

# Notes

## Scope Limitations for Searches Incident to Arrest

The fourth amendment protects the privacy and security of individuals<sup>1</sup> by prohibiting unreasonable governmental intrusions.<sup>2</sup> The Supreme Court has significantly expanded the ambit of the fourth amendment's protections in recent cases;<sup>3</sup> but the wall of constitutional defenses against unreasonable invasions will not be complete until the Court has formulated rules to limit appropriately the scope of warrantless criminal searches, and particularly of searches incident to arrest.<sup>4</sup> The principles and policies recently applied by the Court to limit housing inspections,<sup>5</sup> electronic eavesdropping,<sup>6</sup> and on-the-street frisks<sup>7</sup> would, if extended to searches incident to arrest, produce needed rules for the control of such searches.

### I. Current Law of Searches Incident to Arrest: Theory and Practice

The present rule governing searches incident to arrest grows out of *United States v. Rabinowitz*,<sup>8</sup> decided by the Supreme Court nearly

1. The Court in *Mapp v. Ohio*, 367 U.S. 643, 656 (1960), refers to the fourth amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people . . ." Earlier, in *Boyd v. United States*, 116 U.S. 616, 630 (1886), the Court held that the fourth and fifth amendments apply to "all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life." Several of the amendments to the Constitution protect different aspects of privacy, but no single amendment protects privacy per se. See *Katz v. United States*, 389 U.S. 347, 350 (1967).

2. The right of the government to make some intrusions can, however, be inferred from both the reference in the fourth amendment to a warrant procedure and the emphasis on reasonableness:

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. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).

4. The granting of certiorari this term in *Chimel v. California*, in which petitioner challenges a wide-ranging warrantless search of his home, provides the Court with an opportunity to reevaluate the proper limits of searches incident to arrest. *People v. Chimel*, 61 Cal. Rptr. 714 (Ct. App. 1967), *aff'd sub nom. Chimel v. California*, 68 Cal. 2d 448, 67 Cal. Rptr. 421, *cert. granted*, 89 S. Ct. 404 (1968).

5. *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967) (business premises). See Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521 (1968).

6. *Katz v. United States*, 389 U.S. 347 (1967). See *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 187-96 (1968).

7. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968). See LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39 (1968).

8. 339 U.S. 56 (1950).

twenty years ago. In *Rabinowitz*, federal officers, acting under the authority of an arrest warrant, but without a search warrant, arrested the defendant for selling forged U.S. postage stamps, and then made a lengthy search of the desk, safe, and file cabinets in his small, public office. At trial, the government sought to introduce into evidence 573 forged stamps discovered during the search. Even though the officers had had time to obtain a search warrant, the Court held that the warrantless search was valid and that the evidence was therefore admissible. The majority opinion emphasized that the central concern in any fourth amendment inquiry is the reasonableness of the search in the "total atmosphere"<sup>9</sup> of the case and that failure to secure a warrant would not invalidate an otherwise permissible search.<sup>10</sup>

The *Rabinowitz* majority based its decision on precedent: when incident to valid arrests, warrantless searches of the person and of the area under his "immediate control" had not been held to violate fourth amendment rights in previous decisions.<sup>11</sup> Such searches have been justified in other opinions as necessary to protect the arresting officer against armed attack and to prevent the destruction of evidence of crime.<sup>12</sup> As a practical matter, however, the scope of arrest-based searches has not been limited in strict accord with these objectives.<sup>13</sup>

9. *Id.* at 66.

10. *Id.*

11. The Court thus overruled *Trupiano v. United States*, 334 U.S. 699 (1948), decided two years earlier, which had held that the acquisition of a warrant where practical was a necessary condition for reasonableness. In overruling *Trupiano*, the Court returned to its earlier holdings in *Marron v. United States*, 275 U.S. 192 (1927), and *Harris v. United States*, 331 U.S. 145 (1947). In *Harris*, the Court had reaffirmed *Marron* and upheld a warrantless search of an entire apartment. This search was found to be constitutional because "incident to" a valid arrest under an arrest warrant for a crime involving a forged check. The intensive search turned up forged selective service cards.

12. *E.g.*, *United States v. Rabinowitz*, 339 U.S. 56, 72-75 (1950) (Frankfurter, J., dissenting); *Agnello v. United States*, 269 U.S. 20, 30 (1925). According to *Preston v. United States*, 376 U.S. 364, 367 (1964), "[t]he rule allowing contemporaneous searches is justified, *for example*, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." (Emphasis added.) Despite the mysterious "for example," a thorough search of the case law reveals no other justifications for warrantless searches incident to arrest which do not collapse upon careful inspection into one of the two bases articulated in *Preston*. See, *e.g.*, *Warden v. Hayden*, 387 U.S. 294, 310-11 (1967) (Fortas, J., concurring).

13. The protective barrier established by the *Rabinowitz* Court—that the search incident to arrest must extend no further than the area of the arrestee's immediate control—has not been maintained in lower court decisions. Justice Frankfurter, in his dissent, had foreseen that this limitation would be an ineffective one. 339 U.S. at 79. The weakness in the concept of "immediate control" is that it permits a search of the premises wherever the arrest happens to occur, thus making crucial a circumstance not closely related to the reasons for allowing a search without warrant. See the opinion of Judge Hand below, in which the appellate court had refused to admit the evidence from the warrantless *Rabinowitz* search. 176 F.2d 732, 735 (1949).

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Generally, the lower courts have approved searches of persons or places regardless of their scope if "incident to a lawful arrest."<sup>14</sup>

Given the permissiveness of the *Rabinowitz* rule, one is not surprised to find the police indulging in warrantless searches with great frequency. To avoid both the inconvenience and the restraints of the warrant procedure, police regularly arrange their arrests to squeeze out of them the maximum "warrantless search value." For example, officers may wait to arrest a suspect until he arrives home after work so that they may then engage in a general, warrantless search of his home.<sup>15</sup> Or if police do not have probable cause to arrest or search a man suspected of a serious crime, they may arrest him instead on a minor charge such as vagrancy or speeding, and then carry out an otherwise impermissible search "incident to" the arrest on the lesser charge.<sup>16</sup> So effective are these tactics that a police department in a large city may conduct thousands of searches in the course of a year without procuring more than a handful of search warrants.<sup>17</sup> This

14. The disastrous consequences of this approach are perhaps most easily shown by a selection of recent appellate court decisions. *See, e.g.,* *Wellman v. United States*, 4 *CRIM. L. REP.* 2259 (5th Cir. Dec. 5, 1968) (on the basis of a valid arrest for speeding, the full search of an automobile without antecedent justification was allowed because it was "incident to arrest," although no further evidence of the crime could have been found); *People v. Braden*, 34 *ILL. 2d* 516, 216 *N.E.2d* 808 (1965) (validating search in or around the premises of arrest, incident to the arrest; the search was of an apartment plus a refrigerator and a closet outside of the apartment); *State v. Miller*, 47 *N.J.* 273, 220 *A.2d* 409 (1966) (expands the "area under control" of an arrestee to include another person's residence which an arrestee is visiting. This concept would seem to permit unlimited warrantless intrusions by imaginative police officers. The famous protest of Judge Learned Hand in *United States v. Kirschenblatt*, 16 *F.2d* 202, 203 (2d Cir. 1926), would now have to read, "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home [and has no visitors]"); *People v. Olszowy*, 47 *Misc. 2d* 859, 263 *N.Y.S.2d* 221 (Eric Co. 1965) (the home of a rape suspect having been searched in his absence, the Court held the evidence discovered there admissible at trial because seized incident to a "lawfully attempted arrest"); *Loften v. Warden*, 2 *CRIM. L. REP.* 2056 (Nev. Sup. Ct. Sept. 25, 1967) (on the basis of an arrest for disorderly conduct—a misdemeanor for which no fruits or instruments can exist—the search of the person of a "very quiet" drunk revealed evidence of marijuana; the Court permitted the admission of this evidence at trial because it was discovered in a search incident to a valid arrest).

15. Petitioner accuses the police of employing this tactic in *People v. Chimel*, 61 *Cal. Rptr.* 714 (Ct. App. 1967), *aff'd sub nom.* *Chimel v. State*, 68 *Cal. 2d* 448, 67 *Cal. Rptr.* 421, *cert. granted*, 89 *S. Ct.* 404 (1968).

16. "Arrest under a warrant for a minor or trumped-up charge has been a familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country." *United States v. Rabinowitz*, 339 *U.S.* 56, 82 (1950) (Frankfurter, J., dissenting).

17. For example, during the years 1956-57, 29 search warrants were issued in Detroit; approximately 30 in Milwaukee; and 17 in Wichita. The number of search warrants has remained fairly constant during the years since 1956-57. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 99-100 (1967). *See also* Note, 100 *U. PA. L. REV.* 1182, 1192 (1952) (having surveyed Philadelphia police practice, the author concludes, "the

conduct conflicts sharply with the constitutional standards which the Supreme Court has been developing in recent fourth amendment cases.

## II. Evolving Fourth Amendment Theory

Two principles stressed in the Court's recent decisions would seem to require a reexamination of the rules governing arrest-based searches. The first of these principles represents a shift away from *Rabinowitz* to the position that securing a warrant where practical is a necessary precondition for a reasonable search.<sup>18</sup> Although extensive use of the warrant procedure entails significant costs for society,<sup>19</sup> the Supreme Court has now decided that antecedent justification is so central to the fourth amendment that, subject to a few carefully delineated exceptions, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment."<sup>20</sup> Assessment of the reasonableness of a proposed

use of search warrants in the [Philadelphia] cases examined was virtually non-existent"); Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 570 (1955).

18. The legal world has long debated whether the warrant clause of the fourth amendment states an independent requirement that a warrant must be obtained before a search whenever possible or whether the prior attainment of a warrant is only one factor relevant to a judgment of the reasonableness of a search. For a thorough discussion of this controversy, see Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521, 524 n.13, 529 n.35 (1968).

In addition to the cases cited in the text, emphasis on the importance of the warrant procedure may be found in the following cases: *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances," citing among other cases *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108, 110-11 (1964); *Chapman v. United States*, 365 U.S. 610 (1961); *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948); *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968) (despite *Rabinowitz*, police must obtain a warrant when they have ample time). For non-majority arguments eloquently supporting the warrant requirement, see *Ford v. United States*, 352 F.2d 927 (D.C. Cir. 1965) (Wright, J., dissenting) and *Huguez v. United States*, No. 21,513 (9th Cir., Sept. 30, 1968) (Ely, J., concurring).

19. The Supreme Court no doubt realizes that the warrant principle recognized in the inspection cases involves a substantial cost to government. If warrants are used more extensively, more work will be required of magistrates and police officers, and more magistrates and police officers will be required. Other limitations, respected by police in conducting searches and enforced by the courts through exclusionary rules, will also prevent the government from obtaining and using certain evidence that might otherwise have served to convict wrong-doers. See pp. 437-41 *infra*. So far these costs have been relatively minor, but the rules to be proposed in this Note for the control of searches incident to arrest might make the costs rise greatly. Nonetheless the clear trend of the Supreme Court's recent decisions has been to regard these costs as less important than the preservation of individual privacy, dignity, and security from unnecessary intrusions by government agents. These private interests being of the first order, the costs of using expanded warrant and limitation procedures must be borne by society.

20. *Katz v. United States*, 389 U.S. 347, 357 (1967).

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search by a neutral magistrate is thought by the Court to be a necessary restraint on police.<sup>21</sup> In theory, the magistrate should refuse to approve unreasonable intrusions and should limit by warrant the scope and manner of justifiable searches. In practice, review by a neutral magistrate may become routinized and thus fail to prevent unjustified searches. But at the least, the warrant procedure facilitates later judicial review of the search's constitutionality by requiring a prior sworn statement of police justifications.

The warrant principle has been vigorously applied in recent fourth amendment cases. In *Katz v. United States*,<sup>22</sup> the Court held eavesdropping evidence inadmissible because not obtained under warrant, even though the eavesdropping was conducted with probable cause and in a reasonable manner. And in *Camara v. Municipal Court*,<sup>23</sup> the majority concluded that government inspections of private property were unreasonable, absent consent, unless authorized by a valid warrant. Even before *Camara*, the Court in *Schmerber v. California*,<sup>24</sup> had implicitly applied this principle to one kind of search incident to arrest—a blood test taken at a hospital to verify charges of drunken driving. Only after finding that the evidence (alcohol in the blood) would probably have disappeared before a warrant could have been secured and that the “search” had been made under ideal conditions, did the Court reject petitioner's claim that the blood test was an unreasonable search because not authorized by warrant.

The second principle requiring revision of the present rule on searches incident to arrest is a long established one, recently given new emphasis: a completed search will comply with the fourth amendment's protective requirements only if its scope is no broader than legitimate governmental objectives justify. This increased emphasis on limiting the scope of searches is responsive to the manifest need for more sensitive guidelines for assessing the reasonableness of searches. Although the Supreme Court contends that it “has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope,”<sup>25</sup> lower courts have not in general followed the few cases<sup>26</sup> in which the Supreme Court has

21. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1962); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

22. 389 U.S. 347 (1967).

23. 387 U.S. 523 (1967).

24. 384 U.S. 757 (1966).

25. *Terry v. United States*, 392 U.S. 1, 17-18 (1968).

26. Such cases are *Kremen v. United States*, 353 U.S. 346 (1957); *Go-Bart Importing*

actually applied this principle. Under the pressure of heavy case loads, the lower courts have generally succumbed to the temptation to create broad categories of searches which are presumed to be reasonable—a maneuver that enables the courts to avoid the difficult task of evaluating the scope and manner of each individual search.<sup>27</sup>

The Court's increasing attention to limitations in scope is closely related to its recent acceptance of the concept of "variable probable cause."<sup>28</sup> In deciding the housing inspection and stop-and-frisk cases,

Co. v. United States, 282 U.S. 344, 356-58 (1931). See also United States v. Di Re, 332 U.S. 581, 586-87 (1948). Since *Rabinowitz*, however, no Supreme Court case has struck down a search incident to a lawful arrest. Language from the concurrence of Justice Harlan in *Sibron v. New York*, 392 U.S. 40, 77 (1968), would seem to indicate that even the Supreme Court has faltered in its attention to the intensity and scope of searches incident to arrest: ". . . an officer on probable cause is entitled to make a very full incident search . . .," citing *Rabinowitz* as the leading case.

27. See note 14 *supra*. See also United States v. Worthy, No. 20,888 (D.C. Cir. Aug. 6, 1968) at 10 (Wright, J., dissenting).

The idea that a warrantless search incident to arrest always satisfies the Fourth Amendment has become a virtual shibboleth, unthinkingly repeated by courts. But it is a shibboleth without adequate foundation in reason, and it is time that it be reexamined.

*Id.* at 13-14. In *Adair v. State*, 3 CRIM. L. REP. 2037-38 (Tex. Ct. Crim. App. Mar. 27, 1968), Judge Onion dissenting accused his brothers of holding that a search incident to a traffic arrest is reasonable *per se*.

Examples of other categories of warrantless searches presumed to be reasonable are those of "hot pursuit," "exigent circumstances," and "consent." Consent searches are also in serious need of stricter limitations than those by which they are currently controlled, but the considerations involved in developing the limitations are complex, and the problem is not taken up in this Note. Cf. note 59 *infra*.

28. "Probable cause to arrest means evidence that would warrant a prudent and reasonable man . . . in believing that a particular person has committed or is committing a crime," *Sibron v. New York*, 392 U.S. 40, 75 (1968) (Harlan, J., concurring). *Accord*, *McCray v. Illinois*, 386 U.S. 300, 304 (1966); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959); *Draper v. United States*, 358 U.S. 307, 313 & n.5 (1958); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1948); *Carroll v. United States*, 267 U.S. 132, 162 (1925). While probable cause for arrest denotes the evidentiary state required to justify arrest, probable cause for a search in the case of a crime necessitates an additional element. The evidence must indicate (1) that a crime has been committed; (2) that a given person committed it; and (3) that the described object of search is likely to be found in a given place.

Though a balancing test shows administrative searches to be reasonable and thus constitutional under the first clause of the fourth amendment, the second clause states unambiguously that "no warrant shall issue but on probable cause." The method of accommodation adopted by the Court in *Camara* was to invert the traditional formula for probable cause, and thus to redefine the essential term:

The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. 387 U.S. 523, 539 (1967). Thus the administrative search cases may be understood to articulate a new concept of "variable probable cause." The concept of "variable probable cause" was not altogether foreign even to the law which preceded *Camara v. Municipal Court*, 387 U.S. 523 (1967). See, e.g., FED. R. CRIM. P. 41(c), which requires a higher quantum of cause to warrant a night search than a day search. Under the theory of variable probable cause, the test for any particular intrusion is "would the facts available to the officer at the moment of seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate." *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

Though the emphasis of this Note is on *search*, the same kind of analysis applies to

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the Court has recognized that the fourth amendment governs all intrusions by agents of the public upon personal security<sup>29</sup> and that some intrusions will be reasonable on less evidence than that required for full criminal searches. In the case of housing inspections, the Court found that a relatively limited invasion of the urban citizen's privacy could be reasonably initiated on the lower evidentiary standard of "area probable cause."<sup>30</sup> Essential to the Court's acceptance of "variable probable cause" is the notion that when searches are permitted on less evidence than is required for the usual criminal search, the intrusiveness of such searches must also be more limited if they are to be constitutional.<sup>31</sup>

*seizure*, and the terminology of seizure of the person (e.g., of "stop," "arrest," and "imprisonment") may be used to illustrate some of the interesting possibilities which follow from treating various fourth amendment intrusions in terms of a model of "variable probable cause." The traditional expression "probable cause," like "reasonable suspicion" and "beyond a 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 the constitutionality of the search would depend on the interrelation between the amount of evidence, the justifications for the search, and the scope and manner of the search.

Rules limiting the scope of each major category of arrest (seizure of the person) to its specific justification and required evidentiary standard must be worked out in the same manner as they are now being established by the courts for various categories and sub-categories of searches. For an article which presents the problem very clearly, see Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966). See also United States v. Bonanno, 180 F. Supp. 71, 77-79 (S.D.N.Y. 1960).

29. Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968).

30. The Court noted that housing inspections were "neither personal in nature nor aimed at the discovery of evidence of crime . . ." 387 U.S. 523, 537 (1967).

31. This notion so far has been used most effectively to set proper limits on the intensity of searches made by customs officials at borders. Because the governmental justifications for border searches remain constant, the permissible intensity of the search has been allowed to increase in direct proportion to the degree of cause justifying intrusion. Thus, the mere fact of a border crossing has been held to justify a search of baggage, vehicle, and wallet.

If, however, the search of the person is to go further, if the party, male or female, is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required. And if there is to be more than a casual examination of the body, if in the course of the search of a woman there is to be a requirement that she manually open her vagina for visual inspection to see if she has something concealed there, we think that we should require more than a mere suspicion. Surely, to require such a performance is a serious invasion of personal privacy and dignity, and so unlawful if "unwarranted." Surely, in such a case, to be warranted, the official's action should be backed by at least the "clear indication," the "plain suggestion," required in *Schmerber* and in *Rivas*.

*Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967).

Though there is still much argument as to where particular lines should be drawn, the proportionality notion is well applied in *Henderson*. Three discrete quantum levels of evidence—(1) "the mere fact of crossing the border"; (2) "a real suspicion specifically directed"; and (3) "a clear indication"—are each understood as capable of initiating a reasonable constitutional search, provided the degree of intrusion in each individual case is correlated to the quantum level of cause justifying its initiation.

A vital factor to bear in mind is that as these steps progress the burden of the law enforcement agency increases. What may constitute probable cause for arrest does not necessarily constitute probable cause for a charge on arraignment.

In judging the reasonableness of a search, it is natural to weigh the government's interest, the evidence justifying the search, and the scope of the search together. The Court in *Terry v. Ohio*<sup>32</sup>, however, has divided the determination of reasonableness into a dual inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably limited in scope to the circumstances which justified the interference in the first place."<sup>33</sup> Whatever the Supreme Court's intent in devising this two-step test, its approach is likely to encourage the lower courts to pay closer attention to the interrelated factors of justification and scope in determining the reasonableness of individual searches.<sup>34</sup>

The stop-and-frisk cases offer useful illustrations of the new test at work. In *Terry* the Court first decided that some intrusion was reasonable because (1) the government had a general interest in protecting its investigating agents and (2) the specific facts of the case created a reasonable suspicion that the men searched were armed and dangerous.<sup>35</sup> As a second step the Court inquired whether the scope of the actual search was properly limited to its justifications. The search—a pat-down or "frisk" of the suspect's outer clothing, with a further intrusion only after an object possibly a weapon has been felt—was found to be reasonable because no broader than necessary to meet its legitimate objectives.<sup>36</sup> By contrast, the search of a narcotic suspect's pocket in *Sibron v. New York*<sup>37</sup> failed both halves of the dual test. Reaching into

Goldsmith v. United States, 277 F.2d 335, 345 (D.C. Cir. 1960);

What is thus envisioned is a step profile, to wit, that the probability of guilt required to subject a person to official action is directly correlated to the degree of interference with individual freedom contemplated by the action.

United States v. Thomas, 250 F. Supp. 771, 790 (S.D.N.Y. 1966). See also LaFave, *Detention for Investigation by Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331, 358-60.

Another factor in the balancing of evidentiary standards against intrusiveness should perhaps be the nature of the crime. For example, many who condemn wiretapping generally would make an exception for kidnapping or matters of national security. Justice Jackson first advanced the argument that the seriousness of the crime should influence the determination of the reasonableness of a search incident to arrest in his dissent in *Brinegar v. United States*, 338 U.S. 160, 180-88 (1949).

32. 392 U.S. 1 (1968).

33. *Id.* at 20.

34. Both the need for closer attention to justifications and scope and the difficulties of teaching lower courts how properly to evaluate these factors in assessing the reasonableness of searches are exemplified by a recent Illinois Supreme Court decision which purports to follow *Terry* into the "promised land." In *People v. Tassone*, 4 CRIM. L. REP. 2005 (Ill. Sup. Ct. Sept. 24, 1968), the Court permitted the stopping and "frisking" of a driver suspected of possessing not a weapon but a stolen truck. Even though it was based only on suspicion, the "frisk" of the driver for evidence of authority to operate a truck on Illinois highways was found to be reasonable because it was "extremely limited in scope."

35. *Terry v. Ohio*, 392 U.S. 1, 22-23, 27-28 (1968).

36. *Id.* at 30-31.

37. 392 U.S. 40 (1968).

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Sibron's pocket was unreasonable at its inception because the specific facts of the case did not give the investigating officer justification for any search whatsoever. And even if the officer had had reason to suspect that Sibron was armed, the actual search—a direct intrusion into the pocket rather than a frisk—would still have been invalid under the second part of the test because not “reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer . . . .”<sup>38</sup>

### III. Application of the Evolving Theory to Searches Incident to Arrest

As the housing inspection and stop-and-frisk cases make clear, “reasonable” searches may be initiated on a variety of evidentiary standards. Acceptance of the concept of “variable probable cause” does not, however, require courts to determine without guidelines the reasonableness of particular searches. The courts have used only a small number of categories of searches, and it is practical to formulate rules to guide beleaguered magistrates, police, and lower court judges in authorizing, conducting, and evaluating searches within each of the delineated categories. Following the Supreme Court's lead in *Camara* and *Terry*, appellate courts will no doubt direct their attention to defining more precisely the categories of searches and to setting limits on the range, intensity, duration, purpose, and perhaps punitive consequences of each. The category labelled “searches incident to arrest” is in particular need of such attention; the *Rabinowitz* rule has failed to protect individual privacy adequately and should be redrawn.

Application of the warrant and limitation principles to arrest-based searches would better implement the fourth amendment's guarantees. First, exceptions from the warrant requirement should be more carefully delimited. Intrusions should be made pursuant to a warrant, unless the achievement of the legitimate objectives of a search or part of a search incident to arrest would be prevented by compliance with the warrant requirement. Second, especially for those searches or parts of searches which cannot practically be controlled by warrant, guidelines must be established to insure that “no greater invasion of privacy” occurs than is “necessary under all the circumstances” of each kind of search.<sup>39</sup> The governmental interests justifying arrest-based searches—

38. *Id.* at 62.

39. *Berger v. New York*, 388 U.S. 41, 57 (1967).

which the Supreme Court has identified as the discovery of concealed weapons and the preservation of destructible evidence<sup>40</sup>—can be the bases for these guidelines.<sup>41</sup>

### A. *The Frisk for Weapons*

The government's interest in the safety of police officers certainly justifies some search of an arrestee to discover concealed weapons. But since this objective can be attained by a protective frisk,<sup>42</sup> no greater intrusion should be permitted. If during the frisk the arresting officer feels an object which might be a weapon, he should be allowed to take the object from the arrestee. But objects other than weapons should not be subject to seizure, nor even to careful examination, unless they are obviously contraband.<sup>43</sup>

Whether weapons or other objects seized in a protective frisk should be allowed into evidence at trial is a difficult question. The present rule is that evidence of other crimes discovered during the course of a valid search is admissible.<sup>44</sup> But the traditional rule, when applied to the

40. See p. 431 & note 12 *supra*.

41. Those who wish to see the discussion of rules for searches incident to arrest in the larger context of which it forms a part are referred to Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). Packer's two models are posited on polar value judgments and assumptions. His thesis is that a strong tendency may be observed, at least in judicial decisions, to move from the "Crime Control" model (administrative; "assembly line") to the "Due Process" model (adversary; "obstacle course"). This Note, part descriptive and part normative, shows recent search and seizure law as conforming to the more general trend observed by Packer and makes recommendations for change in the law of searches incident to arrest, so as to bring it back into line. Specifically, the prescriptive section of this Note tries to make the control of arrest-based searches part of the tendency observed by Packer to "move from rules that require case-by-case determination of prejudice to the accused to rules setting forth general standards of police and prosecutorial conduct." *Id.* 36.

42. See p. 440 *supra*.

43. Thus, if the frisk of a man arrested for vagrancy reveals an object possibly a pistol, which turns out after further intrusion into the pocket to be a plastic bottle, the bottle should be returned to the arrestee without closer examination. An alternative rule—less restrictive to police—would allow the arresting officer to keep the bottle if he has probable cause from first sight or feel, together with the totality of circumstances under which the search has taken place, to believe that the possession of the bottle constitutes a crime (*e.g.*, illegal possession of narcotics). Where he has probable cause to search for a weapon at the time of arrest, the arresting officer may of course search directly for the weapon on the person of the arrestee under the rules for evidentiary searches described in the text, *infra*. But where the evidence available at the moment of arrest does not amount to probable cause that the arrestee possesses a weapon—*i.e.*, when the frisk for weapons is purely protective in nature and is initiated on either reasonable suspicion or a still lower evidentiary standard—the danger of police abuse of such a search may require tighter exclusionary protections.

44. The right not to be subjected to unreasonable searches and seizures has long been enforced by exclusion of evidence obtained from such searches. *Weeks v. United States*, 232 U.S. 383 (1914) (exclusion in federal courts of evidence discovered during unconstitutional searches by federal officers); *Mapp v. Ohio*, 367 U.S. 643 (1961) (similar exclusion in state prosecutions).

In *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court abolished the prohibition

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protective frisk, has the disadvantage of presenting over-zealous police officers with a tempting loophole in the fourth amendment's safeguards: when a frisk for weapons is used by the police as a pretext for an evidentiary search, the present rule will not protect the individual by excluding the fruits of such a search unless the trial court is able to discover the illegal purpose.

If efforts to teach the police their constitutional responsibilities fail and the privilege to search for weapons incident to arrest is seriously abused, it would be well to consider a per se rule excluding all evidence, including weapons, discovered during arrest-based frisks.<sup>45</sup> Though the proposed rule would involve significant costs in police efficiency,<sup>46</sup> it would discourage frisks used as pretexts for evidentiary searches by making them unprofitable and would save courts the difficulties of case-by-case evaluation of police good faith. The proposed rule is also in harmony with the Court's recognition in *Camara* that searches on lower evidentiary standards require stricter limitations. Eliminating the retributive consequences of protective frisks, which are initiated on a lesser evidentiary justification than searches for evidence, would substantially limit the hostility of these intrusions without in any way hindering the discovery of concealed weapons.<sup>47</sup>

against seizures of "mere evidence." The traditional exclusionary rule has thus been modified to permit the admission at trial of fruits, instruments, and *other evidence* uncovered during constitutional searches.

45. Under the proposal of this Note, the exclusionary rule would no longer be used as a means of discriminating between "good" and "bad" frisks.

It is only honest to note that the omens for the adoption of the proposed new exclusionary rule are at present unfavorable. The Supreme Court takes a position contrary to the one outlined above when it states in *Terry* that "the exclusionary rule has its limitations, however, as a tool of judicial control. It cannot be properly invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." 392 U.S. 1, 13 (1968). *But see, e.g.,* Note, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 166 (1966).

The exclusionary rule, however employed, cannot, of course, prevent frisks which are motivated by a desire to harass rather than by a desire to find other-crimes evidence. For a discussion of alternatives (or supplements) to the exclusionary rule which would also reach harassment, see Foote, *Tort Responsibility for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

An alternative approach to restricting frisks for weapons on less than reasonable suspicion, whether made incident to a valid arrest or not, would be to label all such searches "unreasonable." If police then chose to continue to make such searches, they would do so only to protect themselves, knowing full-well that discovered weapons and other evidence of crime would not be admissible at trial. The difficulty with this approach is that it is confusing to call such searches "unreasonable" if they are actually justifiable when properly limited to the protection of the officer. Moreover, for a system of criminal administration openly to permit so-called "unreasonable" searches would be to undermine the respect essential for good police-community relations, particularly in the disadvantaged neighborhoods, where the bulk of such searches would be conducted.

46. See note 19 *supra*.

47. Whether or not this proposal for a stricter exclusionary rule is accepted, it is clear

## B. *The Search for Evidence*

Traditionally, searches of both person and place have been permitted when incident to arrest. Ordinarily, if police have probable cause for an arrest, they will also have probable cause to search for evidence of the alleged crime. But all such searches should be limited, and, for many of them, a warrant should be required. Because the need for an immediate search of the person incident to arrest differs from the need for an immediate search of the place of arrest, separate rules must be formulated for these two classes of evidentiary searches.

*Search of the Person.* Since fruits, instruments, or other evidence of crime concealed on the person of the arrestee may be easily disposed of or destroyed, the arresting officer will often be justified in searching without delay. But a warrantless search should be allowed only when it is impossible for police to secure a search warrant in advance,<sup>48</sup> because an arrest is carried out immediately upon receipt of incriminating information.

The limitation principle also requires that when police search a person incident to arrest, they search only for evidence which they have probable cause to believe will be found on the person, and that the search be no more intrusive than necessary to find that object.<sup>49</sup> For some crimes—such as status or traffic crimes—no search of the person should be permitted at all, because no evidence of such crimes can exist.<sup>50</sup>

that frisks for weapons on less than reasonable suspicion (which is the evidentiary standard required by the Court in *Terry* for initiation of a non-arrest-based frisk) should have their scope limited to the fullest degree still consistent with protection of the officer; the claws of such intrusions, in the form of retributive consequences, must be clipped.

48. Technological advance may soon permit extension of the warrant principle to searches or parts of searches for which a warrant requirement is not currently feasible. Is it so unlikely that computerized warrants may some day be required as controls not only for arrest-based searches of the person but also for stop-and-frisk?

49. For example, an arresting officer searching incident to arrest for an object such as a gun or a stolen flute should frisk first, to avoid intruding unnecessarily into "innocent" pockets.

50. In *United States v. Worthy*, No. 20,888 (D.C. Cir. Aug. 6, 1968), Judge Wright propounds this argument in his dissent. The majority opinion affirms the conviction on narcotics charges of a man originally arrested for vagrancy. The conviction was based on evidence obtained during a full search of his person incident to the vagrancy arrest.

A technical difficulty exists with Wright's argument if "no money" is taken to be an instrument of vagrancy; if "no money" must be had by a person in order for him to commit the crime of vagrancy, it should be proper to search for "no money" as evidence of the crime. The search for "no money" would of necessity be wider in scope than the frisk for weapons, and would justify, according to the traditional rule, the discovery and seizure of other-crimes evidence. But the justifications for an immediate warrantless search are not very strong in this situation. It is highly unlikely, after all, that evidence of "no money" could be destroyed (presumably a chum of the arrestee would have to slip him a tenspot on the sly). The most obvious solution is to permit police and judges to

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The rules described above, which strictly limit searches of the person incident to arrest, would be for naught if an unrestricted search of the person were to be allowed a short step later in the criminal process. To prevent circumvention of the proposed safeguards, searches to meet other governmental interests arising after arrest should be conducted under controls similar to those proposed for searches incident to arrest. The objective of keeping weapons and other improper articles out of jails would justify a thorough search of a person about to be imprisoned. But since the legitimate objective of such a search is not to obtain evidence, a warrantless search should be allowed only after the arrestee has been permitted to store in a privileged place (such as a "safety deposit" box)<sup>51</sup> those personal items which he does not wish to take with him into prison. The need for positive identification of the arrestee may also justify some searches of the person;<sup>52</sup> but clearly, no rummaging about in pockets for identifying articles is reasonable if the arrestee can be identified by less intrusive means such as a phone call to his employer or a check at his alleged home address.<sup>53</sup> If police must intrude more deeply into the privacy of the arrestee to secure evidence for identification, their search should be pursuant to a warrant.<sup>54</sup>

presume that the accused vagrant has no money unless he produces money when requested to and thus rebuts the presumption.

An alternative to the approach taken in the text would be to reduce or abolish status crimes. For materials detailing the abuses inherent in a criminal system permitting arrests for status crimes, see W. LAFAVE, *ARREST* 354-63 (1965); Douglas, *Vagrancy and Arrest on Suspicion*, 70 *YALE L.J.* 1, 9 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 *U. PA. L. REV.* 603, 625-31, 649 (1956). See also note 56 *infra*, which discusses searches of both person and place incident to arrest for traffic violations.

51. If defendant chooses to put his possessions into a "safety deposit" box, can this act be additional evidence to obtain a search warrant? This is a problem in which the fourth and fifth amendments "run almost into each other." *Boyd v. United States*, 116 *U.S.* 616, 630 (1885). *Simmons v. United States*, 390 *U.S.* 377, 389-94 (1967), supports the proposition that no inference should be permitted from the fact that a man chooses to keep his possessions from being inspected. The court in *Simmons* held that the testimony of a defendant on a motion to suppress evidence on fourth amendment grounds may not be thereafter admitted against him at trial on the issue of guilt, unless he makes no objection.

52. The justification of such searches rests on the assumption of a significant correlation between probable cause to arrest for one crime and guilt for other crimes, still unsolved on police books. How high this correlation must be for the intrusion it supports to be reasonable—and with what variation for what crimes—is yet to be decided.

53. For a case which illuminates this discussion, see the separate opinions in the dismissal of certiorari in *Wainwright v. City of New Orleans*, 392 *U.S.* 653 (1968).

54. Under the reasoning of *Schmerber v. California*, 384 *U.S.* 757, 760-65 (1966), the fifth amendment does not prohibit fingerprinting. Nor does the fourth amendment, according to most courts. See *Napolitano v. United States*, 340 *F.2d* 313 (1st Cir. 1965); *Smith v. United States*, 324 *F.2d* 879 (D.C. Cir. 1963). According to *United States v. Laub Baking Co.*, 283 *F. Supp.* 217 (N.D. Ohio 1968), fingerprinting is permissible under the fourth amendment even for arrests on misdemeanors. However fingerprinting and the strip search for scars are treated, the search of the pockets for identifying articles would seem to be sufficiently intrusive to be unreasonable unless conducted under warrant, barring exigent circumstances.

*Searches of the Place.* A different set of limitations is required for searches of the place of arrest. The need for immediate action, which in the past has been taken to justify warrantless searches of the area of arrest, can be eliminated if the police remove the arrestee from the place where weapons or evidence might be concealed.<sup>55</sup> If police need to search further in the area of arrest, they should be required to act under a warrant.<sup>56</sup> Whenever practical, this warrant should be secured in advance; but in those cases in which no time was available to obtain a search warrant before the arrest, the police should be allowed to "seize" the place of arrest until a further search can be judicially authorized.<sup>57</sup>

A "seizure" of the place, involving the sealing of a home or car, or at least police surveillance of other lawful occupants would prevent the concealment or destruction of evidence while the warrant is being sought.<sup>58</sup> Those persons not arrested but either asked to leave or placed

55. An alternative response to this need—more appropriate in some situations than in others—would be for the police to handcuff the arrestee immediately after his arrest.

56. In *Preston v. United States*, 376 U.S. 364 (1964), a unanimous Supreme Court limited the then-existing rule as to automobile searches. *Preston* involved a warrantless search of an auto, remote in time and place from the arrest of the driver and passengers. Before *Preston*, such searches were often allowed by courts and justified by loose references to the "exceptional" nature (*i.e.*, the mobility) of cars. While recognizing that questions involving searches of cars or other things readily moved cannot be treated as identical to questions arising out of searches of immovable structures like houses, the opinion stressed that, even in the case of motorcars, the test remains, "was the search reasonable?" Under *Preston*, then, if the search is to be held constitutional, it must be contemporaneous with, and in the same place as, the arrest.

*Sheridan v. State*, 43 Ala. App. 239, 187 So. 2d 294, *cert. denied*, 279 Ala. 674, 189 So. 2d 470 (1966); *cert. denied*, 385 U.S. 1019 (1967), goes one step further in the direction of this Note's prescription, by imposing the warrant-where-practical rule on search of a car incident to arrest. *Sheridan* was found sleeping in his car at night with a pistol on the front seat. He was awakened by the flashlight of a state trooper and arrested for illegal possession of a weapon. A search of his person incident to this arrest, revealed a small vial containing some pills; the deputy then searched the car's glove compartment and found additional pills. Some time later, in front of the station house, and still without the benefit of a warrant, deputies searched the trunk and found more pills.

On appeal from conviction for possessing narcotic drugs and for carrying an unlicensed pistol in a vehicle, the Court of Appeals held that the evidence sustained conviction for the latter offense but not for the former. Nowhere in the toxicologist's testimony was it possible to isolate the source from which the deputy had obtained the contraband narcotic drugs.

As to the search of the trunk, the court was squarely within the authority of *Preston* in finding the search not contemporaneous and therefore unconstitutional. But in ruling that the contemporaneous search of the glove compartment was also unconstitutional, the court made an important advance. The court reasoned that an automatic exemption of all such searches from the warrant requirement creates a category of exceptions which is overly broad. "The rule as to the need inherent in the nature of vehicles (because they can be taken off while the officer goes for a warrant) under *Carroll v. United States*, 267 U.S. 132 (1925), does not bear on the instant facts. Neither *Sheridan* nor any possible confederate was shown to have any likelihood of spiriting his car away." This opinion, though it floats at present as a lonely marker in a foggy sea, is the logical extension of *Preston*.

57. "Seizure" of a movable such as a car or boat would be comparable to the impounding process which often accompanies the arrest on a serious charge of a person in an automobile.

58. As with searches of the person for evidence, searches of the place of arrest should

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under watch would, of course, suffer a temporary impairment of their privacy and freedom. But the alternative means of meeting the government's legitimate need—an immediate warrantless search—would normally involve a still greater intrusion on the important fourth amendment rights of the persons involved, and should not be allowed unless these persons knowingly consent to such a search.<sup>59</sup>

### IV. Beyond Rules

Implementation of the rules proposed above could not prevent by itself all violations of fourth amendment rights during searches incident to arrest. For those dimensions of searches—such as intensity and duration—which are not easily governed by rules, police and lower courts must endeavor to apply case by case the general command that searches be reasonable.<sup>60</sup> Over time, review by appellate courts of these base-level applications of the reasonableness requirement should build up standards to guide the police and lower courts in their decisions. Meanwhile, however, adoption of the rules and procedures proposed in this Note would substantially reduce the unconstitutional intrusions on individual privacy which now occur each day “incident to” arrest.

be permitted only where the nature of the crime gives promise of evidence. In *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, (1968), the Supreme Court hinted that search of a car incident to arrest for a traffic offense, without additional cause, might always be unconstitutional. It did not, however, reach this question, because it held the search in question unconstitutional on *Preston* grounds, as being too remote in time and place to be properly incident to arrest. “I would go further. I would hold that, pretext or no pretext, a lawful arrest of an automobile driver for a traffic offense provides no lawful predicate for the search of the driver or his car—absent special circumstances.” *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968) (Wisdom, J.) (dictum); see Note, *Search Incident to Arrest for Traffic Violation*, 1959 Wis. L. Rev. 347.

59. Excessive seizures of places of arrest might well place new strain on the concept of waiver of fourth amendment rights. To many people, governmental seizures of their homes or cars would be more offensive than immediate warrantless searches. In such cases, if all the people who are present and have fourth amendment rights in the place of arrest desire to waive their rights to a warranted search, this desire should normally be respected. However, safeguards would be necessary to prevent over-zealous police officers from obtaining waivers from people ignorant of their rights and from coercing people into waiving the rights of which they are aware. The best solution would probably be to use a *Miranda*-type approach, requiring that a warning of the right to a warranted search (with its additional safeguards) first be given to the search “victims” so that any waiver given will be given with full knowledge of the constitutional rights waived. An additional requirement should be that the police not unnecessarily use the power to seize the place of arrest as a means of coercing a citizen into agreeing to an immediate warrantless search. The problem of consent searches generally is a difficult one, and beyond the scope of this Note. While it is possible for individuals to *consent* to searches incident to arrest, police do not usually seek consent because they do not require it. The rules suggested for control of search incident to arrest are based on the assumption that no valid consent is given by the individuals being searched.

60. For a hint that police officers are becoming more sympathetic to the concerns of their fellow citizens, see *Ker v. California*, 374 U.S. 23, 28 (1962): “. . . three officers and a fourth, *Officer Love* . . .” (Emphasis added.)