda v. Arizona and the Fourth Amendment*, 46 N.C.L. REV. 142 (1967).

290 United States v. Moderacki, 280 F. Supp. 633, 636 (D. Del. 1968).

291 Rubey v. City of Fairbanks, 456 P.2d 470 (Alas. 1969); Slesiak v. State, 454 P.2d 252 (Alas. 1969); State v. Sherron, No. 2005 (Ariz. Sup. Ct., Jan. 9, 1970); State v. Frisby, — Del. —, 245 A.2d 786 (1968); State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968); People v. Ford, 38 Ill. 2d 607, 232 N.E.2d 684 (1967); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969); State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967); State v. Andrews, 250 La. 765, 199 So. 2d 867 (1967); State v. Williams, — Mont. —, 455 P.2d 634 (1969); State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967); State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968); State v. Leavitt, 237 A.2d 309 (R.I. 1968); State v.

somewhat more evenly divided on the matter.[292]

Indeed, rather than a strengthening of the standards by which consent is evaluated, consent searches are seeing a much wider application. Thus, the operation of a motor vehicle has been deemed to constitute implied consent to undergo a test for blood alcohol content,[293] and the operation of a business may constitute consent for warrantless searches of the company books[294] or premises.[295] The increased police reliance upon consent searches which can well be expected in the future will, no doubt, encourage an expansion of the notion of consent. It would behoove the Court, therefore, to define this term in the fourth amendment context, remembering that "[t]he Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement . . . in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd."[296]

CONCLUSION

The fourth amendment was enacted to remedy a history of abusive

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Martinez, 23 Utah 2d 62, 457 P.2d 613 (1969); State v. Lyons, — Wash. 2d —, 458 P.2d 30 (1969).

[292] Henderson v. Perkins, 6 CRIM. L. RPTR. 2201 (5th Cir. Nov. 12, 1969) (acquiescence in search invalid as consent in absence of warning); United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969) (absence of *Miranda* warnings rendered evidence seized in tax fraud case inadmissible); Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969) (*Miranda* warnings not required to validate consent search); United States v. Mackiewicz, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968) (*Miranda* inapplicable to tax fraud case and evidence seized admissible); Rosenthal v. Henderson, 389 F.2d 514 (6th Cir. 1968) (failure to advise of fourth amendment rights is one of factors to be considered in determining voluntariness of consent); United States v. Vickers, 387 F.2d 703 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968) (warnings not required to validate consent search); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967) (warnings not required); United States *ex rel.* Gockley v. Myers, 378 F.2d 398 (3d Cir. 1967) (warnings not required); United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1967) (warning of fourth amendment rights is requirement for valid consent); United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968) (warnings required for valid consent search even though *Miranda* warnings previously given); United States *ex rel.* Anderson v. Rundle, 274 F. Supp. 364 (E.D. Pa. 1967), *aff'd per curiam on other grounds*, 393 F.2d 635 (3d Cir. 1968) (*Miranda* warnings inapplicable to fourth amendment); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966) (pre-*Miranda* decision requiring warning of fourth amendment rights as condition to validity of consent search). *See also* United States *ex rel.* Daley v. Yaeger, 415 F.2d 779 (3d Cir. 1969) (consent to search invalid in pre-Escobedo v. Illinois, 378 U.S. 478 (1964), and pre-*Miranda* situation where defendant had requested and been denied counsel).

The sharp differences which exist between the circuits should make this question ripe for Supreme Court determination.

[293] Opinion of the Justices, — Me. —, 255 A.2d 643 (1969). Arizona has enacted a similar implied consent law which went into effect Nov. 1, 1969. *See* ARIZ. REV. STAT. ANN. §§ 28-691, -692 (Supp. 1969).

[294] *E.g.*, Zap v. United States, 328 U.S. 624 (1946) (required records); Davis v. United States, 328 U.S. 582 (1946) (consent to search business records).

[295] Colonnade Catering Corp. v. United States, 410 F.2d 197 (2d Cir.), *cert. granted*, 90 S. Ct. 58 (1969); Clark v. State, 445 S.W.2d 516 (Tex. Crim. App. 1969).

[296] United States v. Blalock, 255 F. Supp. 268, 270 (E.D. Pa. 1966).

police practices dating back to the Star Chamber of the Tudors. As proposed by Madison, it was designed to narrow the scope of permissible searches and subject these searches to the requirement of antecedent judicial scrutiny. As modified by Benson, the fourth amendment recognized an independent right of privacy from governmental intrusion. These standards established by the framers came to be eroded, however, as practices akin to those under the general warrants and writs of assistance were eventually sanctioned.

The Supreme Court's recent decision in *Chimel* and Justice Stewart's concurring opinion in *Stanley* recognize and adopt the original intent of the framers of the fourth amendment. "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law."[297] The impracticality of first obtaining a warrant may, in some narrow circumstances, permit the police to conduct a warrantless search, but a search limited solely by the discretion of an officer acting without judicial sanction cannot be approved.

Moreover, given the preeminent right of privacy recognized in the first clause of the fourth amendment, any intrusions into that privacy must be strictly limited by the justifications which give rise to the initial search. The scope and intensity of a search should be no greater than is required to satisfy the reasons for a search and if these reasons can be fulfilled by means which do not entail an invasion of privacy, then such means should be utilized.

The purpose of the fourth amendment was to curb discretionary police invasions of individual privacy. The reasonableness standard of this amendment demands these limitations and should tolerate no less.

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