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Search and Seizure - Incident to Lawful Arrest - Permissible Scope [*Chimel v. California*, 395 U.S. 752 (1969)]

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SEARCH AND SEIZURE — INCIDENT TO LAWFUL ARREST — PERMISSIBLE SCOPE

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

No one can doubt the radical impact which the Warren Court has had upon local law enforcement procedures.[1] Search and seizure incident to a valid arrest, an area of the law already racked with inconsistent judicial guidelines,[2] has been one of the areas most drastically affected.[3] It was perhaps only proper then that on the day that President Nixon personally went to the Supreme Court to accept Chief Justice Warren's formal resignation,[4] the Court handed down its decision in *Chimel v. California*,[5] which further limited accepted police methods of conducting a search incident to a valid arrest. Only history will reveal the plausibility of the guidelines laid down by the Warren Court on its final day; but for those who must utilize this decision as a guideline in their daily work, the effect will be both immediate and profound.[6]

Petitioner Chimel was arrested in the living room of his home

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[1] *See* Pringle & Garfield, *The Expanding Power of Police to Search and Seize: Effect of Recent U.S. Supreme Court Decisions on Criminal Investigation*, 40 ROCKY MT. L. REV. 491 (1968). In a pre-*Chimel* article, the authors point out that most of the recent controversial decisions handed down by the Court have affected the rights of the accused after he is taken into custody, and that these same decisions have had very little effect on the criminal investigation procedures utilized before the suspect has been taken into custody.

[2] This lack of consistency has been referred to by members of the Court on several occasions. In delivering the majority opinion in Simmons v. United States, 390 U.S. 377 (1968), Mr. Justice Harlan candidly admitted that "the law of search and seizure is in a state of flux." *Id.* at 393. *See also* Abel v. United States, 362 U.S. 217, 235 (1960); United States v. Rabinowitz, 339 U.S. 56, 67, 86 (1950) (Black & Frankfurter, JJ., respectively, dissenting).

[3] Following a recent, in-depth survey of criminal activity in the United States, a Presidential Commission was moved to observe that during the last 30 years, standard police procedures offensive to individual privacy have been increasingly restricted by court rulings: "Personal and property searches and the seizure of the evidence they yield . . . have been more and more rigorously measured by the courts against the constitutional standards of due process . . . probable cause . . . [and] the privilege against self incrimination." U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

[4] 395 U.S. (pt. 3) at I-VII (1969).

[5] 395 U.S. 752 (1969).

[6] The President's Commission was aware of the disruptive effect which Miranda v. Arizona, 384 U.S. 436 (1966), and other recent decisions might have on heretofore standard police practices and noted that "the need for legislative and administrative policies to guide police through the changing world of permissible activity is pressing." PRESIDENT'S COMMISSION, *supra* note 3, at 94.

by local police officers pursuant to what was ostensibly a valid arrest warrant. Over the objections of the petitioner, and without a search warrant, the police undertook a systematic search of the entire house on the ground that the search was incident to a valid arrest.[7] At petitioner's trial, several items seized during this search were admitted into evidence and he was found guilty.[8]

In affirming Chimel's conviction, both the district court of appeals[9] and the California Supreme Court[10] accepted petitioner's contention that the arrest warrant was invalid.[11] Nevertheless, reasoning that the arresting officers, acting in good faith and with personal knowledge of the circumstances, had probable cause,[12] they held that the search was lawful.

The Supreme Court granted certiorari[13] and reversed petitioner's conviction, holding that the search of Chimel's home without a search warrant was unreasonable under the fourth and 14th amendments.[14] In reaching this conclusion, the Court explicitly overruled

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[7] *See* note 11 *infra.*

[8] 395 U.S. at 754.

[9] People v. Chimel, 61 Cal. Rptr. 714 (Ct. App. 1967).

[10] People v. Chimel, 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968).

[11] The invalid affidavit is reproduced in 61 Cal. Rptr. at 715-16 n.1. Both courts agreed that the arrest warrant was invalid because the complaint on which it was based merely stated conclusions, rather than underlying facts and circumstances as required by the decisions in Giordenello v. United States, 357 U.S. 480 (1958), and Aguilar v. Texas, 372 U.S. 108 (1964). It should also be noted that the California appellate courts came to their respective conclusions long before the Supreme Court's recent decision in Spinelli v. United States, 393 U.S. 410 (1969), which further delineated the requirements for an adequate showing of probable cause.

[12] 61 Cal. Rptr. at 715; 68 Cal. 2d at 442 & n.4, 439 P.2d at 337 & n.4, 67 Cal. Rptr. at 13 & n.4 (specifying the reasons why probable cause existed in this case).

Probable cause, when cited as the basis for an arrest, implies a quantum of evidence necessary to substantiate independent police action. Mr. Justice Harlan recently stated: "Probable cause to arrest means evidence that would warrant a prudent or 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). *See also* McCray v. Illinois, 386 U.S. 300, 304 (1967); Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925).

Probable cause, when considered in connection with search warrants, takes on a slightly different emphasis. In this latter context, the quantum of evidence required to sustain a valid search warrant is perhaps greater than that required to validate intervention by the police in a chance street encounter. *See* Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 111 (1964).

The inference seems to be that the determination of probable cause made by a neutral magistrate in detached surroundings will be judged by a more stringent criterion than the same determination made by a police officer in the fast-moving world of active law enforcement. *See generally* Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433, 436 n.4 (1969).

[13] 393 U.S. 958 (1968).

[14] The fourth amendment provides:

its previous decisions in *Harris v. United States*[15] and *United States v. Rabinowitz*,[16] and clearly rejected California's contention that the permissible scope of a search incident to a valid arrest may extend to any area considered to be under the control of the person arrested, a principle present in both *Harris* and *Rabinowitz*.

The problem of adequately defining the permissible scope of search incident to a valid arrest has plagued the Court for many years. In fact, only through a brief historical sketch of the ebb and flow of the development of the permissible scope doctrine can one savor the full significance of *Chimel*. The limited right of search and seizure is predicated on, and guarded by, the warrant provisions of the fourth amendment.[17] Under certain circumstances, however, the Court has nonetheless seen fit to grant certain exceptions to the fourth amendment's requirement that searches and seizures be made only pursuant to the warrant requirement. The right of the police to search for and seize certain items[18] incident to a lawful arrest is one of the acknowledged exceptions.[19] Given this impor-

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> 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.

In Weeks v. United States, 232 U.S. 383 (1914), the Court held that admission of evidence gained in violation of the fourth amendment was violative of the fifth amendment due process clause and, therefore, must be excluded from a federal criminal prosecution. Not until 1961, in Mapp v. Ohio, 367 U.S. 643 (1961), did the Court find that the exclusionary rule of *Weeks* was also applicable through the 14th amendment to criminal prosecutions in state courts. In Ker v. California, 374 U.S. 23 (1963), the Court ruled that the standards of reasonableness required under the fourth amendment do not vary when applied to the states via the 14th.

[15] 331 U.S. 145 (1947). The Court had affirmed Harris' conviction which resulted from evidence gained in a systematic search of his entire apartment, conducted without a search warrant, and having nothing to do with the charge on which petitioner had originally been arrested. *Id.* at 155.

[16] 339 U.S. 56 (1950), holding, in part, that a warrantless search of Rabinowitz's entire one-room office was not necessarily invalid if the method used to accomplish the search was reasonable in view of the particular circumstances surrounding the situation. *Id.* at 65-66.

[17] For the full text of the fourth amendment, see note 14 *supra*.

[18] The language of the majority opinion indicates that such items may include weapons which the suspect might use to resist arrest or to effect an escape, and evidence of a crime which may be concealed or destroyed. 395 U.S. at 768. These two general categories do not appear to be exclusive. *See* Sibron v. New York, 392 U.S. 40, 66-67 (1968) (seizure of tools used to commit a crime held valid); Draper v. United States, 358 U.S. 307, 314 (1959) (seizure of contraband narcotics also held valid).

[19] In addition to search and seizure incident to a valid arrest, the Court has grafted certain other exceptions onto the fourth amendment. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit); Cooper v. California, 386 U.S. 58, 59-62 (1967) (automobile); Zap v. United States, 328 U.S. 624, 628-29 (1946) (consent); Carroll v. United States, 267 U.S. 132, 153, 156 (1925) (contraband). *See also* Stoner

tant exception, the problem has remained to adequately define the reasonable perimeter of the search.

Part of the difficulty stems from the Court's use of questionable legal craftsmanship in the early part of this century.[20] Beginning with *Weeks v. United States*,[21] and culminating with its decision in *Marron v. United States*,[22] the Court, by implication, expanded the permissible bounds of the search and seizure to include not only the arrestee's person but also the immediate premises under his control.[23] Although the rapid expansion of permissible scope, from the person in *Weeks* to the premises in *Marron*, was halted for a time,[24] it was again continued in *Harris v. United States*.[25] In *Har-*

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v. California, 376 U.S. 483, 489 (1964); Brinegar v. United States, 338 U.S. 160, 176-77 (1948); McDonald v. United States, 335 U.S. 451, 454-56 (1948).

Besides the exceptions created by case law, there have been certain exceptions created by statute. *See, e.g.*, Comment, *Border Searches — A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457, 458 n.6 (1968).

[20] *See* United States v. Rabinowitz, 339 U.S. 56, 68-86 (1950) (Frankfurter, J., dissenting). After criticizing the former thinking of the Court starting with *Weeks* and extending through *Harris*, Mr. Justice Frankfurter stated: "They merely prove how a hint becomes a suggestion, is loosely turned into dictum and is finally elevated to a decision." *Id.* at 75.

[21] 232 U.S. 383 (1914). By way of dicta, the Court recognized that a federal agent could search both the person of a lawfully arrested suspect and the area within his control. *Id.* at 392.

[22] 275 U.S. 192 (1927). The Court held that the right to seize articles not specifically mentioned in the search warrant, but which were nevertheless used to maintain a nuisance, extended to all parts of the premises on which the illegal activity was being conducted. *Id.* at 198-99.

[23] The expansion process was given momentum by two further cases which came after *Weeks* and before *Marron*. In Carroll v. United States, 267 U.S. 132 (1925), the Court condoned the warrantless search of a car, and the seizure of contraband alcohol therefrom on the grounds that federal agents had probable cause to make the arrest, and that it would be impractical to require a warrant where the subject of the search could quickly move out of reach. *Id.* at 149-53. In Agnello v. United States, 269 U.S. 20 (1925), the scope of search was extended, still by way of dicta, to include the place in which a suspect was arrested, including his home. Although petitioner's conviction was reversed, the Court stated:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing a crime and to *search the place where the arrest is made* in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. *Id.* at 30 (emphasis added).

The Court added: "While the question has never been directly decided by this court, it has always been assumed that *one's house* cannot lawfully be searched without a search warrant, *except* as an incident to a lawful arrest therein." *Id.* at 32 (emphasis added).

[24] *See* Go-Bart Importing Co. v. United States, 282 U.S. 334 (1931), where the Court held that a general exploratory search of the premises on which petitioner was arrested, conducted without a warrant, was unreasonable because no crime was being committed in the presence of the arresting officers. *Id.* at 357. *See also* United States v. Lefkowitz, 285 U.S. 452, 461-62 (1932).

[25] 331 U.S. 145 (1947). *See* notes 15-16 *supra* & accompanying text.

ris, the Court concluded that, under appropriate circumstances, a warrantless search incident to a valid arrest "may extend beyond the person of the one arrested to include the premises under his immediate control."[26] The permissiveness of the scope granted in *Harris* was momentarily checked,[27] and then completely reinstated 2 years later in *United States v. Rabinowitz*.[28]

It thus becomes apparent that the permissible scope of search incident to a valid arrest, as defined by the Supreme Court, has been subject to guidelines which at best vary, and which at worst change abruptly.[29] Nevertheless, the accepted doctrine remained confined to a search of the suspect and the premises under his immediate control[30] until the present decision in *Chimel* where the Court held

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[26] 331 U.S. at 150-51. The "appropriate circumstances" focused on by the Court in *Harris* were that the items specifically being sought (cancelled checks) were of such a nature that they might easily be either destroyed or concealed in a remote corner of the arrestee's four-room apartment. It is interesting to note that the State in *Chimel* tried to justify its warrantless search of petitioner's entire home on substantially the same grounds. The items being sought in the latter case were small coins which the police felt could be easily secreted in any remote corner of the premises. *See* Brief for Respondent at 33, Chimel v. California, 395 U.S. 752 (1969).

[27] *See* Trupiano v. United States, 334 U.S. 699 (1948), where the Court expressed a more restrictive view of search and seizure by holding that certain contraband items, seized by federal agents without a search warrant at the site of an illicit distillery, be excluded from evidence. The Court reasoned that, absent exigent circumstances, it was unlawful to seize such items when there was ample time and opportunity to secure a search warrant. *Id.* at 705.

[28] 339 U.S. 56 (1950). *See* note 16 *supra*. The Court once again reverted to a more lenient view of the permissible scope of a search incident to a valid arrest by holding that it was not unreasonable for the arresting officers to search the arrestee's entire one-room office following a valid arrest therein where the "premises were under the control of the person arrested and where the crime was being committed." *Id.* at 61.

The Court relied on the rationale of *Marron* and *Harris*, that where a crime is being committed in the presence of the arresting officers and where a valid arrest has taken place, the agents have a license to search the premises of the arrested party without a search warrant. *Id.* at 61-63. At the same time, the Court distinguished *Go-Bart* and *Lefkowitz* as being general exploratory searches in situations where no crime was being committed in the presence of the arresting officers. *Id.* at 62-63.

In addition, the Court shifted the emphasis of reasonableness from the *Trupiano* standard of the practicality of securing a search warrant to what the Court felt was the more relevant standard of considering the method used to conduct the search viewed in the context of the particular circumstances of the case. *Id.* at 64-66.

[29] The problem presented by constantly fluctuating guidelines was succinctly stated by Mr. Justice Black: "In my judgment it would be a wiser judicial policy to adhere to the *Trupiano* rule of evidence, *at least long enough to see how it works.*" *Id.* at 67 (Black, J., dissenting) (emphasis added).

[30] *See, e.g.*, Ker v. California, 374 U.S. 23, 42 (1963), where the Court reasoned that to prevent evidence from possibly being destroyed, an extensive search of a suspected narcotics user's home without a warrant was lawful as being within the bounds of *Harris*. *Accord*, Abel v. United States, 382 U.S. 217, 235-37 (1960). Even though the *Harris-Rabinowitz* standard remained intact until *Chimel*, it was generally criticized

that the warrantless search of a suspect's entire home was unreasonable.[31]

Although the holding in *Chimel* represents a departure from the permissive standards of search and seizure enunciated in *Harris* and *Rabinowitz*, it is nevertheless consistent with the rationale underlying recent decisions emanating from the closely related areas of stop-and-frisk and arrest following hot pursuit. Evidently mindful of the increasing rate of crime, the Court has redefined the fourth amendment command of reasonableness as it applies to the chance street encounter between the police and a suspect.

In the area of hot pursuit, the Court has adopted the policy that the arresting officer may take reasonable precautions to protect himself and to insure that evidence is neither concealed nor destroyed. In *Warden v. Hayden*,[32] the Court reasoned that while a search may lawfully extend to the entire premises on which the suspect is arrested following hot pursuit, its scope *should be tempered* by the *immediate necessities* of the situation.[33] This doctrine was further crystallized in *Peters v. New York*,[34] where the Court held that it was reasonable for the arresting officer to search the person of a suspect for weapons or items evidencing criminal activity when that suspect was apprehended following a short chase.[35]

Keeping pace with its decisions in stop-and-frisk, the Court diligently moved to clarify some of the other ambiguities enshrouding the concept of reasonableness relevant to search and seizure.

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by the commentators. *See generally* Way, *Increasing Scope of Search Incidental to Arrest*, 1959 WASH. U.L.Q. 261. *See also* Note, *supra* note 12.

[31] 395 U.S. at 768. The Framers did the Court no favor by declaring that the fourth amendment prohibited only "unreasonable" searches, for by couching the standard in negative terms, they made it difficult for the Court to give the term a positive, workable definition. Basically, reasonableness goes to the method and intensity of a search considered in view of facts and circumstances particular to that case. *See* Terry v. Ohio, 392 U.S. 1, 18 (1967); Camera v. Municipal Court, 387 U.S. 523, 528-29 (1967); Elkins v. United States, 364 U.S. 206, 222 (1960); United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting). *See also* note 51 *infra* & accompanying text.

[32] 387 U.S. 294 (1967).

[33] "The permissible scope of the search must . . . be as broad as may reasonably be necessary" to accomplish the immediate task. *Id.* at 299.

In a related context, it is important to note that the *Hayden* Court rejected the "mere evidence" rule which for years had dictated that evidentiary matters such as personal papers could not be seized either under the authority of a search warrant or as incident to a valid arrest, as opposed to items, such as fruits of a crime, which could validly be seized under either circumstance. *Id.* at 295-96, 300-02.

[34] 392 U.S. 40 (1968) (companion case of *Sibron v. New York*).

[35] *Id.* at 67.

Affirming petitioner's conviction in *Terry v. Ohio*,[36] the Court reasoned that a "patdown" of the suspect's outer garments as a self-protective measure was reasonable,[37] and thus it did not violate the petitioner's rights under the fourth amendment.[38] Such a search, however, "must be strictly tied to and justified by the circumstances which rendered its initiation permissible."[39] The decision in *Sibron v. New York*[40] not only provides a significant contrast to *Terry*, but also gives further insight into the evolving strict interpretation of reasonableness. In reversing petitioner's conviction, the Court cited the fact that the arresting officer had thrust his hands inside the suspect's coat while searching for contraband narcotics, and held that such an intrusion was unreasonable in light of the circumstances known to the officer at the time of the search.[41] The import of these decisions is that a search which is initiated upon probable cause and which is restricted within reasonable limits to those items which justified its inception, will not later be judged to be violative of the arrestee's rights under the fourth amendment.

Immediately prior to *Chimel*, then, there were two operative trends afoot in the area of search and seizure. On the one hand, there was the older *Harris-Rabinowitz* standard which generally permitted a warrantless search of the entire premises incident to a valid arrest. On the other hand, there were the more recent decisions emanating from the related fields of stop-and-frisk and hot pursuit which limited the scope of a search to that area in which the items which justified its inception might be found. The two trends converged in *Chimel*, and the result was a new definition of reasonableness for the fourth amendment.

A brief review of the facts will indicate that Chimel's case lent

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[36] 392 U.S. 1 (1968).

[37] The arresting officer's cautious approach was not unmerited. Commission observers of police streetwork in high-crime neighborhoods of some large cities reported that one out of every five persons frisked was found to be carrying either a knife or a gun. PRESIDENT'S COMMISSION, *supra* note 3, at 94-95. Moreover, the FBI reported that "in 1968, the trend established in prior years continued in that more law enforcement officers met death by criminal action when attempting arrests than from any other cause," and handguns accounted for nearly 75 percent of the deaths. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS — 1968, at 45-46 (1969).

[38] 392 U.S. at 8.

[39] *Id.* at 19. *See also* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

[40] 392 U.S. 40 (1968).

[41] *Id.* at 65. The relevant circumstances indicated that the arresting officer lacked any justification for believing that the petitioner was armed or dangerous, and, thus, thrusting his hand into the suspect's pocket was considered unreasonable.

itself to a reevaluation of the concept of reasonableness by the Court. Petitioner had been the primary suspect in two thefts of valuable coins. Local police obtained a warrant for his arrest, but failed to obtain a search warrant for his home.[42] Following petitioner's arrest in his living room, the arresting officers systematically searched the entire premises. Their search was concentrated on those areas in which stolen coins might be most readily concealed.[43] Several coins so found were introduced into evidence at petitioner's trial on two charges of burglary.[44] In reversing petitioner's conviction, the Court elected not to consider the validity of the arrest, but opted instead to determine whether there had been constitutional justification for the warrantless search of Chimel's entire home as incident to a valid arrest.[45]

The search for constitutional justification must focus upon an historical interpretation of the Constitution. Indeed, through all its other inconsistencies in dealing with the fourth amendment, the Court has consistently emphasized the historical circumstances surrounding the adoption of that amendment.[46] In this context, the fourth amendment is viewed as a barrier[47] which the Framers placed

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[42] The arrest warrant was subsequently found to be invalid. *See* note 11 *supra.* The State tried to justify its failure to obtain a search warrant on purely administrative grounds. Moreover, the State contended that this particular arrest had taken place in the petitioner's home on the rather tenuous ground that the officers desired to avoid causing the petitioner the embarrassment of being arrested at his place of work. *See* Brief for Respondent at 34, 395 U.S. 752 (1969).

[43] The similarities with *Harris* are striking. In that case, petitioner was convicted on the basis of evidence seized without a warrant and in the course of a lengthy and systematic search of a multi-room dwelling. Further, in *Harris* the Court rationalized that by secreting illegal draft cards, the petitioner was, in effect, committing a crime in the presence of the officers, and that the illegal items could be seized on that ground alone. 331 U.S. at 155. A similar argument could be made in *Chimel* to the effect that by secreting stolen property, the petitioner was also committing a crime in the presence of the arresting officers.

[44] 395 U.S. at 754.

[45] *Id.* at 755.

[46] "The fourth amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . . ." Carroll v. United States, 267 U.S. 132, 149 (1925). *See also* Marron v. United States, 275 U.S. 192, 195-97 (1927).

The dissenting opinions of Mr. Justice Frankfurter in both *Harris* and *Rabinowitz* were based, in part, on the circumstances surrounding the adoption of the fourth amendment. *See* United States v. Rabinowitz, 339 U.S. 56, 80-83 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 157-60 (1947) (Frankfurter, J., dissenting). The rationale of these early dissents appears to have been adopted by the present decision in *Chimel.*

[47] "[W]e cannot sustain this warrant without diluting important safeguards [which] assure that the judgment of a disinterested judicial officer will impose itself between the police and the citizenry." Spinelli v. United States, 393 U.S. 410, 419 (1969). *See also* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

between the private citizen and the police in an attempt to protect the integrity of the former from the zeal of the latter.[48] The Court found evidence for this view manifested in the fourth amendment requirement that a lawful search may take place only under certain guarded conditions and the fact that the warrant requirement may be waived in only a limited number of special situations.[49] The reasonable limits imposed on a warrantless search by *Chimel* are an accurate reflection of the probable cause criterion which is the fourth amendment prerequisite to the issuance of a search warrant.[50] Moreover, when determining the reasonableness of a search — either with or without a warrant — the Court has evaluated the method of a search in terms of its intensity, duration, and scope.[51] Resultantly, the guidelines laid down by *Chimel,* especially when considered in the light of the hot pursuit and stop-and-frisk cases, come as close as possible to insuring the protection of the arrestee's fourth amendment rights when the arresting officer is operating without a warrant.

Indeed, viewing the fourth amendment in both its historical and modern perspective, the Court in *Chimel* could have reached no other conclusion. Exceptional circumstances present in other fourth amendment cases,[52] allowing the search warrant requirement to be dispensed with, were simply not present in *Chimel.* The petitioner did not consent to the search of his home. He was not fleeing or evidencing any intent to take flight. The place to be searched was a permanent residence and not a movable vehicle. The evidence being sought, though capable of being concealed, could not be readily destroyed. Finally, the officers investigating petitioner's activities had adequate time to prepare a valid search war-

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[48] Inherent in many of the Court's decisions is an underlying fear of unchecked police action. "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." McDonald v. United States, 335 U.S. 451, 456 (1948). *See also* Johnson v. United States, 333 U.S. 10, 13-14 (1948); Marron v. United States, 275 U.S. 192, 196 (1927).

This same fear of unchecked police action pervaded the Court's thinking in Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964), and resulted from what the Court felt was the unduly coercive atmosphere of the station house.

[49] *See* note 19 *supra.*

[50] *See* note 12 *supra.*

[51] "A search which is reasonable at its inception, may violate the fourth amendment by virtue of its intolerable intensity and scope." Terry v. Ohio, 392 U.S. 1, 18 (1968). *See also* Sibron v. New York, 392 U.S. 40 (1968); Schmerber v. California, 384 U.S. 757 (1966); Elkins v. United States, 364 U.S. 206 (1960); Kreman v. United States, 353 U.S. 346 (1957); Trupiano v. United States, 334 U.S. 699 (1948).

[52] *See* note 19 *supra.*

rant had they been so disposed.[53] Absent any circumstances, then, that might have otherwise justified a warrantless search of the petitioner's entire home, it seems clear that the Court stood on firm ground in holding that it was unreasonable for the search to extend beyond the petitioner's person, or anything within his physical reach.

The real value of the decision seems to be that the Court, beginning with its recent rulings in the related fields of stop-and-frisk and arrest following hot pursuit, and continuing now in *Chimel*, has begun to formulate meaningful answers to traditionally perplexing problems. Workable guidelines are now being established for those members of the community (legal and non-legal) who are directly affected. These guidelines may readily be translated into concrete language that law enforcement agencies can assimilate and apply in discharging their duty. That the Court was able to structure such definitive guidelines is largely attributable to the fact that, unlike previous decisions, in *Chimel* the Court articulated its decision in positive terms — specifying the limits within which the arresting officer may reasonably search, rather than in negative terms of where the officer may not search.

Nor does *Chimel* unduly hamper the efficient execution of a valid arrest. The Court has merely drawn a protective zone around the person of the arrestee, beyond which the arresting officers may not search without a search warrant.[54] To seize evidence outside this protective zone, law enforcement officers must first secure a search warrant to insure that evidence so obtained is "untainted" and admissible in a judicial proceeding.

Presumably, the Supreme Court feels that the evidence necessary to support the issuance of an arrest warrant is insufficient to justify

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[53] On this point, the State argued that it would be overly burdensome to require the police to prepare an adequate affidavit describing in particular the several thousand coins which they felt were secreted in the petitioner's home. *See* Brief for Respondent at 37, 395 U.S. 752 (1969).

[54] The "protective zone" spoken of here is not dissimilar in substance to the zone of privacy concept recognized by the Court in previous fourth amendment cases. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 307 (1967); Wolf v. Colorado, 338 U.S. 25, 27 (1949); Boyd v. United States, 116 U.S. 616, 630 (1888). *See also* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965), which was based on a zone of privacy concept emanating from not just one, but several constitutional guarantees.

Although the Constitution recognizes no right of privacy per se, the Court has seen fit to engraft this right onto the fourth amendment. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court recognized that the fourth amendment creates a "right of privacy, no less important than any other right carefully and particularly reserved to the people." *Id.* at 656. The right of privacy under the fourth amendment was extended in Katz v. United States, 389 U.S. 347 (1967), which held that the petitioner could justifiably expect privacy when speaking from a public telephone booth, and that the government agents violated that privacy when they eavesdropped on his conversation.

an invasion of one's right to privacy by a warrantless search. Although this result may be criticized because it places an obstacle in the path of law enforcement agencies, the decision is consistent with the Court's view that the protection of the fourth amendment "reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws."[55] The effect of the decision is to prohibit law enforcement agencies from using an arrest in the living room to serve as a license for the warrantless search of the arrestee's entire home and a general rummaging of his personal effects.[56]

It is suggested that the new guidelines established by *Chimel* for the permissible scope of search and seizure incident to a valid arrest are more plausible and realistic than their predecessors. Several years ago, Mr. Justice Frankfurter questioned where the rational line of limitation could be drawn if a search was permitted to extend beyond the person of the arrestee.[57] For the interim, at least, this plaintive query has been answered — it must be drawn at the reach of the arrestee.

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[55] Marron v. United States, 275 U.S. 192, 196 (1927).

[56] The Court in *Chimel* apparently equates the warrantless search of Chimel's entire home with the offensively arbitrary searches which took place in England and the Colonies during the 18th century under a general writ. Such an analysis is not unique to *Chimel.* In Warden v. Hayden, 387 U.S. 294, 301 (1967), the Court stated:

> We have examined on many occasions the history and purposes of the [fourth] amendment. It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of the sanctity of a man's home and the privacies of life from searches under indiscriminate, general authority.

See also Marron v. United States, 275 U.S. 192, 195-96 (1927).

[57] *See* United States v. Rabinowitz, 339 U.S. 56, 79, (1950) (Frankfurter, J., dissenting). *See also* Harris v. United States, 331 U.S. 145, 197 (1947) (Jackson, J., dissenting).