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The Inventory Search of an Automobile: A Willing Suspension of Disbelief

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THE INVENTORY SEARCH OF AN AUTOMOBILE: A WILLING SUSPENSION OF DISBELIEF*

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Evidence seized from automobiles under the guise of an automobile inventory search has often been admitted against criminal defendants. This article analyzes the doctrinal basis behind the inventory search, the justifications for its use and concludes that the inventory search is a subterfuge for an unlawful entry into a constitutionally protected area.

With the possible exception of "dropsy" cases,[1] no aspect of Fourth Amendment litigation has afflicted law enforcement with the yawning credibility gap wrought by automobile inventory searches, that is, the examination and listing of the contents of an automobile by the police when it is taken into police custody. This article will attempt to explore briefly three aspects of that insidious device, which has two ostensible purposes: to protect the personal property of the vehicle's owner and to protect the police against false claims of theft.[2] Initially, an attempt will be made to place the inventory search of an automobile in its proper analytical framework. Secondly, the doctrinal status of the inventory search in Maryland will be examined, with a view towards the constitutional erosion of its base. Thirdly, a brief look will be had at the suspect nature of the inventory search generally.

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1. For an incisive analysis of this remarkable phenomenon, see the opinion of Judge Irving Younger in People v. McMurty, 64 Misc. 2d 63, 314 N.Y.S.2d 194 (N.Y. City Crim. Ct. 1970). *See generally* Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEORGETOWN L.J. 507 (1971).
2. *See, e.g.*, St. Clair v. State, 1 Md. App. 605, 614-15, 232 A.2d 565, 570 (1967). *See also* Dixon v. State, 23 Md. App. 19, 39, 327 A.2d 516, 527 (1974).

   This attack on the constitutionality and the basic intellectual integrity of the inventory search is not intended to apply to the inventorying of the contents of abandoned automobiles where owners cannot be located or of disabled automobiles that have to be towed from accident scenes. Neither is this article addressing itself to the inventorying of the personal effects of an arrestee, taken from him when he is placed in custody.

   The attitude of the author toward the inventory search of an automobile is unabashedly editorial. It is based upon the author's personal experience, both upon the bench and in twelve years with a prosecutor's office, with policemen, prosecutors and judges. The attitude of the "apologists" for the inventory search, and their use of the device has been made apparent both in practice and in hundreds of schools, seminars, lectures and question and answer sessions dealing with search and seizure.

WHAT IS AN INVENTORY SEARCH ANALYTICALLY?

The basic thrust of the Fourth Amendment is that an investigator must obtain a warrant issued by a "neutral and detached" magistrate before intruding into a constitutionally protected area in search of evidence.[3] There are a few well-recognized exceptions to that warrant requirement permitting warrantless intrusions generally where circumstances make it impossible or impractical to obtain a warrant.[4] One of these recognized exceptions is the Carroll Doctrine or "automobile exception."[5] Because the inventory search of an automobile and the "automobile exception" both involve automobiles, there is a semantic tendency to try to merge the two constitutionally distinct phenomena into a single doctrine. The first impediment that must be removed before one can understand conceptually the inventory search is the mistaken notion that the inventory search of an automobile somehow involves this "automobile exception" to the warrant requirement. It most emphatically does not. Before we can understand what an inventory search of an automobile is, in terms of doctrinal significance, we must understand what it is not.

For some strange reason our intellectual faculties seem to fail us when we focus upon a confrontation between a criminal investigator and a motorcar. If the word "automobile" is not "a talisman in whose presence the Fourth Amendment fades away and disappears,"[6] neither should it be a talisman in whose presence all capacity for legal analysis fades away and disappears. An automobile (or automobile equivalent, such as a truck, bus, wagon, boat or airplane) is simply one more constitutionally protected area, having a unique characteristic to be sure, but broadly sharing the vicissitudes of other constitutionally protected areas. Fundamentally, it enjoys Fourth Amendment protection; under appropriate circumstances, it is vulnerable to intrusions that fall within the permission of the Fourth Amendment.

Yet the mere testimonial mention of the word "automobile" frequently provokes a judicial knee-jerk. Many judges simplistically "lock in" on "automobile exception" diagnosis according to *Carroll v. United States*[7] and *Chambers v. Maroney*[8] and will not budge from that analytical set. Restricting themselves doggedly to one track, they refuse to grasp that the review of every search of an automobile and

3. Johnson v. United States, 333 U.S. 10 (1948).
4. For a brief discussion of each of these exceptions, *see* notes 9-29 *infra* and accompanying text.
5. The "automobile exception" was specifically established in 1925 in Carroll v. United States, 267 U.S. 132 (1925). The holding of *Carroll* was that 1) probable cause to believe that the vehicle contains evidence of crime and 2) exigent circumstances may justify the warrantless search of an automobile. The "automobile exception" has since been well-delineated in Chambers v. Maroney, 399 U.S. 42 (1970), and Coolidge v. New Hampshire, 403 U.S. 443 (1971).
6. Coolidge v. New Hampshire, 403 U.S. at 461-62.
7. 267 U.S. 132 (1925).
8. 399 U.S. 42 (1970).

every seizure from an automobile need not proceed under the "automobile exception." There are cases involving automobile searches where citation to *Carroll* and *Chambers* ought not to intrude into the remotest footnote. An inventory search is one of them.

The source of the confusion is unquestionably the trick the mind can play in mistaking the functional category "automobile" for the analytical category "automobile." To be an automobile for one purpose is not necessarily to be an automobile for the other purpose. From an analytical viewpoint, many police examinations of the interior of a functional automobile have nothing whatever to do with the "automobile exception." The confusion could be avoided if lawyers and courts would scrupulously remember that what triggers an "automobile exception" analysis is not the functional presence of an internal combustion engine connected to a set of wheels, but rather the arguable presence of both 1) probable cause to believe that the automobile contains evidence of a crime and 2) exigent circumstances arising out of the mobility of the automobile and its consequently likely disappearance if the search is not executed immediately.[9] Reverting to the older usage of Carroll Doctrine as the appropriate label for this exception to the warrant requirement would relieve much of the confusion.

The Carroll Doctrine exception (or "automobile exception") to the warrant requirement is, of course, but one of at least six recognized exceptions.[10] A legitimate search may occur and a legitimate seizure may take place, even inside an automobile, under any of these exceptions—not simply under the Carroll Doctrine.

1. Sometimes a probing into the interior of an automobile does involve the Carroll Doctrine. These warrantless searches have been dealt with by the Supreme Court in *Carroll v. United States*;[11] *Husty v. United States*;[12] *Scher v. United States*;[13] *Brinegar v. United States*;[14] and *Chambers v. Maroney*.[15]

2. On the other hand, a probing into the interior of an automobile may not involve the Carroll Doctrine but may instead provoke analysis under the "search incident to a lawful arrest" exception to the warrant requirement.[16] These situations have been dealt with by the Supreme Court in *Preston v. United States*[17] and *Dyke v. Taylor Implement*

9. *Id.* at 51.
10. The other five are: 1) search incident to lawful arrest, 2) "hot pursuit," 3) "stop and frisk," 4) the "plain view" doctrine and 5) consent. For a brief discussion of each of these exceptions, *see* notes 16-29 *infra* and accompanying text.
11. 267 U.S. 132 (1925).
12. 282 U.S. 694 (1931).
13. 305 U.S. 251 (1938).
14. 338 U.S. 160 (1949).
15. 399 U.S. 42 (1970).
16. The "search incident" exception permits a warrantless search of the area within the reach, lunge or grasp of an arrestee following a lawful arrest. The purposes are to prevent the arrestee from using a possible weapon to injure the officer or make good an escape and to prevent him from destroying readily accessible evidence. Chimel v. California, 395 U.S. 752, 762-63 (1969).
17. 376 U.S. 364 (1964).

Manufacturing Company.[18] Maryland has also analyzed entries into the interior of an automobile under "search incident" analysis.[19]

3. Sometimes a probing into the interior of an automobile will invite analysis under the "stop and frisk" exception to the warrant requirement.[20] The Supreme Court has dealt with this situation in *Adams v. Williams*[21] and *United States v. Brignoni-Ponce*.[22] Maryland has also analyzed the entry into an automobile under the "stop and frisk" exception in *Williams v. State*.[23]

4. A probing into the interior of an automobile also may be analyzed under the "plain view" doctrine exception to the warrant requirement.[24] The Supreme Court did this explicitly in *Harris v. United States*[25] and implicitly in *Cady v. Dombrowski*.[26]

5. Sometimes a probing into the interior of an automobile will be analyzed under the "consent" exception to the warrant requirement.[27] This type of analysis was made by the Supreme Court in *Schneckloth v. Bustamonte*.[28]

6. Although no case has been decided by the Supreme Court involving the "hot pursuit" of a fleeing felon into the interior of a vehicle, it is clear that the rationale of *Warden v. Hayden*,[29] which permits officers in "hot pursuit" to cross the threshold of fixed premises, would, a fortiori, permit the crossing of this lesser threshold.

A particular automobile search may require analysis under more than one of the doctrines listed above. In *Coolidge v. New Hampshire*,[30] a probing into the interior of an automobile was analyzed under three distinct and independent Fourth Amendment doctrines—under "search

18. 391 U.S. 216 (1968).
19. Howell v. State, 18 Md. App. 429, 306 A.2d 554 (1973), *reversed* on factual grounds in Howell v. State, 271 Md. 378, 318 A.2d 189 (1974), but the frame of analysis remained the same. *See also* Peterson v. State, 15 Md. App. 478, 481-93, 292 A.2d 714, 717-23 (1972).
20. This exception to the warrant requirement, articulated by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968), permits an officer, upon a reasonable suspicion less than probable cause, 1) temporarily to detain a suspect and ask him questions and 2) to carry out a "frisk" for weapons, limited in scope to a pat-down of the outer surface of the clothing.
21. 407 U.S. 143 (1972).
22. 422 U.S. 873 (1975).
23. 19 Md. App. 204, 310 A.2d 593 (1973).
24. The "plain view" doctrine, articulated in Coolidge v. New Hampshire, 403 U.S. 443 (1971), permits a warrantless seizure of evidence where 1) there has been a prior valid intrusion into a constitutionally protected area, 2) there is then an inadvertent spotting of the evidence in plain view and 3) there is probable cause to believe that the thing spotted is evidence of crime.
25. 390 U.S. 234 (1968).
26. 413 U.S. 433 (1973).
27. This exception simply provides that the right to be free of an unreasonable search and seizure, like any other constitutional right, may be waived by the person enjoying the right. The only qualification is that the consent be "voluntary" as that term is defined in Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
28. 412 U.S. 218 (1973).
29. 387 U.S. 294 (1967).
30. 403 U.S. 443 (1971).

incident" law in Part IIA of that opinion, under the Carroll Doctrine in Part IIB and under the "plain view" doctrine in Part IIC.

It follows, then, that an inventory search of an automobile need not be subjected to analysis under the Carroll Doctrine simply because a wheeled vehicle is the situs of the inventory; an inventory search is, instead, the antithesis of a Carroll Doctrine search. The inventory search, by definition, purports to be a mere listing of personal property and not a deliberate search for evidence; the Carroll Doctrine search is a deliberate search for evidence. An inventory search is not based upon probable cause—probable cause is an irrelevant notion; a Carroll Doctrine search *must* rest upon probable cause. The inventory search need not depend upon any exigency—the non-likelihood that the owner's relatives or agents will call for the car ostensibly heightens the need for the protective inventory; the Carroll Doctrine search is absolutely dependent upon exigency. Once one gets beyond their surface similarity, the inventory search and the Carroll Doctrine search are diametrically opposed in every doctrinal respect. When one sees, therefore, *Carroll* or *Chambers* cited in support of an inventory search, it is meet to look politely for the nearest wastebasket. Someone has scrambled the eggs of Fourth Amendment analysis.

If an inventory search of an automobile is not a Carroll Doctrine search, what then is it? Assuming for the moment that the making of an inventory is a legitimate excuse for intruding into the constitutionally protected area of one's automobile,[31] then it is clear that there is a prior valid intrusion—one of the necessary conditions to bring into play the "plain view" doctrine as outlined by *Coolidge*.[32] If, following the valid intrusion for this innocuous and non-investigative purpose, there is then an inadvertent spotting of probable evidence in plain view, the evidence is seizable under the "plain view" doctrine.[33] Seizures in the course of inventory searches must, therefore, be analyzed under the "plain view" doctrine.

The constitutional problem with respect to the analysis of an inventory search under the "plain view" doctrine is not what follows a prior valid intrusion but rather whether the purpose of inventorying personal property inside an automobile can give rise to a constitutionally valid intrusion in the first place.

THE AUTOMOBILE INVENTORY IN MARYLAND

The theory underlying an inventory search is that a policeman, when he takes a motorist into custody, should make an inventory of the contents of the automobile. In theory, this is not a search for evidence. It is an effort to protect the personal property of the motorist against loss. According to the accepted fiction, a written inventory will always

31. This very important question is discussed *infra*, beginning at p. 216.
32. 403 U.S. at 466.
33. *Id.* at 469.

be prepared and a copy will always be given to the motorist. With the police department thus committed in writing, the motorist theoretically can rest assured that an over-greedy policeman will not take advantage of the motorist's plight to abscond with an attractive chattel. The theory does not explain how one guards against the policeman-thief who has foresight enough to leave off the inventory list the items he wishes to convert to his own use.

The apologists for the inventory search posit that it serves another interest. In addition to protecting the motorist from theft, so runs the argument, it also protects the police department from false charges of theft. According to the fiction, a plaintiff who claims the loss of personal property at the hands of the police would be precluded from recovering if the police could produce an inventory list showing that the personal property was not in the automobile when it first came into the custody of the police. The apologists do not explain how this self-serving declaration could ever be admitted into evidence or could ever be entitled to any persuasive weight.[34]

Inventory searches in Maryland rest ultimately upon the single authority of *St. Clair v. State.*[35] Before looking to the doctrinal base of *St. Clair*, which appears to have been totally eroded, a look at its facts is enough to reveal the essential duplicity of the police in conducting an inventory search.

In the *St. Clair* case, a Virginia State Police trooper on routine patrol at 11:15 a.m. observed an automobile, bearing Alabama license tags, parked beside the road near the town of Salem in Roanoke County. He aroused the sleeping driver, who produced his California driver's license and his registration papers for the vehicle, showing it to have been titled to him in Alabama. The trooper meanwhile had observed two television sets in open view on the floor of the vehicle. The driver explained that he owned both of the television sets and that he had come from California via Alabama to look for work in the Maryland-Virginia area. He explained that he had arrived late at night and had wanted to avoid awakening relatives with whom he intended to stay, who lived a short distance away. The trooper knew of the driver's relatives and that they lived in the immediate vicinity. Satisfied with the driver's explanation, the trooper began to drive away.[36]

As he was leaving the scene, the trooper checked with his dispatcher by police radio. He learned that the driver was wanted by California authorities for violation of parole and burglary. The trooper immediately stopped the defendant, who was then just driving off, and informed him of a teletyped message for his arrest. The trooper informed the defendant that he would be taken before a justice of the peace in nearby Salem. The driver asked permission to remove an article

34. *See* E. Cleary, McCormick's Handbook of the Law of Evidence 144 (2d ed. 1972), for a discussion of interest-serving statements.
35. 1 Md. App. 605, 232 A.2d 565 (1967).
36. *Id.* at 608, 232 A.2d at 567.

of clothing from the trunk of the car. When the trunk lid was raised, the trooper observed several articles in the trunk which he believed the driver owned.[37]

The defendant was arrested and transported to Salem, twelve miles from the scene of the arrest. It was determined that California would extradite. It was also learned that Texas wished to extradite St. Clair for a burglary allegedly perpetrated by him in that state.[38]

When the defendant was unable to post the necessary bond, he was incarcerated in the Salem jail. The state trooper, accompanied by a sergeant, drove back to the arrest scene so that the sergeant could drive the defendant's car into Salem. The car was brought to Salem and parked near the jail. Trooper Rhodenizer testified that "because we were responsible for them," the items of personal property in the defendant's vehicle were inventoried by serial number and placed in the custody of the local sheriff.[39]

The credibility of the police as to their concern over the security of the property was eroded somewhat when, four days later, the sheriff, because of a shortage of space in his office, returned the goods to the police who placed them back inside the defendant's car, which was still parked adjacent to the jail. Skepticism as to the true police motive is increased by the actions of the police on August 19, when the list of the articles taken from the car was "run on the teletype as police information, found."[40] Trooper Rhodenizer testified that this was done "just for general police information over the teletype network."[41] What purpose it served in preserving the integrity of presumptively innocuous personal property being safeguarded for the benefit of the motorist was not explained. In response to that routine teletype, it was learned that the various articles taken from the trunk of the defendant's car had been stolen in Maryland.[42] This information formed the basis for the ultimate Maryland conviction.

The thrust of this article is not to quarrel with the *St. Clair* decision itself. It was unquestionably good law when it was announced. *St. Clair*, however, as a fair representative of hundreds of cases like it, well illustrates the galling gap between the pose of the police and what one instinctively knows is their true purpose. The fairy tale would have us believe that the police are interested solely and exclusively in safeguarding personal property and are naively surprised when their "safeguarding" efforts turn up evidence of crime. The strange thing about the "safeguarding" is that no effort is ever made to have the arrested driver lock the vehicle and park it in a safe place to his own satisfaction; to drive it or have the police drive it to some nearby and

37. *Id.* at 609, 232 A.2d at 567.
38. *Id.*
39. *Id.*
40. *Id.* at 610, 232 A.2d at 568.
41. *Id.*
42. *Id.* at 609-10, 232 A.2d 567-68.

convenient relative or friend or storage facility; to have a relative, friend or attorney come and pick it up so as to relieve the police of their presumably onerous "safeguarding" responsibilities; or to inquire of the arrested driver in any way as to his wish, with respect to his non-suspect property. Universally, the police studiously avoid all such "safeguarding" alternatives and resort to the single mode of "safeguarding," that also incidentally permits them to get a good look at the interior of the car and its contents, even when this mode is far from the most convenient. The notion that the criminal evidence they then turn up amounts to no more than an unexpected boon strains credulity. A law that permits the police frankly and openly to tear a car apart for possible criminal evidence when a driver is arrested would not be as offensive as the patent intellectual fraud underlying the "inventory" rationale. Everyone knows the real purpose, but police, prosecutors and judges alike play their assigned roles with absolutely straight faces.

The "tip-off" to the real police purpose is what happens when evidence of crime is "inadvertently" discovered in the course of making the inventory. Just this situation occurred in *Dixon v. State*,[43] causing the Court of Special Appeals to remark:

> Curiously, no inventory list was ever turned over to the appellant or produced in court. Apparently none was ever made. In terms of the officer's attentions, solicitude for personalty was easily cuckolded and lightly forgotten once the more attractive rival of the seizure of potentially incriminating evidence appeared in the field. In the light of such easy inconstancy of purpose, it is difficult to credit significantly the asserted initial commitment. As the officer acknowledged on cross-examination:
>
> "Q. So you really didn't take it for his safekeeping? Correct? You took it as evidence, isn't that correct?
>
> A. That's correct."[44]

In the *St. Clair* case itself, the Virginia state trooper testified that St. Clair had told him that St. Clair wanted his brother-in-law to have the vehicle. The trooper even assisted St. Clair in drawing up papers giving to the brother-in-law the power of attorney to get a Virginia title. All of this was done, however, after the contents of the automobile had been inventoried. When the trooper was asked whether St. Clair had said anything with respect to the contents of the car, he replied, "No, not specifically. He mentioned his sister and he indicated that he would like her to get what he had."[45] The trooper, persisting that he felt "responsible" for the contents of the car, testified that the local

43. 23 Md. App. 19, 327 A.2d 516 (1974).
44. *Id.* at 40, 327 A.2d at 528.
45. 1 Md. App. at 610, 232 A.2d at 568.

practice was "to inventory each item that we find in the vehicle and leave them for safekeeping."[46]

St. Clair himself testified that, immediately after his arrest, he asked permission to drive the car to the home of his relatives, approximately one-quarter of a mile from the point of arrest. He was refused such permission and instead was told to "leave it there and lock it up."[47] Notwithstanding his protestations that "one door won't lock and I've got some stuff in it I don't want nobody to take,"[48] the car was left at the roadside as St. Clair was taken to his place of arrest in Salem twelve miles away.[49] The trooper and his sergeant then had to double back that twelve miles to pick the car up and return it an additional twelve miles to Salem.[50] Why driving it the one-quarter of a mile to the relatives' home would not have been more acceptable to all parties was never explained. This would have satisfied St. Clair and would have relieved the police of all responsibility for the vehicle and its contents. The ostensible purposes of an inventory search would have been served in a far more efficient manner.

St. Clair testified further that he gave the keys to his car to the trooper and told the trooper to give the keys to St. Clair's brother-in-law so that the brother-in-law could drive the car to his house.[51] The police persisted, nevertheless, in driving out and retrieving the car themselves, further disregarding the arrestee's wishes.

The evidence demonstrated and the court found that St. Clair consented neither to the inventory nor to the removal of the articles from his car.[52] In the automobile inventory cases generally, this failure to give the motorist any option as to an act which, in theory, is being done exclusively for his own protection is a curious anomaly that the fiction does not seek to explain.

The evidence also revealed and the court found that no search warrant was obtained, because Trooper Rhodenizer had testified that, "[h]e had no reason to suspect that any items in the car were stolen."[53] The selfsame lack of probable cause also precluded any reliance upon the Carroll Doctrine. The *St. Clair* opinion also held, quite properly, that the search of the automobile and the seizure of its contents could not be justified as a search incident to lawful arrest. The police, indeed, had expressly disavowed making any "search" of the vehicle, either incidental to the arrest or otherwise. The police chose to rely exclusively on the inventory rationale of safekeeping the vehicle and its contents. According to all of the police testimony, they

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 610-11, 232 A.2d at 568.
50. *Id.* at 609, 232 A.2d at 567.
51. *Id.* at 611, 232 A.2d at 568.
52. *Id.* at 610, 612, 232 A.2d at 568, 569.
53. *Id.* at 610, 232 A.2d at 568.

"entertained a bona fide belief that the appellant owned both the vehicle and its contents. . . ."[54]

The *St. Clair* opinion relied exclusively upon the inventory rationale, looking secondarily to *Cooper v. California*[55] and primarily to *United States v. Rabinowitz*[56] and its progeny for authority.[57] Not simply the *St. Clair* decision but the inventory search apologists generally seek their initial solace in *Cooper*. It affords none. *Cooper* pointed out that *Preston v. United States*,[58] in rejecting the government's alternative theory of the case, had settled in the negative any idea that the police could routinely seize or search a vehicle after having arrested the driver and passengers.

In *Preston*, the occupants of an automobile were arrested late at night for vagrancy. The police towed their car to the police station. The *Cooper* court, in rejecting the proposition advanced by the State that the police could process the car just because it was in their physical custody, commented on *Preston*, stating:

> In the *Preston* case, it was alternatively argued that the warrantless search, after the arrest was over and while Preston's car was being held for him by the police, was justified because the officers had probable cause to believe the car was stolen. But the police arrested Preston for vagrancy, not theft, and no claim was made that the police had authority to hold his car on that charge. The search was therefore to be treated as though his car was in his own or his agent's possession, safe from intrusions by the police or anyone else.[59]

The court went on:

> Preston was arrested for vagrancy. An arresting officer took his car to the station rather than just leaving it on the street. It was not suggested that this was done other than for Preston's convenience or that the police had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car.[60]

In *Cooper*, on the other hand, the arrest was for a narcotics violation. The controlling factor in the case was that a California forfeiture

54. *Id.* at 612, 232 A.2d at 569.
55. 386 U.S. 58 (1967).
56. 339 U.S. 56 (1950).
57. 1 Md. App. at 613-17, 232 A.2d at 569-72.
58. 376 U.S. 364 (1964).
59. 386 U.S. at 59-60.
60. *Id.* at 61.

statute required the police to "seize and deliver to the State Division of Narcotic Enforcement any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics, such vehicle 'to be *held as evidence* until a forfeiture has been declared or a release ordered.' "[61] The court was careful to catalogue the special circumstances legitimizing the warrantless search of the vehicle:

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car . . . was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of the petitioner's car did not take place until over four months after it was lawfully seized. 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.[62]

Cooper is starkly distinguishable from the myriad of cases and situations that have purported to lean upon it, including *St. Clair*. As *Cooper* made clear, in quoting with approval the lower California court:

> [L]awful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it . . .[63]

In addition to *Cooper*, *St. Clair* relied fundamentally upon the then indispensable authority of *United States v. Rabinowitz*.[64] *St. Clair* cited a number of other state and federal cases[65] but each of these, in turn, is discovered to have been based upon the authority of *Rabinowitz*. The *Rabinowitz* rationale is, thus, the *sine qua non* of *St. Clair*. *Rabinowitz*, of course, was the "search incident" case that commanded that hotly disputed field from 1950 to 1969,[66] the period within which *St. Clair* was decided. The rhetoric of *Rabinowitz* on which the inventory search rationale, both here and elsewhere, was

61. *Id.* at 60.
62. *Id.* at 61-62.
63. *Id.* at 61.
64. 339 U.S. 56 (1950).
65. Cotton v. United States, 371 F.2d 385 (9th Cir. 1967); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965); People v. Prochnau, 251 Cal. App. 2d 22, 59 Cal. Rptr. 265 (1967); People v. Ortiz, 147 Cal. App. 2d 248, 305 P.2d 145 (1956); Heffley v. State, 83 Nev. 100, 423 P.2d 666 (1967).
66. *Rabinowitz* was the "broad scope" search incident phase which replaced the "narrow scope" phase of Trupiano v. United States, 334 U.S. 699 (1948), and was, in turn, replaced by the next "narrow scope" phase of Chimel v. California, *supra*, in 1969. *See* Brown v. State, 15 Md. App. 584, 292 A.2d 762 (1972).

erected was to the effect that the ultimate Fourth Amendment test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[67]

In the wake of *Rabinowitz*, a school of thought arose applying what the Supreme Court, in *Chimel v. California*,[68] termed "the abstract doctrine of that case," to "various factual situations with divergent results."[69] In referring, by way of example, to the indiscriminate extension to searches of homes following street arrests, the Court pointed out that "[s]ome courts have carried the *Rabinowitz* approach to just such lengths."[70] As the Court ultimately concluded in *Chimel*, "[e]ven limited to its own facts, the *Rabinowitz* decision was, as we have seen, hardly founded on an unimpeachable line of authority."[71] The criticism of the loose approach of *Rabinowitz* was intense in the academic community.[72]

In 1969, *Chimel* flatly repudiated the loose and "unconfined" approach of *Rabinowitz*. It pointed out that what is "reasonable" in a particular situation "must be viewed in the light of established Fourth Amendment principles."[73] It rejected the general approach of asking simply whether police conduct was "reasonable" as "little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not [an approach based] on considerations relevant to Fourth Amendment interests."[74] It pointed out that "[u]nder such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point."[75] It did not distinguish *Rabinowitz* but flatly overruled it, holding:

> It would be possible, of course, to draw a line between *Rabinowitz* and *Harris* on the one hand, and this case on the other. . . . But such a distinction would be highly artificial. The rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case. . . .
>
> . . . .
>
> *Rabinowitz* and *Harris* have been the subject of critical commentary for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have

67. 339 U.S. at 60.
68. 395 U.S. 752 (1969).
69. *Id.* at 760, n. 4.
70. *Id.* at 765, n. 10.
71. *Id.* at 760.
72. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 87-117 (1966); Way, *Increasing Scope of Search Incidental to Arrest*, 1959 WASH. U.L.Q. 261 (1959); Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969); Note, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 117-22 (1967).
73. 395 U.S. at 765.
74. *Id.* at 764-65.
75. *Id.* at 765.

> stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.[76]

Under the common law doctrine of stare decisis, we follow not decided cases as such but rather underlying rules of law, of which the decided cases are merely the evidence. *St. Clair* was evidence for a rule of law in Maryland embodying the *Rabinowitz* approach to the Fourth Amendment. The *Rabinowitz* approach is now constitutionally discredited.[77] With the erosion of its doctrinal base, *St. Clair* simply cannot stand alone. It is now an anachronism surviving beyond its time.

The inventory search of an automobile in Maryland rests ultimately upon the single authority of *St. Clair*. Since 1967, *Mackall v. State*[78] and *Plitko v. State*[79] have upheld inventory searches, but both cases relied upon the ultimate authority of *St. Clair* and are no stronger than the foundation upon which they rest. Appropriate in this regard are the observations of Maitland:

> One has still to do for legal history something of the work which S. R. M. did for ecclesiastical history—to teach men, e.g., that some statement about the thirteenth century does not become the truer because it has been constantly repeated, that "a chain of testimony" is never stronger than its first link.[80]

For present purposes, *St. Clair* is the "first link."

The cases of *Reagan v. State*[81] and *Kleinbart v. State*[82] factually distinguished *St. Clair* and did not have to wrestle with the issue of its continuing vitality. *Kleinbart* noted, in passing, the limited utility of *Cooper v. California*:

> The rationale in *Cooper* is not here applicable since the contents of the automobile was not contraband and since the car was not required to be seized by any state law, nor was it subject to forfeiture.[83]

76. *Id.* at 766, 768.
77. On November 3, 1975, the Supreme Court granted certiorari in South Dakota v. Opperman, 228 N.W.2d 152 (S.D. 1975), a case involving the inventory search of an automobile. 96 S.Ct. 264 (1975). Given the current tone of that Court, *Rabinowitz* may be resuscitated. Whatever "binding" effect such a decision might have, it does not diminish the moral conviction behind the argument here being made.
78. 7 Md. App. 246, 255 A.2d 98 (1969).
79. 11 Md. App. 35, 272 A.2d 669 (1971).
80. H.A.L. Fisher, Frederic William Maitland, Downing professor of the laws of England; a biographical sketch 2-3 (Cambridge, 1910).
81. 4 Md. App. 590, 244 A.2d 623 (1968).
82. 2 Md. App. 183, 234 A.2d 288 (1967).
83. *Id.* at 194, 234 A.2d at 295.

Although *Dixon v. State*[84] was not required to meet the broad constitutional question squarely,[85] it implicitly turned a skeptical eye toward the entire matrix of *St. Clair*, *Rabinowitz* and the inventory search rationale.

THE INVENTORY SEARCH RATIONALE GENERALLY

Stripped then of automatic reliance upon *Cooper*, *Rabinowitz* and *St. Clair*, how does the phenomenon of the inventory search fare upon its own merits? It cannot rest upon the legal fiction that it is not a "search." The Court in *Terry v. Ohio*[86] reasoned:

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. . . . This seems preferable to an approach which attributes too much significance to an overly technical definition of "search," . . .[87]

In balancing the Fourth Amendment protection of privacy against the ostensibly salutary purpose of the inventory search, the scales tip emphatically toward the Fourth Amendment protection. The only justification offered for the inventory search is the protection of the personal property of the arrestee and the protection of the police against false claims of theft. A thorough-going analysis of the two competing interests that hang in the balance when the police seek to make an inventory search was made by Judge Stanley Mosk in *Mozzetti v. Superior Court of Sacramento County*:[88]

> It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of the vehicle owner. Regardless of professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private property of an individual.
>
> . . . .
>
> The interests of a vehicle owner are said to be protected by police inventory because the procedure provides the owner with a detailed list of the articles taken into custody by the police,

84. 23 Md. App. 19, 327 A.2d 516 (1974).
85. The direct holding of *Dixon* is that there was not a *bona fide* inventory made in that case. It was held that the "inventory" was a mere subterfuge for an exploratory search for evidence.
86. 392 U.S. 1 (1968).
87. *Id.* at 19, n. 15.
88. 4 Cal. 3d 699, 94 Cal. Rptr. 412, 484 P.2d 84 (1971).

> an itemization he can use in making valid claims for loss or damage against the police and the storage bailee. Also, the inventory brings to light articles of special value or of a perishable nature which might require unusual care by the police and the storage bailee.
>
> . . . In weighing the necessity of the inventory search as protection of the owner's property against the owner's rights under the Fourth Amendment, we observe that items of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property.[89]

The utility of the inventory in terms of protecting the defendant against theft or protecting the police against false charges of theft is also highly doubtful. One writer has stated:

> If the inventory does, in fact, protect the defendant against theft and the police against false charges of theft, its use might be justified. However, it is at least doubtful that inventories serve any purpose other than as a means of a warrantless search for evidence. If the arrestee or a third person subsequently brings a civil action for the alleged loss of property from the vehicle, the burden is on the claimant to prove that the article was left in the automobile and that the bailee failed to return it. The only possible situation in which the inventory would aid the claimant would be if the missing articles appeared on the inventory receipt. However, if the article was stolen either before the inventory or perhaps innocently omitted when the inventory was taken, the inventory would be to the claimant's disadvantage. Furthermore, the inventory would be of only limited benefit to the bailee or the police if the missing articles were not listed on the inventory receipt. First, the inventory is prepared by the police and is to some extent a self-serving document. Second, even if the police have the arrestee acknowledge the inventory by signing the receipt, the inventory would not be binding on a third party claimant. In any of the possible permutations, absent a special statutory provision, the inventory would not be conclusive of the issue.[90]

Boulet v. State[91] noted the inappropriateness of an inventory search as a protection for the police against false claims of theft:

89. *Id.* at 705-07, 94 Cal. Rptr. at 416-17, 484 P.2d at 88-89.
90. Comment, *The Aftermath of Cooper v. California: Warrantless Automobile Searches in Illinois*, 1968 U. ILL. L.F. 401, 407-08 (1968).
91. 17 Ariz. App. 64, 495 P.2d 504 (1972).

> We would first observe that the taking of an inventory does not insure the safety of the contents nor does it ipso facto prevent an owner from later claiming that goods had been stolen or damaged.
>
> We fail to see how the taking of an inventory will insulate the police against false accusations of theft and assure the property owner that his property will not be taken. Unscrupulous persons who desire to steal articles will simply not list them on the inventory. Owners who wish to assert spurious claims against law enforcement officers or the garage owners can simply claim that the officers did not list them on the inventory.[92]

In terms of protecting the personal property of the driver, it is inconceivable that this benevolence should be pressed upon him at the expense of his Fourth Amendment right to privacy without giving him any option in the matter.[93] As one commentator has stated:

> To protect the contents of the vehicle from theft has been offered as another justification. This view appears likewise inadequate. Arrestees should be allowed to assume the risk of loss by asking to leave their own vehicle at the roadside or by requesting that someone be contacted to pick up the car. It is true that when a car must be impounded the risk that some items will be removed when the car is taken to a garage may still be present. But even if this small risk does exist, it is unreasonable to think that the owner would exchange Fourth Amendment rights for unwanted protection against theft. In short, this supposed justification turns the Fourth Amendment on its head.[94]

A growing body of law is recognizing that a threshold prerequisite to any inventory search of an automobile is, at the very least, an initial lawful and reasonable impounding of that vehicle, or other exercise of custody over the vehicle.[95] In *Virgil v. Superior Court of County of Placer*,[96] the California Court of Appeals held that an inventory search of a car impounded by the police after its driver had been arrested for reckless driving was unlawful. Police custody of the car was held unjustifiable since no reason appeared why the driver's friends, who had

92. *Id.* at 68-69, 495 P.2d at 508-09.
93. In *Virgil v. Superior Court of County of Placer*, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968), the court ruled a search unconstitutional because the arresting officer did not consult the driver's wishes or the willingness of his companions to drive the car to a place of safety, but persisted in searching the car over the driver's protest.
94. Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. Rev. 626, 641 (1970).
95. *See* Annotation, *Lawfulness of "Inventory Search" of Motor Vehicle Impounded by Police*, 48 A.L.R. 3d 537, 544, 551-54, 577 (1973).
96. 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968).

been passengers in the car, could not have taken charge of the vehicle. The California court pointed out that a critical factor in the case was the failure of the arresting officer to consult with the driver as to his wishes with respect to his automobile.[97] In *People v. Nagel*,[98] the California Court of Appeals for the Second District invalidated another inventory search of an automobile because of its belief that police custody of the car was neither necessary nor proper. The defendant had been arrested for running a red light and there was no apparent reason why he could not have driven the vehicle to a nearby place for safekeeping.[99] In *United States v. Pannell*,[100] the District of Columbia Court of Appeals invalidated an inventory search of an automobile, holding that the impounding of the automobile was unlawful where, after a driver was arrested for driving without a permit, there was no showing that the car, parked on a lot, was in any way obstructing police operations. This was precisely the situation dealt with by the Maryland Court of Special Appeals in *Dixon v. State*, wherein it reasoned:

> The necessity for impounding the car was not remotely demonstrated. The appellant's car, at the time of arrest, was on the parking lot of the Howard County Courthouse. It was still before noon on a working day. There was no apparent danger to the car or to its contents. The car, in turn, posed no irremediable danger to the flow of traffic. Either the appellant himself or one of the officers, within a few feet and within a few seconds, could have safely parked it, locked it and left it. The officer was asked why he called the tow truck. In view of the obvious and simple alternative of moving the car a few feet into a readily available parking space, the answer strikes us as disingenuous, "It was parked out here in the lane that runs through the Court House parking lot and was obstructing traffic." It is simply not reasonable to tow a car away to avoid moving it to the curb.[101]

It is unrealistic to see in the justifications advanced for the inventory search any substantial counterweight to the basic Fourth Amendment protection of privacy. The failure to consult the wishes of the individual concerned makes a mockery of the claim that the search is in the interest of protecting his personal property. It would be of small comfort to go to the penitentiary, reassured that you are there only because the police were adamant in protecting you from petty theft regardless of whether you wished such protection. To permit an otherwise prohibited intrusion because it is "routine police policy" is to

97. *Id.* at 131, 73 Cal. Rptr. at 796.
98. 17 Cal. App. 3d 492, 95 Cal. Rptr. 129 (1971).
99. *See also* People v. Greenwood, 174 Colo. 500, 484 P.2d 1217 (1971).
100. 256 A.2d 925 (D.C. App. 1969).
101. 23 Md. App. at 38-39, 327 A.2d at 527.

allow the Fourth Amendment protection to "approach the evaporation point."[102] Police routine cannot be the constitutional touchstone unless we are willing to entrust our liberties to the discretion of the police commissioner. *Johnson v. United States*[103] taught us, "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[104] Neither is so fundamental a decision to be entrusted to a police commissioner in the guise of promulgating routine departmental procedures. The inventory search is, in the last analysis, neither a legitimate exception to the warrant requirement in its own right nor a prior valid intrusion into a constitutionally protected area within the contemplation of the "plain view" doctrine.

For American law enforcement, resort to the device of the inventory is creating a credibility gap of mammoth proportions. In the vast majority of cases, it is patently "a case more of investigative opportunism than of genuine solicitude for personal property."[105] It invites the very skepticism voiced by the Maryland Court of Special Appeals in *Dixon*:

> There was no apparent reason why either the impounding or the inventorying was necessary in terms of protecting any personal property that might have been in the vehicle. The appellant himself could have been booked at the nearby stationhouse for the traffic violation and returned to his car well before the afternoon had waned. His sister, alternatively, could have been notified to come and pick it up. To have impounded the car and towed it away, under these circumstances, was a bizarre thing to do, explainable only as a subterfuge to search the car. We cannot credit the officer's representation that his sole purpose in searching the car before turning it over to the tow truck was to discover "valuable personal property, to keep for the defendant, so nothing would happen to it." As the officer acknowledged, easier alternatives were readily available and no explanation was offered as to why they might not have sufficed.[106]

In short, an automobile is a constitutionally protected area in which the owner has a rightful expectation of privacy against unwarranted intrusion. An intrusion thrust upon him without his consent and sometimes against his express wishes in the guise of doing him a favor is, in most of its applications, an epic hypocrisy and is flagrantly unconstitutional.

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102. Chimel v. California, 395 U.S. at 765.
103. 333 U.S. 10 (1948).
104. *Id.* at 13-14.
105. 23 Md. App. at 38, 327 A.2d at 527.
106. *Id.* at 39, 327 A.2d at 527.