CONSTITUTIONAL LAW—SEARCH AND SEIZURE—SEARCH INCIDENT TO A LAWFUL CUSTODIAL ARREST

The United States Supreme Court held in *United States v. Robinson*[1] that a police officer may conduct a full search of a suspect as an incident of a lawful custodial arrest, and his authority to make such a full search requires no justification beyond the fact of arrest. Under such circumstances the search is not only an exception to the warrant requirement of the fourth amendment, but is also a reasonable search under that amendment.[2]

Willie Robinson, Jr. was convicted in United States district court for the possession of heroin. From a prior investigation the arresting police officer had reason to believe that Robinson had fraudulently obtained a driver's license. Observing the suspect driving an automobile, the officer signaled him to stop and effected a full custodial arrest. After asking for and being given Robinson's driver's license, the officer conducted a full search. His discovery of heroin in a crumpled cigarette package in Robinson's coat pocket ultimately led to respondent's conviction. Testimony in the district court indicated that the search was not prompted by any fear on the part of the officer that Robinson had a concealed weapon. Furthermore at trial, the officer denied having any suspicion that Robinson was in possession of narcotics.[3]

The court of appeals remanded for an evidentiary hearing regarding the scope of the search of Robinson at the time of arrest. The district court decision was again adverse to the respondent, and he appealed. The court of appeals reversed this judgment, holding that the search of Robinson violated the fourth amendment to the United States Constitution. On appeal, the Supreme Court reversed the court of appeals, holding that the search was valid under an exception to the warrant requirement of the fourth amendment.[4]

The general purpose of the fourth amendment has long been to impose the independent judgment of an impartial magistrate between law enforcement officers and the privacy of the public.[5] The first clause of the amendment states that the people shall be secure against unreasonable searches and seizures.[6] This provision is general and forbids every search that is

1. ___ U.S. ___, 94 S. Ct. 467 (1973).
2. *Id.*
3. *Id.*
4. *Id.*
5. McDonald v. United States, 335 U.S. 451 (1948).
6. U.S. CONST. amend. IV.
   The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

unreasonable, extending to all people, those suspected of being offeneers as well as those who are innocent.[7] The second clause declares that no warrants shall issue except upon probable cause, supported by oath, particularly describing the place to be searched.[8] The purpose of this clause is to prevent the issuance of warrants based upon vague, inaccurate, or doubtful bases of fact; the particularity required by the clause imports a purpose to forbid all general and exploratory searches. Such searches are considered to be inherently destructive of fundamental principles[9] of liberty, and as such they are condemned in the statutes or constitutions of every state in the union.[10]

Even though the fourth amendment stipulates certain requirements for the issuance of a warrant, a warrant is not always indispensable to a valid search. There were certain common law exceptions to the warrant requirement which have been incorporated into our law.[11] The search incident to a lawful arrest is such an exception and is said to go back to the historic role of the "hue and cry" in Anglo-Saxon times.[12] Traditionally such searches have been justified as growing out of the inherent exigencies of the arrest situation,[13] to protect the police officer, to prevent the destruction of evidence, and to seize instruments which can be used for escape.[14] In all cases the courts have closely scrutinized warrantless searches in order to aid the fourth amendment in functioning as a restraint against invasions of privacy.

Although the fourth amendment was written in response to a natural abhorrence of warrantless searches,[15] the Supreme Court in *Weeks v. United States*[16] first noted in 1914 that the amendment included this common law exception of search and seizure incident to a lawful arrest.[17] In *Weeks* the defendant was arrested and his house searched without either an arrest warrant or search warrant, and the Court held that illegally seized evidence may not be used as evidence in a prosecution of the defendant. While *Weeks* stated that it did not deal with a search incident to arrest, by dictum it made reference to the right of the government under

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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.

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

8. U.S. CONST. amend. IV.

9. 282 U.S. at 356.

10. Agnello v. United States, 269 U.S. 20 (1925).

11. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, RIGHTS OF THE PERSON, pt. 1, at 186 (1968).

12. *See* United States v. Kinschenblatt, 16 F.2d 202 (2d Cir. 1926); People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923).

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

14. Sibron v. New York, 392 U.S. 40 (1968); Preston v. United States, 376 U.S. 364 (1964).

15. Chimel v. United States, 395 U.S. 752 (1969), noted in 48 TEX. L. REV. 1194 (1970).

16. 232 U.S. 383 (1914).

17. *Id.*

both English and American law to search the person of the accused when legally arrested.[18] This dictum has come to serve as the basis and authority for the subsequent incidental search cases decided by the Supreme Court.

Carroll v. United States,[19] decided in 1925, involved the search of an automobile where the driver was arrested and items in the automobile were seized. The search of the automobile was allowed without a warrant because the automobile is a movable object. The Court allowed the search only if the seizing officer had reasonable or probable cause. Therefore, the mention of the *Weeks* case and the search incident to arrest were dicta.[20] Even so, the incidental search statements of *Carroll* have been used to expand the scope of search incident to arrest to the area within the control of the arrested person.

In *Agnello v. United States*,[21] the Court used the dicta in both the *Weeks* and *Carroll* cases to allow a search of the premises where the arrest was made. The specific holding of *Agnello* was that a search incident to arrest does not extend to the residence of the arrestee several blocks away from the place of arrest. The holding of the case is based on an extension and distinguishment of the dictum in *Weeks* and *Carroll*.[22] The *Agnello* case was examined and analyzed a quarter of a century later in Justice Frankfurter's dissent in *United States v. Rabinowitz*[23] where he stated that the words of *Carroll* were far removed from allowing the right to search the place of arrest. However he viewed *Agnello* as an uncritical expansion of *Weeks* and *Carroll*.[24]

Marron v. United States[25] involved a search warrant case in which the warrant described intoxicating liquors and the implements for their manufacture as the things to be seized. Certain ledgers and bills were seized from a closet although not mentioned in the search warrant, but a man was arrested immediately prior to the search for the commission of a crime in the presence of the officers. The Court held that although the ledgers could not be seized under the search warrant, the search could be upheld as an incident to the arrest of the man. The Court cited *Carroll* and *Agnello* as the authority to search the place of the arrest. Since the incidental search statements of these cases were *obiter dictum*,[26] the extensions from *Weeks* to *Marron* are based on rather questionable authority.

The next important case involving a search incident to arrest came several years later in *Go-Bart Importing Co. v. United States*.[27] An arrest

18. *Id.* at 386.
19. 267 U.S. 132 (1925).
20. *Id.* at 153.
21. 269 U.S. 20 (1925).
22. *Id.* at 30, citing 267 U.S. at 158.
23. 339 U.S. 56 (1950)(dissenting opinion). *See* text accompanying notes 36 and 37 *infra*.
24. *Id.* at 76.
25. 275 U.S. 192 (1927).
26. *Id.* at 192-95.
27. 282 U.S. 344 (1931).

warrant issued but it was invalid on its face. In the course of the execution of the arrest warrant, the officers stated that they also had a search warrant, although in fact they did not. Prior to the search two men were arrested. The Court held the arrest valid because the officers had probable cause to arrest without a warrant, but even so, the Court said the search was unreasonable and not allowable as an exception to the valid arrest.[28] This case thus limited for the first time the scope of the search incident to arrest first noted in the *Weeks* dictum and expanded by *Carroll* and *Agnello*.

Less than a year later the *Go-Bart* rationale was used again in the case of *United States v. Lefkowitz*.[29] Lefkowitz was arrested under the authority of a valid arrest warrant. The agents subsequently searched his person, desks, books, and a cabinet, and seized its contents. There was no search warrant, and the search was sought to be justified as an incident to the arrest. The Court distinguished *Marron* by noting the articles were not in plain view. The facts are seen as congruent with *Go-Bart* and the Court classified the search as unreasonable. It was observed by the Court that the officers did not have the authority to scrutinize everything in the room in order to determine whether there was anything present which was evidence of the crime. The essence of *Lefkowitz* is that the search incident to arrest does not allow a general, exploratory rummaging to find evidence of the arrestee's guilt. The arrest may not be used as a pretext to search for evidence. The Court binds itself with *Go-Bart* and limits the pre-*Go-Bart* line of cases beginning with *Weeks*.[30]

Many years later in 1947 in the case of *Harris v. United States*[31] the Supreme Court returned to the broad scope of allowing searches incident to an arrest. There were valid arrest warrants under which the officers went to Harris' apartment and arrested him. They searched the entire apartment for two cancelled checks related to the reason for the arrest. During the search a sealed envelope was found and opened; inside were selective service certificates. These were found inadvertently and were not related to the reason for the arrest. This inadvertent finding later formed the basis for Harris' conviction. The Court cited the *Agnello* dictum to allow the incidental search to extend to the area under the control of the arrestee. The Court defined the area of control in this case as the entire apartment of the arrestee, and since the items originally searched for could be hidden in many places, the meticulousness of the search was allowable. The possession of the draft cards was conceptualized as a continuing offense

28. *Id.* at 349.

29. 285 U.S. 452 (1932).

30. *Id.* at 457. The Court accepts *Agnello* as authority to search the place of arrest. Even so, the Court will not allow the incidental search to be greater than that which could be made with a search warrant. The Court also refuses to allow the incidental search to be used as a pretext to search for evidence of the arrestee's guilt.

31. 331 U.S. 145 (1947).

committed in the presence of the officers.[32] The dissent, by Justice Frankfurter, criticized the continuing offense theory as a fiction which should not be allowed to expand the scope of the search incident to arrest.[33]

About a year later, *Trupiano v. United States*[34] limited *Harris* by holding that law enforcement officers must secure a search warrant whenever it is practicable. After several weeks of investigation federal agents went to a farm house and saw alcohol being made illegally. The agents raided the farm without search or arrest warrants, seizing contraband and arresting one man as he operated an illegal liquor still. The Court upheld the arrest because the operation of the still was an offense committed in the officer's presence, but the seizure of the evidence was held to be violative of the fourth amendment because warrants could have been obtained and the arrest of the man was a fortuitous circumstance which could not be used to justify the seizure as an incident thereto.[35]

The limited scope of the search incident to an arrest of *Trupiano* was short-lived because less than two years later the scope was again broadened in *United States v. Rabinowitz*.[36] Government agents obtained an arrest warrant for Rabinowitz for the possession of forged postage stamps. No search warrant was obtained but the agents nevertheless searched his place of business. Forged stamps were found during the search and Rabinowitz was subsequently convicted on the basis of this evidence. The Supreme Court upheld the arrest and also upheld the search as incident to the valid arrest. The Court reasoned that the fourth amendment required a search to be reasonable to be valid; therefore a warrant is not required in all situations. The *Rabinowitz* Court consequently concluded that *Trupiano* should be overruled to the extent that it determined the validity of a search solely upon whether a search warrant could have been obtained, rather than upon the reasonableness of the circumstances of the search as a whole.[37]

The *Rabinowitz* rule prevailed for a period of almost twenty years when the Supreme Court finally overruled that longstanding decision in the case of *Chimel v. California*.[38] Police officers obtained an arrest warrant for

32. *Id.* at 148.
33. *Id.* at 167.
34. 334 U.S. 699 (1948).
35. *Id.* at 701.
36. 339 U.S. 56 (1950).
37. *Id.*
38. 395 U.S. 752 (1969). While *Chimel* was the first case to expressly overrrule *Rabinowitz*, there were two previous cases which limited the harshness of *Rabinowitz* while failing to overrule it. Jones v. United States, 357 U.S. 493 (1958), held that probable cause or a belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. The police had obtained a daytime search warrant for a house but after dark they arrested two men in the petitioner's yard in a truck containing illegal liquor which was the item named in the warrant. The officers entered the house without arresting anyone else and conducted a general search of the premises seizing illegal distilling equipment. The search was held not valid as incident to the arrest of the two men.

Chimel, proceeded to his home, and were allowed inside by his wife. Chimel arrived later and was given the arrest warrant. Over his objections, the police began to search even though no search warrant had been issued and numerous items were seized and used in a subsequent conviction. The trial court examined *Rabinowitz* and agreed that a warrantless search could extend to the area under the control of the arrestee. The Supreme Court examined *Rabinowitz* and *Harris* and concluded that they should be overruled because they allowed searches not based on probable cause. The Court instead decided that the rationale underlying the search should be the same as that in *Terry v. Ohio*,[39] *i.e.*, the search incident to arrest should be a search for weapons within the area under the control of the arrestee.[40] In this sense, *Chimel* was a return to the limited scope of the *Go-Bart*, *Lefkowitz*, and *Trupiano* decisions.[41]

These cases show no specific, consistent judicial standard or determinative factor to account for the changing parameters of the scope of the incidental search. At least one writer believes that the "only obvious rationale behind either expansion or limitation of the scope seemed to be whether the Court gave priority to efficient law enforcement or fourth amendment protection of the right of privacy."[42] One of the primary purposes in giving this extended history is to juxtapose for the reader the various expansions and limitations of the search incident to arrest. Five times in forty-two years the Court has reversed its field regarding the permissible scope of the incidental search. There have been three periods of broad scope; 1927 to 1931 (*Marron v. United States*), 1947 to 1948 (*Harris v. United States*), and 1950 to 1969 (*United States v. Rabinowitz*). Alternating with these have been three periods of narrow scope; 1931 to

Six years later in Preston v. United States, 376 U.S. 364 (1964), police officers arrested three men they had observed acting suspiciously and charged them with vagrancy. The men were searched and their car towed to a garage where it was searched and found to contain loaded revolvers and other items which were subsequently used to support a conviction for conspiracy to rob a federally insured bank. The Court re-examined the incidental search cases beginning with *Weeks* and while not overruling *Rabinowitz*, concluded that there was no need to search the automobile because there was no danger of it being removed in time and place to be incident to the arrest. *See also* Stoner v. California, 376 U.S. 483 (1964).

39. 392 U.S. 1 (1968).

40. 395 U.S. at 752. *Terry* allowed the use of a protective frisk for weapons only in the case of an investigative stop based on less than probable cause, which is necessary for an arrest. 392 U.S. 1, 16 (1968). The rationale in the *Terry* case was that in the situation of the investigative stop, the police officer would have no reason to search for evidence, etc.; the weapons pat-down would be for the safety of the officer. In the *Robinson* case, there would be no evidence of the offense other than the driver's license. Once the officer had obtained this, there would be no necessity to conduct any search other than the weapons pat-down. The basic principle is that there should be probable cause to believe there is something to search for before a search is conducted.

41. Note, *Criminal Law—Limitations of the Scope of a Search Incident to a Lawful Arrest*, 19 Amer. L. Rev. 575, 584 (1970).

42. 48 Tex. L. Rev. 1194, 1195 (1970); *see also* Way, *Increasing Scope of Search Incidental to Arrest*, 1959 Wash. L. Qtr. 261, 279 (1959).

1947 (*Go-Bart Importing Co. v. United States*), 1948 to 1950 (*Trupiano v. United States*), and 1969 to 1973 (*Chimel v. California*). Having seen the various expansions and limitations of the scope of permissible search, the following analysis of *Robinson* can be easily placed in proper perspective within the historical framework.[43]

There are two underlying issues in the *Robinson* case which form the basis of the majority opinion. (1) Is there a right to search incident to a lawful arrest, and (2) if so, what are the parameters of the search which may be conducted?

The Court answers the first by recognizing the search incident to arrest as a traditional exception to the warrant requirement of the fourth amendment. They divide the exception into two parts: (1) that a search of the person may be made by virtue of the lawful arrest, and (2) that a search may be made of the area within the control of the arrestee. The Court continues by noting that the search of the person has been settled from the first enunciations of the court.[44]

The *Weeks* and *Agnello* cases are examined and it is determined that both cases recognized the validity of this type of search. The *Agnello* case is quoted to summarize the recognition of the search.

> The right without a search warrant contemporaneously to search persons lawfully arrested while commiting crime and to search the place where the arrest is made in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody, is not to be doubted.[45]

The Court then briefly examines a series of cases beginning with *Carroll* and extending through *Chimel* and *Cupp v. Murphy*,[46] and concludes that when a person is arrested it is reasonable for the arresting officer to search the person of the arrestee in order to remove weapons and evidence.[47] The Court is thus answering the second proposition affirmatively, that the person of the arrestee may be searched incident to arrest. The authority to search is viewed as implying reasonableness under the fourth amendment.[48]

Section two of the majority opinion examines the court of appeals analysis which had used a *Terry v. Ohio* rationale and concluded that even after the person is placed under arrest, a full search may not be conducted of his person. The Court points out that the *Terry* search is based on less than probable cause since it is an investigative stop by a police officer. As such,

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43. Moylan, SEARCH AND SEIZURE: A SELECTION OF FOURTH AMENDMENT PROBLEMS 91 (the Maryland State's Attorneys Association).

44. ___ U.S. at ___, 94 S. Ct. at 471-73.

45. *Id.* at ___, 94 S. Ct. at 472, citing *Agnello*, 269 U.S. at 30.

46. 412 U.S. 291 (1973).

47. ___ U.S. at ___, 94 S. Ct. at 472-73.

48. *Id.* at ___, 94 S. Ct. at 472-73.

it must be strictly circumscribed by the exigencies of the situation. The *Robinson* situation is an arrest, seen as an entirely different situation. Because the arrest is a much greater intrusion on the privacy of the individual, the Court sees no basis to apply the *Terry* rationale to the arrest situation.[49]

Section three of the majority opinion begins with the contention that "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta."[50] Upon this determination the Court feels at liberty to examine past practices to determine what scope of incidental search of the person is consistent with the fourth amendment. The Court considers one English and four state decisions. The first of these is the case of *Dillon v. O'Brien*,[51] cited in *Weeks* and relied upon so heavily in subsequent cases. The crux of the *Dillon* case is the practical consideration of preserving evidence which is obtainable at the time of arrest. The *Dillon* court stated regarding the arrestee, that "his custody is of no value if the law is powerless to prevent the abstraction or destruction of the evidence."[52]

Spalding v. Preston[53] and *Closson v. Morrison*,[54] decided in 1848 and 1867 respectively, were next considered by the Court. These two cases represent the oft-repeated principles of the right to search for the protection of the officer and to prevent the destruction of evidence. Also mentioned is the right to seize any implements of escape or items which could be used for escape.[55]

The Court quotes then Chief Judge Cardozo of the New York Court of Appeals in *People v. Chiagles*[56] decided in 1923:

> Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion. . . . If he [police officer] may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds if connected with the crime.[57]

This summarizes the view of the Supreme Court in *Robinson* with respect to the need for and reasons behind the search incident to arrest.

The majority opinion concludes with disagreement with the court of appeals in two areas. The first is the applicability of the *Terry* rationale to an arrest situation. The Court sees the difference between an investigatory stop and an arrest as sufficient to justify the additional intrusion upon

49. *Id.* at ___, 94 S. Ct. at 473-74.
50. *Id.*
51. 16 Cox Crim. Cas. 245 (Exch. Ireland 1887).
52. ___ U.S. at ___, 94 S. Ct. at 474.
53. 21 Vt. 9 (1848).
54. 47 N.H. 484 (1867).
55. ___ U.S. at ___, 94 S. Ct. at 475.
56. 237 N.Y. 193, 142 N.E. 583 (1923).
57. ___ U.S. at ___, 94 S. Ct. at 475, citing *Chiagles*, 237 N.Y. 193, 197, 142 N.E. 583, 584 (1923).

the person of the arrestee, finding that the arrest situation poses two functions in the area of search: (1) the need to search for weapons; (2) the need to preserve evidence for later use at trial. Secondly, the Court sees no necessity to litigate in each case the issue of whether or not there was present one of the reasons supporting the authority for the incidental search. The police officer's determination is seen as controlling.[58]

A vigorous dissenting opinion, written by Justice Marshall, begins with initial disagreement regarding the majority's blanket characterization of reasonableness given a search incident to a lawful arrest.[59] It states that past fourth amendment cases have emphasized that there is no formula for reasonableness and each case should be decided on the basis of its own particular facts. Justice Marshall implies that the majority approach is in fact a formula in which the "fact of the lawful arrest" always establishes the authority for and the reasonableness of the search.[60] He reemphasizes that this is a serious departure from the past practice of the Court, perceiving the new approach to be at odds with fundamental fourth amendment principles.

The dissent goes on to assess the basic principle of the fourth amendment, viz., that "when the right of privacy must yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[61] Even though there are well-defined exceptions to the warrant requirement, Marshall does not see the exception as precluding further judicial inquiry into the reasonableness of the search, because even an exception is invalid if found to be unreasonable.

Justice Marshall notes that as each exception to the warrant requirement has been defined, it has always had as its basis a particular need or purpose. The circumstances of the search must be inquired into in order to determine if an exception is in fact necessary. This concept was not followed by the majority.[62]

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58. *Id.* at ___, 94 S. Ct. at 477.

59. *Id.* at ___, 94 S. Ct. at 477-78.

60. *Id.*

> Certain fundamental principles have characterized this Court's Fourth Amendment jurisprudence over the years. Perhaps the most basic of these was expressed by Mr. Justice Butler, speaking for a unanimous Court in *Go-Bart Co. v. United States*, 282 U.S. 344 (1931): "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." 282 U.S. at 357. As we recently held, "The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). And the intensive, at times painstaking, case by case analysis characteristic of our Fourth Amendment decisions bespeaks our "jealous regard for maintaining the integrity of individual rights." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961).

61. *Id.* at ___, 94 S. Ct. at 479, citing Johnson v. United States, 333 U.S. 10, 13-14 (1948). The dissent also cites Katz v. United States, 389 U.S. 347, 356-57 (1968); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963) in support of the proposition.

62. *Id.* at ___, 94 S. Ct. at 479.

Justice Marshall next concludes that in the vast majority of state and federal cases a full search of a person as an incident to a traffic arrest has not been allowable absent special circumstances. According to Marshall, the conclusion of the majority that exigent circumstances are not needed to justify the search used by the majority is inaccurate and misleading and results from their cursory examination of past cases.[63]

After examination of the facts Justice Marshall divides the search of Robinson into three distinct phases: (1) the patdown of Robinson's coat pocket; (2) the removal of the unknown object from the coat pocket; (3) and the opening of the cigarette package.[64] Each of these phases is examined in terms of whether it was justified at its inception and whether it was reasonably related in its scope to the circumstances which justified the interference in the first place.[65]

The court of appeals unanimously affirmed the right of the police officer to conduct the weapons patdown. Marshall agrees, seeing this as reasonable to insure that the suspect is unarmed, and within the bounds of the police officer's authority in making an in-custody arrest. However, the need to remove the unknown object from the arrestee should depend upon whether the removal can be sustained as part of a limited search for weapons.[66] Assuming the majority's purposes for the incidental search to be valid, Marshall argues from the evidence at the trial, that the officer had conducted a weapons patdown and had no fears or suspicions concerning the dangerousness of the respondent. Secondly, the government did not contend that the search was necessary to seize evidence for the purposes of the initial arrest. There was in fact no evidence or fruits of this type offense which can be seized. Marshall summarizes that since the rationale for this type search is the same as that in *Terry*, the scope is the same. The dissenting opinion also notes that in certain respects the particular type of search in question might need to exceed the *Terry* search. The majority notes this with its use of statistics which show the percentage of officer murders which occur during the course of a traffic arrest. The dissent's counter to this is that in any event a weapons search would be permitted.[67]

The dissent recognizes that even if it were permissible to remove the object from the pocket of Robinson, there would be no justification in the opening of the package. If the pack contained a weapon the respondent could not have used it after it was in the possession of the officer. There is no authority to continue a search simply because there has been one intrusion on the privacy of the respondent.[68]

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63. *Id.* at ___, 94 S. Ct. at 480-83.
64. *Id.*
65. *Id.*
66. *Id.* at ___, 94 S. Ct. at 484-86. *See* text at note 33.
67. *Id.* at ___, 94 S. Ct. at 484-86.
68. *Id.* at ___, 94 S. Ct. at 486-87.

Both of the opinions in *Robinson* are fairly comprehensive summaries of the principles of incidental searches and the authority for the principles. Therefore, this section will primarily concern itself with the logical and conceptual shortcomings of both the majority and minority opinions. The greater emphasis will be given to a criticism of the majority opinion, since it is now the law on this aspect of the subject.

The real issue in this case is not the right to search incident to arrest, but rather, the scope of and the necessity for the search. To ignore this element of the analysis is to say that by virtue of the fact of arrest, all search and seizure requirements of the fourth amendment are met. This is an overly simplistic approach to the problem. Yet this is exactly the approach taken by the majority of the Court.

The majority establishes that the right to conduct the search exists, that it extends to the person in order to remove weapons and evidence which might be destroyed or concealed.[69] An examination of the principle fails to disclose why the search should continue after it has revealed no weapon and has disclosed all evidence that could possibly relate to the reason for arrest.[70] One rationale which would encompass this continuation of the search is to allow the law enforcement officer to attempt to find evidence of a crime of which he has no present knowledge. In other words, the additional search is justifiable because it might reveal other grounds for arrest not known or suspected at the time the initial traffic arrest is made.

On strictly utilitarian grounds this is a practical approach. In fact it does not go far enough if efficient law enforcement is the primary consideration of the Court. The primary conceptual difficulty with this approach is the fourth amendment and its irreconciliable opposition to general warrants or searches.

Bernard Schwartz in his commentary on the Constitution says that the fourth amendment is based upon pre-revolutionary experience in both Britain and this country with general warrants. Such warrants gave government officials an almost unrestrained power of search and seizure. Such a power was considered the power to search wherever suspicions fall.[71] Given these principles it is difficult to determine why a warrantless search, which should by all dictates of rationality be more circumscribed than a search with a warrant, resembles so much the warrantless general searches of colonial times.

Another aspect of the majority opinion is the blanket characterization of reasonableness imputed to incidental searches. This is the primary disagreement voiced by the dissent. The *Robinson* majority holds that a full

69. *Id.* at ____, 94 S. Ct. at 476-77.

70. This particular type of traffic arrest has only one article of physical evidence that can be related to it, viz., the fraudulently obtained license which the officer had in his possession before he began the search of Robinson. Also, the narcotics were not discovered in the course of the search for weapons.

71. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 15 181-82.

incidental search is reasonable under the fourth amendment.[72] Conceptually it is difficult to determine how the Court can make the statement. It is not a question of how the specific search can be reasonable, but a question of how all incidental searches can be considered reasonable without an examination of their circumstances. The majority is in effect saying that in the future a search incident to a lawful arrest will be reasonable and will comply with the fourth amendment regardless of the scope, method, or reason for the search. The decision maker in every case will be the officer making the arrest.

When the incidental search is compared with the search under a warrant, several differences are noticed. The most basic variance is the warrant requirement of some prior knowledge on the part of the police officer which shows probable cause. There is only one incidental search situation where it would appear to be necessary to dispense with the requirement, *i.e.*, the weapons pat-down. This type of search is simply a prudent move on the part of any thinking police officer. This is exactly the type of exigent circumstance that rationally justifies the warrantless search. In the case of an evidentiary search without a warrant, it is a reasonable assumption that a certain type of crime will be indicated by a particular item or type of evidence. Take for example the case of a purse-snatching witnessed by a police officer. After an arrest of the suspect, a weapons pat-down is both rational and reasonable. It is also reasonable for the officer to search for the evidence of the crime, *i.e.*, the purse. If the officer discovers contraband while searching for the purse, it would be reasonable to allow this to be used to form the basis for another conviction other than the purse snatching. The determinative factor is that the other evidence is found *during* the course of a search justifiable on other grounds. If the officer had found the stolen purse first, on what reasonable grounds should he be allowed to continue to search? The only knowledge the officer has about the suspect is that he has seen him steal a purse.

Another type of arrest situation shows the unreasonableness of this type of search allowed in *Robinson*. In the situation where a man is seen speeding by a police officer, the *only* evidence of the illegal act is that the officer has seen the act of speeding. If the officer stops or arrests the man, it is reasonable to allow a weapons search. If no weapons of any kind are found, is it reasonable to allow the police officer to search the inside of the car or the inner clothing of the suspect because there is a possibility that there is some evidence of an illegal act to be found? If this search is allowed, the only rationale for it is an exploratory search; speeding is not an offense that can be evidenced by an object hidden on the person of the arrestee. *Robinson* would allow a search to be made in these circumstances.

The decisions of the Court in the past years concerning search and seizure have produced a striking situation. When the fourth amendment was

72. ___ U.S. at ___, 94 S. Ct. at 477.

written, the warrant was intended to be the accepted method by which a search was conducted. Recent studies tend to show that the incidental search, once an exception, is now becoming the rule. Regardless of the varied interpretations that can be given to the fourth amendment, it is highly doubtful that the writers of the amendment intended this result.[73]

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73. 2 LOYOLA UNIV. L. REV. 168 (1969). This author notes that the adoption of the exclusionary rule should have increased the use of search warrants. His research indicated that in the period from 1931 through 1961, the Los Angeles County Municipal Court issued only 538 search warrants. In the same period 500,000 felony criminal prosecutions originated in the same court. He states that available nationwide studies also indicate that most searches are not conducted through the use of search warrants. If these studies are accurate, it would appear that the vast majority of all searches are either conducted illegally or by the use of one of the exceptions to the warrant requirement. It is difficult to establish any congruence between these figures and the basic meaning of the fourth amendment. If these figures are correct, the Supreme Court must at some time try to reconcile the holdings which have led to this preponderance of warrantless searches and the clear import of the amendment that the primary and best method of authority for a search is a search warrant issued by a judicial officer.