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The Warrantless Automobile Search: Exception Without Justification

By Vivian Deborah Wilson*

"[A]nd no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."

To the colonists, it was anathema that the officers of the King, under the authority of the general warrant, could invade the sanctity of their homes. "Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches . . . . Officers [who] under colour of law and the cloak of a general warrant break thro' the sacred rights of the Domicil . . . ." Although outrage has faded in 300 years, the warrant requirement retains enduring force and it still is articulated as our preference that "inferences [of probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Necessity, however, has tempered our sense of the primacy of the warrant, as progress produced

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1. U.S. Const. amend. IV.


events requiring an officer to conduct intrusions without presenting any particular description of the place, person, or thing involved—indeed, often without possessing a warrant at all. To that end, courts have devised exceptions to the warrant requirement so that warrantless searches and seizures on probable cause may be conducted when an emergency arises, when circumstances demand, when incident to a valid arrest, when an officer legitimately present observes a seizable object in plain view, when the party or owner of the object or place to be searched consents, or when the “effect” to be seized and subsequently searched is an automobile. The automobile has been held to be “constitutionally different” from a house, not only because it is said to be invested with fewer of the characteristics of a sanctuary, but also because it is viewed as an object rather than a place.

The “automobile exception” began with the observation that an officer having probable cause to search a vehicle capable of motion could reasonably expect the vehicle to vanish promptly if the officer delayed to secure a warrant. Depending on the circumstances, the mobility of the automobile could constitute sufficient urgency to justify dispensing with the warrant. Even in the ab-

4. “Emergency Searches. An officer who has reasonable cause to believe that premises or a vehicle contain (1) individuals in imminent danger of death or serious bodily harm; or (2) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or (3) things which will cause or be used to cause death or serious bodily harm if their seizure is delayed, may, without a search warrant, enter and search such premises and vehicles, and the individuals therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.” ALI Model Code of Pre-Arraignment Procedures § 260.5 (1975).

5. When officers are in “hot pursuit” of a suspect, see Warden v. Hayden, 387 U.S. 294 (1967); to prevent the destruction of evidence, see Ker v. California, 374 U.S. 23 (1963).


7. Officers who are legitimately present pursuant to a warrant may seize objects readily identifiable as fruits of suspected criminal activity, contraband, instrumentalities, or evidence. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). In Coolidge, a plurality of the Court stated that the discovery must be inadvertent. Whether or not the discovery must be inadvertent remains a matter of conjecture. See, e.g., North v. Superior Court, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).

8. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Consent searches are governed by the same standards whether the place searched is an automobile, a home, or an office. Consequently, this Article does not discuss consent searches.

9. See notes 22-125 & accompanying text infra.


13. In the unlikely event that the officer could not arrest the car’s driver, it realisti-
sence of such exigency, however, the United States Supreme Court has permitted the warrantless seizure and search of an automobile on the pretext of exigency,\textsuperscript{14} as well as on the grounds that, as a mode of transportation subject to pervasive government regulation, the automobile enjoys a diminished expectation of privacy, thus justifying minimal intrusions.\textsuperscript{15} A line of California cases has developed an additional rule permitting the warrantless seizure of an automobile when the automobile is “itself evidence,” rather than a container for evidence of the crime for which the defendant has been arrested.\textsuperscript{16}

More recently, the courts have begun to define limits more precisely, identifying those “automobile searches” that have nothing to do with an automobile except that one “lurks somewhere in the picture.”\textsuperscript{17} Unfortunately, this complicates the issue with additional inconsistencies, so that the only observation that can be made with any accuracy is that the same search may require a warrant, or permit dispensing with the warrant, depending on the rule applied. Furthermore, the search of the same automobile may justify seizing one object within it and not another.\textsuperscript{18}

It is imperative to define the automobile exception to the warrant requirement with precision. Appropriate distinctions must be drawn between occasions when police, pursuing the legitimate objectives of law enforcement, must be allowed to seize and search an automobile without a warrant and occasions when the balance must weigh against authorizing the warrantless intrusion.

This Article analyzes the incongruities in the automobile exception to the warrant requirement of the fourth amendment as currently defined by the United States Supreme Court. In its characterization of the automobile as an “effect,” the Court has failed to perceive its more significant status as a place. An automobile is

\textsuperscript{16} See notes 56-99 & accompanying text infra.
\textsuperscript{18} If the car is searchable as “itself evidence” of a crime, rather than as a container, the upholstery may be torn apart for evidence that the car is being used to transport contraband. See, e.g., Carroll v. United States, 267 U.S. 132 (1925). A suitcase on the back seat, however, may not be opened without a warrant. See, e.g., United States v. Chadwick, 433 U.S. 1 (1977).
not primarily an object that performs a function or accomplishes an act. It is, more importantly, a site, a location, an area. An automobile can be a repository for documents, or the scene of a commercial transaction between its occupants. It can even function as a home. Warrantless searches of automobiles are, therefore, more appropriately justified according to the standard for the warrantless searches of other places—houses, offices, and public areas.

The Article offers a proposal defining the circumstances in which the warrantless automobile search may withstand traditional analysis of all its phases—the legitimacy of the initial intrusion, the scope of the subsequent search, whether immediate or delayed, and the distinctions compelled by the character of the automobile as a place rather than an object—either as a container of the seizable item or as the scene of the crime.

Analysis of Warrantless Automobile Searches

Probable Cause and Exigent Circumstances

The basic rule to justify a warrantless automobile search requires a coincidence of probable cause and exigent circumstances. Where the facts of a particular encounter fail to satisfy these criteria, however, the Court has allowed probable cause alone without facts of exigency to justify a warrantless search.

Until the 1920's, the automobile did not figure prominently, if at all, as the object of a search. In the first decade of the 20th century, automobiles in the United States numbered fewer than 200,000. In these early years, the automobile was viewed as a novelty and a luxury. When prohibition was enacted the course of history changed; "[a]n automobile [became] an almost indispensable...

instrumentality in large-scale violation of the National Prohibition Act . . . and the car itself therefore was treated somewhat as an offender and became contraband.\textsuperscript{24} The mobility of the automobile created an exigency justifying warrantless intrusions; police officers with probable cause to search an automobile traveling on the open highway were required to do so promptly or risk losing the "fleeting target."\textsuperscript{25}

In \textit{Carroll v. United States}\textsuperscript{26} federal officers patrolling a Michigan highway in search of violators of the National Prohibition Act observed the Carroll automobile, gave chase, effected a stop, and searched the vehicle, seizing contraband hidden in the upholstery. The defendant subsequently was convicted, with the contraband offered as one of the items of evidence at trial.

On review, the Supreme Court found that probable cause existed to justify the warrantless search, denying that "the right to search, and the validity of the seizure [were] dependent on the right to arrest."\textsuperscript{27} Rather, "the facts and circumstances within the officers' knowledge . . . were sufficient . . . to warrant . . . the belief that intoxicating liquor was being transported," that is, sufficient to justify a search.\textsuperscript{28} The question, however, remains: was a warrantless search justified?

The offense, Carroll's first, was only a statutory misdemeanor

\textsuperscript{24} United States v. Di Re, 332 U.S. 581, 586 (1948). The bootleg cases arose while the Court was in the process of developing its rationale for upholding warrantless searches. The Court went no further than to assert that it is within the legitimate function of law enforcement officers to seize vehicles suspected of transporting illegal liquor. \textit{See, e.g., Brinegar v. United States}, 338 U.S. 160 (1949) (federal agents stopped known bootlegger driving heavily loaded car into a state in which laws prohibited the sale of intoxicants and searched and seized liquor after suspect admitted that he was carrying twelve cases); \textit{Scher v. United States}, 305 U.S. 251 (1938) (police set up stake-out on basis of confidential information; search yielding 88 bottles of liquor justified as incidental to arrest); \textit{Husty v. United States}, 282 U.S. 694 (1931) (acting on tip, police observed car until defendant and others appeared, whereupon the officers made their arrest and searched the automobile; justified on grounds of probable cause); cf. \textit{United States v. Lee}, 274 U.S. 559 (1927) (Coast Guard patrol boat seized small motor boat and 71 cases of alcohol after observing cases on deck while boat was in area frequented by liquor smugglers; justified on grounds of probable cause).

\textsuperscript{25} \textit{Id.} at 158.

\textsuperscript{26} \textit{Id.} at 162. Whether probable cause sufficient to obtain a search warrant existed prior to the encounter is questionable. If not, it might well be that there was sufficient probable cause to search at the moment the car was stopped. In that case, there would have been insufficient reason to make a felony arrest until the search, preceding the arrest, had occurred. The evidence found in the resulting search could not be used to justify the earlier arrest which would then justify the search that followed.
for which an arrest could not be made unless the offense was committed in the officer’s presence. Until the contraband was discovered, therefore, no violation had occurred in the officer’s presence and Carroll could not be detained. It was the necessity of releasing Carroll who could be expected to vanish promptly if the officers delayed while securing a warrant that created the exigency. In reaching this conclusion, the Court noted that the fourth amendment guarantees had historically been construed as “recognizing a necessary difference between a search of a store, dwelling or house or other structure . . . and a search of a ship, motor boat, wagon or automobile . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which a warrant must be sought.” Therefore, as long as the essential, identifying characteristic of an automobile is its mobility, exigency is presumed, and nothing more than a showing of probable cause is necessary to justify an immediate on-the-scene search without a warrant.

The Carroll Court’s imputation of exigency to automobile searches fails to consider the practical realities of such a search. It does not appear to concern the Court that mobility can only rarely be demonstrated; in the usual case, the car’s occupants have been arrested and detained in police custody and the automobile has, indeed, been immobilized. For that reason, the Court’s attempts to discover exigency have reached inconsistent conclusions depending on such factors as the late hour of the search, the location of the automobile on an open highway or in a public parking lot, or the unavailability of a custodian for the car. The result has been inconsistency in the rationale and reasoning utilized by the courts.

29. Id. at 164 (McReynolds & Sutherland, J.J., dissenting).
30. Id. at 153.
34. In People v. Dumas, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973), the exigency requirement was fulfilled by the police officer’s unexpected discovery that the defendant possessed a vehicle and by the possibility that another person present at the time of arrest could remove the car or destroy the evidence. Id. at 885, 512 P.2d at 1218, 109 Cal. Rptr. at 314. A thorough search pursuant to a warrant had failed to yield contraband in Dumas’ apartment. When the officers became aware of the suspect’s car parked on the street near the building, they suspected that Dumas “had probably hidden the easily movable stolen property in his automobile.” Id. The car, which was not mentioned in the warrant, was searched and the contraband found. The California Supreme Court in justifying the search assigned to the automobile a “less intense and insistent” expectation of privacy. Id.
If a warrantless automobile search can be justified by the mobility of the vehicle, there would appear to be no impediment to permitting police officers to seize the car, transport it to the police garage, and conduct a delayed search. Such was the case in *Chambers v. Maroney*. After the arrest of its occupants for a gas station robbery, the automobile involved was driven to the police station where a thorough search of its interior produced evidence concealed in a compartment under the dashboard. The Supreme Court in *Chambers* first declined to justify the warrantless search as incident to the arrest, stating:

> Once an accused is under arrest and in custody, then a search made at another place without a warrant is simply not incident to the arrest. . . . The reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house.

Finding that the same facts providing probable cause for the arrest would also justify the search, the Court relied on the *Carroll* rule that sufficient justification could be founded on probable cause and the automobile's character as a "fleeting target," adding that "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Chambers* thus develops the following proposition: if the circumstances justify a warrantless search at the initial moment of contact, then that search assumes a continuing justification extending in time and place, so that days may elapse and miles accrue without dissipating the original justification for the search. The corollary to this proposition is that if police officers can, without a warrant, search an area within a suspect's immediate control as incident to an arrest, it should be possible to conduct that identical, warrantless search at the officer's convenience at the police garage under the theory of continuing justification.

Although such an extension of the warrant exception does not

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36. *Id.* at 47 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1967)).
37. 399 U.S. at 52. Inquiring "which is the greatest and which is the lesser intrusion," the Court concluded it was debatable. *Id.* at 51. Justice Harlan, writing for the dissent, disagreed. *Id.* at 63-64 (Harlan, J., dissenting).
appear to be any more objectionable than the theory of continuing probable cause, there is no reason for it. The necessity for a warrantless search does not apply once time has elapsed. Furthermore, the Chambers holding does not dispose of the critical question of whether the warrantless search of the automobile would have been justified in the first place. The car qualified as a "fleeting target" only momentarily; as soon as the suspects were arrested, the emergency ended. Thus, once the car was safely impounded, there appears to have been no reason for the officers' failure to secure a warrant.38

Subsequent cases have continued to justify delayed warrantless searches, failing to acknowledge that without the mobility factor of Carroll, Chambers should not apply. Whether "there is little [choice] between an immediate search without a warrant and the car's immobilization until a warrant is obtained"39 is an inquiry that should not be invoked if the facts do not support the first condition: the factual necessity for an immediate search without a warrant.

In the California case of People v. Laursen,40 witnesses observed the suspects abandon the getaway car at the scene of the crime after being unable to start it. Having probable cause to search the car, officers towed it to the impound garage where a search of the trunk produced documents leading to Laursen's arrest and conviction.

The California Supreme Court upheld the search, which had been both delayed and warrantless, "because of [the automobile's] distinguishing characteristics of mobility, even though in otherwise similar circumstances a search of a fixed structure may be unrea-

38. "Vehicular Searches. Reasonable Cause. An officer who has reasonable cause to believe that a moving or readily movable vehicle, on a public way or waters or other area open to the public or in a private area unlawfully entered by the vehicle, is or contains things subject to seizure under the provisions of Sections 210.3, may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search . . . . NOTE The Section embodies the substance of the rule, based on Carroll v. United States, that a vehicle may be searched without a warrant, if the officer undertaking the search has probable cause to believe that the vehicle is or contains things properly subject to seizure as contraband or otherwise. The reason for the rule is the probability that seizure will be impossible if a warrant is obtained, because of the mobility of the vehicle. Hence the limitation to a 'moving or readily movable vehicle.'" ALI Model Code of Pre-Arraignment Procedure § 88 260.3 (1975).
39. 399 U.S. at 52.
40. 8 Cal. 3d 192, 501 P.2d 1145, 104 Cal. Rptr. 425 (1972).
sonable within Fourth Amendment prohibitions." The court does not appear to consider that the car had been abandoned because the suspects could not start it. Nor does it examine the likelihood of Laursen or his accomplices risking a return to the stalled automobile "to retrieve it or to remove evidence"—circumstances that negate a finding of exigency.

In Cardwell v. Lewis the tire treads and paint scrapings placed Lewis' car at the scene of a murder for which he was eventually convicted. Having driven his car to a public parking lot, Lewis was arrested pursuant to an arrest warrant issued earlier that day. Although police suspected the car of being an instrumentality of the crime, they did not obtain a warrant to search the car. Nevertheless, Lewis' attorney released the car keys and a parking lot claim check to the police "to avoid a physical confrontation." The car was moved to a police impoundment lot and examined by a technician from the Bureau of Criminal Investigation.

Without concluding that a search had actually occurred, the Court offered the Chambers-Carroll doctrine of constructive exigency-continuing justification for the warrantless search. To the argument that probable cause had existed for some time and could not excuse failure to secure a warrant, the Court stated:

Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest . . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

The very nature of exigency is, of course, that it may arise at any time, but it is difficult to imagine what in the current situation necessitated prompt police action. Despite the court's suggestion that Lewis' arrest increased the "incentive and potential for the car's removal," it does not appear at all likely that the automo-

41. Id. at 201, 501 P.2d at 1151, 104 Cal. Rptr. at 431 (quoting People v. McKinnan, 7 Cal. 3d 899, 907, 500 P.2d 1097, 1103, 103 Cal. Rptr. 897, 903 (1972)).
42. 8 Cal. 3d at 202, 501 P.2d at 1151, 104 Cal. Rptr. at 431.
44. An automobile similar to the defendant's had been observed at the scene of the crime. The car's color was similar to the color of paint scraped from the victim's car. Lewis had had body work done on his car on the day after the crime. Id. at 586-87.
45. Id. at 595.
46. Id. at 595-96 (citation and footnote omitted).
47. Id. at 595.
bile was about to vanish. Body work had already been done on the automobile, and although Lewis had known that he was a suspect, he made no attempt to conceal the automobile or to avoid the police interview. If, then, no exigency existed to justify an on-the-scene examination, a subsequent examination cannot be justified without additional grounds. The ultimate conclusion is inescapable: the Carroll-Chambers rule should not have been applied in Cardwell.

The California Supreme Court appears to have gone beyond the pretexts of both constructive exigency and continuing justification with its decision in People v. Hill.\textsuperscript{48} The facts in Hill involved an automobile chase, a stop and arrest, a warrantless search at the scene of the arrest on suspicion of robbery and narcotics violation, and impoundment of the automobile at the police garage. Evidence collected along the route of the chase and unconnected with the original detention raised the possibility that the suspects were involved in a murder. The next morning the automobile was searched further at the police garage without a warrant. The defendants appealed from murder convictions, contending that the trial court had erred in admitting evidence obtained from the searches.

The court upheld the various stages of the search on the grounds that: (1) contraband had been discovered in plain view at the time of the stop;\textsuperscript{49} (2) the legitimate precautionary pat-down for weapons revealed items that could reasonably have been suspected of being weapons;\textsuperscript{50} (3) the plain view observation of a kilo of marijuana provided probable cause to believe the car was transporting contraband and, under Carroll, justified the warrantless search of the interior of the auto on the scene;\textsuperscript{51} (4) "after the defendants' valid arrests, the officers properly impounded their automobile and removed it to a garage for safekeeping;"\textsuperscript{52} and (5) because probable cause to believe the vehicle contained evidence of a crime justified a warrantless search on the highway, a subsequent warrantless search at the garage was justified by the continuing probable cause theory of Chambers.\textsuperscript{53} The court was not daunted

\textsuperscript{48} Id. at 748, 528 P.2d at 11, 117 Cal. Rptr. 393 (1974).  
\textsuperscript{49} Id. at 748, 528 P.2d at 14, 117 Cal. Rptr. at 406.  
\textsuperscript{50} Id. at 744-47, 528 P.2d at 12-14, 117 Cal. Rptr. at 404-06.  
\textsuperscript{51} Id. at 747-48, 528 P.2d at 14-15, 117 Cal. Rptr. at 406-07.  
\textsuperscript{52} Id. at 749-50, 528 P.2d at 15-16, 117 Cal. Rptr. at 407-08.  
\textsuperscript{53} Id. at 749-52, 528 P.2d at 16-17, 117 Cal. Rptr. at 408-09.
by the recognition that:

the objective in conducting the [post-impoundment] search was most likely unrelated to the offenses for which defendants had been arrested or which resulted in the impounding of the vehicle. This does not, however, render the search constitutionally defective. Whatever their primary motivations the police were authorized to conduct an intensive warrantless search of the entire automobile for evidence related to the marijuana charges. No purpose would be subserved by requiring that when officers are authorized to conduct a warrantless vehicular search for particular evidence they must nevertheless obtain a warrant directing the seizure of evidence which may relate to "other crimes."^54

The court's own characterization of its holding is truly astonishing:

This rationale does not turn on whether the probable cause to search arose before or after the automobile is impounded. Rather, it is only necessary that there be probable cause to search at the time the vehicle is searched.\textsuperscript{55}

As the cases have demonstrated, the requirement of probable cause is fulfilled when officers believe the automobile is an instrumentality connected with criminal activity or a container of incriminating evidence. Facts of probable cause may develop in advance of the officer's encounter with the automobile, may arise unexpectedly at the moment of the encounter, or may occur on the scene through a process of elimination—that is, if officers fail to make the expected discoveries at locations designated in a warrant, they may be permitted to view the car as a likely possibility.

Where probable cause and exigency do not coexist or do not exist at all, warrantless searches have been justified in a number of inventive fashions; the courts have contrived the concept of "continuing probable cause" to justify a search that officers failed to conduct at the scene. If, however, probable cause has dissipated by the time the police conduct the intrusion, that circumstance need not impede a warrantless search. The court may allow subsequent events, unknown and unexpected at the time of the original encounter and arising after the impounding, to satisfy the requirement for the continuing probable cause.

\textsuperscript{54} Id. at 752, 528 P.2d at 17, 117 Cal. Rptr. at 409.
\textsuperscript{55} Id. at 753, 528 P.2d at 18, 117 Cal. Rptr. at 410 (footnote omitted).
Automobile as Object of Scientific Examination

An automobile may become the object of scientific examination if it has been used as an instrumentality of crime, such as the weapon in a homicide, or the scene of a kidnapping. Thus, paint scrapings may be analyzed, blood samples studied, or tire treads compared.

The development of the concept of an automobile as an object or item of evidence requiring scientific examination began with the California case of *People v. Talbot.* The defendant in *Talbot,* a murder suspect, was arrested in his house, and his car was examined on the street where it had been parked. Blood was found on the car’s exterior, and the automobile was sealed, impounded, and searched without a warrant. The defendant was subsequently convicted of first degree murder. On appeal the defendant challenged the admission of the evidence, contending that removal of the car from the scene and the subsequent search of the trunk and seizure of the items within it were unlawful.

The California Supreme Court sustained the search without mention of a warrant, finding it sufficient that the authorities had engaged in “a reasonable search”: “Under the circumstances, the sealing of the trunk was the initial step taken in the process of the scientific investigation, and the actions of the authorities with reference to the automobile were proper.”

Three years later in *People v. Teale,* the court elaborated on the rationale of *Talbot* and articulated the “itself evidence” rule. The defendant in *Teale,* suspected of homicide, was arrested in New Orleans on November 2, 1962, by FBI agents as he was entering his automobile. A pistol found on his person and the automobile were seized. The car was stored for three days until California officers claimed the car from the FBI garage. The car was sealed and shipped by rail to California; it arrived on November 12, ten days and 1200 miles from the arrest. Teale was confined in San Joaquin County Jail and subsequently convicted of robbery and murder on the basis of evidence resulting from a “scientific examination” of the car, showing that it had been at the scene of the crime. No search warrant had ever been obtained.

56. 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966).
57. Id. at 708-09, 414 P.2d at 645, 51 Cal. Rptr. at 428-29.
59. Id. at 508, 450 P.2d at 540, 75 Cal. Rptr. at 178. The evidence included a showing
Starting with the assertion that "scientific examination constituted neither a search nor a seizure within the meaning of the Fourth Amendment," the court's analysis, upholding the admission of the evidence, continues:

[T]wo objects in the defendant's possession and control were seized and taken from him when he was arrested. The first was a .32 caliber automatic pistol . . . . The second was the automobile itself . . . . Clearly the seizure of both of these objects was incidental to the arrest of defendant. Both were seized as evidence connecting defendant with the alleged crimes. Both could have been introduced at trial as evidence.\textsuperscript{61}

The court states categorically:

We can conceive of no reason why a distinction should be drawn between these two evidentiary objects on the basis that one is an automobile . . . . [O]bjects properly seized [may be subject] to scientific testing and examination . . . . [D]efendant cannot reasonably contend that such testing and examination was in derogation of his Fourth Amendment rights . . . .\textsuperscript{62}

The argument blunts the essential character of an automobile as a place rather than as an object. Furthermore, although the court does acknowledge the theoretical distinction between the seizure of a car which is itself evidence of a crime and one which is a container of evidence,\textsuperscript{63} it proceeds to allow without comment or explanation the seizure of articles contained within the car.\textsuperscript{64}

Concluding that the seizure of an object as incident to an arrest in the reasonable belief that the object is itself evidence of the crime for which the arrest is made makes a subsequent examination to determine the object's evidentiary value something other than or less than a search,\textsuperscript{65} the court denies that its holding that blood of the victim's type was found splattered on the automobile's interior and on a man's jacket and shirt. Fibers on the victim's shoes matched the fibers from the car's floor mats. Traces of red paint taken from the car's floor mat also were found on the victim's shoes.

\textsuperscript{60} Id. at 507, 450 P.2d at 570, 75 Cal. Rptr. at 178.

\textsuperscript{61} Id. at 507-08, 450 P.2d at 570, 75 Cal. Rptr. at 178 (emphasis in the original).

\textsuperscript{62} Id. at 508, 450 P.2d at 570, 75 Cal. Rptr. at 178.

\textsuperscript{63} Id. (citing People v. Webb, 66 Cal. 2d 107, 123-24 n.3, 424 P.2d 342, 353, 56 Cal. Rptr. 902, 913 (1967)).

\textsuperscript{64} 70 Cal. 2d at 512-13 n.13, 450 P.2d at 573, 75 Cal. Rptr. at 181.

\textsuperscript{65} Id. at 511, 450 P.2d at 572, 75 Cal. Rptr. at 180. Traditionally, articles seizable pursuant to a warrant were limited to weapons, contraband, fruits, and instrumentalities. "Mere evidence" was exempt from seizure even with a warrant. Gouled v. United States, 255 U.S. 298 (1921). Although the distinction has been disavowed by Warden v. Hayden, 387 U.S. 294 (1967), it seems curious that the very characteristic that made an item unreachable
"evolves from novel principles," but offers the alternative observation that "even if the scientific examination undertaken on November 12, 1962, is considered a 'search' within the meaning of the Fourth Amendment, that search was clearly reasonable in light of the totality of circumstances as a 'continuation of the search lawfully begun at the time and place of the arrest.'" 67

Teale principles, emphasizing necessity, convenience, and practical considerations, embellish Talbot's deference to good police work. The court's conclusion that "scientific examination in California was a proper continuation of the search undertaken incidental to defendant's arrest," 68 offers little satisfaction. The essential question remains: what precisely is the justification for conducting a "reasonable search" without obtaining the prior authorization of a warrant?

In considering the admissibility of evidence resulting from a scientific examination of vacuum sweepings from an automobile, the United States Supreme Court in Coolidge v. New Hampshire 69 concluded that the seizure of the automobile from the driveway of the house where the defendant was arrested and the subsequent examination of it, both without proper warrants, were illegal intrusions. 70 Although a warrant had been issued, the search was ruled warrantless because the issuer was not a neutral and detached magistrate 71 but the Attorney General in charge of the investigation who later served as chief prosecutor. The Court concluded that "the search [stood] on no firmer ground than if there had been no warrant at all." 72

Rejecting the prosecution's additional rationales, the Court found first that the search was not incident to the arrest because it was not contemporaneous with the arrest. 73 Nor, since the car was immobilized, did the Carroll-Chambers theory of delayed search-by warrant is precisely the characteristic that, under Teale, permits a warrantless seizure.

66. 70 Cal. 2d at 508, 450 P.2d at 570, 75 Cal. Rptr. at 178.
67. Id. at 512, 450 P.2d at 573, 75 Cal. Rptr. at 181.
68. Id. at 513, 450 P.2d at 574, 75 Cal. Rptr. at 182.
69. 403 U.S. 443 (1971).
70. Id. at 484.
72. 403 U.S. at 453.
73. Id. at 456-57.
fleeting target apply. The third theory presented by the Government was that because the police were legitimately present on Coolidge’s property to make an arrest and the car was an instrumentality of the crime in plain view it was, therefore, seizable without a warrant. A plurality of the Court held that the officers’ legitimate presence did not necessarily justify the warrantless seizure, for “plain view alone is never enough to justify the warrantless seizure of evidence.” To satisfy the plain view doctrine, the plurality required not only that the article be immediately identifiable as evidence of the crime, but that its discovery be inadvertent, a factor not present in Coolidge.

The Coolidge requirement of inadvertence has stirred controversy. Justice White found it untenable, stating: “Officers secure a warrant to search a house for a rifle . . . . [T]hey discover two photographs of the murder victim, both in plain sight in the bedroom . . . . The discovery of one photograph was inadvertent but finding the other was anticipated. The Court would permit the seizure of only one of the photographs.” That, of course, is precisely the point. When officers legitimately present at a designated place observe an object that is identifiable as fruits, contraband, instrumentalities or evidence, they are not expected to ignore that object or to delay the seizure. The reason is that they did not expect to find it. Therefore, they had no probable cause to secure a warrant.

When the analysis in Coolidge is tracked over its lengthy, wandering course, and then stripped of its pretensions, the case stands exposed, a proponent of the basic rule that Justice White described with such clarity. Inadvertence is simply the interface of probable cause, “[a]nd no amount of probable cause can justify a warrantless seizure.” Indeed, the more probable the cause, the less justification for dispensing with the warrant.

In a case presenting facts similar to Coolidge, the California
Supreme Court dismissed the necessity for inadvertence in a plain view seizure and upheld the admission of evidence from a scientific examination of the automobile. *North v. Superior Court*[^80] involved wheelspan measurements and tire impressions that placed the defendant's automobile at the scene of a kidnapping. Conceding that the car could not have been searched incident to North's arrest inside his apartment, the court relied on the "itself evidence" rule and characterized the event as "the seizure of evidence in plain sight of arresting officers and therefore, after *Teale*, not limited to those objects within the immediate reach of the person arrested."[^81]

The car was, indeed, parked on a public street but its discovery was not inadvertent. The court, admitting this, disposed of the *Coolidge* limitation as a plurality opinion signed by only four members of the Court.

Justice Sullivan, author of the *Teale* opinion, protested that: the majority erroneously rely upon our decision in *People v. Teale* . . . . Crucial to our holding in *Teale* was the fact that the automobile . . . was seized *incident to the lawful arrest* of the defendant, who was placed under arrest while in the act of entering it . . . . That the automobile was in plain view when the defendant in *Teale* was arrested never became relevant to our determination . . . .[^82]

The court quite correctly characterized the North car as "the very instrumentality used to commit the kidnapping."[^83] As an instrumentality in a kidnapping, rather than an instrumentality in armed robbery, vehicular manslaughter, or auto theft, the car as a means of transportation becomes the scene of the crime and the "itself evidence" rule is thus expanded beyond the *Teale* limitation on the warrantless search of the car as evidence and not as container. As scene, situs, or place, the car used in a kidnapping will be evidence precisely because it is a container. Rather than being seized as evidence to be examined, it will be searched as a dwelling is searched, for objects to be seized.

In *Cardwell v. Lewis*[^84] the intrusion occurred not with the search, but with the seizure. The function of the automobile as

[^80]: 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).
[^81]: Id. at 306, 502 P.2d at 1308, 104 Cal. Rptr. at 836.
[^82]: 8 Cal. 3d at 314-15, 502 P.2d at 1313, 104 Cal. Rptr. at 841 (Sullivan, J., dissenting).
[^83]: Id. at 306, 502 P.2d at 1307, 104 Cal. Rptr. 835.
murder weapon operated to limit the search because the police, treating Lewis' car as an object rather than a place, examined only the exterior—an examination no more intrusive than an officer's observation from the apartment parking lot of a narcotics transaction through the open window of a first floor apartment, the illumination by flashlight of contraband on the floor of a car, or the inspection of garbage commingled in a common can. In such cases, privacy expectations have not been demonstrated and it is therefore unnecessary to characterize the observations as a search. If, then, the examination of Lewis' car at the parking lot was not a search, nothing occurred to convert it into a search at the impound lot. The serious question is not the authority for the search but the authority for the seizure that occurred when the car was towed from the parking lot where Lewis had left it.

The dissenting Justices did not hesitate to find that there was a seizure under the fourth and fourteenth amendments. The majority's explanation for towing the car—that "the seizure facilitated the type of close examination necessary"—is inadequate. No particular police action is justified because it facilitates some other action deemed necessary. Such reasoning invokes the blanket excuse of "standard police procedure" to justify all police conduct and misconduct.

85. See Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969).
86. See Marshall v. United States, 422 F.2d 185 (5th Cir. 1970).
87. See, e.g., United States v. Dzialak, 441 F.2d 212 (2d Cir. 1971).
89. Id. at 595.
90. But see Grano, Foreward—Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement, 69 J. Crim. L.C. & P.S. 425 (Winter 1978). Professor Grano theorizes that "[s]eizures as such only affect possessory property interests; they affect privacy interests only when their purpose is a subsequent search." Id. at 461. The distinction, however, has only the appearance of usefulness. To characterize Lewis interest in his car as property rather than privacy does not dispose of the fourth amendment guarantee of his right to be secure in his person, house, papers, and effects against unreasonable search and seizure. Professor Grano's citation of G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), for the proposition that "[w]hen possessory interests are at stake, the Court has not normally required warrant protection" appears to be incorrect. G.M. Leasing involved the warrantless seizure of several automobiles from public streets, parking lots and other "open places" in partial satisfaction of a tax assessment—that is, of a legitimate claim. G.M. Leasing's reliance on the holding in Murray's v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), that the seizure of a debtor's land through a transfer of title did not require a warrant because it did not involve an invasion of privacy suggests that G.M. Leasing may involve no right at all—neither a privacy right nor a possessory right. It can hardly be suggested that Lewis had no interest, protectible in some fashion, in the automobile the police
Furthermore, unlike the usual case, the police did not take custody of the Lewis car merely for safekeeping. Although Lewis had been arrested, the car could have been released to Lewis' wife or attorney. Such a release, however, is precisely the action the police resisted; their acquisition of the car keys and parking lot checks appears to have been rather forceful. The police obviously intended to examine the car. It is that intention which makes it imperative that police present their reasons to a magistrate for an independent evaluation. Lewis presents the rare case where the intrusion occurs not with the search, but with the seizure. The search may not require a warrant; the seizure should.

Other problems remain. To justify a warrantless search on the grounds that the car is "itself evidence" of the crime invites warrantless intrusions into the car as container. That is what happened in People v. Rogers. Late at night the defendant responded to a knock on the door of his van by a police officer. He was recognized by the officer as the white male who, according to a radio report, had attempted to molest two young males in a nearby shopping plaza. Flashing his light into the van, the officer saw on the floor some photographs of naked young boys. Perceiving that the snapshots' background matched the "highly distinctive decor of the van," the officer promptly guessed that the pictures were taken in the van, and the van became "itself evidence."

When the defendant admitted on questioning that he had talked to some boys at the shopping plaza that afternoon, the officer arrested him for contributing to the delinquency of a minor, debauchery, and exposing obscene materials to minors. The defendant then retreated into the van to put on his trousers, and the officer, concerned that the defendant might have a weapon handy, followed. Once inside, the officer observed pornographic magazines and materials and a Polaroid camera. He seized the snapshots with the defendant's consent, and searched the van. The defendant then was taken to the police station and booked, and the van taken to the police garage. At that point the police seized the magazines, paraphernalia, and a loaded revolver previously observed "in plain view in an open box."

91. 417 U.S. at 595.
92. 21 Cal. 3d 542, 579 P.2d 1048, 146 Cal. Rptr. 732 (1978).
93. Id. at 546, 579 P.2d at 1050, 146 Cal. Rptr. at 734.
94. Id.
Once in custody, the defendant consented in writing to a search of the van. This search yielded a letter connecting him to a case of child molestation in California. The defendant was ultimately prosecuted in California, and he challenged his convictions on grounds that they were based on evidence resulting from an unreasonable search and seizure in violation of the fourth amendment.

Unanimously affirming Rogers' conviction, the California Supreme Court held that the warrantless searches of the van, in which the photographs and the letter were seized, were justifiable. The observations of the photographs on the van floor when Rogers opened the door was "not a 'search' in the constitutional sense because they were in plain view and officer clearly had a right to be in the position to have that view." The subsequent warrantless search of the van the court noted, was justifiable on two grounds: first, that the defendant had consented to the search; and, second, that when officers, incidental to a lawful arrest, seize an automobile or other object in the reasonable belief that the object is itself evidence of the commission of the crime for which the arrest is made, any subsequent examination of the object for the purpose of determining its evidentiary value does not constitute a "search" as that term is used in the California and federal Constitutions . . . . In light of the evidence indicating that the pornographic snapshots were taken in the van and might depict the victims of the reported assaults, Officer Szatmary clearly had reason to believe that the van was itself evidence of the crimes for which defendant had been arrested.

95. Id. at 549, 579 P.2d at 1052, 146 Cal. Rptr. at 736. Although the point is not examined, it should be noted that the legitimacy of the seizure of an object in "plain view" is dependent on the legitimacy of the officer's presence. If the officer has no right to be present, he or she cannot seize what is discovered, however plainly the object may appear in view.

96. Id. at 549-50, 579 P.2d at 1053, 146 Cal. Rptr. at 737 (citing North and Teale). Rogers does not acknowledge the supreme court's retreat from Teale. In Guidi v. Superior Court, 10 Cal. 3d 1, 513 P.2d 908, 109 Cal. Rptr. 684 (1973), the court stated that "we manifestly still adhere to the result reached in Teale. Nevertheless . . . we have since Teale departed from the rationale expressed therein for upholding the inspection in that case of an object lawfully seized as evidence. . . . Thus the inspection of the vehicle in Teale was justifiable not because it fell outside the Fourth Amendment, but because that inspection, although a 'search,' was consistent with the reasonableness required by the Fourth Amendment." Id. at 18-19 n.19, 513 P.2d at 920, 109 Cal. Rptr. at 696-97 (citations omitted). Guidi ignores the warrant clause. "The seizure of the vehicle [in Teale] was premised on the reasonable supposition that it had been the site of a homicide. The only way to verify this
To concede the legitimacy of the seizure and viewing of the snapshots and the reasonableness and truthfulness of the officer’s conclusion that, under the circumstances, the van was “itself evidence” does not terminate the inquiry. To state the word “automobile” as the court does, almost parenthetically, and then to characterize it as an object in order to justify its examination as evidence, diminishes the significance of the automobile as a place. To proceed to the assertion that an examination of an automobile is not a search does not alter the conclusion that the “search” of a place “as that term is used in the California and federal Constitutions” cannot be other than a search even if it is called an examination. Furthermore, the court does not discuss the gap between the seizure of Rogers’ van as “itself evidence” and the seizure of the letters and photographs contained in the van. In no sense can the latter be justified as the result of an “examination” of the automobile. The conclusion in Rogers that the “itself evidence” rule permits the warrantless seizure of evidence from within a van merely because the van is movable is an overbroad extension of the rule. This interpretation permits the warrantless search of virtually any automobile connected with a crime in California, even when that automobile is used as a residence.

Where a court has found probable cause to believe that an automobile is “itself evidence” of a crime, it has contrived to extricate the search from fourth amendment proscriptions by characterizing it as a scientific examination rather than as a search. Once the car is seized and removed from the scene, the pretense of scientific examination is abandoned and the search is now called a “continuation of the search undertaken incidental to defendant’s supposition was to subject the vehicle to thorough examination by a criminalist.” Id.

97. 21 Cal. 3d at 549-50, 579 P.2d at 1053, 146 Cal. Rptr. at 737.
98. Although Rogers has been ignored by the California Supreme Court, it has made its mark on the court of appeal. In People v. Young, 85 Cal. App. 3d 594, 149 Cal. Rptr. 524 (1978), the defendant was arrested in an automobile bearing the license number of a getaway car used in a liquor store robbery. The car was impounded, and fingerprints of two other defendants were lifted from both inside and outside the car. Stating that the circumstances did not present a search incident to arrest, a probable cause search on exigency, or an inventory search, the court nevertheless found that “[s]eizing the black and white automobile as evidence incident to the arrest was certainly reasonable” under Teale. Id. at 601, 149 Cal. Rptr. at 528 (emphasis added). The court found that Teale had been “reaffirmed, followed and extended [in Rogers] to include a crucial incriminating letter seized from a suspect van without the requirement of a search warrant . . . by a unanimous Supreme Court.” Id. Young might have disposed of the matter more simply on the grounds that lifting fingerprints is not a seizure.
Unfortunately, the rule has resulted in contradictory directives: (1) the car may be examined only as “itself evidence”; the car, examined as evidence, may be searched as a container of evidence; (2) only the car’s exterior may be examined; the entire car, including the trunk, may be searched; (3) officers may not seize the car as evidence unless the seizure is incident to the suspect’s arrest; the seizure may be justified as a plain view observation of evidence and so may exceed the scope of an arrest-search; (4) probable cause will justify the seizure of the car as “itself evidence” if the car is in plain view; if however, probable cause to believe the car is evidence of criminal activity precedes the plain view observation, that circumstance may prohibit a warrantless seizure.

Caretaking Function of Police

As a means of transportation, the automobile travels the public highways, subjected to public scrutiny and governmental regulation. A natural consequence is that privacy expectations in an automobile are diminished. Nonetheless, permissible intrusions must be correspondingly minimal. In Harris v. United States,\(^{100}\) the defendant’s car was impounded, towed to the precinct garage, and searched, pursuant to a regulation of the District of Columbia police department requiring a search, inventory, and removal of valuables from all vehicles taken into custody.\(^ {101}\) The “search,” however, was nothing more than a “plain view” discovery.

The windows of the car were open and the door unlocked. It had begun to rain . . . .

The officer entered on the driver’s side, searched the car, and tied a property tag on the steering wheel. Stepping out of the car, he rolled up an open window on one of the back doors. Proceeding to the front door on the passenger side, the officer opened the door in order to secure the window and door. He then saw the registration card, which lay face up on the metal stripping over which the door closes.\(^ {102}\)

The Court held that the discovery of the card was not the result of a search “but of a measure taken to protect the car while it was in police custody . . . . Once the door had lawfully been
opened, the registration card, with the name of the robbery victim on it, was plainly visible.\textsuperscript{103}

\textit{Harris} was the first case to rely on the theory of police-care-taker safeguarding the car to justify the seizure of evidence from the automobile. The decision is a narrow one. It does not address the validity of a search authorized by the police regulation. It simply restates the traditional plain view doctrine: the officer was lawfully present at the designated place; his view of the evidence therefore was “plain” and the seizure justified.

In \textit{Cooper v. California},\textsuperscript{104} the defendant’s car was seized pursuant to a statute that vehicles used in the commission of narcotics offenses be held as evidence pending the outcome of forfeiture proceedings.\textsuperscript{105} One week later, a warrantless search produced evidence resulting in Cooper’s conviction.

The United States Supreme Court reasoned that the search in \textit{Cooper} was permissible because the agents, having acquired lawful custody of the car had, by that event, also acquired the right to search it.

[T]he officers seized petitioner’s car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car . . . was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained.\textsuperscript{106}

Perceiving the implication of \textit{Preston v. United States}\textsuperscript{107} and attempting to distinguish that case, the Court offers a \textit{non sequitur}: “the fact that the police had custody of Preston’s car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car.”\textsuperscript{108}

Whatever its relationship to Preston’s offense, police custody

\textsuperscript{103} \textit{Id.} at 236.

\textsuperscript{104} 386 U.S. 58 (1967).

\textsuperscript{105} \textit{Id.} at 60.

\textsuperscript{106} \textit{Id.} at 61.

\textsuperscript{107} 376 U.S. 364 (1964). In \textit{Preston}, the petitioners and two companions who had been seated in a parked car were arrested for vagrancy and searched for weapons. The car was taken to the police garage. It was subsequently searched leading to the discovery of various articles which later were used as evidence in the petitioner’s trial. The Court held that the evidence seized was inadmissible because, being too remote in time or place to be treated as incidental to arrest, it failed to meet the test of reasonableness under the fourth amendment. \textit{Id.} at 368.

\textsuperscript{108} 386 U.S. at 61.
of the automobile in that case was as lawful as if it had been authorized by statute. Indeed, it was necessary. Preston and his two associates had been arrested. There was no one to assume responsibility for the car and no alternative except an inappropriate one: to leave the car unprotected on a public street. Preston presents the familiar case where an arrest disables the car's owner and it becomes the police officer's duty to assume control as caretaker of the car. Whether or not the right to search attaches at that point is another matter.

The Cooper Court finds time significant:

The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time had no right, even for their own protection, to search it. Actually, the police did not know they would retain the Cooper car for four months, and they presumably would never know how long their custody would continue. In any event, Cooper's car was not searched for a week after it had been impounded. If the Court's concern is that the police, having assumed control of a motor vehicle, must take safekeeping measures to protect themselves from explosives, to protect the public from the intruder who makes off with weapons, or to protect the car's owner from theft, then cars in lawful police custody should not only be searched, they should be searched immediately. If that is the case, however, the warrantless search of all cars in lawful police custody would seem to be categorically justifiable without resort to any other precisely delineated theory.

In Cady v. Dombrowski, the defendant's disabled car was towed after an accident, and Dombrowski, a Chicago police officer, was formally arrested for drunk driving and taken to a hospital. A search of his person failed to disclose the service revolver which authorities believed was carried at all times by Chicago police. Despite police persistence, the revolver was never found. A warrantless search of the car's interior uncovered a blood-spattered

109. Id. at 61-62.
111. Some members of the Court believe precisely that. See Arkansas v. Sanders, 442 U.S. 753 (1979) (Blackmun, J., dissenting) (discussed in notes 135-37 & accompanying text infra). See also note 81 supra.
112. 413 U.S. 433 (1973).
flashlight. Still without warrant, the police continued their search into the trunk and recovered other blood-stained objects. Dombrowski subsequently was convicted of first degree murder.

Inquiring into the legitimacy of the initial warrantless search of the automobile, the United States Supreme Court endorsed the consensus that, although a warrantless search of homes and offices is per se unreasonable, automobiles present a different problem because they are extensively regulated by the state.\textsuperscript{113}

The Court's initial inquiry was whether the search of the car was unreasonable simply because the authorities had not obtained a warrant.\textsuperscript{114} Analogizing the car to an "abandoned" vehicle presenting a "nuisance" to the public,\textsuperscript{115} the Court developed the idea suggested in \textit{Harris} that the search was not a search at all but an exercise of the police caretaking function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."\textsuperscript{116} Specifically, "the search of the trunk to retrieve the revolver was 'standard procedure' . . . to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands."\textsuperscript{117}

Concluding that the absence of the warrant did not render the intrusion into the car unreasonable per se, the Court inquired whether the search met fourth amendment standards of reasonableness. The Court found that "[W]here, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals . . . the search was not 'unreasonable' within the meaning of the . . . [Fourth] Amendment."\textsuperscript{118}

The dissent remained unpersuaded. "The police knew what they were looking for and had ample opportunity to obtain a warrant."\textsuperscript{119} The possibility that the police did know what they were looking for, had ample opportunity to present their findings to a magistrate, and failed to do so lurks behind the Court's feeble explanation that "[a]lthough the trunk was locked, the car was left outside, [at a private garage] seven miles from the police station,

\textsuperscript{113.} \textit{Id.} at 440-41.
\textsuperscript{114.} \textit{Id.} at 442.
\textsuperscript{115.} \textit{Id.} at 447.
\textsuperscript{116.} \textit{Id.} at 441.
\textsuperscript{117.} \textit{Id.} at 443.
\textsuperscript{118.} \textit{Id.} at 448.
\textsuperscript{119.} \textit{Id.} at 453 (Brennan, J., dissenting).
and no guard was posted over it." If the dissent is correct, Cady is really a case of the "constable blundering." If the dissent is mistaken and the police did not know what they were looking for and had nothing approaching probable cause to present a magistrate, the blunder is even more egregious.

Confronted with the evidence seized from his automobile, Dombrowski asked for counsel. The appointed counsel subsequently reported the location of a body and another car at Dombrowski's brother's farm. A subsequent search, pursuant to warrant, resulted in the discovery of additional evidence prompting the Wisconsin Supreme Court to comment: "[W]e have seldom seen a stronger collection of [circumstantial] evidence assembled and presented by the prosecution."

It is difficult to determine whether the defendant would have been convicted had the Court declared the initial seizure illegal, thus casting doubt on the later discoveries. The Court's decision to view the police action not as part of a criminal investigation but as within the function of caretakers and protectors of the public deriving from "the extensive regulation of motor vehicles . . . and . . . the extent of police-citizen contact involving automobiles" conclusively foreclosed review on that basis.

In South Dakota v. Opperman, the defendant's automobile, illegally parked in downtown Vermillion, was ticketed twice in a single morning and then towed to the city impound lot pursuant to a local ordinance. The contents of the car were inventoried, and the discovery of marijuana in the unlocked glove compartment resulted in Opperman's conviction for possession of marijuana. The Supreme Court, affirming the conviction, upheld the seizure of the car and its contents on the grounds that the police had unquestioned authority to remove the vehicle from the street and that the inventory was a routine, reasonable, and necessary aspect of the police caretaking function, conducted strictly in accordance with police department regulations. "[The] procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; . . . the protection of the police against claims or disputes over lost or stolen property; . . .

120. Id. at 443.
122. Cady v. Dombrowski, 413 U.S. at 441.
and the protection of the police from potential danger."

The cases justifying automobile inventories by an officer-care-
taker rely on what appear to be eminently reasonable necessities. Benign as such action may seem, a serious threat is posed. The caretaking category of the "automobile exception" provides potentially limitless authority for the warrantless search of automobiles whether impounded as instrumentalities of crime or pursuant to motor vehicle regulations. Thus, intrusions in pursuit of evidence of criminal activity become permissible where the facts would not withstand probable cause analysis.

Automobile as Mere Coincidental Presence

In the course of the development of any theory, a point is reached at which the careful theoretician pauses to take stock and draws inward. The Court, in allowing the automobile exception to flourish, invited the inevitable retrenchment. A group of recent cases provided facts permitting the Court to recognize one exception to the automobile exception: when the search has nothing at all to do with the automobile except that one happens to be present.

In United States v. Chadwick, the defendant and his companions were arrested as they loaded a 200-pound footlocker into the trunk of Chadwick's car. Federal narcotics agents impounded the footlocker and removed it to the federal building where it remained in their exclusive custody. It was searched one and one-half hours later. The agents had not secured a warrant.

On review, the United States Supreme Court affirmed the trial court's suppression of the evidence found in the footlocker. The Court rejected the Government's argument: (1) that automobiles are movable effects, searchable without a warrant; (2) that movable items of personalty are analogous to automobiles; and (3) that movable items of personalty can be searched without a warrant.

Characterizing the automobile's primary function as transportation, the Court acknowledged a superior privacy interest in lug-

124. Id. at 369.
125. See note 134 infra.
127. Id. at 6.
128. Id. at 11-13.
gage, "intended as a repository of personal effects"¹²⁹ and thus failed to acknowledge the automobile's inevitable function as a repository.

The dissent dismissed the requirement of a warrant where property is seized incident to an arrest as a mere "formality,"¹³⁰ acknowledging only that a warrant would protect an "incremental" privacy interest¹³¹ in cases in which the defendant had been arrested in a public place.¹³² Urging a simplification of the constitutional law of criminal procedure to provide for warrantless searches of containers in all such instances, the dissent appraised Chadwick's privacy interest in objects in his possession as "incidental" and suggested that an arrest itself actually justifies further intrusions.¹³³

The suggestion raises alarming possibilities. It means that an officer having made an arrest is invested with virtually unlimited authority to conduct further intrusions. What is truly astonishing is that such a result is not at all astonishing to the dissent, which has simply engaged in the unexamined assumption that the police have authority to exercise unlimited power: "[P]olice may establish a routine procedure of inventorizing the contents of any container taken into custody, for reasons of security and property conservation."¹³⁴ This statement effectively disposes of all questions of probable cause, exigency, or scope of search incident to arrest. Indeed, it would totally dispose of the warrant requirement as it pertains to automobiles.

In Arkansas v. Sanders,¹³⁵ police officers allowed Sanders and his companion to carry their suitcase into a taxi and to leave the municipal airport before stopping the cab. The suitcase was found to contain a substantial quantity of marijuana. The United States Supreme Court properly rejected the argument that the suitcase could be searched without a warrant, simply because it had been lawfully removed from the cab, on the grounds that there is "no

¹²⁹. Id. at 13.
¹³⁰. Id. at 20 (Blackmun & Rehnquist, JJ., dissenting).
¹³¹. Id.
¹³². Id. at 20 n.1.
¹³³. Id. at 20. This might be characterized as the domino theory of warrantless intrusion. "[T]he State contends that the police entry to arrest [the defendant] was so great an invasion of his privacy that the additional intrusion caused by the search was constitutionally irrelevant." Mincey v. Arizona, 437 U.S. 385, 391 (1978).
¹³⁴. 433 U.S. at 21.
greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places."¹³⁶

Chief Justice Burger pointed out that the "relationship between the automobile and the contraband was purely coincidental."¹³⁷ Rational as that observation appears to be, it does not explain why the police may not open Sanders' suitcase without a warrant but do have the authority to grope under the dashboard of Chambers' automobile.

If Sanders and Chadwick are arrested standing outside the Greyhound bus station, the police, with probable cause to believe the suspects are in possession of contraband, may impound the suitcase and the footlocker. In the absence of exigent circumstances, however, the police must delay their search of the contents until they secure a warrant.¹³⁸ If Sanders and Chadwick load their suitcase and footlocker into the car that arrives to transport them to their destination and at that moment are arrested, the same result follows.

But consider the possibility that Sanders and Chadwick load the footlocker into the trunk. They place the suitcase on the back seat and are driven off. Police, following not far behind, deduce from their "furtive gestures" that Sanders and Chadwick have seen them. Five minutes elapse before the car is stopped, the trunk opened, and the footlocker and suitcase searched. The results are

¹³⁶ Id. at 764.
¹³⁷ Id. at 767.
¹³⁸ Recent circuit court decisions have followed the rule laid down in Chadwick and applied in Sanders that, absent exigent circumstances, a warrant must be obtained prior to a search of an arrestee's luggage once it comes under the exclusive control of the arresting officer. See United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978); United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978); United States v. Berry, 560 F.2d 861 (7th Cir. 1977); United States v. Soriano, 482 F.2d 469 (5th Cir. 1973). However, several circuit courts have upheld the warrantless search of luggage and other containers as incident to a valid arrest. See United States v. French, 545 F.2d 1021 (5th Cir. 1977); United States v. Eatherton, 519 F.2d 603 (1st Cir. 1975); United States v. Battle, 510 F.2d 776 (D.C. Cir. 1975); United States v. Kaye, 492 F.2d 744 (6th Cir. 1974); United States v. Frick, 490 F.2d 666 (5th Cir. 1973); United States v. Johnson, 467 F.2d 630 (2d Cir. 1972); United States v. Mehcz, 437 F.2d 145 (9th Cir. 1971). In the most recent case, United States v. Garcia, 605 F.2d 349 (7th Cir. 1979), the court upheld as incident to a lawful arrest and attended by exigent circumstances the warrantless search of the arrestee's suitcases under these unusual facts: agents at the airport saw Garcia approach carrying two suitcases. They stopped her for questioning as she stepped through the doorway. Garcia dropped the suitcases and the agents escorted her out of the flow of traffic. The officers then brought the suitcases from the spot where she had dropped them and opened them. The agents thus brought the suitcase within defendant's control.
unexpected: the footlocker contains bricks. The suitcase contains nothing at all. At this point a true exigency is created because no arrest can take place. Without some intervening reason, Chadwick and Sanders must be released. Can the police, with probable cause to believe the marijuana has been secreted somewhere in the car, tear out the back seat upholstery to look for the marijuana? The answer seems to be that these facts present no impediment to a prompt, warrantless search of the entire interior of the car. The alternative, after all, is that Sanders and Chadwick can be expected promptly to vanish.

Some proffered rationalizations are better than others. In People v. Minjares, police towed the getaway car from the scene of the stop and opened its trunk on the grounds that the second suspect was hiding there. After picking the trunk's lock, the officers removed a zippered tote bag which proved to contain evidence of the supermarket robbery.

The discovery of the evidence in the closed tote bag presented an issue that must logically be separated from the bag's location in the car. The California Supreme Court reasoned that: "[O]nce a closed container comes under an officer's exclusive authority, an immediate search is no longer necessary." The court also observed that: "the tote bag would not have been subject to a warrantless search if appellant had been arrested on the street and the bag taken from his possession [or if appellant had] been arrested in his home."

139. The ALI would permit the search of occupants if the search of the driver and the car does not produce the evidence expected: "Search of the Occupants. If the officer does not find the things subject to seizure by his search of the vehicle, and if (a) the things subject to seizure are of such a size and nature that they could be concealed on the person, and (b) the officer has reason to suspect that one or more of the occupants of the vehicle may have the things subject to seizure so concealed, the officer may search the suspected occupants: Provided, That this Subsection shall not apply to individuals traveling as passengers in a vehicle operating as a common carrier." ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.3(2).

If the Carroll rule is to be accepted at all, it seems both illogical and impracticable to exempt from search the occupants themselves. If there was probable cause to believe that they possessed something unlawful and if they were not in the vehicle, they would be liable to arrest on probable cause. The result should not be different if they are in a vehicle, assuming probable cause to believe that within the vehicle, whether in the trunk or in their pockets, seizable objects will be found. However, the Court has held to the contrary. See United States v. Di Re, 332 U.S. 581, 587 (1948).

141. Id. at 421, 591 P.2d at 521, 153 Cal. Rptr. at 231.
142. Id. at 419-20, 591 P.2d at 519, 153 Cal. Rptr. at 229. Given the broad ruling of
It is more than a mere detail, however, that the trunk of Minjares' car was forceably opened, and the question whether the result would have been different if the open trunk had revealed the evidence in the officer's "plain view" can hardly be avoided. If, as the officer who picked the lock actually testified at the initial suppression hearing, the tote bag had been open and the officer saw the jacket and gun butt protruding from the bag, would the court have acknowledged the legitimacy of the officer's presence? The court prompts that very question by referring to Chambers for the propositions that "when there is justification for a warrantless search of an automobile stopped on the highway, the search is not invalid if undertaken later at the police station" and that there is "no constitutional difference between immobilization of an automobile pending issuance of a search warrant and immediate search." 

The justification is invalid, however, unless there is exigency. Is exigency established under the facts of Minjares so as to allow the opening of the trunk? Assuming that the second suspect was hidden in the trunk, it would have been altogether reasonable, even imperative, for the officer to open the trunk immediately upon stopping the car. Since the officer did not do so but instead had the car towed, the exigency was not diminished but increased. 

Hill, the officers can hardly be faulted for failing to realize it was impermissible to open the tote bag. See notes 48-55 & accompanying text supra.

In People v. Tisdale, 94 Cal. App. 3d 437, 156 Cal. Rptr. 504 (1979), a getaway car, occupied by one of two men who had been observed at the scene of the crime, was stopped soon after the police received a report of the incident. An inventory of the car's interior "in search of registration and identification of [an at-large suspect or] another suspect" failed to disclose the desired information. Id. at 440, 156 Cal. Rptr. at 505. The officer, "[c]ontinuing the search for identity evidence . . . opened the car's trunk, where he found property subsequently identified as the fruits of another . . . burglary." Id. The court of appeal upheld the warrantless search, stating: "We hold that probable cause existed to believe the car was a crime instrumentality, that exigent circumstances existed . . . and that the suppression motion was properly denied." Id. at 444, 156 Cal. Rptr. at 507-08. The court found exigency in that "a first degree burglar was at large in a rural area, presumably on foot, and therefore within a small radius of the crime scene. These facts placed a priority on obtaining prompt identification and other leads by all reasonable, available means to effect a possible quick capture." Id. at 443, 156 Cal. Rptr. at 507. Nor did the court find that Minjares posed any impediment to its reliance on Hill and Laursen. "Minjares states that the belief that an automobile was used in the perpetration of a crime merely supplies the requisite probable cause to search the car. We construe this statement to refer, in context, to the entire car, not just the passenger compartment." Id. at 442, 156 Cal. Rptr. at 507.

143. 24 Cal. 3d at 416, 591 P.2d at 517, 153 Cal. Rptr. at 227.
144. Id. at 418, 591 P.2d at 518, 153 Cal. Rptr. at 228.
by the passage of time. The theory of continuing probable cause, developed in Chambers, would surely justify a speedy, warrantless search of the trunk at the garage. Indeed, had there been any further delay in discovering the second suspect in the trunk, it would have been appropriate to inquire into the validity of the officer’s justification.

In Minjares, the prosecution proposed an alternative justification, characterizing the search as within the “‘instrumentality’ exception”\(^{145}\) to the warrant requirement. The court summarily dismissed the idea as “inapplicable to the facts of this case.”\(^{146}\) “[T]o the extent that there is a separate ‘instrumentality’ exception,”\(^{147}\) it is, however, completely applicable to the car driven by Minjares. The automobile was used as the getaway car and, as such, it was “itself evidence” of the crime for which Minjares was arrested. The eyewitness description of the automobile and its license plate linked Minjares to the crime in precisely the same fashion as the description of the van with Georgia license plates linked Rogers to his crime.\(^{148}\) If Rogers allows the search of an envelope in a van because the van is “itself evidence,” that theory also allows the search of a tote bag in the trunk of a car that is “itself evidence.”

Although the court has not attempted to rationalize Rogers, California recognized the closed container exception to the automobile exception in People v. Dalton.\(^{149}\) The search in Dalton began as a traffic stop, but escalated when the officer observed knives in the driver’s belt and a gun wedged between the seats. After arresting the driver and the passenger, the officers, responding to a request by the passenger, pried open the trunk and found two boxes containing a sawed-off shotgun and drugs. The police also hammered the padlock off a large metal tool box and discovered more contraband.

Under Minjares, Sanders, and Chadwick the California Supreme Court recognized “a greater privacy interest in the contents of closed luggage than in the interior of an automobile.”\(^{150}\) It noted “that luggage, by its nature, may be more easily reduced to the

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145. Id. at 421, 591 P.2d at 520, 153 Cal. Rptr. at 230.
146. Id.
147. Id.
148. See notes 92-98 & accompanying text supra.
150. Id. at 856, 598 P.2d at 470, 157 Cal. Rptr. at 500.
control of police.” Therefore, a showing of exigency was required before a warrantless search on probable cause was justified. The court therefore found that a motion to suppress the evidence should have been granted.

Warrants are required only for the search of closed containers within the car—a footlocker, a closed suitcase, a zippered tote bag, or a metal tool box. On the other hand, the entire interior of the car, its trunk, and articles loosely held within any compartment may be subject to a warrantless search. If the degree of privacy expectation is in fact determinative, one may well inquire how the policy of acknowledging privacy expectations in a car is served by allowing the warrantless discovery of items concealed in the car out of the public view.

Proposal

There are those who think, “you are what you drive.” Those for whom the identification is less absolute nevertheless will acknowledge the automobile as an extension to some degree of self: expression of economic status, social class, age, sex, or degree of audacity. Whatever its more subtle implications, the automobile is more than a mere mode of transportation. At the very least, it also is a repository of personal effects. “Despite the wealth of language that privacy in automobiles is less important than in other areas, most members of our society must frequently use automobiles to convey undeniably private papers and effects. For example, the work load of this court often requires judges to take their work home.” Writers carry manuscripts, law professors carry cartons of anonymously numbered blue books, and, of course, criminals carry weapons, fruits, contraband, instrumentalities, and evidence.

The balance, therefore, cannot be tipped automatically in favor of the warrantless search. It remains necessary to determine when the seizure and search of an automobile can be accomplished

151. Id. at 856, 598 P.2d at 471, 157 Cal. Rptr. at 501.
without a warrant and when the event requires the judgment of a neutral, detached magistrate to be interposed between the police officer's sincere, well-intentioned assessment of probable cause and the intrusion on the citizen's privacy.

This Article began by acknowledging that the automobile's mobility created an exigency justifying warrantless searches: police officers with probable cause to search an automobile on the open highway must do so promptly or risk losing the "fleeting target." If, then, exigency justified an immediate search on the highway, there appeared to be no impediment to permitting officers to seize the car, transport it to the police garage, and conduct a delayed search.

The Carroll-Chambers rule, however, is not recognized by the guidelines proposed below. When officers stop a vehicle on probable cause to believe it is or contains evidence of a crime, that probable cause extends to the arrest of the driver for his or her connection with that crime. The seizure and search of the vehicle is therefore legitimate only to the extent that the intrusion is incident to the suspect's arrest. The event of the suspect's arrest immediately transforms the fleeting target into a target incapable of flight. This exposes the automobile exception as a device without rational basis. The automobile exception, initiated by Carroll, subsequently has failed to satisfy its own imperatives.

The following guidelines are intended to serve, without obliterating, the purpose of the warrant requirement—to preserve the protection provided by the warrant without reducing the issuance of the warrant to a pro forma event and without overburdening the police officer in the legitimate performance of his or her duties.

Intrusions Pursuant to Warrant

Seizure

When the officer has probable cause to believe a car is evidence of a crime that has been committed, the officer must secure a warrant before the car may be seized and transported to the police garage for subsequent examination. The scope of the subsequent examination must be limited to the exterior of the car, un-

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155. "[A] true adherence to the principle that arrest and search warrants are required whenever practicable . . . might conceivably turn the warrant procedure into even more of a mechanical routine." 2 W. LaFave, SEARCH & SEIZURE 6 (1978).
less the warrant authorizes a more extensive examination into the automobile's interior. Exigent circumstances may justify a warrantless seizure. The automobile's potential mobility shall not without other factors constitute a circumstance justifying a warrantless seizure.\footnote{156}

\section*{Search}

When the officer has probable cause to believe a car contains evidence of a crime, he or she must meet the standards set forth in the rules governing seizures. The requirement of a warrant does not proscribe a consent search of the vehicle. If the car has been left on a public street by escaping suspects, officers may, in their discretion, seize articles in plain view within it, \textit{provided} the discovery is inadvertent and the articles are readily identifiable as contraband, fruits, instrumentalities, or evidence of the crime that has been committed.\footnote{157}

\section*{Warrantless Intrusions}

\subsection*{Accompanying an Automobile Stop}

Where an officer makes a routine traffic stop or approaches a driver in an automobile, the officer may conduct a limited examination of the area within the driver's immediate control on the same justification that the officer could conduct a frisk of the driver's person—the possibility that the person is armed and dangerous.\footnote{158}

If the limited examination results in the discovery of fruits, contraband, or evidence of a crime, the rule for traffic stops resulting in arrests applies.\footnote{159} The scope of the search may only be extended on the authority of a warrant.\footnote{160}

\footnote{156. For example, if a car, described by a witness to a hit-and-run accident, has been traced to the suspect's address, officers can keep the location under surveillance until a warrant is secured. Should it appear that the suspect is about to depart in the vehicle, a warrantless seizure may be permissible.}

\footnote{157. The \textit{Laursen} intrusion into the trunk of the car is beyond the scope of such a search. See notes 40-42 & accompanying text supra.}

\footnote{158. The search in \textit{Wimberly} went beyond the area of the suspect's control.}

\footnote{159. See text accompanying notes 161-63 \textit{infra}.}

\footnote{160. Should the officers discover blood-stained clothing on the floor at the driver's seat, the confrontation will escalate, in all probability, to an arrest justifying a limited search. Any broader intrusion requires a warrant.}
An accompanying an Arrest

Where an officer stops a vehicle on probable cause to believe the driver has committed a criminal offense, the officer may make a limited search, incident to the arrest of the driver, of the driver's person and the area of the vehicle within his or her immediate control for items legitimately seizable: weapons, contraband, fruits, instrumentalities, or evidence. The scope of the search may extend to containers accessible to the driver.

The search must be conducted at the time and place of the arrest. The search is limited to items related to the crime for which the suspect has been arrested, and the scope of the search may not extend beyond the area which could contain the items to be seized. If the initial search reveals evidence of a crime unrelated to the crime for which the suspect has been arrested, the scope of the search may not be extended without a warrant. Closed containers within the vehicle may be opened and searched without a warrant only if there is probable cause to believe they contain seizable items connected with the crime for which the suspect has been arrested. Without probable cause to believe the containers contain such items, they may not be opened at all because in that event a warrant may not be secured.

Where officers find it inadvisable to search a vehicle at the

161. A search for the vehicle's registration should not lead the officers into a suitcase on the back seat of the car. See Preston v. United States, 376 U.S. 364 (1964).

162. Assume that the officer stops the suspect on probable cause to believe he or she had committed an armed robbery twenty minutes earlier. The suspect and the car fit the description given by the witness. The report indicated that a twenty inch television set had been taken. The officers may conduct a search incident to the arrest of the driver, the interior of the car, and the trunk, but the officer may not open a box the size of a small suitcase. If, however, the officer is looking for ski gloves worn by the suspect described by the witness, the suitcase may be opened.

If, however, the officer arrests the suspect driving his car two weeks after the robbery took place, the scope of the search will be limited to the suspect's immediate control on the grounds that the officer does not have probable cause to believe seizable items are being carried in the car. If the officer discovers a balloon of heroin on the floor under the driver's seat, that seizure does not extend the scope of an on-the-scene search. The appropriate procedure is to seize the car and secure a warrant.

Note that a rule restricting the search to areas that can physically contain the sought object informs the officer that he or she is expected to support his or her suspicions. This leads to drawing subtle distinctions that may become trivial. The definition of restrictions, however imperfect, is nonetheless a necessary limitation on the officer's authority to search the entire car.

The container distinction adopted by Chadwick, Sanders, and Minjares, is disapproved. See notes 126-48 & accompanying text supra.
place of an arrest, the vehicle may be seized and transported to the police garage without a warrant. No subsequent search may be conducted without a warrant unless there is specific probable cause to believe an immediate search is required.\textsuperscript{163}

**Inventories**

When, pursuant to regulations, an automobile is taken into police custody because it has been abandoned, has been the object of a theft, or is otherwise in need of caretaking, the police may conduct a limited inventory of objects within the interior of the vehicle.

Without specific reason to believe that the car contains valuable or dangerous objects, neither the trunk nor closed containers within the vehicle may be opened.\textsuperscript{164} Where the police do not know the identity of the car's owner, the glove compartment may be opened for information of ownership. The plain view doctrine will apply to all of the searches in this section. Objects discovered in plain view may result in the securing of a search warrant but will not extend the scope of the inventory.

**Conclusion**

The automobile can be an object, that is, an item of evidence requiring scientific examination. More often, it functions as a place, that is, a container for items of evidence. If it is an object, it may be “examined” as a weapon is examined, but any intrusion beyond its exterior becomes a search and transforms the automobile from object to place. It is imperative that the search of an automobile, warrantless or otherwise, must be justified, as the search of any area is justified, according to the rules controlling the search of any place for the seizure of objects contained within it.

\textsuperscript{163} The search in *Chambers* would require a warrant. See notes 35-38 & accompanying text *supra*.

\textsuperscript{164} *Opperman* authorizes an inventory search of excessive breadth. See note 123 & accompanying text *supra*.