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the grasp of the court, whereas it appears that the other putative fathers were not; so for practical purposes, either the defendant was the father or no father could be obtained.

The present state of the law in this area seems much as it should be. Juries certainly should be entitled to any evidence of non-paternity which the defendant can provide, and should be allowed to give that evidence determinative weight if they wish. In cases where the only evidence of paternity is the unsupported testimony of the mother, juries should not be allowed capriciously to reject scientific proof in an effort to aid her in shopping for a father for her child. But in those cases involving scientific proof, where opposing evidence is adequate, a jury should be given a certain amount of leeway. It should be permitted occasionally to find that the legal father is someone other than the biological father.

In all types of cases, allowing juries apparently to reject scientific proof adds to the individualization of the application and administration of the law. While entirely too frequently juries defeat justice when acquitting defendants scientifically proven guilty, or when finding them guilty although scientifically proven innocent, the remedy is not in denying the juries the power to do this. The remedy lies in better selection of the jurors, and more adequate instruction.<sup>19</sup> It would be regrettable indeed to deprive our legal machinery of one of its most effective mechanisms for the promotion of justice in the individual case by denying juries the power to individualize the treatment of the parties.

### HOW FAR CAN FEDERAL OFFICERS SEARCH IN CONNECTION WITH AN ARREST?

Charles Marshall

Until recently federal law enforcement officers engaged in making a lawful arrest could be advised never to conduct a search of the premises occupied by the arrestee without first obtaining a search warrant. However, in the recent case of *Rabinowitz v. United States*,<sup>1</sup> the Supreme Court of The United States announced a rule differing from that previously followed. In this case federal officers, having known for some time that a stamp dealer was selling forged stamps, obtained an arrest warrant and seized the dealer in his place of business. His one room shop was searched for an hour and a half and forged stamps, which are contraband, were seized.<sup>2</sup> This search was upheld as reasonable within the meaning of the Fourth Amendment.<sup>3</sup>

#### *The Inherent Necessity Doctrine*

A revolutionary effect of the *Rabinowitz* decision is the overthrow of the "inherent necessity" doctrine established two years ago in *Trupiano v. United States*.<sup>4</sup> This doctrine required police officers to obtain a search warrant in all

19. See Miner, *The Jury Problem*, 37 J. CRIM. L. & CRIMINOLOGY 1 (1946).

1. 339 U.S. 56 (1950):

2. It is a crime to possess and sell counterfeit obligations of the United States with intent to defraud either the government or a private citizen. 18 U.S.C.A. 687, 62 STAT. 683 (1948).

3. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U. S. CONST. ART. IV.

4. 334 U.S. 699 (1948). For the evolution of the inherent necessity doctrine see Harris v. United States, 331 U.S. 145 (1947) (Mr. Justice Frankfurter's dissenting opinion);

cases where there was sufficient time to do so before making an arrest. Several decisions prior to the *Trupiano* case had permitted arresting officers to search the immediate surroundings without a warrant where a valid arrest had been made.<sup>5</sup> The most extreme of these cases was *Harris v. United States*.<sup>6</sup> There the officers searched an apartment for five and a half hours, but found nothing connected with the crime for which they had arrested the owner. They did, however, find falsified draft cards, for the possession of which the arrestee was convicted. The Supreme Court upheld this search and seizure since the possession of the cards, contraband material, constituted the commission of a crime in the presence of the arresting officers. The dissent felt that this decision came perilously close to permitting the validation of a *trespass ab initio* by the character of the material subsequently seized, thus to a considerable extent bringing back the notorious general search.<sup>7</sup>

Partially as a result of the general unfavorable reaction to the *Harris* case decision and also because of the change in position of Justice Douglas,<sup>8</sup> the court apparently seized upon the first opportunity to limit a federal officer's authority to search incident to an arrest. That opportunity arose in the *Trupiano* case. Federal officers, having kept the operations of an illegal still under constant surveillance for several weeks, entered the farm upon which the still was being operated and arrested one of the bootleggers as he worked the equipment. Even though the officers had ample time in which to obtain a search warrant, they failed to do so. The seizure of the equipment made incident to the arrest was held to violate the Fourth Amendment. Unquestionably the court was influenced to a considerable extent by the officer's failure to secure a search warrant when they had ample opportunity to do so. This wilful disregard of an important limitation on their authority may have been the deciding factor in the decision. However, viewed in the light of the purpose of the Fourth Amendment perhaps the *Trupiano* situation was not the best case upon which to base a general rule limiting the power to search incident to an arrest. Since the purpose of the Fourth Amendment is to protect the individual's right of privacy from being invaded, it is difficult to see how such rights were violated in this situation inasmuch as the agents came upon the land with the consent of the owner and seized only goods in open sight.<sup>9</sup> Regardless of the merits of the court's choice of cases for announcing its new rule, the decision held that the constitutional provision against unreasonable searches prohibited searches incident to an arrest from being conducted without a warrant, where it was reasonably practicable to obtain a warrant prior to the arrest. The effect of the rule was to make the obtaining of a search warrant prior to arrest mandatory except in cases of inherent necessity.<sup>10</sup>

*Johnson v. United States*, 333 U.S. 10 (1948) (narcotic smell emitting from room not sufficient cause for immediate arrest and search); *McDonald v. United States*, 335 U.S. 451 (1948) (search disallowed when agents see arrestee committing a crime and arrest immediately); See note, 39 J. CRIM. L. & CRIMINOLOGY 208 (1948).

5. *Agnello v. United States*, 269 U.S. 192 (1925) (search of house in which sale of narcotics observed); *Marron v. United States*, 275 U.S. 192 (1927) (search of saloon operating when officers enter).

6. 331 U.S. 145 (1947).

7. 331 U.S. 145 (1947) (Frankfurter's dissenting opinion).

8. It is clear that to a considerable extent the *Trupiano* rule was, in reality, created by Justice Douglas, since it was his shift from the position he took in the *Harris* case that caused the Court to reverse itself.

9. A car in the yard was searched but it appears this was not an important element as any material taken from it was not used at the trial.

10. The court spoke in terms of whether or not it was reasonably practicable to obtain a search warrant, so that technically the test was one of practicability rather than necessity. However, the difference is purely one of semantics, inasmuch as the effect of the

Decisions indicated inherent necessity existed when the person of the arrestee was searched for weapons (in order to protect the arresting officer), or when a movable vehicle was searched.<sup>11</sup> However, the premises upon which an arrest was made could be searched without a warrant only if the need for a search warrant appeared for the first time after the arrest had been made,<sup>12</sup> or an immediate arrest was necessary to protect human life.<sup>13</sup> As a practical matter this prevented the search of premises without a warrant.

This doctrine was readily enforced by the lower federal courts.<sup>14</sup> Throughout the two year period in which inherent necessity was the governing law there is no reported case of a court finding conditions which justified the failure to obtain a warrant. But undoubtedly law enforcement officers felt it hampered their activity.<sup>15</sup> The technicalities involved in swearing out a warrant,<sup>16</sup> together with the resulting danger that some omission would invalidate the whole search made officers reluctant to search without a warrant.<sup>17</sup> Added to this were the practical difficulties involved in the extra step of obtaining a warrant when the officers feared that a trap might be sprung or warning reach the criminals.<sup>18</sup> In addition, each officer knew that his decision that an "inherent necessity" existed would be reviewed many months or years later by a court which could never completely comprehend the factors affecting his decision. These considerations undoubtedly spurred the Justice Department's continued opposition to the inherent necessity doctrine.

### *The New Rule*

The inherent necessity doctrine was specifically overruled by the *Rabinowitz* decision. The majority of the Court stated that the opportunity to obtain a warrant, which was the single test of the *Trupiano* case, was only one of a number of factors to be considered in determining the reasonableness of a search incident to an arrest.<sup>19</sup> In addition the opinion indicated that each

courts determination was that if it was not inherently necessary then it was not reasonably practicable.

11. See *Rabinowitz v. United States*, 339 U.S. 56 (1950) (Frankfurter's dissenting opinion). The right to search a car without a warrant was generally recognized before the *Trupiano* decision. *Carroll v. United States*, 267 U.S. 132 (1925) (search of car justified where recognized as belonging to person who previously offered to sell illegal liquor to federal agent); *United States v. Physics*, 175 F. 2d 333 (2d Cir. 1949) (call from superior officer not sufficient to justify search of a car unless shown superior officer had evidence sufficient to cause reasonable man to believe the car contained contraband); *Brinegar v. United States*, 338 U.S. 160 (1949) (probable cause for search where auto heavily laden and driver a known bootlegger).

12. See *Rabinowitz v. United States*, 339 U.S. 56, 85 (1950).

13. See *McDonald v. United States*, 335 U.S. 451 (1948).

14. *United States v. Rabinowitz*, 176 F. 2d 732 (2d Cir. 1949) (lower court decision decided on basis of no inherent necessity); *United States v. Asendio*, 171 F. 2d 122 (3d Cir. 1948) (fact party packing bags to depart not sufficient grounds to find inherent necessity); *Hart v. United States*, 162 F. 2d 74 (10th Cir. 1947) (arrest at home and search of car denied on basis of no inherent necessity).

15. For example see *McDonald v. United States*, 335 U.S. 451 (1948).

16. To obtain a search warrant officers must appear before a U. S. Commissioner, state judge of record, or federal judge and present a sworn affidavit from which the court can determine if there is probable grounds to justify a search. Rule 41c, 18 U.S.C.A. post §467, 54 STAT. 688 (1940).

17. *United States v. Pollack*, 64 F. Supp. 554 (D.C. N.J. 1946) (authority of warrant vitiated where person giving information not sworn).

18. According to an estimate by an Assistant United States District Attorney the mechanics of obtaining a warrant, once the agent arrives at the Commissioner's office, ordinarily takes from twenty minutes to an hour.

19. The court listed five factors considered in upholding the search: (1) search incident

search and seizure case must be judged upon its own facts rather than according to any established rule. Although the *Rabinowitz* case does not set out precise standards, it does indicate factors to guide those who are confronted with the problem.

It is clear from the language of the Court and the facts of the *Rabinowitz* case that the intention of the Court was not to permit general searches without limitation. Consequently officers desiring to do the safest thing should act as if the *Trupiano* rule were still in force. They can avoid the danger of having a search declared illegal and the seized evidence suppressed by always obtaining a search warrant. Assuming, however, that the officer is searching without a warrant after an arrest, the opinion indicates his conduct must be fashioned in accordance with two important rules. First, the search must be made in good faith for objects capable of seizure that the officer has reason to believe are present;<sup>20</sup> and second, it must be confined to the area under the immediate control of the arrestee.<sup>21</sup> The first requirement adds specificity to the search, and tends to prevent a general ransacking of the premises.<sup>22</sup> The second limitation is a more perplexing factor to deal with inasmuch as once a search is allowed to extend beyond the person of the arrestee it is difficult to find a logical terminal point on the basis of control.<sup>23</sup> Possibly the Court means that the search incident to the arrest may only extend to the room in which the arrest is made or to the immediately adjacent rooms. But to impose a strict rule, dependent as it would be upon arbitrary lines based on area and architecture, may well lead to unreasonable results.<sup>24</sup> Rather it would appear that the Court would apply a reasonableness test to the definition of "control," such that in one case an entire house might be lawfully searched, and in another, depending upon the circumstances, such action would be unlawful. In short, since there is no precise definition given by the court for "premises under the immediate control of the arrestee," a test of reasonableness must be applied.<sup>25</sup>

Underlying any decision as to the legality of a search will be the consideration of two other factors, namely, the type of premises being searched and the nature of the articles being sought. Business premises, open to the public, have not been regarded in the same light as a private home,<sup>26</sup> so that perhaps the search of a shop or warehouse may be viewed more leniently than that of the private dwelling. Moreover, if the search uncovers goods which are con-

to a valid arrest, (2) place of search was a business premise, (3) room was small and under immediate control of defendant, (4) search did not extend beyond the room, and (5) possession of stamps was a crime.

20. Generally, only stolen goods, the instrumentalities of the crime, and contraband can be seized. For discussion see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1 (1930); Note, 129 A.L.R. 1296.

21. *Agnello v. United States*, 269 U.S. 20 (1925) (right to search premises on which a felony was committed does not justify search of house two blocks away). *But see Gay v. United States*, 8 F. 2d 219 (9th Cir. 1925) (search beyond house allowed).

22. For cases declaring searches to be too general see *United States v. Lefkowitz*, 285 U.S. 452 (1932) (search of business premises on which no grounds to believe contraband exists is illegal); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (general search of office disallowed where no evidence that liquor was kept there).

23. For discussion see Frankfurter's dissenting opinion in the *Rabinowitz* case.

24. By way of illustration it would certainly seem unreasonable that officers could search a combination living and dining room but that both could not be searched if a screen were separating them.

25. Although such a test is admittedly not a good guide for police officers, it nonetheless puts them on notice that their action has limitations.

26. This distinction has been made previously and not observed. Compare *Davis v. United States*, 328 U.S. 582 (1945) (search for gasoline coupons in filling station) with *Harris v. United States*, 331 U.S. 145 (1947).

traband, there is reason to believe the search is more likely to be upheld.<sup>27</sup> One reason is that in this situation the officers are arresting for a crime committed in their presence and immediate action should be allowed. These underlying factors together with the limitations set out in the preceding paragraph must be considered in every search.

There are now two common situations surrounding an arrest in which it would appear that a search may safely be made without obtaining a warrant. One is where a valid arrest occurs in a small business shop and the officers have cause to believe contraband or stolen goods are concealed therein.<sup>28</sup> The *Rabinowitz* decision indicates this may be true even though the object sought is not in plain view.<sup>29</sup> The other type of situation is where officers actually see a crime being committed. In this situation immediate action is necessary so that the officer can arrest and search for the evidence that is likely to be present.

### Conclusion

The difficulty involved in determining how far an officer can search in connection with an arrest is clearly illustrated by the Supreme Court's complete reversal of position within a two year period. Any evaluation of the problem necessitates the weighing of two important factors, namely, the practical aspect of law enforcement and the security given the individual by the Fourth Amendment. The *Trupiano* case, by requiring law enforcement officers to obtain a search warrant, indicated that the fear of encroachment on the individual's right to be safe from unreasonable searches and seizures was the dominant factor to be considered. Although unquestionably hampering police officers, the *Trupiano* decision had the important advantage of establishing a rule that officers knew had to be complied with in order to have effect given to their action. Rather than take the chance that seized evidence would be suppressed by a court looking at the facts in an objective fashion, officers were forced to make it a point to secure a warrant.<sup>30</sup> The inherent necessity exception was limited to searches for the protection of the arresting officers and therefore gave federal officers little leeway in avoiding the necessity of a search warrant.

Conceptually, the *Harris* case stands at the opposite pole from the *Trupiano* rule. By allowing arresting officers to make an extensive search without a warrant the court indicated that the practical aspect of law enforcement was to be paramount, and the fear of abuse of an individual's right by searches without a warrant under the guise of a search incident to an arrest was secondary. Such an approach could conceivably lead to the virtual extinguishment of the rights protected by the Fourth Amendment. However, by its decision in the *Rabinowitz* case, the court has indicated that in spite of the

27. *Harris v. United States*, 331 U.S. 145 (1947). With the overthrow of the *Trupiano* rule, the *Harris* case has an increased significance and might well be cited as authority where contraband is seized.

28. An important problem left unanswered since the *Harris* case arises when officers searching as incident to an arrest find articles connected to an unrelated crime. The *Rabinowitz* decision by extending the authority to search incident to an arrest might indicate increased liberality in determining the legality of such contraband.

29. If the *Harris* case is brought back in full force by *Rabinowitz*, then a seizure of objects not in plain view could be made in a private dwelling house if the other circumstances were reasonable. However the court in the *Rabinowitz* case specifically stated that the fact the search was conducted on business premises was important; so to that extent the *Rabinowitz* qualification may well take precedence over the *Harris* case.

30. Unscrupulous police officers, by failing to obtain a warrant, may manage to nullify their own action, thus making a big splash without obtaining a conviction.