THE AUTOMOBILE SEARCH AND THE FOURTH AMENDMENT: A TROUBLED RELATIONSHIP

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INTRODUCTION

In recent years, warrantless automobile searches by law enforcement officers have grown into the most perplexing fourth amendment issue confronting the courts. This preeminence is, in part, the natural consequence of the automobile's predominant role in American society. With the increased crime rate, expanded incidence of drunk driving, and intensified use of narcotics, the number of automobile searches has increased dramatically; however, this only partially explains the controversy over police authority to make warrantless searches. The courts, as well as policemen who conduct the searches and laymen whose cars are searched, have had difficulty comprehending the law in this area. The complexity of the warrantless automobile search is best understood when evaluated in light of other warrantless searches.

The fourth amendment, which provides the constitutional authority under which the validity of automobile searches must be determined, was drafted and adopted[1] before the car was invented and when the existing means of transportation did not play as vital a role in recreation, commerce and crime. Thus, the law of search and seizure evolved when the historical concept of protecting a man's castle was preeminent.[2] This concept was never historically applicable to vehicles and, therefore, the courts had difficulty extending the standards developed for stationary objects to automobiles.[3] Compounding the

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1 The Bill of Rights, which includes the fourth amendment, became effective on November 3, 1791.

2 This was recognized in Weeks v. United States, 232 U.S. 383, 390 (1914).

> Resistance to these practices [writs of assistance and general warrants] had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers.

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

Furthermore, this problem was compounded by the development of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). The rule was only in existence for a ten year period when the Supreme Court was faced with Carroll v. United States, 267 U.S. 132 (1924), in which the mobility concept was first enunciated.

problem created by the car's mobility is its use as an instrumentality of crime, either as a get-away car or a carrier of contraband; or as the fruit of the crime itself.[4] As a result, no coherent and logical policy has evolved.

The language of the fourth amendment does not specifically express the extent of its applicability:

> 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.[5]

As a precondition to a search, the amendment has traditionally been interpreted to require a warrant[6] with the exception of certain specific instances:

(1) consent searches;
(2) searches incident to arrest;
(3) emergency searches to prevent the destruction of evidence or danger to police officers or other persons; and
(4) hot pursuit.

The consent search exception applies when a person with standing to consent,[7] intelligently, knowingly, and voluntarily[8] permits law

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[4] In State v. De Simone, 60 N.J. 319, 322, 288 A.2d 849, 851 (1972), the court stated:

> [A]n automobile is different from a dwelling. To begin with, the power to search must be equal to the distinctive threat of this mobile instrumentality of crime.

[5] U.S. CONST. amend. IV.

[6] The historical basis for the warrant requirement has been noted by the Supreme Court:

> The people of the United States insisted on writing the Fourth Amendment into the Constitution because sad experience had taught them that the right to search and seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible.

Trupiano v. United States, 334 U.S. 699, 709-10 (1948).

Before a warrant is issued there must be a decision by a judge or magistrate based on the affiant's oath or affirmation demonstrating that probable cause exists for its issuance. The search warrant must be specific as to the items to be searched for and the person or place to be searched. See FED. R. CRIM. P. 41; N.J.R. 3:5-1 *et seq. See generally* Spinelli v. United States, 393 U.S. 410 (1969); Giordenello v. United States, 357 U.S. 480 (1958); United States v. Bailey, 458 F.2d 408 (9th Cir. 1972); State v. Ebron, 61 N.J. 207, 294 A.2d 1 (1972); State v. De Simone, 60 N.J. 319, 288 A.2d 849 (1972).

[7] Precisely who has standing to consent has been the source of considerable litigation. Stoner v. California, 376 U.S. 483 (1964) (desk clerk cannot consent to search of room of guest in hotel); Chapman v. United States, 365 U.S. 610 (1961) (landlord cannot consent to search of tenants' premises); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965) (wife can consent for husband); State v. Shephard, 255

enforcement officers to conduct a search.[9] The operative rationale is the belief that an individual has the right to make a binding judgment concerning his own affairs.

The search incident to an arrest exception arises when the police search the arrested person and anything under his immediate control in order to discover weapons, prevent the suspect's escape, and stop destruction or concealment of evidence.[10]

The emergency search exception recognizes that when there is apparent danger to the police officers, or a danger that evidence will be destroyed, a search may be carried out without a warrant.[11]

The doctrine of hot pursuit provides that police officers in hot pursuit of a felon can enter the house or building into which the felon fled without obtaining a warrant in order to search for him and for concealed weapons which he might utilize in resisting arrest or attempting escape.[12]

These four exceptions to the warrant requirement apply to all searches irrespective of what is to be searched. In addition, two other

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Iowa 1218, 124 N.W.2d 712 (1963) (husband can consent for wife). There is conflict as to whether the driver of a borrowed automobile can consent. *Compare* United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962), *with* State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964). *See generally* Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 11-12 (1970).

8 Amos v. United States, 255 U.S. 313 (1921) (implied coercion would invalidate the consent); Channel v. United States, 285 F.2d 217 (9th Cir. 1960) (burden of proof on state to show intelligent and freely given consent). There is a dispute as to whether any person would be willing to consent if he were fully aware of his right not to consent. *Compare* United States v. Gorman, 355 F.2d 151 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966), *with* United States v. Viale, 312 F.2d 595 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963). In some cases the courts have required some kind of formal *Miranda* type warnings of the right to refuse to consent. United States v. Fisher, 329 F. Supp. 630 (D. Minn. 1971); United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966). *Contra*, United States v. Menke, No. 72-1319 (3d Cir., Oct. 4, 1972); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967); State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967), *cert. denied*, 392 U.S. 308 (1968). *But see* Rosenthall v. Henderson, 389 F.2d 514 (6th Cir. 1968) (failure to advise of right not to consent is only one element to be considered in determining whether consent was voluntary).

9 *See* Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Ellis, 461 F.2d 962 (2d Cir. 1972); State v. King, 44 N.J. 346, 209 A.2d 110 (1965).

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

> Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

Harris v. United States, 331 U.S. 145, 150-51 (1947) (footnotes omitted).

11 *E.g.*, State v. Cox, 114 N.J. Super. 556, 277 A.2d 551 (App. Div.), *cert. denied*, 58 N.J. 93, 275 A.2d 149 (1971); *see* Schmerber v. California, 384 U.S. 757 (1966); McDonald v. United States, 335 U.S. 451 (1948).

12 Warden v. Hayden, 387 U.S. 294 (1967); State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967), *cert. denied*, 392 U.S. 308 (1968).

exceptions have also developed which are uniquely applicable to the search of the automobile: (1) the search based on probable cause[13] and (2) the inventory.[14] The mobility of the automobile arguably necessitated a warrantless search based on probable cause.[15] The inventory, an examination of a car in police custody and an accounting of the car parts and its contents, was developed to avoid loss to the owner and to protect the police against fraudulent claims.[16]

Unfortunately, because of the difficulty in delineating the various exceptions, the courts have often failed to clearly specify the exception upon which their decision is based. The search incident to arrest is the exception most frequently confused with the specific automobile search exceptions.

The Supreme Court first discussed the "search-incident" rule in dictum in *Weeks v. United States*[17] in 1914 and, most recently, in *Chimel v. California*,[18] decided in 1969. The Court's treatment of this issue in the years between *Weeks* and *Chimel* does not stand as a model of judicial consistency or clarity. Cases decided only a few years apart are in hopeless contradiction, having subjected the rule to sudden contractions and expansions.[19]

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

14 Cotton v. United States, 371 F.2d 385 (9th Cir. 1967).

15 See pp. 112-32 *infra*.

16 See pp. 133-44 *infra*.

17 232 U.S. 383 (1914). The Court noted a right which was

> always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases.

Id. at 392.

18 395 U.S. 752 (1969).

19 In Carroll v. United States, 267 U.S. 132 (1925), the Court extended the *Weeks* reference to search of the person incident to valid arrest to include things under his control:

> When a man is legally arrested for an offense, whatever is found upon his person or *in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

Id. at 158 (emphasis added).

The language in Agnello v. United States, 269 U.S. 20 (1925), allows a search of the place where the arrest took place:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime . . . is not to be doubted.

Id. at 30. The Court did, however, reject the argument that the right to search extended to other places, specifically a house several blocks distant from the place where the arrest occurred. *Id.* at 30-31.

In Marron v. United States, 275 U.S. 192 (1927), the Court adopted the theory set forth in the dictum in *Agnello* that the place of arrest may be searched incident to the arrest. *Id.* at 199.

Rabinowitz v. United States,[20] decided prior to *Chimel*, permitted police to conduct warrantless searches of an entire room as "incident" to the occupant's arrest. *Chimel* overruled *Rabinowitz* and severely restricted the extent of permissible searches, holding that a search incident to an arrest is limited to a search of the arrested person and the area immediately surrounding him into which he might reach to seize a weapon or to conceal or destroy evidence.[21] While *Chimel* at least temporarily clarified the law in this area,[22] confusion of the search incident to arrest doctrine, with the recognized exceptions for automobile searches, further complicated the development of automobile search law. Although *Chimel's* facts did not involve an automobile search, its holding is applicable whenever the prosecution seeks to justify a search of a car as incident to an arrest.

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), restricted somewhat the scope of the search incident to the arrest by saying it could not be an exploratory search in the hope of finding evidence.

Harris v. United States, 331 U.S. 145 (1947), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950), introduced the concept of "immediate control," but held that the occupant of a four room apartment had the entire apartment under his immediate control and a search of a room other than the room in which the arrest occurred was valid.

In 1948, the Supreme Court in Trupiano v. United States, 334 U.S. 699 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950), restricted the right to search incident to arrest. The Court, after discussing the traditional strict requirement that whenever practicable a warrant must be obtained, stated:

> A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.

334 U.S. at 708. The Court concluded that there were no circumstances dictating the need for a search without a warrant.

20 339 U.S. 56 (1950).

21 395 U.S. at 762-63.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id.

22 *But see* United States v. Briddle, 436 F.2d 4 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); People v. Perry, 47 Ill. 2d 402, 266 N.E.2d 330 (1971); People v. Pearson, 126 Ill. App. 2d 166, 261 N.E.2d 519 (1970); State v. McNair, 60 N.J. 8, 285 A.2d 553 (1972).

Prior to *Chimel*, *Preston v. United States*[23] held that an automobile search conducted at the police station subsequent to arrest was too remote in time and place to be a search incident to that arrest. Yet, despite the apparently clear decision in *Chimel*, the courts have continued to wrestle with the problem. It has been suggested that a car's mobility necessitates the extension of the right to search incident to arrest.

In *Paxton v. United States*[24] the Indiana Supreme Court said:

> Although *Chimel* and those cases preceding it set out guidelines for the permissible scope of a search incident to an arrest, that scope is somewhat extended where the defendant is arrested while in an automobile. An extension of the permissible scope as defined in *Chimel* may easily be rationalized in such a case on the basis that an additional element of necessity is interjected, namely the mobility of the automobile . . . .[25]

The cases, however, have generally held that once the car doors are closed and the arrested person has left the car's vicinity, a search would not be permitted if the arrested person made no attempt to reopen it, or was securely restrained by the arresting officer.[26] Despite the language concerning the mobility of the car, even *Paxton* accepts this general principle.[27]

In *In re Kiser*,[28] the search-incident exception was extended to include a search under a blanket in the back seat of the automobile. The court reasoned that the defendant, under arrest by several officers, was "standing within leaping range of the guns in the back seat."[29] This case seems to evade the spirit of *Chimel*.[30]

The courts, unfortunately, have not always clearly delineated their

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23 376 U.S. 364 (1964).

24 23 Ind. Dec. 483, 263 N.E.2d 636 (Sup. Ct. 1970).

25 *Id.* at 490, 263 N.E.2d at 640; *see* pp. 124-26 *infra*.

26 United States v. Pennington, 441 F.2d 249 (5th Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964); Lawson v. State, 484 P.2d 1337 (Okla. Ct. Crim. App. 1971); Fields v. State, 463 P.2d 1000 (Okla. Ct. Crim. App. 1970).

27 23 Ind. Dec. at 492, 263 N.E.2d at 641.

28 419 F.2d 1134 (8th Cir. 1969).

29 *Id.* at 1137.

30 *See* United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971) (apparently holding that *Chimel* is limited to its facts, namely a search of a home, and thus has no relevance to a car search). The court stated:

> The law seems to be well settled that when the driver of a motor vehicle is lawfully arrested in the vehicle, the arresting officer has the right to search the vehicle contemporaneously with and as an incident to the lawful arrest, the vehicle being a thing "under the accused's immediate control."

Id. at 1192 (quoting from Preston v. United States, 376 U.S. 364, 367 (1963)).

reliance upon the search-incident, probable cause, or inventory exceptions. In *Adams v. Williams*,[31] the Court, after justifying the validity of a police officer's stop and frisk of an automobile and its driver on the basis of *Terry v. Ohio*,[32] gave limited consideration to the subsequent search of the automobile, failing to clearly set forth its grounds for justifying the search.

One further constitutional consideration permeates the confusing area of automobile searches. The "plain view" doctrine[33] permits police officers acting legally to seize any evidence of a crime that can be seen by them in plain view.[34] Thus, if a police officer legitimately stops a car,[35] any evidence he sees may be constitutionally seized.

This paper will examine in detail the historical development of warrantless automobile search exceptions—probable cause and inven-

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31 407 U.S. 143 (1972).

32 392 U.S. 1 (1968).

33 In Harris v. United States, 390 U.S. 234, 236 (1968), the Court stated:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure . . . .

Accord, Ker v. California, 374 U.S. 23, 42-43 (1963); Coates v. United States, 413 F.2d 371, 373 (D.C. Cir. 1969); State v. McKnight, 52 N.J. 35, 56, 243 A.2d 240, 252 (1968). *See* Murray & Aitken, *supra* note 3, at 98.

34 "Plain view" has been held to include that which is revealed by shining a flashlight into a car at night. *E.g.*, Williams v. United States, 404 F.2d 493 (5th Cir. 1968); People v. Cacioppo, 264 Cal. App. 2d 392, 70 Cal. Rptr. 356 (Dist. Ct. App. 1968); State v. Griffin, 84 N.J. Super. 508, 202 A.2d 856 (App. Div. 1964).

35 Car searches arise out of so many different factual situations that the courts have often confused the discussions of the validity of an arrest or stop with the validity of an auto search that took place later.

The courts have consistently upheld the validity of a stop for a license and registration check. *E.g.*, United States v. Ware, 457 F.2d 828 (7th Cir. 1972); State v. Kabayama, 98 N.J. Super. 85, 236 A.2d 164 (App. Div. 1967), *aff'd*, 52 N.J. 507, 246 A.2d 714 (1968); *see* N.J. STAT. ANN. § 39:3-29 (1961). A police officer has the right to stop a car for a traffic violation, but such a stop does not justify a search. State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (App. Div. 1964); Lawson v. State, 484 P.2d 1337 (Okla. Ct. Crim. App. 1971); Roberts v. State, 483 P.2d 338 (Okla. Ct. Crim. App. 1971); Baker & Khourie, *Improbable Cause—The Poisonous Fruits of a Search After Arrest for a Traffic Violation*, 25 OKLA. L. REV. 54 (1972). However, after the stop, independent information might develop which would create probable cause for a search. State v. Campbell, 53 N.J. 230, 250 A.2d 1 (1969); State v. Boykins, 50 N.J. 73, 232 A.2d 141 (1967); *see* Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866 (1969). An exception may occur if the violation is for drunk driving or driving while drugged; then the officers may search for liquor or drugs (naturally assuming probable cause). People v. Jackson, 241 Cal. App. 2d 189, 50 Cal. Rptr. 437 (Dist. Ct. App. 1966); State v. Boone, 114 N.J. Super. 521, 277 A.2d 414 (App. Div.), *cert. denied*, 58 N.J. 595, 279 A.2d 680 (1971); State v. Cusick, 110 N.J. Super. 149, 264 A.2d 735 (App. Div. 1970). Police may stop cars at a roadblock. United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960). Moreover, a car may be stopped if police have reasonable suspicion of criminal activity. Adams v. Williams, 407 U.S. 143 (1972); *see* Terry v. Ohio, 392 U.S. 1 (1968); State v. Boone, 114 N.J. Super. 521, 277 A.2d 414 (App. Div.), *cert. denied*, 58 N.J. 595, 279 A.2d 680 (1971).

tory—and will demonstrate how the different exceptions to the warrant requirement have been merged, confused, and misused.

History of the Car Search Doctrine

The "car search" doctrine owes its birth and development to the National Prohibition Act (the Volstead Act). Anticipating that motor vehicles would play a necessary part in any large-scale violations of the Act, Congress set up a warrant requirement scheme that clearly distinguished between searches of buildings and searches of vehicles. The Act required a warrant to search a private home, but imposed no such restriction upon searches of moveable objects, including automobiles.[36]

In the early 1920's, several federal district and circuit courts wrestled with the unique problems inherent in warrantless searches and seizures of vehicles believed to be carrying illegal liquor. The majority view was that such searches did not violate the fourth amendment. The mobility of the automobile, however, was not clearly developed as a basis for justifying a warrantless search. Although the United States Court of Appeals for the Fourth Circuit, in *Ash v. United States*,[37] did specifically recognize mobility as rendering "impracticable" the "usual formality of procuring a search warrant,"[38] it can be considered an exception. Other courts justified the automobile search as a search incident to the "arrest" of the car itself for the offense of transporting liquor.[39] The auto search was also upheld as

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[36] National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 315 (repealed 1935) provided in part:

> No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose . . . .

On the other hand, ch. 85, tit. II, § 26, 41 Stat. 315, did not mention a warrant in providing:

> [A]ny officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law.

The Act enhanced the vehicle-building distinction with respect to warrants by virtue of the Stanley Amendment, ch. 134, § 6, 42 Stat. 223 (repealed 1935), which provided that any federal employee engaged in enforcement of the Prohibition Act or its amendments would be guilty of a misdemeanor if he shall search "any private dwelling" or "without a search warrant maliciously and without reasonable cause search any other building or property."

[37] 299 F. 277 (4th Cir. 1924).

[38] *Id.* at 278-79.

[39] *E.g.*, United States v. Rembert, 284 F. 996 (S.D. Tex. 1922).

simply authorized by a statutory scheme that was similar to older, unchallenged laws permitting warrantless searches of vessels or vehicles for illegally possessed goods.[40]

Implicit in these opinions was the twofold recognition that (a) it would be difficult or impossible in car search situations to obtain a warrant because the car could be moved, and (b) a car is not entitled to the same degree of protection from government search as is a dwelling. However, while these early opinions may have considered mobility in permitting warrantless automobile searches, the same courts also upheld warrantless entries and searches of non-residential buildings.[41]

Although the car-search exception was statutorily recognized, some early opinions appeared to confuse it with, or consider it identical to, the apparently ancient, but federally underdeveloped, doctrine of search incident to arrest.[42] Contributing to the confusion between the vehicle search and the incident-to-arrest exceptions was the fact that automobile bootleg searches most often occurred at the place where the car was stopped and the driver arrested.

Courts that treated the warrantless automobile search as simply incident to the "arrest" of the offending car took a more ingenious, albeit artificial, approach. This "offending automobile" view was analogous to the old common law and Biblical view that an inanimate

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40 Park v. United States, 294 F. 776 (1st Cir. 1924). This case involved cooperation between state and federal officers in seizing and searching a bootlegger's vehicle. The court examining the legality of the search under both state and federal law, noted several state cases from New England applying state statutes that provided for warrantless searches of illegally possessed or used goods. *Id.* at 780-83. *See also* United States v. Bateman, 278 F. 231 (S.D. Cal. 1922) (dictum indicating the finding of liquor justifies the search).

41 McBride v. United States, 284 F. 416 (5th Cir. 1922); Kathriner v. United States, 276 F. 808 (9th Cir. 1921).

42 Lambert v. United States, 282 F. 413 (9th Cir. 1922); United States v. Kaplan, 286 F. 963 (S.D. Ga. 1923).

While the right to make a warrantless search of an arrested person incident to his valid arrest was apparently long recognized in America and England, it was not discussed by the Supreme Court until 1914, in Weeks v. United States, 232 U.S. 383 (1914), where recognized in dictum. *Id.* at 392. Carroll v. United States, 267 U.S. 132 (1925), marked the next time the Court discussed searches incident to arrest. The dissenting Justices in this case treated the search of Carroll's automobile as incident to his arrest, which they considered invalid. *Id.* at 168-69 (McReynolds, J., joined by Sutherland, J., dissenting). The majority briefly explained the search incident to arrest doctrine, but stated that this case did not turn on it. 267 U.S. at 158-59. The erratic development of this doctrine in the years that followed, in which the permissible search area was subject to sudden contractions and expansions (see note 19 *supra*), indicates that it was not a doctrine to which the courts had devoted much thought.

object could be an offender.[43] It did, however, have the advantage of separating the validity of the car search from the legality of the occupants' arrest.

But, whether the search of the auto was treated as incident to the occupants' arrest or as part of the "arrest" of the offending vehicle itself, the dependence of the search upon the validity of the "arrest" raised serious problems in Volstead Act cases.[44] It was, of course, well-established that an arrest without a warrant for a misdemeanor could be made only for a breach of the peace or for an offense actually committed in the officer's presence; mere probable cause based on sources of information other than the officer's own senses would not suffice.[45] Since a first or second offense of transporting liquor in violation of the Volstead Act was only a misdemeanor, no arrest could be made unless the offense was actually committed in the officer's presence.

This problem was recognized by Judge Anderson, dissenting in *Park v. United States*[46] from the first circuit's approval of a warrantless automobile search by state and federal officials who arrested the occupants on the basis of information received from another source. Judge Anderson contended that section 26 of the Act did nothing to change the warrant requirement for misdemeanor arrests.[47] All it did, he said, was to permit the warrantless arrest of a person whom an officer personally "shall discover in the act"[48] of transporting liquor, and to authorize a warrantless seizure of the arrested person's vehicle. This, Judge Anderson contended, did not mean "shall have reasonable cause to suspect or believe."[49] Therefore, the officer should have to personally observe, smell, or otherwise discover the liquor with his senses before he could make a bootlegging arrest and search incident to that arrest.

Although Judge Anderson treated the car search as incident to the driver's arrest, his objection to warrantless misdemeanor arrests would also cover treatment of the car as the object of the arrest. Since an offending car was subject to forfeiture,[50] it was highly unlikely that

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43 United States v. Rembert, 284 F. 966, 1005-06 (S.D. Tex. 1922).

44 The rule that an officer could not make a warrantless misdemeanor arrest except for an offense actually committed in his presence "has been so frequently decided as not to require citation of authority." Snyder v. United States, 285 F. 1, 2 (4th Cir. 1922). See Mr. Justice McReynolds' compilation of authorities in Carroll v. United States, 267 U.S. at 164-65.

45 Park v. United States, 294 F. 776, 784 (1st Cir. 1924) (Anderson, J., dissenting).

46 *Id.* at 788.

47 *Id.*

48 *Id.*

49 *Id.*

50 National Prohibition Act, ch. 85, tit. II, § 26, 41 Stat. 315 (repealed 1935).

any car found illegally transporting liquor was anything but a misdemeanant. Most of the cases involved searches based, in part at least, on information obtained by means other than observation. Thus, if auto searches were dependent upon the arrest of the occupant or vehicle, either traditional restrictions on misdemeanor arrests would have to be lifted or these warrantless searches could not be permitted.

The Mobility Concept

These problems were resolved by *Carroll v. United States*[51] in which the Supreme Court for the first time considered the legality, under the fourth amendment, of a seizure of goods in transport.[52] The Court clearly recognized the authority of Congress, consistent with the fourth amendment, to permit warrantless searches of vehicles or vessels where a warrantless search of a building would be unconstitutional.[53] Prohibition agents stopped an automobile driven by individuals whom the agents knew from previous personal dealings to be bootleggers. The agents searched the vehicle, without a warrant, on the highway where they had stopped it. They discovered contraband liquor concealed behind the back seat.

In interpreting the Volstead Act's search provisions, the Supreme Court articulated the hitherto undeveloped "mobility" concept as permitting a special exception to the warrant requirement. The Court concluded that a vehicle may be searched without a warrant on the basis of probable cause to believe that it contains the contraband sought, independent of any authority to arrest the vehicle's driver or occupants.[54] Chief Justice Taft based this mobility concept on powerful statutory precedent: less stringent warrant requirements for searches of vessels than for searches of buildings were set forth by the country's first statute regulating the collection of duties, the Act of 1789.[55] Furthermore, this law was passed by the same Congress that proposed the adoption of the fourth amendment.

To satisfy the *Carroll* test, officers must have probable cause to believe that a readily moveable vehicle conceals contraband or illegally possessed goods. Under this rule, given probable cause to believe a vehicle contains contraband, authority to search it without a warrant exists independent of any arrest. By formulating a car-search exception

51 267 U.S. 132 (1925).

52 *Id.* at 149.

53 *Id.* at 156.

54 *Id.* at 153-59.

55 Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43. Chief Justice Taft noted several other statutorily authorized searches and seizures. Carroll v. United States, 267 U.S. 132, 150-53 (1924).

to the warrant requirement that had a life of its own independent of the incident-to-arrest exception, the Court neatly avoided the conflict pointed out by Judge Anderson between warrantless vehicle searches under the Volstead Act, and the traditional warrant requirement for misdemeanor arrests. Officers armed with probable cause, but without a warrant, could search a car and, upon perceiving with their own senses the evidence of the offense, arrest the occupant without a warrant for a misdemeanor.

Mr. Justice McReynolds, who was joined in dissent by Mr. Justice Sutherland, did not discuss the automobile search as having its own independent validity, but treated it as dependent upon the legality of the arrest.[56] The Volstead Act, he emphasized, did not authorize a warrantless misdemeanor arrest upon suspicion, and the agents did not have probable cause to stop the car and arrest its occupants.[57]

In firmly establishing the constitutionality of warrantless automobile searches, the *Carroll* Court was not faced with two problems that were to later cause much difficulty. The automobile search in *Carroll* was carried out pursuant to a statute. What of a warrantless automobile search without statutory authorization? Furthermore, the vehicle in *Carroll* was on the open highway and was in motion when stopped. It was searched immediately at the scene. But what of a delayed search, or a search of a vehicle not in motion when seized?

Another problem created by developments subsequent to *Carroll* concerns the "mere evidence rule." Both the Volstead Act and the Act of 1789 provided for forfeiture of any goods found to be held in violation of the law.[58] In *Carroll*, the Chief Justice, relying on *Boyd v. United States*,[59] emphasized that searches for items which the government is entitled to possess are totally different from a search for, and seizure of, a man's private books and papers "for the purpose of obtaining information therein contained, or of using them as evidence against him."[60] However, *Carroll's* treatment of items subject to forfeiture as different from personal papers, was based in part on *Boyd's* reliance on the privilege against self-incrimination and upon the mere evidence rule as spelled out in *Gouled v. United States*.[61]

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56 267 U.S. at 163-75.

57 However, it is interesting to note the weight that Mr. Justice McReynolds would have apparently been willing to give Congressional authority to search on less than probable cause. "When Congress has intended that seizures or arrests might be made upon suspicion it has been careful to say so." *Id.* at 174-75.

58 See notes 50 & 55 *supra* and accompanying text.

59 116 U.S. 616 (1886).

60 *Id.* at 623.

61 255 U.S. 298 (1921). Under the "mere evidence" rule as developed in *Gouled*,

Did the demise of the mere evidence rule more than forty years later in *Warden v. Hayden*[62] mean that an automobile could now be searched without a warrant, under the mobility doctrine, for mere evidence of a crime as well as for contraband? If so, did *Coolidge v. New Hampshire*,[63] decided three years later, resurrect the mere evidence rule with respect to automobile searches?

From the *Carroll* decision in 1925 until the announcement of *Preston v. United States*[64] in 1964, the handful of Supreme Court cases that involved warrantless automobile searches extended *Carroll's* reasoning to slightly different fact situations, and, without going into *Carroll* in depth or altering any part of it, they arguably answered a few of the major questions that it had left open.

New Problems, Some Answers

Six years after *Carroll*, the Court, in *Husty v. United States*,[65] unanimously upheld the warrantless search of a bootlegger's automobile by agents who, armed with probable cause to believe the car contained contraband liquor, had staked it out as it sat parked on a public street. The agents moved in on it only when it was being driven away. They then searched it on the spot. It was reasonable, the Court noted, for the officers to stakeout the car and wait as they did. Under the circumstances, it was just not practicable to obtain a warrant.[66]

Husty is an interesting case in that the mobility factor was not nearly as strong as it was in *Carroll*. The agents had probable cause to search the car when they saw it, at a time when it was neither moving nor occupied. True, as the Court pointed out, the bootleggers could have approached the car to drive it away at any time, and the agents would have reduced their on-the-scene manpower by sending one of their number for a warrant. But it is at least arguable that the agents' stakeout sharply reduced or eliminated the possibility that the car could be removed while a warrant was being obtained.

Read broadly, *Husty* could stand for the proposition that, given

evidence in which the defendant's right of possession was superior to the government's could not be lawfully seized. It had to be returned to the defendant and could not be used against him in a criminal proceeding. In other words, if an item or thing was "mere evidence," the government had no right even under authority of warrant to take it from a person and use it against him. On the other hand, if the item was contraband or the fruit or instrumentality of a crime, so that the government's interest in it was paramount, then it could be seized.

62 387 U.S. 294 (1967).

63 403 U.S. 443 (1971).

64 376 U.S. 364 (1964).

65 282 U.S. 694 (1931).

66 *Id.* at 701.

even potential mobility, law enforcement officers simply need not obtain a warrant even where they have the opportunity to do so. Read more narrowly, it appears to say that the vehicle need not be moving at the time probable cause to search it is established in order to qualify as "mobile."

In the next automobile search case considered by the Court, *Scher v. United States*,[67] the vehicle was actually parked when searched. The car had just pulled into a garage after being followed from the scene of a stakeout by federal officers. This search took place after the repeal of the eighteenth amendment, and there was no indication in the Court's opinion that it was carried out pursuant to specific statutory authority. The Court relied upon *Carroll* without any reference to an authorizing statute.

However, the value of the *Scher* opinion as auto search precedent is somewhat clouded. In concluding that "[t]he officers did nothing either unreasonable or oppressive," the Court referred to two post-*Carroll* cases involving searches incident to arrest.[68] Furthermore, the cloud is darkened somewhat by the fact that the opinion was written by Mr. Justice McReynolds who appeared to assume in his *Carroll* dissent that the auto search there depended upon the validity of the arrest. However, the occupants of the *Scher* vehicle had neither been placed under arrest nor ostensibly detained at the time of the search, and nowhere in his opinion did Mr. Justice McReynolds ever discuss the search as incident to any "arrest."

The last pre-*Preston* Supreme Court case to deal with a car search, *Brinegar v. United States*,[69] focused on the question of whether the searching officers had probable cause. However, *Brinegar* is of interest for what the majority assumed, as well as for what the three dissenting Justices said about *Carroll*. The majority described the facts of the case as similar to *Carroll*, but as in *Scher*, there was no mention of any statute authorizing a warrantless vehicle search. In finding that the officers had probable cause, the majority simply assumed that they did not need a warrant.

Mr. Justice Jackson's opinion for the three dissenting Justices attached great significance to the fact that the *Carroll* search was authorized by statute, while no such authority existed here.

> The Court is voluntarily dispensing with warrant in this case as

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67 305 U.S. 251 (1938).

68 *Id.* at 255. These references were to Agnello v. United States, 269 U.S. 20, 30 (1925); and Wisniewski v. United States, 47 F.2d 825, 826 (6th Cir. 1931).

69 338 U.S. 160 (1949).

> matter of judicial policy, while in the Carroll case the Court could have required a warrant only by holding an Act of Congress unconstitutional.[70]

Thus the post-*Carroll* Supreme Court cases dealing with searches of automobiles kept *Carroll's* distinction between searches of buildings and searches of vehicles clearly in mind.

However, judicial resistance to the idea that a warrantless car search could be justified on its own merits, independent of an arrest, had surfaced in lower federal court opinions, prior to *Carroll*,[71] in the *Carroll* dissent,[72] and in Mr. Justice Jackson's dissent in *Brinegar*.[73] Justices McReynolds and Sutherland, dissenting in *Carroll*, insisted upon tying the search to *Carroll's* arrest; and the three dissenting Justices in *Brinegar* appeared ready to at least limit *Carroll* to cases involving statutory authorization. This hostility toward allowing officers to search automobiles on the basis of their notions of probable cause was motivated by the fear that this power would be abused. The *Brinegar* dissenters, in fact, claimed that this abuse had materialized. *Carroll*, they claimed, was routinely being used to make searches on mere suspicion.[74]

The Court's problem in coming to grips with potential and actual abuses of *Carroll* intensified with the application, in 1961, of the fourth amendment's exclusionary rule to state prosecutions.[75] State and local officials, whose searches and seizures had been previously governed only by state laws and constitutional requirements, now had to meet relatively stringent fourth amendment standards. The courts were faced with the problem of applying fourth amendment standards to police activities that differed markedly from the investigatory and regulatory work that characterized federal law enforcement. It is noteworthy that all six of the "modern" Supreme Court car-search cases involved searches by state or local officials.

The first major twist in the car search doctrine came with *Preston v. United States*.[76] Police responded at 3 a.m. to a complaint that three men had been sitting for five hours in a parked car in the business district. The officers asked the men what they were doing there

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[70] *Id.* at 183 (Jackson, J., joined by Frankfurter & Murphy, JJ., dissenting) (footnote omitted).

[71] See note 45 *supra* and accompanying text.

[72] See note 56 *supra* and accompanying text.

[73] See note 70 *supra* and accompanying text.

[74] 338 U.S. at 183.

[75] Mapp v. Ohio, 367 U.S. 643 (1961).

[76] 376 U.S. 364 (1964).

and received an unsatisfactory answer. The men had twenty-five cents among them. The officers arrested them for vagrancy and had the car towed to a garage. The officers searched the car thoroughly soon after the men had been "booked," and found burglars' tools and getaway apparatus that led to a federal prosecution for conspiracy to rob a bank.

The Court voted unanimously to reverse Preston's conviction on the ground that the warrantless search was unreasonable. But, in reaching this result, the Court, confronted with the government's argument that this warrantless search was reasonable because it was incident to arrest, declared that the search could not be justified on this ground; it was too remote in time and place from the arrest.[77] *Preston* did not refer to *Carroll's* clear statement that the validity of a car search could be established independently of any arrest. It is, thus, not clear whether the Court was disregarding this statement or merely recognizing factual distinctions.

The Court had several bases for distinguishing *Carroll* without casting doubt upon the thrust of its holding. It could have severely limited *Carroll* by pointing out that the warrantless search there was specifically authorized by statute. It could be argued that without explicit statutory authorization, as provided by the Volstead Act, such a broad exception to the warrant requirement should not be judicially approved. Of course, this would have required a review of *Husty* and *Brinegar,* but neither of these cases dealt with statutory authorizations.

Perhaps a more solid basis for distinction was the fact that when the *Preston* car was under police control and no longer readily moveable at the time it was searched, while Carroll's car was searched on the highway, at a time when it had not been secured. The narrowest—and perhaps soundest—basis for declaring the *Preston* search unconstitutional was that the police simply had no probable cause to believe it contained any evidence of crime.[78] Indeed, this was the way *Preston* was subsequently interpreted in *Cooper v. California*[79] and *Chambers v. Maroney.*[80]

The incident-to-arrest posture, in which *Preston* was presented and decided, raised a host of problems for law enforcement officers that

77 *Id.* at 368.

78 However, Mr. Justice Black, writing for the Court, went out of his way to avoid resolving the case on the absence of probable cause. He assumed probable cause, and then, despite his reference to the less stringent warrant requirement for vehicle searches, treated the problem as one of a search incident to arrest. This incident-to-arrest reasoning was similar to Mr. Justice McReynolds' dissent in *Carroll.*

79 386 U.S. 58 (1967).

80 399 U.S. 42 (1970).

either were not problems at all under *Carroll*, or had seemingly been resolved by the Court's post-*Carroll* opinions:

(1) Should a warrant be obtained to search an automobile that is unoccupied, but not abandoned, when the police approach it with probable cause to believe it contains evidence of a crime? In *Husty*, the Court excused the failure to get a warrant in this kind of a situation, although the search did not take place until after the car was occupied and in motion.

(2) What if the police have probable cause to search the vehicle but not to arrest the driver? The opportunity to search could very well be too fleeting to obtain a warrant, and yet, if the search were tied to the arrest, no search at all could take place.

(3) Is a warrantless highway search valid if the driver is still present but has been secured and personally searched?

(4) What effect would limiting the permissible scope of a search incident to arrest have on an officer's authority to search the entire car, as the agents did in *Carroll*, without a warrant?

The last two questions point to the fact that, under the *Preston* approach, authority of officers to make warrantless car searches would be at the mercy of the considerable complexities of the incident-to-arrest rule. This dependence created acute problems when *Chimel v. California*[81] emphatically limited permissible searches incident to arrest to the area within the arrested person's immediate reach.

If *Preston* did violence to the reasoning in *Carroll*, its turn to have violence done to it came soon thereafter in *Cooper v. California*.[82] *Cooper* involved the search of a drug defendant's impounded automobile about a week after his arrest. The auto was being held in a garage pending forfeiture proceedings under a state law that made a car used in the transportation of drugs an instrumentality of the crime.[83] Heroin was found in the glove compartment. The California Court of Appeals felt bound by *Preston* and held that the search was unreasonable, but went on to hold that the admission of the heroin at trial was harmless error.[84]

The Supreme Court did not reach the harmless error point; five Justices voted to uphold the search as reasonable. The Court correctly noted that in *Preston* the government sought to justify the search primarily on incident-to-arrest grounds. Alternatively, the government

81 395 U.S. 752 (1969).

82 386 U.S. 58 (1967).

83 Act of April 7, 1939, ch. 60, § 11611, [1939] Cal. Laws 767, *as amended*, Act of February 23, 1940, ch. 9, § 34, [1941] Cal. Laws 23 (repealed 1972).

84 234 Cal. App. 2d 587, 44 Cal. Rptr. 483 (Dist. Ct. App. 1965).

had argued that the search was justified because there was probable cause to believe the car was stolen. "But," Mr. Justice Black, the author of the *Preston* opinion, wrote for the Court in *Cooper*,

> the police arrested Preston for vagrancy . . . 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. The situation involving petitioner's car is quite different.[85]

In *Preston*, Mr. Justice Black correctly noted that the fact that the police had custody of the car was totally unrelated to the charge for which its occupants were arrested. But he neglected to mention that *Preston* had assumed probable cause to search the car for evidence of its theft.

This particular search, he said, although not incident to arrest, was reasonable on other grounds. Under California law, the car, because it was involved in narcotics transportation, was to be held as evidence until forfeiture proceedings were conducted or a release ordered. While the statute did not expressly authorize the car search,

> [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.[86]

The Court then added that

> [i]t is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[87]

In that the seizure was statutorily authorized and the car subject to forfeiture, *Cooper* was similar to *Carroll*. However, in that the car was not searched until long after if was immobilized, it was more like *Preston*. The net effect of the holding was to recognize anew that there is a separate and distinct car search exception to the warrant requirement, notwithstanding the considerable doubt that had been cast upon it by *Preston*. But it left open the question whether a warrantless car search, not authorized by statute, is permissible independent of arrest. Furthermore, the search in this case, as depicted by the Court, bore some resemblance to an inventory, a police practice raising

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85 386 U.S. at 60.

86 *Id.* at 61-62.

87 *Id.* at 62 (quoting from United States v. Rabinowitz, 339 U.S. 56, 66 (1950), which was overruled in this respect by Chimel v. California, 395 U.S. 752 (1969), just three years after *Cooper*).

fourth amendment problems that the Court has thus far expressly avoided.[88] The Court noted that it would be unreasonable to bar a search by the police even for their own protection—an observation unrelated to its emphasis on the relationship between the arrest and search.

Mr. Justice Douglas, writing for the four dissenters, pointed out that the *Preston* car was also in lawful custody at the time it was searched. The mere fact that the *Cooper* car would, at some subsequent date, become subject to forfeiture proceedings did not mean that the state would then have retroactive title to it. This case, he maintained, was on all fours with *Preston*. Mr. Justice Douglas saw only two ways in which the holding could be explained. One was that it overruled *Preston* sub silentio, and he made it clear that, as far as he was concerned, *Preston* properly limited warrantless car searches to those that could be characterized as incident to arrest. The alternative ground was that a watered-down version of the fourth amendment applies to the states. He rejected this view and it has not, since the incorporation of the fourth amendment, been adhered to by the Court.[89]

Within a two-year period, the Court had announced two separate automobile search doctrines, irreconcilable and inconsistent with past holdings. *Preston*, on the one hand, obscured *Carroll's* major contribution to fourth amendment law—the warrantless car search justified by the vehicle's mobility, existing independently of any arrest authority. *Cooper*, on the other hand, not only misconstrued *Preston*, but, by upholding a search where there was no conceivable exigency that made it impracticable to get a warrant, exhibited a permissiveness toward warrantless searches beyond anything contemplated in *Carroll*. Of course, this permissiveness was predicated not only on the close relationship between the arrest and the object of the search, but also a state forfeiture statute—a strange basis indeed for relaxing a constitutional requirement.

It is not surprising that state and lower federal court treatment of automobile searches was characterized by confusion. The tendency was to simply treat searches of arrested suspects' automobiles as incident to the suspects' arrest.[90]

A few courts continued to recognize the *Carroll* mobility doctrine as a basis, independent of any authority to search incident to arrest, for warrantless automobile searches, but they appear to have been in

88 See pp. 133-34 *infra*.

89 *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

90 *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).

the minority.[91] Thus, when the permissible scope of searches incident to arrest was cut back severely by *Chimel*, the consequences for traditional police searches of automobiles were dramatic indeed. Searches, that would even have been perfectly reasonable under *Preston*, were invalid. *Cooper*, which had been boldly utilized by some courts to cut back *Preston's* restrictions, had to be viewed as limited to its facts, for subsequent courts relied on *Preston*.[92]

Chimel and its Aftermath

In announcing *Chimel's* strict limitations on searches incident to arrest, Mr. Justice Stewart referred to *Preston's* refusal to extend this doctrine to a search that "is remote in time or place from the arrest."[93] This affirmation that *Preston* was indeed based upon the search incident to arrest doctrine was reflected in numerous subsequent opinions declaring unreasonable any warrantless car search made after the defendant had been separated from his vehicle—even though relatively little time had elapsed since the arrest.[94]

Chimel's impact on car-search law is particularly ironic in view of footnote 9 in which Mr. Justice Stewart squarely reaffirmed the mobility exception set forth in *Carroll*:

> Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles 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."[95]

Not all the lower courts merged the car-search and incident-to-arrest doctrines. One particularly perceptive post-*Chimel* opinion, by Judge Ely of the United States Court of Appeals for the Ninth Circuit,

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91 *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 *See, e.g.*, Leven v. United States, 260 A.2d 681 (D.C. Ct. App. 1970); State v. Reyes, 81 N.M. 404, 467 P.2d 730 (1970).

A particularly interesting application of *Preston* as a search-incident case was made by the United States Court of Appeals for the Tenth Circuit, which held that *Preston* forbade a warrantless search incident to arrest *in a home* that extended beyond the accused's immediate control. United States v. Baca, 417 F.2d 103 (10th Cir. 1969), *cert. denied*, 404 U.S. 979 (1971). However, other federal courts have kept clear the doctrinal distinction between searches incident to arrest and searches of mobile vehicles. Ramon v. Cupp, 423 F.2d 248 (9th Cir. 1970); United States v. Lewis, 303 F. Supp. 1394 (S.D.N.Y. 1969).

93 395 U.S. at 764 (quoting from Preston v. United States, 376 U.S. 364, 367 (1964)).

94 See cases cited note 92 *supra*.

95 395 U.S. at 764 n.9 (quoting from Carroll v. United States, 267 U.S. 132, 153 (1924)).

recognized that "[t]he theory upon which the search has previously been upheld is somewhat hybrid, arising from two types of justifications recognized by the Supreme Court."[96] After setting forth the *Chimel* rule, Judge Ely continued:

> In addition, if the officers had probable cause to believe that the automobile was being used at that time to transport contraband and if procuring a search warrant might afford opportunity for quick removal of the vehicle from the jurisdiction, then such exigent circumstances will justify a warrantless search.[97]

Such "exigent circumstances" do not exist when both car and suspect are in custody, Judge Ely concluded, citing *Preston*. He thus demonstrated that he was a better analyst than prophet, for *Chambers v. Maroney*[98] held otherwise just four months later.

Mr. Justice White's dissent in *Chimel* set forth a more relaxed view of the warrant requirement, diametrically opposed to Mr. Justice Stewart's.[99] This view was to underlie his opinion for the Court in *Chambers* the following year.

In the four-year interval between *Cooper* and *Chambers*, the Court decided two cases involving evidence taken from automobiles. In a per curiam opinion, it resolved the first case, *Harris v. United States*,[100] on a plain view basis without finding it necessary to shed further light on the warrant requirement.

In *Dyke v. Taylor Implement Manufacturing Co.*,[101] a shot was fired at a home from a passing car. The sheriff pursued a "suspicious car" that police in another town subsequently stopped for speeding. The car's occupants were taken to jail, and, while the car was parked outside the jail, officers searched it and found an air gun. The search was declared unreasonable. The Court, in an opinion by Mr. Justice

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96 Ramon v. Cupp, 423 F.2d 248, 249 (9th Cir. 1970).

97 *Id.*

98 399 U.S. 42 (1970).

99 In Mr. Justice White's view, the arrest in *Chimel* created exigent circumstances that justified a further warrantless search of the arrested man's house for evidence that the officers had probable cause to believe was hidden there. 395 U.S. at 770-83 (White, J., joined by Black, J., dissenting). The officers' lawful presence to make a valid arrest justified a warrantless search based upon probable cause, even though they arguably could have obtained a warrant before the arrest or could have, by greatly infringing on the freedom of the defendant's wife, secured the house while a warrant was obtained.

This relaxed view of the warrant requirement is far different from the presumption, asserted by Mr. Justice Stewart in *Chimel* and *Coolidge*, that a warrantless search is invalid and can be justified only by circumstances in which it is truly impracticable to obtain a warrant.

100 390 U.S. 234 (1968).

101 391 U.S. 216 (1968).

White, recognized three possible justifications for a warrantless automobile search: first, a search incident to arrest; second, a search made reasonable by a requirement, like the statute in *Cooper*; and third, *Carroll's* recognition that "[a]utomobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office."[102]

The Court found that the search was no more incident to arrest than the *Preston* search was, nor could it be justified on the basis of *Cooper* because there was no forfeiture question. It further held that the police had no probable cause for the search, and found it unnecessary to

> reach the question 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.[103]

The real significance of *Dyke* was that it clearly distinguished between the incident-to-arrest basis of *Preston* and the entirely separate authority, recognized by *Carroll,* to conduct a warrantless car search on the basis of probable cause.

Chambers, Coolidge and Confusion

State and lower federal courts, which had severely restricted permissible automobile searches in view of *Preston,* opened up in light of *Cooper,* and then cut back again as a result of *Chimel,* were given a virtual green light by the Court in *Chambers.* This case, factually speaking, was different than any that had gone before. But, if the assumptions in *Preston* are taken into account, the fact situation was similar to that case in that the vehicle had been completely immobilized at the time of the search.

Within an hour of the armed robbery of a service station, officers arrested four occupants of a station wagon matching the description of the robbers' car. Two of the occupants matched the descriptions of the robbers. The vehicle was in motion on the highway at the time the police stopped it. After the station wagon was driven to the police station by an officer, it was thoroughly searched whereupon evidence was discovered.

The Court, in a 7-1 decision, held that the search of the car was reasonable. Mr. Justice White, writing for the majority, conceded that this search could not be justified as incident to arrest, and quoted

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102 *Id.* at 221.

103 *Id.* at 222.

Preston and *Dyke* for this proposition. But, referring to *Carroll*, he found alternative grounds for justifying the search. It was clearly based on probable cause to believe that the car contained evidence of the robbery while, conversely, both *Preston* and *Dyke* involved situations in which there was no probable cause to search the car.

Mr. Justice White then proceeded to discuss mobility, clearly the distinguishing factor between house and vehicle searches. Under *Carroll*, an automobile's mobility presents an exigent circumstance that, given probable cause to search it, justifies an exception to the warrant requirement. "Hence an immediate search is constitutionally permissible."[104] But *Chambers*, of course, did not involve an immediate on-the-highway search. The occupants and car were safely in custody. Nevertheless, the Court justified the warrantless search of the in-custody car by adopting the theory Mr. Justice White expounded in his *Chimel* dissent. Some kinds of searches, he said, simply do not require a warrant because they frequently must be carried out in situations in which a warrant cannot be obtained. It is arguable whether an immediate search without a warrant is any greater intrusion than immobilization of the car until a warrant is obtained. Which intrusion is greater "may depend on a variety of circumstances."[105] Mr. Justice White did acknowledge that not "every conceivable circumstance"[106] would justify a warrantless car search:

> But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover the opportunity to search is fleeting since a car is readily moveable. Where this is true . . . either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[107]

Thus,

> [f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.[108]

Only Mr. Justice Harlan dissented outright.[109] Asserting the strict view that underlay *Chimel*, he argued that a warrant could be dis-

104 399 U.S. at 51.
105 *Id.* at 51-52.
106 *Id.* at 50.
107 *Id.* at 50-51 (footnote omitted).
108 *Id.* at 52.
109 *Id.* at 55-65 (Harlan, J., concurring in part, dissenting in part).

pensed with only when circumstances made it impossible or impracticable to obtain one. He noted that this case went further than the warrantless highway search for contraband in *Carroll*; it condoned a removal of a car for a warrantless search at the convenience of the police.

An immediate, warrantless search of the vehicle is a far greater intrusion than merely holding it until a warrant can be obtained, Mr. Justice Harlan emphasized. The individual has an interest in the privacy of the automobile. The inconvenience resulting from police immobilization of the car may be lessened considerably by the fact that the individual himself is in custody. Furthermore, the individual can consent to such a search if he considers it a lesser inconvenience than having the car held until a warrant is obtained.

No legitimate law enforcement interest in preserving evidence or ensuring safety is served by this case, Mr. Justice Harlan maintained. The majority's endorsement here of a warrantless invasion of fourth amendment privacy, where a warrant could be obtained at no risk to effective law enforcement, is, he pointed out, at odds with the approach taken in *Preston.*

A major problem left unresolved by this case—one which was to divide at least one federal court of appeals in the year to come—was that of a vehicle in custody at the time the officer obtains probable cause to search it.[110]

The Court's next attempt to introduce some consistency into car-search law was made in *Coolidge v. New Hampshire*[111] which, ironically enough, involved a case in which police did have a warrant. The problem was that the warrant itself was invalid, so that the Court had to consider the search as a warrantless one. Insofar as it was already obvious that the officers had had time to obtain a warrant, this search may have been doomed at the outset.

Manchester, New Hampshire, police officers had obtained invalid warrants[112] to arrest Coolidge for murder and to search his house and

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110 *See* United States v. Golembiewski, 437 F.2d 1212 (8th Cir. 1971), *cert. denied*, 403 U.S. 932 (1971). A car with out-of-state license plates was stopped for illegally passing a school bus. The two occupants were taken to the sheriff's office. While the car was parked outside, a National Crime Information Center check revealed that a car with the same registration number was stolen. An FBI agent and a state trooper, searching the car without a warrant, discovered evidence tending to show that the car's occupants must have known that the car was stolen. The court held 2-1 that the warrantless search was legal. The majority relied heavily on *Chambers'* recognition that the right to search a car rests on a different and more liberal basis than the right to search a dwelling.

111 403 U.S. 443 (1971).

112 The warrants had been issued by the State Attorney General, who clearly did not pass the "neutral and detached" test. *Id.* at 449-53.

two automobiles. They went to his house and saw the car, which eventually yielded evidence of the crime, parked outside. They arrested Coolidge and told his wife that she would have to stay elsewhere that night—they were concerned that she would be harassed by reporters. Transportation was provided for her.

About two and one half hours after Coolidge had been taken into police custody, his automobiles were towed to the police station. The car in question was first searched two days later. Evidence was obtained tending to show that it was highly likely that the victim had been in the car and that a gun had been fired inside the automobile.

Because the warrant was invalid, the Court considered the seizure and subsequent search of the car under the various doctrines permitting exceptions to the warrant requirement. It found that the seizure and search did not come under any of these exceptions, including the automobile search exception.

To apply *Carroll* and *Chambers* to the facts of this case, Mr. Justice Stewart wrote for the Court, would be to extend them far beyond their original rationale. The *Carroll* exception was based on an automobile's actual mobility in a given situation. There was not the "fleeting opportunity" for a search that confronted the officers in *Carroll* or the officers in *Chambers* at the time they actually seized the car. The majority noted, that after the police had arrived at Coolidge's residence, there was no way that he or his wife could have gained access to the car. And prior to their arrival, the police had no reason to believe that he would move the car or remove evidence. He had already had ample opportunity to do so.

Coolidge's one clear addition to the car search doctrine was its limited concept of "mobility" as justification for a warrantless search. The car had to be "mobile" at the time of seizure to justify either the kind of search in *Carroll* or the kind of in-custody search that was carried out in *Chambers*. There must be a danger that, if time is taken to obtain a warrant, evidence will be lost or, at least, a true inconvenience to the police will occur.

Mr. Justice Stewart interpreted *Chambers* as adding to *Carroll* only the refinement that a warrantless search of a mobile car can be delayed until after the car is at the police station. This case, Mr. Justice Stewart said, was controlled by *Dyke*—a case in which, it is interesting to note, there clearly was no probable cause for the search. In acknowledging this point, Mr. Justice Stewart, nonetheless, went on to add that in neither *Dyke* nor this case was there a danger that the car would be moved.

Because it represents a view of the warrant requirement incon-

sistent with the *Chambers* rationale, *Coolidge* did little to clarify the car search doctrine; it had quite the opposite effect. This confusion arises, in part, from Mr. Justice Stewart's comparison of the facts in this case to those in *Carroll.*[113] At two different places in his opinion, he listed factors making for exigent circumstances that were not present in *Coolidge.* There was no indication, Mr. Justice Stewart noted in his first explication, that the suspect meant to flee. He had already had ample opportunity to destroy evidence in the car. Furthermore, there was no suggestion that particular night that the car was being used for any illegal purpose—an observation that was in no way explained. There was no "fleeting opportunity" to search the car. Furthermore, he noted, the objects that the police presumably had probable cause to search for were not stolen nor contraband nor dangerous. He did not explain this curious observation either, raising, but not giving substance to, the "mere evidence" specter.

In his second list, Mr. Justice Stewart enumerated other factors showing that it would have been practicable to obtain a warrant.[114] There was no alerted criminal bent on flight; there was no fleeting opportunity on an open highway after the chase; there was no reason to believe the car contained contraband or stolen goods or weapons (again raising the mere evidence specter); Coolidge had no confederates; and there was not even the inconvenience of a special police detail.

Coolidge did make clear one proposition: the mere inherent mobility of an automobile carries no constitutional significance.[115] The Court thus rejected Justice White's contention that a warrant was not necessary in automobile cases if the search was reasonable. The car must have some actual potential for, more or less, immediate mobility; there must be some danger that it will shortly be moved if police take the time to obtain a warrant.

However, the search in *Chambers* was clearly beyond the scope of a valid search incident to an arrest. Furthermore, the vehicle was safely in custody at the time the search was carried out. What then did *Coolidge* do to *Chambers*? Mr. Justice Stewart, in trying to reconcile the two, raised a further anomaly. *Chambers,* he explained, did not extend the *Carroll* exception. It simply stood for the proposition that, given a valid initial seizure, the actual search could be delayed until after the car was in police custody. Under this rule the question becomes: was the initial intrusion justified? The Court found a significant difference

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113 *Id.* at 460.
114 *Id.* at 462.
115 *Id.* at 461 n.18.

> 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.[116]

Although he would have held *Chambers* inapplicable because Coolidge's car had been held so long before it was searched, Mr. Justice White, in his dissenting opinion, disagreed sharply with the majority's limitations on *Carroll* and *Chambers*.[117] He once more set forth his view that some kinds of searches must be carried out under exigent circumstances so often that they can, as a matter of course, be conducted without a warrant. He also accused the majority of resurrecting the mere evidence rule, and of forbidding the warrantless search of any vehicle that is not moving when seized. Mr. Justice White's dissent made clear the difference between his approach and the Stewart-Harlan approach that a search without a warrant is presumptively invalid. To Mr. Justice White, because the class of searches involving automobiles so often presents situations in which a warrant cannot be obtained, all car searches, for consistency's sake, should be treated in the same manner—no warrant required. But, as an alternative, he suggested that the Court escape from its present bind by either unequivocally adopting his view or by treating vehicle searches and building searches alike.[118]

It is difficult to say just what is the most troublesome question raised by *Coolidge*. The references to the fact that the *Coolidge* car was not, at the time of its seizure, being used for any illegal purpose may not, as alleged, resurrect the mere evidence rule at all. Rather, it may represent a willingness to limit the *Carroll* doctrine to those situations in which the car is presently being used for an illegal purpose. While this narrow interpretation is not required by *Carroll*, neither is it inconsistent with the *Carroll* doctrine. In fact, *Cooper* would then make sense. But, if the Court intended to limit *Carroll* in this way, it did not say so, and it did not face up to the problems that this limitation would present.

Another question raised and left open by *Coolidge* concerns cars which are not moving or even occupied at the time they are seized, but which are not under the same degree of police control as the car in *Coolidge*. Lower courts tend to consider such cars as "mobile."[119]

There is no need to elaborate on the wedding of *Chambers*, with

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116 *Id.* at 463 n.20.

117 *Id.* at 523-27.

118 *Id.* at 527.

119 *See, e.g.*, Dombrowski v. Cady, No. 71-1094 (7th Cir., June 2, 1972); United States v. Leazar, 460 F.2d 982 (9th Cir. 1972); United States v. Miller, 460 F.2d 582 (10th Cir. 1972). *But see* People v. Railey, 496 P.2d 1047 (Colo. 1972).

its relaxed view of the warrant requirement, to *Coolidge's* strict interpretation, except to note the anomaly to which this union has given birth. Now, a car that is mobile, when seized, may, for several hours thereafter, be searched without a warrant even though it is less accessible to any potential allies of the criminal than was the house in *Chimel.*

It is true, as Mr. Justice Stewart asserted in *Coolidge,* that the Court cannot achieve perfect harmony or logical consistency in applying the fourth amendment to the infinite variety of search and seizure situations which confront law enforcement officers. But, as Mr. Justice White says, the Court must do better than it has if the courts, let alone law enforcement officers, are to make any sense at all of the warrant requirement with respect to car searches.

The Court could go a long way toward developing a coherent constitutional car search standard if it could achieve agreement on answers to two questions. It must decide just what makes an automobile "mobile," and thus the proper object of a warrantless search. Since its inherent mobility is "of no constitutional significance," just how does an automobile acquire "mobility" in the constitutional sense, and how does it lose it? *Coolidge* and *Chambers,* read together, do not provide a satisfactory answer.

But, the more fundamental question has to do with the nature of the warrant requirement. Is it that a search must be accompanied by a warrant unless, at the precise moment the search takes place, it is impracticable to obtain a warrant? If so, then the *Chambers* station-house search must be carried out pursuant to a warrant unless it is impossible to obtain one in the foreseeable future. *Chambers* itself would have to be overruled. Or, is the warrant requirement to be interpreted as amenable to a blanket exception for automobile searches? Should the strict warrant-requirement test yield to the "reasonableness" view of Mr. Justice White that, because probable cause to search an automobile so often arises in circumstances where a warrant cannot be obtained, the rule should be that a warrant is not necessary. If this approach were adopted, then the *Coolidge* holding, with respect to the seizure of the "immobile" car, would lose much of its force for the inherent mobility of an automobile would create a presumption that the warrantless search is reasonable.

One thing is clear with respect to automobile searches and the warrant requirement. The Supreme Court is at a crossroads. Whichever path it is to take—the one suggested by *Chambers* or the road favored by *Coolidge*—must be more clearly marked than are the present confusing trails left by these cases and their predecessors.

INVENTORY—NECESSARY PROTECTION OR CONSTITUTIONAL INVASION?

The inventory is the second warrantless automobile search exception. Frequently, cars are impounded by the police[120] when towed away for illegal parking, after an accident, or subsequent to the arrest of the occupant.[121] Upon impounding, the car is inventoried,[122] during which the parts as well as the contents are checked and listed.[123]

In light of the fourth amendment's general prohibition against warrantless searches, inventories immediately raise constitutional questions. Thus, the validity of the inventory rests on whether or not it constitutes a valid exception to the warrant requirement. Unfortunately, the courts which first dealt with inventories did not carefully and logically examine the constitutional implications. This was partially due to inventories arising in situations in which they could be merged or confused with other exceptions to the warrant requirement,[124] such as searches incident to arrest, warrantless probable cause searches, or plain view seizures.

The United States Supreme Court in *Preston*, *Cooper*, and *Harris* was confronted with specific police activity in automobile searches which could have been treated as inventories. In *Preston* and *Cooper*, the Court did not discuss the inventory issue but rather based its

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120 The impounding of the automobile is justified by specific statutory authorization, *e.g.*, CAL. VEHICLE CODE § 22850 (West 1971); police regulation, *e.g.*, Comment, *The Inventory Search of an Impounded Vehicle*, 48 CHI.-KENT L. REV. 48 (1971); or on general police practice, *e.g.*, State v. Wallen, 185 Neb. 44, 173 N.W.2d 372, *cert. denied*, 399 U.S. 912 (1970).

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

122 The inventory may take place on the scene prior to towing. *E.g.*, United States *ex rel.* Clark v. Mulligan, 347 F. Supp. 989 (D.N.J. 1972). However, it occurs more frequently after the car has been removed. *E.g.*, St. Clair v. State, 1 Md. App. 605, 232 A.2d 565 (1967); Jackson v. State, 243 So. 2d 396 (Miss. 1971); Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 408 U.S. 1073 (1972).

123 *E.g.*, Towed Vehicle Report, Police Department, Newark, N.J. Section 20 of the report provides for an inspection of the condition of the vehicle. Checks to be made to determine the extent of any damage include the testing of locks on the doors and trunk. Section 21 lists the items to be included in the inventory—wheels, tires, hubcaps, spare tire, bumpers, wipers, motor, battery, radiator, transmission, air conditioning, inside and outside mirrors, keys, ignition, seats, radio, stereo tape deck, and any other parts obviously missing, stripped or damaged. Furthermore,

> [m]ost agencies require the officer to remove all valuable property found in the automobile and secure this property inside the pound office or with a specified custodian of personal property.

Comment, *supra* note 120, at 48.

124 *See* United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972); State v. Hock, 54 N.J. 526, 257 A.2d 699 (1969), *cert. denied*, 399 U.S. 930 (1970); State v. Olsen, 43 Wash. 2d 726, 263 P.2d 824 (1953).

opinions on a search incident to an arrest in the former, and a forfeiture provision of a California statute in the latter.[125]

Notwithstanding the Court's apparent effort to avoid a decision on the inventory issue,[126] the opinion in *Harris v. United States*[127] has been used to justify it.[128] The accused was arrested and his car impounded because it had been observed leaving the scene of a robbery. The auto was inventoried pursuant to a police regulation requiring that a thorough search be made of any impounded car. A discovered registration card implicating the accused was held to be admissible. The Supreme Court's opinion in *Harris* implies that the card was found during the inventory; however, the circuit court's opinion, referred to by the Supreme Court, clearly demonstrates that the inventory was completed before the card was discovered by the police.[129] The officer, acting "for the sole purpose of rolling up the windows,"[130] found the card in plain view. The Court stated that "the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody."[131]

Therefore, *Harris* was based on the traditionally accepted doctrine of plain view. Hence, in the absence of any controlling Supreme Court decision, the inventory must be examined in light of traditional constitutional precepts.

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125 See pp. 119-24 *supra*.

126 The Court noted:

> The admissibility of evidence found as a result of a search under the police regulation [inventory] is not presented by this case.

390 U.S. at 236. Justice Douglas noted in his concurring opinion:

> [I]n the present case (1) the car was lawfully in police custody, and the police were responsible for protecting the car; (2) *while engaged in the performance of their duty to protect the car, and not engaged in an inventory* or other search of the car, they came across incriminating evidence.

Id. at 237 (emphasis added).

127 390 U.S. 234 (1968).

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

129 The circuit court, adopting the facts of the district court, found that there were two purposes for the check of the car.

> One was to inventory its contents as required by the regulation, and the other was to roll up the windows because it was raining. Accomplishment of the former purpose was begun by opening the door on the driver's side of the car; and a complete examination of the interior of the car was made through, and by means of, this mode of entry. Having completed this examination, the officer then went around to the other side of the car for the sole purpose of rolling up the windows. When he opened the right front door for this purpose, there came into his view a registration card which had been lying on the door jamb concealed by the closed door.

Harris v. United States, 370 F.2d 477, 478 (D.C. Cir. 1966).

130 *Id.*

131 390 U.S. at 236.

Bona Fide Inventory v. Exploratory Search

Several different approaches and solutions have been developed by the courts of various jurisdictions when faced with the complex constitutional arguments concerning inventories. Courts[132] and commentators,[133] who uphold the validity of the inventory, argue its necessity in order to protect the car owner,[134] police officers, and those who tow and store the auto from claims of stolen or lost property.[135] Opponents of the inventory counter that these justifications are not sufficient to permit the widespread invasion of personal privacy which the warrantless inventory produces.[136]

The majority of courts, which have considered the problem, have upheld the validity of the inventory,[137] but have placed limitations

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132 See note 137 *infra*.

133 *E.g.*, Murray & Aitken, *supra* note 3.

134 In Cabbler v. Commonwealth, 212 Va. 520, 84 S.E.2d 781, *cert. denied*, 408 U.S. 1073 (1972), the court stated:

> It has always been the public policy of the Commonwealth to preserve and protect the individual rights of its citizens. Public policy also dictates that a citizen's rights in his property shall likewise be preserved and protected. Thus it would appear, and we so hold, that the policy established and the procedure followed by the Roanoke Police Department to protect the property of a citizen arrested away from his home in possession of property where no other immediate means is available for safekeeping of such property are reasonable and in accord with the public policy of the Commonwealth set forth earlier.

Id. at —, 184 S.E.2d at 782.

135 In State v. Hock, 54 N.J. 526, 257 A.2d 699 (1969), *cert. denied*, 399 U.S. 930 (1970), the court said the purpose of the examination was "to inventory its contents to protect the police against excessive claims and to safeguard the suspect's rightful interest therein." *Id.* at 534-35, 257 A.2d at 703. In Heffley v. State, 83 Nev. 100, 423 P.2d 666 (1967), the court said

> [s]uch practice [inventory] is deemed necessary to defeat dishonest claims of theft of the car's contents and to protect the temporary storage bailee against false charges.

Id. at 103, 423 P.2d at 668. Murray & Aitken, *supra* note 3, at 128, stated: "If it is not abused, the right to inventory the contents of an impounded car is a reasonable precaution against theft claims."

> Prior to 1964 or 1965 it was not customary to remove, inventory and separately store the contents of vehicles which came into possession of the police for safekeeping unless the police were specially requested to do so. In 1964 or 1965, however, complaints were made and claims for reimbursement filed by the owners of vehicles who claimed property was lost or stolen while their cars were so stored. The procedure for removal, inventory and separate storage of the contents of vehicles in safekeeping was instituted then in an effort to prevent theft or loss of property from stored vehicles.

Cabbler v. Commonwealth, 212 Va. 520, —, 184 S.E.2d 781, 782 (1971), *cert. denied*, 408 U.S. 1073 (1972).

136 Mozzetti v. Superior Court, 4 Cal. 3d 699, 705-06, 484 P.2d 84, 88, 94 Cal. Rptr. 412, 416 (1971). Baker & Khourie, *supra* note 35, at 63 refer to inventories as "[p]erhaps the most insidious of the devices which could be employed by some law enforcement agencies to subvert fourth amendment rights."

137 *E.g.*, United States v. Pennington, 441 F.2d 249 (5th Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967); St. Clair v. State, 1

upon it. First, the inventory must be bona fide and not exploratory in nature. The Maryland Court of Appeals, in *St. Clair v. State*,[138] ruled that a decision to inventory a car was justified because it was done for the purpose of safeguarding property and "not for the purpose of making an exploration for incriminating evidence."[139] The court recognized that a search conducted truly for the purpose of inventory was distinct from, and could not be used as a subterfuge for a search for evidence.

The distinction between an inventory and an exploration creates confusing and difficult questions of fact. In *Heffley v. State*,[140] a state court permitted the search as a bona fide inventory.[141] Examining the same case on habeas corpus, the United States Court of Appeals for the Ninth Circuit accepted the inventory concept, but said "the undisputed evidence here demonstrates that the purpose of the search of Heffley's automobile was exploratory."[142]

Md. App. 605, 232 A.2d 565 (1967); 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 (1971), *cert. denied*, 408 U.S. 1073 (1972). In State v. Hock, 54 N.J. 526, 257 A.2d 699 (1969), *cert. denied*, 399 U.S. 930 (1970), the New Jersey Supreme Court, in dictum, supported inventory searches. That case, however, combines many different factors including a search for proof of ownership, an inventory search and a plain view seizure. The court, however, does say that even if the gun had not been partially visible and had been discovered during a thorough search, it would have been admissible. The court relied upon the general concept of reasonableness, and referred to the inventory purposes in protecting police as well as suspects. *Id.* at 535, 257 A.2d at 703.

138 1 Md. App. 605, 232 A.2d 565 (1967).

139 *Id.* at 618, 232 A.2d at 573.

140 83 Nev. 100, 423 P.2d 666 (1967), *habeas corpus granted sub nom.*, Heffley v. Hocker, 420 F.2d 881 (9th Cir. 1969), *vacated and remanded*, 399 U.S. 521 (1970). The Supreme Court's vacation and remand was based on Chambers v. Maroney, 399 U.S. 42 (1970).

141 Upon the following facts the state and federal courts came to opposite conclusions. Heffley was stopped while in an automobile by an officer responding to a radio report that a person answering Heffley's description was attempting to sell guns to pawnshops. When the officer observed guns in the car he arrested him and had him taken to the police station. The car was also taken to the police station where it was thoroughly searched.

Other cases in which two courts came to different conclusions on the same set of facts similarly demonstrate the difficulties inherent in this narrow distinction between bona fide inventories and exploratory searches. In Pigford v. United States, 273 A.2d 837 (D.C. Ct. App. 1971), the defendant had been arrested on three outstanding traffic warrants. He drove his own automobile to the station and parked it outside. Unable to post bail he was detained. An hour later the police took the keys to the car, entered it and searched the glove compartment, under the seats and in the trunk. Stolen property was discovered in the trunk. The court upheld the constitutionality of inventories but held this inventory invalid as an exploratory search.

142 Heffley v. Hocker, 420 F.2d 881, 885-86 n.8 (9th Cir. 1969), *vacated and remanded*, 399 U.S. 521 (1970).

A second limitation on the extent of the inventory has been suggested by some courts.[143] For instance, presuming the purpose of the inventory is to protect the valuables of the car owner, it is hard to justify searching under and around the car radiator, under the frame, and so on. Nevertheless, some courts have justified extensive searches.[144] The better view appears to have been expressed in *People v. Andrews*[145] where the California Court of Appeals limited the scope of the inventory:

> The inventory must be reasonably related to its purpose which is the protection of the car owner from loss, and the police or other custodian from liability or unjust claim. It extends to the open areas of the vehicle, including such areas under seats, and other places where property is ordinarily kept, e.g., glove compartments and trunks. It does not permit a *search* of hidden places, certainly not the removal of car parts in an effort to locate contraband or other property. The owner having no legitimate claim for protection of property so hidden, the police could have no legitimate interest in seeking it out.[146]

Courts which have upheld the inventory, either with or without limitations on the purpose or scope, generally have not examined the constitutional basis for the relaxation of the warrant requirement. Instead, they merely referred to the reasonableness of the inventory procedure in light of its purposes and deemed it to be constitutional.

A Closer Scrutiny

Recently a number of courts have directly dealt with the constitutional implications of warrantless inventories and two diverse theories have been developed to justify them. The first approach recognized that a search requires a warrant, but that an inventory is not a search. In *People v. Sullivan*,[147] the New York court relied on the Model Code of Pre-Arraignment Procedure to define an automobile search as "an intrusion under color of authority on an individual's 'vehicle', 'for the

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143 *See* People v. Andrews, 6 Cal. App. 3d 428, 85 Cal. Rptr. 908 (Dist. Ct. App.), *cert. denied*, 400 U.S. 908 (1970); People v. Garrison, 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (Dist. Ct. App. 1961).

144 Jackson v. State, 243 So. 2d 396 (Miss. 1970) (admitting evidence found in litter bag above sun visor and in air breather at top of carburetor). State v. Olsen, 43 Wash. 2d 726, 263 P.2d 824 (1953) (This case, justified on both incident-to-arrest and inventory theories, allowed a search of the "space between the car radiator and the front grill" and "on a ledge under the dashboard.").

145 6 Cal. App. 3d 428, 85 Cal. Rptr. 908 (Dist. Ct. App. 1970).

146 *Id.* at 437, 85 Cal. Rptr. at 914 (emphasis in original).

147 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

purpose of' seizing things."[148] The court reasoned that, since the primary purpose of the inventory is not "seizing things," an inventory is not a search.

However, in *Mozzetti v. Superior Court*,[149] the California court rejected this approach as overly technical and semantic. Quoting from *Terry v. Ohio*[150] that "the Fourth Amendment governs all intrusions by agents of the public upon personal security,"[151] the court continued:

> 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.[152]

The court was unwilling to draw a distinction between an intrusion for inventory purposes and an intentional search for evidence.

> Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in the Fourth Amendment. Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions.[153]

The majority of cases upholding the inventory have not relied upon the *Sullivan* rationale, but instead have recognized that the inventory is a search governed by the fourth amendment which may be reasonable under the circumstances. The reasonableness doctrine presupposes the division of the fourth amendment into two parts—one requires a warrant:

> [N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.[154]

The other requires only that the search be reasonable:

> The right of the people to be secure in their persons, houses,

148 *Id.* at 77, 272 N.E.2d at 469, 323 N.Y.S.2d at 952 (quoting from ABA-ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, art. 1, § SS 1.01 (1) (Tent. Draft No. 3, 1970)). Even accepting the interpretation of *Sullivan*, it is still necessary to decide the intent of the police officer as to whether or not his purpose is to seize things when he makes the inventory.

149 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

150 392 U.S. 1 (1968).

151 4 Cal. 3d at 705, 484 P.2d at 87, 94 Cal. Rptr. at 415 (quoting from 392 U.S. at 18 n.15).

152 *Id.* at 705-06, 484 P.2d at 88, 94 Cal. Rptr. at 416.

153 *Id.* at 706, 484 P.2d at 88, 94 Cal. Rptr. at 416.

154 U.S. CONST. amend. IV.

> papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .[155]

The exceptions to the warrant requirement are a recognition that, although a warrant is generally necessary, certain circumstances such as consent, arrest, mobility, or emergency, create a situation in which it is unnecessary or impossible to require a warrant. However, while it is not always necessary to fulfill the warrant requirement, a search must always meet the reasonableness criterion of the fourth amendment.

In *Terry v. Ohio*,[156] the Supreme Court decided that the reasonableness criterion of the fourth amendment did apply to the investigatory stop and frisk by officers, but that the warrant requirement did not.[157] The Court commented:

> We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat —which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's *general proscription against unreasonable searches* and seizures.[158]

Those courts permitting inventories consider them a necessary part of the police practice and procedure in protecting the vehicle owner and police. However, the courts have recognized that although inventories must be carried out reasonably, a warrant is not required.[159]

Mozzetti examined this argument in great detail, but refused to extend further the warrantless search exceptions to inventories. Stating

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155 *Id.*

156 392 U.S. 1 (1968).

157 *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967), which had applied the fourth amendment warrant requirement to administrative inspections even though in certain instances the warrant could be dispensed with. The Court was unwilling to limit the fourth amendment only to the traditional police search for evidence.

158 392 U.S. at 20 (citations and footnote omitted) (emphasis added).

159 In Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1970), *cert. denied*, 408 U.S. 1073 (1972), the court stated:

> The Fourth Amendment does not preclude the states from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . . .

Id. at —, 184 S.E.2d at 783. The court then held that the inventory procedure was constitutional within the demands of criminal investigation and law enforcement.

that " 'there must be compelling reasons and exceptional circumstances to justify a search in the absence of a search warrant,' "[160] the court recognized

> the vehicle owner's countervailing interest in maintaining the privacy of his personal effects and preventing anyone, including the police, from searching suitcases, and other closed containers and areas in his automobile at the time the police lawfully remove it to storage.[161]

The court then specifically set forth various reasons that indicated a lack of exigent circumstances to justify an inventory: the car could have been adequately protected by locking the doors and rolling up the windows;[162] if the purpose of the search was beneficial to the owners, consent could have and should have been obtained;[163] the police who take the car into custody are only involuntary bailees and, thus, their liability is minimal;[164] and legal custody by the police or by an involuntary bailee does not create a possessory right justifying a search.[165]

The *Mozzetti* fact situation involved a car accident in which the defendant was injured and taken to a hospital. The car was towed to police storage and, upon inventory, a police officer found and opened a small, unlocked suitcase in which he discovered marijuana. Perhaps, if the police had merely noted the presence of the suitcase, but not opened it, the court would not have been so concerned with the invasion of privacy. Analytically, *Mozzetti* can be read narrowly and restricted to situations in which suitcases or the like are opened, or broadly to reject all inventories. The language of the decision seems to support the latter.

Recently, the New Jersey federal district court adopted an apparent middle position.[166] Officers, observing defendant's attempts to start his car, investigated. Subsequent to a routine check of the defendant's license and registration, which proved valid, a call to headquarters revealed that he was wanted on an outstanding narcotics charge. After arresting him, the officers returned to inventory the car before having it towed away. In plain view, protruding halfway from

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160 4 Cal. 3d at 706, 484 P.2d at 88, 94 Cal. Rptr. at 416 (quoting from People v. Burke, 61 Cal. 2d 575, 578, 394 P.2d 67, 69, 39 Cal. Rptr. 531, 533 (1964)).

161 *Id.* at 707, 484 P.2d at 89, 94 Cal. Rptr. at 417.

162 *Id.*

163 *Id.* at 708, 484 P.2d at 89, 94 Cal. Rptr. at 417.

164 *Id.* at 708-10, 484 P.2d at 89-91, 94 Cal. Rptr. at 417-19; see Comment, *supra* note 121, at 205.

165 4 Cal. 3d at 710-11, 484 P.2d at 91, 94 Cal. Rptr. at 419.

166 United States *ex rel.* Clark v. Mulligan, 347 F. Supp. 989 (D.N.J. 1972).

between the back rest and front seat were glassine envelopes that proved to contain heroin. The court permitted the inventory but restricted it to those items in plain view inside the car. In rejecting the contention that an inventory is per se reasonable, and demanding that each factual situation be analyzed separately, the court arguably would not have allowed the search of closed areas, such as the trunk or glove compartment.

Unfortunately, this case, like *Harris* and many others, did not make a sharp distinction between a seizure of articles in plain view and an inventory:

> We feel that because the police inventory did not intrude into areas out of plain view the seizure was proper. In addition, we note that the purpose of the intrusion was to inventory objects in the automobile. Under these circumstances, and in view of the fact that petitioner had a battery stolen from his automobile the night before, we cannot condemn the procedure used here.[167]

Judge Lacey made a point of restricting his decision to the exact facts of the case: "We hold that the limited search and seizure was proper under the *highly individualized facts* presented here."[168] Although the precedent value of the case is questionable, it points up the need to distinguish the validity of inventories on their particular facts.

In another case involving a detailed scrutiny of the facts, Arizona, faced with the search of a suitcase in an auto similar to the situation in *Mozzetti*, aligned itself with the California decision, stating: "Although there are cases to the contrary, we find the opinion in *Mozzetti* to be compelling and well reasoned."[169] While the lower court had decided that the inventory was made in good faith, the supreme court, greatly influenced by the invasion of personal effects, rejected as fallacious the property protection rationale for the inventory:

> 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. In fact, we can envision instances when the taking of an inventory may actually alert potential thieves to the value of items contained in the automobile.[170]

Additionally, consent could have been obtained, but was not.

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167 *Id.* at 992.

168 *Id.* (emphasis added).

169 *In re* One 1965 Econoline, 17 Ariz. App. 64, —, 495 P.2d 504, 506 (1972).

170 *Id.* at —, 495 P.2d at 508-09.

This element of consent is one factor which distinguishes *Mozzetti* and similar cases from those in which consent was not obtainable.

In New York, where *Sullivan* was decided, the New York City Police towed away more than 2,000 illegally parked cars a week to storage lots where the cars were inventoried. The court, in upholding the inventory, said the purpose of the search was to protect the contents, the police and the bailee. "It is manifest that in inspecting vehicles they take into their custody, in the absence of drivers, the police are not seeking evidence of crime . . . ."[171]

Sullivan, therefore, appears to be the type of case in which an inventory is appropriate: the car was impounded for a parking violation, there was no suspicion that the car contained evidence, and there was no realistic and economic means available of obtaining consent.

An interesting approach to the problem of inventories has been presented in *Mayfield v. United States*.[172] The court did not directly reject the inventory as unconstitutional,[173] but did conclude that any incriminating evidence discovered would be inadmissible. Nevertheless, Judge Ely in his dissenting opinion in *United States v. Mitchell*[174] adopted the *Mayfield* view, permitting

> extensive inventory searches of seized vehicles, so as fully to protect the police, but to forbid, over the objection of one having standing, the use of any item seized in the search as evidence against the objector . . . .[175]

This solution accomplishes the purposes of the inventory, namely that the police may list all objects found in the car, but they may not seize anything incriminating. Although an interesting and pragmatic approach, the conflict with traditional constitutional concepts is evident. First, the plain view rule permits the admission of evidence discovered by law enforcement agents otherwise acting legally. Secondly, it offends the principle that "[t]he purpose of the fourth amendment is to secure to everyone the right to privacy, not to protect the accused from conviction."[176] With these overlapping principles in mind, it has been

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171 29 N.Y.2d at 71, 272 N.E.2d at 465, 323 N.Y.S.2d at 947. It should be noted that there was a strong dissent emphasizing that "the inventory conducted by the police was a general, indeed unlimited, search of a car which should not be tolerated." *Id.* at 80, 272 N.E.2d at 471, 323 N.Y.S.2d at 955 (Fuld, C.J., dissenting).

172 276 A.2d 123 (D.C. Ct. App. 1971).

173 This would apparently eliminate any possibility of a civil action being brought against the police officers. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

174 458 F.2d 960 (9th Cir. 1972).

175 *Id.* at 966.

176 Comment, *supra* note 120, at 57.

suggested that the *Mayfield* approach does not comport with our constitutional framework.[177] Judge Ely dealt with this when he stated:

> The adoption of such a rule, which has already gained some support, would, I believe, work an effective compromise between significantly conflicting interests and most nearly effectuate the delicate and even balance for which we are supposed to strive. Moreover, such a rule would appear to comport with the Supreme Court's pronouncement that "evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents."[178]

The doctrine postulated in *Mayfield*, with which Judge Ely concurs in his dissent in *Mitchell*, focuses on the current debate over the efficacy of the exclusionary rule whose effectiveness in achieving its intended results has recently been attacked.[179] The *Mayfield* doctrine, which squarely relies on the exclusionary rule without any pretence of protecting everyone from unconstitutional searches and seizures. would appear to be in doubt in light of these attacks.

Suggested Approach

Four different approaches[180] suggest solutions to the inventory problem: (1) declare the warrant requirements inapplicable to inventories and only hold the police to the reasonableness standard of the fourth amendment; (2) declare the inventory to be constitutional but exclude all incriminating evidence seized; (3) declare all inventories to be invalid; or (4) decide each case on its specific factual pattern and permit warrantless inventories when intelligent, knowing and uncoerced consent[181] is obtained; if consent cannot be economically and

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177 *Id.*

178 458 F.2d at 966 (footnote omitted) (quoting from Terry v. Ohio, 392 U.S. 1, 13 (1968)).

179 *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting). Chief Justice Burger, in the Appendix, noted several articles disapproving the exclusionary rule. *Id.* at 426-27. *See also* State v. Bisaccia, 58 N.J. 586, 279 A.2d 675 (1971); Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295 (1972); Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 LOYOLA U.L.A.L. REV. 1 (1972).

180 *But see* Comment, *supra* note 120, at 157-58, wherein the author fails to include the fourth alternative listed herein.

181 A person should have his choice of consenting to an inventory of his car or of signing a waiver which would immunize the police officers and the storage bailee from any loss.

Although this has significant appeal, it also raises certain problems including:

1) The rights or duties of the police when they are unable to find the person with the power to consent.

realistically obtained the inventory should only be sustained if it is: (a) a bona fide inventory as opposed to an exploratory search with the burden on the state to prove that it was bona fide; (b) confined to those areas of the automobile where it would be likely to find valuables; and (c) limited to a listing of any closed suitcases, packages, containers or the like, without any inspection of their contents, except under extraordinary circumstances. The fourth alternative, although more difficult in its application, appears to be more just in balancing the constitutional rights involved.

CONCLUSION

The evolution of the car search doctrine from *Carroll* to *Coolidge* is replete with significant vagaries. The validity of the inventory and its permissible scope lack definition. The failure of the Supreme Court to clearly and consistently answer the questions posed by the warrantless search of the automobile has not only created a gap in constitutional theory, but created grave practical problems for law enforcement officials in applying the constitutional standards.

The possible invasion of privacy engendered by these vague constitutional dimensions mandates that the Supreme Court decisively indicate the metes and bounds of automobile searches.

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2) The general problems that arise in every consent search: intelligent waiver of rights without coercion; and whether a person confronted by the police can ever give a truly uncoerced consent.

3) The effect of the failure to consent in terms of further investigation and exploration by the police.

These problems cannot be totally resolved, but it would appear that if the officers make a good faith effort to find the owner, they should not be prohibited from making an inventory. Secondly, methods could be developed which would assume a truly uncoerced consent. This could be achieved by requiring that the police inform the person that he has a right not to consent and that his failure to consent could not be used against him in any way. Finally, the refusal to consent could not be used in any way against the person, either as an aspect of probable cause or for any purpose in the trial.