A RECONSIDERATION OF THE FOURTH AMENDMENT'S DOCTRINE OF SEARCH INCIDENT TO ARREST

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INTRODUCTION

The doctrine of search incident to arrest provides that, as an incident to every lawful full custody arrest, law enforcement officers have an automatic right to conduct a thorough search of the arrestee and the area within his immediate control.1 Although the Supreme Court has stated that the search incident to arrest exception to the fourth amendment's general requirement of a search warrant has been "settled from its first enunciation,"2 the doctrine should be reexamined in terms of constitutional jurisprudence.

The Supreme Court in Chimel v. California3 attempted to enunciate standards that would limit unreasonably broad area searches. Since the Court's 1969 decision in Chimel lacks a defensible rational basis, however, lower courts have applied the Chimel standard inconsistently. This inconsistent application of Chimel stems from the Court's failure to consider the implications of Terry v. Ohio4 in formulating a more rational approach to searches incident to arrest and also from its failure to address the critical problem presented by the presence of third parties at the scene of an arrest. Moreover, lower courts have had to grapple with the realization that the standards limiting area searches established in Chimel may encourage sloppy police work, delayed and pretext arrests, and the fabrication of probable cause to justify such searches. The widespread use of the search incident to arrest exception by police further

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supports the need for reconsideration of the doctrine. The finding of a
1967 study that more than 90 percent of all searches receiving court con-
sideration were incident to an arrest indicates that the exception
virtually has swallowed the warrant requirement of the fourth amend-
ment. The displacement of the warrant process as a primary method for
conducting searches raises issues central to the criminal justice system.
Designed to interpose a neutral, detached magistrate between the police
officer and the citizen, the warrant process allows the objective weighing
of the facts against a legal standard before an individual’s privacy is
invaded; it separates law judgment from law enforcement. If the
majority of searches are being conducted without warrants, however,
this important safeguard against unreasonable invasions of privacy is
subverted.

The Supreme Court’s decisions in United States v. Robinson and
Gustafson v. Florida further underscore the need to review the search in-
cident to arrest doctrine. In Robinson and Gustafson the Court held the
search incident to arrest exception applies to all in-custody arrests, in-
cluding those for minor traffic violations. Writers have criticized the
decisions, but they are a logical outgrowth of the Court’s holding in
Chimel that a law enforcement officer may conduct a full search of a per-
son, incident to his arrest, without further justification. This application
of the search incident to arrest rule threatens to undermine further the
Constitution’s warrant requirement and mandates a reexamination of the
doctrine.

The doctrine of search incident to arrest has generated considerable
uncertainty and ambiguity. The Supreme Court’s pronouncements in the
area have changed frequently. The first section of this article reviews the
common law foundation of warrantless searches, analyzes the leading
Supreme Court decisions from Weeks v. United States to Chimel, and
critically examines Chimel and related cases. The second section

5. L. TIFFANY, D. McINTYRE & D. ROTENBURG, DETECTION OF CRIME 105, 122 (F. Rem-
ington ed. 1967).
8. 414 U.S. at 236 (seizure of heroin found during search incident to arrest for driving after permit revoked upheld); 414 U.S. at 263-64, 266 (seizure of marijuana found during search incident to arrest for driving without license upheld).
analyzes the impact of *Chimel* on subsequent case law and criticizes the distinction drawn in those cases between personal and area searches. In concluding that every search incident to a lawful full custody arrest is not per se justifiable, the article suggests standards by which the validity of such searches may be determined and proposes a modernized warrant process incorporating those standards.

**AN HISTORICAL PERSPECTIVE: THE COMMON LAW THROUGH *Chimel***

American courts have assumed erroneously that English common law established an absolute right to search an arrestee incident to a custodial arrest. A limited right did exist at common law, but the mere occurrence of an arrest did not always create a right to search. A leading English decision, *Leigh v. Cole*, specifically qualified the right to search incident to arrest: “Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend on all the circumstances of the case.” Professor Bishop cites *Leigh* for the proposition that not every search incident to arrest is valid. According to Bishop, an officer must keep the prisoner until lawfully discharged, but he may search the prisoner only if he fears escape. Other commentators, however, have discussed the doctrine in more absolute terms: Pollock and Maitland, for example, observe that at early common law “if by hue and cry a man was captured when he was still in seisin of his crime—if he was still holding the gory knife or driving away the stolen beasts—... he could not be heard to say he was innocent, he could not claim any sort or form of trial.” Courts have cited the “hue and cry” passage and other common law sources to explain the origin of search incident to arrest, but a more reasonable interpretation of Pollock and

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12. 6 Cox Crim. Cas. 329 (1853).
13. Id. at 332.
14. 1 J. BISHOP, NEW CRIMINAL PROCEDURE § 210, at 152 & n.75 (2d ed. 1913).
15. Id. § 210, at 152.
17. See, e.g., United States v. Snyder, 278 F. 650, 653-54 (N.D.W. Va. 1922); United States v. Wilson, 163 F. 338, 340-41 (S.D.N.Y. 1908); State v. Hassan, 149 Iowa 518, 523-24, 128 N.W. 960, 963 (1910); People v. Chiagles, 237 N.Y. 193, 196, 142 N.E. 583, 584 (1923). In *Dillon v. O'Brien* the court considered whether a search incident to arrest may be conducted and concluded that constables... are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime...
Maitland’s thesis is that evidence of an individual’s guilt rather than the arrest itself justifies seizure of an individual.\(^{18}\)

The common law does not support the Supreme Court rule upholding the validity of any search incident to an arrest. Indeed, it reveals that a search must be based on a justifiable purpose. The fourth amendment attempts to assure that every search is reasonable and has a justifiable purpose by establishing the general rule that searches must be preceded by a warrant based on probable cause.\(^{19}\) Searches incident to arrest constitute an exception to this rule, but the doctrine lacks a consistent and defensible rationale and itself has become an inflexible rule.

Three early twentieth century Supreme Court cases form the foundation of the search incident doctrine: \textit{Weeks v. United States,}\(^{20}\) \textit{Carroll v. United States,}\(^{21}\) and \textit{Agnello v. United States.}\(^{22}\) None of these cases, however, involved a search incident to arrest. In \textit{Weeks} the Government had seized the defendant’s personal papers in a series of warrantless searches of his home and used the papers as evidence against the defendant after his arrest at his place of work.\(^{23}\) The Court ordered return of the papers but asserted that the right to search the person of the accused when arrested has been “uniformly maintained in many cases.”\(^{24}\) Eleven years later, in \textit{Carroll}, the Court upheld the right of law enforcement officials to conduct a warrantless search of a vehicle prior to arresting the driver. The police, acting under the National Prohibition Act,\(^{25}\) had probable cause to believe that the car was transporting liquor.\(^{26}\) In responding to defense claims that the search was illegal because Carroll had not been arrested, the Court, while noting the validity of the \textit{Weeks} dictum that arrest justifies the warrantless search of the person, concluded the search was justified nonetheless because the officers had reasonable cause to believe the automobile contained liquor.\(^{27}\) In \textit{Agnello}.\(^{16}\) Cox Crim. Cas. 245, 249 (Exchequer Div. 1887).

Justice Frankfurter notes confusion as to whether the search incident to arrest doctrine resulted from the “hue and cry,” from a need to deprive the prisoner of means of escape, or from a desire to prevent destruction of evidence. \textit{See} Davis v. United States, 328 U.S. 582, 609 (1946) (Frankfurter, J., dissenting).

\(^{18}\) \textit{See Note, Searches of the Person Incident to Lawful Arrest, 69 COLUM. L. REV. 866, 868-70 (1969).} 
\(^{19}\) U.S. CONST. amend. IV. 
\(^{20}\) 232 U.S. 383 (1914).
\(^{21}\) 267 U.S. 132 (1925).
\(^{22}\) 269 U.S. 20 (1925).
\(^{23}\) 232 U.S. at 386-87.
\(^{24}\) \textit{Id.} at 392. The Court did not cite any American precedent to support its recognition of the search incident to arrest doctrine.
\(^{26}\) 267 U.S. at 134-35.
\(^{27}\) \textit{Id.} at 168-69.
the Court held unconstitutional a warrantless search of an arrestee's home several blocks from the place of the arrest.\textsuperscript{28} Citing only \textit{Weeks} and \textit{Carroll}, the Court again noted in its discussion that the power to search incident to arrest, including the place in which the arrest is made, "is not to be doubted."\textsuperscript{29} Since none of these three cases involved a search incident to an arrest, the Court did not feel constrained to analyze thoroughly the search incident to arrest doctrine; the Court simply assumed the validity of the doctrine in \textit{Weeks} and reaffirmed that assumption in the later two cases.

Interpretation of the doctrine of search incident to arrest did not remain constant. In \textit{Marron v. United States}\textsuperscript{30} the Court held that police could search for and seize all items that were part of a criminal enterprise and on the premises in the immediate possession and control of the arrestee.\textsuperscript{31} The term immediate possession and control was defined broadly in \textit{Marron} to include the entire business establishment.\textsuperscript{32} Four years later, in \textit{Go-Bart Importing Co. v. United States},\textsuperscript{33} the Court cited two reasons for refusing to sanction a search that was quite similar to that undertaken in \textit{Marron}: the Government had time to secure a search warrant and the arresting officer had not witnessed an overt act being committed pursuant to a conspiracy.\textsuperscript{34} In \textit{United States v. Lefkowitz}\textsuperscript{35} the seizure of business papers from an office similarly was disallowed on the ground that no overt act pointing toward a conspiracy had been committed in the officer's presence.\textsuperscript{36} In both \textit{Lefkowitz} and \textit{Go-Bart} the Supreme Court emphasized that, unlike the situation in \textit{Marron} where the property seized was in plain view of the arresting officers, the property seized by the police was uncovered after a general search of the premises.\textsuperscript{37} The distinctions among these cases, however, are dubious: all three involved conspiracy and the seizure of business records from an en-

\textsuperscript{28} 269 U.S. at 30-31.

\textsuperscript{29} \textit{Id.} at 30. The Court used a negative proposition as authority for its converse: "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." \textit{Id.} at 32.

\textsuperscript{30} 275 U.S. 192 (1927).

\textsuperscript{31} \textit{Id.} at 199.

\textsuperscript{32} \textit{Id.} at 198-199 (warrant authorized search for illegal liquor; seizure of business ledger from closet and utility bills from beside cash register upheld as incident to arrest).

\textsuperscript{33} 282 U.S. 344 (1931).

\textsuperscript{34} \textit{Id.} at 357-58.

\textsuperscript{35} 285 U.S. 452 (1932).

\textsuperscript{36} \textit{Id.} at 463. The Court in \textit{Lefkowitz} found \textit{Go-Bart Importing Co. v. United States} controlling; the exploratory searches would have been invalid even under a search warrant since police sought mere evidence and not contraband. \textit{Id.} at 465-67; see 282 U.S. 344, 357-58 (1931).

\textsuperscript{37} 285 U.S. at 465; 282 U.S. at 358.
closed area. In attempting to distinguish Marron instead of directly overruling it, the Court in Go-Bart and Lefkowitz further confused the search incident to arrest doctrine.

The Supreme Court's decision in *Harris v. United States* marks a change from the earlier cases. In upholding an extensive police search of the defendant's home, the Court reasoned that the defendant “possessed” all rooms searched, that the evidence—two cancelled checks—could be secreted anywhere in the house, and that the specific location of the arrest should not limit the scope of the search. The implications of the broad holding of *Harris* conflict directly with the Court's admonition in *Lefkowitz* that “an arrest may not be used as a pretext to search for evidence.” Consistent only in its vacillation, the Court announced its fourth different formulation of the rule and implicitly overruled *Harris* one year later in *Trupiano v. United States*. The Court upheld the warrantless arrest of the defendant in *Trupiano* but suppressed evidence of an illegal still because agents who seized it could have obtained a search warrant. Invalidating the search, the Court made a remarkably broad statement concerning the right to search incident to arrest that comports with the English common law:

The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary whenever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant.

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39. *Id.* at 151-53. While searching for two cancelled checks to implicate the defendant in mail fraud, the FBI agents in *Harris* found several altered draft cards in an envelope marked “personal papers.” *Id.* at 148-49. In sustaining the defendant's conviction for possessing, concealing, and altering the draft cards, the Court concluded that Harris had committed the crime “in the very presence of the agents conducting the search” merely by possessing the cards. *Id.* at 146-47, 155.
40. 285 U.S. at 467.
42. *Id.* at 705.
43. *Id.* at 708 (citation omitted). The Court's warning that the exception might swallow the general principle merits close attention. The fourth amendment requires warrants to describe with particularity the place to be searched and the items to be seized. U.S. CONST. amend. IV. A search incident to arrest, however, allows officers great discretion in defining the scope of the search as long as the search is reasonable. 334 U.S. at 710. “[M]uch of the potency of the right of privacy” depends on this difference in standards for searches conducted pursuant to a warrant and those incident to an arrest. *Id.*
Two years later the Court overruled *Trupiano* and apparently revived *Harris* in *United States v. Rabinowitz*. The Court in *Rabinowitz* upheld the complete search of the office in which the defendant was arrested even though the police knew in advance what they were seeking and had time to secure a warrant. The Court essentially ignored the fourth amendment's warrant requirement in sustaining the defendant's conviction, which was based on the evidence seized, and declared that "searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required." The Court's decision in *Rabinowitz*, which remained good law for 19 years, posed serious threats to individual rights by encouraging warrantless searches; the Court's intimation that a search warrant is never necessary when a search is made incident to arrest undermined the fourth amendment's protection.

In *Chimel v. California* police officers arrested the defendant in his home for burglary of a coin store and, without either a search warrant or the defendant's consent, thoroughly searched the three-bedroom house, attic, and garage. In considering whether a warrantless search of the entire house could be justified as incident to an arrest, Justice Stewart, writing for the Supreme Court, noted the inconsistency of prior decisions on search incident to arrest and observed that *Rabinowitz* was "hardly founded on an unimpeachable line of authority." The Court then specifically overruled *Rabinowitz* and *Harris* but held that the police, as an incident to a lawful arrest, may conduct a warrantless search of the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." The rule announced in *Chimel* allowing a search of an area within the defendant's immediate control resulted from the Court's concern with an

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44. 339 U.S. 56 (1950).
45. *Id.* at 65-66 (search of desk, safe, and file cabinets in arrestee's office upheld).
46. *Id.* The Court explicitly overruled any language in *Trupiano* suggesting that warrants are required whenever practical and instead held that the validity of all searches would be evaluated on the basis of their reasonableness after the arrest. *Id.* at 66.
47. *Id.* at 65-66.
49. *Id.* at 753-54. The police officers in *Chimel* arrived at the defendant's house, were admitted by his wife, and arrested the defendant when he arrived home. *Id.* at 753.
50. *Id.* at 755.
51. *Id.* at 760.
52. *Id.* at 763. The Court in *Chimel* separated its discussion of searches of the arrestee's person and its analysis of searches of the area in which the arrest was made, but it concluded that the same rule should govern both personal and area searches. *Id.* at 766-67.
arrestee’s access to weapons and to concealable or destructible evidence of his crime.\textsuperscript{53} Instead, the Court assumed that searches for evidence are just as reasonable as searches for weapons.\textsuperscript{54} Protecting policemen and preventing escapes, however, have no necessary relation to the preservation of evidence. The Court in \textit{Chimel} assumed the two objectives to be inextricably related. That assumption obscures the entirely different purposes of the two types of searches: weapons must be found to protect the officer whereas evidence must be located to preserve it for trial.

The Court’s analysis is also unsatisfactory because it assumes that the fact of an arrest, regardless of the circumstances, justifies a search.\textsuperscript{55} Although recognizing the fallaciousness of the same reasoning in \textit{Harris} and \textit{Rabinowitz}, the Court in \textit{Chimel} implied that many of a suspect’s fourth amendment rights disappear on arrest.\textsuperscript{56} Indeed, the Court criticized its own failure in earlier cases to insist on a meaningful relationship between the search and the arrest\textsuperscript{57} but nevertheless suggested that searches not based on probable cause justifiably may be made incident to an arrest as long as they are confined to an area smaller than that searched in \textit{Harris} and \textit{Rabinowitz}.\textsuperscript{58} The standard established in \textit{Chimel} differs only in degree from the earlier law,\textsuperscript{59} and the Court, instead of analyzing the constitutional issues, continues to eschew application of traditional fourth amendment principles to searches incident to arrest.

\textbf{APPLICATION OF THE FOURTH AMENDMENT TO SEARCHES INCIDENT TO ARREST}

\textbf{WEAPONS SEARCHES}

In the term before its decision in \textit{Chimel}, the Supreme Court in \textit{Terry v. Ohio},\textsuperscript{60} considered the precautions police officers could exercise in protecting themselves from assault. Whether the Court in \textit{Chimel} should have

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 762-63.
\textsuperscript{55} Id.
\textsuperscript{56} See id.
\textsuperscript{57} Id. at 767-68. Justice Stewart noted in the Court’s opinion that “one result of decisions such as \textit{Rabinowitz} and \textit{Harris} is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.” \textit{Id.} at 767.
\textsuperscript{58} Id.
\textsuperscript{59} \textit{But see} Carrington, \textit{Chimel v. California—A Police Response}, 45 \textit{Notre Dame Law.} 559 (1970) (\textit{Chimel} overruled at least 19 years of precedent and drastically restricted right of police to conduct searches incident to arrest).
\textsuperscript{60} 392 U.S. 1 (1968).
looked to Terry for guidance on the standard to be applied to warrantless searches for weapons poses an interesting query. The issue in Terry was whether it is unreasonable for the police, without probable cause for an arrest, to seize a person and conduct a limited search for weapons.\textsuperscript{61} Recognizing that the fourth amendment governs such pat-down searches, the Court sought to define precisely the circumstances that justified such limited invasions of privacy. The Court balanced the need for crime prevention and police safety with the need to protect personal rights, concluding that when a police officer is confronted with someone whom he reasonably suspects is armed and presently dangerous, he may conduct a limited weapons search of the person's outer clothing.\textsuperscript{62}

The Terry standard ties the power given a policeman in the stop and frisk setting to the circumstances of the moment. The officer must be able to point to clearly articulable facts that justify his search and must demonstrate that the circumstances justified the scope of the search.\textsuperscript{63} The Supreme Court in Terry implicitly concluded that the fourth amendment's reasonableness clause required that a search have a legitimate purpose, that the scope of the search reasonably be tied to its purpose, and that the objective cannot be achieved by less intrusive means. In applying these criteria in Terry, the Court recognized the need for police discretion in stop and frisk situations as well as the inherent subjectivity of on-the-spot observations.

The guidelines for weapons searches established by the Court in Terry apply only to investigative stops and, arguably, different standards should govern weapons searches incident to arrest. Since police must have probable cause to make an arrest and the custody of an arrestee will continue beyond the presence of the arresting officer, an arrestee justifiably may be subjected to a more intensive search than the pat-down authorized in Terry. The argument that the fact of an arrest justifies a different standard for initiating weapons searches, however, ignores the justification for such searches. The standard for any weapons search, of the person or the area surrounding the arrestee, should reach at least the minimal level of justification announced in Terry: an officer may frisk for weapons only if he has reason to believe that a suspect or an

\textsuperscript{61} Id. at 4. In Terry the officer confronted three men loitering in front of a store; when the men mumbled answers in response to the officer's questions, the officer spun Terry around and patted down the outside of the defendant's clothing, finding a pistol. Id. at 4-8.

\textsuperscript{62} Id. at 30. The Court emphasized that the rule in Terry did not represent a retreat from the constitutional requirement that police must, whenever practicable, obtain a search warrant prior to any search. Id. at 20.

\textsuperscript{63} Id. at 21.
arrestee is armed and presently dangerous or has quick access to a weapon. The Court’s decision in *Chimel*, however, ignores potential application of this analysis to a search incident to arrest and affords an arrestee little protection from governmental intrusion. Under *Chimel* an officer may search for weapons incident to an arrest regardless of the circumstances. By not following the logic of its decision in *Terry*, the Court in *Chimel* further confused the already muddled law of search and seizure.64

**EVIDENCE SEARCHES**

The Court in *Chimel* ignored the problem presented by the presence of third parties at the scene of the arrest by concentrating on the permissible scope of a search incident to arrest. If police had not searched the defendant’s house in *Chimel* at the time of his arrest, his wife could have disposed of the evidence before the police returned with a warrant.65 *Chimel*, therefore, squarely presented the issue of third party access to destructible evidence; the Court, however, did not treat the problem in sanctioning the warrantless search.66

A year after its decision in *Chimel*, the Court in *Vale v. Louisiana*67 again neglected the problem posed by the presence of third parties at the scene of an arrest. In *Vale* the Court invalidated the search of a narcotics dealer’s house after his arrest on the front porch.68 Although the search was not incident to an arrest under *Chimel*,69 the defendants’ furtive movements coupled with the officers’ observation of a narcotics sale outside the house arguably gave the officers probable cause to believe that the house contained narcotics.70 The Court reasoned, however, that since the police had obtained an arrest warrant, no reason existed for failing to

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65. 395 U.S. at 753-54. The evidence sought in *Chimel* was a number of coins taken in a burglary. *Id.* at 754.

66. Justice White argued in dissent that a warrantless search was justified because the defendant’s wife could have disposed of the inculpatory evidence after the officers left. See *id.* at 775 (White, J., with Black, J., dissenting).


68. *Id.* at 32-33. As in *Chimel*, only the dissenters in *Vale* considered the need to protect against destruction of evidence by third parties. *Id.* at 38 (Black, J., with Burger, C.J., dissenting).

69. *Id.* at 33-34.

70. *Id.* at 32-33, *quoting* 252 La. 1056, 1065-68, 215 So. 2d 811, 814-15 (1968) (state supreme court’s decision in *State v. Vale*).
procure a search warrant before the arrest.\textsuperscript{71} The Court failed to recognize that if the police had left to obtain a warrant someone inside the house could have removed or destroyed the narcotics.\textsuperscript{72}

Although Vale reflects a healthy attitude toward the need for search warrants, it has not aided effective law enforcement. Indeed, the Court's approach in Chimel and Vale, distinguishing between personal and area searches instead of analyzing the distinct functions of searches for weapons and searches for evidence, may restrain unduly the police in conducting area searches for evidence. In personal searches incident to arrest the police may conduct a full scale search for both weapons and evidence without regard for the circumstances. Similarly, the Court's decision in Chimel sanctions, without probable cause, a search of the area within the arrestee's immediate control; the area outside the arrestee's immediate control, however, cannot be searched without a warrant even if the police have probable cause to believe seizable evidence is present. In Vale and Chimel the Court neither considered such anomalous results nor devised a standard with which lower courts could evaluate the lawfulness of evidence searches incident to arrest. In Chimel the officer's right, even in the absence of probable cause, to conduct a limited warrantless search incident to arrest was affirmed; nevertheless the Court did not extend that right to situations where probable cause that evidence exists and may be destroyed is established. Similarly, in Vale the majority eschewed the issue of the possible destruction of evidence by simply noting that the goods seized by the police "were not in the process of destruction."

A comparison of the Chimel rule with the warrant exception in automobile cases further illustrates the uncertain status of the search incident doctrine. In Carroll v. United States\textsuperscript{74} the Supreme Court upheld the warrantless search of a car where the police had probable cause to believe the automobile contained contraband, reasoning that automobiles easily can be hidden or removed from the jurisdiction.\textsuperscript{75} The

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  \item \textsuperscript{71} 399 U.S. at 35.
  \item \textsuperscript{72} See id. at 38 (Black, J., with Burger, C.J., dissenting). The defendant's mother and brother in fact did arrive immediately after Vale's arrest. Id. at 33.
  \item \textsuperscript{73} Id. at 35.
  \item \textsuperscript{74} 267 U.S. 132 (1925).
  \item \textsuperscript{75} Id. at 153. Many cases have cited Carroll for the general proposition that, because of their mobility, searches of automobiles are not subject to the same constitutional standards as searches of dwellings. See, e.g., Chambers v. Maroney, 399 U.S. 42, 48-61 (1970) (search of defendant's car at station after earlier arrest for robbery upheld); Preston v. United States, 376 U.S. 364, 366-67 (1964) (search of car after arrest for vagrancy held invalid; Carroll distinguished); United States v. Di Re, 332 U.S. 581, 584-85 (1948) (dictum) (automobile more vulnerable to warrantless search); Husty v. United States, 282 U.S. 694, 700-01 (1931) (warrantless search of automobile based on probable cause upheld).
\end{itemize}
automobile exception implicitly assumes that protection against removal of evidence is more important than guaranteeing the rights safeguarded by the warrant requirement. Since all evidence, whether located in a car or a home, can be destroyed or hidden, however, the Court should address the problem of third party access to evidence in all situations. Only by articulating new standards for all evidence searches can the Court properly reconcile concerns for effective law enforcement and fourth amendment guarantees.

**IMPACT OF Chimel v. California ON SUBSEQUENT CASE LAW**

**SEARCHES OF THE ARRESTEE**

Cases since *Chimel* involving personal searches of individuals arrested for relatively trivial offenses illustrate the present abuse of the concept of search incident to arrest. Instead of protecting citizens' reasonable expectations of privacy from official invasions, *Chimel* has provided a rationale for otherwise unjustifiable intrusions. Searches incident to arrest may consist either of on-the-spot searches of an arrestee's person or station house inventory searches.

*On-the-spot searches.* Many courts have relied on *Chimel* to ratify searches at the scene of arrest that otherwise may have been termed unlawful under the fourth amendment. These searches typically have followed arrests for minor violations but have produced evidence of more serious crimes. In *United States v. Dyson,* for example, police found a plastic vial and an envelope of heroin while searching an arrestee charged with shooting craps. Although acknowledging that the search could be justified only if it was necessary to protect the officers transporting Dyson to jail, the District of Columbia Court of Appeals ignored the absence of evidence indicating that any of the officers had reason to believe the defendant was armed and did not question the propriety of extending the scope of a *Terry* frisk in an arrest setting. The search in *Dyson* was valid under the *Chimel* standard because no probable cause or justification is required to conduct a search incident to arrest; the search

78. *Id.* at 658.
79. *Id.* at 659.
also might have been justified as a search for destructible evidence since dice can be concealed in pockets, but the court did not even consider this justification for the search. The same court in United States v. Bynum\textsuperscript{80} again failed to consider the factual circumstances or the absence of probable cause; the District of Columbia Court of Appeals merely mouthed the search incident to arrest rule of Chimel in upholding a search that led to the discovery of heroin in a tire thief's pocket.\textsuperscript{31} Nothing in the record indicated that the police reasonably could have believed that the defendant was armed,\textsuperscript{82} and evidence of automobile stripping clearly cannot be secreted on the person.

The Chimel standard has encouraged police to use any arrest as a justification for personal searches. Although nothing in Chimel suggests that the rule does not apply to all custodial arrests, however trivial the offense, many courts have found the Chimel standard inapplicable to traffic offenses, since in such cases there is no evidence for the arrestee to hide or destroy; these courts, when confronted directly with Chimel's irrational rule, have attempted to limit the decision's application.\textsuperscript{83} The Minnesota Supreme Court's decision in State v. Curtis\textsuperscript{84} represents the high-water mark of these decisions. The Minnesota state police stopped Curtis for driving without taillights and for making an improper turn. Before placing the defendant in the squad car for temporary detention pending a check on the validity of his driver's license, the police arrested and searched him. One officer found a package containing marijuana in Curtis's pocket. Another officer, suspecting that Curtis had dropped something into his car before approaching the squad car, simultaneously found a loaded revolver on the front seat.\textsuperscript{85} The court declined to sanction the search of Curtis's person as incident to the traffic arrest, noting both the triviality of the offense and the impossibility of discovering any tangible evidence.\textsuperscript{86} Indeed, the court in Curtis stated that such a search could be valid only if the officers had probable cause to believe that the

\textsuperscript{80.} 283 A.2d 649 (D.C. Ct. App. 1971).
\textsuperscript{81.} Id. at 649-50.
\textsuperscript{82.} Id. at 650.
\textsuperscript{83.} See State v. Curtis, 290 Minn. 429, 430-31, 190 N.W.2d 631, 634 (1971); People v. Marsh, 20 N.Y.2d 98, 101, 228 N.E.2d 783, 785, 281 N.Y.S.2d 789, 792 (1967). Many courts have emphasized the potential for abuse; police could arrest an individual on a minor charge in order to conduct a warrantless search. See, e.g., People v. Xapp, 43 Misc. 2d 81, 83, 249 N.Y.S.2d 1020, 1022 (Erie County Ct. 1964); State v. Michaels, 60 Wash. 2d 638, 644-46, 374 P.2d 989, 992-93 (1962); Barnes v. State, 25 Wis. 2d 116, 125-26, 130 N.W.2d 264, 269 (1964).
\textsuperscript{84.} 290 Minn. 429, 190 N.W.2d 631 (1971).
\textsuperscript{85.} Id. at 430, 190 N.W.2d at 632.
\textsuperscript{86.} Id. at 430-31, 190 N.W.2d at 633.
suspect was armed and dangerous; the prosecution failed to establish that standard of probable cause. The court's insistence on evidence that the defendant was armed and dangerous contrasts with the requirement established in Terry that only reasonable suspicion is necessary to justify a frisk. The lower standard of reasonable suspicion may be justified to protect lives, but a search of a person for evidence should be based on the higher standard of probable cause; a search must have a clearly defined purpose and must be judged in light of its purpose even if it is incident to arrest.

People v. Superior Court further illustrates the need for a requirement that the police must define clearly the purpose of a personal search. Stopped for driving at night without lights, the defendant claimed that his 13 year old automobile had just blown some fuses. When he could not produce his automobile registration or any identification, the defendant was placed under arrest and searched; the search disclosed a plastic packet of marijuana in his pants pocket. The Supreme Court of California refused to apply Chimel to traffic arrests, recognizing that a search may be incident to a lawful arrest but still unreasonable in scope. The court concluded that a traffic arrest other than one for driving under the influence of drugs or alcohol can never justify a search for evidence; only a police officer's reasonable belief that the arrestee is concealing a weapon can justify a personal search following an arrest for a minor traffic violation. The court found convincing the fact that otherwise innocent citizens are arrested frequently for routine traffic violations. Noting that the moment at which a police officer-citizen confrontation crystallizes into an arrest is elusive, the court refused in this instance to read into the fourth amendment the search incident exception. This interpretation illustrates the faulty approach of Chimel. Since the facts surrounding any police officer-citizen confrontation should determine the necessity or lawfulness of any personal search whether or not that con-

87. Id. at 435-37, 190 N.W.2d at 635-36. The discovery of the revolver in the automobile was independent of the personal search of the defendant and was not challenged on appeal. Id. at 430, 190 N.W.2d at 632.
88. Id. at 437, 190 N.W.2d at 636.
89. 7 Cal.3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972).
90. Id. at 191-92, 496 P.2d at 1209-10, 101 Cal. Rptr. at 841-42.
91. Id. at 201, 496 P.2d at 1216, 101 Cal. Rptr. at 848.
92. Id. at 201-02, 496 P.2d at 1216, 101 Cal. Rptr. at 848.
93. Id. at 206, 496 P.2d at 1220, 101 Cal. Rptr. at 852. This standard is more lenient than that enunciated in Curtis in that it is almost identical to that required for a Terry stop-and-frisk. See notes 60-63 supra and accompanying text.
94. 7 Cal.3d at 195, 205-06, 496 P.2d at 1210, 1219, 101 Cal. Rptr. at 844, 851.
95. Id. at 204, 496 P.2d at 1218, 101 Cal. Rptr. at 850.
frontation ever matures into an arrest, no precise rule can define the permissible scope of a search. Chimel created such a rule without reason. The Court should have based Chimel on carefully enunciated fourth amendment standards and should have presented guidelines generally applicable to every search incident to arrest.

The confusion of lower courts in applying Chimel to traffic arrests forced the Supreme Court to treat this specific issue in United States v. Robinson99 and its companion case, Gustafson v. Florida.97 The defendant in Robinson was arrested for operating a motor vehicle after revocation of his license. A pat-down revealed a soft bulge in Robinson’s coat pocket; the officer removed a wadded cigarette package from the pocket, opened the package, and found several gelatin capsules filled with heroin.98 The United States Court of Appeals for the District of Columbia Circuit reversed Robinson’s conviction.99 Although ruling that mere arrest can justify only a search to obtain the fruits, instrumentalities, or evidence of the crime for which an arrest is made,100 the circuit court held that an arresting officer may conduct a limited weapons search even without a reasonable suspicion that the arrestee is armed and presently dangerous.101 Since opening and examining the contents of a cigarette package could not be justified as a weapons search, however, the court concluded that the police had exceeded the parameters of a legitimate search.102 On appeal, the Supreme Court followed Chimel and rejected the distinction between evidence and weapons searches,103 reversed the court of appeals decision, and held that the fact of any arrest creates authority to search thoroughly; searches incident to arrest require no further justification.104 The Court in Robinson

98. 414 U.S. at 220-23.
100. Id. at 1094.
101. Id. at 1098. The court did distinguish between a routine traffic stop in which a weapons search would have to be justified and the Robinson situation, which it termed an in-custody arrest. Id. at 1097.
102. Id. at 1099. Four members of the District of Columbia Circuit dissented from the court of appeals’ reversal of Robinson’s conviction; those judges specifically noted the testimony of a concealed weapons expert that several deadly or incapacitating weapons could have been found in the cigarette package the officer searched. See id. at 1117 (Wilkey, J., with Tamm, MacKinnon & Robb, JJ., dissenting).
103. 414 U.S. 218, 233-34 (1973). In the companion case of Gustafson v. Florida, the Supreme Court affirmed a Florida Supreme Court ruling that had reversed and harshly criticized a lower court decision similar to that of the District of Columbia Circuit in Robinson. 414 U.S. 260, 261 (1973); see State v. Gustafson, 258 So. 2d 1, 4 (Fla. 1972).
104. 414 U.S. at 235.
foreclosed any further reliance on *Terry* in determining the validity of searches of arrestees: "*Terry v. Ohio* ... did not involve an arrest for probable cause [but merely] ... an investigative stop based on less than probable cause to arrest...."

An examination of early authorities provided the Court with slight support for the proposition that an arrest alone validates a personal search.106 Citing the previous Supreme Court cases dealing with search incident to arrest, the Court referred to "the unqualified authority of the arresting authority to search the person of the arrestee"107 and found that "[in] *Chimel* . . . full recognition was again given to the authority to search the person of the arrestee . . . ."108 The Court in *Robinson* properly refused to accept the proposition that an in-custody traffic arrestee inherently can be assumed to be less dangerous than any other arrestee.109

The decision in *Robinson* was the logical outgrowth of the Court's holding in *Chimel*. Indeed, *Robinson* did not change the law of search incident to arrest; it simply affirmed *Chimel's* automatic search rule.

**Station house inventory searches.** Law enforcement authorities have another opportunity to search arrestees indiscriminately when the arrestee is detained at the station house.110 The right to search an arrestee thoroughly at the station house suggests that a search incident to arrest represents no additional infringement of the defendant's fourth amendment rights. Since an earlier search lessens the chance of an assault on a police officer or the destruction of evidence, the search at the

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105. *Id.* at 227.
106. *See id.* at 232.
107. *Id.* at 225.
108. *Id.* at 225-26.
109. *Id.* at 234.
110. *See, e.g.*, Kaufman v. United States, 453 F.2d 798, 801 (8th Cir. 1971); United States v. Gonzalez-Perez, 426 F.2d 1283, 1287 (5th Cir. 1970); Cotton v. United States, 371 F.2d 385, 392 (9th Cir. 1967). In *Cotton v. United States* the Ninth Circuit analyzed the issue of station house searches and concluded:

> It was proper for the police to require [the arrestee] to turn over to them, when he was booked, the property, including papers, that he had on his person. This is standard and necessary police practice.

371 F.2d at 392.

Only those arrestees who are able to post collateral or obtain a prompt pretrial release by other means can avoid a predetention inventory search. *See United States v. Mills, 472 F.2d 1231, 1240 (D.C. Cir. 1972) (en banc) (narcotics discovered during inventory search suppressed because defendant not timely informed of right to post collateral and avoid inventory search).*
scene of arrest seems more practical. This analysis ignores, however, the availability of several viable alternatives to the station house inventory search.\footnote{111. See Note, \textit{The Inventory Search of an Offender Arrested for a Minor Traffic Violation: Its Scope and Constitutional Requirements}, 53 B.U.L. Rev. 858, 869-72 (1973).}

A predetention inventory search has two legitimate purposes: to protect authorities from spurious claims by arrestees that property has been stolen or misplaced during incarceration and to keep potentially dangerous articles, such as drugs or weapons, out of the prison area.\footnote{112. See \textit{People v. Weitzer}, 269 Cal. App. 2d 274, 291 n.7, 75 Cal. Rptr. 318, 329 n.7 (1969).} The first purpose could be served without a search simply by allowing the arrestee to sign a waiver releasing the police from any responsibility for his possessions. The United States Court of Appeals for the District of Columbia Circuit in \textit{United States v. Mills} \footnote{113. 472 F.2d 1231 (D.C. Cir. 1972).} suggested one possible solution to the second problem of keeping contraband from the prison area with minimal intrusion on fourth amendment rights: "[A] less extreme intrusion on privacy . . . [than a search may] mark the limits of reasonableness, . . . [such as] giving him an opportunity, like that accorded someone given a bathhouse locker for temporary use, to 'check' his belongings in a sealed envelope . . ."\footnote{114. \textit{Id} at 1239 n.11.} This concept offers a practical approach to preventing arrestees from smuggling weapons or drugs into jail without infringing their right to privacy more than is absolutely necessary. Prior to the predetention search, the arrestee should be given the opportunity to place any personal belongings into a locker, envelope, or safety deposit box. The belongings would not be inventoried, and the body search for weapons and drugs would proceed.

Although subjecting the arrestee's person to a search still represents an intrusion, this limited invasion is far less objectionable than that resulting from routine station house searches. The District of Columbia Circuit's suggested procedure also will discourage pretext arrests, since any evidence of a crime other than that for which the defendant was arrested could be confidentially checked by the arrestee prior to the predetention weapons and drugs search. Allowing an arrestee to check his personal belongings before being searched at the station house gives the maximum possible protection to his fourth amendment rights without compromising the legitimate governmental interest in security of the jail area.
SEARCHES OF AREA WITHIN ARRESTEE'S IMMEDIATE CONTROL

The standard established in *Chimel* governing area searches also has proven an inadequate guide for lower courts. Although the Supreme Court overruled its earlier decisions in *Harris* and *Rabinowitz*, its opinion in *Chimel* effectively has made little impact on the scope of area searches. Creative police officers and sympathetic judges have extended the test of area within the immediate control of the arrestee for area searches well beyond the limits the Court intended to set, and courts often rely on the alleged need to protect the arresting officer in upholding a purely evidentiary search. Such irrational extensions of the *Chimel* standard never would have been made if the Court had required justifications for a search incident to an arrest other than the mere fact of an arrest.

Courts have interpreted *Chimel* quite broadly whenever a case contains any implication that the search may have been for weapons. In three nearly identical cases, the Delaware Supreme Court relied on that rationale in overruling the reversal of narcotics convictions. The court found the searches and seizures valid in these cases because the arresting officers intended to transport the arrestees to the station house and therefore needed to search the arrestees' possessions for the officers' own protection. Although the Delaware court expressed a proper concern for the safety of the officers, the triviality of the offenses in these cases—hitchhiking—once again raises the possibility of pretext arrests.

The opinion of the United States Court of Appeals for the Tenth Circuit in *United States v. Patterson* further illustrates how courts will expand the concept of the area within the arrestee's immediate control whenever the police proffer a weapons search theory to justify a search. Defendant's wife in *Patterson* was arrested in the living room of the family apartment pursuant to a valid arrest warrant charging her with...
uttering a forged instrument. Police detained the defendant and his wife in the living room while conducting a search of the home. From a partially open kitchen cabinet, officers then seized and examined the contents of a manila envelope that implicated the husband in a robbery of a safety deposit box. The court in Patterson reasoned that the search of the kitchen was reasonable in assuring the safety of the officers and sustained the defendant's conviction.

Although a weapon located in another room can be within the arrestee's reach, nothing in Patterson gave the officers even a reasonable suspicion that a weapon might presently be used, and nothing in the kitchen cabinet was remotely accessible to the arrestee or to her husband. Indeed, five police officers were present and detained appellant and his wife in the living room throughout the search. The court's alleged concern for the officers' safety caused it to ratify what can only be termed an extended search for evidence.

These cases illustrate that the area test articulated in Chimel has failed to achieve its stated purpose of limiting the scope of area searches; the searches in many of the cases resemble those at issue in Harris and Rabinowitz whose unreasonably broad scope the Court specifically sought to limit in Chimel. Chimel's purpose has been perverted precisely because its rule requires no prior justification for a search incident to arrest. To effectuate Chimel's stated but unrealized purpose, any

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120. *Id.* at 425-26.
121. *Id.* at 427.
122. *Id.* at 425-26; *cf.* Holmes v. State, 223 So.2d 417, 419 (Fla. Dist. Ct. App. 1969) (per curiam) (evidence seized eight feet from arrestee held within area of control). The court in Patterson specifically rejected appellant's argument that the Chimel rule invalidated the search of the kitchen, noting the defendant's wife had positioned herself in the doorway between the living room and the kitchen and could have had access to the kitchen "by merely turning around." 447 F.2d at 426.
weapons search at the scene of the arrest should be preceded by at least a reasonable suspicion that the arrestee has access to a weapon in the area being searched; any search for evidence should be based on the stricter standard of probable cause to believe such evidence exists and is in imminent danger of being concealed or destroyed.\(^\text{124}\)

One court even has upheld an area search for weapons when the police themselves were responsible for providing the arrestee with access to the area in question. In *Giacalone v. Lucas*\(^\text{125}\) the defendant was arrested at 6:00 a.m. in his pajamas, and the police, ostensibly concerned about his appearance before the magistrate, requested that the defendant dress.\(^\text{126}\) Prior to allowing defendant to obtain his clothing, however, officers searched the defendant's dresser drawers for weapons and discovered an illegal blackjack; the defendant subsequently was convicted for possession of it.\(^\text{127}\) The Sixth Circuit affirmed the conviction, reasoning that the search properly was incident to a lawful arrest.\(^\text{128}\) Although the officers' fear that the defendant might obtain weapons from the chest of drawers was well-founded, only their actions brought the chest of drawers within the area of arrestee's immediate control. By sanctioning the search, the court in *Giacalone* may have encouraged the police to employ the same rationale as a pretext in similar situations.\(^\text{129}\)

### THIRD PARTY SEARCHES AT THE SCENE OF ARREST

The Supreme Court first addressed the problem presented by the presence of third parties at the scene of arrest in *United States v. Di Re*.\(^\text{130}\) The defendant, who was a passenger in the automobile of an individual arrested and searched on probable cause for selling counterfeit gasoline ration coupons, was also searched.\(^\text{131}\) Rejecting the govern-

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\(^{124}\) Applying this standard of probable cause to area searches would expand the *Chimel* rule slightly. *Cf.* *United States v. Welsch*, 446 F.2d 220, 222 (10th Cir. 1971) (court justified seizure of suitcases from underneath bed out of reach of arrestee on ground of "plain view").


\(^{126}\) *Id.* at 1245.

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 1246.

\(^{129}\) In sustaining the search as incident to a lawful arrest, the Sixth Circuit emphasized the district court's holding in *Giacalone* that the police had arrested the defendant in good faith and upon probable cause and had not used the arrest as a subterfuge to make the search. *Id.*

\(^{130}\) 332 U.S. 581 (1948).

\(^{131}\) *Id.* at 583.
ment's contention that probable cause to search the car conferred a right to search passengers who might easily conceal the contraband, the Court held that Di Re's conviction for possession of counterfeit ration coupons resulted from evidence that was the fruit of an illegal search. Although the Government attempted to distinguish personal searches of third parties in automobiles from personal searches of third parties in dwellings, the Court noted that an occupant of a dwelling could as easily conceal evidence as the occupant of an automobile. Spurning the government's argument of practical necessity, the Court concluded that the fourth amendment's protections against oppressive police conduct supersede any governmental interest in preventing the concealment or destruction of evidence; the rights of third parties do not vanish merely because they are present at an arrest.

The Supreme Court's ruling in Chimel does not address either the rights of third parties present at an arrest or the powers of the police to search those third parties. The lack of useful guidelines for third party searches has resulted in confusing and contradictory lower court decisions. In treating searches of third parties, a few courts have emphasized the different objectives of evidence and weapons searches and have balanced the need to protect the police with the individual's fourth amendment rights. Many other courts, however, have failed to distinguish between the different objectives of weapons and evidence searches or, worse, have upheld apparent evidence searches by terming them weapons searches or security checks. Several post-Chimel cases involving third persons present at an arrest illustrate the fictions employed by courts to sustain searches that otherwise would fall outside the limits set by Chimel or be prohibited by the ruling in Di Re. These cases suggest that courts will approve police action whenever third parties might represent a threat to arresting officers.

132. Id. at 587.
133. Id. at 595.
134. Id. at 587.
135. Id.
136. Id. at 595.
137. Id. The Second Circuit had characterized DiRe's arrest as “utterly indefensible; a mere scooping up of all those present on the chance that any associate of the principals was probably engaged in any dealings between them, or, if not, in other transactions of the same kind...” 159 F.2d 818, 820 (2d Cir. 1947), aff'd, 332 U.S. 581 (1948).
138. 332 U.S. at 587. Courts also have held that a search warrant does not justify searching third parties encountered on the premises specified in the warrant. See State v. Bradbury, 100 N.H. 105, 106, 243 A.2d 302, 303 (1968) (marijuana illegally seized from visitor to dormitory room); State v. Carufel, 106 R.I. 739, 748-50, 263 A.2d 686, 691-92 (1971) (remand to determine whether seizure of cannabis from visitor to apartment valid).
In *United States v. Berryhill*, for example, the defendant was convicted of possessing the contents of a letter stolen from the mail. Two counts of the indictment were supported by evidence obtained from a search of the handbag of the defendant's wife conducted at the time of Berryhill's arrest. Although the arresting officer's testimony that he saw several envelopes protruding from the top of a paper sack in the purse indicates that he searched the handbag for evidence, the United States Court of Appeals for the Ninth Circuit characterized the search as a weapons search. Applying a theory analogous to guilt by association, the court upheld the search as a lawful weapons frisk: "Terry recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest."

Although *Berryhill* and *Di Re* can be distinguished on the ground that the evidence in *Berryhill* was admitted against the original arrestee while that in *Di Re* implicated the third party, the court's reasoning in *Berryhill* conflicts with the logic of *Di Re* and *Chimel*. In *Di Re* the Court specifically concluded that a person does not lose his fourth amendment rights merely by being present in a suspect's car and *Chimel* allows a search only of the person of the arrestee and the area within his immediate control. Neither decision provides blanket authority for the search of third parties. Furthermore, the pat-down of Mrs. Berryhill would have been justifiable under the *Terry* standard only if the officers had had reasonable suspicion that she was armed and presently dangerous. The court in *Berryhill* approved the search, however, without any evidence indicating that the defendant's wife was presently armed and dangerous.

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139. 445 F.2d 1189 (9th Cir. 1971).
140. *Id.* at 1191-92.
141. *Id.* at 1193. The court in *Berryhill* approved the frisk of the defendant's wife on the ground the police knew that the defendant often carried a weapon. *Id.* The court's reasoning ignores the fact that the police had ample time to secure a search warrant and that only letters were visible inside the purse. *Id.* at 1191-92; cf. *Coolidge* v. New Hampshire, 403 U.S. 443, 470-71 (1971) (where police anticipate discovery of evidence, warrant generally required).
142. 445 F.2d at 1193.
143. *But see* United States v. Poms, 484 F.2d 919, 922 (4th Cir. 1973) (per curiam) (*Berryhill* cited as support in upholding conviction of arrestee's companion based on seizure of cocaine from his shoulderbag).
145. 395 U.S. at 762-63.
146. *See* *Terry* v. Ohio, 392 U.S. 1, 21 (1968).
In *United States v. Manarite*\textsuperscript{147} the United States District Court for the Southern District of New York admitted evidence seized from a search of an end table within reach of two persons sleeping in the arrestees' apartment at the time of their arrests.\textsuperscript{148} Although the arresting officers did not know the identity of the two sleeping men and the area searched fell outside the physical reach of the arrestees, the court characterized the area surrounding the sleeping men as in the "constructive reach" of the arrestees.\textsuperscript{149} While the court found the search of the end tables proper under the guidelines of *Chimel*, the Supreme Court in *Chimel* did not make any reference to anything other than the actual physical reach of the arrestees. *Manarite* encourages police to conduct broad evidentiary searches without a search warrant and then to claim in court that they were acting to protect themselves. *Berryhill* and *Manarite* together demonstrate that courts seeking to determine the legality of police action often will ratify questionable searches out of a concern for arresting officers' safety. This justified concern has led to an unreasonable expansion of the scope of the area in which police may search incident to arrest.

Courts also have approved extensive searches of arrestees' homes on the basis of police suspicion of the presence of third parties who could destroy or conceal evidence.\textsuperscript{150} Such security checks often yield evidence that the police otherwise could not obtain without a search warrant. In *United States v. Blake*,\textsuperscript{151} for example, a third party at a narcotics arrest who attempted to dispose of evidence was himself implicated by that


\textsuperscript{148} Id. at 615. The arrestees in *Manarite* were suspected of conspiring to transport obscene material for purposes of sale or distribution. Id. at 611. The arresting officers, FBI agents, had a valid arrest warrant but no search warrant, even though they had known of the arrestees' possible involvement 15 days prior to the arrest. Id. at 611, 613.

\textsuperscript{149} Id. at 615. The court termed the sleeping men "extensions of... [the arrestees'] physical presence..." Id.


\textsuperscript{151} 484 F.2d 50 (8th Cir. 1973).
While executing an arrest warrant against the defendant’s roommate for possession and sale of narcotics, the arresting officer saw Blake throw a purse down a laundry chute after the unexpected presence of the police had prevented Blake from throwing it off the back balcony of the apartment. The officers went to the basement and recovered the purse from the bottom of the laundry chute. The Eighth Circuit condoned the search of the chute on two alternative theories: the arresting officers had a right to make a security check of the basement for possible additional third parties after already discovering one additional person on the premises and the warrantless search was justified by the need to prevent the destruction of evidence. The second rationale recognizes a genuine law enforcement imperative: the probable destruction or removable of evidence. The court apparently felt compelled by existing case law precedent, however, to provide a security justification for the search. Indeed, although the officers were looking for the purse dropped by the defendant, the court termed their discovery of the purse inadvertent.

Subsequent cases strongly suggest that courts essentially have ignored the arbitrary limits of Chimel. The Chimel standards would not justify a search under the Blake circumstances, for example, because the basement laundry chute was not within the area of immediate control of the arrestee. The Supreme Court in Chimel should have established practical yet limited guidelines to provide for the occasional necessity of

152. Id. at 53.
153. Id.
154. Id. at 54, 56-57.
155. Id. at 57. The Eighth Circuit concluded that requiring the officers to procure a search warrant in Blake would have unreasonably risked immediate destruction or removal of the evidence, because the officers did not have probable cause to arrest or detain the defendant. Id. at 54. The court distinguished United States v. Davis, observing that the danger of destruction or removal of evidence in Davis was remote and no accomplice was known to be present. Id. at 56; see 423 F.2d 974, 979 (5th Cir.), cert. denied, 400 U.S. 836 (1970).
156. In sustaining a “fan out” security search of an arrestee’s entire apartment during which a sawed-off shotgun was seized, the Eighth Circuit in United States v. Briddle attempted to distinguish security searches from the search involved in Chimel. 436 F.2d 4, 8 (8th Cir. 1970), cert. denied, 401 U.S. 921 (1971). The court reasoned that the Chimel standard of the area within the arrestee’s immediate control was not applicable because there was no indication in Chimel that “any of the challenged items had been in the plain view of any officer who . . . was in a place where he had a right to be as part of a concededly proper security check . . . .” Id. at 8. The court did not face the issue squarely, however, since the Supreme Court in Chimel indicated that such security searches could not be conducted without a warrant. See 395 U.S. 752, 763 (1969).
a search to prevent destruction of evidence. Justice White, dissenting in Chimel, proposed an exception to the fourth amendment warrant requirement that would permit searches to prevent destruction of evidence. The proposal would allow a warrantless search of the home at which an arrest occurs if two conditions are met: the existence of probable cause to believe seizable items are on the premises and the presence of other exigent circumstances, such as a clear danger that evidence would be destroyed if the police left the scene to obtain a search warrant. This reasoning also could justify a warrantless search for evidence on the person of any third party present. In failing to emphasize the warrant requirement, Justice White's proposal would further weaken fourth amendment safeguards. The history of the search incident to arrest doctrine provides telling evidence of this withering process: if a warrant is not demanded, the police will not obtain warrants even when they have ample time, and searches will extend far beyond the limits a warrant would have imposed. The police also might falsely claim the existence of exigent circumstances or themselves create a situation that would permit the exception to be applied.

To assure fourth amendment liberties, searches involving present or suspected third parties at an arrest should be governed by more definite standards. Courts should allow a Terry pat-down search of third parties present at the scene of an arrest when police have a reasonable suspicion that the third party is armed and dangerous. Police also should be permitted to search the area near third parties only when the officer knows of specific and articulable facts creating a reasonable suspicion that such

157. Several commentators have proposed standards by which the validity of warrantless searches would be determined. See ALI Model Code of Pre-Arraignment Procedure § 230.5 (Official Draft No. 1, 1972) (warrantless search approved if arrestee in or on premises and in view of circumstances police have reason to believe evidence present is likely to be removed before warrant could be obtained); Comment, Third Party Destruction of Evidence and the Warrantless Search of Premises, 1971 U. ILL. L.F. 111, 121 (search approved where probable cause to believe third party present, immediate action necessary to prevent destruction of evidence, probable cause did not exist before police arrived, and police did not create exigent circumstances).


159. See generally Note, Police Practices and the Threatened Destruction of Tangible Evidence, 84 HARV. L. REV. 1465 (1971). To prevent police abuse and assure an arrestee's fourth amendment rights and yet prevent the destruction of evidence, the premises should be impounded while the police obtain a search warrant. See id. at 1474, 1477-81 (suggested guidelines for impoundment); cf. United States v. van Leeuwen, 397 U.S. 249, 252 (1970) (29 hour detention of package at post office while search warrant obtained not violative of fourth amendment).
persons may reach for a weapon and use it. No other searches of third parties should be allowed. The Chimel standard of “area within the arrestee’s immediate control” is arbitrary, and the requirement of probable cause should apply to all broad area evidence searches that are undertaken because of the threat that third parties may destroy or conceal evidence. The balance between the government’s interest in preserving evidence and the fourth amendment guarantee of privacy is identical whether the destruction or concealment of evidence is threatened by the arrestee or by third parties.

Chimel dictates that warrantless searches for evidence never be permitted outside the area within the arrestee’s immediate control; this mandate applies even where the arresting officer knows of specific facts that establish probable cause to believe evidence on the premises or on the person of a third party is likely to be destroyed or concealed if a search is not conducted immediately. Such evidence searches should be allowed, but only in exceptional circumstances where it is impractical to obtain a warrant. If police anticipated before the arrest that evidence would be present, however, the police should obtain a search warrant and a warrantless search would not be allowed. Mere suspicion or fear that evidence would be destroyed or concealed should not per se justify a warrantless search for evidence; the interests protected by the fourth amendment’s warrant requirement are to be preferred over the risk of destruction or loss of evidence. Although evidence will not necessarily be destroyed or secreted when the police leave the scene to procure a search warrant, once fourth amendment protections are breached by a warrantless search, an individual’s privacy cannot be restored if the search later is invalidated.

REINVIGORATING THE WARRANT PROCESS:
THE NEED FOR TELEPHONIC SEARCH WARRANTS

Post-Chimel experience clearly indicates that judicial restrictions on police authority to search, especially those widely perceived as arbitrary, cannot alone assure that the police will comply with the intent of the fourth amendment by obtaining search warrants whenever practical. New procedures must be devised that will simplify the warrant process.

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160. Allowing a search of the area around third parties presenting a danger to police fosters the governmental interest in protecting law enforcement personnel. An alternative that intrudes less on fourth amendment rights would require the arresting officer to request that third persons move away from the area where weapons may be secreted.
162. See generally Carrington, supra note 59, at 591-94.
process and encourage police officers to obtain search warrants. By providing effective law enforcement techniques, the new process will further the privacy expectations of citizens and thereby improve citizen-police relations.

Studies on search warrants reveal that police will not obtain search warrants, even when they have the time, unless required to do so by the courts. The Harris and Rabinowitz decisions actually encouraged police not to obtain search warrants by approving intensive and wide-ranging searches incident to arrest. In Chimel the Court sought to limit police reliance on the search incident to arrest exception by emphasizing the need to obtain search warrants. Whether more warrants have been obtained as a result of Chimel, however, is questionable. The search incident to arrest exception continues to provide police with a convenient alternative to the warrant process and encourages pretext arrests that

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163. More than 90 percent of all searches coming to the attention of courts at all levels in recent years involved searches incident to arrest. L. Tiffany, D. McIntyre & D. Rotenberg, supra note 5, at 122. Figures reflecting the dearth of warrants obtained by police in the period after Harris and Rabinowitz are astounding. During the years 1956 and 1957, 28 search warrants were issued in Detroit, 30 in Milwaukee, and 17 in Wichita; the statistics for these three cities had changed little by 1967. Id. at 100. A Minneapolis city official could recall only two search warrants from 1929 to 1954, and the city had no record of any warrants issued between 1954 and 1961. Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Cornell L.Q. 436, 441 (1964). In 1966, 29,084 serious crimes were reported in San Francisco, but police obtained only 19 search warrants. ABA Standards Relating to the Urban Police Function 256 (Tentative Draft 1972).


165. Studies made on the effect of Mapp v. Ohio on police conduct indicate that Supreme Court mandates in the search and seizure area can have an impact on police behavior. L. Tiffany, D. McIntyre & D. Rotenberg, supra note 5, at 100; see 367 U.S. 643 (1961) (states must exclude from criminal prosecutions evidence obtained in violation of fourth amendment). Prior to Mapp, few search warrants had been issued in New York City, but from 1961 to 1963 over 6000 warrants were issued in that city. L. Tiffany, D. McIntyre & D. Rotenberg, supra at 100. The total number of narcotics misdemeanor cases in New York City also fell dramatically in the year after the Mapp decision. Police generally had 30 percent fewer narcotics cases in 1962, and narcotics specialists had 47 percent fewer cases in 1962 than in 1961. Chevigny, Police Abuses in Connection with the Law of Search and Seizure, 5 Crim. L. Bull. 3, 9 (1969). These figures suggest that a significant number of policemen chose not to make arrests in violation of the Mapp standards. Id.

166. L. Tiffany, D. McIntyre & D. Rotenberg, supra note 5, at 105. The authors note:

A search incident to arrest is more often relied upon by the police than alternative methods of searching, such as by a search warrant, primarily because administratively it is more convenient. There are no written forms to complete, no need to present evidence to the magistrate or prosecutor on the question of probable cause prior to the search, and hence there is minimal expenditure of time in the
allow police to search for evidence of other crimes.167

One explanation for the figures showing minimal reliance on search warrants is that as a practical matter police do not have time to obtain them. An arrest coming after "hot pursuit" supports this reasoning; when police arrest a suspect just after commission of the crime, the circumstances often will establish probable cause to believe that evidence of the crime is still on the person.148 The popular image of the police officer catching the criminal in hot pursuit, however, should be qualified. Statistical studies indicate that almost 50 percent of all arrests are made within two hours of the crime;169 about 45 percent of all arrests occur more than one day after the crime, and nearly 35 percent are made after one week has passed.170 Proponents of warrantless arrests argue that by the time probable cause to arrest exists, the police must move quickly since the defendant will already be alerted.171 But in at least 45 percent of the arrests made the police do have time to obtain an arrest warrant; if the defendant has not left the jurisdiction by the first day after the crime, he probably will not leave.172

The facts of Chimel illustrate that police often have time to obtain a search warrant but instead rely on the search incident to arrest except-

investigation of a case. The search incident to arrest also has the advantage of making an immediate search possible without the delay required to obtain a warrant.

Id. at 122.

167. Id. at 131-32. Tiffany, McIntyre, and Rotenberg emphasize the willingness and ability of the police to use the search incident to arrest doctrine as a pretext to search for evidence of other crimes by quoting police officers:

[Y]ou can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.

You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him . . . .

Id. at 131.


170. Id. In terms of cumulative figures, the arrest rate is as follows: after 30 minutes, 36 percent arrested; after two hours, 48 percent arrested; after eight hours, 51 percent arrested; after one day, 55 percent arrested; after one week, 65 percent arrested; and after one month, 95 percent arrested. Id.


172. See President's Commission on Law Enforcement and Administration of Justice, supra note 169, at 96.
tion. In Chimel the police knew the identity of the defendant and where he lived; moreover, they had obtained an arrest warrant for a crime that had been committed one month earlier. The question should be asked: Why was no search warrant obtained when it was quite practicable to get one? The Supreme Court ignored this question by assuming that searches incident to an arrest always are justified if conducted within a proper scope and duration. Because over a month had passed since the commission of the crime for which the defendant in Chimel was arrested, however, it was unlikely the suspect would have had evidence of that crime on his person. No genuine exigent circumstances can justify a warrantless search in such a case; if probable cause exists to believe that the suspect will be carrying evidence of the crime, the police have time to obtain a warrant. A blanket rule allowing a search of the person of the arrestee incident to an arrest lacks a rational basis.

Police will accept a new warrant process and use it effectively only if the procedures are practical for law enforcement. A basic rule, therefore, should provide that law enforcement authorities obtain search warrants whenever practicable. The “whenever practicable” standard should apply to searches incident to arrest, since the search incident exception has spawned the greatest abuse of the fourth amendment. Police should receive appropriate training, of course, and departmental policy and regulatory supervision should exist to enforce the rule.

To encourage and make more practical this rule, the police should be allowed to obtain warrants over the telephone. A telephonic search warrant process clearly would provide a practical alternative to existing procedures. During a recorded telephone conversation, the officer makes a sworn statement requesting the issuance of a search warrant and presenting the facts giving probable cause to search. This statement would be tantamount to an affidavit and would be transcribed for later reference. The magistrate’s oral authorization to conduct the search would permit the requesting officer to sign the judge’s name on a duplicate warrant form, which is deemed a proper search warrant. The judge signs and files the original warrant with the court clerk. Following execution of the warrant, the officer files with the court the duplicate and the original warrant, the inventory of the search, and the transcription of the recorded conversation.

173. See National Advisory Commission on Criminal Justice Standards and Goals, Police 95 (1973). “[E]very State [should] enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers.” Id.

Adoption of a telephonic search warrant system by police throughout the country would enhance both the reality and the appearance of justice. The police could obtain warrants easily and rapidly on a showing of probable cause, citizens would know that judicial approval by a neutral magistrate preceded police invasion of their privacy, and the courts would have a workable means to deter unlawful or undesirable police conduct. The availability of the recording and transcription of the conversation between the policeman and the magistrate serves two purposes. The accused could determine that the process had protected his rights against unreasonable search and seizure, and the police would have the assurance that the search will be upheld on subsequent review as long as the conversation reveals probable cause to search.175

Simplification of the warrant system will benefit the police in several ways. By obtaining a search warrant before conducting an investigation, the police often will find that individuals affected by the warrant are more willing to cooperate.176 The warrant indicates to these persons that the search does not result from a spur-of-the-moment decision but from a deliberate conclusion reached by the police and by a judicial officer. The existence of a search warrant also can minimize the chance of objections to the search by other concerned individuals or members of the general public. The warrant will minimize the possibility of an altercation by allowing the policeman to explain that he is only doing his duty in carrying out the warrant’s command.177 Even when it appears that the officer himself demanded the warrant, the suspect will see that others concurred in his decision.178 These advantages of obtaining a warrant will reinforce continued adherence to the warrant process. The most important benefit resulting from improving the warrant process is the increased citizen respect, cooperation, and support for law enforcement efforts. In 1966 the President’s Commission on Law Enforcement and Administration of Justice concluded that police estrangement from the

175. The procedure assumes that magistrates are sufficiently independent of the police and have adequate training to make an informed determination of whether probable cause exists. Reinvigorating the warrant process might stimulate the states to upgrade the magistrate function as the federal government already has done. See Federal Magistrates Act, 28 U.S.C. § 636 (1970) (jurisdiction and powers of federal magistrates). Even if magistrates “rubber stamp” telephonic requests for warrants, the establishment of an early record presenting the facts creating probable cause will be useful in later suppression hearings.
177. Id. at 45.
178. Id.
community and the courts is the biggest problem confronting law enforcement, and that this estrangement is an urgent problem in cities. The failure of courts to establish standards that allow police to enforce the law effectively, consistent with constitutional mandates, has contributed to the perceptions of many individuals and community groups that police actions are often unauthorized, unjustified, and illegal. Any measure that will encourage police to seek search warrants necessarily will improve police relations with communities and ease the existing feeling of estrangement.

CONCLUSION

The doctrine of search incident to arrest should be reconsidered by the Supreme Court because it is arbitrary and lacks a sound rationale. The Chimel rule permitting a full scale search of the arrestee regardless of the purpose and circumstances of arrest is overbroad; recent cases demonstrate that the standard enunciated by the Court in Chimel generally has failed to achieve its primary purpose of limiting the Harris-Rabinowitz rule regulating the scope of the search and therefore infringes unreasonably on fourth amendment rights.

In Chimel the Court assumed that the objectives of the weapons search and of the evidence search inextricably are related and concluded that where the circumstances warrant a weapons search, a search for evidence also is reasonable. In formulating a new standard the Court should distinguish between weapons and evidence searches. The scope of the warrantless search incident to arrest properly should be a function of the different objectives of each type of search: weapon searches serve to prevent violence and escape while searches for evidence are conducted solely to prevent the destruction or concealment of evidence. The Supreme Court's decision in Terry v. Ohio implicitly recognizes this distinction between weapons and evidence searches in concluding that the protection of police officers and others from violence merits greater concern than the prevention of the concealment or destruction of evidence.

To assure the protection of police officers and still comply with the fourth amendment's mandate that all searches be reasonable, the following standard is proposed: first, all weapons searches incident to arrest should be governed by the standard of Terry v. Ohio and should be preceded by a reasonable suspicion that the arrestee or a third party potentially is armed and dangerous; second, a search for evidence inci-
dent to arrest should be governed by the standard of probable cause and a warrant should be obtained whenever practical.

The suggested standard effectively deals with the difficulties posed by the presence of third parties at the scene of the arrest. Under Chimel, police officers are not allowed to conduct warrantless searches outside the area within the arrestee’s immediate control, even when probable cause exists to believe third parties are present and may conceal or destroy evidence. The suggested standard allows such searches in those exigent circumstances where it would be impractical to obtain a search warrant. By allowing evidence searches where there is probable cause and where it would be impractical to obtain a warrant, the standard also replaces the dual standard evidenced by the law of automobiles, where the police may search without a warrant upon a showing of probable cause, and the law governing residence searches, where the police cannot conduct a warrantless search. Evidence located in an automobile does not have higher susceptibility to being disposed than does evidence found in the home. In both situations, the nature of the evidence and the likelihood of its destruction or concealment in the particular circumstances should be evaluated according to the suggested standard.

The warrantless search incident to arrest exception to the fourth amendment has emasculated the Constitution’s warrant requirement; today, the search warrant process is used rarely. Modern technology and procedures, such as telephonic search warrants, should be utilized in conjunction with the proposed standard in an effort to make it more practical for police officers to obtain search warrants. Such procedures recognize the time constraints under which police officers often operate and still assure compliance with the fourth amendment. By imposing a new standard on searches incident to arrest that requires police officers to obtain search warrants, the courts would reduce the need and opportunity for pretext arrests. Moreover, by revitalizing the warrant requirement, courts undoubtedly would increase citizen respect, cooperation, and support for law enforcement, the factors upon which the success of law enforcement ultimately depends.