the Constitution.[27]

A case analogous to the instant case is *United States v. O'Brien*,[28] in which the Supreme Court held that destruction of a draft card in protest of the Viet Nam war was not protected speech under the first amendment. In that case, as in the instant case, the Court concluded that when "speech" and "non-speech" elements are combined in the same action, and the non-speech element is contrary to compelling governmental interest, the governmental interest will justify incidental limitations on first amendment freedoms.[29] Thus, even if the action is attached to a speech element, it may still be limited.

In the *O'Brien* case, the Court detailed tests to be applied in determining justifiable regulation of speech. The Court stated that the regulation must be within the constitutional power of the Government, must further an important or substantial governmental interest, must be unrelated to the suppression of free expression, and must be incidental to restrictions on first amendment freedoms.[30]

In *State v. Nelson*, the purpose of the regulation was to protect the public morals and, therefore, was within the power of the government.[31] The interest involved is unrelated to the suppression of free speech. Furthermore, the interest is of much greater significance than the incidental restriction of first amendment freedoms.[32] The students were not punished for their communications, but rather, for the form in which they expressed their communications. The students were punished for exposing their bodies.[33] The dissent stated that our democracy can withstand such conduct without resorting to criminal sanctions.[34] The dissent, however, fails to see that our democracy cannot withstand such an utter disregard of morality. These obscene actions are of such slight social value that the students' conduct ought not be protected.[35]

The Supreme Court of Iowa properly decided that the defendants violated Iowa's obscenity statute. One must accept limitations on free speech in order that all people may obtain the full benefits of democracy. Since the defendants' conduct was in opposition to a compelling governmental statute, the conduct could be regulated.

JAMES C. STEFFES

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[27] United States v. Smith, 249 F. Supp. 515, 518 (S.D. Iowa 1966), *aff'd*, 368 F.2d 529 (8th Cir. 1966); Central States Theatre Corp. v. Sar, 245 Iowa 1254, 1266, 66 N.W.2d 450, 457 (1954).

[28] 391 U.S. 367 (1968).

[29] *Id.* at 376.

[30] *Id.* at 377.

[31] 178 N.W.2d 434, 441 (1970). *See also* Gitlow v. New York, 268 U.S. 652, 666-67 (1925).

[32] Cox v. Louisiana, 379 U.S. 536, 554 (1965), states: "A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."

[33] 178 N.W.2d 434, 441 (Iowa 1970).

[34] *Id.* at 448.

[35] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

Criminal Law—EVIDENCE OBTAINED BY WARRANTLESS SEARCH OF A HOUSE FOLLOWING ARREST OF PERSON COMMITTING A CRIME IN THE OFFICERS' PRESENCE IS INADMISSIBLE IN STATE CRIMINAL PROCEEDINGS.—*Vale v. Louisiana*, (U.S. Sup. Ct. 1970).

Police officers obtained two warrants for Vale's arrest because his bond had been increased on a previous narcotics charge. They arrived at Vale's mother's house and watched for defendant. Shortly after their arrival, they observed defendant apparently make an illegal drug sale to a known addict in front of the house. When the policemen came forth to make the arrests, the addict swallowed something, apparently the evidence, and Vale hurriedly walked toward the house. He stopped on the front steps when officers told him he was under arrest. The officers searched the house, first to see that no one else was present, and secondly, to search for evidence. They found a quantity of heroin in the bedroom. Three minutes after the first search, Vale's mother and brother returned home. The Louisiana supreme court held that the defendant's fourth amendment rights had not been violated because the search occurred in "the immediate vicinity of the arrest" of Vale and was "substantially contemporaneous therewith."[1] On certiorari to the United States Supreme Court, *Held* reversed. For a search of a house to be incident to an arrest, the arrest must occur inside the house and not on the front steps outside. *Vale v. Louisiana*, 90 S. Ct. 1969 (1970).

In *Vale*, the Supreme Court has specifically drawn a line defining the reasonableness of a warrantless search of a house when that search is conducted incident to a lawful arrest. The arrest *must* have been made *inside* the house and the search must be limited to the room in which the arrest was made.[2] By drawing this line, the Supreme Court has disregarded the intent that the founding fathers had when they approved the amendment; it has disregarded the reasons for the exceptions to the prohibitions of the fourth amendment as set forth by the Court at earlier dates; it has made the prohibition of warrantless searches nearly absolute; and it has managed once again to tie the hands of the nation's law enforcement officers.

The founding fathers never intended that all searches without a warrant be prohibited or that the prohibition be absolute. The most obvious evidence of that is the wording of the fourth amendment itself. It states that the people shall be secure against all "unreasonable searches and seizures."[3] The Court has consistently held this to mean that only searches which are unreasonable are prohibited.[4] Conversely, assuming that reasonable searches are not pro-

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1 State v. Vale, 252 La. 1056, 1070, 215 So. 2d 811, 816 (1968).
2 90 S. Ct. 1969, 1971 (1970).
3 U.S. CONST. amend. IV.
4 Chimel v. California, 395 U.S. 752, 772 (1969) (dissenting opinion); Schmerber v. California, 384 U.S. 757, 768 (1966); United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Harris v. United States, 331 U.S. 145, 150 (1947); Carroll v. United States, 267 U.S 132, 147 (1925); Weeks v. United States, 232 U.S. 383, 390 (1914).

hibited, the obvious question arises in this situation as it does on many occcasions in the courtroom: What is reasonable?

In *Carroll v. United States*,[5] the Supreme Court said that the fourth amendment is to be construed in the light of what was considered an unreasonable search when it was adopted. Historically, the fourth amendment prohibition against unreasonable searches and seizures was created in reaction to and as a protection against general warrants and writs of assistance as they existed in England and the Colonies prior to the 1760's. The general warrant was created by the Star Chamber and was a weapon for suppressing political agitation.[6] Basically these warrants gave the officer permission to make a general search of any suspected places in order to find any materials which the suspect might have had that would incriminate him in libel against the government.[7] In *Entick v. Carrington*,[8] Lord Camden declared such searches strictly illegal, and the founding fathers, fearing the use of such warrants in the United States, clearly had such searches in mind when they prohibited unreasonable searches and seizures.[9]

In *Marron v. United States*,[10] the police entered the defendant's establishment with a search warrant in search of illegal liquor. They found the liquor, but also seized a ledger which was instrumental in convicting Marron on the liquor charge. The Court held that general searches have long been deemed to violate a person's fundamental rights and the ledger could not be legally seized under the guise of the search warrant.[11] However, because the crime of liquor sales was being committed in the presence of the officers, they had the right to arrest the defendant and to contemporaneously search the place in order to find instruments used to carry on the criminal enterprise. Thus, seizure of the ledger was held legal.[12]

In two later cases, the Court re-emphasized its prohibition against general searches. In *Go-Bart Importing Co. v. United States*[13] and in *United States v. Lefkowitz*,[14] the defendants were arrested for conspiracy to violate the prohibition act. A general search turned up evidence which convicted defendants in both cases. The Court held the searches illegal and distinguished them with *Marron* on two counts: 1) In *Go-Bart* and *Lefkowitz*, there was no crime being committed in the presence of the officers;[15] and 2) the searches in *Go-Bart* and in *Lefkowitz* were general, not specific.[16] The decisions of the Court distinguish searches of a suspect's house merely to find evidence of some

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5 267 U.S. 132, 149 (1925).
6 United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).
7 Boyd v. United States, 116 U.S. 616, 625 (1886).
8 19 How. St. Tr. 1029 (1765).
9 Boyd v. United States, 116 U.S. 616, 626 (1886).
10 275 U.S. 192 (1927).
11 *Id.* at 194.
12 *Id.* at 199.
13 282 U.S. 344 (1931).
14 285 U.S. 452 (1932).
15 *Id.* at 462; 282 U.S. 344, 357 (1931).
16 285 U.S. 452, 465 (1932); 282 U.S. 344, 358 (1931).

crime, yet unnamed, from searches such as those made to find illicit liquor in order to stop the commission of a crime.[17]

Marron had some very remarkable resemblances to *Vale*. The sale of illegally possessed contraband took place in the presence of the officers of the law. An arrest was made and a search was conducted specifically for the contraband materials in question. In neither case was there the dread general search; in both cases the officers were looking for specific evidence of a specific crime committed minutes earlier in their presence. Yet the first search was reasonable, and the second was not.

In defining reasonable searches, the Court has relied on more than merely an historical approach to the definition. Indeed, they have realized until now that there is no fixed formula as to reasonableness of a search, and that each case should be decided on its own facts and circumstances.[18] In *United States v. Rabinowitz*,[19] the Court said that there is no ready litmus paper test and that reasonableness is in the first instance for the district court to decide.[20]

Trupiano v. United States[21] was one of the few attempts made by the Court to develop a test. The Court there set forth the rule that law enforcement officers must secure and use search warrants "wherever reasonably practicable."[22] In *Rabinowitz*, two years later, the Court had second thoughts about the *Trupiano* rule. It said that it is fallacious to judge events retrospectively considering the time element alone. Time is a requirement but not a "*sine qua non* to the reasonableness of a search."[23] *Trupiano* was overruled and the Court returned to a flexible approach.

In *Chimel v. California*,[24] the Court seemingly reversed itself again. The officers obtained an arrest warrant and went to defendant's house to arrest him for robbery. They searched the house and found the stolen goods. In overturning Chimel's conviction, the Court commented on the fact that the police were able to obtain an arrest warrant and surely could have obtained a search warrant at the same time. They relied on *Trupiano* and said that *Rabinowitz*, as far as its principle is inconsistent with the ones set forth in *Chimel*, is not to be followed.[25]

The *Vale* Court seemingly argued that the search was unreasonable because the officers had time to obtain a warrant.[26] Justice Black, in his dissent, expressed the opinion that the Court mistook the facts because "the record con-

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17 285 U.S 452, 465 (1932).
18 Harris v. United States, 331 U.S. 145 (1947); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
19 339 U.S. 56 (1950).
20 *Id.* at 63.
21 334 U.S. 699 (1948).
22 *Id.* at 705.
23 339 U.S 56, 65 (1950).
24 395 U.S. 752 (1969).
25 *Id.* at 760-61. Rabinowitz however was not necessarily inconsistent with Chimel. Rabinowitz clearly said time "is a requirement . . . ." 339 U.S. 56, 65 (1950).
26 90 S. Ct. 1969, 1972 (1970); 90 S. Ct. 1969, 1975 (1970) (dissenting opinion).

clusively shows that there was no such opportunity here."[27] It is true that the police had warrants for Vale's arrest, but they were issued on another charge. Prior to the officers' arrival, there was no reason for them to believe that he should be searched. If it is assumed that the Court did not mistake the facts, the Court has in effect said that the police must obtain a search warrant before they search a house regardless of the amount of time they have available. Neither *Trupiano* nor *Chimel* was meant to be carried to this extreme in regard to the time element;[28] yet it is hard to believe that the Court would so flagrantly disregard the undisputed facts.

A second test of reasonableness that the Court has expounded is more often considered an exception to the strict application of the fourth amendment prohibition of warrantless searches. The exception states that a police officer has the right to conduct a warrantless search when the search is incident to and contemporaneous with a legal arrest.[29] In *Weeks v. United States*,[30] the Court noted that this right of the government has always been recognized in England and America.[31] The reason for such warrantless searches is to discover and seize the fruits and the evidence of the crime.[32] The Court later explained this doctrine further by stating that the search may be to find the means by which the crime was committed and to find weapons and other means of making an escape.[33]

Carroll v. United States[34] was a landmark case which extended the legal warrantless search to the automobile in which defendant was traveling when arrested for violating the prohibition act. The Court said that whatever was found on the defendant's person or in his control which was unlawful for him to have may be seized and be used as evidence against him.[35] This was particularly necessary where an automobile was involved because of its mobility and the ease by which someone in the car could take the evidence and dispose of it.[36] Thus, the Court had made the exception to the prohibition of warrantless searches applicable for three purposes. The search may be conducted incident to and contemporaneous with a legal arrest for the purpose of finding weapons which would endanger the officers and could lead to an escape of the prisoner; for the purpose of finding evidence which might easily and quickly be destroyed or disposed; and for the purpose of retrieving evidence from movable

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27 *Id.* at 1975.

28 Chimel v. California, 395 U.S. 752, 773 (1969) (dissenting opinion); Trupiano v. United States, 334 U.S. 699, 705 (1948).

29 Shipley v. California, 395 U.S. 818, 819 (1969); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 299 (1967); Stoner v. California, 376 U.S. 483, 486 (1964); Harris v. United States, 331 U.S 145, 150 (1947); Marron v. United States, 275 U.S. 192, 199 (1927); Agnello v. United States, 269 U.S. 20, 32 (1925); Weeks v. United States, 232 U.S. 383, 392 (1914).

30 232 U.S. 383 (1914).

31 *Id.* at 392.

32 *Id.*

33 Agnello v. United States, 232 U.S. 20, 30 (1925).

34 267 U S. 132 (1925).

35 *Id.* at 158.

36 *Id.*

vehicles to prevent its disposal.[37]

These three purposes are indisputable, but the application of the exception required a definition as to the permissible extent of the search. In *Agnello v. United States*,[38] the Court attempted to answer the question in a case where Agnello was arrested and taken several blocks to his house for the search. The Court held that the search was not incident to the arrest and said that the officers may search the place where the arrest was made but the right of search does not extend to other places.[39] In *Marron v. United States*,[40] the Court upheld the seizure of the ledger and stated that the officers' authority to stop the nuisance extended to all parts of the premises used for the unlawful purpose.

Ker v. California[41] was a case very similar to *Vale* in which the officers observed a sale of marijuana by the defendant. After losing Ker in the ensuing high speed chase, they went directly to his apartment, entered without a warrant, arrested him, and seized a block of marijuana. The Court upheld his conviction and said that the officers had reason to act quickly because of "Ker's furtive conduct" and the likelihood that he would have distributed the marijuana or destroyed it before a search or arrest warrant could be obtained.[42] The Court seemed to be saying that it was proper to search the apartment without a search warrant where it was reasonable to believe that the evidence would otherwise be destroyed. In *James v. Louisiana*,[43] the Court held that the search was not incident to the arrest where the police arrested the defendant two blocks from his house.

In *Chimel*, the Court recognized the very real problem of the police waiting to arrest the individual until he is home. By so doing, they can conduct a warrantless search "incident to the legal arrest." As the dissenting opinion in *Rabinowitz* had warned, it is little consolation to know that one's house is free from search and seizure as long as one is not in it.[44] The *Chimel* Court concluded that *Harris* and *Rabinowitz* were no longer to be followed to the extent that they allowed a warrantless search of the entire premises incident to a lawful arrest.[45] Rather, the area subject to warrantless search is that area within

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[37] Schmerber v. California, 384 U.S. 757, 768 (1966); Preston v. United States, 376 U.S. 364, 367 (1964); Ker v. California, 374 U.S. 23, 42 (1963); United States v. Jeffers, 342 U.S. 48, 52 (1951); United States v. Rabinowitz, 339 U.S. 56, 61 (1950); McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 15 (1947); Harris v. United States, 331 U.S. 145, 154 (1948); Marron v. United States, 275 U.S. 192, 199 (1927); United States v. Francolino, 367 F.2d 1013, 1017 (2d Cir. 1966); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1965).

[38] 269 U.S. 20 (1925).

[39] 269 U.S. 20, 30, 31 (1925); *accord*, Stoner v. California, 376 U.S. 483, 486 (1964).

[40] 275 U.S. 192, 199 (1927); *accord*, United States v. Rabinowitz, 339 U.S. 56, 61 (1950); Davis v. United States, 328 U.S. 582 (1946); Sayers v. United States, 2 F.2d 146, 147 (9th Cir. 1924).

[41] 374 U.S. 23 (1963).

[42] *Id.* at 42

[43] 382 U.S. 36 (1965).

[44] 339 U.S. 56, 81 (1950).

[45] 395 U.S. 752, 761 (1969).

which he might gain possession of either a weapon or destructible evidence.[46] The Court said that there was no authority for searching any room other than the one where the arrest was made nor was there authority for searching concealed areas within that room.[47] After many decades of difficulty in following the guidelines of reasonableness, *Chimel* was seen as setting a "workable guideline for the scope of a search incident to a lawful arrest."[48]

In *Vale*, the Court relied heavily on *Chimel* and specifically cited the "immediate vicinity" rule.[49] The Court argued, and rightly so, that only in " 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional scrutiny."[50] The Court then listed several such situations and said that they do not exist here. The officers were not in hot pursuit of a fleeing felon.[51] This is in contradiction to the accepted facts. The police had seen an illegal drug sale; and the salesman was fleeing to his house for reasons unknown to the pursuing police officers. This is hot pursuit. There was no emergency.[52] But, what is an emergency? The Court has previously defined an emergency as a situation "in which delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of the evidence.' "[53] Finally, the Court said that the goods ultimately seized were not in the process of destruction.[54] The Court has never before held that the goods must be "in the process of destruction" nor do the cases cited by the Court support such a rule.[55] Indeed the Court has said that the evidence need only be "threatened with . . . destruction."[56]

It is at this point that the Court has become so absorbed in maintaining the *Chimel* rule, which defines the permissible extent of a warrantless search incident to arrest, that it has disregarded one of the purposes for such searches, *i.e.*, to *prevent* destruction of the evidence. Whereas in *Chimel* the Court said that the police may search the immediate vicinity to prevent destruction of the evidence, in *Vale* it said that the police can only search once they are satisfied that the evidence is in fact being destroyed. By seemingly eliminating the prevention of destruction of evidence as a purpose of a warrantless search, the Court in effect makes the prohibition of warrantless searches nearly absolute. Where it takes only a few seconds to destroy the evidence (as with narcotics), the police need not search at all if they cannot begin until the evidence is being destroyed. It is somewhat ironic that this elaboration of *Chimel* arises out of

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46 *Id.* at 763.
47 *Id.*
48 23 S.W. L.J. 959, 963 (1969). *But see* Harris v. Illinois, 97 Ill. App. 2d 288, 240 N.E.2d 123 (1968), *cert. denied*, 395 U.S. 985 (1965); Mahoney v. LaVallee, 396 F.2d 887 (2d Cir. 1968), *cert. denied*, 395 U.S. 985 (1969).
49 90 S. Ct. 1969, 1971 (1970).
50 *Id.* at 1972.
51 *Id.*
52 *Id.*
53 Schmerber v. California, 384 U.S. 757, 770 (1966); *see also* United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948).
54 90 S. Ct. 1969, 1972 (1970).
55 *Id.* at 1974 (dissenting opinion).
56 *Id.*

circumstances extremely different from those in *Chimel*. There the Court feared the police tactic of waiting to arrest the individual until he was home so a search incident to the arrest could be made. Here the police had no such ulterior motive; in fact, they waited until defendant left the house to arrest him. Yet the *Chimel* rule was still applied.

In a case decided with *Chimel*, *Shipley v. California*,[57] the Court stated that it had never held that a person could be arrested outside his home and then taken inside for a warrantless search.[58] Where the police had arrested the defendant as he stepped out of his car and then conducted a warrantless search of him, his car, and his house, the search could not be upheld under the fourth and fourteenth amendments as incident to his arrest because the search of the house extended without reasonable justification beyond the place in which he was arrested.[59] Extending this view, *Vale* seems to draw the line defining "immediate vicinity" at the threshold of the door of the house, even though the arrest occurred on the porch of the house. This view seems to be drawing subtle distinctions between what is the house and what is not and seems to disregard the facts indicating "reasonable justification" for searching the house. Indeed, it seems to even disregard the view the Court implied in *Shipley*, that there may be a reasonable justification for a search of the house after an arrest outside of it.

The application by the court of *Chimel* and *Shipley* appear as an obvious attempt to maintain a guideline regardless of circumstances. As the Court in *Ker* pointed out in referring to the decision of *Mapp v. Ohio*,[60] *Mapp* did not set a fixed formula for application of the fourth amendment because the Court realized that it would be faced with recurring questions of reasonableness of searches.[61] *Vale* seems to indicate that the Court has had a change of mind, and that now a satisfactory test of reasonableness can be had without reference to the circumstances of the case.

The problems presented by these cases for the law enforcement officers are obvious. The rule seems to be that a search warrant must be obtained by an officer whenever it is at all possible. No longer can the officer judge on the spur of the moment whether obtaining a warrant is reasonably practical under the circumstances. Now he must consider whether it is possible to obtain a warrant. If it is at all possible, he has no choice but to leave the scene of the crime and go for a warrant. This will necessitate leaving an officer to guard the premises, in case someone who may lawfully be there is present or soon returns, as in *Vale*. The officer must either prohibit entry to this person or follow him around the house so that he will not destroy the evidence. Procedure such as this would surely be equally offensive and violative of the rights of

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57 395 U.S. 818 (1969).
58 *Id.* at 819.
59 *Id.*
60 367 U.S. 643 (1961).
61 Ker v. California, 374 U S. 23, 32 (1963).

privacy as an initial warrantless search for a specific item would have been.[62] This is not to mention the questionable legality of the procedure or the futility of the procedure if one officer remains and two persons return or five officers are present and six persons return to the house. In effect, *Vale* strictly limits the flexibility of the police officer in his fight against crime, in spite of the Court's guarantee in *Rabinowitz* that some flexibility will be accorded law officers engaged in daily battle with criminals.[63]

The Court in *Vale* seems determined to maintain the *Chimel* and *Shipley* rules at all costs, including the release of criminals caught committing the crime in the presence of an officer of the law. It can only be hoped that in the Court's tradition of inconsistency displayed as late as 1969,[64] it will revert to the rule of reasonableness in light of the circumstances as espoused by the founding fathers in the fourth amendment and by earlier Courts.

DOYLE D. SANDERS

Torts—ACCOUNTANTS ARE LIABLE TO THIRD PARTIES FOR NEGLIGENT MISREPRESENTATION WHEN BOTH THE NATURE OF THE TRANSACTION AND THE GROUP TO WHICH THE THIRD PARTY BELONGS ARE KNOWN TO THE ACCOUNTANT—*Ryan v. Kanne* (Iowa 1969).

Defendant Kanne owned two lumber companies and sought to reorganize his operations. At the insistence of a creditor, Mid-States Enterprises, Inc., Kanne contracted with the plaintiff, a certified public accountant, to prepare financial statements. The plaintiff negligently understated "Accounts Payable—Trade," in excess of $23,000 and as a result the defendants refused to pay the accounting fees. Plaintiff brought this action to recover his fees against Kanne, Kanne Lumber and Supply, Inc. and Mid-States Enterprises, Inc. and Kanne Lumber and Supply, Inc. counterclaimed against plaintiff for damages. The trial court rendered a judgment in favor of Kanne Lumber and Supply, Inc. for the damages resulting from the negligent misrepresentation by the plaintiff. The court also rendered a judgment against all defendants for the fees, since plaintiff's services were not, as a matter of law, so negligently performed as to be completely valueless. All parties appealed. *Held*, modified and affirmed, one justice dissenting. Certified public accountants who are negligent in the preparation of accounting statements are liable to third parties who have relied on those statements to their detriment, though such parties are not in privity. The accountant, however, must have known before the statement was submitted that

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[62] Chimel v. California, 395 U.S. 752, 774 (1969) (dissenting opinion); Comment, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L. REV. 433, 446 (1969).

[63] 339 U.S. 56, 67 (1950).

[64] *See* authorities cited note 48 *supra*. *See also* 395 U.S. 752, 770 (1969) (dissenting opinion).

such statement was intended for the guidance of the injured party. *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969).

In 1842, Lord Abinger announced that where the parties had a contract, and a third party was injured as a result of the negligent performance of the contract, the injured third party could not sue on the contract. He held that there was a lack of privity and, therefore, a lack of duty, which is required for negligence.[1] Subsequently, courts found that recognition of privity as a condition to recovery in tort often led to placing an unjustifiable burden on innocent third parties. Consequently, a series of increasingly liberal "exceptions" evolved so that by 1960, the requirement of privity had been "relaxed" to the point of extinction with regard to products liability suits for personal injuries.[2] By 1968, the requirement was abandoned with regard to suits for negligence involving simple pecuniary losses.[3] The principal reason for limiting recovery to plaintiffs in privity with the accountant is a practical consideration. Lack of privity would open the door to potentially large and unpredictable liability of the negligent party.[4] Although some courts still find this rationale persuasive,[5] a majority of other courts, and the Iowa court in the instant case, have rejected it.[6] Apparently, these courts feel that they have been able to define a limited group to whom it is reasonable to hold the negligent party liable without potentially unlimited liability.[7] This group definition did not occur, however, without a substantial history of gradual judicial development.

In 1889, an English court[8] established an action for deceit which allowed recovery for fraudulant misrepresentations. The English courts reasoned that fraud could be based on either knowingly false statements or statements made with a reckless disregard for the truth.[9] An American court, however, pointedly observed that fraudulant misrepresentations were not the same as negligent misrepresentations, and therefore, where there was no allegation of fraud, recovery was barred.[10] Subsequently, another American court, nevertheless, allowed recovery for negligent misrepresentations based on the concept of a third party beneficiary contract. In *Glanzer v. Shepard*,[11] a bean merchant contracted with a public weigher to weigh bean bags to be sold to the plaintiff. The

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1 Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Ex. 1842).

2 Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); *see* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

3 Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D.R.I. 1968). *See generally* Annot., 54 A.L.R.2d 324 (1957).

4 Hedley, Byrne & Co., Ltd. v. Heller & Partners, Ltd. (1964) A.C. 465, 482-83. *See* Levitin, *Accountants' Scope of Liability for Defective Financial Reports*, 15 HASTINGS L.J. 436 (1964).

5 *See, e.g.*, Investment Corp. of Florida v. Buckman, 208 So. 2d 291, 296 (Fla. 1968).

6 *See, e.g.*, Ryan v. Kanne, 170 N.W.2d 395, 401 (Iowa 1969).

7 *Id.* at 401.

8 Durry v. Peek, 14 A.C. 337 (1889).

9 *Id.* at 340.

10 Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919).

11 233 N.Y. 236, 135 N.E. 275 (1922).