

1968

# Criminal Law: The Mere Evidence Rule Discarded

Minn. L. Rev. Editorial Board

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## Recommended Citation

Editorial Board, Minn. L. Rev., "Criminal Law: The Mere Evidence Rule Discarded" (1968). *Minnesota Law Review*. 2906.  
<https://scholarship.law.umn.edu/mlr/2906>

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state's interests in that it would place the burden of fair and beneficial contracting upon the company involved.

However, this statutory solution would impose such uncertainty upon a contractor that he would arguably be unwilling to enter *Butler* type agreements. If this proves true, and such contracts are deemed necessary to the state, it would appear that the court's case-by-case solution is the only alternative. It must be recognized, however, that the practical effect of acknowledging the validity of *Butler* type contracts is to permit the state to buy a company's services before there are funds available. This is the type of state spending the Reorganization Act was enacted to prevent,<sup>28</sup> and the considered proposals will not cure this salient defect.

Since none of the above mentioned dangers were factually present in the case before them, the court held the contract to be valid.<sup>29</sup> By so doing, the court apparently established a type of contract to which the provisions of the Reorganization Act do not apply—subject only to case-by-case judicial intervention as a means of state fiscal protection. However, since the judicial arm of government is equipped to punish abuses only after they have occurred and is relatively useless in averting them, the prevention of abuses in state financing can be effectively accomplished only through the legislative process. Therefore, in the light of the court's decision in *Butler*, it would seem that additional legislation is clearly warranted.

### Criminal Law: The Mere Evidence Rule Discarded

Police pursued an armed robber to defendant's house and were admitted by the defendant's wife. They searched the entire house and found the defendant feigning sleep. An officer searching the basement found a uniform fitting the description of the clothes worn by the robber. On the basis of this and other evidence<sup>1</sup> the defendant was arrested and convicted in

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28. See MINN. STAT. § 16.16 (1965).

29. This narrow view ignores the reasoning so prevalent in other jurisdictions: "To declare this contract valid by permitting a strained construction . . . would be tantamount to opening the proverbial 'Pandora's Box', and before it could again be secured the fiscal affairs of the State might well decline to a chaotic level. . . ." State *ex rel.* Point Towing Co. v. McDonough, 150 W. Va. 724, 730, 149 S.E.2d 302, 307 (1966).

1. Other evidence found consisted of a cap, weapons, and ammunition; however, no stolen property was discovered.

state court. After proper appeals in the state courts, he sought and was denied habeas corpus relief in a federal district court. The Fourth Circuit reversed,<sup>2</sup> on the ground that under the Mere Evidence Rule the clothing was improperly admitted. The Supreme Court, finding the search valid as incident to an arrest,<sup>3</sup> reversed, discarding the Mere Evidence Rule and *holding* that the fourth amendment does not forbid a search for specific evidentiary material. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

Under the Mere Evidence Rule (hereinafter referred to as the Rule), materials which are not instrumentalities of the crime, fruits of the crime, contraband, or weapons which might foster an escape may not be seized by law enforcement authorities even though they are of evidentiary value.<sup>4</sup> The Rule was derived from an old English case which struck down general warrants<sup>5</sup> as an impermissible intrusion into private homes.<sup>6</sup> In dictum the English court indicated that a search for evidence is illegal where the effect is to cause a man to be a witness

2. *Hayden v. Warden, Maryland Penitentiary*, 363 F.2d 647 (4th Cir. 1966) (divided court).

3. Actually the Court ruled that the search was valid since it was made while the officers were in "hot pursuit" of the robber. However, the distinction between a search made incident to an arrest and one made while in "hot pursuit" is insignificant to this discussion.

4. *Harris v. United States*, 331 U.S. 145, 154 (1947); see *Abel v. United States*, 362 U.S. 217, 234-35 (1960); *Frank v. Maryland*, 359 U.S. 360, 365 (1959); *Gouled v. United States*, 255 U.S. 298, 309 (1921); *Boyd v. United States*, 116 U.S. 616, 623-24 (1886).

5. In England general warrants were issued by the secretary of state for searching private houses for the discovery and seizure of books and papers that might be used in libel prosecutions. These warrants were among the primary reasons the framers of our Constitution thought the fourth amendment necessary. See *Frank v. Maryland*, 359 U.S. 360, 363-66 (1959); *Boyd v. United States*, 116 U.S. 616, 625-30 (1886). See generally J. LANDYNSKI, *SEARCHES AND SEIZURES AND THE SUPREME COURT* 19-40 (1966); N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 22-105 (1937); 8 J. WIGMORE, *EVIDENCE* § 2184 (McNaughton rev. 1961). For a discussion of the origin of the Rule, see Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966).

6. *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). In this case, suit was brought against the secretary who issued a general warrant and the officer who executed it. The court found a *violation of a property right*, pointing out that even a search for stolen goods was looked upon with suspicion and was allowed only if the owner first swore under-oath that the theft had been committed, that the goods were at a particular place, and the owner accompanied the officer who executed the warrant.

against himself.<sup>7</sup> The Supreme Court,<sup>8</sup> apparently misreading the case,<sup>9</sup> cited it as support for the proposition that the fourth and fifth amendments, rather than the fifth amendment alone,<sup>10</sup> were needed to exclude the evidence.<sup>11</sup> Thus, when the Mere Evidence Rule was first enunciated in *Gouled v. United States*,<sup>12</sup> the Court held that the seizure of mere evidence is prohibited by both the fourth and fifth amendments.<sup>13</sup>

The Rule has been criticized by both courts<sup>14</sup> and commentators.<sup>15</sup> First, the inadequacy of guidelines for applying the Rule has made it possible for courts, in order to prosecute successfully an obviously guilty defendant, to classify an object as one of the exceptions to the Rule.<sup>16</sup> Thus, it has been found that

7. The Supreme Court in *Boyd v. United States*, 116 U.S. 616 (1886), quotes *Entick* for the proposition that:

*It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle.*

*Id.* at 629 (emphasis added). See Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 697 (1961), which suggests that the Court saw an analogous danger in search and seizure as an investigative technique and for this reason required a warrant based on probable cause.

8. *Boyd v. United States*, 116 U.S. 616 (1886).

9. Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 694 (1961).

10. This was the position of the two concurring Justices in *Boyd*. The Court in *Weeks v. United States*, 232 U.S. 383 (1914), and apparently in the instant case, adopted this position. 387 U.S. at 302-03.

11. 116 U.S. 616, 633 (1886).

12. 255 U.S. 298 (1921).

13. The *Gouled* holding was based on *Boyd v. United States*, 116 U.S. 616 (1886); it also relied on *Weeks v. United States*, 232 U.S. 383 (1914), insofar as it established the federal exclusionary rule rendering evidence obtained through an illegal search inadmissible no matter how relevant.

14. See, e.g., *People v. Thayer*, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1965), cert. denied, 384 U.S. 908 (1966); *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965); *State v. Chinn*, 231 Ore. 259, 373 P.2d 392 (1962).

15. E.g., Chafee, *The Progress of the Law, 1919-1922*, 35 HARV. L. REV. 302, 673, 699 (1922); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171 (1962); Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 914-18 (1960); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 478 (1961). But see Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966); Comment, *The Fourth and Fifth Amendments—Dimensions of an Intimate Relationship*, 13 U.C.L.A.L. REV. 857 (1965-1966).

16. See Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 917 (1960). Even the Supreme Court

the very same papers would constitute fruits or, more often, instrumentalities of a crime in some circumstances and mere evidence in others.<sup>17</sup> Clothing, although quite logically mere evidence, has often been classified as an instrumentality by the lower courts,<sup>18</sup> therefore subject to seizure incident to an arrest.

A second criticism is that the constitutional basis for the Rule that the seizure of evidentiary matter violates the privilege against self-incrimination no longer provides sufficient support.<sup>19</sup> While the Rule applies to all merely evidentiary items, since 1966 the fifth amendment's protection applies only to evidence that is testimonial or communicative in nature.<sup>20</sup>

A third criticism of the Rule is that it is based on an old property concept that the sovereign may seize only those objects to which the sovereign may assert a claim on grounds that the objects have been wrongfully obtained,<sup>21</sup> wrongfully used,<sup>22</sup> or

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has avoided the Rule. For example, the Court in *Zap v. United States*, 328 U.S. 624 (1946), bypassed the Rule by holding that testimony or even photographic evidence may be introduced at trial concerning objects not subject to seizure.

17. Compare *Marron v. United States*, 275 U.S. 192 (1927), and *Foley v. United States*, 64 F.2d 1 (5th Cir. 1933) (business records are fruits or instrumentalities of a crime), with *United States v. Thomson*, 113 F.2d 643 (7th Cir. 1940), and *United States v. Poller*, 43 F.2d 911 (2d Cir. 1930) (same type of documents are mere evidence).

18. See *United States v. Caruso*, 358 F.2d 184 (2d Cir.), cert. denied, 385 U.S. 862 (1966) (clothing of bank robber); *Whalem v. United States*, 346 F.2d 812 (D.C. Cir.), cert. denied, 332 U.S. 862 (1965) (clothing for identification); *Morton v. United States*, 147 F.2d 28 (D.C. Cir. 1945) (bloodstained clothing in closet). *Contra*, *Williams v. United States*, 263 F.2d 487 (D.C. Cir. 1959) (coat with button missing found in closet); *United States v. Richmond*, 57 F. Supp. 903 (S.D.W. Va. 1944) (clothing for identification).

19. See, e.g., *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965); Comment, *Limitations on Seizure of "Evidentiary" Objects*, 20 U. CHI. L. REV. 319, 324 (1954). See also Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171, 177 (1962). Mr. Justice Frankfurter, dissenting in *Davis v. United States*, 328 U.S. 582, 595 (1946), states that "papers of an accused cannot be seized even through legal process because their use would violate the prohibition of the Fifth Amendment against self-incrimination." *Id.* at 595.

If fifth amendment protection was the rationale behind the Rule, reliance upon the fourth amendment was not necessary. See note 10 *supra*. The protection of the fourth and fifth amendments developed separately and are distinct. See J. WIGMORE, *supra* note 5, § 2264. See also Chafee, *supra* note 15, at 697; Fraenkel, *supra* note 15, at 366-67.

20. *Schmerber v. California*, 384 U.S. 757, 761-62 (1966).

21. *Gould v. United States*, 255 U.S. 298, 309 (1921).

22. *Boyd v. United States*, 116 U.S. 616 (1886).

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment

illegally possessed. This concept has been validly criticized<sup>23</sup> as fictional since the principal purpose of the fourth amendment is to protect privacy, not property.<sup>24</sup> Furthermore, objects are generally not sought or seized to vindicate a property right, but rather to aid in proving the guilt of the accused.<sup>25</sup>

Finally, the rationale that the Rule protects the privacy of the individual by limiting the search<sup>26</sup> has been discredited.<sup>27</sup> One court stated that the Rule does not protect privacy by preventing exploratory searches, but that it simply prohibits the seizure of mere evidence in the course of any search, with no regard to the reasonableness or legality of the search.<sup>28</sup>

In spite of these weaknesses the Rule existed for over forty years, largely because it was easily bypassed by classifying an object as a fruit or instrumentality,<sup>29</sup> and because until 1961 it was used only in the federal courts.<sup>30</sup> Then, in *Mapp v. Ohio*,<sup>31</sup> the Supreme Court held that the states were obligated under due process to exclude evidence obtained in violation of the

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thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not. . . .

*Id.* at 623.

23. See Kaplan, *supra* note 15, at 475-78; Comment, *Limitations on Seizure of "Evidentiary" Objects*, 20 U. CHI. L. REV. 319, 323-34 (1954).

24. 387 U.S. at 304.

25. See *Jones v. United States*, 362 U.S. 257, 266 (1960); *State v. Bisaccia*, 45 N.J. 504, 508, 213 A.2d 185, 187 (1965).

26. ". . . [L]imitations upon the fruit to be gathered tend to limit the quest itself. . . ." *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930) (L. Hand, J.). See 387 U.S. at 310-13 (concurring opinion). See also Comment, *The Fourth and Fifth Amendments—Dimensions of an Intimate Relationship*, 13 U.C.L.A.L. REV. 857, 861 (1965-1966).

27. See Kaplan, *supra* note 15, at 478. The idea that the Rule limited the quest itself by limiting the search was also indirectly undermined when the Court refused to apply the Rule to wiretap cases—an area where privacy is certainly invaded and evidence obtained. See Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 914-18 (1960).

28. *People v. Thayer*, 63 Cal. 2d 635, 638, 408 P.2d 108, 110, 47 Cal. Rptr. 780, 782 (1965).

29. 387 U.S. at 308-09.

30. Prior to *Mapp*, about twenty-five states, including Minnesota, followed the common law rule of admissibility of evidence at trial even if it was obtained by illegal search and seizure. See J. WIGMORE, *supra* note 5, § 2183; Annot., 50 A.L.R.2d 535 (1956). In 1963 Minnesota passed a statute which provided for suppression of illegally seized evidence; MINN. STAT. § 626.21 (1965), but in the same year it passed a statute which made it clear that a search warrant could be issued to seize objects of evidentiary value only. MINN. STAT. § 626.07 (1965).

31. 367 U.S. 643 (1961).

Constitution. The possibility created by *Mapp* that state courts would be required to follow the Rule increased the confusion and created the need for a ruling by the Supreme Court.<sup>32</sup>

In the instant case, after reviewing the improbable inception of the Mere Evidence Rule and its various criticisms, the Court stated that it had "spawned exceptions so numerous and confusion so great, . . . that it is questionable whether it affords meaningful protection."<sup>33</sup> The Court pointed out that the distinction between mere evidence and instrumental fruits of crime or contraband is not supported by either the language of the fourth amendment or its principal purpose of protection of privacy.<sup>34</sup> In rejecting the proposition that government must have a property interest in material before its seizure is legitimate, the Court directed lower courts to give due regard to government's independent interests in solving crime.<sup>35</sup> To lend support to its discarding of the Rule, the Court noted that although the absence of the Rule may somewhat increase the area of permissible search,<sup>36</sup> the fourth amendment still exists for adequate protection of individual privacy.<sup>37</sup>

The effect of the instant case on the law of search and seizure must be viewed in light of its impact on the two basic areas of permissible search—searches made under a search warrant, and those made incident to an arrest.<sup>38</sup> Since the

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32. Even after *Mapp* the question as to whether the Rule was to be given constitutional sanctity was unanswered. See generally Comment, *The Mere Evidence Rule: Applicability to the States*, 45 N.C.L. Rev. 512 (1967). Many state courts indicated reluctance to follow *Mapp*. See, e.g., *State v. Harris*, 265 Minn. 260, 121 N.W.2d 327 (1963).

33. 387 U.S. at 309.

34. *Id.* at 301-02. The Court noted that privacy is no more disturbed by a search for a specific object of evidentiary value than for a fruit or instrumentality.

35. *Id.* at 304, 306. The basic problem in search and seizure is the great difficulty of balancing two competing values: the right of privacy and the need for effective law enforcement. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Nw. U.L. Rev. 1, 4-5 (1950).

36. Justice Fortas, concurring, 387 U.S. at 310-12, advocated retention of the Rule to prevent unreasonable exploratory searches. His concurrence was based on the belief that clothing should be an exception to the Rule. Justice Douglas, dissenting, *id.* at 312-25, stated that the majority decision will open the door to general searches in violation of both the fourth and fifth amendments.

37. 387 U.S. at 309-10.

38. The right to search without warrant was at first limited to a search for weapons which the accused may use in an attempt to escape. See Way, *Increasing the Scope of Search Incident to Arrest*, 1959 WASH. U.L.Q. 261, 263-71. In this century the right to search expanded from

instant case involved a "search incident to arrest" in which officers, after placing a party under arrest, need not stop their search to obtain a warrant,<sup>39</sup> there is no doubt that the Court's discarding of the Rule affects the scope of this type of search. The Rule had its greatest value here, since it discouraged the general ransacking of the arrested person's house.<sup>40</sup> Now that the Rule has been rejected, if a search is "reasonable,"<sup>41</sup> officers can seize anything which they reasonably believe is evidence pertaining to a specific crime for which they are arresting the person.<sup>42</sup> It would appear, therefore, that the decision, in effect, removes one, if not the only, "restraint" in what was already a very liberal area of search and seizure.

The effect of *Hayden* upon searches under a warrant is not as clear. It can be argued that since *Hayden* involved a search without a warrant, any language in the decision which goes beyond this issue is dicta and does not change the law in the search-with-a-warrant area.

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the well-established right to search the person of the accused when legally arrested, *Weeks v. United States*, 232 U.S. 383, 392 (1914), to the right to make a thorough five-hour search of the defendant's apartment and the seizure of contraband items totally unrelated to the offense for which the arrest had been made, *Harris v. United States*, 331 U.S. 145 (1947). See Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 683 (1961).

39. *Trupiano v. United States*, 334 U.S. 699 (1948), laid down a rule that "law enforcement must secure and use search warrants wherever reasonably practicable." *Id.* at 705. However, this case was overruled by *United States v. Rabinowitz*, 339 U.S. 56 (1950).

40. Judge Learned Hand stated that once officers have gained legal entry by a search incident to an arrest, the practice of ransacking a man's house for anything that may incriminate him seems indistinguishable from what might have been done under a general warrant. *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926). Hand went on to suppress the evidence under the Rule.

41. This apparently means undestructive and with some particular object in mind. See *United States v. Rabinowitz*, 339 U.S. 56 (1950).

42. Any evidence associated with a crime is admissible if found, albeit unexpectedly, during a "reasonable" search for another specific piece of evidence. *Harris v. United States*, 331 U.S. 145 (1947); see *United States v. Rabinowitz*, 339 U.S. 56 (1950). The test is the reasonableness of the search itself, not the practicality of procuring a search warrant. *United States v. Rabinowitz*, *supra* at 65-66. It is asserted that the reasonableness of the search is for the most part determined by how successful the officers are in their search. As Justice Douglas recently stated, "whenever a culprit is caught red-handed, . . . it is difficult to adopt and enforce a rule that would turn him loose." *Draper v. United States*, 358 U.S. 307, 314 (1959) (dissent). But to disregard an individual's constitutional rights because he appears guilty, or is later proven to be guilty because of the violation, seems contradictory to our valued concept of innocent until proven guilty.

However, if effect is to be given to language in *Hayden* which goes beyond the narrow holding allowing seizure of mere evidence where no warrant is required,<sup>43</sup> the case may be interpreted to allow seizure of mere evidence in both areas of search. Under this rule, a warrant could constitutionally be issued to search for and seize mere evidence.<sup>44</sup>

For several reasons the broader interpretation of the case would seem to be more rational. If the Rule is still applicable to obtaining a search warrant, officers will be even more inclined to avoid using a search warrant. Second, the confusion created by the Rule as to what is or is not mere evidence will still exist. Third, the rationale used by the Court in discarding the Rule implies that the Court intended its decision to apply even to searches under a warrant. The Court reasoned that the Rule could be overthrown because the requirements of the fourth amendment as to probable cause, particularity, and the intervention of a magistrate would continue to provide protection in the area of permissible searches.<sup>45</sup> These requirements of the fourth amendment apply to searches in general, which includes searches under a warrant. Therefore, the Court apparently believes that if these requirements are met, a search warrant can be issued to search for and seize mere evidence.

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43. The Court stated that

if its [the Rule's] rejection does enlarge the area of permissible searches, *the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment* and after the intervention of a ". . . magistrate. . . ." [T]he Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure mere evidence from [other] intrusions. . . .

387 U.S. at 309-10 (emphasis added). See note 34 *supra* and accompanying text.

44. Note, however, that the issuance of a warrant must comply with statutory as well as constitutional requirements to be valid.

MINN. STAT. ANN. § 626.07(5) (Supp. 1967), provides that a warrant will issue if: "(5) The property or things to be seized consist of any item or constitute *any evidence* which tends to show a crime has been committed, or tends to show that a particular person has committed a crime." This section clearly allows a warrant to issue for mere evidence alone. If the Rule had been given constitutional sanctity, this statute would probably have been unconstitutional and, if the instant case is narrowly interpreted, it may still be unconstitutional. Even if the case is broadly read, a warrant would have to meet the requirements of probable cause and specificity. Another Minnesota statute provides these requirements. "A search warrant cannot be issued but upon probable cause, supported by affidavit, . . . particularly describing the property or thing to be seized, and particularly describing the place to be searched." MINN. STAT. ANN. § 626.08 (Supp. 1967).

45. 387 U.S. at 309-10.

Because the Rule did not actually prevent exploratory searches, but merely excluded from evidence certain matter found during any type of search, it was a poor means of protecting privacy.<sup>46</sup> While the discarding of the Rule was probably reasonable, it does leave a void in the area of search without a warrant. Since police are, after the demise of the Rule, more likely to extensively search and seize,<sup>47</sup> a more stringent limitation should be put upon the ability of police to search incident to an arrest<sup>48</sup> and seize evidence<sup>49</sup> without a warrant.<sup>50</sup> One possibility would be to return to the rule that law enforcement officers must use search warrants wherever reasonably practical.<sup>51</sup> Once the officers have arrested a person and made a cursory search for their own protection, a requirement that they must obtain a search warrant to search further seems no great burden.<sup>52</sup> This would give valuable and much needed protection to the right of privacy without the confusion and absurdities created by the Mere Evidence Rule. The Court has been striving for a rule to cover all searches, but has been un-

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46. 387 U.S. at 304.

47. Police seem inclined to use lawless enforcement if not checked. Chafee, *supra* note 15, at 703. This is vividly revealed in Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), where 300 general searches without warrants were made by the Baltimore police in search of a murderer in less than a month. In ordering an injunction, the court stated that the case revealed a series of the most flagrant invasions of privacy ever to come before a federal court. *Id.* at 201. See also Brinegar v. United States, 338 U.S. 160, 181-82 (1949) (dissent).

48. For strong criticism of the modern liberality in a search incident to an arrest, see generally United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (dissent); Harris v. United States, 331 U.S. 145, 155 (1947) (dissent); State v. Chinn, 231 Ore. 259, 280, 373 P.2d 392, 401 (1962) (dissent); Way, *supra* note 38.

49. This ability also exists if the arrest is close to the location that officers would like to search. See, e.g., Kernick v. United States, 242 F.2d 818 (8th Cir. 1957) (accused arrested in station with a baggage check found on his person; contraband found in search of the baggage which "was under his control"); United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955) (accused arrested in car, key seized to get into apartment two blocks away where a key was found which opened the garage in which evidence was discovered).

50. The swearing out of a search warrant requires some probable cause that a search will be successful. The mere fact that the defendant was arrested at the place sought to be searched is not, by itself, enough. It is, therefore, more a lack of grounds than a lack of time which would prevent police officers from swearing out a warrant. Kaplan, *supra* note 15, at 491.

51. Trupiano v. United States, 334 U.S. 699, 705 (1948), overruled by United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950).

52. Also, it seems irrational to allow a more extensive search without a warrant than can be made with one.