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I. Introduction

In August of 1969, Senator John L. McClellan of Arkansas addressed the United States Senate to express his concern "that the U.S. Supreme Court in a large number of untenable decisions has been seriously weakening the Government's ability to combat the growing menace of crime in the United States."[1] No one could be better qualified than Senator McClellan to express this concern, for he has done as much as any figure in this country to turn the tide of the rising crime wave.[2] The Senator continued:

> For as the [United States Supreme] Court has moved on and on to more and more attenuated questions of fairness, the single-minded pursuit by some jurist [*sic*] of individual rights defined by an 18th century ideal, but applied to a 20th century society, is threatening to alter the nature of the criminal trial from a test of the defendant's guilt or innocence to an inquiry into the propriety of the policeman's conduct.[3]

The case of *Chimel v. California*,[4] decided on June 23, 1969, vividly illustrates the truth of Senator McClellan's words. *Chimel* overruled at least nineteen years of prior Supreme Court precedent and drastically restricted the right of the police to make searches incident to a lawful arrest. The adverse impact of the *Chimel* decision on the effectiveness of law enforcement in this country is only beginning to be felt; but even now acute practical problems for the policeman "on the street" have arisen as a result of the decision.

This article will discuss the *Chimel* case and its effects on the police.[5] The decision itself will be analyzed, and a description of the problems raised by the decision will be presented, with particular emphasis on the manner in which

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1 115 CONG. REC. S9565 (daily ed., Aug. 11, 1969).

2 For example, Senator McClellan was the moving force behind the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, 42 U.S.C.), particularly the landmark section 701 of that Act, 18 U.S.C. §§ 3501-02 (Supp. IV, 1965-68). This section attempts to limit the scope of Supreme Court decisions dealing with admissibility of confessions (*e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966)) and eyewitness identifications (*e.g.*, Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967)).

3 115 CONG. REC. S9566 (daily ed. Aug. 11, 1969).

4 395 U.S. 752 (1969).

5 In evaluating the practical effects of the *Chimel* case on the police, the writer will be speaking from the point of view of an attorney-policeman whose function is to advise the members of a large (1,050-man) police department on the conduct of searches and seizures and arrests in light of the court decisions. This advice is often rendered on-the-scene, so many of the examples will be based on personal experiences.

the overbroad wording and lack of guidelines in the majority opinion have resulted in the frustration of excellent, conscientious police work. In addition, a model statute or rule of criminal procedure will be suggested as a solution to some of the problems created by *Chimel.*

The theme of this article is that while the majority opinion in *Chimel* is quite sweeping in telling the police what they may *not* do, the same opinion furnishes few if any guidelines as to what police may lawfully do in the critical search-incident-to-arrest area. The working policeman is continuously called upon to make instant decisions. In view of the constant expansions and refinements of the exclusionary rule being made by today's courts,[6] the policeman's decision, if incorrect, can often result in the loss of the entire case. It is submitted that the great majority of today's law enforcement officers *want* to act in a proper and constitutional manner; they need and deserve clearer guidelines for their actions, particularly from the highest tribunal in the country.

The *Chimel* opinion is best understood in the context of the history of the law of search incident to arrest. The majority and dissenting opinions[7] both discussed this history at some length, pointing out that the decisions in this area have been "far from consistent."[8]

The law of search incident to arrest evolved from persons to vehicles to premises. Searches of persons incident to arrest "to discover and seize the fruits or evidences of crime" were first recognized, in dictum, by the Supreme Court in *Weeks v. United States,*[9] decided in 1914. In 1925 the warrantless search of an automobile was upheld by the Court in *Carroll v. United States.*[10] Seven months later, in *Agnello v. United States,*[11] the Court extended the right of search to apply to the place where the arrest was made, citing *Carroll* and *Weeks* as authority.[12] Thus, by 1925, the Court had established a broad-based police right to make searches incident to arrest.[13]

Prior to *Chimel,* the law had taken four major shifts concerning the scope of such searches. The first shift *away from* the broad scope of arrest-based searches came in the 1931 case, *Go-Bart Importing Co. v. United States.*[14] In that case, agents had arrested one Gowen and seized papers from an office on the premises incident to the arrest. The Supreme Court ruled that the papers should have been suppressed, noting that there had been ample oppor-

6 *See, e.g.,* Davis v. Mississippi, 394 U.S. 721 (1969), in which the Court ruled inadmissible fingerprints taken pursuant to an arrest made without probable cause.

7 The majority consisted of Mr. Justice Stewart, who wrote the opinion, Chief Justice Warren, and Justices Marshall, Brennan, and Douglas. Mr. Justice Harlan concurred specially, expressing reservations about the impact of *Chimel* on local police. Justices White and Black dissented. Former Justice Fortas heard the argument but did not participate in the decision.

8 Chimel v. California, 395 U.S. 752, 755 (1969) (Stewart, J.). Similarly, Mr. Justice White stated: "Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search 'incident to an arrest.' " *Id.* at 770.

9 232 U.S. 383, 392 (1914).

10 267 U.S. 132 (1925).

11 269 U.S. 20 (1925).

12 *Id.* at 30.

13 *See also* Marron v. United States, 275 U.S. 192 (1927), where the Court sustained the seizure of items not named in a search warrant because the prohibition agents who made the seizure had made a lawful arrest on the premises while executing the search warrant. *Id.* at 198-99.

14 282 U.S. 344 (1931).

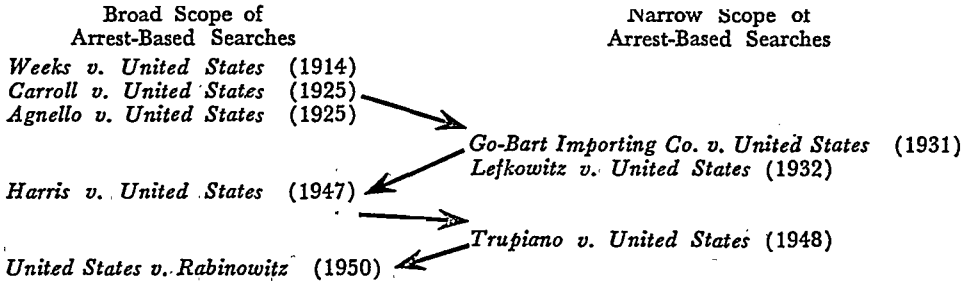
tunity for the officers to procure a search warrant.[15] *United States v. Lefkowitz*[16] also limited the right of search incident to arrest.[17]

Harris v. United States[18] represented the second shift and returned to a broad scope of search incident to arrest. *Harris,* decided in 1947, upheld the search of defendant's four-room apartment by officers armed with an arrest warrant but no search warrant. Harris was arrested for interstate transportation of a forged check; but the search uncovered altered selective service documents, and the use of these documents to convict Harris of a selective service violation was sustained.[19]

The third shift came one year later in *Trupiano v. United States.*[20] In that case the Supreme Court ruled that the seizure of an illicit still was unlawful because the agents did not procure a search warrant, although they had ample time to do so. The Court stated that law enforcement agents must make their searches with warrants "wherever reasonably practicable."[21]

The Supreme Court made its final pre-*Chimel* shift, and again broadened the scope of search incident to arrest, in the 1950 case of *United States v. Rabinowitz.*[22] *Rabinowitz,* overruling *Trupiano,* sustained the search of the defendant's one-room business office as properly incident to his arrest on an arrest warrant. The *Rabinowitz* test, which had survived until *Chimel* was decided, was: "not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[23]

Thus, we may illustrate the shifts in the permissible scope of warrantless but arrest-based searches:



Against this background, the United States Supreme Court granted certiorari in the *Chimel* case.[24]

15 *Id.* at 358.
16 285 U.S. 452 (1932).
17 The Court in *Lefkowitz* seemed to base its decision, at least in part, on the fact that "the searches were exploratory and general and made solely to find evidence of respondents' guilt." *Id.* at 465. The prohibition against searching for items of only evidentiary value was discarded by the Supreme Court in Warden v. Hayden, 387 U.S. 294 (1967).
18 331 U.S. 145 (1947).
19 Thus *Harris* also stood for the principle that items of evidence or the commission of one offense may be seized in the course of a search concerning a different offense. Whether *Chimel,* which overruled *Harris* as to the permissible scope of an arrest-based search, also overruled *Harris* as to this point will be discussed below.
20 334 U.S. 699 (1948).
21 *Id.* at 705.
22 339 U.S. 56 (1950).
23 *Id.* at 66.
24 393 U.S. 958 (1968).

The facts of *Chimel* are relatively simple. In the late afternoon of September 13, 1965, three police officers went to the Santa Ana home of Ted Steven Chimel[25] to arrest him for the burglary of a coin shop. The officers had procured an arrest warrant for Chimel at about 10:30 that morning; they had procured no search warrant. When the officers arrived, Chimel was not home; but the officers were let in by Chimel's wife, and there they waited until he arrived ten or fifteen minutes later. The officers arrested Chimel and, over his protests, conducted a thorough search of the entire three-bedroom house, the garage, attic, and workshop. They found and seized coins taken in the burglary. At Chimel's trial the coins were admitted into evidence over his objection, and he was convicted on two counts of burglary. A California District Court of Appeal[26] and the California Supreme Court[27] both upheld the conviction.

On June 23, 1969, the United States Supreme Court reversed Chimel's *conviction*,[28] in the process overruling *Rabinowitz* and *Harris* insofar as those cases pertained to the scope of a search of premises incident to a lawful arrest.[29] In so doing, the Court has nearly obliterated the right of the police to make such searches.

The majority opinion, delivered by Mr. Justice Stewart, began with a discussion of the history of the law of search incident to arrest; it then criticized the rationale of *Rabinowitz* and cited Mr. Justice Frankfurter's dissent in that case with approval. Some historical background of the fourth amendment was reviewed, and *McDonald v. United States*[30] was cited for the principle that the fourth amendment requires the interposition of a magistrate between the police and the citizens, absent exigent circumstances. Mr. Justice Stewart then enunciated the "*Chimel* rule":

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a 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.

25 The name of the petitioner in *Chimel v. California* may be one of the most consistently mispronounced in legal history. The California Attorney General's office advises that it is pronounced "Chī • mel" — "Chi" as in chimes, "mel" as in melon.

26 People v. Chimel, 61 Cal. Rptr. 714 (Dist. Ct. App. 1967).

27 People v. Chimel, 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968). In sustaining the conviction, the California Supreme Court found that, although the warrant for Chimel's arrest was defective as conclusory under People v. Sesslin, 68 Cal. 2d 418, 439 P.2d 321, 67 Cal. Rptr. 409 (1968), the arrest itself was legal because the officers had knowledge of facts constituting probable cause for Chimel's arrest independent of the warrant.

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

29 *Id.* at 768.

30 335 U.S. 451 (1948).

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial process" mandated by the Fourth Amendment requires no less.[31] (Footnote omitted.)

The sentence quoted above concerning "well-recognized exceptions" to the warrant requirement is footnoted to *Katz v. United States*.[32] The Court's footnote will be discussed in detail later.

Justice Stewart then cited *Preston v. United States*[33] as authority for the *Chimel* rule that he had just enunciated. In *Preston*, the Supreme Court had held unlawful the search of an automobile in which three men had been arrested for vagrancy, basing the illegality of the search on the facts that the car had been towed to a garage and its occupants taken into custody before the search was made. The *Chimel* opinion quoted from *Preston*:

> The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest.[34]

The majority opinion in *Chimel*, however, omitted the sentence that immediately follows in *Preston*. This sentence says: "Once an accused is under arrest and in custody, then a search *made at another place*, without a warrant, is simply not incident to the arrest."[35] (Emphasis added.) Thus it would appear that remoteness in time and place *from the scene* of the arrest in the automobile was the real rationale underlying the holding in *Preston*.[36] The fact that Mr. Justice Black, who wrote the opinion in *Preston*, dissented in *Chimel* lends credence to this view. For in *Chimel* the search of the house was made at the time and place of the arrest; Mr. Justice Black's dissent certainly seems to indicate that he took a much more restrictive view of his language in *Preston* than did the *Chimel* majority.

The language quoted from *Preston* in the *Chimel* opinion is footnoted to say:

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31 Chimel v. California, 395 U.S. 752, 762-63 (1969).
32 389 U.S. 347 (1967).
33 376 U.S. 364 (1964).
34 Chimel v. California, 395 U.S. 752, 764 (1969), *quoting from* Preston v. United States, 376 U.S. 364, 367 (1964).
35 Preston v. United States, 376 U.S. 364, 367 (1964).
36 Justice Black continued in Preston:

> The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . . . Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. *Id.* at 368.

> Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States,* 267 U.S. 132, 153; see *Brinegar v. United States,* 338 U.S. 160.[37]

This footnote seems to indicate clearly that a vehicle may be searched incident to an arrest, or even where no arrest has taken place, so long as there is probable cause for the search and the vehicle retains its character of movability.[38]

Finally, the *Chimel* opinion expressly overruled *Rabinowitz* and *Harris* "on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today . . . ."[39] Based on the above reasoning the Court concluded that the scope of the search in *Chimel* was unreasonable and that the conviction must be reversed.

Recall now the words of Senator McClellan expressing his concern that the United States Supreme Court decisions are "threatening to alter the nature of the criminal trial from a test of the defendant's guilt or innocence to an inquiry into the propriety of the policeman's conduct."[40] This is certainly true of the *Chimel* decision. The question of Chimel's guilt had been determined in a trial, and his conviction had been upheld by two appellate courts including the California Supreme Court. The truth of the matter was that coins taken in a burglary were, in fact, found in the house of Chimel who was subsequently convicted for that burglary. Nevertheless, the question of actual guilt was disregarded by the Court; as Senator McClellan noted, the inquiry was directed entirely to the propriety of police conduct.

The policeman's conduct in the *Chimel* case itself was neither oppressive nor arbitrary.[41] While it is highly unlikely that terms such as "Agnello," "Harris," or "Rabinowitz" were going through the minds of the Santa Ana detectives that fall afternoon as they approached Chimel's house,[42] it is clear that their conduct was within the bounds of approval of nineteen years of United States Supreme Court precedent. Further, the search they conducted was subsequently approved by the California Supreme Court, one of the most "liberal" courts in the nation.

Chimel, then, is an example of a five-justice majority (with another justice reluctantly concurring) of the Court "second-guessing" the Santa Ana police, the California Supreme Court, and the United States Supreme Court that decided *Rabinowitz* in 1950. The legal authority of the *Chimel* Court to engage in this "second-guessing" is beyond question (although every decision, such as *Chimel,*

37 Chimel v. California, 395 U.S. 752, 764 n.9 (1969).

38 *But see* Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969); State v. Reyes, 6 BNA CRIM. L. RPTR. 2220 (N.M. Dec. 1, 1969). Both cases held illegal the search of automobiles where the car itself remained at the scene after the defendant had been removed.

39 Chimel v. California, 395 U.S. 752, 768 (1969).

40 115 CONG. REC. S9566 (daily ed. Aug. 11, 1969); see text accompanying note 3 *supra.*

41 For purposes of comparison, see, for instance, the police conduct described in Davis v. Mississippi, 394 U.S. 721, 722-23 (1969); Mapp v. Ohio, 367 U.S. 643, 644-45 (1961).

42 Mr. Justice Stewart noted that the police officers advised Chimel that they were conducting the search "on the basis of the lawful arrest." Chimel v. California, 395 U.S. 752, 754 (1969). This would indicate that the officers were, in fact, aware of at least the basic elements of the law of search and seizure.

that overrules long-standing precedents erodes the doctrine of stare decisis and weakens the stability and predictability of our system). There remains, however, the deeper question of fundamental fairness to society as a whole; for the "single-minded pursuit by some jurist [*sic*] of individual rights defined by an 18th century ideal, but applied to a 20th century society,"[43] can have a tremendous effect on the safety and domestic tranquility of our society today.[44] The propriety of the policeman's conduct was *all* that the Court chose to consider in *Chimel,* and the impact of its decision on law enforcement was utterly disregarded by the five-justice majority.

Mr. Justice Harlan, who concurred specially in *Chimel,* at least recognized the possibility of the adverse effect of *Chimel* on the effectiveness of law enforcement. In what may be the most significant statement in the entire decision, he noted:

> The only thing that has given me pause in voting to overrule *Harris* and *Rabinowitz* is that as a result of *Mapp v. Ohio,* 367 U.S. 643 (1961), and *Ker v. California,* 347 U.S. 23 (1963), every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment.
>
> Thus, one is now faced with the dilemma, envisioned in my separate opinion in *Ker,* 374 U.S., at 45-46, of choosing between vindicating sound Fourth Amendment principles at the possible expense of state concerns, long recognized to be consonant with the Fourteenth Amendment before *Mapp* and *Ker* came on the books, or diluting the Federal Bill of Rights in the interest of leaving the States at least some elbow room in their methods of criminal law enforcement.[45]

The *Chimel* majority showed no such concern for the states' very real law enforcement problems.

Before proceeding to a discussion of the extent to which the impact of *Chimel* on the police bears out Mr. Justice Harlan's reservations, the points raised by Mr. Justice White in his dissent merit discussion. Just as Mr. Justice

43 115 CONG. REC. S9566 (daily ed. Aug. 11, 1969); see text accompanying note 3 *supra.*

44 The answer that will be raised to this point is that decisions such as *Chimel* protect the rights of individuals in our twentieth-century society also. There remains, however, the question of whether the great majority of our citizens *want* their liberties protected at the expense of personal safety. Consider the results of two Gallup polls taken in 1969. In the first, released in February of 1969, seventy-five percent of those interviewed (whites and blacks alike) felt that the courts did not treat criminals harshly enough. Only two percent felt that criminals were treated too harshly by our courts. Denver Post, Feb. 18, 1969, at 20, col. 4. Further, in June of 1969, another Gallup poll indicated that only thirty-three percent of the public gave the United States Supreme Court a "favorable" rating (eight percent excellent, twenty-five percent good), as opposed to a fifty-four percent "unfavorable" rating (thirty-one percent fair, twenty-three percent poor). Denver Post, June 15, 1969, at 18, col. 4. The article by Dr. Gallup analyzing this poll noted that:

> An important factor behind the court's decline in public favor, as judged by the views expressed in surveys, is the growing feeling that the court is "too soft" on criminals. Others complain that the rights of the individual are being protected at the expense of society as a whole. *Id.* at col. 3.

45 Chimel v. California, 395 U.S. 752, 769 (1969).

Frankfurter's dissent in *Rabinowitz* became one of the bases for *Chimel*, so may Mr. Justice White's dissent become the basis for some future shift back to a more flexible and realistic standard of arrest-based searches.

The dissent began with a brief review of the shifts in the law of arrest-based searches, and the view was expressed that the Court should not now make the fifth shift from *Rabinowitz* to the rigidity of the *Chimel* rule.[46] Justice White then described the "reasonableness" test under the fourth amendment's prohibition on *unreasonable* searches and seizures; he emphasized: "The Court has always held, and does not today deny, that when there is probable cause to search and it is 'impracticable' for one reason or another to get a search warrant, then a warrantless search may be reasonable."[47]

Justice White then observed that it is unreasonable to require the police to leave premises on which they have made a lawful arrest when there is great likelihood that confederates of the arrestee would dispose of evidence while a search warrant is being sought.[48] The *Chimel* case itself was cited as an example of such a situation because in that case "it seem[ed] very likely that petitioner's wife, who in view of petitioner's generally garrulous nature must have known of the robbery, would have removed the coins."[49] Mr. Justice White also expressed strong reservations concerning the legality and the practicability of stationing officers on the premises, against the will of parties not arrested, while a search warrant is being procured.[50] This particular problem, one of the most acute caused by *Chimel*, will be discussed later in detail.

Finally, the dissent took a generous approach to the right of search incident to arrest. In Justice White's view, if the arrest was lawful[51] *and* there was probable cause for making the search, then "the police were not required to obtain a search warrant in advance, even though they knew that the effect of the arrest might well be to alert petitioner's wife that the coins had better be removed soon."[52]

The detectives in *Chimel did* have ample time and opportunity to secure a search warrant prior to the arrest. Since they did not obtain the search warrant, the majority ruled, the search beyond Chimel's immediate area of control was illegal. Justices White and Black in the dissent would hold the search in *Chimel* legal *despite* the fact that it was practicable for the officers to get a search warrant prior to the arrest. The majority opinion, then, leaves open the question of what the rule will be when it is clearly *not* practicable to procure a search warrant prior to the arrest. The lack of guidelines in this area is one of the major problems created for the police by the case, and it is to this problem that the model statute or rule presented in the last section of this article addresses itself.

Mr. Justice White's dissent in *Chimel* illustrates one further point, for he has climbed down from a lofty plane of constitutional theory and deals with the

46 *Id.* at 770.
47 *Id.* at 773.
48 *Id.* at 774.
49 *Id.* at 775.
50 *Id.* at 775 n.5.
51 *Id.* at 776. After a careful analysis of the law of arrest without warrants, Mr. Justice White concluded that Chimel's arrest was in fact lawful. *Id.* at 776-80.
52 *Id.* at 776.

"gut problems" that confront the working policeman. Unlike the *Chimel* majority, Mr. Justice White is keenly aware of the myriad problems that law enforcement officers face in their day-to-day work.[53] Let us now consider some of these problems.

II. *Chimel v. California*—Its Impact on the Police

There are those who subscribe to the theory that the vindication of individual rights through constitutional interpretation is the alpha and omega of our criminal justice system, no matter how such interpretations hamper law enforcement officers in their efforts to fight crime and to protect our society from its lawless elements. This lofty attitude may be very attractive from the comfort and safety of the bench, library, or classroom. Nevertheless, the fact remains that the police are dealing with realities in their work, and the practical police problems raised by *Chimel* cannot be lightly dismissed.

The criticism of the *Chimel* case explicit and implicit in this article may now be put in its proper focus. As noted above, the right of courts to review the conduct of the police is a fundamental and necessary part of our system of justice, and this right is not questioned. The point is raised, however, that reviewing courts ought at least consider the realities of the problems with which the police are faced and, further, that the reviewing courts ought couch their findings in terms sufficiently clear that the police may, with reasonable certainty, know what course of conduct to follow in the future. Former Supreme Court Justice Tom C. Clark, dissenting in *Chapman v. United States*,[54] summed up this point:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with a problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. *It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them.*[55] (Emphasis added.)

This language was addressed to the Supreme Court itself, and properly so, for by the Court's own rulings, at least in the fourth amendment area,[56] its decisions are binding on each and every court and each and every law enforcement officer in the United States. Thus a decision such as *Chimel* must control the actions of literally tens of thousands of policemen, sheriffs, federal agents, and other law enforcement officers throughout the nation. When the actions of these officers result in arrests or searches and seizures, the hundreds of judges who sit at all levels of our state and federal court systems must measure the actions by the yardstick of the Supreme Court's pronouncements. Each of these judges is an

53 Ironically, this empathy for practical police problems is often shown in other opinions by Mr. Justice Stewart. For example, he dissented in Spinelli v. United States, 393 U.S. 410, 439 (1969) and Davis v. Mississippi, 394 U.S. 721, 730 (1969). Both decisions were highly restrictive of police activity. Mr. Justice White was in the majority which decided *Spinelli* and *Davis*, while Mr. Justice Black consistently dissented in *Spinelli*, *Davis*, and *Chimel*.

54 365 U.S. 610 (1961).

55 *Id.* at 622.

56 Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963).

individual, of course, and each must make his own interpretations of what the Court has mandated.[57]

Herein lies the criticism of *Chimel* from the point of view of the police. It is submitted that the majority opinion in that case is so overbroad that: (1) the most conscientious policeman, desiring to act properly, in many cases simply *cannot know* whether his conduct is proper or not; and (2) any judge applying *Chimel* to a given case has such latitude for interpretation that almost any arrest-based search could be held to be a *Chimel* violation if the sitting judge saw fit to do so. This second result is of tremendous importance to the working policeman in his decision-making process, for he must consider that certain judges will interpret his conduct most strictly against him, no matter what the facts of the case. Thus, the more latitude that there is in any Supreme Court decision for a restrictive interpretation against the officer, the less certainty he can have that his decision will not be second-guessed. The *Chimel* Court has made a sweeping reversal of permissible police conduct and every officer in the country is bound by the decision; yet the men who must apply the new standards in practice are left in something of a legal limbo, for they do not know the extent to which their conduct is circumscribed in the various situations that confront them on the street.

Turning to specific problems created by *Chimel,* perhaps the best way to begin would be to describe the immediate response of the law enforcement community to the decision when it was first handed down. This response, in the form of a petition for rehearing in the case, constituted the first attempt to make known to the Court the effects on police operations that its decision could have.

Responding State of California's petition for rehearing in the case deserves scrutiny because it cogently presented to the Court an analysis of the problems for law enforcement inherent in the *Chimel* decision. It is significant that respondent's petition was joined in by the attorneys general of thirty-six states and territories.[58] This clearly indicates very real concern over the effects of *Chimel* on the part of chief law enforcement officers in more than two-thirds of the states.

The petition requested the Court to grant a rehearing, pointing out that the United States Supreme Court[59] and the supreme courts of the five most populous states[60] had in the past relied on *Rabinowitz* or *Harris,* the cases overruled by

57 For example, several courts have denied retroactivity to *Chimel.* United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969); Lyon v. United States, 416 F.2d 91, 93 (5th Cir. 1969); People v. Edwards, —— Cal. 2d ——, ——, 458 P.2d 713, 720, 80 Cal. Rptr. 633, 640 (1969); Scott v. State, 7 Md. App. 505, ——, 256 A.2d 384, 392 (1969). Other courts have applied *Chimel* to cases pending on direct review on the date of the decision. Fresneda v. State, 458 P.2d 134, 143 & n.28 (Alas. 1969); State v. Reyes, 6 BNA CRIM. L. RPTR. 2220 (N.M. Dec. 1, 1969).

58 Joining in the petition were Arizona, Arkansas, Colorado, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, and the Territory of Guam. Respondent's Petition for Rehearing at 13-14, Chimel v. California, 395 U.S. 752 (1969) [hereinafter cited as Respondent's Petition].

59 *Id.* at 2, citing Cooper v. California, 386 U.S. 58, 62 (1967); Ker v. California, 374 U.S. 23, 42 (1963).

60 Respondent's Petition at 3. The petition cited cases from California, Illinois, New York, Ohio, and Pennsylvania.

Chimel. It then quoted the District Attorney of Los Angeles County who estimated that as many as ninety percent of the cases scheduled for trial in that county could be affected by *Chimel.*[61] Further, respondent's petition cited Mr. Justice Harlan's concurring opinion in *Chimel,* in which he expressed reservations concerning the impact of the decision on local police.[62] Also noted was the vast amount of paperwork that the expanded warrant system required by *Chimel* would cause.[63]

One of the most telling points made by the petition dealt with the fact that *Chimel* greatly restricts the ability of the police to secure that most reliable means of proof, physical evidence.[64] The petition noted:

> In the context of the present ruling, there is indeed an ironic, if not hollow, sound to the Court's recent pronouncements justifying new rules restricting the obtaining of confessions on the theory that the police should resort instead to other investigative skills and secure physical evidence of the suspect's guilt . . . .[65]

Finally, respondent's petition turned to the practical problems the decision could cause for law enforcement and to the lack of guidelines for the police to follow in dealing with the problems.[66] It listed some of the major areas of concern:

> What is the "reach" of a suspect or "area from within which he might gain possession of a weapon or destructible evidence"? . . . Does this area vary with the physical build of the particular suspect or with his own mobility and dexterity? Is an area which the suspect could reach in three or four quick bounds within his "reach?" If the suspect is temporarily or permanently incapable of "reaching," does this restrict the scope of the search if the officer is aware, or should be aware, of this circumstance? If the suspect is moving through the house, may the officers search those areas which progressively come within his "reach?" If the suspect observes the officers at a distance of 50 feet approaching to arrest him, what is his "reach?" If he is placed in custody but makes an aborted attempt at escape, may the area where he is again restrained be searched to preclude the suspect from arming himself and destroying evidence? What if the moving suspect is out of the officers' line of vision for a short period of time? How does the Court's ruling affect the doctrine that contraband in plain view may be seized since no "search" is involved? May evidence which the suspect seizes and throws beyond the ambit of his "reach" be seized? These questions are not answered by the Court's opinion and promise to plague trial courts and appellate courts with constant problems of definition and distinction under the new rule propounded by the Court.[67]

The ten problem areas described by the petition are only a few examples of the questions raised by the *Chimel* opinion—questions, it should be noted, that are of such broad scope that there is much latitude in each of the areas for a court, so

61 *Id.* at 4.
62 *Id.* at 5-6.
63 *Id.* at 6.
64 *Id.* at 7.
65 *Id.*
66 *Id.* at 9.
67 *Id.* at 9-10.

inclined, to "second-guess" any officer's good faith attempt to comply with *Chimel.*

Another question posed by respondent's petition concerns one of the most critical problems raised by *Chimel.*

> Assuming that the police effecting the arrest will already have sufficient information to obtain a search warrant, or will acquire such by reason of their observations at the time of the arrest (and this is decidedly *not* always the case), one of the most troublesome problems presented is: May the officers summon other officers to ensure that other persons present, or expected, on the premises will not destroy or secret incriminating evidence while a search warrant is being obtained? What if there are several persons who are not arrested and who remain on the premises? Does this authorize the police to station several officers on the premises and physically to restrain each occupant any time the occupant approaches any evidence which might readily be disposed of? As pointed out by the dissent [*Chimel v. California,* 395 U.S. 752, 775 n.5 (1969)], the invasion of the privacy of the other occupants (who are perhaps innocent of any wrong doing) would be at least as great as that resulting from a warrantless search of the premises incident to the lawful arrest of the suspect.[68]

With regard to this problem it must be remembered that the respondent was raising the question hypothetically, attempting to define for the Court problems that *could* arise. In the short period from June to October, 1969, before the respondent's petition for rehearing was ruled upon, in one city, Denver, Colorado, two cases actually *did* arise in which the hypothetical posed by the petition became a very real problem for the police—a problem in which the application of the *Chimel* rule to two homicide investigations resulted in the frustration of police attempts to secure the murder weapon in each instance.

These two Denver cases led to the second response of law enforcement to the *Chimel* case. The Denver police department, through the office of the Attorney General of the State of Colorado, filed an amicus curiae brief in support of the State of California's petition for rehearing. This brief described the two Denver homicide cases in which *Chimel's* broad mandate together with its lack of guidelines frustrated searches for vital evidence.

The Denver police amicus brief did not ask the Court to reverse itself completely in the *Chimel* case, but only

> to grant Respondent's Petition for Rehearing in the case of *Chimel v. California* so that an opportunity might be presented for spokesmen for law enforcement, on every level, to make known to the Court the impact of this decision on our function of protecting the safety of the people of this country. Further, as a result of such rehearing the Court would have an opportunity to consider the establishment of the guidelines in this area which the police so desperately need.[69] (Footnote omitted.)

The brief itself was factual; the application of *Chimel* to the two Denver

68 *Id.* at 11.

69 Brief of the Attorney General of the State of Colorado and the Denver, Colorado, Police Department, as Amicus Curiae, in Support of Respondent's Petition for Rehearing at 16, Chimel v. California, 395 U.S. 752 (1969) [hereinafter cited as Denver Police Amicus Brief].

homicide cases constituted the main thrust of the argument. The problem raised by *Chimel* and common to each case was summarized in the brief as follows:

> Police seeking a murder suspect learn of his whereabouts and arrest him in a house. There was no time to get a search warrant for the murder weapon and *Chimel* bars an arrest-based search of the house. Consent to search is refused. During the period a warrant is being sought, friends and relatives of the arrestee have every opportunity to remove the weapon (or other evidence) and the police are legally powerless to stop them. The subsequent warrant-based search fails to discover the weapon, although the facts indicate the likelihood that the weapon was in fact present.[70]

The two cases are classic examples of the manner in which an overbroad opinion such as *Chimel* can place the police in a position where they cannot know what actions are proper. In order to understand the problem in all of its aspects, the details of the two cases presented in the Denver police amicus brief are pertinent. The following, therefore, is an excerpt from that brief[71] presenting the two cases.

> CASE NUMBER ONE—HOMICIDE
> DENVER, COLORADO[72]
>
> On July 7, 1969, the victim, a bartender, was shot to death in the parking lot of his tavern by two youths whom he had chased off earlier for prowling cars. The murder weapon was a .22 caliber automatic pistol.
>
> Witnesses described the killers and their car; several days later, detectives learned that uniformed officers had stopped a similar car on the night of the shooting and had taken the names and addresses of A and B, the occupants of the car. Photographs of A and B, together with photographs of others, were shown to the witnesses who tentatively identified A and B as the killers. This investigation was completed on July 12 and on that date a pick-up for homicide was placed on A and B.
>
> On the afternoon of July 12, Officers Haze and Mayes made inquiries at the address that had been given by B. They learned that this was his girl friend's house, and that B had not been seen in the neighborhood for about a week. The officers then went to A's home and were told by A's mother that he was not home; when apprised of the seriousness of the offense, however, A's mother produced him and he was arrested at 6:00 p.m.
>
> A told the officers that B was staying at his mother's house and A agreed to take the officers to this house. Homicide Detectives Mullins and McCormick responded to B's mother's house at about 6:20 p.m. B's mother told the officers that B was not there, but Detective McCormick who had gone to the side of the house arrested B in the side doorway as B was attempting to escape. A search of B's person was made revealing no weapons. Because of the *Chimel* rule, no search was made of the room occupied by B, or of any part of his mother's house, for the murder weapon or other evidence. B's mother, his younger brother and several other people were in the house at the time. Consent to search the house was asked for and refused.[73] B was taken to Denver Police Headquarters where he was advised of

70 *Id.* at 4-5.

71 *Id.* at 5-10. Footnotes appearing in the brief have been renumbered, and some have been omitted.

72 Both cases described have been filed by the Denver district attorney, but neither case has come to trial. For this reason, the names of defendants are not published.

73 The possibility of watching the house while procuring a warrant was considered; but, even if such a watch was set up, there would be no authority to search persons entering or leaving the house.

his rights and denied any involvement with the killing.

Detective Mullins called the Denver Police Department Attorney (Legal Coordinator) who responded to Headquarters at about 7:00 p.m. to draft search warrants for the murder weapon and clothes worn by the killers on the night of the shooting. The Legal Coordinator advised that A and B should be placed in line-ups so that a positive identification of the suspects could be made by witnesses to support the search warrants.[74] Line-ups were held with counsel present for the suspects. A was not identified and was released. B was positively identified by at least three witnesses as one of the assailants; however, by the time the line-ups were concluded, night had fallen and the Colorado Rules of Criminal Procedure barred the execution of a search warrant at night.[75]

The next morning, Detectives McCormick, Martin, Burkhard and Legal Coordinator Carrington procured search warrants for the houses of B's mother and his girl friend seeking a .22 caliber automatic pistol, ammunition and the clothes worn by the killers. No evidence was found at the girl friend's house.

When the warrant was executed at B's mother's house, the mother, B's brother and a neighbor lady were present. The warrant was shown to B's mother who made searching inquiries of the officers as to whether they were sure that the murder weapon was an automatic. Upon being convinced that only an automatic was being sought, B's mother nodded to the neighbor lady who left and returned with a .22 caliber *revolver* wrapped in a "T" shirt. The neighbor stated that B's mother had given her the revolver the night before for "safe-keeping." The revolver was routinely checked but was not the murder weapon. No other weapon was found.

The police in this case simply do not know whether the murder weapon was at B's mother's house when B was arrested. A search of B's room and other areas of the house under his control for the murder weapon would have been permissible prior to *Chimel* as incident to B's arrest. Such a search might have turned up the murder weapon, or it might not; however, the officers, in obedience to *Chimel's* mandate, made no search. One thing is certain; if, in fact, the weapon was in the house, B's mother and brother had all night to search for and dispose of it. B's mother, understandably, wanted to protect B, as shown by her lying to the police in stating that he was not there when they came to arrest him, and by her giving the revolver to the neighbor. It was only when she was sure that an automatic was being sought that she had the neighbor produce the revolver. The police will probably never know whether the weapon was in the house when B was arrested; but, given B's mother's disposition to dispose of evidence they *can* be sure that, if it was there, it was removed before the warrant-based search was made.

CASE NUMBER TWO—HOMICIDE
DENVER, COLORADO

X, Y, and X's girl friend Z, along with several others, "crashed" a party at a private home in the early morning of August 17, 1969. They were told to leave and in leaving they exchanged words with other guests at the party. X, Y, and Z went to X's car nearby and got a rifle out of the trunk. A group of the party guests were standing outside of the house and

74 This decision was based on the tightening of search warrant requirements enunciated by the Supreme Court in Spinelli v. United States, 393 U.S. 410 (1969).

75 Prior to the adoption of COLO. R. CRIM. P. 41(c), effective October 1, 1969, the Colorado rules of criminal procedure provided that a search warrant could only be served at night if the affiant was "positive" that the property sought was on the premises to be searched. Colo. R. Crim. P. 41(c), 1 COLO. REV. STAT. ANN. 279 (1963).

a shot was fired at X's car, whereupon someone in X's car fired 8 shots into the crowd killing the victim.

Detectives McCormick and Isenhart were assigned to investigate and on the morning of August 17th questioned witnesses who identified photographs of Y as being in the group who crashed the party. At 11:00 a.m. on the 17th, Y was arrested at his home by officers Duyker and Davin. Y told officers that X had done the shooting and that X and Y had taken the rifle into X's house. Y further told the officers that Z, X's girlfriend, another suspect in the shooting, was living with X.

Y agreed to take the officer's [*sic*] to X's house. As the officers, Davin, Duyker, and Secrist, approached, X apparently tried to escape by running out of the back door but he was arrested as he ran around the house. Officers entered the house and arrested Z inside the house. A search of Z's immediate area revealed no weapons. No further search was made.

Approximately ten persons were in the house at the time, including X's brother, who became abusive and ordered the officers out of the house. The officers left and called the detectives who procured a search warrant to search the house for the rifle. It took approximately an hour and a half to draft the warrant and find a judge to sign it. During this period, the officers remained outside of the house; but they did not stop or search any persons leaving the house. When the house was searched pursuant to the warrant, the rifle was gone.

THE DEFENDANT, X, TOLD THE POLICE THAT WHEN HE WAS ARRESTED, THE RIFLE WAS IN THE HOUSE. The conclusion is inescapable; while the police waited for the search warrant, one of X's friends removed the murder weapon. A pre-*Chimel* search for the weapon incident to Z's arrest in the house would doubtless have located the weapon; but the officers knowing that the *Chimel* rule would make the weapon inadmissible, were forced to take no action to secure this vital evidence until it was too late.[76]

These two cases are not unique to Denver, nor is the problem confined to homicides; in many minor crimes the impact of the *Chimel* rule has also been felt.[77] The two described cases illustrate that, despite the gravity of the offense and the really excellent police work involved in each case, *Chimel* can frustrate the best efforts of the officers.

An analysis of these two strikingly similar cases leads to three conclusions.

First, in the *Chimel* case itself the police admittedly had time to procure a search warrant. In the Denver cases there was clearly no time to procure search warrants for the houses of X and B because in each case, the police had arrested one of two murder suspects and there had been witnesses to the arrests of the first suspects. Thus, there was every probability that the word of these arrests would be relayed to the second suspects enabling the latter to flee. (As a matter of fact, both X and B *did* attempt to flee as the officers approached.) As the Denver police amicus brief pointed out, when the police learn of the whereabouts of potentially armed and dangerous criminals, delay for a period of hours or

76 Participating officers were asked why they did not keep the persons in the house or search them when they left. They each answered that they felt that they had no legal authority to do either, and they feared civil suits for false arrest or "civil rights violations."

77 For example, half an hour after the theft occurred, an officer entered a house to arrest a defendant for the theft of some liquor. Defendant and his parents were sitting in the kitchen. After defendant's arrest, the officer found the liquor in the refrigerator. The officer had to be told that his search was illegal under the *Chimel* rule, despite the likelihood that the parents would have disposed of the liquor.

even days while a search warrant is being procured is a luxury that the police cannot afford. The police have an overriding duty to the public to take such suspects into custody *and to seize their weapons* before they commit further crimes. It is submitted that it is not too much to ask that any reviewer of police conduct take cognizance of the fact that many cases require swift action on the part of the police, and that delay by the police in such cases would constitute a serious dereliction of duty.[78]

Second, once officers have made their entry to arrest, they are committed; all surprise is lost, and other persons on the premises are made aware that the suspect has been arrested. In both of the Denver cases friends and/or family of the arrestees were on the premises, consent to search was refused, and there was every probability that an attempt would be made to dispose of evidence. The officers clearly had probable cause to search for the murder weapon on the premises, but the broad language of *Chimel* could be construed to bar a warrantless, arrest-based search of the houses. Thus, the officers in the Denver cases had two options at this point. They could either search for the murder weapon and risk losing it *legally* if a court should construe *Chimel* broadly enough to cover the case, despite the exigencies of the circumstances; or they could take the "safe" course, waiting for the procurement of a search warrant but risking loss of the weapon *physically* through the agency of the friends or family of the arrestee.

Third, if the police elect the "safe" course and wait for a search warrant, as did the Denver police officers, they are then faced squarely with the problem of securing the premises in such a way that the evidence will not be disposed of. The Denver police amicus brief discussed the alternatives open to the police.

> A. May the police remain on the premises, prevent the persons there from leaving, and follow them from room to room?
>
> The *Chimel* majority decision certainly gives the police no authority for so doing, and Justice White, in his dissenting opinion, points out that such a course of conduct on the part of the officers would constitute an invasion which "would be almost as great as that accompanying an unlawful search." [*Chimel v. California*, 395 U.S. 752, 775 n.5 (1969).]
>
> Detaining persons, inside the house, for whom there is no probable cause to arrest could easily result in a civil suit against the officers for false arrest or false imprisonment; and the authority of officers to remain on the premises against the will of an owner or co-occupant is questionable at best. Thus, in addition to risking possible civil liability, the officers might find a court excluding even the evidence seized *pursuant to a search warrant* because the officers exceeded their authority by remaining on the premises while the search warrant was being procured.
>
> B. May the officers leave the house itself but position themselves just outside the house; and, until the search warrant arrives, search persons leaving the house for the murder weapons or other evidence?
>
> Again, there is no authority in the *Chimel* opinion for such a search, and, in the absence of probable cause to arrest a person, such a search would almost certainly be held illegal. Even a "frisk" for weapons on less than probable cause to arrest, under the doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968) would be doubtful since that case is expressly tied to the

78 *See* Denver Police Amicus Brief at 10-11.

> necessity of the protection of the officer rather than a search for evidence. Again, the risk of a civil suit in battery or assault against an officer making such a search is apparent; as a matter of fact, a person searched by an officer as he was leaving the suspect house might even claim that an assault on the officer was justified as validly resisting an unlawful search.
>
> C. The police, then, as a final alternative, may leave the premises, search no one leaving the premises and wait for the search warrant to be procured. This is exactly what was done in the two cases described. In one of the cases, it is *known* that the murder weapon was removed by friends of the defendants while the police waited for the warrant. In the other case, it is known that the defendant's mother removed *at least* one weapon from the house in the overnight period that it took to secure a valid search warrant; whether the murder weapon itself was removed will probably never be known.[79]

It is obvious that in the Denver cases the police "guessed wrong." The point to be made is that in cases as serious as the two described *the police should not have to guess at all.* Surely, guidelines dealing with such cases (where the police are acting under exigent circumstances or where they are faced with an imminent loss of vital evidence) could have been spelled out in the *Chimel* opinion, yet this was not done.

In the Denver cases *Chimel* carved out a constitutional "zone of immunity" for those who would accommodate a friend or relative by disposing of incriminating evidence, and this is so despite the best efforts of the police to act in a proper manner. The "zone of immunity"[80] rendered the procurement of a search warrant a futile gesture.

The Denver police amicus brief ended with a plea to the Court for police guidelines so that cases such as those described need not happen again.[81] But the Court denied rehearing in *Chimel* without opinion.[82]

These, then, were the original responses of law enforcement to *Chimel:* respondent's petition for rehearing (joined by thirty-six attorneys general) and the Denver police amicus brief. As far as accomplishing their main purpose, that of persuading the Court to rehear *Chimel,* the attempts were obviously fruitless. But law enforcement response had another, salutary, if somewhat unexpected, result. On October 23, 1969, Senator McClellan addressed the Senate about *Chimel v. California* and its impact on police work. Of *Chimel* he said:

> Mr. President, most recently, it has come to my attention that local law enforcement is now beginning to feel the ill effects of the recent Supreme Court decision of *Chimel v. California*—395 U.S. 752 (1969)—which, in line with the Court's recent tradition of handing down decisions seriously weakening law enforcement's ability to combat crime, further hamstrings law enforcement by greatly curtailing the right of police officers to make searches of premises incident to a lawful arrest.[83]

79 *Id.* at 12-13.
80 See text accompanying notes 122-24 *infra.*
81 Denver Police Amicus Brief at 16.
82 Chimel v. California, 395 U.S. 752, *rehearing denied,* 396 U.S. 869 (1969).
83 115 CONG. REC. S13131 (daily ed. Oct. 23, 1969).

Senator McClellan referred specifically to respondent's petition for rehearing in *Chimel* and to the Denver police amicus brief. Of the two Denver homicide cases he said: "These two examples graphically show how our law enforcement officers are increasingly being restricted by court-imposed special rules of criminal procedure. They give flesh and bones to the antiseptic statistics I noted above."[84]

He then read the Denver police amicus brief into the Congressional Record in almost its entirety.[85] As was noted above, Senator McClellan may be the single most important figure in the country in combating crime in an effective and constructive manner. His interest in the problems created by *Chimel* may bode well for future legislation, at least on the federal level, dealing with *Chimel*-created problems.

The two Denver homicide cases are excellent examples of the dilemma that can face a policeman called on to make important decisions in the absence of adequate guidelines. Since the problems that *Chimel* raises are, in large measure, caused by this lack of guidelines, let us turn to the majority opinion in order to ascertain what, if any, guidelines are given. Here the writer asks that the reader consider the subject on a practical rather than a theoretical plane. Place yourself, if you will, in the position of the working policeman who desires to act in a professional and constitutional manner. What does the *Chimel* opinion say to him?

First, *Chimel* tells the officer that he may search the *person* of the arrestee for weapons and for destructible evidence.[86] Further, it is permissible for the arresting officer to search the "immediate area" of the arrestee—that area from which he might obtain a weapon or destructible evidence.[87] As California's petition for rehearing pointed out,[88] this language raises myriad problems of interpretation; but the paragraph in the *Chimel* opinion that tells the officer what he may *not* do is the one that really leaves the officer floundering:

> There is no comparable justification, however, for routinely searching any room other than that in which the arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.[89] (Footnote omitted.)

On these words must depend the arrest-based search decisions of every police officer in the country.

We see, then, an almost blanket prohibition on arrest-based searches outside of the arrestee's "immediate area," the definition of which opens the door to the widest possible variation in judicial interpretations.

Hopefully, reviewing courts dealing with the "reach" question will take as realistic a point of view as did the Maryland Court of Special Appeals in the case of *Scott v. State*.[90] In that case the Maryland court enunciated what may

84 *Id.*
85 *Id.* at S13132-33.
86 Chimel v. California, 395 U.S. 752, 763 (1969).
87 *Id.*
88 Respondent's Petition at 9-12.
89 Chimel v. California, 395 U.S. 752, 763 (1969).
90 7 Md. App. 505, 256 A.2d 384 (1969).

be called the "lunge" doctrine—that is, the permissible scope of an arrest-based search extends beyond mere arm's length into that area into which the suspect could lunge, leap, or dive in order to gain control of a weapon or destructible evidence.[91] This eminently realistic holding indicates that the Maryland court was concerned with the practical application of the *Chimel* rule to the actualities of police work. Unfortunately, there is no way of knowing whether other reviewing courts will take such a generous view of police problems. Certainly if a court wished to confine the *Chimel*-limited search to a strict "arm's length" area, the majority opinion is vague enough to sustain such a restrictive interpretation.

In addition to the lack of guidelines concerning the "reach" question, *Chimel* does not adequately specify *when* its rule applies. What exceptions exist to the rigors of the *Chimel* mandate? The majority opinion states that search warrants are required "in the absence of well-recognized exceptions."[92] Here was an opportunity for the opinion to set forth clearly those exceptional situations in which searches beyond the immediate area of the arrestee might lawfully be made; instead the sentence on exceptions is merely footnoted.

The footnote[93] may well become one of the most construed in the history of Supreme Court jurisprudence, for it is the only clue to what Mr. Justice Stewart may have had in mind when he spoke of "well-recognized exceptions." The footnote says: "See *Katz v. United States,* 389 U.S. 347, 357-358."

Our guideline-seeking officer now turns to the cited pages in *Katz;* what does he find? He learns, first, that *Katz* is an eavesdropping case rather than a case dealing with arrest-based searches.[94] In *Katz,* which was also written by Mr. Justice Stewart, the Court held that the fourth amendment requires the suppression of evidence obtained by the use of an eavesdropping device placed on top of a public telephone booth by FBI agents without a search warrant. The "trespass" theory,[95] which required an actual physical invasion to make warrantless eavesdropping illegal, was overruled by *Katz.*

The *Chimel* footnote refers to pages 357 and 358 of the *Katz* opinion. On these pages in *Katz* our officer finds language discussing the hot pursuit and consent search exceptions to the warrant requirement, but the opinion merely states that these exceptions do not apply to eavesdropping cases. The only other language of apparent significance in the text of that part of the *Katz* opinion states that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—*subject only to a few specifically established and well-delineated exceptions.*"[96] The italicized language is again *footnoted:* "See, *e.g., Carroll* v. *United States,* 267 U.S. 132, 153, 156; *McDonald* v. *United States,* 335 U.S. 451, 454-456; *Brinegar* v. *United States,* 338 U.S. 160, 174-177; *Cooper* v. *California,* 386 U.S. 58; *Warden* v. *Hayden,* 387 U.S. 294, 298-300."[97] Thus, in a

91 *Id.* at ——, 256 A.2d at 389.
92 Chimel v. California, 395 U.S. 752, 763 (1969).
93 *Id.* at n.8.
94 The opinion states: "We do not deal in this case with the law of detention or arrest under the Fourth Amendment." Katz v. United States, 389 U.S. 347, 353 n.13 (1967).
95 *See* Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942).
96 Katz v. United States, 389 U.S. 347, 357 (1967) (emphasis added, footnote omitted).
97 *Id.* at n.19.

footnote to a footnote we finally encounter "guidelines" dealing with exceptions to the search warrant requirement and, therefore, to the *Chimel* rule. Of the five cases cited in the *Katz* footnote, three, *Carroll, Cooper,* and *Brinegar,* are concerned with the searches of automobiles. *Warden v. Hayden* deals with the permissible scope of a warrantless, arrest-based search of premises when officers are in "hot pursuit," and *McDonald* defines "exigent circumstances" as an exception to the warrant requirement for searching premises. Both *Warden v. Hayden* and *McDonald* are extremely important cases in search and seizure law and will be discussed in detail later. It is submitted, however, that by no stretch of the imagination can a footnoted reference to a footnote in another case be considered *guidelines* for a police officer who is desirous of clear instructions as to what actions he can or cannot lawfully take.

We turn now to specific areas of police work in which the combination of the *Chimel*-created restrictions on searches, together with the Court's failure to furnish guidelines for proper police action, has hampered or predictably will hamper the effectiveness of law enforcement. The first of these problem areas is perhaps the most critical from the point of view of the officer himself.

A. *Chimel* and the Safety of the Officer

Mr. Justice Stewart, writing the majority opinion in *Chimel,* paid lip service to the safety of police officers by stating that searches of *persons* may be made incident to an arrest: "Otherwise, the officer's safety might well be endangered and the arrest itself frustrated."[98] In enunciating the "reach" doctrine of the case, Mr. Justice Stewart again mentioned the protection of the officer: "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."[99] But here the majority's concern for the officer apparently ends, for the next paragraph in the opinion prohibits searches of other rooms or even closed compartments in the room in which the arrest took place. The majority seems to be of the opinion that only the arrestee himself could be dangerous; the possibility that others on the premises could pose a threat to the officer is ignored.

Consider the following hypothetical cases:

> *Example # 1.* Officers respond to a call that a man in a certain apartment has been threatening his neighbors with a pistol. The officers enter the apartment to find the man alone and in a highly agitated state. At this point, the primary concern of the officers will be to secure the pistol before it can be used against them or others, and this is true no matter where the fortuitous circumstances of the case dictate that the actual arrest take place.
>
> While one of the officers is trying to deal with the highly disturbed suspect, his partner secures the weapon from a drawer in a desk across

98 Chimel v. California, 395 U.S. 752, 763 (1969).
99 *Id.*

the room. In this case the police have acted to protect themselves and others from harm; but, by so doing have they violated the *Chimel* rule so that the gun, necessary evidence if the man should be prosecuted for threatening the neighbors, must be suppressed?

Example # 2. Two officers receive a reliable tip that Jones, wanted for a murder by shooting, may be found at his brother's house. The officers are also advised by the informant that Jones may leave at any time. There is clearly no time to procure a search warrant, so the officers proceed at once to the brother's house. Upon entering they find Jones on the living room sofa. They arrest him and handcuff him; a search of the sofa reveals nothing.

The brother enters the room and, becoming highly abusive, starts towards a desk across the room from where Jones was arrested. There is not an experienced police officer in this country who would not check the desk before the brother could get to it to see if it contained a weapon; yet suppose that the desk does contain a gun and that the gun in the desk is the one used by Jones in the murder. Must the gun be suppressed in Jones's murder trial as the product of an unlawful search under the *Chimel* rule?

Both of the above examples illustrate a fairly common police problem encountered where an officer has a reasonable fear that weapons may be concealed on premises where an arrest has taken place. With the broad language of *Chimel* now governing the officer's conduct, the officer is faced with a disturbing dilemma. If he acts to preserve his safety, he may be acting at the peril of his case, for any weapon that he finds might be ruled inadmissible because the scope of his "search" ranged too far beyond the arrestee's "reach."

Under a broad interpretation of *Chimel,* there may even be a question as to whether officers can *look* in rooms other than that in which the arrest took place. Consider this in the context of an actual incident that took place during a raid in Dade County, Florida:[100]

Example # 3. The case involved a post-*Chimel* arrest of a dope peddler in his home. The suspect's mother and sister, who had no love for the police, were also present. The sister stated that she had to go to the bathroom and started into another room. Fortunately, an alert officer followed her in time to seize a fully loaded 9mm automatic from the top of a dresser in a bedroom that the sister had entered. The Dade County officers are frankly uncertain whether the sister would have taken up the gun or not; the point is that the gun was there and had she not been followed the officers might have found themselves looking down the barrel of an automatic.

In cases like these it is entirely reasonable for an officer to search more

100 Details of this incident were related to the author by members of the Dade County Public Safety Department's Police Legal Unit who actually took part in the raid described.

than an arrestee's "immediate area" to make sure that there are no weapons present; nevertheless, the lack of any guidelines in *Chimel* covering this situation leaves the officer's reasonable conduct subject to second-guessing by reviewing courts.

Certain courts are deeply concerned with the officer's safety. For example, in a post-*Chimel* case, *State v. Moody*,[101] the Missouri Supreme Court upheld a traffic-arrest–based search of an automobile for weapons, stating: "We believe that police officers, while in the performance of their official duties, are entitled to all the safety and protection we can give them within constitutional limitations."[102] The police have every reason to be grateful to the Missouri Supreme Court for taking this realistic attitude towards the dangers of police work. Whether other reviewing courts will take such a generous point of view cannot be known; but in light of the *Chimel* opinion, such an approach would be at best uncertain in many courts.

B. *Chimel* and the Riot Situation

Riots and civil disorders have become an item of acute law enforcement concern in this country, and the police are the ones who must deal with these situations. When a police force is committed to the street during the height of a riot, there will be little opportunity for them to delay their investigations in order to procure search warrants. The police will, of necessity, be acting under extreme stress and will have to make search and seizure decisions under pressures that will be impossible to re-create in the serenity of a courtroom months later when the officer's actions are reviewed.

This may be illustrated by the following hypothetical:

> *Example # 4.* Officers are in a riot situation and are under fire on the street; they observe shots coming from a certain apartment window and storm the apartment. Upon entry, they find the sniper and his rifle in the room from which the shots emanated. There is no question that the officers will, at this point, fan out through the apartment in search of other snipers and other weapons.
>
> Suppose that the officers find no other persons present, but they *do* find a cache of arms and ammunition concealed in a closet in another room in the sniper's apartment. Must this evidence be suppressed at a subsequent trial of the sniper or other conspirators because the search admittedly ranged far beyond the sniper's reach?

Many theories can be advanced to sustain this search. *Chimel* proscribes officers "routinely" searching other rooms without a warrant,[103] and the circumstances in the example are far from routine. In addition, with the officers

101 443 S.W.2d 802 (Mo. 1969).
102 *Id.* at 804.
103 Chimel v. California, 395 U.S. 752, 763 (1969).

in "hot pursuit" of the sniper, a search of the apartment could be upheld under the authority of *Warden v. Hayden*,[104] in which the Supreme Court sustained the warrantless search of an entire house when the officers entered "within minutes" of the suspect's entry. Finally, *McDonald v. United States*[105] could be cited to justify the warrantless search as having been made under "exigent circumstances."

It is highly likely that most courts would, in fact, uphold the search described in the foregoing example. But it must be remembered that certain courts consistently rule that cases must be resolved most strictly against the police, and such a court could find ample authority in the broad language of *Chimel* to suppress the evidence.

This is exactly the position taken by the District of Columbia Court of Appeals in the case of *Leven v. United States*.[106] During the April, 1968, riots in Washington, D.C., officers arrested Leven for a curfew violation while Leven was driving a truck through the city with a shotgun prominently displayed. The officers followed Leven to the police station, where Leven parked the truck and went inside. One of the officers, who had observed Leven place something under the front seat, looked there and found two revolvers after Leven went into the police station.

The District of Columbia court ruled that the revolvers must be suppressed since Leven had left the truck, citing *Preston v. United States*. *The fact that the arrest occurred during a riot situation was completely disregarded by the majority in Leven.* Chief Judge Hood, dissenting, said:

> Under these circumstances, I think it is most unreasonable and unrealistic to say that the officer, at a time when there was a great shortage of police manpower, should have gone across the city seeking a judicial officer to issue a search warrant.[107]

The *Leven* case clearly illustrates the absolute lack of concern for the realities of police problems shown by some courts. Such a court would undoubtedly suppress weapons found in a situation such as is described in the hypothetical *Example # 4* above.

As a further illustration of the fact that certain judges remain oblivious to *any* exigencies of a situation, consider the case of the murder of a Detroit policeman and the attempted murder of another that occurred in March of 1969.[108] At about 11:42 P.M. on March 29, 1969, patrolmen Michael Czapski and Richard Worobec of the Detroit police department reported that there were

104 387 U. S. 294 (1967).
105 335 U. S. 451 (1948).
106 6 BNA CRIM. L. RPTR. 2352 (D.C. Cir. Jan. 15, 1970).
107 *Id.* at 2353.
108 This account of the Detroit incident is based on accounts appearing in the Detroit newspapers at the time of the shooting, Detroit News, Apr. 1, 1969, at 5-C, 13-A, on the testimony of Lt. William R. McCoy, Special Investigations Bureau, Detroit Police Department, before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, *Hearings on Riots, Civil and Criminal Disorders Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess., pt. 20, at 4368-70 (1969), and on the Detroit police account of the incident that appeared in the Detroit newspapers shortly after the incident in the form of a full page advertisement paid for by the Detroit Police Officers Association. Detroit News, Apr. 15, 1969, at 13-A.

men with rifles at Linwood and Euclid streets in Detroit. When the two officers left their car to investigate, the men opened fire, killing officer Czapski and seriously wounding officer Worobec. According to the Detroit police, the assailants ran directly into New Bethel Baptist Church at 8450 Linwood, which had been rented for a meeting of the Republic of New Africa, a militant black organization. The police officers responding to the scene of the killing were fired upon from the church and were again fired upon when they forced entry into the church.

One hundred fifty-two persons in the church were arrested and taken to police stations for identification and nitrate tests to determine if they had recently fired weapons. All but two of those arrested were freed by Detroit Recorder's Court Judge George W. Crockett on the grounds that the police had violated their rights by arresting them and subjecting them to scientific tests.

Here we have an incident in which one policeman was killed, a second wounded, and others subjected to fire from the church, yet one judge released almost all of the potential suspects. It is submitted that such an attitude towards the police by a reviewing court could result in the application of *Chimel* to riot situations despite the exigencies of the circumstances. Further, the lack of guidelines covering such situations in the *Chimel* opinion does little to prevent such an unrealistic interpretation.

C. *Chimel* Coupled with Other Search and Seizure Restrictions

1. Chimel *and* Spinelli.

The holding in *Chimel* that, henceforth, almost all searches of premises must be made with warrants cannot be taken in a vacuum. Rather, the Court's prior pronouncements regarding search warrants must now be considered.

Until 1969 the Court had followed a fairly liberal "rule of reason" with regard to the requirements for a valid search warrant. In *United States v. Ventresca*[109] in 1965, the Court had stated:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity, once exacted under common law pleadings have no proper place in this area. *A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to judicial officers before acting.*[110] (Emphasis added.)

In March of 1969, four months before *Chimel* was decided, the Court decided *Spinelli v. United States*[111] and exhibited that very "grudging and nega-

109 380 U.S. 102 (1965).
110 *Id.* at 108.
111 393 U.S. 410 (1969).

tive" attitude towards search warrants that *Ventresca* had cautioned against. Mr. Justice Harlan, writing the majority opinion in *Spinelli,*[112] literally picked to pieces the affidavit for a search warrant in an FBI gambling case; he found it to be defective.

The affidavit in *Spinelli* was based on a reliable informant's tip that Spinelli was accepting bets over two telephone numbers identified by the informant. FBI surveillance, recited the affidavit, had placed Spinelli in the apartment where the telephones identified by the informant were located, and the affiant FBI agent stated that Spinelli was known to him to be a bookmaker and gambler.[113]

In dissecting the *Spinelli* affidavit, Mr. Justice Harlan first found the informant's tip insufficient to meet the test of *Aguilar v. Texas*[114] for informant-based search warrants. *Aguilar* requires that, in order to establish probable cause, an affidavit based on information from an informant must show (1) *why* the informant is to be considered reliable and (2) *how* the informant knows that that property to be searched for is located where he says it is. The affidavit in *Spinelli* brought out neither of these points, but it was argued that the FBI surveillance corroborated the informant's tip sufficiently to establish probable cause. Mr. Justice Harlan rejected this, saying that Spinelli's entrance into the apartment was not sufficient corroboration. The FBI agent's statement that Spinelli was known to him as a gambler and bookmaker was dismissed as mere police suspicion.

Mr. Justice Fortas, dissenting in *Spinelli,* said:

> In the present case, as I view it, the affidavit showed not only relevant surveillance, entitled to some probative weight for purposes of the issuance of a search warrant, but also additional specific facts of significance and adequate reliability: that Spinelli was using two telephone numbers, identified by an "informant" as being used for bookmaking, in his illegal operations; that these telephones were in an identified apartment; and that Spinelli, a known bookmaker, frequented the apartment. Certainly, this is enough.[115] (Footnote omitted.)

In the *Spinelli-Chimel* combination we have a truly ironic situation. *Spinelli* is an extremely restrictive decision on the validity of search warrants with which Mr. Justice Stewart, a dissenter in *Spinelli,* did *not* agree. But four months later Mr. Justice Stewart expanded the warrant requirement out of all proportion. Thus, Mr. Justice Stewart in *Chimel* requires the police to operate under a warrant system governed by the *Spinelli* restrictions in which he did not concur. To complete the irony, Mr. Justice Harlan, in *Chimel,* expressed concern over "the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision . . . ."[116] Certainly the administration of the warrant system required by

112 The majority consisted of Chief Justice Warren and Justices Brennan, Douglas, Harlan, and White. Justices Black, Stewart, and Fortas dissented, while Mr. Justice Marshall took no part in the decision.
113 Spinelli v. United States, 393 U.S. 410, 420 (1969).
114 378 U.S. 108 (1964).
115 Spinelli v. United States, 393 U.S. 410, 420 (1969).
116 Chimel v. California, 395 U.S. 752, 769 (1969).

Chimel will not be aided by the extremely restrictive view of search warrants that Mr. Justice Harlan expressed in *Spinelli*.[117]

A case that occurred in Denver will illustrate how the *Spinelli-Chimel* combination can work in practice:

> *Example # 5.* Certain minibikes had been stolen in Denver. A confidential informant of established reliability had located the minibikes in suspect X's basement. To his knowledge, the informant was the only person besides X who had been in X's basement and had seen the minibikes.
>
> *Chimel* barred the police from arresting the suspect in his home and making an arrest-based search for the minibikes;[118] and the requirement of *Spinelli* that an affidavit for search warrant state how the informant knows the property is on the premises to be searched precluded the use of a search warrant. This was so because, obviously, if the affidavit stated that the informant had seen the minibikes in X's basement, X would know who the informant was, even though the affidavit did not identify the informant by name.
>
> Under these circumstances the police came to the conclusion that a valid search warrant meeting the *Spinelli* test could not be drawn without identifying the informant by implication. No minibikes are worth risking the life or safety of an informant; consequently no search was made and the bikes were not recovered.[119]

One might ask whether this is really important. After all, what are a few minibikes? The case, nevertheless, is important, for here again we see a constitutional "zone of immunity" protecting the items from seizure and the suspect from arrest because of the combination of circumstances with two extremely restrictive holdings by the Court.

The fourth amendment ought not be used to shield the guilty from police action. It is highly unlikely that the founding fathers who drafted the amendment desired this end, yet the Court's interpretations have created such a situation. Mr. Justice Black, dissenting in *Davis v. Mississippi*,[120] noted that:

> This case is but one more in an ever-expanding list of cases in which this Court has been so widely blowing up the Fourth Amendment's scope that its original authors would be hard put to recognize their creation.[121] (Footnote omitted.)

117 *See generally* Singer, Filpi & Race, *The Supreme Court and the Fourth Amendment, October, 1968, Term*, 60 J. CRIM. L.C. & P.S. 493 (1969).

118 The arrest of the suspect based on the reliable informant's tip would have been justified under McCray v. Illinois, 386 U.S. 300 (1967), which held that information from an informant of demonstrated reliability may be the basis for arrest. *McCray* also stands for the proposition that an informant who merely furnishes the police with probable cause for *arrest* need not be identified.

119 One might ask why the police did not simply place X's house under surveillance. With street crime skyrocketing, few police departments can now spare the men needed for the long periods of surveillance required in a case such as this where there was no way of knowing when the suspect might bring one of the bikes out of his house.

120 394 U.S. 721 (1969).

121 *Id.* at 729.

2. Chimel *and the "Night Search Warrant Rule."*

Under the rules of procedure in certain states, e.g., Arizona[122] and Colorado[123] (prior to October of 1969), and under the Federal Rules of Criminal Procedure,[124] it is required that for a search warrant to be served at night the affiant must be "positive" that the property to be sought is on the premises to be searched. This requirement, coupled with *Chimel*'s limitation of arrest-based searches, can result in further "zones of immunity" protecting certain violators despite the best efforts of the police. Another case from Denver will illustrate this:

> *Example # 6.* Colorado rules of criminal procedure required a "positive" affidavit for a nighttime search warrant until October 1, 1969, when the Supreme Court of Colorado discarded this provision. In a Denver case that arose after *Chimel* was decided but before October first, officers had received information from a confidential informant, whose information had resulted in numerous seizures in the past, that a marijuana party was taking place in Denver.
>
> To obtain a nighttime search warrant for the house in which the party was taking place, however, the police felt, based on past cases, that in order to have a valid "positive" affidavit for a nighttime search the affidavit must show that the informant had been in the house within a few hours of the time that the warrant was sought. Since there was only a small number of persons at the party, the positive affidavit, pinpointing the time when the informant was present, would have permitted the violators to identify the informant by process of elimination.
>
> The doctrine of *McCray v. Illinois*[125] would protect the identity of the informant from *actual* disclosure by the police; yet, as in *Example # 5*, the use of a search warrant in the circumstances of the particular case would allow the identity of the informant to be deduced by the violators. There was a very real danger to the informant in this case if his identity had become known; as a result, the police were forced to forego *any* search due to *Chimel*'s prohibition of an arrest-based search superimposed on the "night search warrant rule." By morning all evidence had been consumed.

Again, search and seizure restrictions forced the police to sit by and do nothing, despite relatively certain knowledge of a violation. The case just described was cited to the Colorado Supreme Court by the Denver police department and the Denver district attorney's office as a practical argument in favor of doing away with the "night search warrant rule" in Colorado. The Colorado court took a realistic attitude towards the problem and did, in fact, remove the positive requirement from the Colorado rules of criminal procedure.[126] But such

122 ARIZ. REV. STAT. ANN. § 13-1447 (1956).
123 Colo. R. Crim. P. 41(c), 1 COLO. REV. STAT. ANN. 279 (1963).
124 FED. R. CRIM. P. 41(c).
125 386 U.S. 300 (1967); see note 118 *supra*.
126 See note 75 *supra*.

a rule is still in force in other jurisdictions where problems such as the Denver case could easily arise. The above example further illustrates the total disregard for practical police problems evidenced by the majority opinion in *Chimel*; nowhere in that opinion is the slightest consideration given to the possibility that the expanded warrant system would become doubly cumbersome under such local restrictions.

3. *Local Restrictions on the Seizure of Certain Items.*

Consider the case in which a local search warrant statute does not provide for the seizure of certain classes of items. A hypothetical example will illustrate:

> *Example* # 7. The Arizona statute concerning search warrants does not authorize a warrant to issue for mere evidence.[127] Suppose that the police go to the house of a rape-murder suspect and arrest him in the doorway. There are no items of evidence found on his person, and *Chimel* prohibits an arrest-based search ranging farther than his "immediate area." Now, suppose further that the police have information that the suspect's bloody underclothes are concealed in the house. The underclothes constitute items of mere evidence so that a search warrant could not issue for them in a jurisdiction such as Arizona. Seizure incident to the arrest is foreclosed by *Chimel* so that assuming that a consent search is refused, the "zone of immunity" surrounding a piece of highly probative evidence is complete. Despite the existence of probable cause, the police would be unable to make a constitutional seizure of such evidence.

The foregoing example is not farfetched when one considers the extremely grudging attitudes taken towards search warrants by some lower courts. Illustrative of just such an attitude is the post-*Chimel* case of *State v. Paul*,[128] decided by the New Mexico Court of Appeals, in which *Chimel* is interpreted most strictly against the police. In *Paul* the court suppressed items of evidence of a burglary discovered and seized in the course of a lawful search made pursuant to a search warrant. The court ordered the items suppressed because these specific items were not named in the search warrant, although they were connected with the burglary for which the warrant issued. The court apparently felt that since *Chimel* overruled *Harris v. United States*[129] with regard to the permissible scope of an arrest-based search, it also overruled that part of *Harris* that had been construed as permitting the seizure of incriminating items discovered in the course of a lawful search made with a warrant, even though such items were not named in the warrant.[130]

The question of the seizure of items not named in a search warrant is not discussed in *Chimel*; and *Chimel* expressly overruled *Harris* (and *Rabinowitz*)

127 ARIZ. REV. STAT. ANN. § 13-1442 (1956).
128 80 N.M. 521, 458 P.2d 596 (1969).
129 331 U.S. 145 (1947).
130 The court stated: "We do not attempt to define the effects of *Chimel* upon *Harris*. Because of *Chimel*, however, we do not consider *Harris* as authority for the seizure of items not named in the warrant." State v. Paul, 80 N.M. 521, ——, 458 P.2d 596, 600 (1969).

only "insofar as the principles they stand for are inconsistent with those we have endorsed today."[131] Thus, the New Mexico court has gone much farther than the United States Supreme Court in restricting police activity and has created a restriction on search warrants that has certainly not been mandated by *Chimel*.[132]

D. *Chimel* and the Unavailability of an Issuing Magistrate

In certain areas of this country the police are faced with a situation where there may be no magistrate available to issue a search warrant at a given time. This is particularly true in rural areas and in the less populous states, as indicated in a statement by James E. Barrett, Attorney General of the State of Wyoming:

> I was further very interested in the observation made in [the *Chimel*] brief with respect to the impact of Chimel on rural police departments where the number of persons authorized to issue search warrants is limited. It is already a fact of life in many of the small counties of Wyoming that it is impossible to secure the services of a Justice of the Peace in the dead of night for the purpose of either an arrest or a search warrant.[133]

The unavailability of a magistrate can result in delays of hours or days while a search warrant is being procured—delays allowing evidence to be consumed, removed, or destroyed. The following is an actual case from Aspen, Colorado.

> *Example # 8.* Aspen is a small resort town in the Colorado high country. One county judge lives in Aspen and is the only person in town empowered to issue warrants. The next nearest magistrate is in Glenwood Springs, about fifty miles from Aspen; but when the mountain roads are snow covered the round trip may take a matter of hours. During particularly heavy snowfalls the road may be impassable.
>
> On the occasion in question the police had received information from a person of proven reliability that a group of young people were engaged in the use of drugs in a certain residence in Aspen. A search

131 395 U.S. 752, 768 (1969).

132 The most recent pronouncement by the Supreme Court concerning the seizure of items not named in a search warrant came in Stanley v. Georgia, 394 U.S. 559 (1969), in a concurring opinion by Mr. Justice Stewart joined by Justices Brennan and White. *Stanley* reversed the conviction of a Georgia man convicted of having obscene films in his own home, the reversal being predicated on first amendment grounds. Mr. Justice Stewart would have reversed on fourth amendment grounds because the films were, in his opinion, unlawfully seized. The films were discovered during the course of a warrant-based search for gambling paraphernalia and were not named in the warrant. The key to Mr. Justice Stewart's argument is that the police first had to view the films in order to determine that they were obscene. He felt that they had no right to look at the films because they obviously were not gambling paraphernalia. He went on to say:

> This is not a case where agents in the course of a lawful search come upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. *Id.* at 571 (footnote omitted).

133 Letter from James E. Barrett, Attorney General of Wyoming, to Duke W. Dunbar, Attorney General of Colorado, Oct. 9, 1969.

warrant was drafted and a concentrated effort was made to find the county judge in Aspen. The judge could not be found and the weather conditions were such that a trip to Glenwood Springs would have taken hours. Faced with this situation the officers entered the house to arrest the participants only to find that the drugs had been consumed and most of the violators had departed during the time that a warrant was being sought. Even if the officers *had* found narcotics upon their entry, they risked having this evidence suppressed as being the fruit of a *Chimel* violation in spite of the fact that no one was available to issue a search warrant.

It surely does not tax the imagination to foresee cases in which quick action by the police is essential but in which there will be no person available who is authorized to issue search warrants. On this critical point the *Chimel* majority is completely silent.

E. *Chimel* and the Imminent Destruction or Loss of Evidence

If police work were a leisurely process in which each step could be calculated in advance, the expansion of the warrant requirement mandated by *Chimel* would be eminently reasonable. Unfortunately, this is not the case. Often policemen must act quickly or risk losing evidence necessary to convict a violator. This is particularly true in the area of narcotics enforcement, where swift action is often necessary because of the ease and rapidity with which narcotics may be consumed or destroyed.

The following is an account[134] of a case that occurred in Dade County, Florida, after the *Chimel* decision was announced.

> *Example # 9.* On October 18, 1969, at approximately 2:40 A.M. in an unincorporated area of Dade County, Florida, where rapes of white females had occurred on the previous Friday night, a police officer was accompanying a lone white female to her house. As he crossed the back yard of an apartment building with her, he had occasion to look into a ground-floor apartment. He observed four white males smoking homemade cigarettes in the manner characteristic of the marijuana smoker. A fifth white male was injecting a substance into the arm of a Negro male. In addition, the police officer, who had been trained in narcotics, smelled the distinctive odor of marijuana coming through an open fan vent measuring approximately three feet square.
>
> Based upon this information, the Dade County Police Legal Advisor advised officers to enter the premises pursuant to the emergency doctrine and on the separate theories that both a felony was being committed in the officer's presence and that the officer had reasonable grounds to

134 This account was furnished by Mr. Howard Levine, Legal Advisor, Police Legal Unit, Dade County Public Safety Department, Dade County, Florida. Letter from Howard Levine to Frank Carrington, Dec. 1, 1969.

believe that the evidence of that felony was being destroyed. Obtaining a search warrant would have been impractical.

After the officers had entered, secured the premises, and properly advised all the subjects of their constitutional rights, each of the subjects individually admitted to possessing and smoking marijuana.

On November 25, 1969, a judge of the Criminal Court of Record of Dade County ordered the evidence seized suppressed on the grounds that the officers had failed to obtain a search warrant.

In this case the need for haste was apparent, as evidence was being consumed before the officer's eyes. Further, the good faith attempt of the officer to comply with the law is patent, as indicated by his attempt to secure legal advice before acting. But, all went for naught; the officer was "second-guessed" and the evidence was suppressed despite the obvious exigencies of the case. Here, *Chimel*'s broad language retroactively created a "zone of immunity" protecting contraband from lawful seizure.

A further example of *Chimel*'s restrictions as applied to narcotics may be found in the limitations that the case placed on one of the most effective narcotic enforcement devices, the "controlled buy."[135]

Example # 10. The "controlled buy" technique is a procedure whereby officers use an informant to make a purchase of narcotics. The informant is first searched to be sure that he has no narcotics in his possession and is then sent to the seller's premises to make a purchase with marked money. When the informant leaves the seller's premises he is again searched to make sure that the money is gone; the narcotics he has purchased are turned over to the officers to be used as evidence. Prior to *Chimel,* the officers would immediately enter, arrest the seller, and search the premises for the marked money and for further narcotics.

It should be obvious that speed is of the essence in these cases, because if there is any delay the seller may have time to get rid of the marked money, an essential ingredient in the case against him. *Chimel* restricts the arrest-based search to the person of the arrestee and his immediate area, so that officers using the "controlled buy" technique must hope that they are lucky enough to find the marked money on the person of the seller. If the seller has secreted it on the premises, it is protected by *Chimel*'s restrictions on the scope of search. Thus, if the officers act with the speed necessary in this type of case, their success must be governed by the fortuitous circumstance of whether the pusher placed the money in his pocket or hid it on the premises.

Of course, once the buy is made the officers may proceed to obtain a search warrant. But in the time necessary to obtain the warrant, there is a grave risk that the marked money will be disposed of by the seller,

135 While not describing a specific case, *Example # 10* describes a situation that has been encountered in the Miami area since *Chimel* was announced. The source of this information was Mr. James Jorgenson, Legal Advisor, Police Legal Unit, Dade County Public Safety Department, Dade County, Florida.

either because, like most of his breed, he is extremely suspicious of *all* transactions, or because he has used the marked money to make change for other buyers.

One who is unfamiliar with the realities of police work could innocently inquire why the police could not place the seller's premises under surveillance while a search warrant is being procured. The answer that any experienced narcotic investigator would give to this question is that it is usually impossible to get an officer anywhere near such premises, due to the extremely cautious and suspicious nature of those who traffic in narcotics. The mere presence of a stranger in the neighborhood would likely alert the seller to get rid of his supply of narcotics and any money that he had taken in.

The United States Supreme Court has sanctioned the use of undercover agents[136] and informants[137] to gain evidence of crime; but, as a practical matter, one of the most effective methods of using such techniques has been seriously curtailed by *Chimel*, for in many instances that case penalizes the officer for acting with the swiftness necessitated by the circumstances. The second-level dope pusher is no one's object of great sympathy, yet because of *Chimel* one of the primary methods of making a valid case against these crafty individuals has been drastically restricted.

F. *Chimel* and the "Game Theory"

Mr. Justice Clark, dissenting in *Chapman v. United States*,[138] stated that the inconsistent rules that the Supreme Court has laid down in the search and seizure cases have turned "crime detection into a game of 'cops and robbers.' "[139] To those who are involved in the enforcement of the criminal laws of this county, police work is not a game but a deadly serious business. As noted by Justice Clark, however, there are reviewing courts which seem to feel that *is* a game—a game to be governed by the most intricate, rigid, and technical rules. *Chimel* is a decision that has presented such courts the widest possible latitude to develop and refine these technicalities.

Illustrative of this "game theory" is a recent case decided by the Supreme Court of Illinois, *People v. Machroli*.[140]

Example # 11. Police officers went to Machroli's room to arrest him for aggravated battery. Machroli was in his underwear when the officers entered; an officer handed him his jacket after searching it. The officer then handed Machroli his pants, but, for some reason, the officer failed to search the pants. Machroli put the pants on and then removed a metal box from the pants pocket and put it on a table. The officer took Machroli

136 Lewis v. United States, 385 U.S. 206 (1966).
137 Hoffa v. United States, 385 U.S. 293 (1966).
138 365 U.S. 610 (1961).
139 *Id.* at 623.
140 —— Ill. 2d ——, 254 N.E.2d 450 (1969).

from the room, then returned and secured the metal box, which contained narcotics. The Illinois Supreme Court ruled that the narcotics must be suppressed because the officer's search violated the *Chimel* rule, since Machroli had been removed from the room.[141]

Consider this ruling from the point of view of the officer. If the officer had taken the box out of the pants *before* handing them to Machroli, the search would have been lawful under the *Chimel* ruling; even if the officer had searched the pants while they were *on* Machroli the seizure would have been lawful since *Chimel* permits a search of the arrestee's person. But once Machroli got the box out of the pants and moved away from it, *Chimel* is used by the Illinois court to create another "zone of immunity" around the contraband.

While the nice distinctions made in this case might delight the hearts of constitutional theorists, they are unrealistic and unfair to an officer who is attempting to do his job. The courts ought not play "now-you-may-seize-it, now-you-may-not" with him. It should be emphasized in this instance that this is not a case of offensive or abusive conduct by the police officer, nor did the officer conduct a general search. Machroli was already under arrest, yet the Illinois Supreme Court used *Chimel* to insulate the contraband, in effect penalizing the officer because he was inadvertent in not searching the pants before Machroli had a chance to attempt to dispose of the narcotics.

Chief Justice Underwood and Justice Crebs dissented strongly in *Machroli*, pointing out that it was perfectly natural for the officer to seize the box after seeing Machroli remove it from the pants.[142] The dissenting justices showed a great deal more understanding of the realities of police work than did their brothers.[143]

G. *Chimel* and the Problem of Other Persons on the Premises Where the Arrest Is Made

This is perhaps the most perplexing for the police of any of the *Chimel*-related problems; for, as was shown in the Denver police amicus brief discussed above, in a great many cases friends or relatives of the arrestee will make an effort to dispose of evidence against him. The problem arises where it is impracticable for the police to obtain a search warrant prior to making the arrest of the suspect, a situation which often arises. The imminent flight of suspects, the threat of loss of evidence, and the possibility of danger to the officers or third persons are examples of exigencies that would necessitate an immediate

141 *Id.* at —, 254 N.E.2d at 452.
142 *Id.* at —, 254 N.E.2d at 452-53.
143 The game theory may have reached its zenith in a recent case tried in a municipal court in San Bernardino, California. Police there arrested a man and a woman after finding heroin in the diapers of a nine-month-old baby girl. The court refused to admit the heroin into evidence on the grounds that the search was unconstitutional. According to reports, the court held: "A baby has the rights of a person . . . and therefore must be afforded the protection of the constitution." Denver Post, Jan. 31, 1970, at 1, col. 3.

entry into premises to make an arrest. The delay involved in getting a search warrant could often frustrate the purpose of the arrest.

Once the entry to arrest is made, however, the officers are committed and any element of surprise is lost. If there are others on the premises the danger of removal or concealment of evidence, weapons, or contraband is present. If there is no probable cause to arrest these parties, it is questionable whether the officers can do anything to prevent the threatened removal or concealment of incriminating items. He who believes that persons remaining on the premises will *not* attempt to dispose of evidence against the arrestee may be reaching the heights of starry-eyed naïveté. The police deal with criminals, and the friends and relatives of the criminals generally know that they are criminals. Further, in most cases the associates of the arrestee will have no reason to love the police or to help them in any way.

There are cases, of course, where those on the premises at the time of an arrest would not desire to dispose of evidence. A mother who has just seen her young son arrested for selling marijuana at school might very well desire to help the police find the "stash" in order to get matters straightened out before Junior gets into deeper trouble. In these cases it is even likely that consent to search would be given; but such cases are exceptional. If there are associates of the arrestee present, and a consent search is refused, the officers making the arrest must, of necessity, take the realistic view that an attempt will be made to dispose of items incriminating to the arrestee.

The range of practical problems that confront an officer who makes an arrest with others on the premises is almost unlimited. Many variables may be involved in such a situation, and we might profitably examine a few.

1. *The ratio of persons on the premises to officers.* Setting legal questions aside for the moment, it is clear that if there are more persons present than officers the officers would have very little chance of keeping them all under observation. On the other hand, if there are fewer persons present than officers, the officers are in a much better position to prevent any tampering with the evidence.

2. *The type of evidence involved.* Even the hapless officer left on the premises with five friends of the suspect is in a position to prevent the removal of, say, stolen tires because of the sheer bulk of these items. If he observes one of the parties leaving with a tire he can arrest that person on a charge such as destroying or concealing evidence.[144] The fact of the matter is, however, that evidence, contraband, or weapons can often be concealed on the person. Items such as cash, jewelry, papers, narcotics, betting slips, or small weapons very easily could be removed from the premises or disposed of while the officer's attention is diverted.

3. *The sex of the persons remaining.* As a practical matter a male

144 For example, in California it is a misdemeanor to wilfully destroy or conceal evidence with the intent of preventing its use in a trial, inquiry, or investigation. CAL. PENAL CODE § 135 (West 1954).

officer will generally not risk searching a woman because of the threat of being accused of taking indecent liberties. Unless he believes that she is carrying a weapon, an officer will rarely search a woman whom he has *arrested,* much less one whom he has no probable cause to arrest. Thus, if an officer is left with the arrestee's wife at the scene of an arrest while a warrant is being secured, he may be forced to watch the wife walk out with stolen rings or narcotics in her brassiere or with a pistol tucked into her girdle.

4. *The type of premises on which the arrest took place.* An officer stationed in a hotel room or a one-rooom apartment while a warrant is being sought would, of course, be in a much better position to observe and prevent attempts to dispose of contraband or evidence than an officer stationed in a three-bedroom house. Unfortunately, the police cannot pick and choose the most convenient premises upon which to make an arrest.

These are a few of the practical problems that are involved when the question of securing premises arises. Of equal concern are the legal problems; the question arises whether an officer has the authority to secure premises at all. The *Chimel* majority blithely ignored the problem; but Mr. Justice White, dissenting, did not. He took a dim view of securing premises. In discussing the feasibility of leaving an officer on the scene while others procured a search warrant, he stated:

> Assuming that one policeman from each city would be needed to bring the petitioner in and obtain a search warrant, one policeman could have been left to guard the house. However, if he not only could have remained in the house against petitioner's wife's will, but followed her about to assure that no evidence was being tampered with, the invasion of her privacy would be almost as great as that accompanying an actual search. Moreover, had the wife summoned an accomplice, one officer could not have watched them both.[145]

Such language from a dissenting justice in *Chimel* does not bode well for the prospect of stationing officers on the premises against the will of the occupants.[146]

The reader is asked to place himself in the position of an officer who is faced with the following situation:

Example # 12. An arrest has been made in a house under circumstances making it impracticable to obtain a search warrant prior to the arrest. The arrestee's mother, two brothers, and girl friend (there is no probable cause to arrest any of these) remain on the premises after the arrest. There is probable cause to believe that evidence of the crime for

145 Chimel v. California, 395 U.S. 752, 775 n.5 (1969).

146 In People v. Edgar, 60 Cal. 2d 171, 383 P.2d 449, 32 Cal. Rptr. 41 (1963), the California Supreme Court used language to the effect that officers might remain on the premises and keep those present under surveillance. In view of the reservations expressed by Mr. Justice White in *Chimel,* this authority would seem to be at least questionable.

which the arrest was made is concealed on the premises. At best it will take two hours to draft a search warrant and locate a judge to sign it. Those remaining on the premises are already hostile to the police and a consent search has been refused in no uncertain terms. Two officers are left to "secure" the premises. The arrestee's mother orders the officers to leave. They refuse—but on what grounds?

The arrestee's brothers begin to disperse, each to a separate room. An officer tells them to remain where they are. They refuse. Each proceeds into a different room. May the officers restrain them? May they arrest them for refusing to obey them in their own house? If an officer follows each brother, the mother and girl friend will be left alone.

Each brother returns and starts to leave the house. May the officers detain them on the premises? May the officers search them? Upon what authority?

The girl friend tells an officer she has to go to the bathroom. May he restrain her in view of the fact that she is not under arrest?

These are just a few of the practical problems that could be encountered by officers faced with such a situation—problems for which there are simply no answers. Further, the problem goes deeper than the preservation of evidence for a criminal prosecution. The question also arises whether an officer is risking civil liability for remaining on an individual's premises against the will of that individual or for interfering with the liberty of persons whom there is no probable cause to arrest.[147] Arguably, tort actions for false imprisonment, assault, battery, or invasion of privacy could lie against the officers who restrained or forcibly searched a person under such circumstances.

Currently it appears to be "open season" on police officers through the filing of civil suits of highly questionable validity.[148] Based on the writer's experience with the Denver police department, the threat of baseless civil suits filed against officers for simply doing their jobs is the biggest morale factor affecting the police today. Now, *Chimel*, as written, would seem to require police officers to expose themselves further to civil liability in order to protect evidence in those cases where securing premises is necessary.

H. *Chimel* and Police Manpower

During one twenty-four-hour period in September of 1969, eight cases of forcible rape were reported in Denver, including one case in which the victim required sixty to seventy stitches in order to close her face and head cuts.[149] In one eight-day period in December of 1969, 302 burglaries took place in Denver in which property valued at $80,000.00 was taken.[150] Denver is far

147 See note 76 *supra.*

148 This is illustrated by a civil suit alleging "unreasonable search and seizure" recently filed against two Denver police officers. The officers' "unreasonable" conduct consisted of seeing through an open, uncurtained window into a house from the porch of that house, under circumstances in which the officers had a right and duty to be on the porch.

149 Rocky Mountain News, Sept. 8, 1969, at 12.

150 Rocky Mountain News, Jan. 11, 1970, at 7.

from having an unusually high crime rate, but, like most cities, Denver is gravely underpoliced in the face of rising crime.[151] The need for policemen *on the street* is critical.

The expanded warrant system required by *Chimel* will require that the police spend less time in patrol and investigation and more time in drafting affidavits and search warrants and in presenting them to magistrates. Another Denver case will illustrate this:

> *Example # 13.* At about 4:30 P.M. on July 16, 1969, a citizen called the Denver police to advise that some young men were drying marijuana on a third-floor fire escape of the apartment building next to hers. Officers viewed the marijuana from the informant's apartment; and, after putting a watch on the marijuana, called the Denver police Legal Coordinator to draft a search warrant for the apartment that fronted on the fire escape.
>
> At about 6:40 P.M. the officers watching the fire escape reported that two youths had removed the drying marijuana from the fire escape and were now leaning out of the window of the apartment smoking brown-paper rolled cigarettes.
>
> The legal coordinator felt that this was sufficient evidence of consumption of contraband to justify a warrantless entry to arrest those who had been seen smoking the homemade cigarettes. Six police officers and the legal coordinator proceeded to the apartment, entered, and arrested six parties therein for possession of marijuana.
>
> Marijuana, other drugs, and narcotics implements were found in plain view upon entry. Prior to *Chimel,* an arrest-based search of the apartment at this time would clearly have been permissible; after *Chimel,* question arose as to whether or not a search warrant was now necessary to search further in the apartment. Electing the "safest" course, the legal coordinator decided to draft a new search warrant for the apartment in order to search for other narcotics not in plain view.
>
> With six prisoners to guard (one was a methedrine addict recently released from a mental hospital who stated he would be killed before he was arrested again) it was necessary to leave four officers on the premises. The legal coordinator and two officers drafted a search warrant and, after several attempts, found a judge at home who could sign the warrant. No further search of the premises was made until the warrant was secured.
>
> The search warrant was signed by the judge, returned to the premises, and executed. A small additional amount of marijuana was discovered. The entire transaction took from one and one-half to two and one-half hours.
>
> In this case the "safe" course of conduct, taken in order to prevent suppression of evidence under a broad application of the *Chimel* rule, kept six officers off the street for about two hours each. Under pre-

151 *See* Denver Post, Jan. 8, 1970, at 30, cols. 1-8.

> *Chimel* standards the entry and arrest-based search could have been accomplished in a half hour.

Twelve hours of lost patrol time may seem to be a *de minimis* argument at first glance; but when this loss of time is multiplied by similar incidents in other cities across the country, the loss of police time occupied in drafting, securing, executing, and returning search warrants is considerable. In addition, the "dead time" consumed by officers waiting for the arrival of a search warrant must be considered. In a letter responding to questions concerning the impact of *Chimel* on his department, Chief E. M. Davis of the Los Angeles police department commented on the manpower problems raised by *Chimel*: "The problem factor lies in the expenditure of numerous man hours where it becomes necessary to leave officers on the premises of suspected wrongdoers."[152]

The Supreme Court of the United States has never recognized logistical problems such as police manpower shortages as a valid argument when it is engaged in pursuing the vindication of individual rights, yet it is submitted that such considerations *ought* be recognized by the Court. This nation is experiencing a crime wave, a *street* crime wave, of unprecedented proportions. The police are needed on the street to stem this rise in crime both by apprehending criminals and through the pure deterrent factor of a visible force on the street. The Court's pursuit of constitutional protections in theory must, of necessity, result in a decrease of that *actual* protection the public expects from the police.

The problems described are examples of only a few areas in which *Chimel,* and cases like it, can cause legal and practical difficulties for the working policeman. This article deals, in large measure, with only a few instances in one police department in the relatively short time since *Chimel* was announced, but the problems described illustrate the enormous chasm, noted by Senator McClellan, between "individual rights defined by an 18th-century ideal, but applied to a 20th-century society."[153]

A realistic appreciation of these problems led Mr. Justice Clark to say in 1961:

> It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these [search and seizure] cases. It turns the wellsprings of democracy—law and order—into a slough of frustration. It turns crime detection into a game of "cops and robbers." We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility.[154]

III. A Proposed Solution

From the point of view of the police, all of the problems created by *Chimel* could be resolved by a return to the more flexible *Rabinowitz-Harris* standard.

152 Letter from E. M. Davis, Chief of the Los Angeles Police Department, to John P. Forhan, Dec. 11, 1969, on file with the *Notre Dame Lawyer.*

153 115 CONG. REC. S9566 (daily ed. Aug. 11, 1969); see text accompanying note 3 *supra.*

154 Chapman v. United States, 365 U.S. 610, 623 (1961) (dissenting opinion).

Perhaps this may lie in the future, for if anything is certain in this area of the law, it is that the rules are constantly shifting. There can be no question that, as of this writing, the makeup of the Court is changing;[155] and, while no professional policeman could, or should, expect the Court to "rubber-stamp" police desires, the Court's future criminal law decisions may very well show a more realistic approach to police problems. It is not inconceivable that, at some later date, Mr. Justice White's dissent in *Chimel* may become the law.

Assuming that a rapid reversal of the *Chimel* rule will not be immediately forthcoming, those who might wish to alleviate some of the adverse impact of that decision on the police appear to have two courses. The first alternative would see the Congress of the United States examine *Chimel* and its effects and then enact legislation to "overrule" the decision, as was done in section 701 of the Omnibus Crime Control and Safe Streets Act of 1968,[156] which greatly limited the scope of *Miranda v. Arizona*,[157] dealing with confessions, and the *Wade-Gilbert-Stovall*[158] trilogy dealing with eyewitness identification.[159]

Congressional action taken specifically to lessen the impact of Supreme Court decisions on the police is admittedly rather drastic action, but the rise of crime in this country may demand drastic action.[160] Certainly, a Congress–Supreme Court confrontation raises one of the most fascinating, important, and controversial issues in government, but the question is of constitutional dimensions beyond the scope of this article. It is submitted, however, that even *within* the *Chimel* opinion there is latitude for legislation or judge-made rules of criminal procedure that would resolve many of the problems described in this article. This is the second course available to those who wish to resolve some of the difficulties attending *Chimel*. The remainder of this article will consider the possible legislation or rules.

The suggested rule[161] proceeds on the assumption that where it is practicable for the police to obtain a search warrant (as it was in the *Chimel* case itself) they must do so. The rule deals with those cases in which it is *not* practicable for the police to procure a search warrant prior to making an arrest; the rule would supply the guidelines for police conduct in this area omitted from the *Chimel* opinion. As will be shown, a detailed analysis of the *Chimel* opinion furnishes ample authority for the guidelines in the proposed rule; the police, however, need these guidelines spelled out rather than buried in an opinion.

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155 Chief Justice Warren Burger has replaced Earl Warren and Mr. Justice Blackmun now sits in the seat vacated by Abe Fortas.

156 18 U.S.C. §§ 3501-02 (Supp. IV, 1965-68).

157 384 U.S. 436 (1966).

158 United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

159 Of course, federal legislation directly affects only the federal court system; nevertheless, such congressional action can act as an effective precedent for the states to follow.

160 Most recently, the Senate has passed, overwhelmingly, the Organized Crime Control Act of 1969, S. 30, 91st Cong., 1st Sess. (1969), title VII of which "overrules" Alderman v. United States, 394 U.S. 165 (1969). This provision is currently under consideration by the the House Judiciary Committee.

161 The suggested response to *Chimel* could be adopted in the form of a statute or as a court-made rule of criminal procedure where this is permitted. For convenience, the term "rule" will be used hereafter in this article, although the word "statute" could be read for "rule" throughout.

Only then can the police know how to act properly, and only then will there be a basis for uniform application of *Chimel* by the courts.

The proposed rule will be referred to as the "warrant-if-practicable" rule and may be stated as follows:

Scope of Search Incident to a Lawful Arrest

(A) Articles or evidence seized pursuant to a search made incident to a lawful arrest shall be admissible evidence in any criminal prosecution if the search was limited to (1) the person arrested, and (2) the immediate area of the person arrested.

(B) Articles or evidence seized pursuant to a warrantless search incident to a lawful arrest beyond the scope permitted by section (A) of this rule shall not be admissible evidence in any criminal prosecution unless the trial judge finds as a fact that (1) in the circumstances of the case it was not reasonably practicable for the officer or officers to obtain a search warrant, and (2) there was probable cause to believe that weapons, contraband, or other evidence were located on the premises on which the arrest took place.

(C) The trial judge, in determining whether it was reasonably practicable for the officer or officers to obtain a search warrant, shall take into consideration all the circumstances existing at the time of the arrest, including:

(1) The reasonable probability that weapons, contraband, or evidence would be destroyed, removed, concealed, or otherwise disposed of while a search warrant was being procured;

(2) The reasonable probability of danger to the officers or to third persons if the search were delayed while a search warrant was being procured;

(3) The reasonable probability that the person to be arrested would flee or escape while a search warrant was being procured;

(4) The availability of a judicial officer empowered to issue search warrants; and

(5) Any other circumstances that would indicate to a prudent man that the delay involved in procuring a search warrant would render fruitless a subsequent search.

The presence or absence of any of the above circumstances need not be conclusive on the issue of the reasonable practicability of obtaining a search warrant.

The rule seeks to codify those circumstances under which a warrantless, arrest-based search would be permissible in light of the *Chimel* opinion. The primary concern in an analysis of the proposed rule, then, must be whether the rule is consistent with the *Chimel* opinion.

Obviously, section (A) of the proposed rule comports with *Chimel* since it merely restates the holding in *Chimel* that the person of the arrestee and his immediate area may be searched incident to an arrest. Section (B) emphasizes

that a search warrant is necessary to search further but also brings in the exceptions to the *Chimel* rule and deals with the concept of "reasonable practicability." At this point, it is necessary to turn to the *Chimel* majority opinion in order to ascertain whether it will brook such an exception.

The "reasonable practicability" argument is based on the premise that when *Chimel* overruled *United States v. Rabinowitz,*[162] it revived *Trupiano v. United States,*[163] a case *Rabinowitz* had overruled. The Court in *Trupiano* enunciated the rule of reasonable practicability. In that case federal revenue agents had kept a still under surveillance by observation and through an undercover agent from May thirteenth to June eighth of 1946. On June eighth, without securing either an arrest warrant or a search warrant, the agents conducted a raid and arrested one Antionole, whom they caught tending the still. Trupiano and other defendants were arrested later at the still. The Supreme Court held that the arrest of Antionole was lawful but that the seizure of the still was unlawful because the agents did not procure a search warrant though they had ample time to do so prior to the arrest. The key language in *Trupiano* was quoted by Mr. Justice Stewart writing for the majority in *Chimel*:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants *wherever reasonably practicable.* . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes *wherever possible.* And subsequent history has confirmed the wisdom of that requirement.
>
> "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. *It grows out of the inherent necessities of the situation at the time of the arrest.* But there must be something more in the way of necessity than merely a lawful arrest." [334 U.S.] at 705, 708.[164] (Emphasis added.)

This language from *Trupiano,* quoted with approval in *Chimel,* clearly deals with the practicalities of securing a search warrant; it recognizes that there are cases in which "the inherent necessities of the situation at the time of the arrest" should permit a warrantless, arrest-based search.[165] This emphasis on practicability takes on added significance when one recalls that in the *Chimel* case itself there was ample time for the police to procure a search warrant prior to making the arrest and that the police clearly had sufficient probable cause to support such a warrant. Thus, the *Chimel* case itself would have been unaffected by the proposed warrant-if-practicable rule, since there it *was* practicable to obtain a search warrant.

Further support for the premise that in certain limited situations a search of premises may be made without warrant is found in two United States Supreme

162 339 U.S. 56 (1950).
163 334 U.S. 699 (1948).
164 Chimel v. California, 395 U.S. 752, 758-59 (1969).
165 Mr. Justice White also mentioned the practicability concept in his dissenting opinion. See text accompanying note 47 *supra.*

Court cases, *McDonald v. United States*[166] and *Warden v. Hayden.*[167] *McDonald* is often cited as the case that enunciated the doctrine of "exigent circumstances" as an exception to the warrant rule. There the police had had the defendant, a known numbers operator, under surveillance for several months. On the day of the raid the officers surrounded defendant's rooming house, entered the house, and followed the sound of adding machines until they came to the room where the numbers operation was being conducted. Looking over the transom, they observed McDonald and another engaged in the numbers business; they entered the room, arrested the operators, and seized the wagering paraphernalia. The Supreme Court reversed McDonald's conviction, saying: "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances . . . ."[168] The Court then went on to hold that officers seeking to justify a search without a warrant must be prepared to show "that the exigencies of the situation made that course imperative."[169] A similar showing is required by the proposed rule.

Warden v. Hayden, decided by the Supreme Court in 1967, is further authority for the premise that warrantless searches are sometimes permissible. In that case an armed robber held up a Baltimore taxicab company, taking an

166 335 U.S. 451 (1948). A recent example of the exigent circumstances doctrine is Dorman v. United States, 7 BNA CRIM. L. RPTR. 2107 (D.C. Cir., April 15, 1970) (en banc). Police made a warrantless search of an armed robbery suspect's home four hours after the crime, and evidence seized during the search was held admissible by the court sitting en banc. The police entered the house to search for and arrest the suspect; they were not entering merely to search for evidence. Moreover, police had attempted to obtain a search warrant, but no magistrate was available to issue one. The panel which originally heard Dorman's appeal held the search unreasonable. Jones v. United States, 5 BNA CRIM. L. RPTR. 2124 (D.C. Cir. May 5, 1969), *rev'd sub nom.* Dorman v. United States, 7 BNA CRIM. L. RPTR. 2107 (D.C. Cir. April 15, 1970). The court, sitting en banc, considered the warrantless search reasonable and discussed the factors influencing its opinion:

> First, that a grave offense is involved, particularly one that is a crime of violence.
> * * *
>
> Second, and obviously inter-related, that the suspect is reasonably believed to be armed. Delay in arrest of an armed felon may well increase danger to the community meanwhile, or to the officers at time of arrest. This consideration bears materially on the justification for a warrantless entry.
>
> Third, that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including "reasonably trustworthy information," to believe that the suspect committed the crime involved.
>
> Fourth, strong reason to believe that the suspect is in the premises being entered.
>
> Fifth, a likelihood that the suspect will escape if not swiftly apprehended.
>
> Sixth, the circumstance that the entry, though not consented, is made peaceably. Forcible entry may in some instances be justified. But the fact that entry was not forcible aids in showing reasonableness of police attitude and conduct.
> * * *
>
> Another factor to be taken into account, though it works in more than one direction, relates to time of entry—whether it is made at night. On the one hand, as we shall later develop, the late hour may underscore the delay (and perhaps impracticability of) obtaining a warrant, and hence serve to justify proceeding without one. On the other hand, the fact that an entry is made at night raises particular concern over its reasonableness, . . . and may elevate the degree of probable cause required, both as implicating the suspect, and as showing that he is in the place entered . . . . Dorman v. United States, *supra,* at 2108.

167 387 U.S. 294 (1967). Both *MacDonald* and *Warden v. Hayden* are indirectly cited in *Chimel* as exceptions to the warrant requirement. See text accompanying notes 92-97 *supra.*

168 McDonald v. United States, 335 U.S. 451, 454 (1948).

169 *Id.* at 456.

amount of cash and fleeing. Two taxi drivers followed the robber, Hayden, to a certain house and radioed to their dispatcher a description of the robber and the clothes that he was wearing. The dispatcher notified police, who arrived at the house within minutes, knocked on the door, and, when Mrs. Hayden answered, informed her that they believed a robber was inside and that they wanted to search the house. Mrs. Hayden made no objection. The officers spread throughout the house, searching two floors and the basement for the robber and his weapons. They found Hayden in bed feigning sleep and arrested him. Meanwhile, other officers had found a pistol and a shotgun in the flush tank of the toilet, clothes such as the robber had worn in a washing machine in the cellar, ammunition and a cap under the mattress of Hayden's bed, and shotgun ammunition in a bureau drawer in Hayden's room.

All of these items were introduced into evidence at Hayden's trial, and he was convicted of robbery. On appeal, the Fourth Circuit reversed Hayden's conviction,[170] sustaining the search itself but holding that the clothing seized constituted "mere evidence," which was not subject to seizure. The United States Supreme Court reversed the court of appeals on the "mere evidence" question and upheld Hayden's conviction. The Supreme Court, in sustaining the search said:

> We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative."[171]

The Court further stated that the search of the entire house for weapons was lawful:

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.[172]

The Court then assumed, *but it did not decide,* that the exigencies of the case only permitted a search for weapons; even under such an assumption it was held that the clothes found were found in a bona fide search for weapons and that the seizure of the clothes was lawful.[173] Having found the search lawful, the Court then overruled the doctrine of *Gouled v. United States*[174] that items of evidentiary value only could not be seized.

Considering *McDonald* and *Warden v. Hayden* together we see two extremes of police conduct. Clearly, officers who have conducted months of surveillance, as in *McDonald,* have no excuse for not procuring a search warrant;

170 Hayden v. Warden, 363 F.2d 647 (4th Cir. 1966), *rev'd,* 387 U.S. 294 (1967).
171 Warden v. Hayden, 387 U.S. 294, 298 (1967).
172 *Id.* at 298-99.
173 *Id.* at 299-300.
174 255 U.S. 298 (1921).

equally clearly, officers in hot pursuit need not delay their investigations to seek a search warrant.[175] The proposed warrant-if-practicable rule seeks to establish and clarify a middle ground in which officers may properly proceed without a warrant if they can show that the circumstances of the case justify such conduct.

Section (C) of the proposed rule seeks to list some of the circumstances that might create a "reasonable impracticability" of obtaining a search warrant. These are common-sense standards; hopefully, they would not be subjected to hypertechnical interpretation. The first two factors, threatened loss of evidence and danger to officers or third persons, are sanctioned by *McDonald* and *Warden v. Hayden*. There is also ample authority in the federal courts of appeals for the inclusion of such considerations.[176] The third factor listed in section (C), the unavailability of an issuing magistrate, must be considered in the context of the other exigencies discussed above; at least one federal court has held that the fact that a magistrate is unavailable has a bearing on the practicability of obtaining a search warrant.[177]

The fourth circumstance to be taken into consideration under the proposed rule is directed at situations where the delay in procuring a search warrant would render the subsequent search futile. This section is based on an opinion by Mr. Justice White, writing for a majority of the Court in *Camara v. Municipal Court*.[178] Discussing the fourth amendment's requirement of search warrants, Mr. Justice White stated that

> the question is not whether the police interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part *upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.*[179] (Emphasis added.)

Some of the examples presented in this article lend emphasis to the need for such an exception to the warrant requirement. The fourth amendment was drafted to prevent abuses by the police, but there was never an intent to create wide "zones of immunity" for certain violators or to completely insulate some evidence from lawful seizure.

Finally, it should be noted that, in addition to a showing of "impracticability," the proposed rule would require the police to show that there was probable cause to believe that weapons, contraband, or evidence were located on the premises.

In summary, then, the warrant-if-practicable rule carves out a limited area in which the police can be assured that they may act properly in securing evidence

175 *See also* Ker v. California, 374 U.S. 23, 42 (1963). In State v. Sutton, 7 BNA CRIM. L. RPTR. 2047 (Mo. Mar. 9, 1970), the Missouri Supreme Court upheld the admission of evidence seized during a warrantless search not incident to arrest on the grounds that the officers' search of a house was "justified by the exigencies of the situation and in fact demanded by the nature of their duties as peace and law enforcement officers."

176 *See, e.g.*, Williams v. United States, 260 F.2d 125, 128 (8th Cir. 1958), *cert. denied*, 359 U.S. 918 (1959); United States v. Garnes, 258 F.2d 530, 532 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959); Ellison v. United States, 206 F.2d 476 (D.C. Cir. 1953).

177 United States v. Pierce, 124 F. Supp. 264, 266 (N.D. Ohio 1954), *aff'd mem.*, 224 F.2d 281 (6th Cir. 1955).

178 387 U.S. 523 (1967).

179 *Id.* at 533.

which otherwise might be lost due to the particular circumstances of the case. The rule does *not* permit the police to circumvent the warrant requirement where it is practicable to obtain a search warrant; the rule *does* give the police some guidelines for proper action when it is not reasonably practicable for them to secure a search warrant. The warrant-if-practicable rule would have permitted, for example, an arrest-based search for the murder weapons in each of the homicide cases described in the Denver police amicus brief; in the second of those cases, where the police *knew* that a weapon was removed by the defendant's friends, the proposed rule almost assuredly would have resulted in the lawful seizure of a vital piece of evidence.

IV. Conclusion

This article represents a police-oriented response to *Chimel v. California.* Decisions such as *Chimel*—sweepingly prohibitive but containing no guidelines for proper police action, expansive in the theoretical protection of the individual's liberties but unmindful of the problems created for those charged with protecting the individual's safety—do little to improve our criminal justice system. It is a decision which merits police response. If this response consists only of generalized grumbling about being "handcuffed," then it serves no function at all. To be effective, police response must first isolate and define the problem and then, if possible, present a workable solution. That has been the object of this article.