CAR 54—HOW DARE YOU!: TOWARD A UNIFIED THEORY OF WARRANTLESS AUTOMOBILE SEARCHES

ELDON D. WEDLOCK, JR.*

I. INTRODUCTION: CAUTION—ROAD HAZARD

The automobile is the primary form of passenger transportation in the United States, and many, if not most Americans spend a significant portion of their lives driving or riding in motor vehicles. Countless tradespeople, artisans, and laborers spend their work day with a car or truck close at hand. To some, motor vehicles serve as mobile offices and communication centers. To others, cars and trucks are hobbies and sources of recreation in which a great deal of leisure time is spent. Some people, whether by choice or misfortune, even live in their vehicles. More than a few of us were conceived upon four or more wheels. From its humble beginnings as a novelty for the rich and eccentric, the automobile, today, is symbolic of America and the freedom of its people. There are few possessions in which Americans have greater pride, need, or affection.

It should not be surprising that automobiles are prime targets for police searches. Few areas can yield as much information about an individual and his or her activities as the automobile. In fact, many cases involve evidence discovered by police in the course of a search of a suspect's automobile. Virtually all of this evidence is found without the aid of a warrant. Yet, despite sixty years of case law concerning when such searches are reasonable under the Fourth Amendment, the Supreme Court's decisions in this area are less than clear or satisfactory.[1]

---

* David Harper Means Professor of Law, University of South Carolina School of Law. The author wishes to thank his colleagues, Professors William Shepard McAninch, Patrick H. Hubbard, David K. Linnan, and Rachel J. Beckford, for their criticisms and suggestions. The author would also like to thank Ira Glasser for suggesting the opening line of the title. All unfortuitous representations herein made, however, are the sole responsibility of the author.

1. *See, e.g.*, Thomas J. Gleason, Comment, *The Fourth Amendment Seen through the Automobile Exception: An Example of the Supreme Court's Failure to Define the Warrant Requirement*, 15 SW. U. L. REV. 397 (1985); Shauna S. Brennan, Note, *The Automobile Inventory Search Exception: The Supreme Court Disregards Fourth Amendment Rights in* Colorado v. Bertine—*The States Must Protect the Motorist*, 62 NOTRE DAME L. REV. 366 (1987); Steven M. Christenson, Comment, Colorado v. Bertine *Opens the Inventory Search to Containers*, 73 IOWA L. REV. 771, 789 (1988); *see also infra* note 230.

The Fourth Amendment clearly mandates searches and seizures conducted pursuant to the authority of warrants, issued upon probable cause, where the place to be searched and the person or things to be seized are described with particularity. Searches and seizures conforming to the warrant requirements are not unreasonable.[2] The text of the amendment does not, however, reveal whether warrantless searches are ever reasonable, and, if they are, under what circumstances. Nevertheless, the courts have not read the amendment as a per se proscription of warrantless searches. In fact, warrantless searches are valid in a variety of circumstances, if they are considered a reasonable exercise of law enforcement authority.[3]

Some of the exceptions to the warrant requirement are recognized as a matter of common law. However, the common law is of little value in determining whether a warrantless search of a private automobile is reasonable or not. Eighteenth century American society was not a highly mobile one, and its culture did not include anything like today's use of private automobiles. It is therefore difficult to assess what the founders would have thought of an exception to the warrant requirement that would open such a vast and intimate area of personal activity to governmental intrusion without prior magisterial approval.

This article reviews the development of the law of warrantless searches of automobiles and their contents under the various exceptions allowed: the automobile exception, search incident to arrest, and the inventory search. The article will analyze the effects of decisions in other areas of search and seizure law which have had collateral effects on automobile search law. It will argue that present automobile search law has strayed far from the meaningful control of the Fourth Amendment. It will suggest a reform that

---

2. The right of the people to be secure in their persons, houses, papers, and effects, from unreasonable search and seizure, shall not be violated, and no Warrant shall issue, except upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. A warrantless search of the person and area in the immediate control of an arrestee may be made incident to the arrest. Chimel v. California, 395 U.S. 752 (1969); New York v. Belton, 453 U.S. 454 (1981). A warrantless search may be made of an automobile upon probable cause. Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); California v. Carney, 471 U.S. 386 (1985). A warrantless search of an area may be made during the hot pursuit of a suspect. Warden v. Hayden, 387 U.S. 294 (1967). Warrantless searches may be made in enforcing certain noncriminal regulatory regimes. United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (highway search for undocumented aliens); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (employee drug testing); New York v. Burger, 482 U.S. 691 (1987). A warrantless search for weapons on reasonable suspicion may follow a "stop" for investigation. Terry v. Ohio, 392 U.S. 1 (1968). Incoming foreign mail may be opened without a warrant. United States v. Ramsey, 431 U.S. 606 (1977). A warrantless search may proceed upon consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

would provide clear guidance for the courts and police and would allow the motoring public to drive free from the threat of unreasonable searches and seizures. Finally, the article will analyze how the suggested reform may, or may not, be reconciled with current case law.

II. THE FIRST FORTY-FIVE YEARS

A. *The "Automobile Exception"* & Carroll v. United States

Searches of automobiles presented few cases to the courts before the advent of the Prohibition Era.[4] The Eighteenth Amendment[5] and the National Prohibition Act[6] were preceded by a number of state statutes which made the manufacture, sale, and transportation of liquor a crime.[7]

Prohibition laws propagated a vast body of search and seizure law, and it is no surprise that a large part of this law involved automobiles. Even before *Carroll v. United States*[8] was decided in 1925, there was a considerable body of case law upholding the seizure of liquor from automobiles.[9] Liquor could be seized upon service of a valid search warrant, but courts had upheld warrantless searches as well.[10]

Although it was often unclear from these decisions what the legal foundation for upholding the search was, three themes predominated. A valid search could be made incident to the arrest of an occupant; it could proceed on the grounds that the automobile transporting contraband was itself subject to seizure for forfeiture, and once seized it could be searched; or the search could proceed upon reasonable suspicion.[11]

---

4. *See* Annotation, *Searches & Seizures*, 7 A.L.R. 1888-1918, 8659 (1922); Annotation, *Constitutional Guarantees Against Unreasonable Searches and Seizures as Applied to Search for or Seizure of Intoxicating Liquor*, 3 A.L.R. 1514 (1919).

5. "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1, *repealed* by U.S. CONST. amend. XXI, § 1.

6. ch. 83, 41 Stat. 305 (1919) (repealed 1933).

7. *E.g.*, 1917 Mich. Pub. Acts 161.

8. 267 U.S. 132 (1925).

9. *See* Annotation, *Constitutional Guarantees Against Unreasonable Searches and Seizures as Applied to a Search for or Seizure of Intoxicating Liquor*, 39 A.L.R. 811 (1925); Annotation, *Constitutional Guarantees Against Unreasonable Searches and Seizures as Applied to a Search for or Seizure of Intoxicating Liquor*, 27 A.L.R. 709 (1923); Annotation, *Constitutional Guarantees Against Unreasonable Searches and Seizures as Applied to a Search for or Seizure of Intoxicating Liquor*, 13 A.L.R. 1316 (1921); Annotation, *Construction and Effect of the Volstead Act*, 10 A.L.R. 1553 (1921); 3 A.L.R. at 1514.

10. 39 A.L.R. at 829-32; 27 A.L.R. at 733-39.

11. 39 A.L.R. at 816-23; 27 A.L.R. at 715-24.

The latter rationale appeared in most of the early cases upholding searches of automobiles for liquor. It was generally based on language in the relevant prohibition statute authorizing seizure of the liquor upon discovery by the enforcement agents.[12] Early on, power to search was limited with respect to houses and other premises. However, when it was applied in an automobile context, together with other applicable theories, the search and subsequent seizure were deemed valid.[13] This fact often made the road less than open.

The first time the United States Supreme Court addressed the issue of whether warrantless searches were reasonable in the automobile context was in the Prohibition Era case of *Carroll v. United States*.[14] In *Carroll*, the defendants were returning to Grand Rapids, Michigan, from Detroit, then a recognized center for illegal importation of liquor from Canada.[15] Their car was stopped by two federal prohibition agents.[16] The defendants were "known" bootleggers,[17] and the agents had been involved in an earlier unsuccessful undercover attempt to purchase liquor from them.[18] On one prior occasion, the agents had unsuccessfully attempted to follow these bootleggers to Detroit.[19] Based upon these experiences, the agents concluded that the defendants were probably transporting contraband liquor.[20] The automobile was stopped, and during the course of a warrantless search of the automobile, the agents discovered sixty-eight bottles of liquor hidden behind the upholstery of the seats.[21] The defendants were arrested[22] and

12. *Id.*
13. *Compare* 27 A.L.R. at 711-15 *with* 27 A.L.R. at 733-39 *and* 39 A.L.R. at 829-32.
14. 267 U.S. 132 (1925).
15. *Id.* at 160.
16. *Id.* at 135-36.
17. *Id.* at 134-35.
18. *Id.* at 135.
19. *Id.*
20. *Id.* at 134-36.
21. *Id.* at 136.
22. Note that the search was conducted prior to arrest. *Id.* at 159. Although the agents had probable cause that the defendants were committing a crime by possessing contraband liquor, this offense was only a misdemeanor. National Prohibition Act, ch. 85, § 29, 41 Stat. 305, 316 (1919) (setting penalty at less than a year); Act of Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1088, 1152 (defining offenses with penalties less than one year as misdemeanors). An officer could not effect a warrantless arrest for a misdemeanor unless it was committed in his presence. *Carroll*, 267 U.S. at 156-57; Kurtz v. Moffitt, 115 U.S. 487 (1885) (arrest for desertion without a warrant unlawful since desertion not a felony); John Bad Elk v. United States, 177 U.S. 529 (1900) (arrest without warrant unauthorized in absence of common law right or congressional permission). The arrest could not occur until the officers actually viewed the contraband. *Carroll*, 267 U.S. at 158. For a detailed and prophetic analysis of this and other aspects of *Carroll*, see Forrest R. Black, Comment, *A Critique of the Carroll Case*, 29 COLUM. L. REV. 1068 (1929), one in a series of articles entitled "Ill Starred Prohibition Cases."

subsequently convicted of violating the National Prohibition Act.[23] They appealed their conviction on the ground that the warrantless search and seizure of the vehicle violated their Fourth Amendment rights, and that failure to suppress the evidence at trial was reversible error.[24]

The United States Supreme Court disagreed with the defendants' assertions and upheld the warrantless search. Chief Justice Taft, in his majority opinion, articulated the parameters of the Fourth Amendment protection afforded to automobile operators:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, 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.[25]

The decision in *Carroll* did not rest on any distinction between the interests of passengers in, or owners of, vehicles and those located in houses and other permanently affixed structures.[26] The exception was based on the nature of the place to be searched; thus, *Carroll* did not stand for the proposition that automobiles are generally less worthy of Fourth Amendment protections. Rather, *Carroll* refused to permit automobiles, and their operators, to enjoy a practical advantage over fixed structures by virtue of their mobility. The narrow exception to the warrant requirement merely offset the jurisdictional limits of the warrant. It did not, as a general rule, render vehicles easier to search than houses.[27] Under *Carroll*, the warrantless search of a car could be upheld only if the search was based upon probable cause to believe the car was transporting contraband liquor.[28]

The *Carroll* exception was very limited. An important predicate for *Carroll* was the fact that Congress had *statutorily* exempted searches of automobiles for one item, liquor, from the warrant requirement.[29] In up-

---

23. *Carroll*, 267 U.S. at 136.

24. *Id.* at 134.

25. *Id.* at 153.

26. *But see* Cardwell v. Lewis, 417 U.S. 583 (1974), discussed *infra* at text accompanying notes 185-215.

27. *Carroll*, 267 U.S. at 156.

28. *Id.* at 160-61.

29. Through statutory construction and legislative history, the Court concluded that Congress wished to unchain searches of vehicles from the warrant requirement when there was probable cause that they contained contraband liquor. *Carroll*, 267 U.S. at 143-47. The 1923 amendment was apparently a reaction to judicial approval of overzealous enforcement of § 29.

holding the search in *Carroll*, the Court only authorized warrantless searches of automobiles for liquor and only under the specific terms of the National Prohibition Act.[30] Automobiles in other circumstances were still protected by the warrant requirement.[31]

Between 1925 and 1969, the United States Supreme Court invoked the *Carroll* rule to uphold the warrantless search of an automobile on three occasions.[32] Each case involved a search for contraband liquor, although only *Husty v. United States*[33] was decided under the direct authority of the National Prohibition Act.

In *Scher v. United States*,[34] revenue agents discovered untaxed liquor[35] in a vehicle driven by the defendant after he had pulled the automobile from the public street into his open garage. The primary issue before the Court was whether or not there was probable cause to believe there was untaxed liquor in the automobile.[36] The Court concluded that there was more probable cause, than in *Carroll*, and that following the car into the garage did not destroy the agents' authority to search it. What is unclear, however, is whether the search was approved by the Court under the *Carroll* exception or under the search incident to arrest doctrine.[37] Some features of the case

---

While the weight of authority was decidedly contrary, several cases had held that the Act authorized searches of dwelling places without a warrant on suspicion, information, or belief that intoxicating liquor would be found therein. *See* 3 A.L.R. at 1514; 10 A.L.R. at 1553; 13 A.L.R. at 1316; 27 A.L.R. at 709; 39 A.L.R. at 811; *see* Annotation, *Sufficiency of Showing of Probable Cause for Search Warrant for Intoxicating Liquor*, 41 A.L.R. 1539 (1926); R.E. Heinselman, Annotation, *Constitutional Guarantees Against Unreasonable Searches and Seizures as Applied to Search for or Seizure of Intoxicating Liquor*, 74 A.L.R. 1418 (1931); R.P. Davis, Annotation, *Sufficiency of Description in Search Warrant of Automobile or Other Conveyance to be Searched*, 47 A.L.R. 2d 1444 (1956).

30. 47 A.L.R. 2d at 1444; 74 A.L.R. at 1418; 41 A.L.R. at 1539; 39 A.L.R. at 811; 27 A.L.R. at 709; 13 A.L.R. at 1316; 10 A.L.R. at 1553; 3 A.L.R. at 1514.

31. *Cf.* United States v. Di Re, 332 U.S. 581, 585 (1948) (*Carroll* does not establish the principle that vehicles are subject to search without warrant for enforcement of all federal statutes).

32. Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931). *But see* Henry v. United States, 361 U.S. 98 (1959), Rios v. United States, 364 U.S. 253 (1960) (no probable cause to support application of *Carroll*); United States v. Di Re, 332 U.S. 581 (1948) (assuming arguendo that if *Carroll* would permit a warrantless search of an automobile, the search could not be extended to the passenger in the vehicle).

33. 282 U.S. 694 (1931).

34. 305 U.S. 251 (1938).

35. Prohibition was over. However, the revenue laws made possession of untaxed liquor a felony. Liquor Taxing Act of 1934, ch. 1, § 201, 48 Stat. 313, 316. The offense charged in *Carroll* was only a misdemeanor. *See supra* note 22.

36. The other question, whether the police had to disclose their informant's identity, was answered in the negative. *Scher*, 305 U.S. at 254.

37. After concluding that there was probable cause under *Carroll*, the Court wrote: "[t]he following officers properly could have stopped petitioner's car, made search and put him under

suggest that *Scher* should be considered a search incident to arrest case and not a *Carroll* case.[38]

The next extensive discussion of the *Carroll* exception was dicta, joined by seven members of the Court, in *United States v. Di Re*.[39] In *Di Re*, federal agents had probable cause from an informant to believe that counterfeit ration coupons would be in the possession of a certain individual. The suspect was in a car located in a parking lot when the agents approached. The informer was in the back seat exhibiting two of the counterfeit coupons. Another passenger, Di Re, was in the front seat. All three were taken into custody. A stationhouse search of Di Re turned up counterfeit coupons secreted on his person. The government urged the *Carroll* exception as an alternative ground[40] for the search. Commenting on the government's assertion, the Court wrote:[41]

> The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of

---

arrest." *Scher*, 305 U.S. at 255. The subsequent paragraph states: "Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt." (citing Agnello v. United States, 269 U.S. 20 (1925) (search of premises incident to arrest lawful). *Id.* *See infra* notes 79-124 and accompanying text.

38. First, there was no statutory authorization for warrantless searches of automobiles under the Liquor Taxing Act of 1934, as there was under the National Prohibition Act. *See supra* note 29. The government, when using *Carroll* as authority for upholding the search, apparently was cognizant of this distinction and attempted to cover it by noting:

> The Court has indicated that in revenue cases a broader scope will be accorded to the right of search and seizure than in non-revenue cases. *Boyd v. United States*, 116 U.S. 616, 625 [(1886)]; *Carroll v. United States*, 267 U.S. 132, 149 [(1925)]. . . . [T]he [fourth amendment] rule may be somewhat relaxed when contraband articles are seized. *Weeks v. United States*, 232 U.S. 383 (1914).

Brief for the United States at 16 n.8, *Scher*, 305 U.S. 251. There is no indication in *Scher* that the Court acceded to this position. *See also* United States v. Di Re, 332 U.S. 581, 585 (1948) (*Husty* but not *Scher* cited as a "progeny" of *Carroll*); Brinegar v. United States, 338 U.S. 160, 183 (1949).

Second, the violation of the Liquor Taxing Act of 1934 was a felony. Ch. 1, § 217, 43 Stat. 313, 317 (setting punishment at over one year); Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029 (defining crimes with penalties over one year as felonies). This would authorize a warrantless arrest of Scher upon probable cause, from which a lawful search of his vehicle could ensue. *See infra* notes 79-124 and accompanying text. Carroll's offense was only a misdemeanor, and hence he could not be lawfully arrested until after the search of his vehicle. *See supra* note 22.

39. 332 U.S. 581 (1948).

40. The other ground asserted was search incident to arrest. As to this, the Court held that there was no probable cause to arrest Di Re—only the driver of the car who the informant had identified as the one in possession of the counterfeit coupons. *Di Re*, 332 U.S. at 595.

41. The Court ultimately held that even if *Carroll* applied, it would not provide a basis to authorize the search of a passenger of a vehicle. *Di Re*, 332 U.S. at 587. *Cf.* Ybarra v. Illinois, 444 U.S. 85 (1979) (search warrant for public bar insufficient basis for search or frisk of patron). *But see* Michigan v. Summers, 452 U.S. 692 (1981) (resident of house for which search warrant issued may be detained during execution of search).

> *Carroll v. United States*, 267 U.S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone. . . .
>
> Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. . . . [T]he *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so.[42]

In discussing the government's argument, that if *Carroll* applied it permitted the search of the passenger on the grounds that contraband ration coupons could be concealed upon the person, the Court observed:[43]

> This argument points up the different relation of the automobile to the crime in the *Carroll* case than in the one before us. An automobile, as was there pointed out, was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act . . . .[44]

These passages indicate that after nearly a quarter century *Carroll* was still considered a peculiar decision based upon congressional response to the special needs of suppressing a highly organized and mobile traffic in contraband liquor. There seemed to be little chance of extending *Carroll* beyond its limits.

Yet the following year, in *Brinegar v. United States*,[45] the statutory limits of the *Carroll* rule were surpassed for the first time. Brinegar was convicted of a misdemeanor for violating the Liquor Enforcement Act of 1936[46] for transporting alcohol into Oklahoma, a "dry" state. The trial court and court of appeals upheld the seizure of liquor from Brinegar's automobile as a search incident to arrest.[47] Neither court referred to *Carroll* at all.[48]

The Supreme Court, however, relied exclusively upon *Carroll* to uphold the search and seizure. The Court ruled, as in *Scher*, that under *Carroll* the facts supported probable cause to believe Brinegar was transporting liquor in violation of the law. While it could be argued that *Brinegar* involved a

---

42. *Di Re*, 332 U.S. at 584-85.

43. In fact, the *car* was never searched. Only the occupants were searched. *Id.* at 586. *Cf.* United States v. Johns, 469 U.S. 478 (1985).

44. *Di Re*, 332 U.S. at 586.

45. 338 U.S. 160 (1949).

46. ch. 815, § 3(a), 49 Stat. 1928.

47. *Brinegar*, 338 U.S. at 163-64.

48. *Id.* at 164 n.3.

search incident to arrest,[49] the opinion clearly relied on *Carroll* as the authority for upholding the search.[50]

Significantly, a crucial underpinning of *Carroll* was missing from the facts in *Brinegar*. As the dissent observed, there was no statutory authority for the warrantless search of automobiles under the Liquor Control Act of 1936.[51] Thus, despite only two dissents from a contradictory statement in dicta the preceding term,[52] and without any discussion of the issue, the Court relied on *Carroll* to uphold the search of Brinegar's vehicle.

Nevertheless, in the early to mid-1950s, the *Carroll* doctrine could still be said to apply only to warrantless searches for liquor. All of the cases predicated on *Carroll* had involved probable cause to specifically search for liquor. The Court was urged to apply *Carroll* in other situations, but either declined the invitation or found that probable cause was missing.[53]

By the end of the 1950s, dicta suggested that the *Carroll* exception might have a more expansive role to play in automobile searches. For instance, in *Henry v. United States*,[54] the Court held that there was no probable cause to believe that the defendants had committed an offense, and Justice Douglas concluded his opinion by noting:

> The fact that the suspects were in an automobile is not enough. *Carroll v. United States* . . . liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.[55]

---

49. *Cf. Brinegar*, 338 U.S. at 178-80 (Burton, J., concurring).

50. The advantage of relying on *Carroll* was that it avoided the question of whether pulling Brinegar's automobile over on probable cause was an unlawful arrest for a misdemeanor. *See supra* note 22. The lower courts and Justice Burton concluded that the arrest did not occur until after Brinegar admitted that the vehicle contained liquor. Thus, the misdemeanor was committed in the presence of the officers and the arrest was legitimate. Today, we would say that the officers "stopped" Brinegar upon reasonable suspicion for an investigation, which yielded probable cause to make an arrest. *Cf.* Terry v. Ohio, 392 U.S. 1 (1968); United States v. Sharpe, 470 U.S. 675, 682 (1985).

51. *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting).

52. "[T]he *Carroll* decision falls far short of establishing a doctrine that, without such [congressional] legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes." United States v. Di Re, 332 U.S. 581, 585 (1948). *See supra* notes 39-44 and accompanying text.

53. *See* Rios v. United States, 364 U.S. 253 (1960) (no probable cause to believe vehicle contained narcotics); Henry v. United States, 361 U.S. 98 (1959) (no probable cause to believe automobile contained stolen goods); United States v. Di Re, 332 U.S. 581 (1948) (*Carroll* rule does not authorize search of passenger in automobile).

54. 361 U.S. 98 (1959).

55. *Id.* at 104.

Despite the breadth of the dicta, however, *Carroll* (even after *Brinegar*) had not yet been interpreted to relax compliance with the warrant requirement on the grounds of practicality.

In *Rios v. United States*,[56] the Court cited *Carroll*, *Brinegar*, and *Henry* to distinguish warrantless automobile searches with probable cause from lawful arrests and contemporaneous searches.[57] The defendant had been charged with possession of narcotics. Significantly, the citations made no mention of either the congressional authorization underpinning of the *Carroll* exception or of the limitation on the nature of the items for which Congress permitted warrantless searches. The limited nature of the *Carroll* rule is not apparent in *Rios*.[58] Nevertheless, the Court had never during this period applied *Carroll* to authorize a warrantless search for anything other than illegal liquor.[59]

B. The Mere Evidence Rule

Even without the statutory restriction on the proper objects of warrantless searches of automobiles, at the time *Carroll* was decided, and, for nearly the next half-century, the Fourth Amendment provided another limit on the scope of a warrantless automobile search. In *Carroll*, the Court held that a warrantless search of an automobile could be no broader than that which could be authorized by a magistrate on the same facts.[60] In

56. 364 U.S. 253 (1960). The defendant had been riding in a taxicab when arrested. *Id.* at 256. *Rios* was a companion case to Elkins v. United States, 364 U.S. 206 (1960), which overturned the "Silver Platter Doctrine," which allowed evidence seized by state officers to be admitted into federal prosecutions whether or not the actions of the state officials would have rendered the evidence inadmissible under Weeks v. United States, 232 U.S. 383 (1914), if undertaken by federal officers. Because the trial court had not considered whether or not the search was constitutional, *Rios* was remanded for clarification of the record, which was insufficiently illuminating on the facts surrounding the search and seizure. *Rios*, 364 U.S. at 261-62.

57. The offenses in *Rios*, against The Narcotics Control Act of 1956, ch. 628, § 105, 70 Stat. 567, 570, *originally enacted as* 21 U.S.C. § 174, *repealed by* 21 U.S.C. §§ 812(c)(b)(10), 844 (1988) (now a misdemeanor) and *Henry*, against 18 U.S.C. § 659 (1988), were felonies. Act of June 25, 1948, ch. 645 § 1, 62 Stat. 684, *formerly codified as* 18 U.S.C. § 1, *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, § 218(a)(1), 98 Stat. 2027. This fact made it unnecessary to differentiate probable cause to arrest from probable cause to search in the absence of authority to arrest. *See supra* notes 22 & 38. *See also infra* notes 79-124 and accompanying text on searches incident to arrest.

58. One such commentator lamented that the police were underinformed about the power to search automobiles even with probable cause. Gardner L. Turner, Note, *Search and Seizure-Search of an Automobile Without A Search Warrant*, 43 KY. L.J. 163, 171 (1954-55).

59. In United States v. Henry, 361 U.S. 98 (1959), FBI agents were looking for stolen crates of liquor when they came upon the stolen crates of radios. *Id.* at 99. *See supra* notes 45-52 and accompanying text.

60. *Carroll*, 267 U.S. at 153; United States v. Ross, 456 U.S. 798, 823 (1982).

1925 a significant limiting feature of that statement was the "mere evidence rule" of *Gouled v. United States*.[61]

The mere evidence rule provided that the government, even with a magistrate's warrant, could not seize property just because it was evidence of a crime.[62] The underlying rationale for the rule was that the Fourth Amendment protected a person's property from government seizure. Items could be seized only if the government could assert a property claim superior to that of the possessor.[63] A necessary corollary to this rule was that government agents may not search for that which they may not seize.

The categories of property subject to seizure came to be called fruits, instrumentalities, and contraband.[64] Individuals could claim no property right in fruits of a crime because the fruit of the crime belonged to the victim, for whom the government was an agent. Things used, or intended to be used, in crime become property of the state under an expanded version of the ancient doctrine of *deodand*, [65] or forfeiture. Thus, there can be no private right of possession in what the law denounces as contraband.[66] Nonetheless, the government could not assert a superior interest in property that did not fall into one of these categories even though it might be evidence of crime. In *Gouled*, the Court wrote:

> [Search warrants] may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[67]

Thus, searches for, and seizures of, "mere physical evidence" were prohibited even with a search warrant.[68]

---

61. 255 U.S. 298 (1921), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967). *Cf.* Selected Bureau Drafts, *An Act to Authorize the Search of Vehicles*, 1 HARV. J. ON LEGIS. 51, 61 (1964).

62. *Gouled*, 255 U.S. at 309.

63. *Id.*

64. Warden v. Hayden, 387 U.S. 294 (1967).

65. BLACKS LAW DICTIONARY 436 (6th ed. 1990). According to English law, a chattel which was the immediate cause of the death of a person was forfeited to the Crown to be put to holy use. *Deodand* originates from the Latin *deo dandum*, a thing to be given to God. *Id.*

66. *Hayden*, 387 U.S. at 303.

67. *Gouled*, 255 U.S. at 309 (citation omitted).

68. Because the "mere evidence" in *Gouled* was documentary, it has been suggested that the rule was somehow connected with the Fifth Amendment and only applied to such evidence. This view never attained the status of doctrine although the evidence suppressed under the mere evi-

The mere evidence rule was much criticized[69] and often circumvented.[70] For example, in *United States v. Guido*,[71] the Seventh Circuit Court of Appeals categorized a pair of shoes as an instrumentality of a crime because the shoes "would facilitate a robber's getaway and would not attract as much public attention as a robber fleeing barefooted from the scene of a hold-up."[72] Despite such strains, the mere evidence rule along with the particularity requirement provided a basis for questioning the intrusiveness of such a search, with or without a warrant.[73] When there was a warrant, the question would be whether the items described in the warrant were mere evidence. When there was no warrant, the seizure of items could still be challenged as being for only mere evidence. As Judge Learned Hand observed in *United States v. Poller*,[74] "[L]imitations upon the fruit to be gathered tend to limit the quest itself . . . ."[75]

Insofar as the mere evidence rule limited the scope of an automobile search with a warrant, it would certainly have been applicable to *Carroll* searches[76] if the scope of those searches were not already constricted by

---

dence rule was most often documentary. James M. Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172 (1964); Major Thomas H. Davis, *The "Mere Evidence" Rule in Search and Seizure*, 35 MIL. L. REV. 101 (1967). In extrapolating the mere evidence rule from the Constitution in Warden v. Hayden, 387 U.S. 294 (1967), Justice Brennen did, however, note that the evidence seized was not "testimonial" or "communicative." *Id.* at 302-03.

69. *See* John Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 474 (1961); John W. Brown, Comment, *The Anachronistic Infusion of the Mere Evidence Rule on the Fourth Amendment*, 13 S.D. L. REV. 183 (1968); W. Thomas Tete, Comment, *Whence and Whither the Mere Evidence Rule?*, 27 LA. L. REV. 53 (1966).

70. *See, e.g.*, United States v. Klaw, 227 F. Supp. 12 (S.D.N.Y. 1964) (material promoting sale of obscene literature held to be instrumentality of the crime); United States v. Boyette, 299 F.2d 92 (4th Cir. 1962) (records of earnings of prostitutes considered fruits of crime), *cert. denied*, Mooring v. United States, 369 U.S. 844 (1962); Abel v. United States, 362 U.S. 217 (1960) (false birth certificates were considered instrumentalities of the crime of espionage, since they could help the accused pass as an American citizen); Matthews v. Correa, 135 F.2d 534 (2d. Cir. 1943) (bankbook containing evidence of bankrupt's assets was a fruit; federal law makes it unlawful to conceal property belonging to a bankrupt and the book itself was such property); Ronald H. Heck, Comment, *The Gouled Rule: Current Utility* 4 DUQ. L. REV. 582 (1965-66); Davis, *supra* note 68.

71. 251 F.2d 1 (7th Cir. 1958), *cert. denied*, 356 U.S. 950 (1980).

72. *Id.* at 3-4. The prosecution's purpose in getting the shoes admitted into evidence was for their evidentiary value: one of the robbers had stepped on a marble counter and left a heel print during the hold-up. Thus, the shoes connected him to the crime. *Id.* at 5.

73. *See* Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief with evidence of criminal sexual activity suppressed).

74. 43 F.2d 911, 914 (2d Cir. 1930).

75. *Id.* at 914.

76. *See also An Act to Authorize the Search of Vehicles*, *supra* note 61; *cf. Carroll*, 267 U.S. at 148 (citing *Gouled*).

statute.[77] In other words, under a generalized version of *Carroll*, before the police could engage in the search of an automobile, there would have to be probable cause that fruits, contraband, or instrumentalities of a crime were secreted therein. Thus, general, exploratory, warrantless searches of automobiles would have been restricted by the mere evidence rule even if *Carroll* had created a general exception to the warrant requirement for searches of automobiles.[78]

C. Searches Incident to Arrest (SIAs)

It is more than likely, however, that expanded application of the *Carroll* rule was not urged because during this period the search incident to arrest (SIA) doctrine was sufficiently broad to give police ample access to the interiors of automobiles. During the Prohibition Era, the SIA doctrine was one of many avenues through which courts approved the search of vehicles for contraband liquor.[79]

The SIA doctrine was not urged by the United States in *Carroll* because it would not have availed the government. The arrest in *Carroll* came after the search and discovery of liquor.[80] Despite the fact that the agents had probable cause to believe Carroll to be in possession of contraband, they could not arrest him until after viewing the liquor because the offense was only a misdemeanor.[81] If the offense had been a felony, however, Carroll could have been arrested and contemporaneously searched.

The common law SIA doctrine originally allowed only a search of the *person* of the arrestee.[82] Nearly contemporaneously with *Carroll*, the doctrine was expanded to permit the search of the *place* in which the arrest occurred. In the 1925 case of *Agnello v. United States*,[83] with little fanfare and without citing direct authority, the Supreme Court observed:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was

77. *See supra* notes 29-36 and accompanying text.

78. The mere evidence rule was abolished in Warden v. Hayden, 387 U.S. 294 (1967). *See infra* text accompanying notes 153-161.

79. *See* 47 A.L.R. 2d at 1444; 74 A.L.R. at 1418; 41 A.L.R. at 1539; 39 A.L.R. at 811 (annotating Carroll v. United States, 267 U.S. 132 (1925)); 27 A.L.R. at 709; 13 A.L.R. at 1316; 3 A.L.R. at 1514.

80. *Carroll*, 267 U.S. at 156-57. *See supra* note 11.

81. *See supra* note 22.

82. *Cf.* Weeks v. United States, 232 U.S. 383 (1913).

83. 269 U.S. 20 (1925) (seized contraband suppressed as search too remote in time and space to qualify as a search incident to arrest).

committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. [84]

Marron v. United States [85] was the first case in which the Court applied the SIA doctrine to uphold the seizure of items by the government. The premises were entered under the authority of a warrant to search for liquor and items used to manufacture liquor. The agents discovered a speakeasy. In the course of a search for the liquor, agents also discovered and seized ledgers and bills used to conduct the unlawful business which were not described in the warrant. The Court held that while the material could not be seized under the authority of the warrant, it could be seized incident to the arrest of the manager of the establishment for committing an offense in the presence of the officers. The Court relied on dicta from *Agnello*, *Carroll*, and *Weeks* to support its conclusion.[86]

Following *Marron*, the Court became concerned with the scope of the *Agnello/Marron* rule. In *Go-Bart Importing Co. v. United States*[87] and *United States v. Lefkowitz*,[88] the Court limited the reach of the broad language of the earlier cases. Both cases involved the lawful arrests of individuals for conspiracy to violate the National Prohibition Act. Contemporaneously with the arrests, the government agents searched the desk, files, and safe of the defendants and seized papers which were used in evidence against them. The Court rejected the claim that the evidence was lawfully seized incident to arrest, distinguishing it from *Marron*.

In *Marron*, the arrest, which supported the seizure, was for an offense committed in the presence of the agents. In *Go-Bart* and *Lefkowitz*, the offense was not committed in the arresting officers' presence.[89] The items seized in *Marron* were in plain view of the officers conducting a search for liquor under a warrant. In *Go-Bart* and *Lefkowitz*, the evidence was not in plain view.[90] The items in *Marron* were deemed to be "instrumentalities" of the ongoing criminal nuisance for which the arrest was made. In *Go-*

84. *Id.* at 30. The Court cited dicta from *Carroll*, 267 U.S. at 158, as well as from Weeks v. United States, 232 U.S. 383, 392 (1913), which, at best, only obliquely supports the Court's statement. On the other hand, there was plenty of authority in state and lower federal courts to support the notion that the place of arrest could be searched incident to the arrest. *See* Annotation, *Right of Search and Seizure Incident to Lawful Arrest, without a Search Warrant*, 32 A.L.R. 680 (1924).

85. 275 U.S. 192 (1927).

86. *Id.* at 199.

87. 282 U.S. 344 (1931).

88. 285 U.S. 452 (1932).

89. *Go-Bart*, 282 U.S. at 358; *Lefkowitz*, 285 U.S. at 465.

90. *Go-Bart*, 282 U.S. at 358; *Lefkowitz*, 285 U.S. at 465.

Bart and *Lefkowitz*, the papers seized were mere evidence of the past offense.[91]

Soon after recognition, the scope of the federal power to search the place of arrest was construed very narrowly.[92] It only allowed the seizures of fruits, instrumentalities, or contraband, which were in, or came into, plain view during a limited search of the area for weapons, means of escape,[93] or other authorized search of the premises.[94] The doctrine was also limited by the requirements set down in *Agnello* that the person be arrested while committing a crime and that the search be contemporaneous with the arrest.[95] The language of *Go-Bart* and *Lefkowitz* left no doubt that the

---

91. *Lefkowitz*, 285 U.S. at 465-66; *see Go-Bart*, 282 U.S. at 358. In the early 1920s, the weight of authority was that the mere evidence rule, *see supra* notes 60-78 and accompanying text, did not apply to SIAs. Rather, the search of the person (and place) was not confined, and anything that could be used to connect this individual with the crime or that could be used to effect an escape, could be seized. People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923); *see* 32 A.L.R. 680 (1924). *But see* People *ex rel.* Tamplin v. Beach, 113 P. 513 (Colo. 1911) (seizure of items found in SIA limited to fruits, instrumentalities, and contraband). In United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926), however, the court applied the mere evidence rule in a SIA case, and in *Marron*, 275 U.S. at 199, the illegal enterprise. *Id.* By 1931, a trend toward the application of the mere evidence rule to searches of *premises* incident to arrest had begun, see 74 A.L.R. 418, 431 (1931), and after *Lefkowitz*, the rule for SIAs of premises was established in the federal courts. The application of the mere evidence rule in state courts, however, was not uniform. Annotation, *Validity of Statute or Ordinance Requiring Commodities to be Sold in a Specified Quantity or Weight*, 32 A.L.R. 676 (1923); *see* 74 A.L.R. at 1418; Annotation, *Right of Search and Seizure Incident to Lawful Arrest Without a Search Warrant*, 82 A.L.R. 782 (1933); Annotation, Comment Note, *Illustration of Distinction, as Regards Search and Seizure, Between Papers or other Articles Which Merely Furnish Evidence of Crime and the Actual Instrumentalities of Crime*, 129 A.L.R. 1296 (1940) and A.L.R. later case services.

92. The extent of the new limits were not as great in the states. *See supra* note 91 and *infra* note 93.

93. The search of an arrestee for weapons or means of escape has always been an approved part of SIA doctrine, see cases collected in Annotations, 32 A.L.R. 680 (1924), and the rationale behind this rule equally applied to searches of the area around the arrestee. *Cf. Agnello*, 269 U.S. at 30. Against the background of authority giving broad scope to searches of premises incident to arrest for evidence of crime, see cases collected in Annotations, 32 A.L.R. 680 (1924); 51 A.L.R. 424 (1927); 74 A.L.R. 1387 (1931), it would only make sense in the federal context to recognize a power to search the premises incident to arrest for weapons or means of escape. Fruits, instrumentalities, or contraband which came into plain view during the search for weapons could be then seized. *Cf. Marron*, 275 U.S. 192. The "plain view" limitation on the seizure of items during a search of premises incident to arrest does not seem to have been supported by authority in the states. *See* 32 A.L.R. at 680; Annotation, *Right of Search and Seizure Incident to Lawful Arrest, Without a Search Warrant*, 51 A.L.R. 424 (1927); 74 A.L.R. at 1418; 82 A.L.R. at 782.

94. *Go-Bart*, 282 U.S. at 358; *Lefkowitz*, 285 U.S. at 465.

95. *Agnello*, 269 U.S. at 30. *See also Lefkowitz*, 285 U.S. at 452; *Go-Bart*, 282 U.S. at 344; *Marron*, 275 U.S. at 199.

Court was concerned with the danger that the SIA could be used as a pretext for an unwarranted exploratory search.[96]

These concerns, however, did not appear to trouble the courts with respect to searches of automobiles incident to arrest. In a case slightly antedating *Marron*, the Supreme Court held, *inter alia*, that the search of a vessel for contraband liquor could be upheld under the SIA doctrine.[97] For more than two decades following *Carroll*, other courts routinely held that entire automobiles could be searched incident to arrest.[98]

The Supreme Court again visited the SIA doctrine in 1947 in *Harris v. United States*.[99] The Court upheld a search of an individual arrested days after allegedly committing mail fraud, thereby eliminating the requirement that the search be incident to an arrest for a crime in progress.[100] The Court also broadened the scope of the area that could be searched from the confines of *Go-Bart* and *Lefkowitz*.[101] Premises under the immediate control of the arrestee had previously been defined in terms of *physical* control; the area from which the arrestee could retrieve weapons or destructible fruits of the crime. In *Harris*, however, the dual rationales underlying the SIA, protection of the arresting officers and preservation of evidence, were obscured when the relevant area of control shifted from one of physical control to one of possessory control in the property.[102]

---

96. "It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found." *Go-Bart*, 282 U.S. at 358. "Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt . . . ." *Lefkowitz*, 285 U.S. at 465.

97. United States v. Lee, 274 U.S. 559, 563 (1927) (citing *Agnello*). The arrest was for a felony; the Court also upheld the probable cause search for contraband, citing *Carroll*. *Id.*

98. *See* Brubaker v. United States, 183 F.2d 894 (6th Cir. 1950); Altshuler v. United States, 3 F.2d 791 (3d Cir. 1925); Fisher v. United States, 2 F.2d 843 (4th Cir. 1924), *cert. denied*, 266 U.S. 629 (1924); United States v. Strickland, 62 F. Supp. 468 (W.D.S.C. 1945); People v. Derrico, 100 N.E.2d 607 (Ill. 1951); People v. Tabet, 83 N.E.2d 329 (Ill. 1949) *cert. denied*, 336 U.S. 970 (1949); People v. Exum, 47 N.E.2d 56 (Ill. 1943); People v. Euctice, 20 N.E.2d 83 (Ill. 1939); Smith v. State, 21 N.E.2d 709 (Ind. 1939); Dafoff v. State, 153 N.E. 398 (Ind. 1926); Jameson v. State, 149 N.E. 51 (Ind. 1926); Haverstick v. State, 147 N.E. 625 (Ind. 1925); People v. Bommarito, 14 N.W.2d 812 (Mich. 1944); People v. Overton, 291 N.W.216 (Mich. 1940); Toliver v. State, 98 So. 342 (Miss. 1923); State v. Askew, 56 S.W.2d 52 (Mo. 1932); State v. Williams, 14 S.W.2d 434 (Mo. 1929); O'Dell v. State, 158 P.2d 180 (Okla. 1945); Lee v. State, 185 S.W.2d 978 (Tex. 1945); State v. Hughlett, 214 P. 841 (Wash. 1923).

99. 331 U.S. 145 (1947).

100. *Id.* at 146-50.

101. *Id.* at 152.

102. *Id.*

Although the Court apparently had second thoughts about the wisdom of the broad SIA exception in *Trupiano v. United States*,[103] it nonetheless returned to the *Harris* rationale in *United States v. Rabinowitz*.[104] There, the Court approved a SIA of the defendant's desk, file cabinets, and safe. *Go-Bart*, *Lefkowitz*, and presumably *Trupiano* were reinterpreted to only disapprove a SIA if used as a pretext to conduct an exploratory search.[105]

The broad power to SIA a wide area within an arrestee's control was also held to apply to highway arrests.[106] Therefore, the police could search an entire automobile absent probable cause, so as long as it was contemporaneous to a lawful arrest of the driver or occupant.[107] Thus, there was no constraint upon the scope of an automobile search[108] under the SIA doctrine as there was under the *Carroll* rule. Although it was true that the mere evidence rule could limit the power of the police to *seize* items discovered in an SIA, the rule under that doctrine had no effect upon the scope of a search which might turn up unexpected fruits, instrumentalities, or contraband of crimes other than those for which the arrest was made.[109] It is therefore not surprising, that the focus of litigation concerning Fourth Amendment violations, which involved searches of automobiles, was focused on the lawfulness of the arrest, rather than on whether the police had probable cause to search the vehicle.[110]

Although not directly addressing the problems of the scope of searches of automobiles, Justice Frankfurter, dissenting in *Rabinowitz*, noted that the Court was "confusing (1) the right to search the person arrested and articles in his immediate physical control and (2) the right to seize visible instruments or fruits of crime at the scene of the arrest with (3) an alleged

---

103. 334 U.S. 699 (1948) (search of farm for evidence of bootlegging could not be sustained as a search incident to a warrantless night-time arrest since officers had ample time and information to secure a search warrant for items seized).

104. 339 U.S. 56 (1950).

105. *See Rabinowitz*, 339 U.S. at 62, 66; *Harris*, 331 U.S. at 153; *see also* Kremen v. United States, 353 U.S. 346, 349-59 (1957) (per curiam) (disapproval of the seizure of a vast array of items during a search incident to arrest).

106. *See* Kenneth R. Reed, Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding*, 11 ARIZ. L. REV. 457, 484 n.190, 485-87 (1969). *See supra* note 98.

107. Lewis R. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557 (1982). *But see* Preston v. United States, 376 U.S. 364 (1964) (search of vehicle too remote in time from arrest to be lawful SIA); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

108. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

109. People v. Barg, 51 N.E.2d 168 (Ill. 1943), *cert. denied*, 321 U.S. 789 (1944); People v. Davis, 226 N.W. 337 (Mich. 1929).

110. Ironically, the Court in *Carroll* eschewed such a theory as a predicate for upholding the search. *Carroll*, 267 U.S. at 157.

right to search the place of arrest . . . ."[111] Justice Frankfurter continued: "The short of it is that the right to search the place of arrest is an innovation based on confusion, with historic foundation, and made in the teeth of a historic protection against it."[112]

Nearly twenty years later, in *Chimel v. California*,[113] the Court vindicated Justice Frankfurter's views. The facts of *Chimel* were very similar to those in both *Harris*[114] and *Rabinowitz*.[115] Police officers obtained a warrant authorizing them to arrest the defendant for the burglary of a coin shop.[116] They went to his home and were admitted by his wife after they had identified themselves. When the defendant arrived, they arrested him and asked if they could "look around."[117] Although Chimel objected, the policemen told him they could conduct a search because he had been lawfully arrested.[118] The police then conducted a forty-five minute search which encompassed the entire house, including three bedrooms, the attic, the garage, and a small workshop.[119] Chimel was convicted on the basis of the evidence found. He sought reversal on the ground that the evidence admitted had been seized pursuant to an unlawful search.[120] The appellate court upheld the admission of the evidence because it was the result of a valid SIA. The United States Supreme Court reversed.[121] The reasoning behind the reversal was the Court's recognition that, although "[t]here is ample justification, therefore, for a [warrantless] 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,"[122] there is no justification for allowing broad SIAs to result from construing "area within his immediate control" in the property sense of possession.[123] In so holding, the Court followed the position taken by Justice Jackson in *Harris*:

> The difficulty with this problem [broad SIAs] for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practi-

111. *Rabinowitz*, 339 U.S. at 75, 76-79 (Frankfurter, J. dissenting).
112. *Id.*
113. 395 U.S. 752 (1969).
114. *Harris*, 331 U.S. at 145.
115. *Rabinowitz*, 339 U.S. at 56.
116. *Chimel*, 395 U.S. at 753.
117. *Id.*
118. *Id.* at 753-54.
119. *Id.* at 754.
120. *Id.*
121. *Id.* at 754-55.
122. *Id.* at 763.
123. *Id.*

> cal limit short of that set in the opinion of the Court—and that means to me no limit at all.[124]

In *Chimel*, the Court responded to Jackson's concern and limited the scope of the SIA by narrowing the area allowed to be searched. This was consonant with the earlier rationale that justified expanding the SIA exception beyond the person of the arrestee.

III. *CARROLL* EXHUMED AND EXPANDED

The rationale underlying *Chimel* doomed broad SIAs of automobiles.[125] First, *Chimel* could never authorize warrantless searches of locked glove compartments or trunks, which are not easily accessible to an arrestee. Second, once the arrestee is physically removed from the automobile and handcuffed or placed in a police vehicle no part of the automobile is within his physical possession; therefore, whatever power the government has to search the vehicle incident to arrest dissipates.[126] There may be instances in which a limited search would be permissible because of the possibility that confederates of the arrestee might destroy evidence secreted in the automobile.[127] However, because the automobile of an arrestee will often be taken into custody,[128] this situation should not often arise.

Whether or not the Supreme Court understood this effect at the time is unclear. It was clear, however, that if the police were going to continue to engage in routine exploration of the contents of an arrestee's automobile, a different foundation would have to support the practice. A year after *Chimel*, *Chambers v. Maroney*[129] provided that foundation by resuscitating the dormant automobile exception of *Carroll*, thereby extending *Carroll* beyond its facts.

In *Chambers*, witnesses to an armed robbery provided police with descriptions of the vehicle used and what one of the robbers was wearing.[130] Within an hour, a vehicle matching that description was stopped within two miles of the robbery location. The defendant's attire matched the report

---

124. *Harris*, 331 U.S. at 197 (Jackson, J., dissenting).

125. Reed, *supra* note 106, at 486; Anthony Murray & Robert E. Aitken, *Constitutional Limitations on Automobile Searches*, 3 LOY. L.A. L. REV. 95, 117-22 (1970); Catherine A. Shepard, Comment, *Search and Seizure: From Carroll to Ross, The Odyssey of the Automobile Exception*, 32 CATH. U. L. REV. 221, 235 (1982).

126. *See* Preston v. United States, 376 U.S. 364, 367 (1964); *cf.* United States v. Chadwick, 433 U.S. 1 (1977).

127. *See* Chimel v. California, 395 U.S. 752, 775 (1969) (White, J., dissenting).

128. *See* Chambers v. Maroney, 399 U.S. 42 (1970).

129. *Id.* at 42 (1970).

130. *Id.* at 44.

given by the eyewitnesses.[131] Police arrested the occupants and drove the car to the police station, where they searched the automobile.[132] They found nothing.[133] Finally, through interrogation, the evidence was eventually discovered under the dash of the car.[134]

Writing for the majority, Justice White recognized that once the police removed the car to the station the search could no longer be justified as an SIA even under the broader standards of *Harris* and *Rabinowitz*. "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."[135] Nevertheless, the warrantless search was upheld on "alternative grounds"[136] by extending the rule of *Carroll*.

Because the facts known to the police that led to the arrest of the defendant would have equally upheld a determination of probable cause that fruits or instrumentalities[137] of a crime were within the vehicle, the Court concluded that *Carroll* clearly authorized[138] the seizure of the car and its search upon the highway.[139] However, *Carroll* authorized nothing more. Arguably, the failure to discover evidence of the crime should dissipate the probable cause with regard to the automobile (although not necessarily as to the suspect).[140] In any event, the rule of *Carroll*, intended to avoid the crippling effects of the jurisdictional limits of the warrant requirement, does not speak to the issue of warrantless *stationhouse* searches of vehicles. Justice White filled this lacuna with an *ipse dixit*:

> On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The prob-

131. *Id.*

132. *Id.* The lower court upheld the search as incident to arrest. United States *ex rel.* Chambers v. Maroney, 281 F. Supp. 96, 100 (W.D. Pa. 1968), *aff'd*, 408 F.2d 1186, 1193 (3d Cir. 1969), *cert. granted sub nom.* Chambers v. Maroney, 396 U.S. 400 (1969), *aff'd*, 399 U.S. 42 (1970).

133. *Chambers*, 399 U.S. at 63 n.8 (Harlan, J., dissenting).

134. *Id.* If there had been a warrant, this second search would likely have been unlawful. *See* State v. Trujillo, 95 N.M. 535, 624 P.2d 44 (1981).

135. *Chambers*, 399 U.S. at 47 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).

136. *Id.*

137. *Id.*

138. *Id.* at 52.

139. Since the arrest occurred at night, it might have been reasonable to take the car to the station for the "highway" search.

140. Furthermore, if police had been searching the automobile under the authority of a warrant it would not have authorized a second search. Although not yet decided by the Supreme Court, this appears to be the majority rule in the states. *See* 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 4.10(d) (1978). *See also* State v. Trujillo, 95 N.M. 535, 624 P.2d at 44 (1981). *But see* United States v. Carter, 854 F.2d 1102 (8th Cir. 1988).

able-cause factor still obtained at the station house and so did the mobility of the car . . . .[141]

Even if Justice White was correct in asserting that probable cause still existed at the station house, the automobile was no longer "mobile" in the *Carroll* sense of the word.[142] It was not possible for the car to "flee" the territorial jurisdiction of the warrant before it could be obtained and executed. Furthermore, even if there was the possibility of another party claiming the automobile and driving it away, once the car was in possession of the police it was at least "*reasonably* practicable" to secure a warrant.[143] In fact, *Carroll* stands for the proposition that the automobile exception does not apply when search warrants are easily obtainable.[144]

Furthermore, if a third party made a claim for the car, at that point it would not be amiss to conclude that the automobile would become mobile in the constitutional sense, authorizing a warrantless search before releasing custody of the vehicle. Justice White did not address these issues, but rather set up a fictitious constitutional dilemma and authorized the police to resolve it either way. The Court stated:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion[145] is permissible until the magistrate authorizes the "greater". But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[146]

---

141. *Chambers*, 399 U.S. at 52.

142. Perhaps Justice White still had the same fear that he expressed in *Chimel*, 395 U.S. at 775 (White, J., dissenting), concerning the possibility of confederates removing the vehicle. If so, that would explain why he thought the car was still mobile. However, under the circumstances, there was little chance of anyone removing the car.

143. Carroll v. United States, 267 U.S. 132, 156 (1925) (emphasis added).

144. *Id. Cf.* Trupiano v. United States, 334 U.S. 699 (1948); United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950).

145. The "lesser" intrusion would be a temporary seizure of the automobile while applying for a warrant. *Chambers*, 399 U.S. at 51. *Cf.* Segura v. United States, 468 U.S. 796 (1984) (police "impoundment" of apartment upon probable cause and to maintain status quo for nineteen hours while applying for search warrant constitutional); United States v. Place, 462 U.S. 696 (1983) (temporary seizure of luggage for investigation upon reasonable suspicion may be permissible).

146. *Chambers*, 399 U.S. at 51-52.

In a dissent which showed greater fidelity to *Carroll's* "well delineated exception"[147] to the warrant requirement, Justice Harlan did not find Justice White's question debatable:

> [T]he lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant . . . . [T]o be sure, one can conceive of instances in which the occupant . . . would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay.[148]
>
> . . . .
>
> The Court, unable to decide whether search or temporary seizure is the "lesser" intrusion, in this case authorizes both.[149]

Additionally, Justice Harlan noted the Court's failure to even consider, as required by *Carroll* whether after the car had been secured, the officers were able to promptly take their case before a magistrate.[150] *Chambers* did more than resurrect *Carroll* to give police the latitude they enjoyed under pre-*Chimel* law; it gave the police the leisure to search that neither the *Carroll* nor SIA exceptions permitted.

The *Carroll/Chambers* rationale did, however, revive a probable cause requirement that the pre-*Chimel* SIA approach did not. However, the resurrection of *Carroll* by *Chambers* did not bring with it the corollary limits of searching for contraband[151] or the mere evidence rule.[152] The latter limit on warrantless searches (the mere evidence rule) had been eliminated in *Warden v. Hayden*.[153]

The defendant in *Hayden* robbed a cab company and fled on foot. Cab drivers followed the robber to his house and radioed the address and a description of the defendant's clothing to the company dispatcher, who relayed the information to the police. Within minutes the police arrived at Hayden's house, knocked, and were allowed to enter by Mrs. Hayden.[154] The officers spread out and searched the first and second floors of the house

147. *See* Katz v. United States, 389 U.S. 347, 357 (1967).

148. *Chambers*, 399 U.S. at 63-64.

149. *Id.* at 63 n.8.

150. *Id.*

151. Justice Harlan alone noted that *Chambers* extended *Carroll* to a warrantless search for things which were not contraband. *Id.* at 62 n.7 (Harlen, J. dissenting).

152. The mere evidence rule would not have presented an obstacle to the search of the vehicle in *Chambers* as the items for which the police had probable cause to search were fruits (loot) and instrumentalities (weapons).

153. 387 U.S. 294 (1967). *See* Paul J. Liacas, *Warrantless Automobile Searches: The Meaning of* Chambers v. Maroney, 34 AM. J. TRIAL LAW. ASS'N. 174, 176 (1972).

154. *Hayden*, 387 U.S. at 297.

as well as the cellar. Hayden was found in an upstairs bedroom and arrested. In an adjoining bathroom an officer discovered, and seized, a pistol and ammunition. Another officer, searching the cellar for the suspect or the loot, discovered and seized some clothes in a washing machine that matched the description of the clothing worn by the robber. In addition, the police discovered a clip, cap, extra ammunition under the mattress, and ammunition for a shotgun in Hayden's bureau drawer.[155] The government introduced these items against Hayden at his trial.[156]

After upholding the search of the washing machine and drawer on the grounds of exigency,[157] the Court considered whether seizure of the clothing violated the Fourth Amendment because it was mere evidence.[158] The Court took the opportunity to abandon the mere evidence rule. Justice Brennan wrote:

> Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects . . ." without regard to which the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation.[159]
>
> . . . .
>
> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment though the Government asserts a superior property interest at common law. We have recognized that the principal object of this Fourth Amendment is the protection of privacy rather than property,[160] and have increasingly discarded fictional and procedural barriers rested on property concepts.[161]

The effect of *Hayden*[162] and *Chambers*[163] was to extend the scope of warrantless searches to anything for which there was probable cause to be-

155. *Id.* at 298.

156. *Id.*

157. Here, the seizures occurred prior to or immediately contemporaneous with Hayden's arrest. The search and seizure resulted from an effort to find a suspected armed felon in the house into which he had run only minutes before the police arrived. The permissible scope of the search must be as broad as reasonably necessary to prevent the suspect from resisting or escaping. *Hayden*, 387 U.S. at 299.

158. *Id.* at 300.

159. *Id.* at 301.

160. Relying on Katz v. United States, 389 U.S. 347, 353 (1967) (Fourth Amendment protects privacy, not property.).

161. *Hayden*, 387 U.S. at 305.

162. *Id.* at 302.

lieve the object was connected with a prosecutable offense.[164] Very extensive warrantless searches of automobiles would not be held to violate the Fourth Amendment. Moreover, because police officers did not need to consider the practicability of obtaining a warrant before making a warrantless search,[165] officers were free to forgo applying for a warrant. The net effect of these decisions is that motorists suffer a loss not contemplated by *Carroll*; the loss of an important constitutional limitation on the scope of searches of automobiles. Before *Hayden* and *Chambers* motorists were protected by either the particularity requirement of the warrant clause or by the limits of the mere evidence rule. After 1970, however, motorists had neither of these protections.

The Court's decision in *Carroll*, to allow the investigating officer to act upon his probable cause determination as to the presence of specified contraband, removed the protection afforded by a neutral, detached magistrate. The importance of a neutral magistrate has long been recognized.[166] Nonetheless, this protection was outweighed by necessity in *Carroll*.

Even if *Carroll* were read broadly not to require specific statutory authority to search warrantlessly for a particular species of contraband, the warrant clause nevertheless imposed a residual particularity limitation on the scope of the search after *Carroll*. Under pre-*Hayden* law, relinquishing the warrant requirement did not emasculate the particularity requirement. The "mere evidence" rule, by its nature, limited the scope of the search by limiting the items that were subject to seizure.[167] Because the mere evidence rule applied to both warrantless seizures and seizures conducted pursuant to validly issued warrants, the only Fourth Amendment value to be balanced in *Carroll* was the judicial supervision of the determination of probable cause. Thus, there was still a generic particularity requirement.

---

163. *Chambers*, 399 U.S. at 24.

164. *Hayden*, 387 U.S. 294.

165. *Chambers*, 399 U.S. at 52.

166. [T]he informed and deliberate determination of a magistrate empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (citations omitted). *E.g.*, McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948).

167. For example, before *Hayden*, if there was probable cause to believe a person had used his car to transport a stolen oriental carpet that was later recovered, the "mere evidence" rule protected the automobile from search (with or without a warrant). There would be no chance of discovering fruits, instrumentalities, or contraband.

With the demise of the mere evidence rule, the warrantless search was free from any limit on its scope. This result troubled Justice Harlen in *Chambers*. He noted that *Chambers* went further than *Carroll* insofar as it permitted searches for things which were not contraband.[168] If there is probable cause to believe that a car has somehow been connected to a crime, sophisticated modern forensic techniques can "probably" turn up "some evidence" of that crime. Having probable cause that an automobile contains contraband or the fruits or instrumentalities of a crime is a much more specific requirement than probable cause that the car contains some evidence of a crime. Automobile searches in the post-*Hayden* era are not as limited as they were at the time the Supreme Court decided *Carroll*.

Furthermore, the elimination of the warrant requirement for automobile searches (flowing from *Chambers*' conclusion that *inherent* or *potential* mobility satisfied the *Carroll* standard for permitting warrantless searches) expands the potential for exploratory searches. There is a substantially different degree of intrusion in an actual stationhouse search from that of a highway search. The former is likely to be more intrusive than the latter, as the facts in *Chambers* indicate. In a typical highway search, the scope of the warrantless search and the accompanying intrusion is most likely limited to a gross, though thorough,[169] inspection of the trunk, interior, and glove compartment, simply because patrol officers lack the necessary equipment to do a more sophisticated evidentiary analysis. Under *Chambers*' continuing authority rule, the problem of unlimited warrantless searches becomes significant. In *Chambers*, the search was limited to fruits and instrumentalities of the crime, knowledge of which gave the arresting officers probable cause to stop, arrest, and search. Still, *Chambers* illustrates the problem because the only limit on the intrusiveness of the search was self-imposed by the police, not by the Constitution.

IV. RECONSIDERATION: *COOLIDGE V. NEW HAMPSHIRE*

Coolidge v. New Hampshire[170] provides yet another clear illustration of the dangers associated with warrantless searches of automobiles. In *Coo-*

168. *Chambers*, 399 U.S. at 62 n.7. Continuing the example of the oriental carpet, *supra* note 167, post-*Hayden*, the police could vacuum the automobile to search for carpet fibers which would connect the arrestee with the crime, but only with a warrant. *Carroll* would not have authorized a warrantless search for the fibers, since there was no statutory exemption for automobiles from the warrant requirement with respect to searches for evidence, as there was for searches for contraband liquor. That opportunity was made available in *Chambers*.

169. Recall that in *Carroll* the agents tore open the upholstery of the vehicle in order to discover the contraband liquor. *Carroll*, 267 U.S. at 136.

170. 403 U.S. 443 (1971).

lidge, the defendant was arrested as a result of an investigation into the murder of a young girl.[171] Following Coolidge's arrest, his car was towed from his driveway to the police station. The car was searched and vacuumed two days later, again a year later, and yet a third time, approximately thirteen months after the initial search.[172] Evidence obtained from vacuuming the car was introduced at Coolidge's trial and he was convicted of murder. Coolidge appealed the conviction on the grounds that, *inter alia*, the warrantless searches could not be upheld under *Carroll* and *Chambers*.[173] The United States Supreme Court reversed the conviction[174].

In considering whether the warrantless[175] searches were saved by the automobile exception, Justice Stewart's plurality opinion distinguished *Chambers* by ruling that the actual mobility of the vehicle had to be considered when applying the automobile exception:

> As we said in *Chambers* . . ."exigent circumstances" justify the warrantless search of "an automobile *stopped on the highway*," where there is probable cause because the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.[176]

Because Justice Stewart found *Chambers* inapplicable, the analysis could have ended there. Yet the opinion continued on to expressly respond to the state's misplaced reliance on the *Carroll*-based automobile exception:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States*—no alerted criminal bent on flight,[177] no fleeting opportunity on an open highway after a hazardous chase, no *contraband* or *stolen goods* or *weapons*, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," (*Carroll*, 267 U.S. at 153)

---

171. *Id.* at 447.

172. *Id.* at 448.

173. *Id.* at 458.

174. *Id.* at 490.

175. *Coolidge*, 403 U.S. at 449. Warrants had in fact been issued, but not by a neutral and detached magistrate. *Id.* The petitioner also argued that the warrants were not issued upon facts sufficient to establish probable cause. Petitioner's Brief at 12, *Coolidge*. The vacuuming of his automobile was a general search for "what may turn up." Petitioner's Reply Brief at 6, *Coolidge*. The Court did not address these questions.

176. *Coolidge*, 403 U.S. at 460 (emphasis added).

177. The Court found that Coolidge had known that he was under investigation and had ample chance to destroy the evidence, but had not attempted to do so. *Id.*

and the "automobile exception," despite its label, is simply irrelevant.[178]

Justice Stewart's attempt to recapture the earlier restraints of the *Carroll* rule was intellectually honest and held promise for motorists' privacy.[179] However, the Court's post-*Coolidge* decisions have not fulfilled that promise. Instead, the Court embarked on a course of further eroding Fourth Amendment protections.[180] Part of the reason, lies in choosing not to repudiate the broad language of *Chambers*. Reconciling *Chambers* and *Coolidge* by asserting factual distinctions[181] has only added to the confusion in warrantless automobile searches, because the distinctions are facile, sterile, and artificial.[182]

The greatest failing of *Coolidge* was that the Court never addressed the issue of whether probable cause supported the intrusive warrantless searches.[183] The only disciplined and factual distinction between *Coolidge* and *Carroll*, which would rationally justify the different results after *Chambers* and *Hayden*, is that a search for "debris, . . . hair and fibers,"[184] is just too vague and imparticular to be sustained, with or without a warrant. In short, the search in *Coolidge* was exploratory, with no limits as to its scope or intrusiveness established by specifying the items sought. Justice Stewart's echoes of the "mere evidence rule" in Coolidge were not enough to remind the Court that *Carroll/Chambers* only authorized warrantless searches that a magistrate could have validly authorized. Thus, despite *Coolidge's* admonition, subsequent cases have made the word "automobile" a talisman to cut loose the inquisitiveness of police from traditional Fourth Amendment constraints. In turn, a new analytical framework is used to

178. *Id.* at 461-62 (emphasis added). Justice White, not unreasonably, accused the plurality of resurrecting the mere evidence rule. *Id.* at 519 (White, J., dissenting). *See also* John G. Miles, Jr. & John B. Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 131 (1972).

179. Michael D. West, Comment, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistently Through the Seamless Web*, 53 N.C. L. REV. 722, 741-42 (1975).

180. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); Lewis R. Katz, United States v. Ross: *Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172 (1983); Lawrence A. Laskey, Note, *Misstating the Exigency Rule: The Supreme Court v. The Exigency Requirement in Warrantless Automobile Searches*, 28 SYRACUSE L. REV. 981 (1977).

181. *See Coolidge*, 403 U.S. at 463 n.20.

182. *See id.* at 504 (Black, J., dissenting in part and concurring in part).

183. *See supra* note 175.

184. The warrants for the search of Coolidge's cars, home, and place of business all recited the same items for which the police were to search, including "workshop debris, . . . hair and fibers." Appendix at 133-34, 143, 150, 158, *Coolidge*. The returns listed vacuum sweepings and debris. *Id.* at 136, 145, 153, 161.

strike the balance between privacy and police investigation that the warrant requirement enforced.

V. LESSER EXPECTATIONS OF PRIVACY: *CARDWELL V. LEWIS*[185]

The Supreme Court's next decision on warrantless automobile searches,[186] *Cardwell v. Lewis,*[187] did little to settle an area of law that was beginning to roil. Rather than building on the limits imposed by *Coolidge*, the Court narrowly limited *Coolidge* to its facts.[188] The seizure in *Cardwell* could not be sustained under *Carroll/Chambers* or even under the pre-*Chimel* SIA doctrine. Thus, the Court added a new formula to warrantless automobile search law, diminished expectations of privacy.[189]

Defendant Lewis was questioned at police headquarters about a murder they suspected he committed.[190] The victim had been shot in the head and the police had circumstantial evidence which indicated that Lewis' car had been used to push the victim's car over an embankment.[191] Following the interview, police arrested Lewis. Without a warrant, his car was removed from a commercial public parking lot and impounded.[192] The next day, a state criminal investigation technician made casts of the tires and took paint scrapings from the exterior of the car for laboratory analysis.[193] Later, the technician testified that one of the casts matched tracks found at the scene of the crime and that the paint samples were no different from the foreign paint found on the fender of the murder victim's car.[194]

In upholding the search[195] Justice Blackmun wrote:

---

185. 417 U.S. 583 (1974).

186. Arguably, Cady v. Dombrowski, 413 U.S. 433 (1973), was the next warrantless automobile search case. This case is treated separately because it was an "inventory search" case. The courts have recognized that warrants are not required in inventory searches because the basis for searches of this type is not probable cause. *See* United States v. Chadwick, 433 U.S. 1, 10 n.5 (1977).

187. 417 U.S. 583 (1974).

188. *Coolidge* was said to stand for the proposition that automobiles which are located on private property enjoy greater protection from warrantless searches than automobiles located on public property. *Cardwell*, 417 U.S. at 593. *Accord* California v. Carney, 471 U.S. 386 (1985).

189. *Cardwell*, 417 U.S. at 591-92. *See* West, *supra* note 179, at 747.

190. *Cardwell*, 417 U.S. at 586.

191. *Id.* at 587.

192. *Id.* at 588.

193. *Id.*

194. *Id.*

195. Only three other justices joined in the opinion. Justice Powell concurred in the result because he thought that federal collateral review of a state court's findings that a prisoner had not been denied constitutional rights guaranteed by the Fourth Amendment should be limited. *Cardwell*, 417 U.S. at 596.

> This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search" that implicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the *exterior* and an observation of the tread on a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect.[196]

The Court does not analyze, however, how this search is different from a search of the exterior of anything else. Instead, Justice Blackmun simply asked whether this *exterior* search was as intrusive as a warrantless *interior* search and answered:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and contents are in plain view. . . . This is not to say that no part of the interior of an automobile has Fourth Amendment protection; . . . . But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.
>
> . . . With the "search"[197] limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed.[198]

None of this is exceptionable. Despite the *Katz* dictum that the Fourth Amendment protects people, not property,[199] the fact remains that the amendment does protect the rights of people *in their property* from government intrusion. *Katz* cannot be read *sub silentio* to erase the word "effects" from the Fourth Amendment. Although a "privacy" interest may not have

---

196. *Id.* at 588-89 (emphasis in original).

197. Despite the disputatious use of quotations, Justice Blackmun never wrote that a search did not occur, only that the search did not implicate "traditional considerations of the owner's privacy interest." The dissent clearly thought that the police actions constituted a search. Given the extent of the testing that took place on the seized vehicle, it would be preposterous to claim that a search did not occur. *See Cardwell,* 417 U.S. at 595 n.11. Even if a search did not occur, clearly a warrantless seizure was accomplished. *Id.* at 597 (Stewart, J., dissenting).

198. *Cardwell,* 417 U.S. at 590-91. Because one has lesser expectations of privacy in vehicles, the trespass is not a "search" subject to Fourth Amendment constraints. The formulation has another incarnation: Because one has lesser expectations of privacy in vehicles, what is concededly a search thereof is not fully protected against by the Fourth Amendment. *See* South Dakota v. Opperman, 428 U.S. 364 (1976), and *infra* text accompanying notes 294-97.

199. Katz v. United States, 389 U.S. 347, 353 (1967).

been at risk in *Cardwell*, certainly some constitutionally protectable interest was evident. At the very least, the actions of the police amounted to a trespass.

Whatever may be said for diminished privacy interests in an automobile, a motorist's property interests are not thereby diminished. It is difficult to believe that Justice Blackmun, or anyone else, would not feel intruded upon if he observed a stranger fiddling with his tires or scraping the paint from his car with a penknife. More importantly, however, is that the interest is justifiable, because there is no societal expectation that others will handle (and possibly damage) our automobiles.[200]

Unlike the car itself, however, certain interior compartments of a car, which often serve as repositories of other personal effects and are not in plain view, were exempted from *Cardwell's* diminution analysis and were opined to be fully protected from warrantless searches.[201] This premise gave rise to what may be one of the more bewildering series of "closed container" cases including *United States v. Chadwick*,[202] *Arkansas v. Sanders*,[203] *Robbins v. California*,[204] and *New York v. Belton*.[205]

VI. THE CLOSED CONTAINER CASES

In *United States v. Chadwick*,[206] the defendants removed a two hundred pound footlocker from an Amtrak train and placed it into the trunk of a waiting automobile.[207] Federal narcotics officers observed the loading and had probable cause to believe that the footlocker contained marijuana.[208] The officers arrested the defendants and seized the automobile before the trunk was closed and before the engine was started.[209] The footlocker was

200. *Cf.* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); William S. McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435 (1991).

201. "[N]othing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence." *Cardwell*, 417 U.S. at 591.

202. 433 U.S. 1 (1977).

203. 442 U.S. 753 (1979).

204. 453 U.S. 420 (1981).

205. 453 U.S. 454 (1981).

206. 433 U.S. 1 (1977).

207. *Id.*

208. Probable cause was based on two factors. First, federal officers had received a tip from Amtrak railroad officials in San Diego, who had spotted the footlocker leaking talcum powder, a substance often used to mask the odor of marijuana. *Id.* at 3. Second, a dog trained to detect the presence of controlled substances had signalled the presence of drugs inside the trunk immediately prior to the arrest. *Id.* at 4.

209. *Id.*

removed from the car and opened at the federal building. Because the agents failed to obtain a warrant, the defendants moved to suppress the evidence.[210] The district court granted the motion and the First Circuit Court of Appeals affirmed the suppression.[211] In arguing for reversal, the government claimed that the footlocker was analogous to an automobile, for purposes of Fourth Amendment searches and seizures.[212]

> Writing for the majority, Chief Justice Burger conceded that:
>
> [the Court's treatment of] automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable. Nevertheless, we have sustained "warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent."[213]

Justice Burger relied on *Cardwell v. Lewis* to dispose of this apparent anomaly: "The answer lies in the diminished expectation of privacy which surrounds the automobile."[214] Echoing *Cardwell*, the Chief Justice further stated that people have diminished expectations of privacy in automobiles because their function is transportation, they seldom serve as a residence or as the repository of personal effects, their occupants and their contents are in plain view, they are subject to heavy state regulation, and they are often taken into police custody in the interests of public safety.[215]

Luggage, however, is not subject to continuing inspection or official scrutiny. Furthermore, luggage is intended as a repository of personal effects.[216] In sum, "[t]he factors which diminish the privacy aspects of an automobile do not apply to [a] footlocker . . . a person's expectations of privacy in personal luggage are substantially greater than in an automobile."[217] With respect to the footlocker the Court noted:

---

210. *Id.* at 4.

211. *Id.* at 5.

212. *Id.* at 11-12.

213. *Id.* at 12 (citations omitted).

214. *Cardwell*, 417 U.S. at 590.

215. *Chadwick*, 433 U.S. at 12. Of course, *Cardwell* was decided just as the craze for motor homes and conversion vans was taking off. The Chief Justice perhaps should not be criticized for failing to identify this development. On the other hand, it seems not to have interested him much. *See* California v. Carney, 471 U.S. 386 (1985). The last two factors cited as reducing automobile privacy expectations were reasons the Court had given previously as justifications for allowing warrantless inventory searches. However, as Justice Burger had recognized earlier in the *Chadwick* opinion, 433 U.S. at 10 n.5, the propriety of warrantless inventory searches proceeds under a different analysis than that used to examine other types of automobile searches.

216. *See infra* text accompanying notes 265-300.

217. *Chadwick*, 433 U.S. at 13.

> Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained . . . [w]ith the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.[218]

Arkansas v. Sanders[219] extended the privacy approach of *Cardwell* and *Chadwick* in yet another context. Acting on a tip from a reliable informant, the police had probable cause to believe that the defendant would arrive at the Little Rock, Arkansas, airport carrying a green suitcase that contained marijuana.[220] When the defendant arrived at the airport, two police officers observed him load the suitcase into the back of a waiting taxi and drive off.[221] The police then gave pursuit, stopped the taxi, and had the driver open the trunk. Without asking the defendant's permission, the police opened and searched the suitcase.[222] In the suitcase they found 9.3 pounds of marijuana.[223]

The Supreme Court held that the trial court had incorrectly denied the defendant's motion to suppress the evidence. The Court did not question that the automobile was lawfully stopped or that the warrantless arrest was constitutional.[224] Justice Powell recognized that a "closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides."[225] However, he thought that *Chadwick* required that "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control."[226] Therefore, suitcases were not mobile in the constitutional sense. Furthermore, the Court also concluded that citizens had higher expectations of privacy concerning luggage than automobiles because "the very purpose of a suitcase is to serve as a repository for personal items when

218. *Id.*

219. 442 U.S. 753 (1979).

220. *Id.* at 755.

221. *Id.*

222. *Id.*

223. *Id.*

224. The search of the suitcase could not be justified as incident to arrest. The suitcase was located in the trunk of the taxicab; it was not within the physical control or reach of the defendant at the time of the arrest. *Sanders*, 442 U.S. at 763-64 n.11.

225. *Id.* at 763.

226. *Id.*

one wishes to transport them."[227] The Court's analysis led to the inescapable conclusion that neither the resurrected *Carroll* test nor the *Cardwell* approach could support the search.[228] Thus, the search was unconstitutional.

Robbins v. California[229] presented the Court with yet another "nesting boxes" problem.[230] Robbins was stopped by two California Patrol officers, who had observed him driving erratically.[231] The officers smelled marijuana when Robbins got out of the car.[232] One of the patrolmen patted him down and found a vial of liquid.[233] Afterwards, the police searched the passenger compartment and found marijuana. Police also discovered two packages wrapped in opaque green plastic in the luggage compartment.[234] The officers opened these packages and found marijuana.[235]

The State of California argued that the search was constitutional based on what it deemed to be the true holding of *Sanders*. Footnote thirteen of *Sanders* states:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.[236]

The California court interpreted *Sanders* as authorizing the *Robbins* search because the nature of the containers led the officers to infer that they contained marijuana.[237] In fact, one of the officers had testified that the green

---

227. *Id.* at 764.

228. *Id.* at 765-66.

229. 453 U.S. 420 (1981).

230. By this time the *Carroll* exception was thoroughly unpredictable, as evidenced by the position taken by each of the justices. Justice Stewart, author of *Coolidge*, wrote the plurality opinion, joined by Justices White, Brennan, and Marshall. Chief Justice Burger, author of *Chadwick*, concurred in the judgment. Justice Powell, author of *Sanders*, filed a separate opinion concurring in the judgment. Justice Blackmun, who had written *Cardwell*, Justice Stevens, and Justice Rehnquist all wrote dissenting opinions. Justice Powell summed up the situation when he wrote, "[T]he law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided." *Robbins*, 453 U.S. at 430.

231. *Id.* at 422.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Sanders*, 442 U.S. at 764-65 n.13.

237. *Robbins*, 453 U.S. at 427.

plastic bags attracted his attention because he had heard that marijuana was often transported in such bags.[238]

Nevertheless, the Supreme Court rejected the state's argument that this case fell within this exception to the closed container rule. The Court stated:

> The . . . exception is . . . little more than another variation of the "plain view"[239] exception, since, if the distinctive configuration of a container proclaims its contents,[240] the contents cannot fairly be said to have been removed from a searching officer's view.[241]

The Court held that the green plastic bags were closed containers within the rule of *Chadwick/Sanders*, and therefore, that the warrantless search was unconstitutional.[242] The Court thereby narrowed the *Carroll* exception and developed a supposedly bright-line test: anytime a closed container is discovered in an automobile in which the police have probable cause to believe seizable items are present, the police must obtain a warrant before examining the contents of any container seized, even if police have probable cause to search the container.

VII. COLLATERAL DAMAGE

A. Searches of Automobiles Incident to Arrest

In addition to distorting the *Carroll* rationale for warrantless automobile searches, and engendering the confusion of the "nesting box" cases, *Cardwell*'s "lesser expectations" analysis had a spillover effect on other doctrines under which the police could search automobiles and their contents. In a companion case to *Robbins*, the constrictions on the automobile excep-

238. *Id.* at 427-28.

239. The plain view doctrine allows police to seize evidence of crime or contraband that lawfully comes under their gaze. The officers must have a right to occupy their vantage point and the criminal nature of the object must be immediately apparent. Horton v. California, 496 U.S. 128 (1990); Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971) (plurality opinion). *Horton* eliminated the *Coolidge* plurality's requirement that the discovery be inadvertent. *Compare Horton*, 496 U.S. at 128 *with Coolidge*, 403 U.S. at 472-73.

240. The Court gave police officers no guidance in deciding whether a container's contents are obvious enough to allow a warrantless search. *But see* Texas v. Brown, 460 U.S. 730, 742-43 & n.7 (1983) (plurality opinion) (standard of certainty for plain view seizure no more than probable cause).

241. *Robbins*, 453 U.S. at 427.

242. In *Carroll* the agents tore open the upholstery to view the liquor bottles. Carroll v. United States, 267 U.S. 132, 136 (1925). This would be seen by many as more intrusive than looking in Chadwick's footlocker or Sanders's suitcase. *See* United States v. Roe, 456 U.S. 798 (1982).

tion wrought by *Chadwick* and *Sanders* created a need to re-examine SIAs in the automobile context.[243]

The facts in *New York v. Belton*[244] are a fugue on *Robbins*. A New York State patrolman, riding in an unmarked car, was passed by another vehicle traveling in excess of the speed limit.[245] The police officer gave chase, caught the speeding vehicle, and ordered its driver to pull over.[246] Upon approaching the vehicle the officer smelled marijuana and observed an envelope marked "supergold" on the floor of the car. Based on these observations, the officer directed the four male occupants out of the car and placed them under secure arrest.[247] Following the arrest, the officer searched the passenger compartment of the car and found a black leather jacket belonging to Belton.[248] The officer unzipped one of the jacket pockets and discovered cocaine.[249] The trial court refused to suppress the evidence at Belton's trial. The Appellate Division of the New York Supreme Court upheld the trial court's decision, the New York Court of Appeals reversed, and the state sought review in the United States Supreme Court.[250]

The rules set forth in *Chadwick*, *Sanders*, and *Robbins* would seem to compel affirmation.[251] "In both cases, [*Robbins* and *Belton*] the automobiles had been lawfully stopped on the highway, the occupants had been lawfully arrested, and the officers had probable cause to believe that the vehicles contained contraband."[252] Yet, rather than apply the *Chadwick-Sanders-Robbins* closed container rule,[253] the Court expanded the automobile exception to include SIAs.

It had been settled that once an arrestee had been separated from his vehicle, the vehicle could not be subject to an SIA.[254] *Chimel* reinforced

---

243. *Cf.* David S. Rudstein, *The Search of an Automobile Incident to Arrest: An Analysis of* New York v. Belton, 67 MARQ. L. REV. 205, 254 (1984).

244. 453 U.S. 454 (1981).

245. *Id.* at 455.

246. *Id.* at 455-56.

247. *Id.* at 456.

248. *Id.*

249. *Id.*

250. *Id.* at 456-57.

251. Three of the justices thought both the search in *Robbins* and the search in *Belton* should be disallowed. Three of the justices thought that both searches should be upheld. Only three justices reached "the curious conclusion that a citizen has a greater privacy interest in a package of marijuana enclosed in a plastic wrapper than in the pocket of a leather jacket." Robbins v. California, 453 U.S. 420, 444 n.1 (Stevens, J., dissenting).

252. *Id.* at 444.

253. *Belton*, 453 U.S. at 462.

254. Preston v. United States, 376 U.S. 364 (1964); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

that proposition and *Chambers* and *Coolidge* continued to respect it as well.[255] *Belton*, however, departed from earlier law. Instead, another bright line rule was adopted, which permitted the arresting officer to search the passenger compartment of an automobile and any closed container therein, as a function of the SIA of the driver and the passengers.[256] Unlike the *Carroll* exception, however, a *Belton* search is not dependent upon the existence of probable cause.[257] *Belton* subsumes all expectations of privacy in items within the passenger compartment upon the event of the arrest.[258] As such, the decision greatly expanded the power to conduct exploratory searches within the interior compartment of an automobile.

Perhaps frustrated with the inescapable result that would follow from an application of the automobile exception in *Belton*, the swing members of the Court chose to deform another area of search and seizure law in order to uphold the search.[259] This made automobile search law more confusing than ever and worked a major revision of *Chimel*. More importantly, it exposed the sterility of the "greater/lesser expectations" analysis. Practically speaking, a motorist had a greater or lesser expectation of privacy depending upon the location of an item, no matter what its character. A briefcase could be searched incident to arrest without probable cause if it were in the back seat, but could not be searched (even if with probable cause) if it happened to be in the trunk of an automobile.[260]

Aside from nearly returning[261] to the pre-*Chimel* days of wide latitude of SIAs of automobiles, *Belton* set the stage for utilizing the bright line test in highway situations. Soon, the Court extended the idea to highway stops on less than probable cause. In *Michigan v. Long*,[262] the Court held that

255. Chambers v. Maroney, 399 U.S. 42, 46 (1970); Coolidge v. New Hampshire, 403 U.S. 443, 456-57 (1971).

256. *Belton*, 453 U.S. at 460 n.4. In limiting the *Belton* search to the passenger compartment, the Court was nodding in the direction of the "wingspan" limit of *Chimel*. To do otherwise would be to turn back to the days of *Harris* and *Rabinowitz*.

257. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973) (probable cause to believe evidence present not needed to conduct a search incident to arrest).

258. The "justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies infringement of any privacy interest the arrestee may have." *Belton*, 453 U.S. at 461.

259. Robert A. Stern, Comment, Robbins v. California *and* New York v. Belton: *The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U. L. REV. 291, 311 (1982).

260. *Cf.* Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 605-13 (1982) (for existing uncertainties in search and seizure law).

261. SIAs of automobiles prior to *Chimel* would have permitted a search of the trunk and anything in it. *See supra* notes 95-96 and accompanying text. *Cf.* United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

262. 463 U.S. 1032 (1983).

under the rule of *Terry v. Ohio*,[263] police could conduct a "frisk" of the interior[264] of a stopped car upon reasonable suspicion that the driver or passenger was in possession of a weapon. While neither *Belton* nor *Long* made reference to the lesser expectations analysis, it is not unreasonable to conclude that the Court was influenced in its decisions both by the notion of lesser privacy expectations in automobiles and the limits on the automobile exception worked by *Chadwick*, *Sanders*, and *Robbins*.

B. Inventory Searches

In addition to working a revision of SIA law to create an automobile exception, the lesser expectations analysis has affected inventory searches as well. *Harris v. United States*[265] is the foundation for the so-called inventory exception to the Fourth Amendment warrant requirement. Defendant Harris was seen leaving the scene of a robbery.[266] His car was traced and he was arrested at home.[267] The police took possession of the automobile to use as evidence.[268] The car windows were open and the door unlocked. One of the officers went to the lot where the car had been stored with the intention of removing all valuables for safekeeping, tagging the car for identification, rolling up the windows, and locking the door.[269] As the officer opened the door on the front passenger side, he found a registration card in the doorjamb, which belonged to the robbery victim.[270]

The Supreme Court upheld the court of appeals' decision not to suppress the evidence in a narrow and succinct per curiam opinion:

> The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not. *The admissability of evidence found as a result of a search under the police regulation is not presented by this case.* The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card

263. 392 U.S. 1 (1968).

264. This includes closed containers which could contain a weapon. Michigan v. Long, 463 U.S. at 1049.

265. 390 U.S. 234 (1968) (per curiam). Cooper v. California, 386 U.S. 58 (1967), is often considered the first in the line of "inventory cases." South Dakota v. Opperman, 428 U.S. 364 (1976). However, *Cooper* involved the discovery of narcotics during a warrantless search of a car that was impounded pursuant to a state forfeiture statute. Therefore, it rests on a different governmental interest than those involved in the typical safekeeping function underlying the inventory exception.

266. *Harris*, 390 U.S. at 235.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

> was not the result of the search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.
>
> Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.[271]

Justice Douglas concurred with the understanding that the police inadvertently came across the evidence while performing their duty to protect the automobile, not while "engaged in an inventory or other search."[272] Given that the *Harris* Court did not reach the legitimacy of inventory searches, but instead based its decision on the plain view exception, the case provides little support for the proposition that purposeful inventory searches that result in the discovery of incriminating evidence are reasonable under the Fourth Amendment.[273] However, justification for warrantless inventory searches was later said to be "controlled by principles that may be extrapolated from *Harris v. United States* . . . and *Cooper v. California*. [274]

In *Cady v. Dombrowski*,[275] police in West Bend, Wisconsin, arrested an off-duty Chicago policeman for drunken driving after he had been involved in an accident, which immobilized his rented car.[276] Believing that Dombrowski was required to carry his service revolver at all times, the police made a cursory search of the car at the scene of the accident.[277] One policeman later returned to the garage where the wrecked automobile had been towed to conduct a more thorough search for the "missing" gun.[278] During the course of the more intrusive warrantless search, the police officer seized a number of blood-stained items he found in the trunk of Dombrowski's

---

271. *Id.* at 236 (emphasis added).
272. *Id.* at 236-37.
273. *See* Dennis M. Cooley, Note, *The Inventory Search of An Impounded Vehicle*, 48 CHI-KENT L. REV. 48 (1971); Miles & Wefing, *supra* note 178, at 134.
274. Cady v. Dombrowski, 413 U.S. 433, 445 (1973). *See supra* note 265.
275. 413 U.S. 433 (1973).
276. *Id.* at 435-36.
277. *Id.* at 436.
278. *Id.* at 437.

rented car.[279] These items eventually led to other evidence and to Dombrowski's conviction for murder.[280]

Although the Court proceeded on Fourth Amendment grounds,[281] it placed great emphasis on findings by the federal district and state court that the search was not investigatory in nature nor based on probable cause. Rather, the Court found that the search was motivated by "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."[282] Moreover, because the officers "were simply reacting to the effect of an accident, one of the recurring practical situations that results from the operation of motor vehicles and with which local police must deal every day,"[283] the search was not considered unreasonable.

In *South Dakota v. Opperman*,[284] the Court completed its extrapolation from *Harris* and gave full approval to inventory searches of automobiles so long as they were conducted according to standardized procedures.[285] Unlike the other defendants, whose cars had been impounded after involvement in a serious offense,[286] Opperman had his car towed because he parked in a restricted zone.[287] While conducting an inventory of the car,

---

279. *Id.* Of the three decisions issued in the case, only the federal district court saw fit to address the question of the legitimacy of the seizure of the bloody items. Dombrowski v. Cady, 319 F. Supp. 530 (E.D. Wis. 1970). Despite the fact that there was no probable cause to believe a crime had been committed, Judge Gordon opined that the officer "could not be expected to ignore" them. *Id.* at 532.

280. These were the facts the Court relied upon in its opinion. *See infra* text accompanying notes 418-26.

281. The Wisconsin Supreme Court held that the discovery of the evidence was not a search, but rather an inspection not subject to Fourth Amendment restriction. State v. Dombrowski, 44 Wis. 2d 486, 171 N.W.2d 349 (1969). By the time the case reached the Seventh Circuit on review of a denial of a petition for habeas corpus, Dombrowski v. Cady, 319 F. Supp. 530 (E.D. Wis. 1970), the state had conceded that a "search" had occurred. Dombrowski v. Cady, 471 F.2d 280 (7th Cir. 1972).

282. *Cady*, 413 U.S. at 447. For criticism of the view that such noncriminal "benign" searches are not subject to Fourth Amendment limits, see Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 848-53 (1974); *see also* West, *supra* note 179, at 759-60.

283. *Cady*, 413 U.S. at 446.

284. 428 U.S. 364 (1976). *See also* Florida v. Wells, 495 U.S. 1, (1990), Colorado v. Bertine, 479 U.S. 367 (1987).

285. Phillip G. Rosenberg, Note, *Constitutional Law - Fourth Amendment - Search and Seizure - Warrantless police inventory of items beyond plain view during search of automobile impounded for parking infraction violates the fourth amendment*, 53 J. URB. L. 347 (1975).

286. Cooper v. California, 386 U.S. 58 (1967) (impoundment for forfeiture); Harris v. United States, 390 U.S. 234 (1968) (robbery); Cady v. Dombrowski, 413 U.S. 433 (1973) (DUI; wrecked auto).

287. South Dakota v. Opperman, 428 U.S. 364, 366 (1976).

purportedly to safeguard its contents,[288] the police discovered marijuana in the glove compartment.[289] Opperman was later arrested and convicted for possession of the marijuana.[290] The South Dakota Supreme Court reversed his conviction, but the United States Supreme Court held that the warrantless search was constitutional.[291]

In the interval between *Cady* and *Opperman*, the Court had decided *Cardwell v. Lewis*.[292] The concept that citizens had lesser expectations of privacy with regard to the contents of their automobiles had risen to the forefront of automobile search law. Unlike the revision of the SIA doctrine, the Court explicitly premised its inventory exception on the lower expectations associated with automobiles. The Court explained:

> The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel.[293] [L]ess rigorous warrant requirements [for automobiles] govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office . . . . Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles . . . .[294]

The Court concluded that whatever expectations of privacy remained were outweighed by institutional needs of the safekeeping function: "the protection of the owner's property while it remains in police custody . . .; the protection of the police against claims or disputes over lost or stolen property . . .; and the protection of the police from potential danger."[295]

There are several problems with both the Court's reasoning and the result reached in *Opperman*. Most obvious is the Court's conclusion that citizens have lower expectations of privacy in *all* areas of their automobiles. This was a significant expansion of *Cardwell v. Lewis* in which the lower

---

288. *Id.* at 366 n.1.

289. *Id.* at 366.

290. *Id.*

291. *Id.* at 367. Upon remand, the South Dakota Supreme Court again reversed Opperman's conviction on the grounds that the inventory violated S.D. Const. art. VI, § 11. State v. Opperman, 247 N.W.2d 673 (S.D. 1976). The court held that the state constitutional provision, virtually identical to the Fourth Amendment, limited noninvestigatory police inventories of automobiles without a warrant to the safeguarding of articles lying in plain view of an officer's vision. *Id.* at 675.

292. 417 U.S. 583 (1974).

293. *Opperman*, 428 U.S. at 367-68. *See* Cardwell v. Lewis, 417 U.S. 583 (1974), and *supra* note 198 for the other version of the lesser expectations analysis.

294. South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976).

295. *Id.* at 369.

expectation of privacy was only associated with the exteriors of automobiles and the observable interior passenger compartment.[296] In that case, the Court expressly recognized that the decision was "not to say that no part of the interior of an automobile has Fourth Amendment protection."[297] Nevertheless, the existence of the automobile had trumped the Fourth Amendment once again.[298]

Moreover, once the expectation of privacy was diminished, it was easy to conclude that what remained could be overcome by the possibility, rather than the probability, that the other interests identified by the Court were endangered. In *Opperman*, aside from the watch on the dashboard and a few items on the seat, there was nothing about the parking offense which remotely suggested that any of these interests were really threatened.[299]

The approach in *Opperman* also ran counter to the Court's concern for closed containers as exhibited by *Chadwick*, *Sanders*, and *Robbins*. In these cases, the closed container was immunized from a warrantless search even with probable cause "because the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them."[300] Automobile glove compartments and trunks were exempted from this concern even though they are utilized as repositories for personal effects, but containers within them were not. No such delineation was made with regard to inventory searches. It is unclear whether the bag in Opperman's glove com-

296. *See supra* notes 185-205 and accompanying text.

297. *Cardwell*, 417 U.S. at 591.

298. Some will argue that the inventory exception is unrelated to automobiles except insofar as it may apply to automobiles as much as anything else. *See* Illinois v. Lafayette, 462 U.S. 640 (1983) (standard stationhouse inventory of arrestee's backpack); United States v. Edwards, 415 U.S. 800 (1974) (stationhouse search of defendant's clothing). Before one agrees with that position, one should reflect on the fact that the inventory exception emerged from automobile cases, Cooper v. California, 386 U.S. 58 (1967); Harris v. United States, 390 U.S. 234 (1968); Cady v. Dombrowski, 413 U.S. 433 (1973). In addition, *Edwards* would not pass muster under evolved inventory search doctrine, *Opperman*, 428 U.S. 364; Illinois v. Lafayette, 462 U.S. 640 (1983); Colorado v. Bertine, 479 U.S. 367 (1987) and Florida v. Wells, 495 U.S. 1 (1990) (all requiring a standardized procedure, lacking in *Edwards*). Finally, *Lafayette*, 462 U.S. 640, actually represents an extension of the principles of automobile search law into nonautomobile cases. *See also* Florida v. Wells, 495 U.S. 1 (1990) (prying open a locked suitcase found in the trunk of DUI arrestee's impounded auto not a lawful inventory search because there were no standardized procedures to limit officer's discretion).

299. *Opperman*, 428 U.S. at 366. *See* Fred L. Alvarez, Comment, Colorado v. Bertine: *An Expansion of the Inventory Doctrine as Applied to Vehicles and its Impact on Illinois Law*, 19 LOY. U. CHI. L. J. 1097, 1111 (1988); Christenson, *supra* note 1, at 785-87; Carlos A. Esqueda, Note, Colorado v. Bertine: *Automobile Inventory Searches of Closed Containers: The Waning Right of Privacy*, 13 J. CONTEMP. L. 365, 377 (1987) (for criticism of the interests asserted as being chimerical).

300. Arkansas v. Sanders, 442 U.S. 753, 764 (1979).

partment was opaque or not. *Illinois v. Lafayette*[301] suggests that it would not have made a difference and *Colorado v. Bertine*[302] confirmed it.

Most recently, the Supreme Court held evidence found during an alleged inventory of defendant's automobile inadmissible.[303] The Court held that since the Florida Highway Patrol had no procedure with which to guide police discretion in conducting the inventory, a crucial element of the exception was lacking. Although the judgment was unanimous, only five justices joined the Chief Justice's opinion. The split on the court[304] concerned the degree of latitude a constitutionally acceptable standardized inventory procedure may permit an individual officer to exercise.

The majority would allow procedures which permit the "exercise of judgment based on concerns related to the purposes of an inventory search,"[305] while the minority would require procedures which would prohibit the police from selecting from within a class of containers those they will or will not open.[306] If this is to be the line of distinction in the automobile inventory area[307] for the 1990s, we may be in for a series of cases as troublesome as the closed container cases of the late 1970s and early 1980s.[308] The bottom line on the inventory search, however, is that because of the diminished expectations analysis, an individual's privacy may be warrantlessly intruded upon. Furthermore, the intrusion may be based on generalized possibilities rather than on particularized probable cause.

VIII. RESOLUTION: *UNITED STATES V. ROSS*[309]

The problem confronting the Court was how to define the scope of the search authorized by *Cardwell's* revision of the automobile exception, e.g., the "lesser expectation of privacy" an individual has in an automobile. The

---

301. 462 U.S. 640 (1983) (closed backpack may be opened during standard stationhouse inventory of disorderly conduct arrestee's belongings on the authority of *Opperman*).

302. 479 U.S. 367 (1987) (very thorough inventory search required by local police regulations of sealed envelopes and containers within containers within closed backpack found in van impounded after driver arrested for DUI held lawful). *See* Esqueda, *supra* note 299, at 382.

303. Florida v. Wells, 495 U.S. 1 (1990).

304. Justice Stevens also criticized the Chief Justice for undertaking extended dicta to correct a "minor flaw" in the Florida Supreme Court's opinion. *Id.* at 12.

305. *Id.* at 4.

306. *Compare Wells*, 495 U.S. at 3 *with Wells*, 495 U.S. at 7-8 (1990) (Brennan, J., concurring) *and Wells*, 495 U.S. at 11 (Blackmun, J., concurring) (Stevens, J., concurring).

307. The inventory of the personal effects of custodial arrestees is likely to be controlled by United States v. Edwards, 415 U.S. 800 (1974) (custodial arrestee has no remaining expectation of privacy in his personal effects which come into police safekeeping).

308. California v. Acevedo, 111 S. Ct. 1982 (1991); *see supra* notes 206-242, particularly note 230, and *infra* notes 307-311 and accompanying text.

309. 456 U.S. 798 (1982).

Cardwell approach suggests that when a person places a "fully protected" container within a "lesser protected" automobile he should suffer a corresponding diminution in privacy expectations in the container. Thus, the container should be as subject to search without a warrant as the automobile itself.

Apparently, the Court was troubled that this analysis would prove too much and expose areas protected by the warrant requirement to warrantless searches. Therefore, the Court attempted to limit the scope of the automobile exception by declaring searches of closed containers[310] in an automobile off limits under *Carroll/Chambers.*

The analytical distraction which created the result in *Chadwick, Sanders,* and *Robbins* was the injection of the lesser expectations of privacy concept into the foundation of the automobile exception, rather than adhering to the fifty year old *Carroll* rule.[311] *Carroll* suggested that the exception was recognized earlier, with regard to other means of transportation known in the Eighteenth Century—wagons, buggies, and ships—and was only more vital in the face of highly mobile automobiles.[312]

Chadwick and *Sanders* may be accepted as correct decisions without recourse to the rationale advanced by the Supreme Court. As Chief Justice Burger and Justice Stevens pointed out, those cases are not really automobile cases.[313] *Carroll* applies when the police have probable cause to search for some identified item, but do not know where in an automobile it may be located. It does not authorize a general search of a vehicle after that item is discovered.[314] The probable cause the police had in *Chadwick* would not have authorized a search of the car's glove compartment.[315] Nor would the probable cause in *Sanders* authorize a search of the cab driver's money pouch.

These results follow because the particularity requirement of the warrant mandates the termination of a search when the police locate the items

---

310. This limitation led to questions regarding the "worthiness" of various containers, Robbins v. California, 453 U.S. 420 (1981) (plurality) (rejection of a distinction between types of containers), *accord Ross,* 456 U.S. at 822, and whether a container might be "open" by virtue of its outward appearance. Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979); *Robbins,* 453 U.S. at 427; Texas v. Brown, 460 U.S. 730 (1983) (Stevens, J. concurring).

311. *See* Katz, *supra* note 107, at 572.

312. Carroll v. United States, 267 U.S. 132, 153 (1925).

313. *Sanders,* 442 U.S. at 767 (concurring opinion); *see also* California v. Acevedo, 111 S. Ct. 1982 (1991) (Stevens, J., dissenting).

314. *Sanders,* 442 U.S. at 770 (Blackmun, J., dissenting).

315. *But see* United States v. Johns, 469 U.S. 478 (1985).

described in the warrant.[316] Because the record clearly reflected that the contraband sought by the police was in the footlocker and suitcase respectively, any search (even one with a warrant) beyond those areas would have been unauthorized. These cases must, therefore, be treated under the traditional rule that personal belongings, no matter how transportable, may not be searched without a warrant or some exception to the warrant requirement such as SIA.[317]

The result in *Robbins v. California*[318] cannot be sustained under this traditional analysis. In *Robbins*, while the agents had probable cause to search for contraband, their knowledge was general and did not point to a particular item (or place) to be searched.[319] Indeed, one can hardly imagine a case in which the application of the *Carroll* rule would be more appropriate.

The Court apparently recognized this in *United States v. Ross*,[320] decided one year after *Robbins*, on almost identical facts. Acting on a tip that Ross had made a narcotics sale from his car and that more narcotics were in the automobile, the police stopped his vehicle, arrested Ross, and searched his automobile twice. At the scene, the police discovered heroin in a paper bag in the trunk. At the stationhouse, they discovered a zippered leather pouch containing cash.[321]

The Court upheld the searches of the closed containers, distinguishing *Chadwick*, *Sanders*, and *Robbins*. The Court concluded that because the police had probable cause to believe that there was contraband in the automobile, although they had no idea where the material might be located, the intrusion into the closed containers was permissible under *Carroll*.[322] The police could search any place where contraband might be located. If this is true, *Chambers* would support the search at the stationhouse.

Ross, therefore, authorizes the police to search any closed container within an automobile that may contain the object sought. The Court relied heavily upon the degree of intrusion approved in *Carroll*,[323] concluding that

316. Because the warrant only authorizes a search for the items named in it, when they are discovered the authority of the warrant is exhausted. *See* LAFAVE, *supra* note 140, at § 4.10(d). *See also* State v. Trujillo, 95 N.M. 535, 624 P.2d 44 (1981). *But see* United States v. Carter, 854 F.2d 1102 (8th Cir. 1988).

317. Robbins v. California, 453 U.S. 420, 420 (1981).

318. *Id.*

319. *Id. Cf.* United States v. Van Leeuwen, 397 U.S. 249 (1970).

320. 456 U.S. 798 (1982).

321. *Id.* at 800-01.

322. *Id.* at 825. In *Carroll*, the agent tore into the automobile's upholstery. *Carroll*, 267 U.S. at 136.

323. *Carroll*, 267 U.S. at 136.

the degree of intrusion in *Ross* was no more offensive to the Fourth Amendment.[324] *Chadwick* and *Sanders* were reinterpreted as not being automobile search cases, but rather cases in which the probable cause as to the automobile existed only because of the probable cause in the containers.[325] *Robbins* was effectively overruled.[326]

By returning to the analysis of *Carroll*, *Ross* has done much to clean up the confusion that resulted from the *Cardwell v. Lewis* lesser expectations analysis. In *Ross*, the Court upheld the search, nominally distinguishing *Robbins* on the grounds that a pure application of *Carroll* was not pressed by the parties.[327] *Ross* returned much sanity to the law of automobile searches. It also relied on *Carroll* for the law. The lesser expectations analysis is not found in the opinion. Instead, the rationale runs straight from *Carroll* through *Chambers* to *Ross*. Justice Stevens' opinion in *Ross* echoes *Carroll's* holding that the scope of the automobile exception is no broader than that which could be authorized by a magistrate's warrant.[328]

Ross, however, raised a new anomaly. Although it purported to address the legitimate scope of an automobile search,[329] it gave police little guidance to that end. The opinion seems to place a premium on police ignorance. That is, the less precise the knowledge of the police, the greater their authority to explore the private areas within an automobile.[330] *United States v. Johns*[331] illustrates this point. In *Johns*, customs agents had two pickup trucks at a desert airstrip under surveillance. They noted the landing of two small planes, trucks approaching the planes, and then the planes' departure.[332] The officers proceeded to the trucks, where they detected a strong smell of marijuana coming from within, and observed green plastic wrapped packages in the back of the trucks.[333] The customs agents arrested the men, impounded the trucks, and removed the packages.[334] Three days later, the packages were opened without a warrant and their contents identified as marijuana.[335] Johns argued that the search was not controlled by *Carroll/*

---

324. *Ross*, 456 U.S. at 818.

325. *Id.* at 814. The *Chadwick/Sanders* rule was discarded in California v. Acevedo, 111 S. Ct. 1982 (1991).

326. *Ross*, 456 U.S. at 824.

327. *Id.* at 824.

328. *Id.* at 823, 825.

329. *Id.* at 800.

330. Kirk Miller, Comment, *The Expanding Scope of Warrantless Automobile Searches:* United States v. Ross, 20 SAN DIEGO L. REV. 457, 468 (1983).

331. 469 U.S. 478 (1985).

332. *Id.* at 480.

333. *Id.* at 480-81.

334. *Id.* at 481, 483.

335. *Id.* at 481.

Chambers or *Ross* but rather by *Chadwick*, as the officers only had probable cause to search the packages and not the entire vehicle.[336]

While the Court recognized that the officers could logically conclude that the marijuana smell emanated from the packages,[337] it upheld the stationhouse search of the packages because "contraband might well have been hidden elsewhere in the *vehicle*."[338] The "plain odor" of contraband[339] wafting from the vehicles gave rise to probable cause that they contained contraband. Thus, any closed containers within them could be subjected to a warrantless stationhouse search.[340]

There is no suggestion that apart from the packages there was any contraband within the trucks or that there was probable cause for the officers to think there was. Indeed, the record did not show whether the trucks were ever thoroughly searched.[341] Notwithstanding the clear implication that the probable cause emanated from a particular place in the truck (the packages), the Court premised its holding on the ignorance of the officers regarding other contents of the trucks.[342]

The Court explicitly noted that the officer did not see the packages loaded into the truck and did not know they were there until they approached the vehicles and smelled the odor of marijuana.[343] If this observation was meant to suggest that had the officers seen the packages placed in the trucks, the case would have been governed by *Chadwick*,[344] it also suggests that the police should beware of knowing too much.[345] This disincentive for knowledge runs contrary to both good investigative practice and adequate respect for Fourth Amendment rights. Indeed, the approach not only proposes that the less the police know the broader their power to

336. *Id.* at 482.
337. *Id.*
338. *Id.* (emphasis added)
339. *Id.* at 486.
340. *Id.*
341. *Id.* at 483.
342. One might wonder why this rationale would not be applicable to the facts in *Chadwick*. Despite the fact that the agents there had probable cause to believe that contraband was in the footlocker, they did not know that there was no contraband in any other place in the auto. Under the *Johns* reasoning, the police could not have searched the entire vehicle and its contents without a warrant. California v. Acevedo, 111 S. Ct. 1982 (1991).
343. *Johns*, 469 U.S. at 482.
344. *Id.*
345. People v. Acevedo, 216 Cal. App. 3d 586, 592 (1989), *rev'd*, California v. Acevedo, 111 S. Ct. 1982 (1991); Shepard, *supra* note 125, at 255.

search may be, but also suggests that the scope of a search is to be governed by what may be possible instead of what is probable.[346]

This discontinuity in Fourth Amendment law was an artifact of the lesser/greater expectations approach,[347] a by-product of *Cardwell v. Lewis*.[348] Despite *Ross*' return to the *Carroll* analysis and its repudiation of the container cases,[349] it did not lay to rest this haunt of automobile search law.[350] The fact remained that any limit to the scope of a search under any of the automobile exceptions would continue to turn upon a showing by the defendant that his expectation of privacy in some area within an automobile was greater than his lesser expectation of privacy in the automobile itself. As with the container cases, areas within an automobile would have to be subcharacterized for purposes of Fourth Amendment analysis.[351]

The same exercise is required with respect to controlling the scope of so-called inventory searches. In *Florida v. Wells*,[352] the Court divided sharply over the degree of specificity police regulations had to exhibit before they would qualify as the "standard criteria" necessary to support a lawful inventory search. At the bottom of the controversy, however, lay the question of how to determine when the opening of a particular closed container within an automobile was consistent with the Fourth Amendment. The majority mused that the criteria could pass muster even if considerable discretion were left to the officers conducting the search.[353] The concurring Justices, while not adopting the Florida Supreme Court's "all or nothing"[354] approach, wrote that the majority's dicta was inconsistent with *Opperman* and *Bertine*[355] and created the potential for abuse.[356] Nevertheless, the concurring opinions' reliance on police regulations, to check overreach-

346. Bernard J. Bobber, Note, *Fourth Amendment—Warrantless Search of Packages Seized From an Automobile*, 76 J. CRIM. L. & CRIMINOLOGY 933 (1985).

347. *Cardwell* resurfaces in *Johns*, 469 U.S. at 487. *See also* Colorado v. Bertine, 479 U.S. 367, 372 (1987).

348. Cardwell v. Lewis, 417 U.S. 586 (1974).

349. "The scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which contraband is secreted." *Ross*, 456 U.S. at 824.

350. *Ross* never cites *Cardwell* for any proposition.

351. One irony is that it was just such a process of categorization that was denounced in Warden v. Hayden, 387 U.S. 294, 302 (1967) (abolition of the mere evidence rule). As we have seen, one set of categories replaced another, with the net effect being a substantial reduction in the Fourth Amendment protections people enjoy in their automobiles.

352. 495 U.S. 1 (1990).

353. *Id.* at 3-4.

354. The Florida Supreme Court held that only a policy that required the opening of *all* closed containers or *no* closed containers would satisfy the Constitution. State v. Wells, 539 So. 2d 464, 469 (Fla. 1989).

355. *Wells*, 495 U.S. at 8 (Brennan, J., concurring).

356. *Id.* at 11 (Blackmun, J., concurring) (Stevens, J., concurring).

ing inventory searches, is premised upon the antecedent classification of containers as being either openable or non-openable during inventory. This approach will be as unsatisfactory in the long run as the rules provided by the container cases.

Likewise, *Belton* and its companion *Michigan v. Long*,[357] define the legitimate scope of a SIA by characterizing certain areas of the automobile as "Fourth Amendment free zones." These exceptions to the rules of *Chimel v. California*[358] and *Terry v. Ohio*[359] are clear departures from the rule that the scope of a warrantless search "must 'be strictly tied to and justified by' the circumstances which rendered its initiation permissible."[360] Although neither *Belton* nor *Long* mentioned *Cardwell*, it is not unreasonable to conclude that the lesser expectations miasma surrounding automobiles made these distortions more palatable. In addition, *Belton* is directly traceable to dissatisfaction with *Chadwick* and *Sanders*. While *Ross* undermined the cause for this unease, it did nothing to topple the edifice already erected.

IX. UNLIMITED ACCESS: *CALIFORNIA V. ACEVEDO*[361]

In *Belton v. New York*,[362] Justice Stewart wrote:

> [T]he protection of the Fourth . . . Amendment "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[363]
>
> . . . .
>
> In short, "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[364]

If this observation was prompted by frustration over the intricacy of the automobile exception imposed by *Chadwick*, *Sanders*, and *Robbins*, Stewart's desire for a simple rule was finally realized in *California v. Acevedo*.[365]

---

357. 463 U.S. 1032 (1983).

358. 395 U.S. 752 (1969).

359. 392 U.S. 1 (1968).

360. Belton v. New York, 453 U.S. 453, 457 (1981) (quoting *Chimel*, 395 U.S. at 752 quoting *Terry*, 392 U.S. at 19).

361. 111 S. Ct. 1982 (1991).

362. 453 U.S. 453 (1981).

363. *Id.* at 458 (quoting Lafave, *"Case-by-Case Adjudication" vs. "Standardized Procedure": The Robinson Dilemma*, 1974 S. Ct. REV. 127, 142).

364. *Id.* (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

365. *Acevedo*, 111 S. Ct. at 1985.

The Supreme Court disapproved the California courts' order to suppress the marijuana discovered in the trunk of Acevedo's automobile. The arresting officers had arranged a controlled delivery of marijuana discovered by employees of a private delivery service. They observed the defendant enter the apartment to which the contraband had been delivered and saw him leave with a full brown paper bag about the size of the bricks of marijuana delivered to the apartment. The defendant placed the bag in the trunk of his car and began to drive away. He was stopped, the police searched both the trunk and the bag, and found the marijuana.[366]

The California court held that the police had probable cause to believe there was marijuana in the bag located in the trunk of the car and thus could seize it. The court further held, however, that under the *Chadwick/Sanders* rule, the police could not search the container without first securing a warrant. The appeals court noted that if the officers had less specific probable cause, a different result would obtain under *Ross*, but it held the case inapposite because their probable cause was only directed to the bag, and not to the car generally.[367]

The Supreme Court reversed,[368] holding that the case was governed by the rule in *Ross* rather than by the rule of *Chadwick/Sanders*.[369] The Court observed that *Chadwick/Sanders* bred confusion within law enforcement and among lower courts.[370] Further, it noted the anomaly that the rule placed a premium on ignorance,[371] and only minimally protected privacy since the container could be seized pending the arrival of a warrant.[372]

---

366. *Id.* at 1984.

367. *Id.* at 1985.

368. Four justices joined Justice Blackmun's opinion for the Court. Justice Scalia concurred on the separate ground that a warrantless search of items in public places upon probable cause was inherently reasonable under the Fourth Amendment. *Id.* at 1992 (Scalia, J., concurring). Justices White and Stevens, joined by Marshall, dissented. *Id.* at 1994. The focus of the dissent was that *Ross* had recognized that *Chadwick* and *Sanders* were "luggage" cases, not "automobile" cases, and that the concerns voiced by the majority provided no basis to question either the legitimacy or wisdom of the demarcation. *Id.*

369. *Id.* at 1990. The Court did not explicitly overrule either *Chadwick* or *Sanders*; it only disapproved their results and the rule they generated. The cases may continue to have some vitality. Still to be addressed, for example, is whether once the police remove the target container to the police station, they must secure a warrant, *Chadwick*, or whether *Chambers*' extension of *Carroll* will control that situation. In addition, the Court explicitly stated that the dicta in *Sanders*, that the probable cause to search the container could not be bootstrapped into probable cause to search the automobile itself, was still to be adhered to. *Acevedo*, 111 S. Ct. at 1991.

370. *Id.* at 1989.

371. *Id.* at 1990 (citing United States v. Johns, 469 U.S. 478 (1985)).

372. *Id.*

Ross was said to have undermined the *Chadwick/Sanders* rule, which allowed the outcome of a search to turn on fortuitous circumstances.[373] The Court concluded that *Ross* provided the simplest way out of the situation and held that the police may search any container within an automobile with probable cause, whether the probable cause attaches to the automobile generally, or to the container specifically.[374]

With respect to automobiles and other motor vehicles, we now have a set of simple rules which all but consume the warrant clause of the Fourth Amendment.[375] Probable cause is not necessary to search under the SIA and the inventory search exceptions. The probable cause requirement has been abandoned in favor of bright line rules and standardized inventory procedures. In addition, the Court permits the police to make checkpoint stops for license, safety, and sobriety tests.[376] Moreover, police have the discretionary authority to make full custodial arrests, which authorize SIA's, for minor traffic violations.[377] There is no apparent concern that police may use a minor traffic infraction as a pretext to accost the driver of an automobile, if not for a full custodial arrest authorizing an SIA,[378] at

---

373. *Id.* at 1991. The Court, of course, could have added New York v. Belton and South Dakota v. Opperman on this point. Prior to *Ross*, these cases forecasted the conclusion that closed containers within automobiles were not entitled to any protection from search greater than that afforded the automobile itself.

374. *Id.* at 1990. While *Acevedo*'s rejection of *Chadwick/Sanders* is consistent with *Ross*'s interpretation of *Carroll*, it opens an new anomaly, as noted by the dissent: A container which may not be searched without a warrant on probable cause, United States v. Place, 462 U.S. 696 (1983), now may be warrantlessly searched if placed in an automobile. *Id.* at 1998. (Stevens, J., dissenting). This problem, if it is one, does provide the opening for Justice Scalia to argue for his public-place/probable-cause exception to the warrant requirement. *Id.* at 1993 (Scalia, J., concurring).

375. In California v. Carney, 471 U.S. 386 (1985), the Court held that motor homes shared the mobility features of automobiles and upheld a warrantless search and seizure therein under the automobile exception.

376. Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990); *cf.* Delaware v. Prouse, 440 U.S. 648 (1979).

377. *See* Christenson, *supra* note 1, at 783-84; *cf.* Gustafson v. Florida, 414 U.S. 260 (1973).

378. Authority is divided on whether a lawful but pretextual traffic arrest will render a statement or fruits of an SIA inadmissible. *Compare*, evidence suppressed, Black v. State, 739 S.W.2d 240 (Tex. Crim. App. 1987), Diggs v. State, 343 So. 2d 815 (Fla. 2d Dist. Ct. App. 1977); State v. Gray, 366 So. 2d 137 (Fla. 2d Dist. Ct. App. 1979); Gustafson v. Florida, 414 U.S. 260, 267 (1973)(Stewart, J., concurring) (petitioner might have prevailed on an unmade argument that his traffic arrest was pretextual); *cf.* State v. Volk, 291 So. 2d 643 (Fla. 2d Dist. Ct. App. 1974) (pretextual impoundment) *with*, evidence admissible, United States v. Kordosky, 878 F.2d 991 (7th Cir. 1989), *cert. granted and judgment vacated*, 495 U.S. 916 (1990); United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989); State v. Kehoe, 498 So. 2d 560 (Fla. 4th Dist. Ct. App. 1986). *But cf.* South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (dicta) (eschewing the use of the inventory as pretext for an investigatory search); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931).

least for the purpose of seeking consent to search the automobile.[379] Finally, the week before deciding *Acevedo*, the Court held that a generalized consent to search an automobile included consent to search closed containers as well.[380] If the motorist has any expectation of privacy remaining in the automobile or what is placed therein, it is simply because the Supreme Court has not yet declared it to be outweighed. Despite Justice Stewart's admonition in *Coolidge* that an automobile is not a talisman against the Fourth Amendment, recent developments have proven him wrong.[381]

This result was not envisioned by the framers of the Fourth Amendment, the Prohibition-era Congress which created an authorization for warrantless searches of automobiles for liquor, or the Supreme Court which upheld a narrow exception in *Carroll*. It is time to re-examine the automobile exceptions.[382]

X. A UNIFIED THEORY: CONGRESS AND THE MERE EVIDENCE RULE

A. The Essence of the Problem

The major constitutional problem with all warrantless searches or inventories is how to limit their scope. With a warrant, the particularity requirement provides an advance limit on when and for how long the police

---

379. Florida v. Jimeno, 111 S. Ct. 1801 (1991) (officer who overheard conversation suggesting drug deal followed defendant's automobile and stopped it for not coming to a full stop before turning right on red, sought and obtained consent to search automobile).

380. *Id.* Of course the consent to search must be "voluntary" (in the sense of noncoerced). Schneckloth v. Bustamonte, 412 U.S. 218 (1973). But there is no minimal Fourth Amendment limit to the scope of the search; only if the consent is specifically withheld as to an area will a search of that area be deemed unlawful. *Jimeno*, 111 S. Ct. at 1803.

381. *See* Matthew Lippman, *The Decline of Fourth Amendment Jurisprudence*, 11 CRIM. JUST. J. 293, 329 (1989); Paul M. Clyons, et al. *Bright Lines On the Highway: The Demand for Specificity In Relation to the Motor Vehicle Exception to the Warrant Requirement*, 24 N.H.B.J. 145, 153-54 (1983); Mary C. Gilhooly, Note, United States v. Ross: *The Supreme Court Redefines the Scope of Warrantless Searches Under the Automobile Exception*, 14 LOY. U. CHI. L. J. 139, 165-66 (1982); Michael A. Jeter, Comment, *Constitutional Law*—United States v. Ross: *Final Obliteration of Fourth Amendment Protection From Warrantless Searches of Cars and their Contents*, 8 BLACK L.J. 306 (1983); Christopher J. St. John, Note, *Robbins, Belton and Ross: Reconsideration of "Bright Line" Rules for Warrantless Container Searches*, 31 CLEV. ST. L. REV. 529, 571 (1982); Deborah Culver, Note, *Erasing Bright Lines to Expand the Constitutional Scope of Warrantless Automobile Searches:* United States v. Ross, 20 HOUS. L. REV. 1253, 1267-68 (1983); Martin R. Gardner, *Searches and Seizures of Automobile and Their Contents: Fourth Amendment Considerations In A Post-Ross World*, 62 NEB. L. REV. 1, 47, 48 (1983); *cf.* James M. McCauley, Comment, *Search and Seizure of Containers Found in Automobiles: The Supreme Court Struggles for a "Bright Line" Rule*, 16 U. RICH. L. REV. 649, 676 (1982); Raymond L. Slaidins, Note, *Fourth Amendment - Automobile Exception to the Warrant Requirement - Probable Cause Allows Warrantless Search of Containers Found Within Legitimately Stopped Automobile,*—United States v. Ross, 23 SANTA CLARA L. REV. 305, 317-18 (1983).

382. *Cf.* William M. Phillips, Comment, *Toward a Functional Fourth Amendment Approach to Automobile Search and Seizure Cases*, 43 OHIO ST. L. J. 861 (1982).

may search. Without the constraint of a warrant, a search or inventory may easily become exploratory.[383]

Whenever there is probable cause to link an automobile with a crime it is likely that there is probable cause that some evidence will be discovered through a thorough search. Thus, there is always *general* probable cause to search the automobile, even if the police cannot specify or describe the object of their search. It is precisely this kind of exploratory search that the particularity requirement of the warrant clause was designed to prevent. *California v. Acevedo* represents the end of the attempt to formulate a substitute protection from some searches based on the greater/lesser expectations analysis of *Cardwell v. Lewis*. As such, it opens the way for unrestricted police access to a person's papers and effects if they happen to be temporarily on wheels.[384]

Under current doctrine, inventory searches are equally open to abuse. Despite Justice Blackmun's observation,[385] automobiles *are* a repository of personal effects for many Americans. It is doubtful that there is anyone who does not keep some personal items in their automobile. It is precisely because the police know this that their natural curiosity and official vigilance lead some officers to conduct in-depth inventories that go far beyond what is necessary to serve the interests asserted as justification for them.[386]

---

383. *See* Florida v. Wells, 495 U.S. 1, 8 (1990) (Brennan, J., concurring) (facts supported conclusion that alleged inventory was in truth an exploratory search based on a hunch); United States v. Lefkowitz, 285 U.S. 452 (1932) and Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (searches incident to arrest exploratory).

384. Whatever may be said for the efficacy of the "wingspan" limit on SIAs, Chimel v. California, 395 U.S. 752 (1969), New York v. Belton, 453 U.S. 454 (1981), the emerging "regulatory" limits on inventory searches, Colorado v. Bertine, 479 U.S. 367 (1987), Florida v. Wells, 495 U.S. 1 (1990), or the "temporal" limits on exigent circumstance searches, Schmerber v. California, 384 U.S. 757 (1966), Warden v. Hayden, 387 U.S. 294 (1967), there is nothing like these limits associated with the modern automobile exception. California v. Acevedo, 111 S. Ct. 1982 (1991); United States v. Ross, 456 U.S. 798 (1982); Chambers v. Maroney, 399 U.S. 42 (1970); *see also supra* notes 371-376 and accompanying text.

385. Cardwell v. Lewis, 417 U.S. 583, 590 (1974); *see supra* note 198 and accompanying text.

386. Justifications include: protection of the owner's property, the police from false claims and from dangerous instruments. South Dakota v. Opperman, 428 U.S. 364, 469 (1976). The first can be satisfied by park and lock in a secure impound lot. Deep inventories do nothing to prevent false claims, since the fraudulent claimant would simply persist and claim that the "missing" item was left off the inventory. In addition, state law does or could easily provide protection from liability for all but the grossest negligence. Finally, just what *is* the likelihood that an impounded vehicle contains an explosive device? If there is probable cause to believe a gun or bomb is in a car, *Carroll* would allow a search for it. *Cf.* New York v. Quarles, 467 U.S. 649 (1984) (recognizing a "public safety exception" to the rule of Miranda v. Arizona, 384 U.S. 436 (1966) (questioning by police must be preceded by warnings if subsequent statement is to be admissible in state's case-in-chief)); Cady v. Dombrowski, 413 U.S. 433 (1973); *see infra* text accompanying notes 413-418. In short, all the justifications for inventories are mere possibilities that provide police a perfect cover for conducting exploratory searches for evidence without probable cause. *Wells*, 495

Under the current approach adopted by the Court, which requires inventories to be carried out according to standardized procedures, the privacy of motorists is not likely to receive much protection. If the majority in *Florida v. Wells* is any indication of the Court's position, the police will have discretion to follow these procedures or not.[387] But even more troubling than the question of police discretion, is the fact that a motorist's privacy is not constrained by the limits of the Fourth Amendment but rather by regulations contained in police manuals.

In short, the present law of automobile searches, under whatever guise, falls short of the requirements of the Fourth Amendment. The absence of any particularity requirement, or a meaningful alternative protection in lieu thereof, will continue the disquiet and turbulence in future cases.[388] Or, as in *Acevedo*, it will sacrifice the individual right to privacy to the convenience of law enforcement.

B. A Statutory Remedy

One hedge against these problems would be to return to the narrow exception carved out in *Carroll* where the police could only warrantlessly search (or inventory) automobiles when they had probable cause to search for that which Congress (or the state legislatures) statutorily exempted from the warrant requirement. *Carroll* only authorized dispensing with the magistrate's prior approval to search when Congress acted to describe with particularity the object of the search. The agents could not search for anything else without a warrant. Today's Congress might target narcotics and perhaps contraband firearms.[389]

Alternatively, Congress could impose a modest statutory expansion of the exception recognized in *Carroll* and thereby permit warrantless searches for fruits or instrumentalities if, and only if, the precise object of the search is identified *on the record* prior to the commencement of the search.[390] Ulti-

---

U.S. at 8. (Brennan, J., concurring). *See also Bertine*, 479 U.S. at 369 (the inventory form filled out in a slipshod manner, although inventory was extremely thorough).

387. *Wells*, 495 U.S. at 3.

388. *See supra* notes 349-356 and accompanying text.

389. Congress has ample power to permit such searches under U.S. Const. art. I, § 3 (regulation of interstate commerce). *See* Carroll v. United States, 267 U.S. 132 (1925). Congress also has the authority to prohibit all differing state practices under U.S. Const. amend XIV, § 5, as well as the power to enforce the guarantees of the due process clause. *Cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966), which incorporates the protection against arbitrary police intrusion.

390. The nature and circumstances of the offense would provide a touchstone for the search for such items. *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971); Chambers v. Maroney, 399 U.S. 42 (1970).

mately, the purpose of any change would be to require that there be some antecedent description of the object of any search.

C. *In Defense of the Mere Evidence Rule*

While this approach will undoubtedly be criticized as reintroducing the deficiencies of the much maligned mere evidence rule, that charge is hollow. The proposal would only apply to warrantless searches of automobiles. When it was in force, the mere evidence rule forbade the seizure of mere evidence with or without a warrant. The fancy footwork to characterize the items seized was necessary to avoid the rule's full reach.[391] No sophistry is necessary under this proposal; the police could search automobiles for and seize merely evidentiary items, if they obtained a warrant.[392]

The limited reintroduction of the mere evidence rule would be consistent with *Warden v. Hayden*.[393] In defending the repudiation of the mere evidence rule from the criticism that it enlarged the area of permissible searches, Justice Brennan noted: "[T]he intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a 'neutral and detached magistrate'. . . ."[394] In automobile searches, where there is neither the intervention of a neutral and detached magistrate nor any alternative satisfaction of the particularity requirement, *Hayden* is easily distinguishable.

If the objection is raised that *Hayden* itself was a warrantless search case, it should be noted that the search of the washing machine was held to be lawfully made in a hot pursuit search for weapons or means of escape, *i.e.*, instrumentalities.[395] The scope of the search for those items was not disputed. The seizure of the clothing was challenged because it was not fruits, instrumentalities, or contraband.[396] This proposal would not limit the power of the police to seize mere evidence if they discover it in the course of a warrantless search of an automobile upon probable cause to believe it contained fruits, instrumentalities, or contraband. If there was no antecedent probable cause, then a warrant describing the evidence thought to be present in the vehicle would be required.

---

391. One should view older cases treating the mere evidence rule as suspect precedent.

392. In a comment generally critical of the mere evidence rule, it was conceded as necessary to restrain the scope of warrantless searches. *See* Tete, *supra* note 69, at 71.

393. 387 U.S. 294 (1967).

394. *Id.* at 309-10 (citation omitted).

395. *Id.* at 299.

396. *Id.* at 300.

XI. REVISITING PRECEDENT: EFFECTS ON PRIOR JUDGMENTS

Justice Stevens had it half-right in *United States v. Ross*[397] when he wrote:

> The scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.[398]

The problem is that without the warrant application, the "object of the search" is unclear. Despite the teaching of *Chambers v. Maroney*,[399] that "probable cause to search a particular auto for a particular [crime connected] item,"[400] is required, many searches take place on less than that.[401]

This problem was not an issue in *Carroll*, because however intrusive the search, its statutory purpose was clear. A more balanced course would be steered if the courts adhered to the contemporaneous collateral limits on the scope of the search authorized by the automobile exception in *Carroll*. These collateral limits were later removed by *Hayden* and *Chambers*.

If the scope of a warrantless search of an automobile were constrained by a judicially or statutorily created mere evidence rule, there would be no need to protect special areas within the automobile. It is precisely the vulnerability of nonsuspect closed containers to a general search, authorized by the lesser expectations analysis, which created a need for the Court to draw the line in *Chadwick* and *Sanders*.

As *Ross* recognizes, if there is probable cause that an automobile contains contraband, and, such a container is located in the automobile, it is nonsensical to declare the container off-limits to a warrantless search. The rationale of *Carroll* applies to any box nested within an automobile that might leave the jurisdiction before a warrant may be issued and served.[402]

In most of the cases surveyed, the object or the police search was clear. Most of the time it was not mere evidence. It would take no great revision

---

397. 456 U.S. 798 (1982).

398. *Id.* at 824.

399. 399 U.S. 42 (1990).

400. *Id.* at 51.

401. *See, e.g.*, United States v. Jones, 452 F.2d 884 (8th Cir. 1971) (search between seat cushions after traffic arrest revealed stolen welfare check); United States v. Coleman, 322 F. Supp. 550 (E.D. Pa. 1971) (later search of car after arrest); People v. Hering, 27 Ill. App. 3d 936, 327 N.E.2d 583 (1975) (search of car after driver "bolted" from traffic stop); Maldonado v. State, 528 S.W.2d 234 (Tex. Crim. App. 1975) (scientific search of stolen car).

402. This rule would not apply to public transportation such as trains, buses, and airplanes. The fact that distinguishes automobiles from public transportation is that, unlike public transportation, the destination and route of the automobile and its contents are unknown and may be evasive. This gives rise to the exigency for an immediate search if based on probable cause.

of case law to impose the mere evidence limit on warrantless searches of automobiles and in the process cut away the confusing offshoots of the lesser expectations analysis. The result would be increased clarity in the law and greater individual privacy in one's automobile.

Returning to the initial, narrow interpretation of *Carroll* would require overruling *Chambers*,[403] as there was no statutory authority for the warrantless search in that case. However, *Chambers* could tolerate the reapplication of the mere evidence rule for automobile searches. In *Chambers*, the police were looking for fruits and instrumentalities. Although the Court referred to a search for "articles" and "contents,"[404] in holding that there was probable cause to search the car, the Court only referred to "fruits and guns [instrumentalities]."[405]

The proposed modification is most appropriate because *Chambers' sub silentio* expansion of *Carroll* is the cause for all the uncertainty in the administration of the automobile exception. Without authority, *Chambers* assumed that *Carroll* gave rise to an unconstrained exception to the warrant requirement. Yet it is apparent that there were two contemporaneous limits on the scope of a *Carroll* search—antecedent congressional particularization and the mere evidence rule.

In addition, the suggested reform would remove the potential for abuse that the *Chambers'* stationhouse expansion of *Carroll* created. Permitting warrantless stationhouse searches is neither necessary nor wise. They invite the police to undertake broad exploratory searches over extended periods of time. The present law provides the police with unnecessary authority, unavailable even in the heyday of the broad SIA rule of *Harris* and *Rabinowitz*.[406]

---

403. *Chambers*'s extension of *Carroll*, permitting stationhouse searches for *Carroll* authorized searches, would not have to be abandoned, but perhaps should be.

404. *Chambers*, 399 U.S. at 48, 51.

405. *Id.* at 47, 48.

406. *Id.* While the courts are reconsidering *Chambers*, it might make sense to overrule the stationhouse expansion completely. The repeated searches in *Chambers* would not likely be permissible even with the authority of a warrant, *see* LAFAVE *supra* note 140, at § 4010(d). *Chambers* only hints at the unrealistic possibility that the burden of securing a warrant might result in the opportunity to search (the impounded vehicle) vanishing before the warrant could be obtained. *Chambers*, 399 U.S. at 51-52. In addition to the criticism leveled at this possibility by Justice Harlan's dissent, *Id.* at 62-64 (Harlan, J., dissenting), the later decisions of United States v. Place, 462 U.S. 696 (1983) (approving the temporary seizure of luggage while a warrant was being sought), and Segura v. United States, 468 U.S. 796 (1984) (approving the quarantining of an apartment by police while a warrant was sought), indicate that the police have ample authority to maintain custody of an automobile for a reasonable period during the warrant application process. It seems inconsistent that we insist on a warrant for impounded luggage and apartments, while not requiring the same for an impounded automobile.

Using the mere evidence approach, *Chadwick* and *Sanders* were wrongly decided and thus *Acevedo*'s repudiation of them[407] should not be affected. *Robbins* had already been taken care of by *Ross*, which is consistent with the revision suggested.[408]

The result in *Belton* should be upheld, but it should suffer a revisionist fate. *Belton* can be decided on the basis of *Carroll* and *Ross*,[409] consistent with a mere evidence limit on warrantless searches of automobiles. When the officer had probable cause to arrest the occupants of the automobile for a present narcotics violation, he had probable cause to believe there were drugs in the automobile. Under *Ross*, he could lawfully search the jacket pocket since that was an area into which drugs could be secreted. In addition, he would be privileged to search the trunk of the car instead of being limited to the passenger compartment as required by *Belton*. *Long* could remain as it is insofar as it is based upon particularized grounds to believe a weapon is present.

The inventory cases would have to undergo a significant modification. Although the earlier cases could stand,[410] the more recent ones should be overruled.[411] Much like re-visiting *Chambers*,[412] this would re-introduce both privacy and certainty into automobile search law.

It is precisely these later inventory cases that are not supported by any interpretation of *Carroll*. Instead, they relied on the lesser expectations analysis of *Cardwell v. Lewis*,[413] which exacerbated the confusion begun by *Chambers*'s faulty resurrection of *Carroll*. *Florida v. Wells*[414] should serve as a warning that the inventory search doctrine is headed towards an area of potentially divisive and conflicting results. The *Cardwell* analysis should be explicitly abandoned and *Ross*' and *Acevedo*'s revival of *Carroll* should provide the touchstone for all automobile search law.

Once it is recognized that there is no lesser expectation of privacy in automobiles, only overriding governmental interests will permit warrantless

---

407. California v. Acevedo, 111 S. Ct. 1982 (1991).

408. In returning to *Carroll*, *Ross* speaks almost exclusively in terms of its authorization to conduct warrantless searches for *contraband* upon probable cause. United States v. Ross, 456 U.S. 798 (1982).

409. *See* Gardner, *supra* note 381 at 47; *see also* Miller, *supra* note 330 at 472.

410. Preston v. United States, 376 U.S. 364 (1964); Cooper v. California, 386 U.S. 58 (1967).

411. South Dakota v. Opperman, 428 U.S. 364 (1976); Colorado v. Bertine, 479 U.S. 367 (1987). The judgment in Florida v. Wells, 495 U.S. 1 (1990), need not be overruled. However, the predicate for the decision should be revised. The grounds for the suppression of evidence was that there was no probable cause to believe that contraband, fruits, or instrumentalities of a crime were in the vehicle. *Id.*

412. *See supra* note 401.

413. 417 U.S. 583 (1974).

414. 495 U.S. 1 (1990).

search in limited circumstances. Moreover, the balancing acts performed in *Opperman*[415] and especially *Bertine*[416] become much more difficult to accomplish. The potential threat to marginal government interests, which support these cases, are not so weighty as to overwhelm full privacy expectations. Best of all, the quagmire forecast by the *Wells* opinions would be avoided. Abandoning these cases can only serve to protect the privacy interests of the ordinary motorist.[417]

This new direction would not include discarding *Cooper* and *Harris*. *Cooper* is sustainable as a nonroutine inventory, since the state was claiming possessory authority over the automobile as a result of the forfeiture proceeding. *Harris* is simply a plain view case (until the discovery of the victim's ID card, whereupon it became a probable cause case). In *Harris*, there was neither a "search" for Fourth Amendment purposes nor any sense of exploration.

Cady v. Dombrowski,[418] however, presents a different problem and should be re-examined. The facts raise troubling questions regarding the attitude of the police toward their power to search automobiles under the variety of means available to them.[419] In *Cady*, the officer visited the automobile at the private garage where it was towed. It was not in the custody of the police and therefore it was accessible to the public. The officer tried to locate the police service revolver that Dombrowski was thought to lawfully have had in his possession. The officer searched the trunk where the revolver would likely be kept. The problem in sustaining the search under the modified mere evidence approach, is that the weapon was not a fruit, instrumentality, or contraband. Hence the search of the vehicle for the revolver would seem to be unlawful.

However, it is axiomatic that the public's interest in health and safety supersedes an individual's Fourth Amendment interests in privacy, although generally a warrant may be required prior to the intrusion.[420] As with other situations, exigencies may result in the privacy interest being

415. South Dakota v. Opperman, 428 U.S. 364, 364 (1976).

416. Colorado v. Bertine, 479 U.S. 367 (1983).

417. In addition, retreating from the "lesser expectations" analysis might invite more careful consideration of police activities which are fraught with potential for pretextual abuse of authority. *See supra* notes 371-373 and accompanying text.

418. 413 U.S. 433 (1973).

419. *See* Florida v. Wells, 495 U.S. 1 (1990).

420. *See, e.g.*, Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

subordinated insofar as it is protected by the warrant requirement.[421] If it be so here, *Cady* could be reinterpreted and upheld as a particularized search for a weapon to secure the public safety.[422] Upon opening the trunk and looking for the weapon the officer discovered materials that ultimately led to Dombrowski's conviction. The scope of a proper search for a revolver was not exceeded and the discovery of the evidence was not the result of a general exploratory search of the trunk.

The officer may have acted improperly in seizing the bloody towel and floor mat unless Dombrowski could be linked to a crime of violence. The items could then be seized under the plain view doctrine. The modified mere evidence rule would not prohibit the seizure. It only works to limit the scope of the search, not, as before *Hayden*, to limit what may be properly seized. But there was no report of a crime to which the bloodstained material could be connected. Hence, there would seem to be no rationale, save for the discredited inventory, which could be advanced to sustain the seizure of the towel and mat.[423] Without probable cause, they would have been improperly seized and should have been suppressed.[424]

But even so, that does not mean that the officer would have "to ignore" the discovery.[425] The observations of the officer would not be tainted. His discovery was made while he was lawfully examining the trunk for a particular item. The observation could lawfully provide the foundation for further investigation. If probable cause could be established that the items were related to a crime, the warrant process would be available to authorize the seizure of the material as *evidence*. In addition, if thought necessary, the automobile could be secured for a reasonable period while a magis-

---

421. *Cf.* Carroll v. United States, 267 U.S. 132 (1925) (mobile vehicle upon the highway); Schmerber v. California, 384 U.S. 757 (1966) (blood alcohol evidence being metabolized away); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit).

422. *See* West, *supra* note 179, at 760.

423. At the appellate level the case was confined to the propriety of the opening the trunk. The question we address here was not raised in *Cady* beyond the district court. Dombrowski v. Cady, 319 F. Supp. 530 (E.D. Wis. 1970). There, Judge Gordon offered no justification for upholding the seizure of the items without probable cause except to say that the officer "could not be expected to ignore them." *Id.* at 532. It is the thesis of this article that the police neither had to ignore them nor unconstitutionally seize them. It is only by pressing the issue past that point of search that we can see how cavalierly the police and courts treat the search and seizure of items from automobiles.

424. In the absence of any indication that the blood was not human, could we conclude that the items themselves would give rise to probable cause that a crime had been committed? If so, the materials would be immediately seizable under the modified mere evidence approach.

425. *But cf. Cady*, 319 F. Supp at 532.

trate's approval was sought.[426] If probable cause did not develop, the items could not be lawfully seized—that is how the Fourth Amendment works.

XII. CONCLUSION: THE ROAD AHEAD

Only those who would hold that the Fourth Amendment is an eighteenth century anachronism would suggest that the present state of automobile search law is consistent with the reasonable expectation of privacy and security from arbitrary police intrusion.[427] Presently, we are at a fork in the road, or actually a bit past the fork. But even so, there is still time to choose another path. We must see the wisdom of the teachings of our predecessors and insist upon government protection of our liberty interests, as accorded by the warrant clause and the particularity requirement.[428]

Based upon reconsideration of past cases and constitutional principles, this article has presented an alternative route which may be taken without any significant change to existing case law. The Congress, the Supreme Court, or state legislatures and courts may act to limit the scope of any automobile search by imposing a mere evidence rule for warrantless searches of automobiles. This would lead us out of the existing morass of separate rules governing various automobile search situations; rules which presently threaten the right of people to be free from unreasonable searches and seizures in their automobiles.

---

426. *Cf.* Segura v. United States, 468 U.S. 796 (1984); United States v. Place, 462 U.S. 696 (1983).

427. *See* Amsterdam, *supra* note 200; McAninch, *supra* note 200.

428. Less than a month after the *Carroll* decision, Justice Ethridge of the Mississippi Supreme Court, characterized *Carroll*, as follows:

> It appears to me that the recent decision of [*Carroll*] . . . speaks of a different philosophy from that of [earlier Supreme Court cases] . . . . The previous cases speak the voice of Liberty and Democracy. They accord to the citizen his full constitutional liberties and rights. The Carroll & Kiro Case bespeaks the supremacy of the government over the citizen's constitutional rights—the doctrine of thrones, the doctrine of the Stuart Kings. . . .
>
> With due respect to the high court and to my Brethren who follow it, I say that if this decision is correct the court condemns our forefathers as being rebels against the law in resisting the writs of assistance [which were the equivalent to statutory permission to search without a warrant]. . . .
>
> It is unfortunate, I think, that the liberty and privacy and immunity from arrest and search are to be placed in the control of [the police]. . . . There are those living in the realm of Utopian musardy, who believe that the millennium will be brought about by clothing a constable with dictatorial powers. There are those who would burn down a barn rather than permit the rats to escape. But such was not the faith of the Fathers, and I cannot bring my mind to accept that philosophy. I do not believe that the outlaw by his wrongdoing should be able to destroy the liberty of whole people.

Moore v. State, 138 Miss. 116, 190-94, 103 So. 483, 497-98 (1925) (Ethridge, J., dissenting).