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Criminal Law: Search and Seisure as Incident to Arrest

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COMMENTS

SEARCH AND SEIZURE AS INCIDENT TO ARREST

The doctrine is well established by the great weight of authority that where a lawful arrest has been made, officers may, as an incident thereof, without a search warrant, search the person and immediate premises of the defendant, and seize things connected with the crime as its fruits, or as the means or instrumentalities by which it was committed.* To what extent a search of the premises where the accused is lawfully arrested and seizure of evidence of crime may be made, is a question upon which there has been considerable confusion, among the courts and textbooks, largely caused by the application of broad general rules announced in cases without careful consideration of the facts to which the general rule is applied.

This problem has acquired new precedent in the recently decided case of *Harris v. United States*.[1] Two valid warrants were issued for the arrest of George Harris. The first warrant charged him with a violation of the Mail Fraud Statute of the Federal Criminal Code in which it was alleged that he sent a letter through the mails in connection with the execution of a scheme to defraud by negotiating and cashing a forged check drawn on an oil company in the amount of $25,000. The second warrant charged that he caused the same check to be transported in interstate commerce in violation of the National Stolen Property Act. Five agents of the Federal Bureau of Investigation, acting under the authority of these two warrants, went to Harris's apartment in Oklahoma City and there arrested him. Following the arrest, which took place in the living room of his four-room apartment, Harris was handcuffed and a systematic ransacking of the entire place was undertaken. Operating without the benefit of a search warrant, they made a search which they admitted was "as thorough as we could make it". The agents stated that the object of the search was to find two $10,000 cancelled checks of the oil company which had been stolen from that company's office and which were thought to have been used in effecting the forgery. In addition, the search was said to be for the purpose of locating "any means that might be used to commit these two crimes, such as burglary tools, pens, or anything that could be used in a confidence game of this type." For five hours they literally tore the place apart from top to bottom, going through all of Harris's clothes and personal be-

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*Adams v. New York, 192 U.S. 585, 24 S. Ct. 372 (1904); Sayers v. U.S. 2F (2d) 146 (C.C.A. 9th, 1924); Agnello v. U.S., 269 U.S. 20, 46 S.Ct. 4 (1925); U.S. v. Seltzer, 5 F. (2d) 364 (D.C. Mass., 1925); Furlong v. U.S., 10 F (2d) 492 (C.C.A. 8th, 1926); U.S. v. Poller, 43 F. (2d) 911 (C.C.A. 2d, 1930).

[1] 67 S. Ct. 1098 (1947).

longings, looking underneath the carpets, turning the bed upside down, opening all the chest and bureau drawers, and examining all personal papers and effects. Nothing was left untouched or unopened. The agents did not find the cancelled checks which were the object of their search. Most significant of all, however, was the unexpected discovery and seizure at the end of his long search, of a sealed envelope marked "George Harris, personal papers". This envelope, which was found in a dresser drawer in the bedroom, beneath some clothes, contained eleven draft registration certificates and eight notices of draft classification. Harris was then charged with the unlawful possession, concealment, and alteration of these certificates and notices. Nothing was ever developed as to the forged $25,000 check which was the basis of the defendant's original arrest, and no evidence of these crimes was found; nor did any prosecution for these crimes result.

Prior to the trial, defendant moved to suppress the evidence on the grounds that it had been obtained by means of an unreasonable search and seizure contrary to the provisions of the Fourth Amendment[2] and that to permit the introduction of that evidence would be to violate the self-incrimination clause of the Fifth Amendment.[3] The motion to suppress was denied, and defendant was found guilty and convicted. He then brought certiorari to the Supreme Court of the United States.

In a five to four decision, the Court held that the search and seizure was incidental to the arrest and not unreasonable, and that the draft cards were admissible in the subsequent prosecution for violation of the Selective Service Act. Its reasoning was that the entry into defendant's apartment was lawful because the agents had a warrant of arrest. The ensuing search was lawful because the agents acted in good faith, and as an incident of a lawful arrest, the police may search the premises on which the arrest took place since everything was in the "possession" of the accused and subject to his control. It was lawful, therefore, for the agents to rummage the apartment in search for "instruments of the crime". Since the search was lawful, anything illicit discovered in the course of the search was lawfully seized. In any event, the seizure was lawful

[2] The Fourth Amendment provides:
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The constitution of every State contains a clause like that of the Fourth Amendment and often in its precise wording. In Wisconsin, Art. I, Sec. 11 (1848).

[3] Insofar as pertinent, the Fifth Amendment provides:
"No person * * * shall be compelled in any Criminal Case to be a witness against himself, * * *."

because the documents found were property of the United States and their possession was a continuing crime against the government.

The *Harris* case thus illustrates the broadest extension of the scope of search incident to arrest without a search warrant. Its implication may be a serious threat to our traditional freedom under the Fourth Amendment.[4] It was a right protected under the English Common Law. Historically, this provision sought to guard against an abuse that more than any other single factor gave rise to American independence. It will be recalled that the Fourth Amendment was derived from a similar provision in the first Massachusetts Constitution. In commenting on this provision, the early Massachusetts court said.[5]

> "With the fresh recollection of those stirring discussions (respecting writs of assistance), and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted. This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable', and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law."

And again in the *Olmstead* case, Justice Brandeis remarked.[6]

> "The makers of our Constitution conferred as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Along with the desire to protect the innocent, there is the definite feeling that the preservation of government integrity is an important factor in the building up of an efficient police system. A government "of the people" ought to be enforceable without resort to illegal or underhanded methods. Police officers, however, are schooled to deal with criminals and undoubtedly, the natural tendancy is for them to assume that everyone with whom they are forced to deal is a criminal. The zealousness with which they perform their duties is subject nevertheless, to the constitutional restraint that all searches and seizures must be reasonable, and it is the duty of the courts

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[4] Supra, note 2.
[5] Commonwealth v. Dana, 2 Metc., Mass., 329 at 478.
[6] Olmstead v. U.S., 277 U.S. 438 at 478, 48 S. CCt. 564 at 572 (1928), where Justice Brandes applied the prohibition of the Fourth Amendment to wiretapping

adequately to protect a private individual in this constitutional right. In a New York case Judge Learned Hand in his opinion stated:[7]

> "The real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating the crime."

It has been seen that a search may be unreasonable though conducted under the authority of a search warrant because in the execution of such warrant officers are authorized to seize only the particular articles described and no discretion is left to the officer as to what is to be taken.[8] Since a judicially-issued warrant is the primary protection against a general search or a search without probable cause, it should follow than an officer should have at least as much grounds for searching without a warrant as would be necessary to procure the warrant. However, the one exception to this rule is a search as made incident to a lawful arrest. Thus the extent of such a search is obviously greater than under a search warrant in that mere evidence may be seized; evidence, that is, which does not come under the classification of stolen or embezzled goods, goods used as the means of committing a felony, or goods possessed with intent to use them to commit a felony. The reasons generally advanced in the cases for this extension of the right of search and seizure, if any, are the great necessity for the prosecution of criminal justice[9] and the fact that it has always been done. Although the latter may not appear to be very forceful at first, nevertheless, people are not apt to protest as unreasonable a thing which they have acquiesced in for many years. A further justification may be that since such searches are always limited to lawful arrests, the chances of an innocent person's privacy being infringed upon are reduced to a minimum. It should be noted, then, that many searches and seizures may be legalized by an arrest,

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[7] U.S. v. Poller, 43 F. (2d) 911 at 914 (C.C.A. 2d, 1930).

[8] U.S. v. Snyder, 278 F. 650 (D.C., W.Va., 1922); Jokosh v. State, 181 Wis. 160 (1923); Hessian v. State, 196 Wis. 435 (1928); O'Leary v. State, 196 Wis. 442 (1928); Paper v. U.S., 53 F. (2d) 184 (C.C.A. 4th, 1931); as to search and seizure in Wisconsin generally, see Dax and Tibbs, "Arrest, Search and Seizure" (1946); see further Fraenkel, "Concerning Search and Seizure," 34 Harv. L. Rev. (1921); 13 Minn. L. Rev. (1928).

9. Spalding v. Preston, 21 Vt. 9 (1848); Weeks v. U.S., 232 U.S. 383, 34 S. CtC. 341 (1914); People v. Chiagles, 237 N. Y. 193, 142 N.E. 583 (1923); State v. Massie, 95 W. Va. 233, 120 S.E. 514 (1923); 4 Am. Jur. 47; 25 Jrnl. Crim. Law 282 (1934).

though they would be illegal if a search warrant alone were relied upon.

The right of search of the person incident to a lawful arrest, without warrant was liberally recognized at common law. This was sanctioned for the purposes of safety of the custody, and incarceration of the defendant as well as ascertaining the presence of weapons or implements of escape.[10]

Following the enactment of the Federal Prohibition Law in 1919, due in part to the practical difficulties attending the enforcement not only of this but of other criminal laws under present conditions of quick communications and movement, the tendancy has been to extend rather liberally the right of search and seizure incident to arrest. These searches have been justified on the ground that difficulties would attend the enforcement of laws if a search warrant were required since the goods might be removed beyond the jurisdiction during the time required to obtain the warrant.[11] In *Milan v. United States,*[12] federal officers had reasonable grounds for believing that a certain truck was being used for illegal transportation of liquor. They stopped the truck and started to search it, but instead of liquor they found Chinamen being illegally imported into the country. The seizure of the Chinamen was held proper.

The seizure of one's private papers, though, was more restricted at English Common Law. In an old English case,[13] Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help forward conviction even in cases of the most atrocious crime and said:[14]

> "Whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

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[10] Thornton v. State, 117 Wis. 338 (1903); Getchell v. Paige, 103 Me. 387, 69 A. 624 (1908); 147 Am. Jur. 515, note 13.

[11] These cases involved searches of automobiles: Carrol v. U.S., 267 U.S. 132, 45 S. Ct. 280 (1925); Wilder v. Miller, 190 Wis. 136 (1926); Husty v. U.S., 282 U.S. 694, 51 S. Ct. 240 (1931); State v. Leadbetter, 210 Wis. 327 (1933); Gray v. State, 343 Wis. 57 (1943).

[12] 296 F. 629 (C.C.A. 4th, 1924); In Gray v. State, supra, note 11, defendants were arrested for vagrancy and subsequent search of automobile revealed stolen property. Its seizure was held proper as an incident of the arrest. See also U.S. v. Jankowski, 28 F. (2d) 800 (C.C.A. 2d, 1928); Matthews v. Correa, 135 F (2d) 534 (C.C.A. 2d, 1943).

[13] Entick v. Carrington, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (1765).

[14] Ibid., at 1032.

This same restriction was, also, applicable to private dwelling houses. Lord Chatham's eloquent words probably speak as well for persons now as then in recognizing that a man's home is still his castle in some respects:[15]

> "Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No, the poorest man may, in his cottage, bid defiance to all forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; all his force dares not cross the threshold of the ruined tenement."

This restriction was relaxed in the United States, and in the *Gouled* case,[16] the Court ruled a valid search may result in the seizure of papers as well as other kinds of property; the test being not the nature of the property seized, but whether such property was used by the accused in perpetrating the crime. The decision was supported by the following language of the Court:[17]

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized — and lottery tickets — and we cannot doubt that contracts may be so used as in instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant for the purpose of preventing further frauds."

Again in *Kirschenblatt v. United States*,[18] the court while recognizing that papers or documents found in the possession of the party lawfully arrested are not immune from the application of the principles herein considered, and may in a proper case be seized as an incident of the lawful arrest, yet denied the doctrine that the right of search of premises gives as broad a right to seize articles which are not the tools or fruits of the crime, such as documents, as when these articles are found on the person so arrested. In other words, the court supported the view that there may be a right to seize articles found on the person of the party arrested, as an incident of the arrest, where no such right would exist if the articles were found on the premises of the one arrested, even though it is admitted that

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[15] Address to Parliament 1766, quoted in 1 Cooley, Constitutional Limitations, 8th ed., at 611 (1927 and in Flagg v. U.S., 233 F. 481 at 482 (C.C.A. 2d, 1916).
[16] Gouled v. U.S., 255 U.S. 298, 41 S. Ct. 261 (1921).
[17] Ibid., at 309.
[18] 16 F (2d) 202 (C.C.A. 2d, 1926).

the immediate premises may be searched as an incident of the arrest. This is plain from the classical language of Judge Learned Hand.[19]

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premsits; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

It is thus apparent that a lawful arrest is not a carte blanche to make a general exploratory search, since a "fishing expedition" without some grounds for believing evidence is per se unreasonable. Illustrative of this are the strict limtiations the Court has placed upon searches and seizures without a warrant, in connection with a lawful arrest, in the past.[20]

In the *Marron* case,[21] officers executing a valid search warrant for intoxicating liquor found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging the place. The Court held their seizure proper as an incident to the arrest.

The *Marron* case was misunderstood and was later distinguished in the *Go-Bart* case.[22] There, prohibition agents entered the office of a company, placed under lawful arrest two of its officers on a charge of conspiracy to sell intoxicating liquors, and made a general search of the premises. They compelled by threats of force the opening of a desk and safe, and seized therefrom and from other parts of the office, papers and records belonging to the company and its officers. The Court, in assuming that the facts of which the arresting

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[19] Ibid., at 203.
[20] Marron v. U.S., 275 U.S. 192, 48 S. Ct. 74 (1927); Go-Bart Importing Co. v. U.S., 282 U.S. 344, 51 St. Ct. 153 (1931); U.S. v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420 (1932).
[21] Supra, note 20.
[22] Supra, note 20.

officers had been previously informed were sufficient to justify the arrests without a warrant, nevertheless, held that the search of the premises was unreasonable. In distinguishing this case from the *Marron* case, it pointed out that the articles seized in the latter case were in plain view, no search or rummaging was made for them, and when the arrest was made the ledger and bills were in use to carry on the criminal enterprise.

The *Go-Bart* case has been the leading case and has been followed in subsequent decisions.[23] in the *Lefkowitz* case,[24] the defendants were charged with conspiracy to violate the National Prohibition Act and as a part of the conspiracy, they were using a designated room in soliciting orders for liuor. Under a warrant of arrest issued upon the complaint, the defendants were arrested in the room designated. The officers explored all desks, cabinets, and waste baskets for evidence of guilt, and found various books, papers, and other things intended to be used in soliciting orders for liquor. In holding the search unreasonable as an incident of the arrest, Justice Butler's conclusion was:[25]

> "The right of personal security, liberty, and private property is violated if the search is general, for nothing specific but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. Such a search and seizure as these officers indulged themselves in is not like that in *Marron v. U.S.* where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is the *Go-Bart* case."
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> "* * * The whole point about the Fourth Amendment is that its protection extends to offenders as well as to the law abiding, because of its important bearing in maintaining a free society and avoiding the danges of a police state. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest cetarinly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance

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[23] U.S. v. 1,013 Crates of Empty O.S. Whiskey Bottles, 52 F. (2d) 49 (C.C.A. 2d, 1931); U.S. v. Lefkowitz, supra, note 20; Bushouse v. U.S., 67 F (2d) 843 (C. C.A. 6th, 1933); U.S. v. Brengle, 29 F. Supp. 190 (D.C., 1939); U.S. v. Thompson, 113 F. (2d) 643 (C.C.A. 7th, 1940).

[24] Supra, note 20.

[25] Ibid., at 462 and 464.

upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

The result of these decisions is apparently that while officers in making a lawful arrest, may as an incident thereof, without a search warrant, make a valid search of the premises immediately under the possession and control of the person arrested and seize such articles as are used by him in carrying on the criminal offense charged, or useful for that purpose, they may not make a general exploratory search as an incident of the arrest, and seize private papers which are of value only as evidence of the crime. *It should, also, be noted that where articles are visibly accessible or openly displayed to view, so no exploration or rummaging is necessary to seize them, such seizure will not be unreasonable.*[26]

Throughout all of the cases involving these situations there are certain factors of policy which appear to control the courts in determining the reasonableness of a search and seizure without a warrant:

(1) The extent of the privacy which is invaded, measured by the natural feeling of an innocent individual. This should always be a major consideration in any case. Opposed to this is the necessity for seizing the goods. Goods possessed with the intent to use them to commit a crime must be seized to protect the public.
(2) The practicability of getting a warrant before seizing the property. This factor is particularly exhibited in those cases dealing with the right to search an automobile.
(3) The manner of the search.
(4) The probable cause for believing that the search would show property that might be seized.

In the instant *Harris* case, Justice Frankfurter saw the implications of such an extensive application of the general doctrine, when he stated in his vigorous dissent:[27]

"No doubt the Fourth Amendment limits the freedom of the police in bringing criminals to justice. But to allow them the freedom which the Fourth Amendment was designed to curb was deemed too costly by the Founders. As Mr. Justice Holmes said in the *Olmstead* case, "we must consider the two objects of desire both of which we cannot have, and make up our minds which to choose." Of course arresting officers generally feel irked by what to them are technical legal restrictions. But they must not be allowed to be unmindful of the fact that such restrictions are essential safeguards of a free people. To sanction conduct such as this case reveals is to

[26] Italics the writer's.
[27] Supra, note 1, at 1112.

> encourage police intrusions upon privacy, without legal warrant, in situations that go even beyond the facts of the present case if it be said that an attempt to extend the present case cay be curbed in subsequent litigation, it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene. It is for this reason — the dangerous tendency of allowing encroachments on the rights of privacy — that this Court gave to the Fourth Amendment its wide protective scope."

Thus the attendant dangers of the *Harris* case plainly appear. In the light of this decision a man's home is his castle only if he is not at home. The Fourth Amendment is no longer a bar to tyranny and oppression. The stringent requirements of a search warrant are now dead letters as to those arrested in their homes. In circumventing the traditional protection of individual privacy, the authority of the *Harris* case is now an invitation to fishing expeditions. As Judge Learned Hand recently remarked:[28]

> "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion."

For these reasons, it is submitted that the *Harris* doctrine is unsound and search and seizure on premises incident to arrest should be limited to the following conditions:

(1) When such search and seizure is within the category of mere incidents of the arrest for the purpose of securing the safety of the officers, as when concealed weapons may be possessed, or for getting the subject-matter or evidence of *the* crime for which *the* arrest has been made and

(2) when such search and seizure does not involve unnecessary ransacking or rummaging so as to be mere exploratory searches for evidence of crime in general, on the theory that they are incidental to a lawful arrest.

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[28] U.S. v. DiRe, 159 F. (2d) 818 at 820 (1946).