

# INCREASING SCOPE OF SEARCH INCIDENTAL TO ARREST

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## INTRODUCTION

One of the major problems in the law of search and seizure today is the increasing scope of search incidental to arrest.<sup>1</sup> This problem is intimately connected with the decline in the use of warrants by law enforcement officers. In part this decline can be attributed to the vast urbanization and industrialization which has occurred in the United States in the last seventy-five years. Searches and seizures by warrants are undoubtedly easier in a more rural society than is found in the United States today. In the rural atmosphere of the United States from the founding of our nation until the post-Civil War period the absence of rapid means of communication and transportation did not necessitate the speed of action which law enforcement officers believe is demanded in the urban community. The result of this demand for quick action has been a decline in the use of the warrant.

The decline in the warrant has intensified the problem of determining by a post-mortem the reasonable limits of search and seizure. Without the prior statement of probable cause and the particular description of the places to be searched and the things to be seized, law enforcement officers must use their own judgment of what constitutes reasonable physical scope of the search and seizure. Allowing for a certain area of disagreement which would be present whether a warrant were used or not, law enforcement officers have demonstrated a tendency to push the limits of the physical scope of search and seizure to the utmost.

## PRINCIPLES OF REASONABLE SCOPE OF SEARCH AND SEIZURE

The description in a search warrant of the place to be searched places an initial limitation upon the physical scope of the search. A certain minimal description is required in all warrants. However, the degree of description required will depend upon the circumstances of

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1. By scope of search is meant the physical area which may be reasonably searched as incidental to arrest.

the case. The less description there is in the warrant, the more likely it is that an officer will attempt to make as broad a search as he thinks a court would allow in the event of any judicial review of his actions.<sup>2</sup>

The problems in defining reasonable scope of search and seizure, however, have not been primarily those of searches under warrants, but rather have developed as searches incidental to an otherwise valid arrest, with or without an arrest warrant. Indeed, there have been few cases which have reached the federal appellate level where the question of scope under a warrant has been involved. On the other hand, the federal courts have been continually faced with the problem in the last thirty-five years of defining the scope of incidental search.

Regardless of whether a warrant is used or not, the principles which limit the scope of search and seizure should be the same. The following appear to be some of the basic principles which have governed the problem in the federal courts. The application of these principles in specific cases has produced a broader scope than one might suspect from a mere reading of the principles.

1. A search and seizure occurs only for that which offends the law.

(a) No search is reasonable which is conducted merely to secure evidence of a crime; hence general or exploratory searches aimed only at the uncovering of mere evidence of a crime are unreasonable.

2. The search and seizure is to be no broader than the justifying basis.

(a) The justifying basis for the initial action of the arrest or search will be determined upon the basis of facts known prior to the search or arrest and the nature of the crime.

(i) A search and seizure cannot be made reasonable by what it uncovers, nor can the physical extent of the search be so justified.

#### SEARCH INCIDENTAL TO ARREST

##### *Historical Background of Incidental Search.*

Before the development of the warrant in the law of search and seizure, the English common law recognized the right to search a person as incidental to an arrest. With the coming of formal process the English law continued to recognize this right of incidental search as well as the right of arrest without warrant under the limitations of

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2. The general rule of description will be found in *Marron v. United States*, 275 U.S. 192, 196 (1927), and *Steele v. United States*, 267 U.S. 498, 503 (1925).

necessity.<sup>3</sup> American state cases in the nineteenth century followed the English rules in this area.<sup>4</sup> An examination of the early cases reveals that the principle of search incidental to a valid arrest had its origin in the necessity of rendering the prisoner harmless and preventing the destruction of goods otherwise subject to seizure. While there is no complete agreement in this area, most of the early state cases strictly limited the scope of the search to the body of the prisoner and to goods which were subject to seizure and were visible to the arresting officer.<sup>5</sup> In no case was a search allowed to go beyond the things actually in the possession of the prisoner. This was generally construed to be the person of the prisoner, in other words, the "frisk" as we know it today.

Particularly, the desire to disarm the prisoner brought about the enlargement of the valid scope of the search. If the weapons of the prisoner were not actually on his body, the officer was allowed to extend his incidental search so that such items might be seized. The very ambiguity of the term "in possession" of the prisoner lent itself to this enlargement.<sup>6</sup> An 1866 New York court decision on this point is a fair representation of the general rule that prevailed in the latter part of the nineteenth century. The court stated that an officer, acting under an arrest warrant, had no authority "to search the house or premises of the accused for concealed property. For this purpose another process is necessary; but he may search the person of the alleged thief, or take into custody the property, if in his possession, and pointed out to him as that described in the process."<sup>7</sup> This decision is certainly a far cry from what we shall presently discern to be the current federal rules on the extent of incidental search.

#### *The Federal Rule of Search Incidental to Valid Arrest.*

The right without a search warrant contemporaneously to search persons lawfully arrested while committing a crime and to search

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3. Hale, Pleas of the Crown §§ 60-61; 1 Stephen, History of the Criminal Law of England 193 (1883); Note, Law of Arrest Without Warrant, 1 Albany L.J. 86 (1870); Note, Arrest Without Warrant—Offense in the Presence of the Officer, 36 Cent. L.J. 475 (1893).

4. E.g., Reifsynder v. Lee, 44 Iowa 101 (1876); Rohan v. Swain, 59 Mass. (5 Cush.) 281 (1850); Houghton v. Bachman, 47 Barb. 388, 392 (N.Y. 1866); Wakely v. Hart, 15 Pa. 295 (1814).

5. Justice Frankfurter's dissent in Davis v. United States, 328 U.S. 582, 609 (1946) touches briefly upon the historical background of this problem.

6. See Ewbank, Extent of Right to Search and Bind Persons When Arrested, 56 Cent. L.J. 303 (1903).

7. Houghton v. Bachman, 47 Barb. 388, 392 (N.Y. 1866). See also United States v. Mills, 185 Fed. 318, 319 (2d Cir. 1911); Closson v. Morrison, 47 N.H. 482 (1867).

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.

Thus the Supreme Court firmly established the right of incidental search in the *Agnello* decision of 1925.<sup>8</sup> While the rule of the *Agnello* case has been frequently relied upon in federal courts, there has been a basic misunderstanding about the rule which has contributed in no small degree to the extension of the physical scope of search at the time of arrest.

The facts of the *Agnello* decision as well as the language of the Court seem to indicate that the Court intended that the rule be limited to cases of arrest for a crime committed in the presence of the arresting officer. Later federal decisions ignored any relationship between the scope of incidental search and whether the arrest was under warrant or without a warrant for a crime committed in the presence of the officer, or in still another category, for a crime in which the officer had probable cause to believe that a felony had been or was being committed.

The important thing about an arrest for a crime being committed in the presence of the officer is that there is necessity for dispensing with the warrant so that the officer can immediately seize the person committing the crime and make a thorough search of the prisoner in order to render him harmless. When the officer actually sees a crime being committed in his presence, there is little speculation as to probable cause for the arrest. There is little likelihood that the prisoner's privacy will be unreasonably invaded if the arrest occurs at a place where the officer is lawfully present. In the instances where the arrest is by warrant, the magistrate has been presented with the probable cause and limits the arrest thereby. In the unusual circumstances where an officer does not see a crime being committed, has no time to apply for a warrant, but has probable cause to believe that a crime has been committed or is being committed, the chances are far greater that an unreasonable invasion of privacy will occur. Historically these unusual circumstances were limited to grave crimes against the public safety and not just to any felony under the laws of the United States. The cause for such arrests was the immediate protection of public safety and not the mere detection of crime.

In *Carroll v. United States*,<sup>9</sup> the first Supreme Court decision to elaborate on search without a warrant, the element of necessity for prompt action was a central point in dispensing with the warrant. There the Court found that the mobility of the automobile necessitated

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8. *Agnello v. United States*, 269 U.S. 20, 30 (1925).

9. 267 U.S. 132 (1925).

the quick action by officers, even to the extent of foregoing formal process. However, the Court stated that "in cases where the securing of a warrant is reasonably practicable, it must be used. . . ."<sup>10</sup> In the *Agnello* decision, which was handed down in 1925, the same year as the *Carroll* case, the Court followed the requirement of necessity for immediate action; that is, where it was not reasonably practical to attempt to secure process, the search without a warrant would not necessarily be unreasonable. Again, in 1931, the Court noted in ruling against the search in the *Go-Bart*<sup>11</sup> case that the officer had had ample time to secure a warrant and had failed to do so.

The question of necessity in searches without a warrant is mentioned here in order that the reader may watch the widening scope of search in the absence of necessity in cases after 1948. In the cases below, a short outline will be made of the development of this problem from 1925 through 1958.<sup>12</sup>

#### *Incidental Search Does Not Extend Beyond the Place of Arrest.*

The first Supreme Court decision to give any indication of the reasonable extent of incidental search was the decision in *Weeks v. United States*.<sup>13</sup> In this case Weeks had been arrested at the Union Station in Kansas City, Missouri. While Weeks was being arrested, other officers went to his residence some distance from the place of arrest and conducted a search of his home without a warrant. The Court held this latter conduct to be unreasonable and not justifiable on the basis of the arrest. The Court did say that an incidental search could be made at the time of arrest for fruits of the crime found at such time and within the control of the prisoner.<sup>14</sup> It is obvious from the decision that the Court would not allow Weeks' residence to come within the phrase "the control of the prisoner." Beyond this the Court gave no indication of what it considered to be the limitations of this phrase.

There is no indication in the *Weeks* case that the government attempted to justify the arbitrary invasion of Weeks' residence without a warrant as incidental to the arrest at the Union Station. Such an attempt would have made a mockery of the privacy of one's home as protected by the fourth amendment. In 1925, in *Agnello v. United States*<sup>15</sup> federal agents did make such a bold attempt. The agents witnessed the consummation of an illegal sale of narcotic drugs by looking

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10. *Id.* at 156.

11. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931).

12. The outline will follow major topics within the chronological development of the topics.

13. 232 U.S. 383 (1914).

14. *Id.* at 392

15. 269 U.S. 20 (1925).

through a window in the home of one Alba. The agents entered the home, arrested the defendants and seized the packages of cocaine as well as the money used in the sale. At this point the agents left Alba's residence and went to the home of one of the other persons arrested and searched it without a warrant. Upon finding no narcotic drugs the agents then went several blocks further to the home of Agnello, one of those arrested, and entered it without a warrant. In the meantime the prisoners had all been taken to police headquarters. The Court upheld the arrest and incidental search and seizure made at the place of arrest, that is, at the home of Alba. The other searches and seizures were held to be in violation of the fourth amendment. The Court pointed out that it was not to be doubted that officers had a right to search persons lawfully arrested *while committing a crime* in order to seize weapons, or instruments and fruits of the crime.<sup>16</sup> Such an incidental search does not extend, however, beyond the place of the arrest and the Court reminded the government that except as incident to a valid arrest there is no sanction for the government to search a private dwelling house without a warrant. In noting that officers had an incidental right of search at the place of the arrest, the Court commented that "the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody elsewhere."<sup>17</sup>

#### *Incidental Search and Third Parties.*

On at least one occasion the Supreme Court has indicated that the right of incidental search does not extend to third parties. In *United State v. Di Re*<sup>18</sup> an informer told the police he was to purchase counterfeit gasoline ration coupons from a certain person at a designated time and place. When the officers appeared they found its owner, from whom the informer had just purchased the coupons, sitting in the automobile with a third party, Di Re. The owner of the car and Di Re were arrested without a warrant. Di Re accompanied the officers to the police station without protest. A search of his person revealed an envelope containing counterfeit coupons. The Government contended that the search of Di Re was justified as incident to the search of a car reasonably believed to be carrying contraband, or as incident to the

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16. *Id.* at 30. See the recent case of *Draper v. United States*, 358 U.S. 307 (1958), where the Court upheld an arrest without a warrant and the incidental search in a case where the officer did not see a crime being committed in his presence but merely had probable cause to believe that one was being committed.

17. *Id.* at 30-31.

18. 332 U.S. 581 (1948).

lawful arrest. The Court held that an otherwise valid incidental search did not carry with it the right to search a third party even if the desired article, because of its smallness, could be easily concealed. To allow such would mean that the officers could search guests in a home as an incident to the search of the house, a position which even the government did not contend for. As to the government contention that the search was justified as an incident to the lawful arrest of *Di Re*, the Court stated that this position could not be accepted since the initial arrest was invalid. As the officers arrested in the state of New York, federal law required them to conform to the mode of process for that state.<sup>19</sup> The arrest was for a misdemeanor and the New York law, like that in many other jurisdictions, stipulates that arrest for a misdemeanor without a warrant must be for a crime committed in the presence of the officer. Yet *Di Re* committed no offense in the presence of the arresting officers. To have made a valid arrest the officers must have had probable cause, and the necessary probable cause could not be inferred simply by the proximity of *Di Re* to the occasion of a crime or from his submissiveness in the face of arrest.

The *Di Re* decision seems to have been a wise one. There could be many instances where an individual would be fortuitously placed in physical proximity to the commission of a crime. In the absence of any probable cause which would connect the individual to the crime, the police should not be allowed to extend their incidental searches to bystanders or even those intimately associated with the person arrested. The immediate intimate contact does not of necessity mean the individual is a party to the crime.

#### *Extent of Incidental Search at the Place of Arrest.*

Two years after the *Agnello* decision the Supreme Court had occasion to rule upon the extent of search at the place of arrest. In *Marron v. United States*<sup>20</sup> prohibition agents obtained a search warrant for the search and seizure of intoxicating liquors and articles for their manufacture. Upon arriving at the described place, the agents found that liquor was being sold on the premises by the drink. In view of the crime being committed in their presence, the agents arrested the attendant in charge and proceeded to search the premises. They seized articles other than those described in the search warrant and justified this as a search and seizure incidental to the execution of a search warrant. The Court rejected the contention that the execution of a search warrant allows an incidental search and seizure. However, the Court allowed the search and seizure as incidental to the arrest for a

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19. 1 Stat. 91 (1789).

20. 275 U.S. 192 (1927).

crime committed in the presence of the officers. It is important to note that the search went beyond the confines of the barroom in which the arrest was made and extended to a closet. In the closet the officers found a ledger which they seized as an instrument of the crime. Additionally it is important to note that the Court, as in the *Agnello* case, held that the search of the place was dependent upon the fact that there had been an arrest for a crime committed in the presence of the officers.

The implications of the *Marron* case could have gone a long way toward circumventing the protection against general searches. However, in 1931, the Supreme Court handed down a decision which was to take some of the sting out of the *Marron* case. In *Go-Bart Importing Co. v. United States*<sup>21</sup> an arrest warrant had been issued upon complaint of a conspiracy to violate the prohibition act by the purchase of an automobile. The officers, upon entering the office of the defendants, arrested them and made an incidental search and seizure of the persons arrested. The officers then conducted a search of the three rooms where the arrest was made, forcibly entering locked drawers and seizing papers therefrom. In examining the search, the Court stated that "there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed."<sup>22</sup> Nor could the officers have claimed that there was a crime being committed in their presence. Secondly, the Court remarked that there had been ample time for securing a search warrant. Finally, the Court attempted to distinguish the *Marron* case, holding that in the *Marron* case the seizures were of visible and accessible articles and that there was no threat, as in the instant case, of general ransacking. The Court ignored the reported fact in the *Marron* case that the ledger seized was not visible from the place of arrest but found upon search of the closet of the barroom. There seems to be little doubt, however, that Justice Butler, who wrote the opinions in both of these cases, intended to limit the *Marron* case.

One year after the *Go-Bart* case Justice Butler again wrote the Court's opinion for a case which veered away from the *Marron* decision. In *United States v. Lefkowitz*<sup>23</sup> officers, acting under an arrest warrant, proceeded to a specified room in a New York City office building. Upon entry they found Lefkowitz, designated in the warrant as Henry Miller, and arrested him. The room was divided by a partition and the officers searched both areas of the room as well as the person of the defendant. They opened drawers, cabinets, and seized various

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21. 282 U.S. 344 (1931).

22. *Id.* at 357.

23. 285 U.S. 452 (1932).

articles. The Court held this to be an unreasonable search and seizure. The decision pointed out that the complaint upon which the warrant of arrest was issued was conspiracy to solicit in a wholesale business, intoxicating liquor in violation of the National Prohibition Act. There was no complaint that the defendants were engaged in openly running a bar. There was no bar and there was no crime committed in the presence of the officers. As in the previous cases, the Court stated that the government could not justify the search beyond the person as reasonable on the basis of a crime being committed in the presence of the officers. "Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the rooms in order to ascertain whether the books, papers, . . . contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense under the Act."<sup>24</sup> The Court pointed out that the authority to search under an arrest warrant is certainly no greater than that under a search warrant. Upon the basis of the probable cause that the officers had for the particular crime, no search warrant could have been validly issued which would have conferred the authority that they assumed under the arrest warrant. That is to say, the Court felt that as there was insufficient probable cause for a search warrant, the officers could not assume greater authority under an arrest warrant than the initial probable cause justified. The Court again warned that security against unlawful searches is best protected by resort to search warrants.<sup>25</sup>

It is quite clear that by the time of the *Lefkowitz* case, incidental search of the premises or place of arrest, as distinguished from the person of the prisoner, was to be limited to those cases where the arrest was for a crime committed in the presence of the officer.<sup>26</sup> All of the Supreme Court cases which had allowed incidental search beyond the person as reasonable were cases in which a crime was being committed in the presence of the officer. It is true that the Court never stated before 1947 whether or not other types of arrest carried with them the right of incidental search beyond the person of the prisoner. In other words, prior to 1947, the only affirmative statements of incidental search beyond the person of the prisoner had been limited to arrests for crimes committed in the presence of officers. The failure of the Court to make any affirmative statements of the right existing

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24. *Id.* at 463-64.

25. *Id.* at 464.

26. See Lasson, *History and Development of the Fourth Amendment to the United States Constitution* 128 (1937).

in other types of arrest does not necessarily preclude the existence of the right. However, these cases are a strong indication that the Court did not intend that arrest supersede the requirements of the fourth amendment for the reasonable invasion of privacy by the use of search warrants.<sup>27</sup>

*Control or Possession of the Place of Arrest: Broader Scope in the Lower Federal Courts.*

Prior to the *Go-Bart* and *Lefkowitz* cases the lower federal courts were allowing a much broader scope to incidental search than any previous Supreme Court decision had supported. In *Sayers v. United States*<sup>28</sup> officers discovered that the defendant was using the kitchen of her apartment as a place for the illegal sale of liquor. The kitchen was being used as a business establishment open to the public. The officers went there and purchased liquor from the defendant and after the commission of the crime the officers arrested her. After the arrest the officers searched the entire premises, including private rooms across the hall from the place of arrest. The court held this incidental search to be reasonable and announced a doctrine hitherto completely unsupported by any Supreme Court decision. The lower court stated that an incidental search might go "to the extent that the offender's control and activities likely extended."<sup>29</sup> The court even noted that the search beyond the person might extend to every room of a building.<sup>30</sup>

In the year following the *Sayers* case another federal court carried this doctrine to the extreme. In *United States v. Charles*<sup>31</sup> the court held as valid the search of a hotel proprietor's living quarters after the arrest had been made in the hotel lobby. As in the *Sayers* case the arrest was for a crime committed in the presence of the officers. Another case illustrative of this doctrine is *Dibello v. United States*.<sup>32</sup> Here the court allowed an incidental search of the basement of a soft drink establishment after an arrest on the main floor. Again, the arrest was for a crime committed in the presence of the officers.

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27. In *United States v. Lester*, 21 F.R.D. 376 (W.D. Pa. 1957) the district court did stress the difference between incidental search under a warrant and incidental search at arrest for a crime committed in the presence of the officer and cited the *Marron* case on this point. See also the same point in *Henderson v. United States*, 206 F.2d 300 (5th Cir. 1953).

28. 2 F.2d 146 (9th Cir. 1924).

29. *Id.* at 147.

30. Cf. *United States v. Seltzer*, 5 F.2d 364 (Mass. 1925), where a broad incidental search was allowed upon commission of a crime in the presence of the officers. Here, however, at least part of the broad scope can be attributed to the defendant's waiver of protection of areas at the place of arrest.

31. 8 F.2d 302 (N.D. Cal. 1925).

32. 19 F.2d 749 (8th Cir. 1927).

In contrast to the above decisions is the opinion of Judge Learned Hand in *United States v. Kirschenblatt*.<sup>33</sup> This case was somewhat different as there was a search warrant as well as a search incidental to an arrest. However, it is significant that the court treated as inseparable the two different authorities for search. After the arrest was made in Kirschenblatt's office, a general search of the premises was made and a small quantity of liquor and a number of papers were seized. Judge Hand held that the scope of the incidental search was dependent upon the authority for the arrest. The arrest was based upon a violation of the National Prohibition Act. Under the particular provision of this act the search and seizure was to be limited to containers and property for the manufacture of illegal liquor. The search could not extend to the seizure of private papers. "[S]trict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of person, [yet] it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. . . . [I]t is . . . a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him. . . ."<sup>34</sup>

The *Kirschenblatt* decision was to be cited in later Supreme Court decisions and along with the *Go-Bart* and *Lefkowitz* cases narrowed the permissible area of incidental search. However, a number of years after these cases the Supreme Court handed down a decision which went a long way towards giving approval to the nearly unlimited incidental search of the *Sayers* doctrine.

#### *Expansion of Incidental Search.*

##### 1. The *Harris* Decision, 1947.

In 1947, the Supreme Court made the biggest step backward in the protection of privacy in the nearly 160 years of its history. Reference is made to the decision of the Court in *United States v. Harris*.<sup>35</sup> In this case agents of the Federal Bureau of Investigation, acting under an arrest warrant, went to the apartment of Harris and arrested him on charges of fraud and forgery. The officers stated they were looking for specific cancelled checks alleged to have been used for forgery purposes and which they believed were in the possession of Harris. It is important to note that the government openly acknowledged that the incidental search was directed to articles about which they had a considerable amount of prior knowledge. The search for these checks covered the entire four-room apartment and lasted five

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33. 16 F.2d 202 (2d Cir. 1926).

34. *Id.* at 203.

35. 331 U.S. 145 (1947).

hours. In the course of this highly detailed search one of the officers found in a dresser drawer a sealed envelope marked "George Harris, Personal Papers." The officer opened the envelope and found eight Selective Service Notice of Classification cards and Registration Certificates. Although unconnected with the cause of arrest, these papers were seized as unlawfully in the possession of Harris and were used against Harris in a prosecution for violation of the draft laws.

In a five-to-four decision, Chief Justice Vinson held for the majority that the five-hour four-room search was reasonable as incidental to the arrest; this in spite of the fact that the Supreme Court had never previously allowed an incidental search beyond the person under an arrest warrant. In fact the majority gave no indication that they were aware of the nature of the arrests in the previous cases on incidental search.

The majority focused attention on the fact that the checks were of such small size that a thorough search was necessary. They felt that since the checks could have been hidden in various secluded spots in the apartment, an extensive and intensive search was demanded. The Chief Justice did observe, however, that "other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive."<sup>36</sup> The Chief Justice ignored the question of why the officers did not secure a search warrant for the checks if they had prior knowledge that the checks had been stolen and were in the possession of the defendant. The failure to apply for a search warrant can only lead to the conclusion of a callous disregard for the requirements of the fourth amendment. The only other conclusion is that the officers did not have prior knowledge of the checks, in which case the incidental search was a general exploratory search in the hopes of securing evidence of the crime.

As to the seizure of the draft cards, the Court held that since they were properly subject to seizure as government property illegally in the possession of the defendant and since they were discovered in the course of an otherwise valid search made in good faith their seizure was reasonable. If one can accept the assumption that the search was otherwise valid, then the Court's conclusion here seems sound.

## 2. The *Rabinowitz* Decision, 1950.

The final Supreme Court case which is relevant to the question of the scope of search is the decision in *United States v. Rabinowitz*.<sup>37</sup> The case is interesting if for no other reason than the fact that it

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36. *Id.* at 152.

37. 339 U.S. 56 (1950).

overruled the recent *Trupiano*<sup>38</sup> decision on the practicality of securing a warrant. The *Trupiano* decision tended to make the factor of the opportunity to secure a warrant the primary test of the reasonableness of search and seizure.

In the present case Rabinowitz was arrested under a warrant charging him with selling and having in his possession forged and altered government stamps. The arrest took place in his one-room office, an office open to the public. As incidental to this arrest the officers searched the desk, safe, and file cabinets and seized a number of forged stamps which were introduced as evidence against him, over his timely objection. The Supreme Court voted four to three to uphold the conviction, with Justice Minton delivering the majority opinion.

The arrest warrant was issued after a printer disclosed to the government that Rabinowitz had purchased forged overprint federal stamps, and also the warrant was based upon the fact that Rabinowitz had sold forged stamps to a postal inspector. The respondent had been previously convicted of illegally overprinting federal stamps.<sup>39</sup>

The majority held that the valid arrest under the warrant was broad enough to cover the crime of possession of illegal goods and "even if the warrant of arrest were not sufficient to authorize arrest for possession of stamps, the arrest therefor [*sic*] was valid because the officers had probable cause to believe that a felony was being committed in their very presence."<sup>40</sup> This comment by the Court was directed at the fact that the arrest warrant was primarily limited to the charge of selling four false or altered stamps. This of course leaves an important issue in the case in a state of suspension: Was the incidental search and seizure made from the arrest warrant or did the officers have a broader probable cause than stated which allowed them to make an arrest on a separate charge without a warrant and thus execute an incidental search and seizure? If the incidental search was conducted under the authority of the arrest warrant, this would follow the *Harris* case. If, however, the incidental search was conducted under a fictionalized second arrest, that is, an arrest on reasonable grounds to believe that Rabinowitz had illegal stamps in his possession and thus was committing a crime in the presence of the officers, then this is the first Supreme Court decision that has ever allowed incidental search at an arrest without a warrant where the officer only had probable cause to believe that a crime was being committed. The *Agnello* decision and all other Supreme Court decisions prior to 1947 had allowed an incidental search only in conjunction with an arrest

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38. *Trupiano v. United States*, 334 U.S. 699 (1948).

39. Overprinting is the practice of the government of printing the name of a particular state or possession over a previously printed stamp prior to its sale.

40. 339 U.S. 56, 60 (1950).

for a crime visibly committed in the presence of the officer. The *Harris* case expanded these decisions to allow incidental search under an arrest warrant. The present decision appears to be a further expansion of incidental search.

After the Court had established the power of arrest in the *Rabinowitz* decision, it went on to say that an incidental search could be made upon the person and all within his "immediate control." It determined that the *Harris* and *Marron* cases constituted ample authority for such a search, noting that the *Go-Bart* and *Lefkowitz* cases had not drained the *Harris* and *Marron* cases of their validity.<sup>41</sup> The Court further stated that the incidental search was reasonable because it was conducted in a business room to which the public, including the officers, was invited, that the room was small and under the immediate and complete control of the respondent, and finally that the search did not extend beyond the room used for the unlawful purposes. The Court then overruled the *Trupiano* decision to the extent that it required a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after the arrest.<sup>42</sup> The test of the incidental search then is to be determined by the "reasonableness under all circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."<sup>43</sup> The majority ended its opinion with the contention that there is sufficient protection from unreasonable incidental searches in the fact that officers must justify their conduct before the courts.

The following points summarize the weakness of the Court's position in the *Rabinowitz* case:

(1) It departs from the *Go-Bart* and *Lefkowitz* cases in that the searches in these two cases were of the same essential character and extent, yet they were held to have been in violation of the fourth amendment.

(2) If the officers had probable cause to believe that the stamps were in fact concealed in the office, then this should have been weighed before a magistrate by applying for a warrant. Probable cause to believe that goods are illegally hidden in an area that is constitutionally protected is never a justification for the search of that place without a warrant.

(3) To say that the test of reasonableness of an incidental search is the total atmosphere of the case is to leave no test at all unless the Court establishes some criteria for reasonableness. The Court here would seemingly abdicate the responsibility of judicially weighing

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41. *Id.* at 62-63.

42. *Id.* at 65-66.

43. *Ibid.*

probable cause before a search and only after the fact of the search determine the reasonableness. The only result of such abdication will be that the police concept of reasonableness will become dominant and controlling. This is true because not all searches will get before the courts and hence judicial control will never be exercised as it would have been in the application for a warrant. Secondly, police reasonableness will prevail because the post-mortem examination of the search tends to give more weight to what the police believe to be probable cause. While a judge might carefully examine the contentions for probable cause before the fact of arrest, after the fact a judge will be inclined to support executive judgment.

(4) The decision lays the groundwork for the complete abandonment of the requirement of a warrant to search. This follows in that the decision departs from the requirement of necessity as the basis for every search without a warrant of an area within the protection of the fourth amendment.

(5) It is an open invitation to police officers to use arrest instead of a search warrant wherever possible, even though they have the intention to search for various items in advance of the arrest.<sup>44</sup>

As the law stands today, an incidental search may be made in any type of arrest, with a warrant, without a warrant for a felony committed in the presence of the officer, or without a warrant for a felony which the officer has probable cause to believe has been committed by the person arrested. On the basis of the *Harris* and *Rabinowitz* decisions what the criteria will be for the determination of the reasonableness of the scope in such cases is highly uncertain. The courts will examine the "total atmosphere" of the case and possibly they will consider the following factors:

(1) The prior probable cause which led the officers to believe that the objects of seizure were in fact concealed in the place of arrest.

(2) That the objects sought were of a small size and thus not necessarily visible at the time of arrest.

(3) That the place searched was open to the public.

(4) That the place searched was in the legal, immediate and complete control of the prisoner.

However, these factors offer little guide to the law enforcement officer, since the Court has not indicated how many of these factors must be present to justify the search.

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44. For various comments on the *Rabinowitz* case see Beisel, *Control Over Illegal Enforcement of the Criminal Law* 28 (1955); Machen, *Law of Arrest*, 76-81 (1950); *The Supreme Court*, 1949 Term, 64 *Harv. L. Rev.* 114; 124 (1950); *Notes*, 36 *Cornell L.Q.* 125 (1950), 36 *Iowa L. Rev.* 142 (1950).

## PRESENT TRENDS IN INCIDENTAL SEARCH

*Effect of the Harris and Rabinowitz Decisions.*

## 1. Law Enforcement Practices.

The meaning of the phrase "incidental search" has always been, prior to the *Rabinowitz* case, that the search was to be strictly incidental to the arrest and not the primary factor in the arrest. However, as Justice Frankfurter commented in his dissent in the *Rabinowitz* case, the new rule makes "arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest."<sup>45</sup> There are indications that the rule of the *Rabinowitz* case has not passed unnoticed by law enforcement agencies. The following cases will indicate the nature of the problems. In *McKnight v. United States*<sup>46</sup> the defendant was suspected of carrying on a lottery trade and was trailed as a "pick-up" man repeatedly. Officers secured a warrant for his arrest but were given orders not to arrest him until he entered one of the houses he had been seen to enter on previous occasions. The object of such an instruction was to allow an incidental search of the place of arrest. The arrest was made as instructed and the officers made an incidental search of the place of arrest. However, the court declared this incidental search unreasonable and said that the arrest was a mere pretext for the search. "To call this seizure incident to this arrest is like saying that cashing a check is incident to writing it. Means are incident to ends, not ends to means."<sup>47</sup>

A situation similar to the *McKnight* case occurred in *United States v. Johnson*.<sup>48</sup> Here the police secured a warrant for arrest but again they had specific instructions to wait until the defendant entered his apartment before executing it. In fact they rejected a convenient opportunity to arrest him on a public street. The apartment did not belong to the defendant but he was known to visit it. The police had some suspicions about the activities of the owner of the apartment, but they did not have sufficient cause to secure a valid warrant. Clearly the easiest way to reach the desired area would be to search the apartment by arresting the defendant when he visited it. The Court held this to be an unreasonable search for the same reasons as given in the *McKnight* case.

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45. 339 U.S. 56, 80 (1950).

46. 183 F.2d 977 (D.C. Cir. 1950).

47. *Id.* at 979. Cf. *United States v. Booth*, 161 F. Supp. 269 (Alaska 1958), where the arresting officer stated in court that he arrested defendant in order to search him. The court upheld the government, holding that such a statement by the officer had to be taken in the context of the long investigation that the police had conducted in the case.

48. 113 F. Supp. 359 (D.C.D.C. 1953).

## 2. Expansion of Scope: Area in Control of the Prisoner.

A second effect of the *Harris* and *Rabinowitz* cases has been a tendency by law enforcement officers to use those cases to justify an increase in the physical area of incidental search. How widespread this problem may be is presently unknown. However, there has been a sufficient number of cases within the eight years after the *Rabinowitz* case to warrant the conclusion that the courts are faced with an ever-increasing problem of whether to limit or allow police invasions of privacy by means of incidental searches. Until the Supreme Court gives a clearer indication of the reasonable scope of incidental search, the lower courts will be subject to pressures from enforcement agencies to allow a wide scope to incidental searches.

In *Kernick v. United States*<sup>49</sup> the defendant was arrested in Union Station, Kansas City, Missouri, on probable cause to believe that he was committing a felony in the presence of the officers. The officers searched his person and found a key to a luggage locker. They went to the locker in the station and found nothing in it but they continued their search by using a baggage check found on the person of the defendant. The officers secured nine ounces of heroin from the baggage. The court held this incidental search within the permissible area since the suitcase was said to be within the "constructive possession" of the prisoner.<sup>50</sup>

In *United States v. Fowler*<sup>51</sup> the defendant was arrested in his car some two blocks from his apartment. The officers seized three keys from the person of the prisoner and then took him with them to his apartment. The officers used one of the seized keys to open the apartment door, made a search of the apartment and found a key to a garage in the rear of the apartment. They used this key to open the locked door of the garage which they searched and from which they seized contraband heroin. The police justified their conduct as incidental to the arrest. The court, assuming *arguendo* that the arrest was valid, ordered the heroin suppressed and a new trial granted as the search of the apartment and garage were not found to be incidental to the arrest.

Another example of current tendency of officers to expand the scope of incidental search is the case of *Clifton v. United States*.<sup>52</sup> Here the court allowed the incidental search of a residence when the arrest took place in the yard of the residence. The officers purchased illegal liquor

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49. 242 F.2d 818 (8th Cir. 1957).

50. See also *United States v. Howard*, 138 F. Supp. 376 (Md. 1956), where a warrant was required to search a bank deposit box upon arrest.

51. 17 F.R.D. 499 (S.D. Cal. 1955).

52. 224 F.2d 329 (4th Cir. 1955).

from one Padgett in the backyard of Clifton's home and then made a search of the Clifton home which the officers called incidental to the arrest. The officers contended that as Padgett was acting on behalf of Clifton in the illegal activity, they therefore had a right to search the home. The court did not indicate if there were any limits to the search of the home but simply stated that Clifton could not insulate his home from incidental search by the expedient of employing Padgett to make the sales.<sup>53</sup> The court here seems perfectly sound in its contention that Clifton could not insulate his home from search by employing Padgett and it also seems obvious from the case that the officers had probable cause to believe that the home did contain goods subject to seizure. But the officers should have made application for a search warrant before invading the home. Belief, however well founded, that illegal goods are in a place is positively no justification in itself to search that place without a proper warrant. The *Rabinowitz* and *Harris* cases at least had the merit that the arrest took place in the home or office and also that the Court directed attention to the extent of the search within the constitutionally protected areas.<sup>54</sup>

In 1957, two years after the *Fowler* and *Clifton* decisions, a federal district court in *United States v. Jackson*<sup>55</sup> allowed an officer to extend the scope of the incidental search from the car in which the defendant was arrested to an apartment some distance from the place of arrest. The defendant was arrested without a warrant while driving on a city street. The incidental search produced a key to an apartment which the officers knew that the defendant had occupied. The court allowed this search of the apartment, holding that "it has been held that the search incidental to arrest may be extended beyond the immediate place of arrest to an adjacent area within the defendant's control . . ."<sup>56</sup> and the court cited the *Harris* and *Clifton* cases in support of this position. Of course neither case could support such a position and the *Agnello* case is obviously in the opposite direction.

An additional tendency at the present time is to search the entire premises as incidental to the arrest and justify such on the basis of the *Harris* and *Rabinowitz* decisions. While it is true that before these decisions by the Supreme Court the lower courts had allowed the

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53. See also *Rhodes v. United States*, 224 F.2d 348 (5th Cir. 1955), where the court stated that the right of incidental search extends some considerable radius from the place of arrest.

54. See also *Drayton v. United States*, 205 F.2d 35 (5th Cir. 1953), where officers attempted unsuccessfully to extend their incidental search to various locked rooms of a rooming house when the arrest took place at the entrance to the residence.

55. 149 F. Supp. 937 (D.C.D.C. 1957), rev'd on other grounds, 250 F.2d 772 (D.C. Cir. 1957).

56. 149 F. Supp. 937, 940 (D.C.D.C. 1957).

search of a whole house as incidental to an otherwise valid arrest, still the *Go-Bart* and *Lefkowitz* decisions of the Supreme Court were aimed directly at eliminating such a wide area of incidental search. In *Smith v. United States*,<sup>57</sup> in an arrest without a warrant on a narcotics charge, the police were allowed to search as incidental to this arrest the entire upstairs and ground floor of the house.<sup>58</sup> The court cited in support of this the *Harris* case. However, the Supreme Court stressed in the *Harris* case that the articles being searched for were small and required a thorough search and additionally that the items seized were illegally in the possession of the defendant. In the present *Smith* case the lower court allowed the seizure of narcotics paraphernalia which is not contraband and it is doubtful if it could be called an instrumentality of a crime when the body of the crime itself was never produced.

#### CONCLUSION

In *Rhodes v. United States*<sup>59</sup> the court held that incidental search extends to some "considerable radius" from the place of arrest; in the *Fowler* case the court held that this search extends to the "constructive possession" of the prisoner; and in the *Clifton* case the home was invaded yet the arrest took place in the yard of the home. If trends evidenced by these cases continue, the fourth amendment will quickly become a historical curiosity in the face of arrest.

Adequate law enforcement in the United States today requires some degree of incidental search and seizure at the time and place of arrest. However, the present author has found nothing in the problems confronting law enforcement agencies which demands that they be allowed the increased scope of incidental search which has occurred in the past eight years. Sooner or later the Supreme Court must squarely face the issue of whether it is going to allow the fourth amendment to become a third-class right by the simple expedient of using arrest as a pretext for search. Even where arrest is not an expedient but made in good faith, the Supreme Court must soon face the problem of the increasing scope of incidental search. The gradual eating away of privacy by increasing the scope of incidental search will change the tense in that famous old phrase in Western civil liberties: "a man's home is his castle," to "a man's home *was* his castle." The chief difficulty in pressing for a reasonable narrowing of the scope of search incident to arrest is that, as Justice Douglas has recently

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57. 254 F.2d 751 (D.C. Cir. 1958).

58. See also *United States v. Garnes*, 258 F.2d 530 (2d Cir. 1958), as another of the many examples of this same situation.

59. 224 F.2d 348 (5th Cir. 1955).

stated, "wherever a culprit is caught red-handed, as in the leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and the guilty alike."<sup>60</sup>

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60. *Draper v. United States*, 358 U.S. 307, 314 (1958) (dissenting opinion).