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III. CONCLUSION

In situations in which the excess business holdings of the private foundation are stock interests in closely held corporations, redemption provides the most attractive means for complying with section 4943 without the threat of equity interests passing to third persons. Unfortunately, since a corporation often will be a disqualified person vis-a-vis the foundation, any redemption must conform to one of the provisions providing relief from self-dealing taxation. If the redeeming corporation desires to redeem the stock in exchange for appreciated property, section 101(1)(2)(B) of the Tax Reform Act in conjunction with section 311(d)(2)(A) appears to be the best alternative. Regardless of the approach adopted, it is clear that a problem exists for many private foundations and that to avoid penalty taxation under chapter 42 these foundations must have some awareness of the restrictive provisions and a firm grasp of the options available.

DAVID R. FRANKSTONE

Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistently Through the Seamless Web

I. INTRODUCTION

The automobile, originally recognized only as a new and more rapid mode of transportation, has in modern America become a status symbol, a repository of effects, and an extension of its owner's personality. As society placed an increasingly personal value on the automobile, it was transformed from a simple tool of conveyance to an accepted place of privacy. This change has been reflected in the United States Supreme Court's inconsistent treatment of warrantless searches and seizures of automobiles.¹ As a result of this inconsistency, law enforcement officers, who frequently must conduct warrantless automobile searches and seizures, and the courts that must judge the propriety of their actions, are forced to seek guidance from a "branch

1. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974) (5-4 plurality decision); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (5-4 decision); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (5-4 plurality decision); *Cooper v. California*, 386 U.S. 58 (1967) (5-4 decision).

of the law [which] is something less than a seamless web."²

Automobiles may be seized and searched by law enforcement officers for many reasons and under an infinite variety of circumstances. However, warrantless searches and seizures are conducted most frequently in three situations. First, policemen may wish to seize and search a vehicle for the purpose of discovering contraband or evidence of a crime. Since automobiles are "effects" within the fourth amendment,³ such police action is subject to the general proscription against "unreasonable" searches and seizures.⁴ Searches and seizures of this type, however, may be made consistent with the fourth amendment, even without a warrant, when *both* exigent circumstances and probable cause to believe that the car will yield contraband or evidence of a crime exist.⁵

A second situation in which police frequently seize and search automobiles occurs when they make a lawful custodial arrest⁶ of the driver or owner while he is inside or close to his vehicle. In such a case the police may conduct an immediate evidentiary search of the car at the site of arrest, or they may seize the vehicle and tow it to an impoundment lot or garage where it subsequently is searched. In either case the police may later seek to justify the warrantless search, not on the grounds of probable cause plus exigent circumstances,⁷ but on the basis that the search was one made incidental to the lawful arrest.⁸ This second type of automobile search and seizure invokes the

2. *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973).

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

4. *Carroll v. United States*, 267 U.S. 132 (1925).

5. *Cardwell v. Lewis*, 417 U.S. 583, 589-96 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). "Evidence" within this rule includes, of course, fruits and instrumentalities of the crime and contemplates that the car itself, as well as its contents, may in a given case fall into one of these "seizable" categories. *See, e.g., Cooper v. California*, 386 U.S. 58 (1967). This broad reading of "evidence" is also consistent with the Supreme Court's rejection of the distinction between "mere evidence" and contraband for search and seizure purposes. *Warden v. Hayden*, 387 U.S. 294, 302-06 (1967).

6. "Lawful custodial arrest" here refers to an arrest, made upon probable cause, in which the arrestee is actually taken into physical custody by police, as opposed to an arrest in which the offender is not taken into actual custody, as in the case of a citation for a speeding violation. *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973).

7. *See* note 5 and accompanying text *supra*.

8. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Preston v. United States*, 376 U.S. 364 (1964).

general incidental-search-to-a-lawful-arrest exception to the fourth amendment warrant requirement. Although the Supreme Court has frequently dealt with this exception,⁹ it has not squarely addressed the issue of the permissible scope of the search-incident exception with respect to searches and seizures of automobiles. As a result, recent Court decisions defining the permissible scope of searches of the premises¹⁰ and person¹¹ of the arrestee incidental to his arrest may not be precisely applied to automobile search law.¹²

A third frequently recurring category of warrantless automobile searches is that in which police seize, impound, and subsequently search a vehicle for benign, non-evidentiary purposes. Such benign purposes include removing a disabled or abandoned vehicle from the highway when it constitutes a nuisance,¹³ towing an automobile after a parking violation,¹⁴ preparing a vehicle for forfeiture,¹⁵ and impounding a car and removing its contents to a safe place after the driver's arrest to protect the arrestee's property from damage or theft while he is in custody.¹⁶ This category of warrantless "inventory" automobile

9. *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Rabinowitz*, 339 U.S. 56 (1950), *overruled*, *Chimel v. California*, 395 U.S. 752 (1969); *Trupiano v. United States*, 334 U.S. 699 (1948), *overruled*, *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947), *overruled*, *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Co. v. United States*, 282 U.S. 344 (1931); *Marron v. United States*, 275 U.S. 192 (1927); *Agnello v. United States*, 269 U.S. 20 (1925); *Carroll v. United States*, 267 U.S. 132 (1925).

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

11. *United States v. Robinson*, 414 U.S. 218 (1973).

12. Compare *Preston v. United States*, 376 U.S. 364 (1964) (search of car at station house after occupants' arrests too remote in time and place to be incident to arrest) and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (search of car at station house after owner's arrest not incident to arrest), with *Cooper v. California*, 386 U.S. 58 (1967) (search at station house after occupants arrest upheld despite facts analogous to *Preston*) and *Adams v. Williams*, 407 U.S. 143 (1972) (search conducted of arrestee's car while still at scene of arrest but substantial period of time after arrestee taken into custody and separated from car upheld as incidental to arrest). See generally *Chambers v. Maroney*, 399 U.S. 42 (1970); *Chimel v. California*, 395 U.S. 752 (1969).

13. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Mozzetti v. Superior Ct.*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

14. See, e.g., *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

15. See, e.g., *Cooper v. California*, 387 U.S. 58 (1967); *Derby v. Cupp*, 302 F. Supp. 686 (D. Ore. 1969).

16. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Harris v. United States*, 390 U.S. 234 (1968) (per curiam). See also *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *United States v. Pennington*, 441 F.2d 249 (5th Cir.), cert. denied, 404 U.S. 854 (1971); *Mozzetti v. Superior Ct.*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal.

searches raises important fourth amendment issues.¹⁷ Although an increasing number of lower federal¹⁸ and state¹⁹ courts have addressed the problem, the Supreme Court has never expressly ruled on the propriety of any inventory search and seizure.²⁰ Consequently, the questions of the constitutionality, in the first instance, and the permissible scope, of the inventory automobile search and seizure remain unresolved. As a result, the lower courts remain divided on these issues.²¹

The decisions of the Supreme Court dealing with automobile search and seizure, from *Carroll v. United States*²² to *Cardwell v. Lewis*,²³ cannot be satisfactorily harmonized.²⁴ In seeking what little consensus there may be in the area and in speculating on the future of automobile search law, it is helpful to group the cases into the three broad categories previously described—probable cause evidentiary

Rptr. 412 (1971); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781, *cert. denied*, 405 U.S. 1073 (1971).

17. See, e.g., Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 WASH. & LEE L. REV. 197 (1972).

18. See, e.g., *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *United States v. Mitchell*, 458 F.2d 960 (9th Cir. 1972); *United States v. Pennington*, 441 F.2d 249 (5th Cir.), *cert. denied*, 404 U.S. 845 (1971); *United States ex rel. Clark v. Mulligan*, 347 F. Supp. 989 (D.N.J. 1972); *Dodge v. Turner*, 274 F. Supp. 285 (D. Utah 1967). See also Annot., 48 A.L.R.3d 537 (1973).

19. See, e.g., *Boulet v. State*, 17 Ariz. App. 64, 495 P.2d 504 (1972); *Mozzetti v. Superior Ct.*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971); *State v. All*, 17 N.C. App. 284, 193 S.E.2d 770, *cert. denied*, 414 U.S. 866 (1973); *State v. Hock*, 54 N.J. 526, 257 A.2d 699 (1969), *cert. denied*, 399 U.S. 930 (1970) (dictum); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781, *cert. denied*, 405 U.S. 1073 (1971). See also Annot., *supra* note 18.

20. However, the Court has considered cases involving police action approximating that observed in inventory searches and seizures. See *Cady v. Dombrowski*, 413 U.S. 433 (1973) (disabled vehicle of drunken driving arrestee towed from highway accident scene to impound lot and searched for incapacitated driver's gun pursuant to "standard police procedure"); *Harris v. United States*, 390 U.S. 234 (1968) (per curiam) (vehicle of arrested robbery suspect towed to police impound lot and inventoried pursuant to requirements of written police department regulation); *Cooper v. California*, 386 U.S. 58 (1967) (vehicle of drug arrestee searched in course of preparing vehicle for forfeiture pursuant to state forfeiture statute); *Preston v. United States*, 376 U.S. 364 (1964) (vehicle of vagrancy arrestee towed to police station and subsequently searched).

21. Compare *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972) and *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971), with *Williams v. United States*, 412 F.2d 729 (5th Cir. 1969) and *Mozzetti v. Superior Ct.*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

22. 267 U.S. 132 (1925).

23. 417 U.S. 583 (1974).

24. Of the three most recent Supreme Court decisions in the area, two have been plurality opinions. *Id.*; *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The third involved a bare majority of one vote. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

searches under exigent circumstances; searches incident to the arrest of the driver or occupants of the vehicle; and benign purpose inventory searches for non-evidentiary purposes.²⁵

II. WARRANTLESS EVIDENTIARY AUTOMOBILE SEARCH AND SEIZURE

A. *The "Automobile Exception" and the Concept of Mobility*

During the early 1920's lower federal courts struggled to develop criteria for dealing with warrantless searches and seizures of automobiles believed to be transporting illegal liquor.²⁶ While a majority of these courts found such searches consistent with the fourth amendment,²⁷ the grounds upon which these decisions rested were hardly consistent,²⁸ and in fact often raised additional constitutional conflicts.²⁹ Some of these problems were soon resolved, however, in *Carroll v. United States*.³⁰

In *Carroll* the Supreme Court for the first time addressed the con-

25. Eliminated from specific treatment are "special" types of automobile searches, such as "border searches," those made pursuant to the consent of the vehicle's owner or occupant, and searches and seizures made by private citizens.

26. Congress, as part of the National Prohibition Act, statutorily authorized federal agents to search without a warrant movable vehicles suspected of carrying contraband spirits. Ch. 85, tit. II, § 26, 41 Stat. 315 (1919) (repealed 1935).

27. See Miles & Wefing, *The Automobile Search and the Fourth Amendment*, 4 SETON HALL L. REV. 105, 112 (1972).

28. All but a minority of the early lower federal court decisions treated the validity of a warrantless automobile search as dependent on the legality of an "arrest," either of the vehicle itself or of its occupants. *E.g.*, *Lambert v. United States*, 282 F. 413 (9th Cir. 1922); *United States v. Rembert*, 284 F. 996 (S.D. Tex. 1922). A minority of these courts justified the searches simply as authorized by the statutory scheme of the Prohibition Act. *E.g.*, *Park v. United States*, 294 F. 776 (1st Cir. 1924). A very few of these courts, perhaps anticipating the Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132 (1925), ruled that the mobility of the automobile might, in certain circumstances, obviate the "usual formality of procuring a search warrant." *Ash v. United States*, 299 F. 277, 278-79 (4th Cir. 1924). This infant mobility doctrine was, however, the definite exception rather than the rule, and for the most part it remained, until *Carroll*, a largely undeveloped fourth justification for warrantless automobile searches.

29. The early treatment of warrantless automobile searches as dependent upon some type of legal arrest conflicted with the rule against warrantless misdemeanor arrest absent an offense actually committed in the presence of the police officer. *See, e.g.*, *Carroll v. United States*, 267 U.S. 132, 164-65 (1925) (McReynolds, J., dissenting); *Park v. United States*, 294 F. 776, 784 (1st Cir. 1924) (Anderson, J., dissenting); *Snyder v. United States*, 285 F. 1, 2 (4th Cir. 1922). Since nearly all of the early cases involved searches conducted on the basis of information secured through means other than the officer's own observations, they could not be sustained, if indeed they were dependent on the validity of the arrest of the occupant or the vehicle. Miles & Wefing, *supra* note 27, at 114-15.

30. 267 U.S. 132 (1925).

stitutionality of a warrantless seizure and search of an automobile. In December 1921 two federal undercover agents stopped a vehicle suspecting it to contain contraband liquor. Defendant Carroll and one Kilo were in the car. Since the agents had not seen them in possession of contraband liquor, no misdemeanor had then been committed in their presence, and the officers had no authority to arrest Carroll and Kilo.³¹ Nevertheless the agents searched the car and discovered more than sixty bottles of liquor, whereupon they arrested Carroll and Kilo.

In upholding the search, the Court clearly indicated that the protections of the fourth amendment extended to automobiles.³² At the same time, however, it emphasized that, for fourth amendment purposes, there was a "necessary difference" between the search of a stationary structure like a house and the search of a vehicle which has been stopped on the open road, "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."³³ This was a case where "seizure was impossible except without a warrant."³⁴ Furthermore, the Court rejected the argument that the validity of the search depended on the right to arrest. Rather, the legality of the search turned on the existence of probable cause to believe the car contained contraband liquor.³⁵

The Court in *Carroll* thus recognized a new exception to the warrant requirement independent of any arrest—the probable cause-movable automobile search exception. To invoke the exception, a two-prong test had to be met. First, there had to be probable cause to search. Secondly, the element of actual ready mobility had to exist at the time of the stop and search. Neither probable cause nor mobility alone would suffice.³⁶

The requirement that there be actual mobility at the time of the search narrowly confined the newly enunciated exception. Under this branch of the test, "a vehicle is not movable . . . merely because it . . . has wheels, or is *capable* of being moved."³⁷ Rather, it is mov-

31. See note 29 *supra*.

32. "[T]he maxim that 'a man's home is his castle' does not include the full scope of the Fourth Amendment. It likewise protects the persons, and effects, wherever they may be, against unreasonable searches and seizures." 267 U.S. at 140.

33. *Id.* at 153.

34. *Id.* at 156.

35. *Id.* at 158-59.

36. *Id.* at 153-54, 156.

37. Murray & Aitken, *Constitutional Limitations on Automobile Searches*, 3 LOYOLA U. OF L.A.L. REV. 95, 101 (1970).

able only when the circumstances make it truly impracticable to obtain a warrant.³⁸ In short, the practicability of obtaining a warrant was made the measure of the *Carroll* exception. Thus, although the Court did draw a constitutional distinction between cars and houses, it "[did] not declare a field day for the police in searching automobiles."³⁹ Rather, the Court in *Carroll* indicated that if a warrant could be practicably obtained, it had to be used.⁴⁰

The *Carroll* standard of probable cause plus mobility as an exigent circumstance obviating the necessity of obtaining a warrant should be considered in light of the fact that the "reasonableness" clause of the fourth amendment implies a balancing of the interests involved in each case.⁴¹ Furthermore, since "[e]xigent circumstances" implies not just a police need, but a police need sufficient to override the claims of the private citizen,⁴² the determination of when "exigent circumstances" exist and are sufficient to excuse compliance with the warrant requirement "demands the same balancing of interests as the standard of reasonableness requires."⁴³

In *Carroll* the interest of the agents clearly was their desire to search for and seize contraband liquor,⁴⁴ and the interest of the driver, although not clearly defined by the Court, apparently was his freedom to travel on the public roads without interference.⁴⁵ Balancing these interests, the Court concluded that the agent's need for immediate seizure of contraband concealed in a moving vehicle outweighed the driver's interest in unimpeded movement.⁴⁶ While it has been argued that *Carroll*, when viewed in this light, presented only the fourth

38. *Id.*

39. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973).

40. 267 U.S. at 156.

41. *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967).

42. Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 836 (1974). See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), where the Court states: "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Id.* at 273. See also *Camara v. Municipal Ct.*, 387 U.S. 523, 533 (1967).

43. Note, 87 HARV. L. REV., *supra* note 42, at 836.

44. 267 U.S. at 156.

45. *Id.* at 153-54, where the Court noted: "[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause"

46. Analogous are the "stop and frisk cases," illustrated by *Terry v. Ohio*, 392 U.S. 1 (1968), which uphold a stop and frisk of a pedestrian on less than probable cause.

amendment issue of the validity of the seizure of the driver's person, which was accomplished by stopping the car,⁴⁷ this view relegates *Carroll* to the same dependent-on-arrest posture of most of the lower federal court automobile search cases decided before *Carroll*⁴⁸ and completely ignores the Court's repeated emphasis in *Carroll* that the warrantless auto-search doctrine existed independent of the incidental search exception.⁴⁹

Nevertheless, *Carroll*, by phrasing the driver's interest in terms of freedom of movement, apparently overlooked the possibility that other interests might be implicated in the prearrest stop and search. This is due in part to the fact that, when *Carroll* was decided, the automobile was a relatively new invention, the primary value of which was its use as a tool for motion. As the car became more widely accepted, society began to place a less neutral value on it and on the expectations and rights as to its use, and began to view the automobile as an expected place of privacy.⁵⁰ With this expectation came the recognition that warrantless prearrest seizures and searches of automobiles not only intruded upon the driver's freedom of movement, but also involved two other interests—control over his property, and the privacy or secrecy of the items within the car.⁵¹ The manner in which the Supreme Court has weighed these diverse interests against the police need to search, particularly in its struggle to apply the *Carroll* doctrine to post-arrest search situations, is the primary reason for the sporadic growth of modern automobile search law.⁵²

The birth and early growth⁵³ of the *Carroll* doctrine coincided with the first applications of the federal fourth amendment exclusionary rule enunciated by the Supreme Court in *Weeks v. United States*.⁵⁴

47. See, e.g., Note, 87 HARV. L. REV., *supra* note 42, at 838-40.

48. See, e.g., *Lambert v. United States*, 282 F. 413 (9th Cir. 1922); *United States v. Rembert*, 284 F. 996 (S.D. Tex. 1922).

49. See text accompanying notes 35-36 *supra*.

50. Note, 87 HARV. L. REV., *supra* note 42, at 840 n.28.

51. *Id.* at 841.

52. Compare *Carroll v. United States*, 267 U.S. 132 (1925), with *Chambers v. Maroney*, 399 U.S. 42 (1970).

53. In the first fifteen years after *Carroll* the Supreme Court on three different occasions reaffirmed and expanded the warrantless automobile search exception. *Brinegar v. United States*, 338 U.S. 169 (1949); *Scher v. United States*, 305 U.S. 251 (1938); *Husty v. United States*, 282 U.S. 694 (1931). In so doing the Court extended the *Carroll* mobility concept to include vehicles that could be considered mobile although motionless when probable cause to search them first arose. *Husty v. United States*, *supra*. Moreover, the Court also applied the exception to cases which involved no statutory authorization for the search. *Brinegar v. United States*, *supra*; *Scher v. United States*, *supra*.

54. 232 U.S. 383 (1914).

Since the exclusionary rule was not applicable to the states, it is not surprising that the cases involving the *Carroll* rule that reached the Supreme Court during this time almost exclusively dealt with searches made by *federal* officers. Consequently, the *Carroll* doctrine during its early existence probably had relatively little effect on automobile searches and seizures conducted by *state* law enforcement officials. This was, however, not to remain the case.

B. Modern Automobile Search Law

The Supreme Court in *Mapp v. Ohio*⁵⁵ extended the *Weeks* fourth amendment exclusionary rule to the states. The application of this rule to the states greatly complicated auto search law, for state law enforcement officials now had to conduct their searches and seizures in a manner consistent with the fourth amendment. Furthermore, state courts have had to apply the standards of these guaranties to police actions that are often far different from the investigatory and regulatory work of federal authorities.⁵⁶ As a result, all of the "modern" Supreme Court automobile search cases have involved searches by state or local authorities.⁵⁷

In *Preston v. United States*,⁵⁸ the Supreme Court gave the automobile search doctrine its first post-*Mapp* inspection. Police received an early-morning complaint that three men had been seen sitting in a parked car for five hours in the business district. Investigating officers found Preston and two companions seated in the parked car. Believing the men to be indigent, and receiving an inadequate explanation for their extended presence in the area at that time of night, police placed the men under arrest for vagrancy. No immediate search was made of the car at the scene of the arrest. Instead, the police had the arrestees' vehicle towed to the police station and then impounded in a gar-

55. 367 U.S. 643 (1961). Overruling its earlier decision in *Wolf v. Colorado*, 338 U.S. 25 (1949) and applying its reasoning through the fourteenth amendment to the states, the Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." *Id.* at 655.

56. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Cooper v. California*, 386 U.S. 58 (1967).

57. *Miles & Wefing*, *supra* note 27, at 119. The "modern" car search cases, for the purposes of this comment, are those considered by the Supreme Court since its decision extending the fourth amendment exclusionary rule to the states in *Mapp v. Ohio*, 307 U.S. 643 (1961). The remainder of this comment will be devoted mainly to discussion and analysis of these cases, in terms of the *Carroll* probable cause-exigent circumstances rule, the search-incident-to-arrest-warrant exception, and the benign purpose-inventory search and seizure.

58. 376 U.S. 364 (1964).

age. A thorough search of the car several hours later revealed evidence which led to Preston's conviction on a federal charge of conspiracy to rob a bank.⁵⁹

Faced in *Preston* for the first time with the question of the validity of a warrantless search made of an automobile at a later time and different place than that of the arrest, a unanimous Court, reaffirming the applicability of the fourth amendment to auto searches, held the search unreasonable and reversed Preston's conviction.⁶⁰ The reasoning of the Court was, however, less than clear. The Court first declared the search was too remote in time and place to be incident to Preston's arrest,⁶¹ but nowhere did the majority opinion by Mr. Justice Black refer to the Court's statement in *Carroll* that the validity of a warrantless vehicle search otherwise within the scope of the *Carroll* rule did not depend on the legality of any arrest.⁶² If the Court thus was trying to distinguish *Carroll*, it could have done so much more satisfactorily in any of three ways. First, the Court could have narrowly read *Carroll* as having approved only a warrantless search pursuant to statutory authorization. Secondly, the Court could have emphasized that at the time of the search, Preston's car was under police control at a garage and therefore the mobility factor required by *Carroll* was not present in *Preston*. Finally, the Court simply could have treated the search as having been made without probable cause.⁶³ Instead of clearly resting his decision on the inapplicability of *Carroll* due to the lack of probable cause or exigent circumstances, however, Mr. Justice Black assumed the existence of probable cause,⁶⁴ and then, despite reference to the less stringent warrant requirements for vehicle searches,⁶⁵ treated the case as one of search incident to arrest.⁶⁶ The incident-

59. *Id.* at 364-66.

60. *Id.* at 366-68.

61. *Id.* at 368.

62. See text accompanying notes 32-35 *supra*.

63. Miles & Wefing, *supra* note 27, at 120.

64. 376 U.S. at 367-68.

65. *Id.* at 366-67, citing *Carroll v. United States*, 267 U.S. 132, 153 (1925): "[Q]uestions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. . . . [W]hat may be an unreasonable search of a house may be reasonable in the case of a motorcar."

66. 376 U.S. at 367-68. Even assuming probable cause to search at the arrest scene, the Court stated that "this does not decide the question of the reasonableness of a search at a later time and at another place"; indeed, the search took place only after police had arrested the occupants of the car and towed it to the garage, at which time there was no danger that any weapons in the car might be turned on the police, no danger that any evidence in the car could be destroyed, and no danger that the car could be moved out of the jurisdiction. *Id.* at 368. However, these references to the lack

to-arrest posture in which *Preston* was decided seemed to once again inject into auto search law the idea that the validity of automobile searches was somehow dependent on a valid arrest.⁶⁷

Three years later the Court brought still more confusion to the area when it contradicted its *Preston* rationale in *Cooper v. California*.⁶⁸ Police arrested Cooper on a drug charge after he sold narcotics to a police informer. Acting pursuant to a state statute that authorized the impoundment and forfeiture of any vehicle used in transporting drugs,⁶⁹ the police took possession of Cooper's car. One week later, while the vehicle was still in the police garage, a warrantless search of it was conducted. The search produced heroin that was subsequently used against the defendant at his trial.⁷⁰

In a five-to-four decision, the Court upheld the search as reasonable under all the circumstances,⁷¹ but as in *Preston*, the opinion failed to produce a clear basis for the decision. The Court held on one hand that *Preston* was not controlling⁷² and then attempted to distinguish *Preston* on two grounds. First, in *Preston* the search was too remote in time and place to be justified as incident to the driver's arrest, and there was no nexus between the purpose of the search, the reason for the arrest and the seizure of the car. In *Cooper*, however, although it was conceded by the State that the search was not incident to the arrest of Cooper,⁷³ the police were required by law to seize and retain defendant's car because of the crime for which he had been arrested, and the "subsequent search . . . was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained."⁷⁴ While lawful custody of the vehicle could not in itself automatically justify the later warrantless search of the vehicle in *Cooper*, "the reason for and nature of the custody . . . constitutionally [justified] the search."⁷⁵ This sounds much like a con-

of exigent circumstances and the absence of the mobility factor present in *Carroll* came almost as an afterthought, and were clearly secondary to the Court's primary holding that the search was not incident to Preston's arrest.

67. See note 29 *supra*.

68. 386 U.S. 58 (1967).

69. Act of April 7, 1939, ch. 60, § 11611, [1939] CAL. LAWS 767, as amended, Act of Feb. 23, 1940, ch. 9, § 34, [1941] CAL. LAWS 23 (repealed 1972). Interestingly, while the statute provided for the seizure and retention of the vehicle until a forfeiture was declared or a release ordered, it nowhere authorized any search of it.

70. 386 U.S. at 58-59.

71. *Id.* at 61-62.

72. *Id.* at 61.

73. *Id.* at 60.

74. *Id.* at 61.

75. *Id.*

clusion that the police had probable cause to search the car. Closely related to the first basis for distinguishing *Preston* was the second. In *Preston* the police arrested the defendant for vagrancy, a charge that gave them no authority to impound or retain custody of defendant's car.⁷⁶ Rather, his car was towed to the station house merely as a convenience to him. In *Cooper*, however, the police were statutorily authorized to seize the defendant's car because of the very charge on which he was taken into custody. Moreover, the statute in *Cooper* entitled the police to retain custody of the car superior to any claim to it by the defendant or anyone sent by him to claim it.⁷⁷

An alternative ground for upholding the search in *Cooper*, and another basis for distinguishing *Preston* was the Court's statement that "[i]t would be unreasonable to hold that the police, having to retain the car . . . had no right, *even for their own protection*, to search it."⁷⁸ This observation, however, is unrelated to the prior emphasis placed upon the relationship between the reason for the arrest, and the seizure and search of the automobile.⁷⁹ This is true even though the police first could have obtained a warrant but failed to do so, because "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."⁸⁰

Cooper had the ultimate effect of reaffirming the basic "automobile exception" created in *Carroll*. But in upholding a search where it could scarcely be said to have been impracticable to obtain a warrant, a new permissiveness toward warrantless searches of automobiles far beyond anything discernible in *Carroll* was exhibited. Although it is possible to read the holding in *Cooper* as merely justifying a self-protective warrantless search by police of an automobile which by statute they are required to impound pending forfeiture proceedings,⁸¹ the language of the opinion more broadly suggests that anytime there is a close nexus that passes muster under the general fourth amendment reasonableness test the search will be upheld even when the circumstances clearly would have allowed the securing of a warrant.⁸²

76. *Id.* at 60.

77. *Id.* at 61.

78. *Id.* at 61-62 (emphasis added).

79. See text accompanying notes 73-77 *supra*.

80. 386 U.S. at 62, quoting *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

81. 386 U.S. at 61-62.

82. This broader interpretation of *Cooper* is supported further by the fact that the California forfeiture statute did not give the police the right to search cars seized pursuant to its seizure provisions. See note 69 *supra*. Moreover, it is difficult to justify a search not conducted until a week after the vehicle is impounded as necessary self-pro-

Within two years, the Supreme Court in *Preston* and *Cooper* had announced two irreconcilable car search doctrines. Such decisional discord continued in the near future.⁸³ In the year after *Cooper*, however, the Court decided a case that provided a few clarifications.

In *Dyke v. Taylor Implement Manufacturing Co.*,⁸⁴ a shot was fired from a passing car at the home of one of the Taylor Company's non-striking employees, in violation of a county court injunction issued in connection with a local labor dispute. A deputy sheriff pursued a "suspicious car" that sped away but was ultimately stopped by police in another town. The occupants were arrested, apparently for reckless driving, and were taken to the station house. Their car was parked outside on the street, presumably as a convenience to the owner. Police officers noticed what appeared to be a fresh bullet hole in the car, whereupon they proceeded to make a warrantless search of the vehicle. A rifle was discovered under the seat and was subsequently introduced as evidence against the defendants in a prosecution for criminal contempt, which resulted in their conviction.⁸⁵

The Court, in an opinion by Mr. Justice White, found the search could not be justified on the basis of any prior auto search law. The search was no more incidental to arrest here than in *Preston*, and *Cooper* was inapplicable because there was no indication that the police had impounded the car, that there was any statute authorizing them to do so, or that the search was related to the purposes of any such custody other than the convenience of the owner.⁸⁶ Finally, while reaffirming the *Carroll* exception, the Court pointed out that the *Carroll* line of cases "always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."⁸⁷ In *Dyke*, no such probable cause

protective action by police, even if the forfeiture statute is interpreted as giving police a possessory interest in, and a corollary right to search, the car. See Note, 87 HARV. L. REV., *supra* note 42, at 847, 852. For further general discussion of *Cooper* as a protective or benign purpose inventory search see notes 199-201 and accompanying text *infra*.

83. Compare *Chambers v. Maroney*, 399 U.S. 42 (1970), with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). See also *Chimel v. California*, 395 U.S. 752 (1969).

84. 391 U.S. 216 (1968). *Harris v. United States*, 390 U.S. 234 (1968), decided just prior to *Dyke*, will be discussed in the context of inventory searches. See text accompanying notes 202-06 *infra*.

85. 391 U.S. at 217-19, 221.

86. *Id.* at 220-21. "The case . . . is like *Preston* and unlike *Cooper* according to each of the distinguishing tests set forth in the *Cooper* opinion." *Id.* at 221.

87. *Id.*

existed, and thus the search could not be sustained under the Carroll doctrine.⁸⁸

Thus, *Dyke* confirmed that *Preston* survived *Cooper*.⁸⁹ More importantly, for the first time since *Carroll* the Court in *Dyke* clearly distinguished the incident-to-arrest rule, which constituted the basis of *Preston*, and the automobile exception to the warrant requirement, which provides the authority to conduct a warrantless automobile search on the basis of probable cause, that was developed by the Court in *Carroll*.⁹⁰

Amid the confusion that abounded in the aftermath of the Supreme Court decisions in *Preston* and *Cooper*, the potential for clarity held out by the decision in *Dyke* was lost in the state and lower federal courts—the tendency remained to abandon the distinction between these conflicting Supreme Court decisions and to treat all post-arrest automobile searches as incidental to the occupants' arrest.⁹¹ Following the Supreme Court's decision in *Chimel v. California*,⁹² which drastically curtailed the permissible scope of searches incidental to arrest, these lower courts faced a situation in which many warrantless searches previously valid even under *Preston* now appeared illegal and in which *Cooper*, once cleverly used to circumvent the *Preston* restraints, now could be viewed as limited to its facts.⁹³ Ironically, despite the apparent culmination in *Chimel* of the Court's recent moves to restrict warrantless searches,⁹⁴ the *Carroll* doctrine was squarely reaffirmed in that very decision.⁹⁵ With the doors slammed tighter on warrantless auto

88. *Id.* at 221-22.

89. *Id.* at 220. Mr. Justice Douglas had suggested just prior to *Dyke* in his concurrence in *Harris v. United States*, 390 U.S. 234 (1968), that *Preston* which he felt had been overruled *sub silentio* by *Cooper*, had been resurrected by the majority's decision in *Harris*. *Id.* at 236-37.

90. 391 U.S. at 220-22.

91. See, e.g., *United States v. Barnett*, 418 F.2d 309 (6th Cir. 1969); *Commonwealth v. Cockfield*, 431 Pa. 639, 246 A.2d 381 (1968). But see *People v. Jones*, 38 Ill. 2d 427, 231 N.E.2d 580 (1967); *State v. Fish*, 280 Minn. 156, 159 N.W.2d 786 (1968).

92. 395 U.S. 752 (1969).

93. See *Miles & Wefing*, *supra* note 27, at 124. For a fuller discussion of the incident-to-arrest doctrine insofar as it relates to warrantless searches and seizures of automobiles see text accompanying notes 202-06 *infra*.

94. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967), decided shortly before *Dyke*, where the Court read the fourth amendment as protecting people and their reasonable expectations of privacy, rather than places. See also *Vale v. Louisiana*, 399 U.S. 30 (1970), which followed *Chimel* by a year and, along with *Preston*, *Dyke*, *Katz*, and *Chimel*, seemed to point to a full-scale war on warrantless searches. See generally Comment, *Auto Search: The Rocky Road From Carroll to Coolidge*, 17 S.D.L. REV. 98 (1972).

95. "Our holding today is . . . entirely consistent with the recognized principle

searches after *Chimel* than ever before, the stage was set for some surprising results as the Court prepared to consider the question, posed but left unanswered in *Dyke*, "whether *Carroll* and *Brinegar* . . . extend to a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse."⁹⁶

C. *Chambers and Coolidge—At the Crossroads*

In *Chambers v. Maroney*,⁹⁷ decided soon after *Chimel*, the Court dispelled the notion that *Chimel* constituted a "potential roadblock to vehicle searches."⁹⁸ Following a late night robbery of a gas station, police were informed by witnesses that four men, one of whom was wearing a green sweater, had committed the robbery and fled in a station wagon, which was also described. A short time later, policemen spotted a car matching the description of the one used in the robbery and stopped it in a dark parking lot. One of the four occupants, Chambers, was wearing a green sweater. Police arrested all of the occupants of the car and drove the car to the police station. A search of the car produced evidence that was used to convict the defendants of robbery.⁹⁹ The Supreme Court upheld the search.¹⁰⁰

The Court began by conceding that the search could not be justified as incidental to the defendant's arrest, citing *Preston* and *Dyke*. Nor could it be sustained under *Cooper*, for no claim of statutory authorization for holding the car as evidence was made.¹⁰¹ The Court held, however, that the officers did have probable cause to search the car when they first encountered it.¹⁰² Thus turning to the *Carroll* doctrine, the Court reaffirmed the distinction drawn there between searches of houses and searches of cars, for purposes of the fourth amendment, and then addressed "[t]he question . . . whether probable cause justifies a warrantless search in the circumstances presented."¹⁰³

that, assuming the existence of probable cause, automobiles . . . may be searched without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.'" 395 U.S. at 764 n.9, quoting *Carroll v. United States*, 267 U.S. 132, 153 (1925).

96. 391 U.S. at 222.

97. 399 U.S. 42 (1970).

98. Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A.L. REV. 626 (1970).

99. 399 U.S. at 44-45.

100. *Id.* at 52.

101. *Id.* at 47, 49-50 & n.7.

102. *Id.* at 47-48.

103. *Id.* at 50 n.7.

In short, the Court for the first time squarely faced the issue of whether, given probable cause, the warrantless search of an automobile, conducted after the arrest of the occupants and while the car was under police control, could be sustained solely under the *Carroll* exception.¹⁰⁴

The Court concluded that, given probable cause, the search was justified by the *Carroll* doctrine. Although there would appear to have been no exigent circumstances that justified dispensing with the warrant requirement in *Chambers*, Mr. Justice White asserted that “[t]he probable-cause factor still obtained at the station house and so did the mobility of the car”¹⁰⁵ The Court gave no explanation for this conclusion. Perhaps the Court was hypothesizing a situation in which the arrestee or one in his behalf claimed the car, in which case the police, absent some statutory authority for holding the car, would be forced to release it.¹⁰⁶ In any event, according to Justice White, the alternative to an immediate station house search is a warrantless seizure to strip the automobile of its mobility while a search warrant is obtained. Since both are intrusions incapable of being distinguished in many cases,¹⁰⁷ either course of action is constitutionally permissible given probable cause.¹⁰⁸

The holding in *Chambers* contradicts the *Carroll* requirement that, even if probable cause exists, a warrant must be used when possible,¹⁰⁹ which would seem to include a situation in which the car was under police control similar to that in *Preston* and its occupants under arrest before the search was conducted. *Chambers* seems to have modified the *Carroll* doctrine so that the mere inherent or potential mobility of an automobile constitutes an exigent circumstance sufficient to justify an unwarranted search. This modification would limit *Preston* to incidental search situations and effectively exempt all automobile searches from the fourth amendment warrant requirement.¹¹⁰ Such a reading

104. This issue was present, but only secondarily, in *Preston* and *Cooper*, and was not decided directly by the Court in that the cases turned primarily on the application of the incident-to-arrest and state-forfeiture-statute search rules.

105. 399 U.S. at 52.

106. This is suggested by the Court's statement that the mobility factor continued at the station "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured." *Id.* (emphasis added).

107. "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 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." *Id.* at 51-52.

108. *Id.* at 52.

109. *Carroll v. United States*, 267 U.S. 132, 156 (1925).

110. Thus *Chambers* dismembered *Preston* and *Dyke* and reconstructed them to per-

of *Chambers* conflicts with the principles set down in *Preston* and *Chimel* and expands the *Carroll* automobile exception even further than did *Cooper*.¹¹¹

The result in *Chambers* can more readily be squared with *Carroll* by looking at the interests involved. The privacy interests of citizens protected by the fourth amendment that are involved in automobile searches include the freedom of movement, control over one's car, and the secrecy of its contents. The search of a person's car intrudes upon his social expectation of secrecy, and a seizure of his car invades his expectation of control. However, the reasonableness of the search and seizure in the *Carroll* prearrest situation, and the reasonableness in the *Chambers* post-arrest situation, turn upon different configurations of these interests.¹¹²

In an open-highway, prearrest case like *Carroll*, a stop followed by an immediate search results in only a brief detention of the suspect and a temporary seizure of his car; however, his interest in the secrecy of the contents of his car is greatly infringed. Alternatively, immobilization of the automobile until a warrant is obtained gives fullest fourth amendment protection to the secrecy interest, but constitutes a much greater infringement upon the driver's mobility and control interests. A consensus of opinion among citizens is unlikely whether the immediate search or the prior immobilization constitutes the greater intrusion,¹¹³ but either will protect the government's interest in preserving evidence. Furthermore, immobilization will almost always require greater efforts and possible exposure to danger on the part of policemen and greater expenditures by the state. Weighing these interests, it seems reasonable to leave the choice between seizure and immediate search to the law enforcement officer rather than the driver on the open highway.¹¹⁴

In the *Chambers* post-arrest situation, however, the balancing of the interests indicates a different result. The driver's mobility and control interests have already been removed, or reduced by his arrest.

mit a delayed warrantless search, watered down the *Carroll* mobility factor for dispensing with the warrant requirement in the name of reaffirming that doctrine, and went beyond even *Cooper* where, unlike *Chambers*, the searched car had actually been impounded.

111. See, e.g., Note, *Search and Seizure Since Chimel v. California*, 55 MINN. L. REV. 1011, 1027 (1971).

112. Note, 87 HARV. L. REV., *supra* note 42, at 841, 844.

113. See note 107 *supra*.

114. Note, 87 HARV. L. REV., *supra* note 42, at 841-42.

Thus his major concern at this point is the privacy of the car's contents. The inconveniences involved in seizing and towing the auto cannot be avoided by policemen in the post-arrest situation; however, in this situation, where the driver's secrecy interest may be the only interest with which he is still concerned, it seems likely that most drivers would find detention of their car while a warrant is secured preferable to an immediate search. Hence, it seems here that only immobilization, as opposed to search, should be reasonable without a warrant. "The result in *Carroll* turned on giving the police a choice between an immediate search and what might be a more administratively costly seizure. Once the car is brought to the station . . . , it would seem that the police have already made their choice."¹¹⁵

A final aspect of *Chambers* that may have influenced the Court's decision is the fact that the automobile was at least as mobile when the police initially encountered it in the parking lot as had been the vehicle in *Carroll*. Since the police had probable cause to search the car, *Carroll* would have justified an immediate warrantless search.¹¹⁶ Holding that the arrest of the occupants and the removal of the automobile to the station house invalidated a warrantless search, which otherwise could have been made without a warrant, would condition the right of warrantless search on the fortuities of location, time of day, and whether there were grounds for an arrest. The Court thus held the arrest to be valid and treated the removal of the car to the police station as a necessary precaution taken by the police to avoid searching under dangerous circumstances.¹¹⁷

Many commentators viewed *Chambers* as standing for the dual proposition that the inherent mobility of automobiles would always give rise to exigent circumstances and therefore all subsequent automobile searches conducted without a warrant would be reasonable within the *Carroll* doctrine, notwithstanding the practicability of obtaining a warrant.¹¹⁸ However, as the Court quickly proved in *Coolidge v. New Hampshire*,¹¹⁹ this was not the case.

Coolidge was arrested on a murder charge, and his wife was told that the two family cars, which were parked outside in the driveway of the Coolidge home and visible from both the street and the house,

115. *Id.* at 844-45.

116. 399 U.S. at 47-48, 52.

117. *Id.* at 46, 52 n.10.

118. *See, e.g.*, Note, 55 MINN. L. REV., *supra* note 111.

119. 403 U.S. 443 (1971).

were "impounded." Two hours later the vehicles were towed to the police station, and two days later one of the cars was searched without a warrant.¹²⁰ The search revealed evidence that indicated that the murder victim likely had been in Coolidge's automobile.¹²¹

The Court, in an opinion by Justice Stewart, considered the seizure and subsequent search in light of the prior automobile search cases and found that none could be invoked to save the search.¹²² The Court felt that *Preston* dictated that the police could not remove and later search the car without a warrant. Furthermore, the Court refused to apply *Carroll* and *Chambers* to the facts in *Coolidge*, on the grounds that to do so would extend them far beyond their original rationale, which Mr. Justice Stewart construed as being based on the *actual* mobility of an automobile, initially stopped on the open highway, which makes it impracticable to secure a warrant.¹²³ The Coolidge car was not stopped on the open highway; rather it was seized as it sat parked in a private driveway when, for practical purposes, it was already under the effective control of the police and when there was no realistic chance of flight by the accused or the removal or destruction of evidence, weapons, or contraband which might be inside the vehicle. There was, in the Court's opinion, simply no exigent circumstance making it impracticable to secure a warrant, and thus no basis for invoking the *Carroll* doctrine.¹²⁴ "The word 'automobile,'" admonished the Court, "is not a talisman in whose presence the Fourth Amendment fades away and disappears."¹²⁵

Moreover, since *Carroll* was inapplicable, *Chambers* did not validate the search because that case merely stood for the proposition that, given a right to stop and search a car on the open road under *Carroll*, the police could instead seize the vehicle and search it later at the police station.¹²⁶ Having found that the " 'automobile exception' . . .

120. Strangely enough, *Coolidge* involved a search conducted pursuant to search warrants. However, the warrants were invalid because they had been issued by the State Attorney General, who obviously failed to qualify as a "neutral and detached magistrate." *Id.* at 449-53. Thus the Court treated the search as a warrantless one.

121. *Id.* at 445-48.

122. *Id.* at 458-60. The Court also held the incident-to-arrest exception and the plain view doctrine inapplicable on the facts of *Coolidge*. *Id.* at 455-57, 464-73.

123. *Id.* at 458-60.

124. *Id.* at 460-62. This part of Court's analysis appears, however, to overlook the fact that there was evidence that Coolidge's wife wished to move one of the vehicles. *Id.* at 447. Unless the police could legally seize the cars, it is therefore arguable that at least one of them was mobile.

125. *Id.* at 461-62.

126. *Id.* at 463.

[was] simply irrelevant,"¹²⁷ the Court held that *Dyke*¹²⁸ was controlling—a rather surprising conclusion in light of the fact that the search there was invalidated because it was conducted without probable cause, a factor that did exist in *Coolidge*. However, in neither *Dyke* nor *Coolidge* was there any real danger that the car would be moved, an analogy which the Court found to be controlling.¹²⁹

The most notable effect of *Coolidge* on automobile search law is the Court's return to the limited concept of mobility originally enunciated in the *Carroll* case. Under the rule of *Coolidge*, exigent circumstances in terms of mobility sufficient to justify a warrantless auto search apparently exist only when the car is *actually* moving when it is seized. To emphasize this fact, the Court clearly stated that the mere inherent or potential mobility characteristic of all automobiles is of no constitutional significance.¹³⁰ Furthermore, impracticability as defined in *Coolidge* requires a potential for immediate flight of the automobile or the imminent danger of loss of evidence contained therein if time is taken to secure a warrant. The Court reaffirmed but redefined *Chambers* in terms of these rejuvenated concepts of actual mobility and genuine impracticability,¹³¹ and made it "clear that the reach of *Chambers* as a precedent should only extend to cases in which the initial confrontation between the policeman and the citizen was on the open highway, with the policeman having probable cause to search."¹³² If *Coolidge* did not overrule *Chambers*, it did recast *Chambers* as "*Carroll* after arrest, at the station house."¹³³

127. *Id.* at 462.

128. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

129. *Coolidge v. New Hampshire*, 403 U.S. 443, 463-64 (1971).

130. *Id.* at 461 n.18.

131. "On its face, *Chambers* purports to deal *only* with situations in which the police may legitimately make a warrantless search under *Carroll* The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station." *Id.* at 463 n.20 (emphasis by the Court). Thus the Supreme Court refused to read *Chambers* as extending the *Carroll* rule.

132. Note, 87 HARV. L. REV., *supra* note 42, at 845.

133. *Id.* With respect to the idea that the initial encounter between the police and the vehicle must be at least initially justifiable under *Carroll*, *Coolidge* emphasized that there is an important "constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. 403 U.S. at 463 n.20. This constitutional distinction probably was the essence of *Coolidge*, and the basic grounds on which *Coolidge* distinguished *Chambers*. See *Cardwell v. Lewis*, 417 U.S. 583, 593 (1974).

Due to the frequency with which the need to search automobiles arises in circumstances in which a warrant cannot be secured, Mr. Justice White in dissent urged that

Coolidge appeared to narrow the permissible boundaries of warrantless automobile searches to the dimensions which they had been thought to encompass prior to *Cooper*¹³⁴ and *Chambers*. A strict interpretation of the warrant requirement consistent with *Chimel* again had resurfaced. However, the Court did not overrule *Cooper* and *Chambers*, thus leaving many questions unanswered in the law of automobile search and seizure. Two were of paramount importance. One was under what circumstances a car would acquire, and lose, "mobility" in a constitutional sense; the other was the nature and applicability of the warrant requirement as applied to searches of automobiles. With regard to both questions, the Supreme Court after *Coolidge* was at a crossroads. Only the future would tell which path—the one suggested by *Chambers* or the one preferred by *Coolidge*—the Court would take.¹³⁵

D. *Beyond the Crossroads—Still a Seamless Web?*

In *Cardwell v. Lewis*¹³⁶ the Supreme Court for the first time since *Coolidge* dealt squarely with the warrantless evidentiary search and seizure of an automobile based on probable cause. In that case police arrested the defendant on suspicion of murder and later his car was seized, without a warrant, from a public commercial parking lot. The car was towed to the police impoundment lot where the exterior was examined. The "examination" consisted of comparing the tires of defendant's car with tire tread casts made at the murder scene and the matching of paint samples taken from defendant's car with those taken from the car of the decedent. Although police officers had known for eleven weeks of the probable roles of the defendant and his automobile

all such searches, for the sake of uniformity, be exempt from the warrant requirement, with probable cause being the sole prerequisite of reasonableness. 403 U.S. at 524-27.

134. *Cooper v. California*, 386 U.S. 58 (1967).

135. *Miles & Wefing, supra* note 27, at 132.

136. 417 U.S. 583 (1974). During the period between *Coolidge* and *Cardwell*, the Court decided two cases involving warrantless searches and seizures of automobiles. *Cady v. Dombrowski*, 413 U.S. 433 (1973), involved a non-evidentiary search and is thus best considered in the context of benign purpose inventory searches. See text accompanying notes 207-30 *infra*. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), involved primarily the question whether the warrantless search therein considered could be sustained under a federal immigration statute or the "border search" warrant exception, and will not be treated in this comment.

In addition, the Supreme Court has recently decided two companion cases involving searches not of automobiles, but of their occupants, incidental to their arrest. *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973). The implications of these cases regarding car search law will be discussed in the context of automobile searches and the incident-to-arrest doctrine. See text accompanying notes 186-92 *infra*.

in the crime, no search warrant was served, either before or after defendant's arrest and the seizure of his car. The defendant was convicted and his conviction was affirmed in state courts. He applied for federal habeas corpus relief and ultimately his case came before the Supreme Court. In a plurality opinion by Mr. Justice Blackmun, the Court held that the seizure and "examination" of the car were reasonable.¹³⁷

The Court first addressed the issue of whether there had been a "search" of defendant's automobile within the terms of the fourth amendment. Although the holding of the case was equivocal on this point,¹³⁸ the plurality opinion strongly implied that the "examination" was not a "search."¹³⁹ The Court pointed out that the "examination" extended only to the exterior of a car which had been left in a public parking lot, and it relied on *Cooper* for the proposition that the "examination" was reasonable because there was probable cause to believe that the automobile had been used in the commission of the crime for which defendant was arrested.¹⁴⁰ Affirming that the purpose of the fourth amendment was to protect the privacy interests of individuals, the Court found the examination of defendant's car invaded no reasonable expectation which that amendment was designed to insure.¹⁴¹ In any event, insisted the Court, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as . . . the repository of personal effects."¹⁴²

The Court's suggestion that the examination of defendant's car was not a search implicating the fourth amendment is inconsistent with the earlier teaching that "the Fourth Amendment governs *all* intrusions by agents of the public upon personal security."¹⁴³ The intrusion here

137. 417 U.S. at 588-96. The opinion of the Court by Mr. Justice Blackmun was joined by Chief Justice Burger and Justices White and Rehnquist. Mr. Justice Stewart filed a dissenting opinion, in which Justices Douglas, Brennan, and Marshall joined. Mr. Justice Powell filed an opinion concurring in the result.

138. "Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is *not unreasonable* under the Fourth and Fourteenth Amendments." *Id.* at 592 (emphasis added). If by "examination" the Court means "no search," it seems that the fourth amendment standard of "reasonableness" would not be relevant. Perhaps the Court is merely suggesting that there was no search, but if there were, it was reasonable.

139. Throughout this portion of its opinion the Court referred to the inspection of the car as an "examination," and in fact began with the statement that "[t]he evidence with which we are concerned is not the product of a 'search' that implicates traditional considerations of the owner's privacy interest." *Id.* at 588-89.

140. *Id.* at 592.

141. *Id.* at 593; *see id.* at 591-93.

142. *Id.* at 590.

143. *Terry v. Ohio*, 392 U.S. 1, 17-18 n.15 (1968). *See also* ALI MODEL CODE

was not limited to mere observation of the exterior of the automobile. It included a search of the layers of paint beneath the visible surface of the vehicle.¹⁴⁴ Furthermore, the Court's reliance on *Cooper* suggests that, simply because an object is an "instrumentality" of crime, it can be seized and searched with impunity. The distinction between "instrumentalities" and other evidence was laid to rest, however, in *Warden v. Hayden*.¹⁴⁵ Additionally, *Cooper* involved the search of an automobile that had been seized pursuant to a state forfeiture statute, whereas there was no such statutory authority for the impoundment in *Cardwell*.

More troubling is the Court's assumption that a citizen enjoys a lesser expectation of privacy in his automobile simply because it is an automobile. Such a novel approach is not supported by prior case law or common experience. It is true that the earlier car search cases differentiated between vehicles and fixed objects with respect to the fourth amendment warrant requirements.¹⁴⁶ However, this distinction rested upon the greater mobility of the automobile, which when manifested gave rise to exigent circumstances, "not [upon] some inherent expectation of privacy marking automobiles as second-class effects under the fourth amendment."¹⁴⁷ While the automobile in its early life may have been considered in a neutral sense merely a tool of movement, today it has become an expected place of privacy.¹⁴⁸ Thus, even if, as the Court asserts, "[t]he search of an automobile is . . . less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building."¹⁴⁹ it is also true that the fourth amendment "protects people, not places."¹⁵⁰

Regardless of whether there was a "search" in *Cardwell*, there was without doubt a warrantless *seizure* within the meaning of the fourth

OF PRE-ARRAIGNMENT PROCEDURE, art. I, § 1.01(1) (Tent. Draft No. 3, 1970), which defines an automobile search as "an intrusion under color of authority on an individual's 'vehicle,' 'for the purpose' of seizing things."

144. *Lewis v. Cardwell*, 354 F. Supp. 26, 35 n.10 (S.D. Ohio 1972), *rev'd*, 417 U.S. 583 (1974).

145. 387 U.S. 294 (1967).

146. *Id.* See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

147. 7 AKRON L. REV. 343, 349 (1974).

148. See Note, 87 HARV. L. REV., *supra* note 42, at 840 n.28.

149. 417 U.S. at 590, quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (Powell, J., concurring).

150. *Katz v. United States*, 389 U.S. 347, 361 (1967). Given this fact, "it becomes clear that the reach of [the fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

amendment.¹⁵¹ To justify this seizure, the Court looked to the "automobile exception" as expanded in *Chambers*. Concluding that the car's exterior could have been searched without a warrant in the parking lot, Mr. Justice Blackmun quoted with approval the language from *Chambers* that supported either a seizure or an immediate search of the automobile and suggested that the probable cause and exigent circumstances that obtained at the initial spot of encounter with the car continued at the station house.¹⁵² The "exigent circumstances" relied on by the Court apparently consisted of the fact that, at the time of his arrest, the defendant, having left his car in a parking lot open to public access, was alerted to the police decision to seize his automobile and therefore the danger arose of its being removed or tampered with before a warrant could be obtained.¹⁵³

This analysis, however, ignores the fact that for eleven weeks the defendant had known of the suspicions of the police with regard to himself and his car, and yet the police at no time were sufficiently concerned that he would spirit the automobile away to seek a search warrant, even though they had probable cause to do so, and in fact did obtain an arrest warrant. This is inconsistent with a claim that suddenly upon defendant's arrest, such an imminent need to search developed that time could not be taken to secure a warrant from the magistrate's office that was only minutes away from the police station.¹⁵⁴ Moreover, *Chambers*, after *Coolidge*, clearly stood only for the proposition that a warrantless seizure could be made and the search delayed until a later time and place where the seizure and search

151. Mr. Justice Stewart in dissent felt that the no-search argument was "irrelevant," since before the "examination" there had been a seizure. Since the fourth amendment protects "against 'unreasonable searches and seizures,' the warrantless seizure itself must first have been justified." 417 U.S. 596, 597-98.

152. *Id.* at 593-94, quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

153. *Id.* at 590-91, 594-95.

154. See Brief for Respondent at 16, *Cardwell v. Lewis*, 417 U.S. 583 (1974). This is particularly true in light of the facts that the police at this time had custody of defendant, his car keys, and the parking lot claim check, so that the car was effectively immobilized; that no confederates were at large; and that no one inclined to move the car knew of defendant's arrest. Although there was evidence that defendant asked his attorney at the time of his arrest to see that his wife got the car, the fact remains that the attorney turned the keys and claim check over to police. Defendant's wife did not know of his arrest, and he had no way of communicating that fact other than through his attorney. It can hardly be suggested that defendant's lawyer, an officer of the court, would, either alone or in conspiracy with anyone else, attempt to move or tamper with the automobile. Furthermore, it is difficult to see how anyone could disturb the car or move it off the parking lot without the keys or claim check since the car was in a commercial lot staffed with attendants whose job it was to oversee the automobiles of its customers.

initially would have been justifiable under *Carroll*. In *Cardwell* the exigent circumstances of *Carroll* were absent—there was no fleeing suspect, no “fleeting opportunity” to search, “no contraband or stolen goods or weapons,” and no confederates.¹⁵⁵ Therefore *Coolidge*, not *Chambers*, would seem to have controlled the case.¹⁵⁶ The plurality in *Cardwell* nevertheless followed *Chambers* and distinguished *Coolidge*.

The grounds on which the Court sought to distinguish *Coolidge* basically was that the seizure of the car in *Coolidge* was made from private property whereas in *Cardwell* “the automobile was seized from a public place where access was not meaningfully restricted.”¹⁵⁷ While it is true that this was partly the ground on which *Coolidge* distinguished *Chambers*, it is also true that the search in *Coolidge* could not be sustained under *Carroll*, while the search in *Chambers* could, because in both *Carroll* and *Chambers* the car was in fact *actually moving on the road when seized*. Thus the Court’s statement, that “[t]he fact that the car in *Chambers* was seized after being stopped on a highway, whereas [defendant’s] car was seized from a public parking lot has little, if any, legal significance,”¹⁵⁸ seems, in the circumstances of *Cardwell*, an unconvincing basis for reinstating a broader reading of *Chambers* than that allowed in *Coolidge*.

Additionally, the attempt to distinguish *Coolidge* on the basis of this “public” versus “private” property rationale seems inconsistent with *Coolidge* both factually and legally. The original seizure in *Cardwell* took place in an attended commercial parking lot in which defendant had, in effect, rented a space, locked his car and taken the keys with him. The purpose of such a parking lot is to provide a place of security for a customer’s automobile away from the vulnerability of truly public areas. *Cardwell* correctly states that “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.”¹⁵⁹ However, it must also be admitted that “what

155. *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971).

156. For a warrantless search to be justified under the *Carroll* line of cases, two conditions must be met. First, it must be shown that a warrant could not have been obtained in advance. Secondly, it must be clear that there was a real, not merely a problematical, danger that the evidence would be removed or destroyed if time were taken to obtain a warrant. See *id.* at 458-60.

157. 417 U.S. at 593. The Court also referred to the fact that in *Coolidge* the search extended into the interior of the vehicle whereas in *Cardwell* it was limited to the exterior. *Id.* at 593 n.9.

158. *Id.* at 594.

159. *Id.* at 591, quoting *Katz v. United States*, 389 U.S. 347, 351 (1967).

he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."¹⁶⁰ The *Coolidge* doctrine simply would seem not to fit the Court's artificial "public" versus "private" interpretation.

It is difficult to assess the impact that *Cardwell* will have on automobile search and seizure law. The "private" versus "public" property rationale of the case can be read broadly as severely limiting, if not for practical purposes overruling, the holding in *Coolidge*. The case may have at least reinstated *Chambers* to its pre-*Coolidge* status, if not extended that case in the abstract to allow warrantless searches of all automobiles on probable cause even where they are "mobile" only in some innate sense. In short, the case could be read as requiring only minor, if any, "exigency" to allow warrantless seizures and searches of automobiles when they are not on private property. Furthermore, the language in the case implying that automobiles are "second class effects" in terms of reasonable expectations of privacy protectable under the fourth amendment suggests that the warrant requirement will henceforth be inapplicable to automobiles, in fact if not in words.

On balance, it seems that greater, not lesser, confusion may be the result of *Cardwell*. The case returns the Court to the crossroads at which it stood after *Chambers* and *Coolidge*, leaving *Chambers* juxtaposed with not one but two conflicting pluralities, both of which are equally vague on the still unanswered questions regarding "exigent circumstances," the mobility factor, and the warrant requirement in the context of automobile search law. Consequently, the law of probable cause automobile search and seizure today remains less certain than when it began with *Carroll* fifty years ago.

III. AUTOMOBILE SEARCH AND THE INCIDENT-TO-ARREST EXCEPTION

A. Background

The most widely recognized exception to the warrant requirement is the category of searches conducted incidental to a lawful arrest. The right of law enforcement officials to conduct, and the permissible scope of such searches, are important to automobile search law because of the frequency of arrests made in or near automobiles. Searches allegedly made incidental to the arrest of the driver of an automobile may involve searches of the person of the driver or his automobile or

160. *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

both.¹⁶¹ Such incidental searches may be made under circumstances analogous to those in which "automobile exception" searches are conducted. However, the validity of the true incidental search turns on the condition precedent of a contemporaneous lawful arrest and the resulting immediate need to search to protect the arresting officer and prevent the removal or destruction of evidence. In contrast, the validity of the "automobile exception" search depends on the existence of probable cause to search the car under exigent circumstances.¹⁶²

B. *History of Search-Incident-to-Arrest Doctrine*

The Supreme Court of the United States in dictum first announced the incidental-search doctrine in 1914 in *Weeks v. United States*.¹⁶³ Since then the Court's decisions regarding this exception have followed an unsteady course. The incidental search exception was first thought to allow the warrantless search of the person of an arrestee for evidence contemporaneously with his arrest.¹⁶⁴ Eventually, the permissible scope of a search incidental to arrest was expanded to allow searches of the premises in which the arrest was made for weapons as well as evidence.¹⁶⁵ Reacting to the increasingly broad permissible scope, the Court for a short time imposed a strict practicability limitation upon the incidental search doctrine, allowing incidental searches only when there was insufficient opportunity to obtain a search warrant prior to making the arrest.¹⁶⁶ However, this restriction was short-lived, and after its demise the commentators suggested that the search-incident exception had swallowed the warrant requirement.¹⁶⁷ Given both the demise of

161. *United States v. Robinson*, 414 U.S. 218 (1973); *Adams v. Williams*, 407 U.S. 143 (1972); *Preston v. United States*, 376 U.S. 364 (1964).

162. *See Murray & Aitken*, *supra* note 37, at 110.

163. 232 U.S. 383, 392 (1914).

164. *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950); *Harris v. United States*, 331 U.S. 145, 165 (1947) (Frankfurter, J., dissenting); *Carroll v. United States*, 267 U.S. 132, 158 (1925) (dictum); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (dictum). *United States v. Robinson*, 414 U.S. 218 (1973), and its companion case, *Gustafson v. Florida*, 414 U.S. 260 (1973), were the first cases in which the Supreme Court squarely considered the permissible scope of an incidental search of a *person*, rather than premises. *See* text accompanying notes 186-92 *infra*.

165. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950); *Harris v. United States*, 331 U.S. 145, 151 (1947); *Marron v. United States*, 275 U.S. 192, 199 (1927); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (dictum); *Carroll v. United States*, 267 U.S. 132, 158 (1925) (dictum).

166. *Trupiano v. United States*, 334 U.S. 699, 705, 708 (1948); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357-58 (1931).

167. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (relevant test is not whether reasonable to get warrant but whether search reasonable). *See, e.g., Player, Warrantless Searches and Seizures*, 5 GA. L. REV. 269, 285-86 (1971); *Murray & Aitken, supra* note 37, at 114.

the practicability test and the broad permissible scope of incidental searches of premises of the arrestee, the rule, that searches must be made pursuant to a warrant, except when made as incidents of lawful arrests, was in danger of reading instead that "searches may be made without warrants except when no one on the premises has been arrested."¹⁶⁸ With *Chimel v. California*,¹⁶⁹ the Court chose to review this state of incidental search law.

In *Chimel* police, armed with an arrest warrant, arrested the defendant in his home for burglary. A thorough search of the premises revealed incriminating evidence. In invalidating the search, the Court set down the definitive rule regarding the permissible scope of incidental searches: a search for weapons or evidence incident to a lawful arrest must be limited to the person of the arrestee "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."¹⁷⁰ *Chimel* thus turned on a redefinition of the incidental search exception, but at the same time it gave new life to the practicability test of *Trupiano v. United States*,¹⁷¹ at least insofar as searches beyond the person and reach of the arrestee.¹⁷²

C. Pre-*Chimel* Incidental Search Law and Automobiles

The incidental search doctrine, like all warrant exceptions, is premised on the need for immediate action occasioned by an emergency situation—the need for an immediate search, arising from the lawful custodial arrest of a suspect, to prevent the destruction or removal of evidence, injury to the arresting officer, or the escape of the

168. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 45 (1969). See *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947).

169. 395 U.S. 752 (1969).

170. *Id.* at 763. In reaching this conclusion the Court overruled two earlier cases. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947). The Court chose to limit the search-incident exception by redefining the reasonable scope of "incidental" to extend only to searches of the person and areas within his immediate reach rather than imposing a strict warrant requirement on all incidental searches. After *Chimel*, warrantless searches extending beyond this narrowly defined area can be justified only by a warrant exception other than the incidental-to-arrest rule; however, as to searches sufficiently contemporaneous to the arrest and restricted in scope to qualify as an incidental search, the Court made no clear statement regarding what effect the absence of a warrant, when there was time to obtain one, would have on the reasonableness of the search. See *Player, supra* note 167, at 289-90.

171. 334 U.S. 699 (1948).

172. See text accompanying note 166 *supra*.

offender. Mindful of this fact, the Court in *Preston v. United States*¹⁷³ held that the post-arrest warrantless search of the impounded car of a suspect charged with vagrancy could not be justified as incidental to his arrest because, being remote in time and place, it was not contemporaneous with the arrest. Moreover, once officials obtained custody of the suspects and their car, there was no danger of evidence being destroyed or weapons being drawn from the vehicle; therefore, the emergency justifying a warrantless incidental search had disappeared, and so had the right to search.¹⁷⁴

Within three years, in *Cooper v. California*,¹⁷⁵ the Court approved a warrantless automobile search that seemed even more remote in time and place than had been the one in *Preston*. The Court emphasized that the seizure of the car had been made pursuant to a state forfeiture statute and that the subsequent search was closely related to the reason for this seizure and the driver's arrest. The Court made it clear that the overall reasonableness of the search, not the presence or absence of a warrant, was the test.¹⁷⁶ *Cooper* thus made it unclear whether the restrictions placed on the search in *Preston* remained viable, and it proved that *Preston* did not indicate that the Court was returning to the *Trupiano* practicability test.

After the Court's decision in *Chimel*, two years after *Cooper* and five after *Preston*, the question posed was what effect the former case would have on the latter two. *Chimel* clearly breathed new life into *Preston*, specifically approving the holding in that case that the need to seize weapons or destructible evidence is "absent where a search is remote in time or place from the arrest."¹⁷⁷ Moreover, the limiting redefinition of the permissible scope of an incidental search in *Chimel* seemed inconsistent with a search such as that in *Cooper*, even though the Court did not expressly overrule *Cooper* in *Chimel*.¹⁷⁸ The only

173. 376 U.S. 364 (1964). For a fuller discussion of *Preston* as a warrantless probable cause auto search case, see notes 58-67 and accompanying text *supra*.

174. *Id.* at 367-68. "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." *Id.* at 367.

175. 386 U.S. 58 (1967). See notes 68-82 and accompanying text, *supra*.

176. *Id.* at 61-62; *Preston v. United States*, 376 U.S. 364, 368 (1964).

177. *Chimel v. California*, 395 U.S. 752, 764 (1969), quoting *Preston v. United States*, 376 U.S. 364, 367 (1964). Subsequent cases have followed this interpretation of *Preston* in *Chimel* regarding the permissible scope of searches of automobiles allegedly made incidental to an arrest. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Chambers v. Maroney*, 399 U.S. 42 (1970).

178. While pointing out that *Harris* and *Rabinowitz* had been relied on decreasingly as precedent, the Court nevertheless noted that *Cooper* remained as somewhat bothersome authority. 395 U.S. at 768 n.15; *id.* at 768.

basis upon which *Cooper* seemed justifiable after *Chimel* was that it approved a search of a car, which police were required by law to seize and keep in their custody for a considerable period of time, at least for their own protection.¹⁷⁹

D. *Post-Chimel Incidental Search Law and Automobiles*

Following the decision in *Chimel* limiting the permissible scope of incidental searches, many lower courts, relying on *Chimel's* reaffirmation of the holding in *Preston*, have held the *Chimel* restrictions applicable to automobile searches justified as incidental to arrest.¹⁸⁰ However, at least one, and possibly three, recent Supreme Court cases may cast doubt on this application of *Chimel*.

In *Adams v. Williams*,¹⁸¹ a police officer, in response to a late-night tip of a known informant that a man seated in a nearby car in a high-crime area of the city was carrying narcotics and had a gun at his waist, approached the suspect's car and told him to open the door. Instead, the man rolled down the window, whereupon the officer reached into the car and removed a loaded revolver from his waistband. The defendant was then arrested on a firearms charge, and a warrantless search of the defendant's person and his car was made, revealing drugs on his person and other weapons in the car. The Supreme Court upheld the search of both the arrestee and his automobile.¹⁸²

While the *Adams* decision apparently allows the search of the entire car as incidental to the arrest, the case is questionable precedent for this assertion. The Court, while finding the initial actions of the officer reasonable under the stop-and-frisk rationale of *Terry v. Ohio*,¹⁸³ did not specifically approve the search of the entire car under the incident-to-arrest rule, and in fact cited traditional "automobile exception" cases on this point.¹⁸⁴ Moreover, the evidence discovered on defendant's person was probably sufficient to convict him of the fire-

179. See *Cady v. Dombrowski*, 413 U.S. 433 (1973).

180. See cases cited note 177 *supra*. See also *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972); *Application of Kiser*, 419 F.2d 1134 (8th Cir. 1969); *People v. Superior Ct.*, 3 Cal. 3d 807, 91 Cal. Rptr. 729, 478 P.2d 449 (1970); *State v. Pettit*, 20 Ohio App. 2d 170, 252 N.E.2d 325 (1969); *Gonzales v. State*, 507 P.2d 1277 (Okla. Cr. 1973). See generally 23 OKLA. L. REV. 447 (1970).

181. 407 U.S. 143 (1972).

182. *Id.* at 144-49.

183. 392 U.S. 1 (1968).

184. 407 U.S. at 147-49, citing *Brinegar v. United States*, 338 U.S. 160 (1949) and *Carroll v. United States*, 267 U.S. 132 (1925).

arms charge. Therefore, the Court's reference to the validity of the automobile search, as opposed to the search of defendant's person, was dictum.¹⁸⁵

In the recent case of *United States v. Robinson*¹⁸⁶ the Supreme Court considered the permissible scope of a search of the *person* of a driver placed under lawful *custodial* arrest for a traffic violation. The Court upheld *both* the thorough search of the traffic offender's person and the search of a cigarette package, subsequently found to contain heroin, located in his coat pocket.¹⁸⁷ The lawful custodial arrest *itself* was held sufficient to establish the right to make a full incidental search of the person; therefore, whether, there was further justification for the search, such as the probability that the arrestee was armed or that he had on his person fruits or evidence of the crime for which the arrest was made need not be litigated in each case.¹⁸⁸

Although the search in *Robinson* did not extend to any part of defendant's car, the fact that the Court allowed the examination of the cigarette package after its removal from the arrestee's person raises the questions whether *Robinson* impliedly provides for searches of an arrestee's car as well as his person incidental to his arrest and whether the Supreme Court will simply refuse to consider such an automobile search independent of the incidental search of the person. Several aspects of the case mitigate against such an interpretation. First, the discussion and holding of the case focus primarily on the search of the *person* of the arrestee. Additionally, the protective rationale¹⁸⁹ of the

185. See Comment, *Criminal Procedure—Stop and Frisk Warrantless Car Searches—Adams v. Williams*, 407 U.S. 143 (1972), 50 DENVER L.J. 243, 258 (1973).

186. 414 U.S. 218 (1973). The companion case to *Robinson*, *Gustafson v. Florida*, 414 U.S. 260 (1973), involved facts similar to those in *Robinson*. The Court, relying on *Robinson*, also upheld the *Gustafson* search. Only *Robinson* will be discussed specifically in this comment.

187. 414 U.S. at 235-36. Defendant conceded that the officer had probable cause to arrest him for driving after revocation of his operator's license. The officer actually took defendant into custody rather than merely issuing him a citation. *Id.* at 220-21. The Court specifically held that in the case of *any* lawful custodial arrest a *full* search of the arrestee's person is not only an exception to the warrant requirement of the fourth amendment, but also a reasonable search under that amendment. *Id.* at 235-36.

188. *Id.* at 227-29, 234-35.

189. The Court premised its decision primarily on the need of the officer to search the person of the arrestee for weapons in the interest of his own safety and rejected the argument that a protective frisk of the suspect's outer clothing should be sufficient in cases of custodial traffic arrests to accomplish this purpose unless it disclosed a basis for a more thorough search, which then, but only then, would be allowed. The Court distinguished the stop-and-frisk cases, such as *Terry v. Ohio*, 392 U.S. 1 (1968), on the grounds that those cases involved brief encounters with suspicious persons on less than probable cause, which involved much less danger to the policeman than placing a defer-

case would not seem to support a search of the arrestee's car as incidental to his arrest particularly where the arrest is for a traffic offense, and in any case where the offender has been removed from his car, since any search conducted after this time would not be necessary to protect the safety of the arresting officer. Moreover, the Court, in allowing the search of the cigarette package, may simply have been anticipatorily employing the reasoning, enunciated four months after *Robinson* in *United States v. Edwards*,¹⁹⁰ that "it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they *already have in their lawful custody as the result of a lawful arrest.*"¹⁹¹ If so, it would seem that the arresting officer could not search the automobile incidental to the arrest unless they also lawfully seized it along with the driver. Even if they could and did lawfully impound the car, absent independent probable cause to search the vehicle, which would validate the search under the "automobile exception," the search would be lawful only if made for a legitimate non-evidentiary purpose.¹⁹²

Notwithstanding possible readings of *Adams* and *Robinson* suggesting the contrary, it is unlikely after *Chimel* that the Supreme Court would uphold a warrantless search of an entire automobile solely under the incident-to-arrest exception. Certainly, when the offender has been separated from his car, the incidental-search doctrine should not be applied because the arrestee could neither destroy nor conceal evidence inside the car nor procure a weapon from within the car. Even when the arrest is actually affected while the suspect is still inside the vehicle, the scope of any search incidental to that arrest after *Chimel* should be restricted to that part of the car within the reach of the arrestee in which he could reasonably be expected to conceal dangerous weapons or evidence.

IV. BENIGN-PURPOSE INVENTORY SEIZURES AND SEARCHES OF AUTOMOBILES

A. Background

In addition to seizing and searching vehicles in connection with the suspected criminal activity of their occupants, police in recent years

ant under full-custody arrest on probable cause and transporting him to the station house. *Id.* at 227-28.

190. 415 U.S. 800 (1974).

191. *Id.* at 806 (emphasis added).

192. Nakell, Search of the Person and His Cigarette Package Incident to a Traffic Arrest, at 10, 1974 (unpublished manuscript).

have often found it necessary to seize and search vehicles in situations unconnected with violations of the criminal statutes. For example, vehicles have been seized and taken into temporary police custody for such benign, non-evidentiary purposes as removing from the highway a disabled or abandoned vehicle constituting a nuisance, towing an automobile after a parking violation, and impounding a vehicle for safekeeping after the driver's arrest.¹⁹³ In such cases the police may also conduct inventory searches of the automobiles pursuant to statutory or departmental authorization, the purpose of which purportedly is not to look for incriminating evidence or contraband, but to catalogue and remove the contents of the automobile to a secure place, to protect the arrestee's property from damage or theft and to prevent false claims against the police for loss or damage to the arrestee's property while his car is in custody.¹⁹⁴ The Supreme Court has decided at least four cases that may be considered in the context of benign purpose non-evidentiary inventory seizures and searches of automobiles.

B. *Preston, Cooper, and Harris*

*Preston v. United States*¹⁹⁵ can be viewed as involving an inventory search defined in its broadest sense—a search of an arrestee's car after his arrest and removal of his car to an impoundment lot or garage. However, the Court decided the case primarily on the grounds that the search was "too remote in time or place to have been made as incidental to arrest."¹⁹⁶ Although the case could be read broadly as prohibiting all post-arrest searches of automobiles in police custody, including inventories, later cases have limited the *Preston* holding to searches justified under the incident-to-arrest rule.¹⁹⁷

*Cooper v. California*¹⁹⁸ involved the warrantless search of an automobile a week after its owner was arrested on drug charges and his car impounded in a police garage pursuant to a state forfeiture statute. It has been suggested that *Cooper*, which upheld the search, may stand for the proposition that police may inventory the contents of an automobile that is retained in custody for a substantial period of time to protect

193. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433 (1973). See also cases cited notes 18-19 *supra*.

194. See cases cited notes 18-19 *supra*.

195. 376 U.S. 364 (1964).

196. *Id.* at 368.

197. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433 (1973).

198. 386 U.S. 58 (1967).

themselves from liability for loss of items stored within the car.¹⁹⁹ However, the value of *Cooper* as precedent for the validity of inventory searches is limited for several reasons. First, the Court in *Cooper* emphasized the close connection between the reasons for the arrest and the seizure and search of the car. This emphasis suggests the presence of probable cause, which would obscure the relationship between mere custody and a search for non-evidentiary protective purposes that characterizes the traditional inventory search and seizure case. Moreover, the initial seizure in *Cooper* was made pursuant to a state statute that also *required* the police to retain custody of the vehicle until a forfeiture was declared or a release ordered, so that the police in effect had a possessory interest in the car and could deny possession of it even to the owner. This situation is also unlike the usual inventory situation where the car is only temporarily in custody of the police, who have no right to retain the car after the arrested owner's release. Perhaps *Cooper* is best read, therefore, as allowing the police to search an automobile "with or without probable cause, *if they have a continuing right to possess it.*"²⁰⁰ Despite the apparent inapplicability of this interpretation of *Cooper* as a justification for inventories made of cars temporarily held by police under circumstances in which the custodians have no continuing possessory interest in the vehicles, a majority of lower courts that have considered the issue have nevertheless broadly extended the *Cooper* rationale to all validly impounded vehicles.²⁰¹

199. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire"*, 8 CRIM. L. BULL. 9, 24 n.57 (1972), citing *Cooper v. California*, 386 U.S. 58, 61-62 (1967): "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, *even for their own protection*, to search it." (emphasis added). However an inventory conducted a week after impoundment is scarcely consistent with a need to protect against false claims. And *Cooper's* car was hardly an inherently dangerous object threatening the physical safety of the police. See note 82 *supra*.

200. Note, 87 HARV. L. REV., *supra* note 42, at 846 (emphasis added). The Court's reference to self protection may indicate approval of a search furthering such a police possessory interest, which would not depend on the presence of a probable cause. *Id.* at 847. It has been suggested that such a reading of *Cooper* makes the citizen's privacy rights turn on possession of the automobile in circumstances in which there is no opportunity for the citizen to protect his privacy interests, unlike the case of a voluntary transfer of his car, and that the rule in *Cooper* should be changed to provide the opportunity for a pre-search reclamation of the automobile's contents in cases of seizures pursuant to forfeiture statutes. *Id.* at 847-48. The proper reading of *Cooper*, however, remains uncertain. Compare *Cady v. Dombrowski*, 413 U.S. 433, 445-47 (1973) (Rehnquist, J.), with *id.* at 452-53 (Brennan, J., dissenting). See also *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220-21 (1968) (White, J.).

201. Comment, *The Inventory Search of an Impounded Vehicle*, 48 CHI.-KENT L. REV. 48, 52 (1971). For a discussion of more narrow extensions of *Cooper* to inventory searches see *id.* at 49-52.

In *Harris v. United States*²⁰² the Supreme Court for the first time had before it a case that arguably presented the issue of the constitutionality of a warrantless inventory search of an impounded automobile absent a forfeiture statute. The defendant's car was observed leaving the scene of a robbery, and after the automobile was traced to him, he was arrested and his car towed to the police impoundment lot. Pursuant to a departmental regulation, the arresting officer conducted an inventory of the automobile for the purposes of tagging the vehicle for identification and listing and removing its contents for safekeeping. Having completed the inventory, the officer opened the door to roll up the car window. The officer found a registration card in the doorjamb of the vehicle implicating the accused.²⁰³

In upholding the seizure of the card and its use against the defendant at trial, the Court expressly declined to decide the inventory issue, stating that "[t]he admissibility of evidence found as a result of a search under the police regulation [inventory] is not presented by this case."²⁰⁴ Instead the Court found that the officer discovered the card while performing a justified non-evidentiary function solely for the protection of the car and not for the purpose of securing incriminating evidence, and therefore, on the basis of the plain view doctrine, upheld the seizure and use of the card in defendant's prosecution.²⁰⁵

Given that the Court in *Harris* went out of its way to avoid the inventory issue, ultimately deciding the case in terms of the traditional plain-view exception, *Harris* stands as uncertain precedent for the rule that inventory searches are reasonable under the fourth amendment as a separate exception to the warrant requirement. However, that case has been relied on by several lower courts to justify inventory searches.²⁰⁶

C. *Cady v. Dombrowski*—Closer to the Mark?

In *Dombrowski*²⁰⁷ the police arrested an off-duty policeman for

202. 390 U.S. 234 (1968) (per curiam).

203. *Id.* at 234-36. Although the Court's opinion suggests that the card was seized during the actual inventory, the opinion of the Court of Appeals for the District of Columbia, referred to by the Supreme Court, *id.* at 236, indicates that the card was discovered *after* the inventory had been completed. *Harris v. United States*, 370 F.2d 477, 478 (D.C. Cir. 1966).

204. 390 U.S. at 236.

205. *See id.* at 236-37 (Douglas, J., concurring).

206. *See, e.g., United States v. Mitchell*, 458 P.2d 960, 961 (9th Cir. 1972); *State v. Criscola*, 21 Utah 2d 272, 275 n.6. 444 P.2d 517, 519-20 n.6 (1968).

207. *Cady v. Dombrowski*, 413 U.S. 433 (1973) (5-4 decision).

drunken driving, after a late night accident that totally disabled his rented car. Believing that the arrestee was required to carry his service revolver at all times, the police made a cursory search of Dombrowski and his car at the scene of the arrest but found no gun. Two hours after the car was towed to a private garage and Dombrowski had been booked and taken to a hospital for treatment, one of the arresting officers returned to the garage to continue the search for the defendant's gun. In the process he discovered blood-stained items in the trunk of the vehicle that led to Dombrowski's conviction for murder.²⁰⁸

Relying on the federal district court's finding that the search in *Dombrowski* was not conducted to discover incriminating evidence, the Court upheld the warrantless search of the car's trunk on the grounds that it was made in the discharge of the police department's non-investigative "community care-taking functions" and was motivated out of a "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."²⁰⁹ Seeking to justify the warrantless search of Dombrowski's admittedly immobile car, Mr. Justice Rehnquist cited the large volume of non-evidentiary "care-taking" functions performed by local police with respect to automobiles. Then he stated that the constitutional distinction between automobiles and houses, originally based on the ambulatory nature of vehicles, now also stemmed from "the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband."²¹⁰ Emphasizing that the police had exercised a form of valid custody over the vehicle, the Court compared *Dombrowski* to *Cooper* and *Harris*, two cases in which vehicle mobility also was not present, and concluded:

In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper*: concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of a vehicle.²¹¹

Dombrowski lends itself to at least two interpretations apart from its value as precedent justifying warrantless inventory searches. First,

208. *Id.* at 435-39.

209. *Id.* at 447.

210. *Id.* at 442.

211. *Id.* at 447.

the case may stand for the proposition that the warrant requirement will no longer apply to automobiles. This reading is suggested by the Court's expansion of the constitutional distinction for fourth amendment purposes between cars and houses, which anticipates the more explicit language in *Cardwell* that automobiles are places of a lesser expectation of privacy and therefore warrant only secondary fourth amendment protection.²¹² The Court's attempt to distinguish *Coolidge* on the "private" versus "public" place rationale, which was later enunciated in *Cardwell*, also supports this view of *Dombrowski*.²¹³ Finally, the implied suggestion in the Court's holding that any purpose "as reasonable as" those in *Cooper*, *Harris*, and *Dombrowski* may signal a return to the *Rabinowitz* rule that the practicability of obtaining a warrant has no bearing on the reasonableness of a search.²¹⁴

Secondly, *Dombrowski* possibly indicates that the Court will simply not apply the warrant requirement to searches conducted for non-evidentiary purposes. This suggestion is supported by the Court's emphasis on the benign motive for the search in *Dombrowski*. Such a rationale is analogous to the Court's administrative search cases, but even here a warrant has been required, although on less than probable cause.²¹⁵

Dombrowski may certainly be read as precedent supporting warrantless auto inventories. The Court's repeated emphasis on the benign purpose of the search lends some support to that line of cases holding that inventories are simply not fourth amendment searches.²¹⁶

212. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

213. 413 U.S. at 446-48; 417 U.S. at 593. The Court also distinguished *Preston* by limiting its applicability to searches alleged to have been made incidentally to the driver's arrest.

214. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

215. See, e.g., *Camara v. Municipal Ct.*, 387 U.S. 523 (1967). *Camara* held that a person could not be criminally prosecuted for refusing to permit a housing inspector to conduct an inspection of his home pursuant to a city housing code providing for warrantless inspections. The Court required a warrant but allowed one to issue on "area wide" probable cause to inspect even though probable cause as to the particular house did not exist.

216. See, e.g., *Fagundes v. United States*, 340 F.2d 673 (1st Cir. 1965); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971). This view finds some support in the recent decision of *Wyman v. James*, 400 U.S. 309 (1971), in which the Court held that a home visit by a welfare social worker was not a fourth amendment search. *Id.* at 317. However, *Wyman* alternatively held that, if the visit was a search, it was reasonable. *Id.* at 318-24. Moreover, *Wyman* can be distinguished on the grounds that it involved a program historically subject to government regulation, and that, unlike *Camara*, refusal to admit the investigator without a warrant could not result in criminal charges but only in a suspension of welfare benefits. Furthermore, this view imposes a strict reading on the word "search" that is inconsistent with the Court's rea-

However, *Dombrowski* declined to decide this issue and, assuming a search, still found *Cooper* and *Harris* controlling. The better approach would be to consider even benign purpose inventories as searches within the fourth amendment, and then determine whether the warrant requirement should be dispensed with and whether the subsequent warrantless search is reasonable.²¹⁷

Dombrowski implies that the subjective intent of the officer in conducting an inventory will be determinative of the need for a warrant.²¹⁸ Thus when there can be no doubt that the inventory was made for a non-evidentiary purpose, such as when an inventory is made of a car towed from a no-parking zone, no warrant should be required. Cases involving inventories conducted following the driver's arrest on charges not related to the automobile itself will pose a closer question,²¹⁹ especially when the law enforcement agency involved routinely inventories all impounded vehicles.²²⁰ But at least when it is clear that the inventory was conducted for evidentiary purposes, the warrant requirement should be enforced.²²¹

Dombrowski also may be read as supporting the reasoning of those cases in which the warrant requirement has been dispensed with and the resultant inventory has been held a reasonable search designed to protect the owner's property from damage or theft and the police from physical harm or liability for lost or stolen property.²²² In equating the need to search for protection of the public safety with the need to search for protection of the owner and the police, the holding in *Dom-*

soning in *Terry v. Ohio*, 392 U.S. 1 (1968), in which the Court stated that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security," *id.* at 17-18 n.15, and does not comport with the statement in *Camara* that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Ct.*, 387 U.S. 523, 530 (1967).

217. *See, e.g.*, *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972).

218. 413 U.S. at 443.

219. *See, e.g.*, *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *St. Clair v. State*, 1 Md. App. 605, 232 A.2d 565 (1967).

220. *See, e.g.*, *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *State v. Montague*, 73 Wash. 2d 381, 438 P.2d 571 (1968).

221. *See, e.g.*, *Pigford v. United States*, 273 A.2d 837 (D.C. Ct. App. 1971) (auto left unlocked and unguarded after purported safekeeping inventory).

222. *See, e.g.*, *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *United States v. Pennington*, 441 F.2d 249 (5th Cir.), *cert. denied*, 404 U.S. 845 (1971); *State v. All*, 17 N.C. App. 284, 193 S.E.2d 770, *cert. denied*, 414 U.S. 866 (1973); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972).

browski implies that *all* are reasonable justifications for a warrantless search. However, *Dombrowski* can be distinguished from *Cooper* and *Harris* on several grounds. *Cooper* relied on both the close connection between the reason for the search and the reason for the arrest, and the relationship between the reason for the seizure and the reason for the search. In *Dombrowski* the search was clearly unrelated to the crime for which the defendant was arrested, and the reasons for the seizure and impoundment were unrelated to the reason for the arrest and the object of the search. Moreover, since the car was not being held as evidence and there being no forfeiture involved, the police had no right or obligation to retain the car beyond the time that *Dombrowski* was released or made other arrangements for the vehicle. Thus the need for a self-protective search seems weaker in *Dombrowski*.²²³

Harris turned on a finding by the Court that there was no search, whereas *Dombrowski* assumed a search occurred. Furthermore, *Harris*, unlike *Dombrowski*, involved no intrusion into a securable area of the car. Thus no significant privacy interests were infringed by the initial intrusion in *Harris*, which was not the case in *Dombrowski*. The "narrow circumstances" in *Harris* in which a warrant was not required were not present in *Dombrowski*.²²⁴

Finally, *Dombrowski* can be distinguished from the more typical inventory search in two respects. First, the police in *Dombrowski* had probable cause to believe a specific item was inside the car, and they were looking only for it. This is unlikely in most inventory situations. Secondly, *Dombrowski* involved the seizure and search of a disabled vehicle constituting a nuisance on the highway under where the driver was intoxicated and later comatose. In the more usual situation, the driver could likely make arrangements for the safekeeping of the vehicle and its contents himself, if he were allowed the opportunity.²²⁵

These considerations suggest not only that *Dombrowski* may be uncertain inventory-search precedent, but also that some of the traditional justifications relied on to sustain the reasonableness of warrantless inventory searches need to be reexamined. First, barring unusual circumstances, inventory searches hardly seem necessary for the physical safety of the custodians. Secondly, although claims against police departments for damaged or stolen property are frequently filed, it

223. Note, *Cady v. Dombrowski: The Demise of Coolidge*, 35 U. PITT. L. REV. 712, 719-20 (1974). See *Cooper v. California*, 386 U.S. 58 (1967).

224. Note, 35 U. PITT. L. REV., *supra* note 223, at 717-18.

225. *United States v. Lawson*, 487 F.2d 468, 471, 474-77 (8th Cir. 1973).

would seem that police or other impoundment custodians are at most involuntary bailees who are required to exercise only minimal care for the safety of their bailments. Thus, as far as legal liability is concerned, a constitutional rule that police can do no more than roll up the windows and lock the doors of impounded cars should be conclusive.²²⁶ Finally, although the inventory process may provide greater protection for the owner's property than rolling up the windows and locking the doors of his car, it also means a substantially greater intrusion into the privacy of his automobile. Moreover, there may be no property in the car, and, if there is, in most instances the custodians of the car can locate the owner, who usually can take whatever steps he desires to protect his own property. Furthermore, car owners can insure against property loss but not against a loss of privacy.²²⁷

Weighing the interests of both the police and the citizen that are involved in an inventory search, it has been suggested that warrantless inventories should be allowed only in special circumstances, such as where the police reasonably believe that the car contains protectable property and the driver cannot be located or is in a condition which precludes his arranging for the protection of his car and its contents.²²⁸ This rule would be consistent with a narrow reading of *Dombrowski*,²²⁹ and seems preferable in that it "would bring inventory searches into line with the general corpus of fourth amendment law."²³⁰

V. CONCLUSION

The Supreme Court of the United States recently stated that "very little . . . we might say . . . can usefully refine the language of the [fourth] Amendment . . . in order to evolve some detailed formula for judging [automobile search] cases"²³¹ This is not necessarily the case. The Court could best accommodate individual privacy rights and police investigatory needs by adhering to the following suggestions. First, the Court should apply the *Carroll* automobile exception narrowly, following the rule in *Coolidge* that *Carroll* is applic-

226. *Id.* at 474-77; cf. *Mozzetti v. Superior Ct.*, 4 Cal. 3d 699, 709-10, 484 P.2d 84, 90-91, 94 Cal. Rptr. 412, 418-19 (1971) (en banc).

227. *See United States v. Lawson*, 487 F.2d 468, 474-77 (8th Cir. 1973); Note, 87 HARV. L. REV., *supra* note 42, at 852-53.

228. *United States v. Lawson*, 487 F.2d 468, 471, 474-77 (8th Cir. 1973); Note, 87 HARV. L. REV., *supra* note 42, at 853.

229. *See United States v. Lawson*, 487 F.2d 468, 471 (8th Cir. 1973); Note, 35 U. PITT. L. REV., *supra* note 223, at 723-24. *But see id.* at 722, 724.

230. Note, 87 HARV. L. REV., *supra* note 42, at 853.

231. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973).

able only to those cases in which a moving automobile is halted on the open road by a law enforcement officer who has probable cause to search the vehicle.

Secondly, warrantless searches of automobiles, which have been impounded after the driver's arrest, should be allowed only in circumstances in which an immediate search at the scene of the arrest would have been proper under *Carroll*—where the car has been seized in flight on the open road on probable cause to search. Better, perhaps, would be to apply Mr. Justice Harlan's view in his dissent in *Chambers*²³² to such post-arrest, post-impoundment situations, permitting station-house detention of the automobile on probable cause but no search until a warrant is obtained. Such a rule would have the advantages of respecting the fourth amendment commands and furnishing greater protection for individual rights, while providing for, rather than hindering, effective law enforcement.

The restrictions placed on incidental searches of premises in *ChimeI*²³³ should be applied to warrantless searches of automobiles allegedly conducted incidentally to the driver's arrest. This is necessary to prevent the use of the incident-to-arrest doctrine to circumvent the fourth amendment when vehicles are the objects to be searched.

Finally, the Supreme Court, when it chooses to decide squarely the constitutionality of inventory searches, should treat them as searches within the fourth amendment, and determine on a case-by-case basis whether the warrant requirement should be dispensed with and whether the resultant search is reasonable. As a general rule, inventories should be allowed without a warrant only when police officers have reason to believe that the car contains securable property and the owner of the automobile cannot be found or is so incapacitated that he cannot provide for the safety of his car and its contents. If the owner can be found and prefers that police secure his property, an inventory would also be permissible, provided that the owner's consent is legally binding and he signs a release discharging the custodians from liability for lost or damaged property. However, even where inventories can properly be conducted, the scope of the search should at most extend

232. *Chambers v. Maroney*, 399 U.S. 42, 55 (1970) (Harlan, J., concurring and dissenting). Justice Harlan favored the approach of *Preston* that it was more reasonable and less intrusive upon individual privacy temporarily to immobilize the car for the short time necessary to obtain a warrant than to conduct a full warrantless search of the entire vehicle. *Id.* at 67.

233. See text accompanying notes 170-72 *supra*.

to those areas of the car that are in plain view and that one might reasonably believe contain valuables. Locked suitcases and the like should be removed and listed on the inventory but not opened except in unusual circumstances. Perhaps police should be required to do no more than lock the car doors and windows. Any incriminating evidence discovered in the course of a properly restricted inventory should be admissible at later prosecutions, but when the inventory was conducted for an evidentiary rather than a benign purpose, the search should be invalidated if made without a warrant.²³⁴

Charles Evans Hughes once said, "We are under a Constitution, but the Constitution is what the judges say it is."²³⁵ Regarding the fourth amendment as it applies to warrantless seizures and searches of automobiles, the judges are finding it difficult to declare the laws. The law of automobile search and seizure thus remains "something less than a seamless web," and the constitutional guarantee against "unreasonable searches and seizures" is undermined as a result.

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234. See Miles & Wefing, *supra* note 27, at 143-44; Note, 87 HARV. L. REV., *supra* note 42, at 853.

235. 7 AKRON L. REV. 343, 351-52 (1974), quoting ADDRESSES OF CHARLES EVANS HUGHES 185 (2d ed. 1916).

