Warrantless Searches and Seizures

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Mack Player, Warrantless Searches and Seizures, 5 Ga. L. Rev. 269 (1971), Available at: http://digitalcommons.law.scu.edu/facpubs/748

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THE fourth amendment to the Constitution has two basic clauses.¹

The first, the reasonableness clause, protects the people against unreasonable searches and seizures. The second, the warrant clause, sets forth conditions under which a warrant may issue.² Searches and seizures made pursuant to a warrant are, quite obviously, governed by the commands of the warrant clause. However, the effect of the warrant clause upon searches and seizures made without warrants is not clear from the amendment itself,³ and the Supreme Court has failed to develop a consistent interpretation of the proper role of that clause.⁴

There are two theories about the proper relationship of the reasonableness and warrant clauses. The first reads the clauses as complements to each other. Adherents of this theory discern an historical preference for the warrant process, a desire to place a magistrate between the citi-

¹ The full text of the amendment is as follows:

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.

U.S. Const. amend. IV.


³ The Fourth Amendment . . . consists of two conjunctive clauses . . . But the Amendment nowhere connects the two clauses; it nowhere says in terms what one might expect it to say; that all searches without a warrant issued in compliance with the conditions specified in the second clause are eo ipso unreasonable under the first. A.L.I. & A.B.A., Trial Manual for Defense of Criminal Cases, Prelim. Draft 1, 28 (1965).

zen and the police. The argument is that the amendment was designed to insulate the people from hastily conceived, unilateral police action. This insulation is provided by the "neutral and detached magistrate." Therefore, except in unusual or emergency situations when resort to the judicial authority is impossible, searches and seizures without warrants must be considered unreasonable.⁵

The second theory of interpretation would treat the warrant and reasonableness clauses as independent and severable. Adherents of this theory argue that searches and seizures conducted without warrants should be judged solely by the standard of reasonableness.⁶ Little or no reference need to be made to the language of the warrant clause, and no significance need be placed upon the failure to secure a warrant.⁷

⁵ An early advocate of this view was Mr. Justice Butler who stated: "Indeed, 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 and others who happen to make arrests." United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

Later, Justices Jackson and Frankfurter declared, in no uncertain terms, that a warrant was a necessary ingredient in the determination of reasonableness. Specifically, Mr. Justice Jackson wrote:

"[The Fourth Amendment's] protection consists in requiring that those inferences [which can be drawn from the facts] be drawn from a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. When the right of privacy must reasonably yield to the right of search, is, as a rule, to be decided by a judicial officer, not by a policeman . . . ." Johnson v. United States, 333 U.S. 10, 14 (1948).

Likewise, Mr. Justice Frankfurter stated in a dissenting opinion: "[W]ith minor and severely confined exceptions, inferentially, a part of the [Fourth] Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant." Harris v. United States, 331 U.S. 145, 162 (1947). Dissenting again in Davis v. United States, 328 U.S. 582 (1946), Mr. Justice Frankfurter stated: "[The warrant clause is] the key to what the framers had in mind by prohibiting 'unreasonable' searches and seizures . . . [A]ll seizures without judicial authority were deemed 'unreasonable.'" Id. at 605.

Some recent opinions by other members of the Court have also indicated a preference for interpreting the warrant clause as complementary to the reasonableness clause. See Katz v. United States, 389 U.S. 347, 357 (1967) (Justice Stewart); McCray v. Illinois, 386 U.S. 300, 316 (1967) (Justice Douglas dissenting). See also Terry v. Ohio, 392 U.S. 1, 35 (1968) (dissenting opinion); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).


⁷ Professor Telford Taylor has advocated this view and had marshaled considerable historical support for his position. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-50 (1969). In Taylor's view, Justice Frankfurter and others who have read a warrant requirement into the reasonableness clause have stood the amendment on its head. Professor Taylor points to the celebrated English General Warrant affairs of the mid-18th Century concerning John Wilkes and John Entick and to the great controversy in our
The court has failed to adopt one theory or the other to control all areas of search and seizure. Indeed, it has displayed surprisingly little consistency in its overall philosophy. In one instance the Court makes bold statements indicating that police invasions without warrants are prima facie unconstitutional. The next decision disclaims the importance of warrants and rules upon police conduct guided solely by the flexible standard of reasonableness. Both theories have even been reflected in the language of a single decision.8

Although the overriding role to be played by the warrant clause in warrantless searches and seizures is undefined, what is unclear and contradictory as a generality takes on more consistent clarity when it is broken down into distinct areas and analyzed one area at the time. For the purposes of the following analysis the cases will be divided into three categories. The first category contains cases where the sole question involved is a seizure of the person, an arrest. The second category is made up of cases where there is in issue only a search accomplished without seizure of the person. The third category is comprised of cases where an arrest and a search are combined, i.e. the search is alleged to

8 In Terry v. Ohio, 392 U.S. 1 (1968), the Court found that “the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” Id. at 19. But later the Court stated that “in most instances the failure to comply with the warrant requirement can only be excused by exigent circumstances.” Id. at 20.
be incidental to the arrest. The most difficult problems of reconciling the two fourth amendment clauses erupt in this third area.

**ARREST**

Although not specifically set forth in the fourth amendment, the word "arrest" has been defined as a "seizure of the person" and thus found within the purview of the amendment. The Court has indicated that the point of "seizure" is reached "[w]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . ." Although the definition appears quite simple, very difficult problems are encountered in determining exactly the point at which liberty is restrained.

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10 392 U.S. at 19 n.16. In earlier decisions the Supreme Court did not impose the fourth amendment protections until a formal arrest had been consummated. E.g., Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959). Therefore, to determine the point at which the constitutionality of conduct would be considered, lower federal and state courts relied upon common law concepts and definitions of arrest. Rodgers v. United States, 362 F.2d 358 (8th Cir. 1966); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); McChan v. State, 238 Md. 149, 207 A.2d 632 (1965). In some instances "arrest" was interpreted to mean the actual or purported holding of a seized person to answer a criminal charge. See, e.g., Busby v. United States, 296 F.2d 328, 331 (9th Cir. 1961); 2 W. BLACKSTONE, COMMENTARIES 289 (3d ed. 1884); F. FISHER, LAWS OF ARREST 7, 42 (1967); RESTATEMENT (SECOND) OF TORTS § 112 (1965); UNIFORM ARREST ACT § 1. Others advocated the notion that there must be some belief on the part of the arrested person that he was being held for criminal proceeding. See F. Fisher, supra at 52 (1967). Even the courts, when ostensibly applying some common law concept of arrest, often added that pre-arrest detention must be reasonable. Rodgers v. United States, supra; United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 92, 252 N.Y.S.2d 458 (1964). In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court attempted to rectify this misinterpretation of the fourth amendment. For constitutional purposes only the point of seizure was relevant.

11 This is illustrated by comparing Terry v. Ohio, 392 U.S. 1 (1968), and Peters v. New York, 392 U.S. 40 (1968), where the police ostensibly and physically curtailed the accused's freedom of movement, with a companion case, Sibron v. New York, 392 U.S. 40 (1968), where the liberty of the accused was restrained by a "show of authority" by the arresting policeman. Although Sibron presented the opportunity to shed some light on this problem, the Court assiduously avoided the question. However, in a concurring opinion, Mr. Justice Harlan proposed that the initial encounter between the policeman and the suspect resulted in sufficient restraint to activate the provisions of the amendment. For further illustration of this problem, compare Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963) with United States v. Vita, 294 F.2d 524 (2d Cir. 1961).

It is also interesting to note the similarity between the language in Terry, which defined the point at which the protections of the fourth amendment must be reckoned with, and the language in Miranda v. Arizona, 384 U.S. 436 (1966), which specified the juncture at which the protections of the fifth and sixth amendments are activated, i.e.
Once it is accepted that a seizure has indeed taken place, the problem becomes that of the proper standard to be applied to determine whether the seizure was constitutionally justified. Conceivably a court could measure all seizures of the person against the standard of their inherent reasonableness with no reference to the warrant clause. However, the Supreme Court has not done this in typical arrest situations (as distinguished from brief on-the-street encounters). Rather, in a limited way it has read the reasonableness clause in conjunction with the warrant clause. It has ruled that warrants are the preferred method of apprehension.\textsuperscript{12} If an officer secures a warrant, the fourth amendment's warrant clause specifically requires that he demonstrate probable cause\textsuperscript{13} to the issuing magistrate.\textsuperscript{14} The Court reasons that if a lesser showing than probable cause is permitted for seizures without warrants, then resort to the "preferred" warrant process would be discouraged.\textsuperscript{15} The warrant clause standard of probable cause has thus influenced considerations of what is reasonable.

No doubt the Court could have reached the same result without any reference to the warrant clause. It could have held that probable cause was the historical common law requirement for legal arrests\textsuperscript{16} and thus


\textsuperscript{13} "Probable cause" is an objective standard and is not measured by subjective good faith or belief. Beck v. Ohio, 379 U.S. 89 (1964); Giordenello v. United States, 357 U.S. 480 (1958). It exists when there are facts sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed and that the person named is connected therewith. Spinelli v. United States, 393 U.S. 410 (1969); Draper v. United States, 358 U.S. 307 (1959); W. LAFAVÉ, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 244 (1965); 4 J. WHARTON, CRIMINAL LAW & PROCEDURE, 234-44 (1957).

\textsuperscript{14} The fourth amendment provides in relevant part: "[N]o warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV.


There is even considerable authority for the proposition that, properly to encourage use of the "preferred" warrant, the standard for probable cause to justify unilateral police action should be more stringent than the probable cause justifying the judicial issuance of the warrant. See Aguilar v. Texas, 378 U.S. 108, 111 (1964); Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967), rev'd, 393 U.S. 410 (1969).

necessary for a "reasonable" seizure. It was merely a historical coincidence that similar language appears in the warrant clause. In this way the two clauses would have been viewed as entirely independent and severable. Whatever might be the historical accuracy of such an approach, it is quite clear that the Court did not, in fact, interpret the two clauses in this manner. The warrant clause itself was read to have some relationship to "reasonableness" and because of this relationship a similar standard was demanded for the two types of seizures.

Nevertheless, except for a brief glimmer found in the quickly overruled *Trupiano v. United States* and for hints in *Beck v. Ohio*, the Court has given no positive indication that it intends to turn the preferred method of arrest into a required method. The lower federal courts have rejected the proposition that the fourth amendment requires the securing of a warrant in order to make an arrest reasonable. The test is probable cause not whether the officers could have secured a warrant.

When one considers the Court's position that most searches require the prior authorization of a warrant, its refusal to require an arrest warrant when time permits seems quite incongruous. In an age when the protection of personal liberty is thought to be more significant than the protection of property interests, it is difficult to justify a distinction which allows constitutional protections to the privacy of places but

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17 At common law, arrests without warrants were substantially circumscribed. However, warrants, often creatures of non-judicial bodies, were occasionally issued on less stringent standards and authorized sweeping invasions. Lasson, *The History and Development of the Fourth Amendment to the Constitution* 23 ff. (1937); Taylor, *supra* note 7 at 24-27. Therefore, it could be argued that the colonists accepted the fact that arrests without warrants based upon probable cause were imminently reasonable. However, fearing the general warrant based upon little or no showing of cause, he desired to see imposed a similar restriction upon the issuance of warrants. Thus, rather than the warrant clause indirectly imposing a probable cause standard upon warrantless actions, the reverse was true. The accepted probable cause standard for warrantless arrests found its way into the warrant clause.


20 See McCray v. Illinois, 386 U.S. 300 (1967); Draper v. United States, 358 U.S. 807 (1959). This is not to say that there are not volumes of forceful statements indicating the need for warrants. See Jones v. United States, 362 U.S. 257, 270 (1960); McDonald v. United States, 335 U.S. 451, 456 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948). But these cases and others directed their attention to searches and not arrests.

21 United States v. Rubio, 404 F.2d 678 (7th Cir. 1968); Churder v. United States, 387 F.2d 825 (8th Cir. 1968); Lee v. United States, 365 F.2d 469 (8th Cir. 1966); Rouse v. United States, 359 F.2d 1014 (D.C. Cir. 1966).

22 See text accompanying notes 31-36 *infra*. 
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denies them to the liberty of persons. This incongruity is particularly apparent when the highly protected right of privacy itself is circumvented. It should be patently unreasonable to permit the police to invade without judicial authorization the private premises of the accused for the purpose of making an arrest and then permit them while there to seize objects and to conduct searches as incidents to the arrest. Such a practice endangers privacy as well as liberty. Therefore, even if public arrests without warrants can be sanctioned, it would seem that invasions of private areas to search for persons should receive no less protection than invasions to search for physical objects.

The Supreme Court recently recognized an exception to the probable cause standard for warrantless seizures of the person. In Terry v. Ohio the Court determined that, when police conduct an on-the-street encounter and superficial search for weapons, the fourth amendment, though applicable to the seizure, required neither adherence to the warrant process nor the presence of probable cause. The validity of a seizure in such a “stop and frisk” is determined solely by the reasonableness of the police conduct. Thus, in this limited situation the Court gave complete independence and preeminence to the reasonableness clause and completely ignored the presence and language of the warrant clause.

The method by which the Court has handled the “stop and frisk” problem necessarily leads to a difficult subsidiary problem that could have been avoided. The Court seems to view the concept of “reasonableness” and “probable cause” as independent and irreconcilable. “Probable cause” is viewed as a more or less static and constant standard,

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23 See Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966); People v. Sprovieri, 95 Ill. App. 2d 10, 238 N.E.2d 115 (1968). A similar but distinguishable problem is presented when officers in executing a search warrant describing the objects to be seized come upon additional fruits, evidences, or contraband. Can these undescribed items be seized? Compare Johnson v. United States, 293 F.2d 539 (D.C. Cir. 1961) and United States v. Alloway, 397 F.2d 105 (6th Cir. 1968) (yes) with People v. Baker, 23 N.Y.2d 507, 244 N.E.2d, 232 (1968) (no).

24 After noting that the question was not before the Court, Justice Harlan in Jones v. United States, 357 U.S. 493 (1958), stated that “whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought [raises a grave constitutional question].” 357 U.S. at 499-500. In Dorman v. United States, No. 21,736 (D.C. Cir. April 15, 1970) (en banc), the Court held that invasions of the home for the purpose of making an arrest must, when possible, be based upon an arrest warrant. In this case, however, the court found exigent circumstances that excused resort to the warrant process.

while “reasonableness” is recognized as highly flexible. The Court has thus held that when the “seizure” is an “arrest” the fixed standard of probable cause must be applied. However, when the “seizure” is only a “stop” the flexible standard of reasonableness may be used. The Court will necessarily be forced to draw a line between the “stop” and the “arrest” in order to determine which standard to apply. To draw this line the Court may well resort to the difficult common law determinations of when the arrest takes place.

The Court could have avoided this problem by either abandoning probable cause as a constitutional imperative for public seizures or by requiring probable cause for all seizures but defining probable cause in flexible rather than fixed terms. The idea of a flexible probable cause standard was perhaps first and best expressed by Mr. Justice Jackson. The idea has been recognized by writers and has received some ac-

26 This problem is highlighted by Davis v. Mississippi, 394 U.S. 791 (1969), and Morales v. New York, 396 U.S. 102 (1969). In Davis a seizure of individuals for investigation and fingerprinting was held to be a violation of fourth amendment rights. However, the Court left the door open to the possibility that certain seizures of persons might be permitted “under narrowly defined circumstances” even though no probable cause existed. These narrowly defined circumstances were not present in Morales. There the accused was seized and detained thirty minutes for police interrogation. The state court held that, although probable cause did not exist, the seizure was nevertheless reasonable when one balanced the difficulty of apprehension and the seriousness of the crime against invasion of individual freedom. See People v. Morales, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1966). In vacating the judgment the Supreme Court stated: “The ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest... goes beyond our subsequent decisions ....” 396 U.S. at 104-05.

27 See note 10 supra. In fact there may have been very little change of the law as the result of Terry because many courts already recognized that the pre-arrest seizures had to be reasonable. See, e.g., Rodgers v. United States, 362 F.2d 358 (8th Cir. 1966).

28 If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every out-going car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I would candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. Brinegar v. United States, 338 U.S. 160, 183 (1949) (dissent).

29 The traditional expression “probable cause” like “reasonable suspicion” and “beyond reasonable doubt” has been used as a label for the quantum of evidence necessary to justify a particular level of intrusion on personal privacy in the criminal law area; but it would be perfectly rational, although unusual, to speak of “probable cause to stop” and “probable cause to imprison” as well as “probable cause to arrest.” In each case the reasonableness and thus constitutionality of the [seizure] would depend on the interrelation between the amount of evidence, the justification for the [seizure] and the scope and manner of the [seizure].

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ceptance by the courts. In taking this approach the courts would require a showing of probable cause before any and all seizures. However, to determine whether probable cause existed many factors would be taken into account including the seriousness of the offense, the absolute need to conduct this type of investigation, the nature of the locale, activities of the suspect, the danger to the public if immediate action is not taken, the nature and length of detection, and the harm to the suspect. In reality there is little difference between this approach to probable cause and that which views all seizures solely by their reasonableness. However, abandonment of the concept of probable cause would mean overruling precedent that predates our Constitution. Such a course would probably be unacceptable to the Court. However, adoption of a flexible standard of probable cause would achieve the same result but in an acceptable way. Certainly such an approach to public seizures of persons would give the police and lower courts a guide preferable to that which first requires them to distinguish between “stops” and “arrests” and then directs them to application of “reasonableness” or “probable cause.”

SEARCH

When the problem of a search is in issue, the interrelationship between the reasonableness and warrant clauses is quite apparent. In this class of cases, a warrant is not viewed as a mere preference but, with some exceptions, is looked upon as a condition precedent to a constitutional search.

30 In United States v. Kancso, 252 F.2d 220 (2d Cir. 1958), the court stated: “The word ‘reasonable’ is not to be construed in abstract or in a vacuum unrelated to the field to which it applies. Standards which might be reasonable for the apprehension of bank-robbers might not be reasonable for the arrest of narcotics peddlers.” Id. at 222.

In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court, in fact, applied this flexible analysis to administrative searches. The Court held that warrants should be secured before normal inspections. However, the Court recognized the problem of effective enforcement of administrative regulations if probable cause in a static form could be demanded. In recognition of this particular need the Court indicated that probable cause standards for the warrant could be judged flexibly to meet the needs of this area of regulation. The right of privacy was to be weighed against the need for governmental intrusion. It was this flexible approach to probable cause that prompted Justice Harlan’s dissent.

31 See Schmerber v. California, 384 U.S. 757 (1966) (warrantless seizures of blood sample from defendant’s arm justified by fact that delay would result in destruction of the evidence); Chapman v. United States, 365 U.S. 610 (1961) (recognized exception but found it not present in the facts); Carroll v. United States, 267 U.S. 132 (1925) (need for immediate action because of mobility of the object, a car, to be searched); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1966) (need to search luggage checked for an outbound airplane flight). The doctrine of “hot pursuit” is also a branch of the exigent
Again the Court could logically have viewed all searches on the basis of reasonableness. Unless the search is made pursuant to a warrant, no reference necessarily need be made to the warrant clause. Again, however, the Court has not taken this approach. "[E]xcept in certain carefully defined classes of cases, a search of private property without consent is 'unreasonable' unless it has been authorized by a valid search warrant." Unlike arrests which may be made upon probable cause without any necessity of securing a warrant, searches may not be made solely upon a showing of probable cause. As pointed out above this distinction between arrests and searches is difficult to rationalize.

SEARCHES INCIDENTAL TO ARRESTS

The most widely recognized exception to the search warrant requirement is the category comprised of searches conducted incidental to a lawful arrest. Arrests are measured against the standard of reasonableness as influenced by the concept of probable cause; searches are measured against the standard of the warrant process. When an arrest and a search are interrelated, the problem arises as to which analysis should be applied. This problem appears throughout the development of the law in this area.

The common law accepted warrantless searches of the person when they were incidents to lawful arrests. Early Supreme Court dicta indicated that a warrant is normally required for a constitutional search but that an exception is to be made when a search of a person is made at the time of his lawful arrest. These dicta were soon a circumstances exception to the warrant requirement. See Warden v. Hayden, 387 U.S. 294 (1967). Finally, the widely-recognized power of the police to search as an incident to a lawful arrest, though widely employed, must be viewed as an exception to the rule requiring warrants. It is only the immediate need of the police to search for weapons that might be used against them and for evidence that might be destroyed that justifies the search. Chimel v. California, 395 U.S. 752 (1969).

32 See Stoll, supra note 6.
33 See TAYLOR, supra note 7, at 23 ff.
34 Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).
36 "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification whatever for a search of that place without a warrant." Agnello v. United States, 269 U.S. 20, 33 (1925).
37 "There is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." T. TAYLOR, supra note 7, at 28. See Ex parte Hurn, 92 Ala. 102, 9 So. 515 (1891); People v. Chiagles, 287 N.Y. 198, 142 N.E. 583 (1923).
38 In Weeks v. United States, 232 U.S. 383 (1914), the Court stated: "[T]he right . . . to
part of the constitutional folklore. The notion is now firmly embedded in the terminology of criminal law.

Accordingly we have both a rule which requires a warrant and an exception which allows warrantless searches incident to a lawful arrest. The exception has the potential for overwhelming the rule. Warrants are not currently demanded for legal arrests, and searches that are incidents to the arrests are permitted even absent a warrant. Assuming that prior judicial authorization for searches is a goal, steps must be taken to insure that the "incident" exception does not strangle the rule. There are two methods by which the exception might be kept in bounds and the warrant process preserved as a viable check on police intrusions. The first method would be to apply the warrant clause as it is normally applied to seizures. Unless excused by exigent circumstances, any search beyond the person of the arrested party, must be authorized by a warrant if it is to be found reasonable. A second method would be to place a strict interpretation upon the word "incident." Incidental searches without warrants would be permitted, but their scope would be sharply circumscribed by "reasonableness." Unless one of these two approaches is taken, the warrant rule will be strangled by its exception.

In 1925 the Supreme Court established that "[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." However, two years later in Marron v. United States, the Court sustained a seizure of liquor and account books which were found in a room other than the one in which the arrest took place. The Court stated that the police "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise... The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose." The implications of this holding certainly threatened the newly estab-

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42 275 U.S. 192 (1927).

43 Id. at 199.
lished warrant rule. In the early 1930s, the Supreme Court stemmed any wave of broad contemporaneous searches that could have flowed from the 1927 Marron decision. First in Go-Bart Importing Co. v. United States and then in United States v. Lefkowitz, the Court struck down broad searches that the government sought to characterize as incidents to legal arrests. In so doing, however, the Court failed to adopt any clear analysis of the role to be played by the two clauses of the fourth amendment. The lack of clarity in the Court's analysis confused the lower federal courts, and the want of guidance left them floundering.

An opportunity for clarity was presented in Harris v. United States.

44 The lower courts, however, did not seem to be allowing unduly broad incident searches under the authority of Marron. See Day v. United States, 87 F.2d 80 (8th Cir. 1929); United States v. Solomon, 33 F.2d 193 (D. Mass. 1929); Benton v. United States, 28 F.2d 695 (4th Cir. 1928).
45 282 U.S. 344 (1931).
46 285 U.S. 452 (1932).
47 In Go-Bart the Court made reference to the importance of the warrant process in protecting individual liberties. The Court then noted how the officers had an abundance of information and time to swear out a valid warrant. However, the Court went on to indicate that the test to be applied was that of reasonableness. Although no question was raised as to the search of the person, the thorough search of the office in which the person was arrested was characterized as a "lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found." 282 U.S. at 858.

Lefkowitz also contains language and analysis indicating that searches conducted at the time of arrests must be viewed in terms of reasonableness. However, even more than in Go-Bart, the Court made extensive reference to the value and need for search warrants. See 285 U.S. at 464.

To complicate the analysis further, Lefkowitz relied heavily upon the Gouled mere evidence rule. Gouled v. United States, 255 U.S. 298 (1921). The case and rule were subsequently overruled by Warden v. Hayden, 387 U.S. 294 (1967). Gouled allowed warrants to issue only when the search was for contraband or the fruits and instrumentalities of crime. Warrants to search for "mere evidence" were held to violate the fourth and fifth amendments. In Lefkowitz the Court recognized that the search that was conducted contemporaneous with the arrest was for mere evidence. Since a warrant could not issue for this search, the Court was not constrained to allow a warrantless search.

48 For such an expression thereof, see United States v. Thomson, 113 F.2d 643 (7th Cir. 1940).
49 A number of cases seemed to focus on the motive for the search. If it appeared that the search was conducted for the purpose of securing evidence, the search was struck down as exploratory. In re Ginsburg, 147 F.2d 749 (2d Cir. 1945); Hershkowitz v. United States, 65 F.2d 920 (6th Cir. 1933); United States v. Antonelli Fireworks Co., 55 F. Supp. 870 (W.D.N.Y. 1943). Some cases seemed to read a warrant requirement into the concept of reasonableness. Brown v. United States, 83 F.2d 383 (5th Cir. 1936); Milborne v. United States, 77 F.2d 310 (2d Cir. 1935); United States v. 1018 Crates, 52 F.2d 49 (2d Cir. 1931). Searches as an incident to the arrest were accepted without a warrant, but what was considered an incident varied considerably. Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); Safarik v. United States, 62 F.2d 892 (8th Cir. 1938); Martin v. United States, 62 F.2d 215 (1st Cir. 1932).
50 331 U.S. 145 (1947).
On the basis of an arrest warrant charging mail fraud, the defendant was arrested in the living room of his four-room apartment. Without a search warrant the officers conducted an extensive five-hour search of the entire apartment. In the defendant's desk the officers unearthed a sealed envelope containing altered draft cards. These were used against defendant in a prosecution under the selective service laws.

The Court did not raise any question about whether the officers had time to secure a warrant. It looked solely at the reasonableness of the search. Although the opportunity to define the limits of incidental searches was presented, the Court added nothing to the existing analysis. It merely repeated a statement from Go-Bart: "The test of reasonableness cannot be stated in rigid absolute terms. Each case is to be decided on its own facts and circumstances." The value of this case as precedent rests not upon what little the Court said but upon the implications of its holding. The search had ranged through the defendant's entire dwelling. The Court placed no apparent importance upon the size of the dwelling. It noted that "[t]he area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment." Without stating what was reasonable, the Court indicated that a search would be permitted as an incident to an arrest if it were made in an area over which the arrested person exercised "control." Significantly, it did not modify the word "control" with the word "immediate" as it had done in the earlier case of Marron v. United States. Noteworthy too is the fact that the Court cited and relied upon circuit court opinions which had sanctioned sweeping incidental searches. Quite clearly the Court was interpreting the reasonableness clause to permit very broad searches as incidents of lawful arrests.

With this sweeping interpretation given "incident" one of the two potential blocks against virtually unrestrained avoidance of the warrant

51 Id. at 150.
52 Id. at 152.
53 275 U.S. 192 (1927).
54 Matthews v. Correa, 135 F.2d 534 (2d Cir. 1943), and Parks v. United States, 76 F.2d 709 (5th Cir. 1935), approved searches of an entire home pursuant to a lawful arrest in the home. United States v. 71.41 Ounces Gold, 94 F.2d 17 (2d Cir. 1938), upheld the incidental search of a multi-room business premise.
55 Furthermore, unlike Lefkowitz which condemned as "exploratory" a thorough search of files and a wall safe, the Court in Harris did not seem concerned with the thoroughness of the search of defendant's apartment. Five hours of rummaging through the personal papers of defendant was accepted as "reasonable."
process was removed. However, the position of the Court on the second block upholding the warrant requirement was still unsettled. There was the fifteen-year-old dictum in *Lefkowitz* and *Go-Bart* indicating that the ability of the police to secure a search warrant was a factor in determining the reasonableness of searches made pursuant to arrests. Though a few lower courts had applied this dictum, it had not been significantly reasserted by the Court nor widely accepted by the lower courts.

Now that incidental searches had a virtual free reign, the warrant process for searches was in danger of complete erosion. If police were not required to secure a warrant when time permitted, there would be little impetus to utilize the warrant process at any time. Instead of searches requiring a warrant except when made as incidents of lawful arrests, the rule was in danger of reading: "searches may be made without warrants except when no one on the premises has been arrested."

Such was the setting when, a year later in *Trupiano v. United States*, the Court was called upon to consider a search that, though far reaching, was clearly an "incident" to a lawful arrest under the *Harris* definition. The police had sufficient time to secure a warrant but had failed to do so. The Court ruled that the search and seizure was a violation of the fourth amendment. Rather than attacking *Harris* and holding that the search was not an incident, the Court asserted the rule requiring searches to be authorized by a magistrate unless resort to that process was made impossible by the circumstances. Since the holding in *Harris* remained good law, the two cases, *Harris* and *Trupiano*, had to be read together, as complements to each other. If there was no opportunity to secure a search warrant in the advance of police action a warrantless search as an incident to the arrest would be permitted. "Incident" as defined by *Harris* permitted intensive and far ranging inspections of premises. *Trupiano* indicated, however, that if opportunity in advance of the arrest permitted the securing of a search warrant, a far ranging "incidental" search would not be considered reasonable. The warrant

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56 See, e.g., Brown v. United States, 83 F.2d 383 (3d Cir. 1936); United States v. 1013 Crates, 52 F.2d 49 (2d Cir. 1931).
57 See, e.g., Safarik v. United States, 62 F.2d 892 (8th Cir. 1933); Martin v. United States, 62 F.2d 215 (1st Cir. 1932).
58 See T. Taylor, supra note 7.
60 Heavy reliance was placed upon dicta from Carroll v. United States, 267 U.S. 182 (1925), Johnson v. United States, 333 U.S. 10 (1948), and *Lefkowitz*. 
clause was thus playing an important role in the determination of reasonableness. Here was a code of relatively simple application that the lower courts had no apparent difficulty in applying.\textsuperscript{61}

*Harris* and *Trupiano* did leave problems,\textsuperscript{62} but they had no time to be resolved. Two years after its birth *Trupiano* was overruled by *United States v. Rabinowitz*.\textsuperscript{63} *Rabinowitz* was the culmination of a struggle between philosophies about the proper relationship between the two clauses of the fourth amendment.\textsuperscript{64} With this decision the reasonableness clause was given the center of the stage, and the influ-

\textsuperscript{61} United States v. Donnelly, 179 F.2d 227 (7th Cir. 1950); United States v. O'Brien, 174 F.2d 941 (7th Cir. 1949); Cradle v. United States, 178 F.2d 962 (D.C. Cir. 1949).

\textsuperscript{62} Assume, for instance, that the police had time to secure a search warrant yet failed to do so. Assume they made a legal arrest. Could they, pursuant to this arrest, search the person of the arrested party? If the holding in *Trupiano* were read literally such a search could be considered "unreasonable" because time permitted the securing of a search warrant. However, it is doubtful that the Court intended to overrule the established common law power of the policeman to protect himself when making a lawful arrest by searching the person of the arrestee. See United States v. O'Brien, 174 F.2d 941 (7th Cir. 1949). Rabinowitz v. United States, 339 U.S. 56 (1950), which overruled *Trupiano*, seemed to assume this interpretation. Broad incidental searches would not be accepted when time permitted the securing of a warrant. But the common law "incident" search of the person might be considered reasonable in the absence of a warrant.

A second unanswered problem would be presented when the police did not have time to secure a search warrant in advance of their arrest. After the arrest, must they secure a warrant before proceeding with a search of the premises? The answer would seem to be no. The warrant requirement in *Trupiano* appeared to relate only to pre-arrest process.

\textsuperscript{63} 339 U.S. 56 (1950).

\textsuperscript{64} In a 5 to 4 decision with Justices Frankfurter, Jackson, Murphy and Rutledge dissenting, *Harris* gave force to the reasonableness clause by expanding the concept of "incidental" to include what was reasonable. One year later Mr. Justice Douglas changed sides to join the *Harris* dissenters, and this five man majority in *Trupiano* required a warrant for the *Harris* type of "incidental" search. During the next two years two members of the Court who favored the warrant process, Justices Rutledge and Murphy, were replaced. Only Justices Frankfurter, Jackson and Douglas remained from the *Trupiano* majority. The new members of the Court, Justices Minton and Clark, sided with the *Trupiano* dissent. It was under Mr. Justice Minton's authorship that *Rabinowitz* overruled *Trupiano*.

It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to secure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.

ence of the warrant clause upon searches incidental to arrests was rendered largely nugatory.

The facts of Rabinowitz are surprisingly similar to Lejkowitz. Armed with an arrest warrant the police seized Rabinowitz in his one-room office. Although there was sufficient time to secure a search warrant, the police neglected to do so. The office was thoroughly searched and incriminating evidence seized. On the basis of Trupiano the circuit court reversed the trial court's acceptance of the search. The Supreme Court reversed the circuit court and overruled Trupiano. The majority of the Court was not impressed with the argument that the warrant clause should be read into the concept of reasonableness. The Court relied upon the reasonableness language found in Go-Bart and Lejkowitz. However, these cases, on similar facts, struck down the searches and stood for the limitation upon the power to search.

Rabinowitz had the potential for limited application. First, it dealt with the search of a one-room business office that was open to the public. Second, the Court repeatedly qualified the "control" language found in Harris by adding the modifier "immediate." These factors were listed as making this search reasonable. Although the Court did lay the groundwork for a future restriction on the scope of warrantless searches, no further work was done. Until the recent case of Chimel v. California, the Court made only a few efforts to limit the application of the Rabinowitz holding.

In brief, the combination was no longer Harris-Trupiano. It was Harris-Rabinowitz. Rabinowitz stood for the proposition that a search as an incident to a lawful arrest would be considered reasonable even in the absence of a search warrant. Harris stood for the proposition that incidental searches could be broadly interpreted to include entire buildings. The lower courts took their cue and generally sanctioned extensive and far-reaching incidental searches.

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65 Id.
66 The Court readopted the modifier used in Marron v. United States, 275 U.S. 192 (1927), but dropped from the decision in Harris.
68 In James v. Louisiana, 382 U.S. 36 (1965), the Court reiterated the established proposition: "A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." 382 U.S. at 37. An arrest outside a structure would not be grounds for a search within the structure.
69 Numerous incidents of searching entire dwellings, even multi-floor dwellings, were
The overturning of *Trupiano* removed the second and final barrier to the widespread avoidance of the warrant process. *Harris'* broad interpretation of "incident" lowered one barrier. The second barrier came down when far-ranging incidental searches were permitted without a warrant. Now the police could conduct most of the searches they needed simply by making a lawful arrest. Seldom would there be a need to resort to the warrant process. In fact use of a warrant presented certain hazards. If all the technical requirements of the warrant were not met, the evidence that was seized thereunder would not be admissible. There would be no such risks with the incidental search. Therefore, only if there was no one on the premises who could be legally arrested or who could give consent to the search would the police need to secure magisterial authorization. As a result the warrant process was largely dead.

If one starts with the proposition that the warrant process is a valuable protection to individual privacy, he could not but mourn the virtual destruction of that process. If one accepts the many pronouncements from the Court that the warrant is the "preferred" method of procedure, he could only be mystified by the logic that complete and undisguised avoidance of that process is not in some way unreasonable as well as undesirable. It is an interesting application of policy to establish a rule which says searches must be authorized by a warrant sustained. *Harris* and *Rabinowitz* were cited as parallel authority. Robinson v. United States, 327 F.2d 618 (8th Cir. 1966) (Blackmun, J.); Collins v. Klinger, 322 F.2d 54 (9th Cir. 1964); Townsend v. United States, 271 F.2d 445 (4th Cir. 1959); Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958). Even searches outside of the dwelling were sustained as incidental to the arrest that took place in the dwelling. Gentry v. United States, 268 F.2d 63 (4th Cir. 1959); People v. Braden, 34 Ill.2d 516, 216 N.E.2d 808 (1966).

A few courts did place a more restrictive meaning on *Rabinowitz*, and thus a few instances of courts condemning searches as "exploratory" can be found. United States v. Tate, 209 F. Supp. 762 (D. Del. 1962); United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951).

The potential for abusive searches was accelerated by the demise of the mere evidence rule in *Warden v. Hayden*, 387 U.S. 294 (1967). While it existed, the rule perhaps had some prophylactic effect on police and judicial practices. Theoretically, searches for evidence, as distinguished from fruits, instrumentalities, or contraband, were unconstitutional. See United States v. Lefkowitz, 285 U.S. 452 (1932); United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y. 1943). In practice, however, the courts avoided the effect of the rule by labeling virtually all evidence as either "fruits" or "instrumentalities." See, e.g., Morrison v. United States, 262 F.2d 449 (D. C. Cir. 1958); State v. Chinn, 281 Ore. 259, 375 P.2d 392 (1962).

"Less than 150 search warrants will be issued in a major city, such as Detroit, during an entire year." L. HALL, supra note 40, at 8. See L. TIFFANY, D. McINTYRE, & D. ROTENBERG, DETECTION OF CRIME 100-05 (1967) for similar statistics.
but then create an exception that completely destroys the rule. But that is what the Court did.

Not only were the results of these cases open to logical and philosophical criticism, they created a train of difficult problems. Distinguishing between incidental and non-incidental exploratory searches gave the lower courts a difficult guide to follow.\(^{72}\) Furthermore, as the ability to make a warrantless search of the premises depended upon an arrest being made thereon,\(^ {73}\) it became important to time the arrest to take place inside the premises. Likewise, an arrest on "technical" charges could be used as a pretext for a general search. These timed\(^ {74}\) and pretext\(^ {75}\) arrests were not allowed to serve as a basis for an incidental search. Nonetheless, the determination of whether an arrest was timed or was a pretext was a difficult factual problem.

With *Chimel v. California*\(^ {76}\) the Court accepted the opportunity to reevaluate its position on incidental searches. In *Chimel* incriminating evidence was seized in a search of petitioner's home and curtilage. No search warrant had been obtained although police had had adequate time to secure one.\(^ {77}\) The state attempted to justify the search on the grounds that petitioner was legally arrested in his home.

If the Court desired to place a curb on free-wheeling incidental searches it could take either of two courses of action. It could revive the *Trupiano* ruling that all broadly defined incidental searches must be justified by a warrant and thereby emphasize the role of the warrant clause. Or the court could attack the *Harris* definition of "incident" and accomplish reform via the reasonableness clause. Either approach would revive the lost art of applying for search warrants. The choice could

\(^{72}\) See Kremen v. United States, 353 U.S. 346 (1957). As pointed out by Professor LaFave, the terms "immediate control" and "immediate presence" are ambiguous. They can mean essentially what the reader desires. LaFave, *supra* note 2, at 285-86.


\(^{74}\) Niro v. United States, 388 F.2d 535 (1st Cir. 1968); United States v. James, 378 F.2d 88 (6th Cir. 1967).


\(^{77}\) The police had obtained an arrest warrant which was declared invalid. Nonetheless, the Court assumed on the basis of existing probable cause that the arrest was valid. If the police got an arrest warrant they must have had an opportunity to secure a search warrant.
play an important role in the further development of the law. The second alternative was elected.

In *Chimel* the Court declared the warrantless search of petitioner's home and environs to be a violation of the fourth amendment. Refusing to be satisfied by distinguishing the facts, the court attacked the *Harris* interpretation of the point at which a search was incidental to an arrest. Thus the Court elected to base its decision upon a reinterpretation of the reasonableness clause as opposed to the imposition of a warrant requirement. The Court stated that a warrantless search may be conducted as an incident to a lawful arrest only when the search is confined to the person arrested and confined to an "area from within which he might have obtained either a weapon or something that could have been used as evidence against him." Searches beyond this limited area fall outside the "incident" exception and within the general rule that requires the securing of a warrant. Thus, the complete search of Chimel's home was "unreasonable."

While *Chimel* 's attack was directed at *Harris* it certainly breathed new life into *Trupiano*. For, as in *Trupiano*, if the search ranges far beyond the person arrested a warrant will be necessary. However, a theoretical difference exists. *Trupiano* was founded upon the warrant clause's imposition upon the reasonableness clause. *Chimel*, however, is founded upon a redefinition of the exception to the warrant requirement. This difference in theories could be telling.

Assume, for example, that there is need for prompt police action in making an arrest. There is no time prior to the arrest to resort to magisterial authorization. Assume further that the police recognize a need to search beyond the person of the arrestee after the arrest. On its surface *Chimel* would seem to require a warrant before the police could proceed. The search can no longer be justified under the "incident" exception and no other exception would seem to justify avoidance of the warrant requirement. However, assume in addition that the unique facts of the case prevent the officers from securing a warrant without risking loss of the evidence believed to be present. The arresting officer might be alone, and, if he leaves, unarrested confederates

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78 *Harris* involved the search of a four-room apartment. *Rabinowitz* with its theoretically limiting language involved the search of a single-room business office. *Chimel*, however, had to rule upon the search of the entire house including attic as well as garage and workshop.

79 395 U.S. at 768.
might destroy any secreted evidence or contraband. The problem is: can the officer stay and make the needed search without a warrant?

The answer under the *Harris-Trupiano* theory would seem to be clear. If there was no time to secure a search warrant before the police made their initial move to arrest, no warrant was demanded. Once the arrest was made, an extensive search could be conducted as an incident to that arrest because "incident to the arrest" as defined by *Harris* could be a far-reaching affair. Only if there was time in advance of the arrest to secure a search warrant did *Trupiano* demand a warrant.

However, applying *Chimel* to the hypothetical, the result would be far from clear. *Chimel*, unlike *Trupiano*, did not demand that a search warrant be obtained if time permitted. Nor did it excuse it if circumstances prohibited. The Court only said that the *Harris* definition of "incident to an arrest" was too broad. Thus, even though the police had no opportunity to secure a search warrant in advance of the arrest, a complete search of the premises cannot now be justified as an incident of the arrest. Such incidental searches are now limited to the person and that area within his reach. Therefore, to justify the warrantless search beyond this area, as the above hypothetical would require, an exception must be found other than the arrest exception. Perhaps the doctrine of emergency or exigent circumstances could be applied to this particular situation. If evidence is in danger of destruction, certainly this is an emergency that would justify a warrantless search.

An alternative solution to the problem could come by adapting a closely-related branch of the exigent circumstances concept—"hot pursuit." The "hot pursuit" exception was espoused and relied upon in the recent case of *Warden v. Hayden* in which the police were

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80 *Trupiano* did not have sufficient longevity to have this particular point actually ruled upon.

81 This conclusion is drawn from the fact that the thrust of *Trupiano* was directed to the time the officers had to secure a warrant before they moved in to make the arrests. In *Harris* it is unclear what opportunity the officers had to secure a warrant prior to the arrest. However, they could have secured a warrant after the arrest but before the search, but they failed to do so. Hence, *Trupiano* did not overrule *Harris*. The majority apparently accepted the fact that in *Harris* there was no time in advance of the arrest to secure the warrant and that after the arrest there was no constitutional obligation to secure one. If the Court in *Trupiano* had been concerned with securing a warrant after the arrest presumably it would have directed its wrath to that aspect of *Harris* and so overruled it.


informed of a robbery and were told that a suspect had entered a particular dwelling some five minutes earlier. The police entered and spread throughout the house. They searched under mattresses, in bureau drawers, and even in the washing machine and toilet tank. Evidence from basement to second story was seized and introduced against the defendant who was arrested inside the structure. The Court assiduously avoided classifying this search as one incident to the arrest. The seizure was held to be a proper part of the pursuit of the suspect and the search for weapons. Had the Court based its decision upon the search as incidental to the arrest, which it could have done given the state of the law at that time, quite clearly that decision would have been overruled by the later Chimel decision. Given their close proximity in time and the careful avoidance of arrest justification in Warden v. Hayden, the two decisions should not be viewed as inconsistent. They are better viewed as complementary, to be used together in solving the problems presented when the police need to search but have had no opportunity in advance of their arrest to secure a search warrant.

The doctrine of “hot pursuit” as applied in Warden v. Hayden could be given a somewhat expansive interpretation. “Hot pursuit” could be found in any situation where anticipated apprehension of a suspect was such that resort to the warrant process would be a practical impossibility. Such a situation would be present when the police observed a crime or received information which made prompt action imperative, and, under the holding of Warden v. Hayden, a search of the premises could be made without the necessity of a warrant. However, when the nature of the arrest is such that the police have the opportunity to secure a search warrant before they act, as was the case in Chimel, the

85 Perhaps the Court, when it decided Warden v. Hayden, was looking ahead to the facts found in Chimel.
86 In the concurring opinion of Mr. Justice Stewart in Stanley v. Georgia, 394 U.S. 557, 570-72 (1969), there is an indication that a search otherwise lawful might be limited in its thoroughness. The discovery of a reel of movie film while executing a search warrant describing gambling paraphernalia did not justify a warrantless investigation of the film. Thus, a superficial search for the suspect and weapons and the seizure of obvious evidence that is in plain sight might be permissible under “hot pursuit.” On the other hand, a thorough investigation of hidden and private places that have no relationship to the seeking of a suspect or weapons might be considered beyond the scope of the privilege. However, it must be noted that, in Warden v. Hayden, the Court sanctioned the seizure of evidence from places where the defendant could not possibly have been hiding. Given the facts of that case it is highly unlikely that any weapons located therein could have been used against the police. Thus, an extremely thorough search was permitted.
police will be limited in their warrantless search to the person and the area immediately within his reach.

The hypothetical situation posed above would easily be solved by such an interpretation of the two cases. Because the police had no opportunity to secure a warrant in advance of their arrest, their actions would not be governed by the limitations of *Chimel*. Rather the "hot pursuit" doctrine would be applicable and would permit a reasonable search of the premises as part of the pursuit.\(^{87}\) Thus the analysis and result would be the same under the short lived *Harris-Trupiano* rule.

In light of *Chimel* the Court may be unwilling to allow a broad incidental search solely because police had no time before the arrest to secure a warrant. Hopefully, however, they will view such searches as "reasonable." The determination of constitutional "reasonableness" is governed by balancing the underlying social policies against the need of the government to gather information.\(^{88}\) There is a strong social policy behind the demand that, whenever possible, the police must secure warrants before initiating intrusions. This policy justifies excluding evidence when the demand is not met. However, the social policy behind the securing of warrants *after* a valid arrest, when no opportunity to secure a warrant existed in advance of the arrest, is considerably weaker. Evidence reasonably seized under these circumstances does not contravene basic social values to the extent necessary to justify exclusion.

For example, requiring a warrant to be secured after a valid arrest

\(^{87}\) This analysis depends, of course, upon a broad and expansive interpretation of *Warden v. Hayden*. There is no assurance or even indication that the Court would accept such an interpretation. There is language in that case that indicates it might have limited application. The Court was very intent upon pointing out that the search could well have been made for weapons and not for evidence. Secondly the search was largely completed *before* the suspect was arrested. Whether it would be applied to searches that are conducted *after* the arrest is completed is a matter for speculation. However, it must be noted that the Court did sanction an extremely thorough search into areas where the defendant could not possibly have been hiding, and it did so without the slightest hint that the police should first have looked for the suspect. After they had him in custody the police could have secured a warrant to look in the washing machine, under the mattress and in the tank of the household toilet. The Court, however, did not require a warrant.

If this interpretation of "hot pursuit" is not accepted by the courts, it would seem that, even if the police have no time for judicial authorization prior to the time of the arrest, after the arrest is made they must secure a warrant validly to search the structure. In situations where the facts prohibited the officers from leaving the scene to secure a warrant, their conduct would probably be guided by the concept of reasonableness. The emergency of the situation would gauge the propriety of their search.

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adds no great protection to the privacy of the accused. His premises have already been invaded by the arresting officers. His person and the surrounding area have been subjected to a lawful search.\textsuperscript{80} If the arrest is lawful, very likely there is "probable cause" sufficient to secure a warrant authorizing a search of the entire premises. Securing this warrant is only a matter of time and formality. At this point the privacy of the accused is going to be open to governmental intrusion. The warrant gives no real protection.\textsuperscript{80} It is when the evidence is potentially ambiguous that judicial evaluation and authorization for intrusion has its greatest meaning. When the police have the time before their intrusion to submit their information to judicial evaluation, avoidance of the process is inexcusable. But once there has been a legal arrest under emergency circumstances, there is no longer any substantial likelihood of probable cause questions upon which reasonable minds would differ. Furthermore, the policy of encouraging resort to the warrant process as a protection of individual liberty is served by requiring the police to secure warrants when they have time before the arrest. Little additional meaningful encouragement is added by requiring the police, after making a valid arrest when time did not permit securing a warrant, to stop and perform a time-consuming ritual of marginal social value.

No one would contest the proposition that when a legal arrest is made the officers should be entitled to search the suspect and the area within immediate access. Officers must be careful, however, not to go beyond the limits established by \textit{Chimel}. In a particular case the limit is perhaps impossible to ascertain. If society, as represented by the police, has unjustifiably neglected to get prior judicial authorization, it cannot complain if the vague boundary of permissible searches is crossed and the use of the evidence so seized is lost. However, if circumstances prohibit securing a warrant prior to arrest and if for the officer's protection some search must be made, it is unfair to make the officer accu-

\textsuperscript{89} This is not a restatement of the dissent in \textit{Chimel}. There it was asserted that, even though time permitted, the securing of a warrant should be excused because the invasion was justified due to the admitted right to arrest and search. No such assertion is made here. If the police have time in advance to secure a warrant they cannot assert the right to make a broad search.

\textsuperscript{90} The above argument is equally applicable to searches of the premises hours or even days after the arrest therein. The securing of the warrant would be a mere "formality." Yet in such a situation the "formality" would seem to be required. \textit{See} Preston v. United States, 376 U.S. 364 (1964); United States \textit{ex rel.} Nickens v. LaVallee, 391 F.2d 123 (2d Cir. 1968). \textit{See also} State v. Elkins, 245 Ore. 279, 422 P.2d 250 (1966) (warrant demanded for seizure of an object already discovered by a valid search).
rately judge the limits of this self-protection under the pain of losing valuable evidence. Similarly, in the situation that makes securing a warrant after the arrest difficult, the police will be called upon to make an on-the-spot evaluation of whether sufficient emergency exists legally to excuse the securing of a warrant. If they make the search and their evaluation of the emergency is later deemed wrong, the evidence is lost. If when time permitted, the police failed to secure a warrant in advance of their initial intrusion, they have no one to blame for this loss but themselves. However, if they had no time to secure a warrant before the arrest, they are not responsible for their dilemma. It is unfair to force them to make an accurate legal evaluation where lawyers and judges probably could not agree. The police should not be made victims of a dilemma not of their own making.

Therefore, this area should be governed by the proposed Chimel-Hayden test. When there is no opportunity to secure a warrant in advance of the initial intrusion, a reasonable search of the premises should be permissible. This is the Hayden branch of the test. However, when there is time to secure a search warrant in advance of police action, Hayden would not apply. The search would be limited by Chimel's doctrine of "person and area within his reach."

This would seem to be a fair rule. It goes great lengths to insure that, whenever practicable, the magistrate is placed between the police and the people. It is a rule that has relative ease of application. Of course, what constitutes sufficient time to secure a warrant is a question of degree that is not subject to exact answers. However, this concept is certainly no more vague than "incident," "probable cause" and numerous other terms the police have learned to live with if not relish. In many ways it is perhaps a concept the police can understand and appreciate. "If you have time, get a warrant," is not a difficult command to obey. At the same time the rule does not make a fetish out of the warrant process. Once the policeman validly initiates his action he can move freely without needless sidetrips to the courthouse, and, while acting validly, he will be faced with a minimum of dilemmas not of his own construction.

CONCLUSION

As should be apparent by now, the application of the fourth amendment to arrests, searches and seizures is a forest of confusion. Much of this maze is the result of unclear analysis of the relationship between the fourth amendment's warrant and reasonableness clauses. For instance, when the police desire to search a place or seize a thing, the
basic rule demands that they secure a warrant prior to their action. However, if they desire to seize a person no warrant is required.

Confusing inconsistency likewise results from a lack of clear articulation of the nature of probable cause. What is its source—common law or the warrant clause? What is its character—constant or flexible? The way from the thicket would seem to lie in the direction of a reexamination of the importance of the warrant requirement and of the term "probable cause" in the determination of fourth amendment "reasonableness."

As a basic rule all searches and seizures, whether the object of the invasion is person, place or thing, should require a warrant. The privacy and sanctity of the individual should be protected by the disinterested magistrate and should not be unnecessarily subjected to the unilateral whim of the police. Only if it can be shown that the exigencies of the circumstances, such as, for instance, on-the-street encounters, prohibited the police from resorting to judicial authorization should this requirement of reasonableness be excused.

If because of the exigency, a warrant could not practically be secured, the sole test of police action then should be one of "reasonableness." The first and foremost requirement of "reasonableness" is cause. The police cannot arrest without cause. They cannot search without cause. Cause, however, demands something more than subjective motivation. Cause must be measured by an external standard of objectivity. Otherwise the police would be the sole judges of their intrusions. Though all objective standards are by definition constant, this does not mean that different amounts of information might not authorize varying degrees of police reaction under differing circumstances. As the "reasonable man" reacts differently according to the facts before him, so the standard of cause needed for reasonable police action should vary according to the circumstances faced by the police. Once their intrusion is justified by emergency, the police may proceed within the limits of reasonableness bounded by cause and the numerous other relevant factors inherent in the term.

In summary, the first rule that should be satisfied is the warrant requirement. All initial intrusions, searches, and seizures should demand resort to the process. If that is impossible, the police must have cause before they act. If this cause would reasonably warrant police action, the police may proceed with search, seizure, or arrest. The particular police action is to be measured by the raw concept of reasonableness and the myriad of factors bound up in it. In this way, the fourth amendment's protections could be fairly and coherently applied.