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CONSTITUTIONAL LIMITATIONS ON AUTOMOBILE SEARCHES

*By Anthony Murray**

*Robert E. Aitken***

INTRODUCTION

Under what circumstances may incriminating evidence lawfully be obtained by police without a search warrant from an automobile and be used against an accused in California courts? This article attempts to answer that question.¹ The answer is as easy to state—the evidence may be used so long as it has not been obtained in an unreasonable search and seizure—as it is difficult to apply. The Fourth Amendment to the United States Constitution² and Article 1, Section 19³ of the California Constitution prohibit “unreasonable” searches and seizures. Since automobiles are personal “effects”⁴ they are entitled to Fourth Amendment protection.⁵ Auto searches, however, are governed by constitutional standards of reasonableness quite different from those used to test searches of dwelling houses, buildings and other places. The justification for the different treatment lies in the movability of the automobile. In general, it can be said that the rule of reasonableness does not require a police officer to obtain a warrant to search a car that may not be there when he returns. But in some California cases the application of a reasonableness test involving auto searches has not

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¹ We deal only with the constitutional reasonableness of a warrantless auto search or inspection. We do not discuss the lawfulness of an arrest to which a search may be related, probable cause to make an arrest, search or arrest warrants, or the circumstances that entitle an officer to detain, question and frisk a suspect. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968); *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963).

² “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.”

³ This Section of the California Constitution uses the identical language of the Fourth Amendment of the United States Constitution.

⁴ Comment, *Freedom of the Road: Public Safety v. Private Right*, 14 DE PAUL L. REV. 381 (1964); *Robinson v. State*, 197 Ind. 144, 149 N.E. 891 (1925).

⁵ *Carroll v. United States*, 267 U.S. 132 (1925).

produced uniformity.⁶ In this article we examine important recent developments in automobile search cases which have been decided by the United States Supreme Court and the California courts.

I. BACKGROUND

The Fourth Amendment proscription of unreasonable searches and seizures had its roots in the Eighteenth Century. In 1761 the use of Writs of Assistance, which empowered revenue officers to search homes and other places for smuggled goods, was attacked in Boston by James Otis. The Writs, he argued, placed "the liberty of every man in the hands of every petty officer."⁷ In the English Parliament, Sir William Pitt (the Elder) made his famous declaration of the inviolability of the home,⁸ and in 1765 Lord Camden, in *Entick v. Carrington*,⁹ enunciated a principle of English law which became part of the Bill of Rights, the basic protection of which has become imbedded in the concept of due process of law.¹⁰ The court there held unlawful the use of a general executive warrant to break into a citizen's home and search for evidence of a libelous utterance.¹¹

From this insistence upon the protection of the individual's sovereignty

⁶ Compare *People v. Simons*, 208 Cal. App. 2d 83, 25 Cal. Rptr. 57 (1962) with *Wirin v. Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

⁷ W. TUDOR, *LIFE OF JAMES OTIS* 66 (1823). See Justice Felix Frankfurter's discussion in *Frank v. Maryland*, 359 U.S. 360 (1959), which includes the declaration of John Adams:

Otis was a flame of fire; with a promptitude of classical allusions, a depth of research, a rapid summary of historical events and dates, a profusion of legal authorities, a prophetic glance of his eyes into futurity, and a rapid torrent of impetuous eloquence, he hurried away all before him. American Independence was then and there born. The seeds of patriots and heroes, to defend the *Non sine Diis animosus infans*; to defend the vigorous youth, were then and there sown. Every man of an immense crowded audience appeared to me to go away as I did, ready to take arms against Writs of Assistance. Then and there, was the first scene of the first act of opposition, to the arbitrary claims of Great Britain. Then and there, the child Independence was born. In fifteen years, i.e. in 1776, he grew up to manhood and declared himself free. *Id.* at 364 n.3.

⁸ The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement! 15 T. HANSARD, *PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, 1307 (1806-1820)*.

⁹ 19 Howell's State Trials, col. 1030 (1765).

¹⁰ *Id.* at 1074. Mr. Justice Frankfurter alluded to this principle in *Frank v. Maryland*, 359 U.S. 360, 363 (1959).

¹¹ 19 Howell's State Trials, col. 1030 (1765). Lord Camden declared:

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty. *Id.* at 1073.

over his own affairs came the command of the Fourth Amendment that in conducting searches and seizures the government must not act unreasonably. By proscribing unreasonable searches the Fourth Amendment did not bar the warrantless search. However, the warrantless search is regarded as an exception to the general rule that the "Fourth Amendment has interposed a magistrate between the citizen and the police."¹² Consequently, warrantless searches are unreasonable unless they fall within established exceptions to the general rule requiring a warrant.¹³

In 1914 the Supreme Court was first faced with the problem of the effect an unlawful search had upon the admissibility of the evidence seized. The Court held, in *Weeks v. United States*,¹⁴ that the use of evidence secured through an illegal search and seizure was barred by the Fourth Amendment in a federal prosecution.¹⁵ For forty-seven years, however, the rule applied to bar the use of illegally obtained evidence only in federal courts.¹⁶ *Wolf v. Colorado*¹⁷ held in 1949 that

¹² *Chimel v. California*, 395 U.S. 752, 761 (1969), quoting from *McDonald v. United States*, 335 U.S. 451, 455 (1948).

¹³ The most important exception is the search conducted incident to a lawful arrest. CAL. PEN. CODE § 836 (West Supp. 1968) authorizes an officer to make an arrest:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

Only arrests made pursuant to subsections 1 and 3 will support an incidental search. *People v. Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955). Subsection 2 permits an arrest of a person who has *in fact* committed a felony even though the arresting officer, at the time of arrest, *did not have reasonable cause* to believe the person had committed a felony. A search, however, must be reasonable and therefore cannot be made as an incident to an arrest not based on reasonable cause. A search incident to such an arrest "can be no more reasonable than the arrest itself." *People v. Brown, id.* at 644, 290 P.2d at 530.

Other exceptions to the general rule requiring a search warrant are the consent search, the border search, *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966), and the auto search based on reasonable cause to believe the car contains items subject to seizure, *Carroll v. United States*, 267 U.S. 132 (1925). The auto search exception is discussed in detail in section II *infra*.

¹⁴ 232 U.S. 383 (1914).

¹⁵ The *Weeks* ruling was not derived from the explicit requirements of the Fourth Amendment; rather, the decision was a matter of judicial implication. *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁶ Originally, the exclusionary rule embodied in *Weeks* applied only if federal agents were the guilty parties in procuring the evidence. If the evidence was illegally obtained by state officials or private parties and then turned over to the federal officers on a "silver platter" it could be used in a federal trial. But in *Elkins v. United States*, 364 U.S. 206 (1960), the Supreme Court rejected the "silver platter" doctrine. See C.H. PRITCHETT, *THE AMERICAN CONSTITUTION* 608 (2d ed. 1968).

¹⁷ 338 U.S. 25 (1949), overruled in *Mapp v. Ohio*, 367 U.S. 643 (1961).

freedom from unreasonable search and seizure is "implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause,"¹⁸ but the Court decided that the *Weeks* exclusionary rule was not embodied in the Fourteenth Amendment. Finally, in 1961, the Court in *Mapp v. Ohio*¹⁹ followed the lead of the California Supreme Court²⁰ and held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."²¹ From these decisions there emerged a constitutionally guarded "right of privacy".²²

Since the Fourth Amendment applies only to a "search", the first question is whether the evidence was obtained in a search in the constitutional sense. "[T]he term [search] implies some exploratory investigation or an invasion and quest, a looking for or seeking out. . . . A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way."²³ An officer's observation of evidence in plain sight from a place where he has a right to be does not constitute a search.²⁴

¹⁸ *Id.* at 27-28.

¹⁹ 367 U.S. 643 (1961).

²⁰ *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

²¹ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). In a later case, *Ker v. California*, 374 U.S. 23 (1963), the Court determined that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.

²² *Mapp v. Ohio*, 367 U.S. 643 (1961).

²³ *Bielicki v. Superior Court*, 57 Cal. 2d 602, 605, 371 P.2d 288, 289-90, 21 Cal. Rptr. 552, 553-54 (1962); *People v. West*, 144 Cal. App. 2d 214, 219, 300 P.2d 729, 733 (1956); *People v. Prochnau*, 251 Cal. App. 2d 22, 29-30 n.6, 59 Cal. Rptr. 265, 271 n.6 (1967).

²⁴ *Harris v. United States*, 390 U.S. 234 (1968) (registration card in plain sight on metal door stripping); *People v. Terry*, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964) (officers in apartment garage saw marijuana cigarette on car dash board); *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956) (bag containing narcotics on car seat); *People v. Tambini*, 275 Cal. App. 2d —, 80 Cal. Rptr. 179 (1969) (marijuana in plainly visible box in car; no attempt to distinguish visibility of container from contraband inside which was presumably not in plain sight); *People v. Cacioppo*, 264 Cal. App. 2d 392, 70 Cal. Rptr. 356 (1968) (flashlight revealed benzedrine pills on car floor); *People v. Schultz*, 263 Cal. App. 2d 110, 69 Cal. Rptr. 293 (1968) (marijuana seed on car floor); *People v. Sjosten*, 262 Cal. App. 2d 539, 68 Cal. Rptr. 832 (1968) (stolen record player visible in car); *People v. Harris*, 256 Cal. App. 2d 455, 63 Cal. Rptr. 849 (1967) (stolen phonograph tapes in plain view in car); *People v. Norman*, 252 Cal. App. 2d 381, 60 Cal. Rptr. 609 (1967) (stolen furs visible on back seat); *People v. Lozano*, 250 Cal. App. 2d 58, 58 Cal. Rptr. 102 (1967) (plainly visible burgled coins); *People v. Nieto*, 247 Cal. App. 2d 364, 55 Cal. Rptr. 546 (1966) (guns under front seat of car); *Mardis v. Superior Court*, 218 Cal. App. 2d 70, 32 Cal. Rptr. 263 (1963) (gun in open glove compartment); *People v. Beverly*, 200 Cal. App. 2d 119, 19 Cal. Rptr. 67 (1962) (stolen radiators on back seat); *People v. Russell*, 195

Similarly, evidence obtained in the course of making an inventory of an impounded car seized during an auto safety inspection,²⁵ found in an abandoned car,²⁶ or revealed in an examination of an auto which itself constitutes evidence of a crime,²⁷ may be seized and such inspections are not considered searches. We deal here with the most commonly encountered auto searches and inspections. We eliminate from the discussion special rules governing border searches,²⁸ searches made pursuant to the consent of a car owner or occupant,²⁹ the admission of evidence where the defendant failed to move to suppress the evidence before trial,³⁰ or to object to its introduction,³¹ and searches and seizures made by private citizens.³²

Cal. App. 2d 529, 16 Cal. Rptr. 9 (1961) (trunk lid flew open exposing stolen whiskey); *People v. Linden*, 185 Cal. App. 2d 752, 8 Cal. Rptr. 640 (1960) (flashlight revealed gun protruding from beneath two pillows in car); *People v. Wright*, 153 Cal. App. 2d 35, 313 P.2d 868 (1957) (clothing on back seat); *People v. Martin*, 140 Cal. App. 2d 387, 295 P.2d 33 (1956) (marijuana on defendant's shirt and in a sack held between his heels); *People v. Johnson*, 139 Cal. App. 2d 663, 294 P.2d 189 (1956) (marijuana cigarette seen on dashboard by officer sitting in defendant's car interrogating him).

"In plain sight" is to be distinguished from evidence "in plain smell." *People v. Marshall*, 69 Cal. 2d 51, 59, 442 P.2d 665, 670, 69 Cal. Rptr. 585, 590 (1968).

²⁵ The inventory and safety inspection rules are discussed under Section IV *infra*.

²⁶ *People v. Smith*, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966); see CAL. VEH. CODE § 22702 (West Supp. 1970).

²⁷ *People v. Teale*, 70 Cal. 2d —, 450 P.2d 564, 75 Cal. Rptr. 172 (1969) (blood stains in interior and fibers and paint flecks matching victim's shoes on car floor mat); *People v. Talbot*, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966) (blood stains on car); *People v. Norman*, 252 Cal. App. 2d 381, 60 Cal. Rptr. 609 (1967) (car examined to determine identity of occupants); *People v. Miller*, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966) (car in which deceased burned to death examined to determine cause of fire).

²⁸ *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966); compare *People v. Mendoza*, 251 Cal. App. 2d 835, 60 Cal. Rptr. 5 (1967) with *People v. Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956) (over dissent, search at Mexican border held not subject to border search rules).

²⁹ *People v. Martinez*, 259 Cal. App. 2d Supp. 943, 65 Cal. Rptr. 920 (1968); *People v. Dahlke*, 257 Cal. App. 2d 82, 64 Cal. Rptr. 599 (1967); *People v. Beverly*, 200 Cal. App. 2d 119, 19 Cal. Rptr. 67 (1962); *People v. Anushevitz*, 183 Cal. App. 2d 752, 6 Cal. Rptr. 785 (1960); *People v. Underhill*, 169 Cal. App. 2d 862, 338 P.2d 38 (1959); *People v. Hickens*, 165 Cal. App. 2d 364, 331 P.2d 796 (1958).

³⁰ CAL. PEN. CODE § 1538.5 (West Cum. Supp. 1968).

³¹ *People v. Green*, 257 Cal. App. 2d 240, 64 Cal. Rptr. 765 (1967); *People v. Barreto*, 256 Cal. App. 2d 392, 64 Cal. Rptr. 211 (1967).

³² *People v. Superior Court*, 70 Cal. 2d —, 449 P.2d 230, 74 Cal. Rptr. 294 (1969); *Stapleton v. Superior Court*, 70 Cal. 2d —, 447 P.2d 967, 73 Cal. Rptr. 575 (1968); *People v. Katzman*, 258 Cal. App. 2d 777, 66 Cal. Rptr. 319 (1968); *People v. Wright*, 245 Cal. App. 2d 265, 53 Cal. Rptr. 844 (1966); *People v. Randazzo*, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (1963).

II. CARROLL V. UNITED STATES:³³ THE REASONABLE CAUSE AUTO SEARCH

The auto search analysis begins with the fundamental principle that searches of autos must meet the Fourth Amendment test of reasonableness³⁴ and that searches conducted without warrants are unreasonable unless "those who seek exemption from the constitutional mandate [show] that the exigencies of the situation made that course imperative."³⁵ An important exception to this general rule is the search incident to a valid arrest.³⁶ Another exception has been recognized by the United States Supreme Court: *the reasonable cause auto search*. On September 29, 1921, two undercover prohibition agents arranged to buy liquor from Carroll and Kiro in a Grand Rapids, Michigan apartment. Carroll and Kiro left in an Oldsmobile to get the liquor somewhere east of Grand Rapids but did not return. On December 15, two and one-half months later, the agents saw the same Oldsmobile heading east from Grand Rapids. Carroll and Kiro were in the car. The agents stopped the car on the suspicion that it contained liquor. Under the Prohibition Act³⁷ a first possession of liquor offense was a misdemeanor. Since the agents only suspected but had not seen Carroll and Kiro in possession of liquor when they stopped the car, no misdemeanor had at that time been committed in their presence and they had no authority to arrest the suspects.³⁸ The agents nonetheless searched the car, found sixty-eight bottles of liquor and then arrested Carroll and Kiro.

Carroll presented a unique situation: a search of an automobile made without a warrant and not incident to a valid arrest. In an opinion by Chief Justice Taft, the Court rejected the defendants' contention that the search could be justified only if incidental to an arrest. The Court announced a new exception to the general rule that a search is unreasonable unless made pursuant to a search warrant. Analyzing the intended meaning of the Fourth Amendment, the Court lent great significance to a 1789 Act of Congress³⁹ regulating the collection of duties. The Act required a warrant for the search of a building to enforce payment of duties but permitted a search without a warrant of

³³ 267 U.S. 132 (1925).

³⁴ *Preston v. United States*, 376 U.S. 364, 366 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132, 156, 158-59 (1925).

³⁵ *Chimel v. California*, 395 U.S. 752, 761 (1969), quoting from *McDonald v. United States*, 335 U.S. 451, 456 (1948).

³⁶ E.g., CAL. PEN. CODE § 836 (West Cum. Supp. 1968).

³⁷ Act of Oct. 28, 1919, ch. 85, 41 Stat. 305 (repealed 1935).

³⁸ *But see* CAL. PEN. CODE § 836 (West Cum. Supp. 1968).

³⁹ Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (repealed 1790).

any ship or vessel which agents had reasonable cause to believe contained merchandise subject to duty. Thus Congress drew an important distinction between permanent buildings and movable vehicles. The Court observed:

Thus contemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods *in course of transportation* and concealed in a *movable vessel* where they readily could be put out of reach of a search warrant.⁴⁰ (emphasis added.)

The importance of the *Carroll* case, however, lies as much in what it did not hold as in the new exception it declared. The distinction, as to the necessity of obtaining a warrant, between vehicles and permanent structures relates not to all vehicles but to *movable* vehicles. The term "movable" as used in *Carroll*, has a special meaning. It is not a synonym of "mobile" or an antonym of "stationary" or "immobile". A vehicle is not movable in the *Carroll* sense merely because it floats, has wheels, or is *capable* of being moved. A vehicle is movable when there is someone at large who has the power and ability to move it before an officer can obtain a warrant. When an owner or other person with the right to control a vehicle is free to move it, the officer who reasonably suspects that the vehicle contains items subject to seizure need not obtain a warrant because it is "not practicable" to do so. *Carroll* made "practicability" the complement of "movability". In examining this vital point, the Court reasoned:

The guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not *practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought*.⁴¹ (emphasis added.)

The Court underscored its holding that practicability limits the right to search a movable vehicle without a warrant by cautioning that the rule "fulfills the guaranty of the Fourth Amendment. In cases where

⁴⁰ *Carroll v. United States*, 267 U.S. 132, 151 (1925).

⁴¹ *Id.* at 153. In *Chimel v. California*, 395 U.S. 752, 764 (1969), the Court affirmed the continued vitality of the practicability test by quoting *Carroll's* language cited here.

the securing of a warrant is *reasonably practicable*, it must be used"⁴² (emphasis added.) Having emphasized the narrow confines of the rule, the Court announced that:

The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest⁴³

The two essential conditions to the validity of the reasonable cause auto search under the *Carroll* exception are: 1) The officer must have reasonable cause to believe the auto contains items subject to seizure, and 2) the auto must be "movable" in the sense that the officer reasonably believes that it may be moved by someone who is free to do so and that it is therefore not "reasonably practicable" to secure a search warrant.⁴⁴

⁴² *Id.* at 156.

⁴³ *Id.* at 158-59. Rejecting the defendants' contention that the search was illegal because not incidental to an arrest, the Court said: "This is certainly a very unsatisfactory line of difference when the main object of the section is to *forfeit and suppress* the liquor, the arrest of the individual being only incidental as shown by the lightness of the penalty." *Id.* at 157-58 (emphasis added). This limitation of the holding to contraband goods, where the object of the search is to forfeit and suppress the goods and only incidentally to arrest, has neither been discussed nor followed in the California cases.

Carroll is a factually unfortunate case. The holding that the agents had reasonable cause to believe Carroll's car contained liquor, just because it was seen on a freeway leading east from Grand Rapids two and one half months after Carroll departed in that direction in the same car after promising to obtain liquor, is certainly questionable. Such reasoning gave the agents virtually unlimited authority to stop Carroll's car any time they discovered it eastbound from Grand Rapids to Detroit.

⁴⁴ The Supreme Court applied its *Carroll* rule in *Husty v. United States*, 282 U.S. 694 (1931) and *Brinegar v. United States*, 338 U.S. 160 (1949). In *Husty*, a prohibition officer had reliable information that Husty, a known bootlegger who had been twice convicted of Prohibition Act violations, had liquor in his car. The officer found the car, waited until Husty returned, searched the car which contained 18 cases of liquor, and then arrested Husty. In an opinion written by Justice Stone, the Court upheld the search under *Carroll*: "The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and the arrest for the transportation or possession need not precede the search." *Husty v. United States*, *supra* at 700.

In *Brinegar v. United States*, *supra*, officers parked near the Missouri-Oklahoma line saw Brinegar, a known bootlegger, drive by in a heavily-loaded car. The officers stopped and searched the car and found 13 cases of liquor. The Court held the search reasonable under *Carroll*. In a dissenting opinion, Justice Jackson, joined by Justices Frankfurter and Murphy, wrote: "I dissent because I regard it as an extension of the *Carroll* case, which already has been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion." *Id.* at 183.

Application of the *Carroll* exception by California courts can best be understood by a separate consideration of these questions.

A. *Did the officer have reasonable cause to believe the auto contained items subject to seizure?*

The first requirement of the *Carroll* exception is that the officers in fact have reasonable cause to believe the auto contains evidence that they properly may seize.⁴⁵ Several California cases have failed to pass this test. In *People v. Gale*,⁴⁶ defendant's car was stopped at a sheriff's check station at the Mexican border. An officer noticed apparently recent damage to the front of the car, ordered defendant out, searched the car, and found a narcotic under the front seat. The California Supreme Court rejected the Attorney General's argument that the front end damage gave the officer probable cause to believe the car had been involved in a hit and run,⁴⁷ and held the search unlawful because it was not based on reasonable cause to believe the car contained items subject to seizure. The court quoted from the *Carroll* case: "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and

⁴⁵ In *Henry v. United States*, 361 U.S. 98 (1959), F.B.I. agents stopped a car occupied by Henry and Pierotti whom the agents suspected were implicated in a theft of an interstate whiskey shipment. In the car the agents saw cartons bearing the "Admiral" label and addressed to an Ohio company. After an inquiry revealed that the cartons had been stolen, the agents formally arrested Henry and Pierotti. The Supreme Court held that the search could only be justified as an incident to a lawful arrest because when the agents stopped the car they did not have reasonable cause to believe it contained stolen property. Thus, the lack of reasonable cause eliminated the *Carroll* exception as justification for the search. The Court held that an arrest was complete when the car was stopped. Since at that time the agents did not have probable cause to believe the defendants had committed a felony, the search was not incidental to a valid arrest and the evidence was improperly seized. "[A]n arrest is not justified by what the subsequent search discloses." *Id.* at 104. The importance of *Henry* for present purposes is its clear holding that the warrantless search not incidental to an arrest is unlawful unless supported by reasonable cause leading the officers to believe that the car contains items subject to seizure. The Court said:

The fact that the suspects were in an automobile is not enough. *Carroll vs. United States* . . . liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause. *Id.* at 104.

See Comment, *Search and Seizure of an Automobile Incident to an Arrest for an Offense Other than a Traffic Violation*, 31 Mo. L. Rev. 436 (1966).

⁴⁶ 46 Cal. 2d 253, 294 P.2d 13 (1956).

⁴⁷ See CAL. VEH. CODE § 22655 (West Supp. 1970) which authorizes an officer to impound and inspect an auto which he has reasonable cause to believe has been involved in a hit-and-run accident.

indignity of such a search."⁴⁸

In *People v. Molarius*⁴⁹ the court condemned a search of a car that was stopped because the driver had made an illegal "U" turn.⁵⁰ *People v. Moray*⁵¹ involved an auto search that turned up marijuana where officers stopped defendant for a traffic violation. The court held that reasonable cause was not supplied by the officers' additional observation that defendant raised his shoulder as if to reach in his pocket, leaned toward the right hand seat, and appeared to make an effort to keep his head pointed ahead at that time.⁵² In *People v. Franklin*,⁵³ an officer stopped a car on February 10, 1966, solely because it had a 1965 Illinois license plate. He had previously been an Illinois police officer and knew that in Illinois and California the license renewal deadline was sometime in February. The occupants of the stopped car gave the officer permission to inspect the car for registration and the inspection yielded marijuana. The court held unlawful the "indiscriminate stopping"⁵⁴ on mere speculation that the registration had expired. The search that followed was therefore an unreasonable "fishing expedition"⁵⁵ not justified by reasonable cause.⁵⁶

⁴⁸ 46 Cal. 2d at 256, 294 P.2d at 15.

⁴⁹ 146 Cal. App. 2d 129, 303 P.2d 350 (1956).

⁵⁰ The court was not impressed with this asserted justification because the officers admitted that they advised defendants they were being arrested only for a traffic violation. Defendants were booked for vagrancy but were not charged with the illegal possession of burglary tools. *Id.* at 130, 303 P.2d at 351.

⁵¹ 222 Cal. App. 2d 743, 35 Cal. Rptr. 432 (1963).

⁵² *Id.* at 744, 35 Cal. Rptr. at 433.

⁵³ 261 Cal. App. 2d 703, 68 Cal. Rptr. 231 (1968).

⁵⁴ *Id.* at 707, 68 Cal. Rptr. at 234.

⁵⁵ *Id.*

⁵⁶ See *State v. Cuezze*, 249 S.W.2d 373 (1952); *Search and Seizure of an Automobile Incident to an Arrest for an Offense Other than a Traffic Violation*, *supra* note 45; 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 107-08 (1961); Note, *Constitutional Law—Search Incident to Arrest for Traffic Violation*, 6 WAYNE L. REV. 413 (1960); Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation*, 1959 WISC. L. REV. 347; Simeone, *Search and Seizure Incident to Traffic Violations*, 6 ST. LOUIS U.L.J. 506 (1961); Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone*, 7 ST. LOUIS U.L.J. 1 (1962); Note, *Search and Seizure Incident to Traffic Violations*, 4 WILLAMETTE L.J. 247 (1966).

Compare the above with the rules governing roadblock searches (discussed in Section IV. C. *infra*); see also *Wirin v. Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948) (indiscriminate auto and personal searches at blockades without reasonable cause); *People v. De La Torre*, 257 Cal. App. 2d 162, 64 Cal. Rptr. 804 (1967) (CAL. VEH. CODE § 2814 (West Supp. 1970) authorizing roadblock for purpose of conducting equipment safety checks held constitutional); *City of Miami v. Aronovitz*, 114 So. 2d 784 (Fla. 1959) (roadblock for purpose of inspecting drivers' licenses held reasonable); *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960), *rev'd on other grounds, sub nom.*, *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960) (check point established to stop

Many California cases approve of warrantless searches not accompanied by probable cause for arrest. In *People v. Martin*,⁵⁷ two men in a car parked at night on a lovers lane in Oakland fled when they saw a police car. When the officers pulled them over they saw that the two men had their hands on a bag on the seat. The bag contained narcotics. The California Supreme Court upheld the stop and search.

In *People v. Blodgett*,⁵⁸ officers ordered two people out of a cab that was double-parked in front of a hotel at 3:00 a.m. As one of the officers opened the rear door defendant withdrew his hand from behind the seat. The officers removed the seat and found marijuana cigarettes. The court held that the search was proper, not as incident to the cab driver's traffic violation, to which the search was unrelated, but because defendant's furtive gesture justified the officers' belief that he was hiding contraband. Thus the search was reasonable under the *Carroll* exception. Justice Carter vigorously dissented from the holdings in both *Martin* and *Blodgett*. In *Blodgett*, he said:

I cannot agree that the sight of a cab parked in front of a hotel in the early hours of the morning is sufficient to constitute reasonable cause for a police investigation . . . Just how it can be said that two people getting into a cab early in the morning is 'unusual conduct' is not entirely clear to me. I had thought that it was a frequent occurrence.⁵⁹

*People v. Simons*⁶⁰ is an unfortunate case. A highway patrolman made a radio check of a car that defendant had left at a service station for repairs but found that the car had not been reported stolen. The officer nevertheless inspected the car for a registration certificate. The certificate was taped on the top of the dashboard but the officer denied seeing it. In the back seat he found various non-incriminating items and testified that "because of" these items he continued his search. Still purporting to be looking for a registration slip, he opened a zipper shaving case in which he found several bottles of narcotic pills. Defendant was arrested when he arrived two days later to pick up his car. The court upheld the search as a reasonable inspection for registra-

cars coming from particular house where police suspected meeting of organized criminals was taking place held reasonable); Note, *Random Road Blocks and the Law of Search & Seizure*, 46 IOWA L. REV. 802 (1961); Note, *Constitutional Law—Use of Police Roadblock to Inspect Drivers' Licenses*, 6 WAYNE L. REV. 417 (1960).

⁵⁷ 46 Cal. 2d 106, 293 P.2d 52 (1956).

⁵⁸ 46 Cal. 2d 114, 293 P.2d 57 (1956).

⁵⁹ *Id.* at 118, 293 P.2d at 59.

⁶⁰ 208 Cal. App. 2d 83, 25 Cal. Rptr. 57 (1962).

tion.⁶¹ It is difficult to understand how the officer was reasonable in his asserted belief that a registration certificate might be found in a shaving case.⁶²

Genuinely suspicious circumstances may afford a reasonable basis for stopping and searching a car. The circumstance most frequently invoked as suspicious is the "furtive" gesture or conduct of a car occupant. Included among the various gestures classified as furtive are the "forward lean", which is said to reasonably lead an officer to believe that the suspect is trying to hide evidence under the seat or on the floor,⁶³ the "throwing motion",⁶⁴ flight from police officers,⁶⁵ and other conduct raising a suspicion that the suspect is trying to conceal or destroy evidence.⁶⁶ Other cases have viewed as suspicious circumstances giving rise to a right to search, the mere presence of a car in an unusual place or at an unusual time.⁶⁷ Similarly, the mere fact that a person evasively or untruthfully answered questions about his presence in a place has been held to give rise to the same right.⁶⁸

B. *Was the car "movable" so that it was not reasonably practicable for the officer to obtain a search warrant?*

As noted, the practicability of obtaining a warrant is the measure

⁶¹ CAL. VEH. CODE § 2805 (West 1954) permits an investigation to determine title and locate registration. The inspection for registration is discussed in Section IV. A. *infra*.

⁶² *But see* People v. Gil, 248 Cal. App. 2d 189, 56 Cal. Rptr. 88 (1967) (no reason to believe property to be inventoried would be under floor mat where marijuana cigarette was found). A car search may be unreasonably broad in scope either because the item sought is unlikely to be in the place searched or because it physically would not fit in such a place—the search for an "elephant in a glove compartment."

⁶³ People v. Wigginton, 254 Cal. App. 2d 321, 62 Cal. Rptr. 104 (1967) (defendant leaned forward after police car started following him); People v. Shapiro, 213 Cal. App. 2d 618, 28 Cal. Rptr. 907 (1963) (driver leaned forward and car wheel hit curb after police turned on red light); People v. Sanson, 156 Cal. App. 2d 250, 319 P.2d 422 (1957) (two front seat passengers appeared to be hiding something under seat).

⁶⁴ People v. Anders, 167 Cal. App. 2d 65, 333 P.2d 854 (1959) (defendant threw package containing marijuana cigarettes from car window).

⁶⁵ People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956); Perez v. Superior Court, 250 Cal. App. 2d 695, 58 Cal. Rptr. 635 (1967).

⁶⁶ People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956) (defendant withdrew hand from behind rear seat of cab where marijuana cigarettes found).

⁶⁷ People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956) (two people in double-parked cab at 3:00 a.m.); People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956) (two men parked at night on lovers' lane); People v. Beverly, 200 Cal. App. 2d 119, 19 Cal. Rptr. 67 (1962) (officers stopped car because "it was kind of unusual" for a car to be leaving wrecking yard area at 9:30 p.m.).

⁶⁸ People v. Brajevich, 174 Cal. App. 2d 438, 344 P.2d 815 (1959) (defendant walking on street gave evasive answers about his presence and denied ownership of a car parked nearby that contained registration showing defendant as owner).

of the *Carroll* exception, as it is the measure of the other exceptions, to the general rule that a warrantless search is unreasonable. A movable car may be searched if there exists reasonable cause to believe it contains contraband, but only if accompanied by the impracticability of obtaining a search warrant.⁶⁹ This principle is illustrated in *Preston v. United States*.⁷⁰

Officers arrested Preston and his two companions for vagrancy, took the defendants to police headquarters, and impounded the car in which defendants had been sitting but did not search it at the time of arrest. After they booked the suspects the officers went to the impound garage, searched the car, and found two loaded revolvers and other evidence of a contemplated robbery. Assuming without deciding that the arrest for vagrancy was proper, the Supreme Court held that the search violated the Fourth Amendment. The search was unrelated to the vagrancy arrest and was too remote in time and place to be considered contemporaneous with the arrest. Thus the search could not be justified as incident to the arrest. The Court then held that the *Carroll* exception did not justify the search. Since the suspects were in custody and the car was in the police impound garage, there was no danger that the car would be moved before the officers could obtain a warrant. The Court said:

The search of the car was not undertaken until petitioner and his companions had been arrested and taken into custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime assuming that there are articles which can be the 'fruits' or 'implements' of the crime of vagrancy . . . [n]or, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll v. U.S.*⁷¹

While some federal jurisdictions have followed *Preston's* strict inter-

⁶⁹ *Henry v. United States*, 361 U.S. 98, 104 (1959); *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925). California courts are not disposed to require that one officer watch the car while the other obtains a warrant. "To require in the present case that one officer go to obtain a warrant while the other remains camped by the marijuana would further no recognizable interest; it would magnify technicality at the expense of reason." *People v. Kampmann*, 258 Cal. App. 2d 529, 533, 65 Cal. Rptr. 798, 802 (1968) (not an auto case); *People v. Tambini*, 275 Cal. App. 2d —, 80 Cal. Rptr. 179 (1969) (auto case).

⁷⁰ 376 U.S. 364 (1964).

⁷¹ *Id.* at 368-69. See also Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 CALIF. L. REV. 907 (1963).

pretation of the *Carroll* exception,⁷² California courts have not been uniform in applying *Preston* to the *Carroll* exception. In *People v. Terry*⁷³ officers saw a marijuana cigarette on the dashboard of defendant's car which was parked in an apartment garage. After observing defendant escaping from his apartment through a window, the officers seized the cigarette. The court upheld the search on the basis of the car's movability.

*People v. Fritz*⁷⁴ is an example of a proper application of the *Carroll* exception. Officers arrested four armed robbery suspects who had arrived at an apartment in two cars. Neither car was owned by any of the suspects. Believing the cars contained guns used in the robbery, the officers searched both cars and in one found two revolvers. The search was proper because the cars were movable and it was not practicable to obtain a warrant. "The search of these vehicles for this purpose had to be immediate because neither belonged to any of the arrestees . . . and each could have been picked up by its respective owner at any time."⁷⁵ *People v. Garrison*⁷⁶ illustrates the concept of movability. Defendant was arrested for vagrancy and his companion for forgery. Defendant's car was impounded and searched four days later. The search revealed evidence of forgery. The court held the search unreasonable. It was neither incident to the arrest nor a proper search of a movable vehicle. The court explained:

Inasmuch as the search in the instant case was not incident to a lawful arrest, the question remains whether the rule allowing reasonable searches of vehicles under the *Carroll* decision applies. We think it does not. The rule is based upon the capacity of a vehicle to depart from a jurisdiction. In the present case *the vehicle was impounded*

⁷² *United States v. Marrese*, 336 F.2d 501 (3d Cir. 1964) (search will be held unreasonable when suspect in custody); *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960) (search unreasonable where defendant in custody and officers had ample time to obtain warrant). *But cf. Arwine v. Bannan*, 346 F.2d 458 (6th Cir. 1965) (car search upheld though defendant in custody). See Comment, *Freedom of the Road: Public Safety v. Private Right*, 14 DE PAUL L. REV. 381, 385-86 (1965).

⁷³ 61 Cal. 2d 137, 37 Cal. Rptr. 605 (1964).

⁷⁴ 253 Cal. App. 2d 7, 61 Cal. Rptr. 247 (1967).

⁷⁵ *Id.* at 16, 61 Cal. Rptr. at 253. The court also observed that since the cars were not parked on a highway they could not be impounded under CAL. VEH. CODE § 22651 (West 1960). The right to impound is discussed in Section IV.B. *infra*. See also *People v. Brajevich*, 174 Cal. App. 2d 438, 344 P.2d 815 (1959), where officers searched defendant's car because he gave evasive answers as to the reason for his presence and denied ownership of the car whose registration slip showed him as the registered owner. The sufficiency of the cause for search may be open to question, but because defendant had not been arrested the case met the movability test.

⁷⁶ 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (1961).

and was no more movable than a dwelling house. A search warrant should have been procured.⁷⁷ (emphasis added.)

Other cases have misconstrued the *Carroll* exception. *People v. Daily*⁷⁸ upheld an auto search as incident to the owner's arrest and then cited *Carroll* as authority for the holding. The reliance on *Carroll* was misplaced since the incidental search was precisely what was not involved. *Perez v. Superior Court*⁷⁹ suggested that *Carroll*, which plainly required reasonable cause to believe the car contains contraband, permits an "investigative or exploratory search of an automobile incident to an equivocal situation which does not suggest the commission of a specific offense."⁸⁰ In a recent case, the court did not discuss the fact that defendant was in custody when officers found marijuana and hashish in the hubcap of his car. The court stated as a rule the following: "[A]n officer may conduct a warrantless search of an automobile if he had probable cause to believe that it contains contraband and '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.'"⁸¹ However, because the defendant was in custody, the car was not movable.

III. THE AUTO SEARCH INCIDENT TO ARREST

Because arrests are so often made in or near automobiles, the right to search and the permissible scope of a search made incident to an arrest is of great importance. The incidental search derives its initial validity from a valid arrest although the search can become unreasonable if its permissible scope is exceeded.⁸² Since all searches must be reasonable under the Fourth Amendment, for an incidental search to be valid, it must be based upon antecedent probable cause for an arrest.

Under California law⁸³ a felony arrest is valid if the suspect has in fact committed a felony even though the arresting officer did not have probable cause at the time of arrest to believe that the arrestee had committed the crime. Such an arrest, however, will not support an inci-

⁷⁷ *Id.* at 555, 11 Cal. Rptr. at 402-03.

⁷⁸ 157 Cal. App. 2d 649, 321 P.2d 469 (1958).

⁷⁹ 250 Cal. App. 2d 695, 58 Cal. Rptr. 635 (1967). Two persons jumped out of a car parked in a vacant lot and ran when police arrived. The area was littered with beer cans. A search revealed unopened beer cans, marijuana in a bag in a heater vent, and white straw paper. Defendant was arrested when he returned to the car.

⁸⁰ *Id.* at 698, 58 Cal. Rptr. at 637.

⁸¹ *People v. Barrett*, 2 Cal. App. 3d 142, 146, 82 Cal. Rptr. 424, 426 (1969).

⁸² *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

⁸³ CAL. PEN. CODE § 836 (2) (West Cum. Supp. 1968).

dental search.⁸⁴

As seen in the above discussion of the *Carroll* exception, the auto search not incident to an arrest is based on the officers' reasonable belief that a movable auto contains items subject to seizure. The incidental search, on the other hand, depends for its validity upon the propriety of the arrest to which it is related. These are the foundational differences between the two kinds of searches. Although the differences may at first appear to be substantial, the similarities in the two searches may be even more significant. We must remember that both the *Carroll* search and the incidental search are *exceptions* to the general Fourth Amendment proscription of searches made without a search warrant.

It is now plain that both exceptions depend upon resolution of a single question: Under the particular circumstances was it reasonably practicable for the officer to secure a warrant?⁸⁵ When the officer reasonably believes that a movable auto contains contraband, he is confronted with an emergency that justifies dispensing with a warrant. Thus the practicability of obtaining a warrant depends upon the existence of an emergency. The same is true of the incidental search. The right to search, and the scope of the search, are measured by the need for immediate action occasioned by an emergency situation. Only in an emergency is it impracticable to obtain a warrant. The emergency that justifies a search under the *Carroll* exception is the movability of the automobile. The emergencies that will justify a search, without warrant incident to an arrest, arise when there is a substantial likelihood that unless the officer makes an immediate search: 1) Evidence may be destroyed, 2) the officer or other person may be injured, and 3) the suspect may escape.

A. *History of the incidental search*

The United States Supreme Court decisions concerning the incidental search tread a tortuous and confusing path. The difficulty is encountered in defining the scope of the search incident to arrest. The warrantless search incident to arrest was probably set forth for the first time, in dictum, in *Weeks v. United States*⁸⁶ where the Court suggested there is a right to search the *person* of the accused incident to his arrest. *Carroll*, again in dictum, extended the rule to include an incidental search for

⁸⁴ *People v. Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955), discussed in *supra* note 13.

⁸⁵ *Chimel v. California*, 395 U.S. 752 (1969).

⁸⁶ 232 U.S. 383 (1914).

items "upon his person or in his control" ⁸⁷ *Agnello v. United States*,⁸⁸ in 1925, held unreasonable a search of the defendant's house made after the defendant had been arrested and taken into custody several blocks from the house. The search of the house was not substantially contemporaneous in time and place with, and therefore not incidental to, the arrest. Nor was the search dictated by an emergency that made it impracticable to obtain a warrant. The Court announced a rule suggesting that if the search had been contemporaneous with the arrest, the officers *might properly have searched the house* for evidence even in the absence of an emergency.

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.⁸⁹

In *Marron v. United States*,⁹⁰ officers searched a building pursuant to a search warrant authorizing seizure of intoxicating liquors and articles used in their manufacture. In a closet they found incriminating documents. Defendant was not on the premises but the officers arrested one of defendant's partners. The Court held that although the warrant did not authorize seizure of the documents, the seizure was justified as an incident to the arrest of defendant's partner. The officers, said the Court, "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."⁹¹ *Marron* was the first clear holding that the *place* of arrest might be searched incident to the arrest. *Go-Bart Importing Co. v. United States*,⁹² the next case to consider the question, held unlawful a broad search of defendants' business office allegedly incident to an arrest for conspiracy to sell liquor. The Court viewed the search as excessive in scope⁹³ and held that since the officers had ample time to obtain a warrant they should have done so. "Notwithstanding he [the agent] had an abundance of information and time to swear out a valid warrant, he

⁸⁷ 267 U.S. at 158.

⁸⁸ 269 U.S. 20 (1925).

⁸⁹ *Id.* at 30.

⁹⁰ 275 U.S. 192 (1927).

⁹¹ *Id.* at 199. Citing *Agnello v. United States*, 269 U.S. 20 (1925), *Carroll v. United States*, 267 U.S. 132 (1925), and *Weeks v. United States*, 232 U.S. 383 (1914).

⁹² 282 U.S. 344 (1931).

⁹³ The Court distinguished the case from *Marron v. United States*, 275 U.S. 192 (1927), on the ground that the search in *Marron* was limited in scope.

failed to do so It [the search] was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found."⁹⁴ On this basis the Court distinguished the search from that in *Marron*. *United States v. Lefkowitz*⁹⁵ also condemned the exploratory search, holding unreasonable a search of desk drawers and a cabinet incident to a lawful arrest.

Later cases dealing with the validity and scope of the incidental search did little to clarify the governing standards. Of all the cases that departed from the practicability of obtaining a warrant as the test of an incidental search, *Harris v. United States*⁹⁶ is the prime offender. Acting on the authority of valid arrest warrants, F.B.I. agents arrested defendant in his four room apartment for forgery. For the next five hours, allegedly as an incident to the arrest and acting without a search warrant, they carefully ransacked his entire apartment for evidence of forgery. Near the end of the search, an agent found a number of altered draft cards and related documents in a sealed envelope marked "George Harris, personal papers" which were in a bedroom bureau drawer. The papers were concededly in no way related to the purpose of the arrest. Defendant's conviction for unlawful possession of the draft board papers was upheld by the Supreme Court in a five-four decision. The Court held that a search incident to an arrest may, "under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control."⁹⁷ The "appropriate circumstances" that justified the search of Harris' entire apartment were not specified except by the Court's reasoning that "[h]is control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested."⁹⁸ The Court concluded that the search was not a general exploration.⁹⁹

A year after *Harris*, the Court decided *Trupiano v. United States*,¹⁰⁰ a temporary restoration of reason. Federal agents, on the basis of

⁹⁴ 282 U.S. at 358.

⁹⁵ 285 U.S. 452 (1932).

⁹⁶ 331 U.S. 145 (1947).

⁹⁷ *Id.* at 151.

⁹⁸ *Id.* at 152.

⁹⁹ *Id.* at 153. *See also* dissent by Frankfurter, J.:

Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime. *Id.* at 157.

¹⁰⁰ 334 U.S. 699 (1948), *overruled in* *United States v. Rabinowitz*, 339 U.S. 56 (1950).

knowledge gained at least three weeks before that defendants were operating an illegal liquor distillery, raided the distillery without obtaining search or arrest warrants. They arrested one defendant who was operating the still, searched the entire premises, and seized contraband. The Court held the search unreasonable. The arrest of the defendant for operating the still, a felony, was proper, but the later search, even though it was claimed to have been made as an incident to the arrest, was unlawful. Citing *Carroll* and *Go-Bart*, the Court declared the rule of practicability: "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable."¹⁰¹

The rule of practicability "rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities."¹⁰² The mere fact that an arrest was made on the premises searched did not warrant the search. "The test is the apparent *need for summary seizure* . . ."¹⁰³ (emphasis added.) Thus, according to *Trupiano*, the incidental search is justified not because officers are able to make an arrest nearby, but by specific facts giving rise to an immediate need to search.

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*. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant. [Citing *Carroll v. United States*]. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest.¹⁰⁴ (emphasis added.)

The *Trupiano* principle, however, was soon overruled. Two years later the Court in *United States v. Rabinowitz*¹⁰⁵ upheld, as incident to an arrest made with a valid arrest warrant, a search of the one room office where defendant was arrested. The search was thorough and produced forged stamps found in defendant's desk, safe and filing cabinets. The Court approved the search on the authority of *Harris*, but in doing so it eradicated *Trupiano*. Assuming that the officers had time to procure a search warrant, the Court held that the officers

¹⁰¹ *Id.* at 705.

¹⁰² *Id.*

¹⁰³ *Id.* at 708.

¹⁰⁴ *Id.*

¹⁰⁵ 339 U.S. 56 (1950), *overruled in* *Chimel v. California*, 395 U.S. 752 (1969).

were not bound to do so "because the search was otherwise reasonable. . . ."¹⁰⁶ For the test of practicability, the Court substituted an amorphous formulation of reasonableness under all the circumstances of each case. The Court replaced a test with a conclusion. The ultimate inquiry to be made under the Fourth Amendment is whether the search is reasonable. But what are the *standards* by which reasonableness is determined? *Trupiano* said the search is unreasonable if the officers have time to obtain a warrant and reasonable if the necessities of the moment render impracticable the procuring of a warrant. The reasoning of *Rabinowitz* is circular: The search is reasonable if it is reasonable.

To the extent that *Trupiano v. United States*, . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than on the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.¹⁰⁷

Justice Frankfurter, joined by Justice Jackson, dissented in *Rabinowitz*:

The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise. Only thus can I account for a disregard of the history embedded in the Fourth Amendment and the great place which belongs to that Amendment in the body of our liberties as recognized and applied by unanimous decisions over a long stretch of the Court's history.¹⁰⁸

The evolution of the law relating to incidental search was furthered in two cases involving the search of automobiles. The first of these, *Preston v. United States*,¹⁰⁹ discussed earlier, relates both to the *Carroll* reasonable cause search and to the incidental search. Not only did the Court hold the search unreasonable under *Carroll* but it also determined that the search was not justified as incident to the arrest. The search, being remote in time and place from the arrest, was not contemporaneous with the arrest. The Court explained that a contemporaneous search may sometimes be necessary to seize weapons, preserve evidence or prevent an escape. But the emergency disappears

¹⁰⁶ *Id.* at 64.

¹⁰⁷ *Id.* at 66.

¹⁰⁸ *Id.* at 68.

¹⁰⁹ 376 U.S. 364 (1964).

when the search is not contemporaneous with the arrest.

The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in *time or place* from the arrest. 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.¹¹⁰ (emphasis added.)

Assuming that the police had the right to search the car at the scene of arrest, the Court noted, "this does not decide the question of the reasonableness of a search at a later time and at another place."¹¹¹ Thus lawful custody of a car that may be searched at the scene of arrest does not confer the right to search at a different time and place. The right to search without a warrant disappears with the emergency. At the impound garage "there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime. . . ." ¹¹²

The second auto search case, *Cooper v. California*,¹¹³ dampened any hopes raised by *Preston* that the Court was returning to the *Trupiano* practicability test. Officers arrested Cooper for selling heroin to a police informer, impounded his car, and a week later searched his car and found evidence linking him to the crime. The Supreme Court held that the search was proper because the car had been impounded not for the convenience of the owner but because California law¹¹⁴ then provided for the forfeiture of any vehicle used to store or transport narcotics. On the basis of the reason for the impound the Court sought to distinguish the case from *Preston* where no reason was given for impounding the car. Conceding that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,"¹¹⁵ the Court pointed out that the search in *Preston* was entirely unrelated to the vagrancy arrest. On the authority of *Rabinowitz* the Court held: "It is no answer to say that the police could have obtained a search warrant, for [t]he relevant test is not

¹¹⁰ *Id.* at 367.

¹¹¹ *Id.* at 368.

¹¹² *Id.*

¹¹³ 386 U.S. 58 (1967).

¹¹⁴ CAL. HEALTH & SAFETY CODE § 11611 (West 1964).

¹¹⁵ 386 U.S. at 61.

whether it is reasonable to procure a search warrant, but whether the search was reasonable.' *United States v. Rabinowitz*"¹¹⁶

The Court's attempt to distinguish *Cooper* from *Preston* is unconvincing. It is true that in *Preston* the search was unrelated to the charge for which the defendants were arrested. However, the Court in *Preston* reasoned that "we may assume, as the Government urges that either because the arrests were valid or because police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place."¹¹⁷ (emphasis added.) The search in *Preston* was held unreasonable not because it was unrelated to the arrest but because, being *remote in time and place*, there was no emergency that would justify dispensing with a warrant. Thus despite the argument to the contrary by Justice Black who wrote the majority opinions in both cases, the conclusion that *Cooper* impliedly overruled *Preston* is not without justification.¹¹⁸

The question is now of academic interest only. *Chimel v. California*¹¹⁹ marks a return to the practicability test of *Trupiano*, for areas outside of the physical reach of the arrestee, and a reinstatement of *Preston*. Officers arrested Chimel in his home for burglary of a coin shop. On the basis of the arrest, they searched his entire three bedroom house including the attic, garage and a small workshop. A number of coins and tokens were seized. In a six-two decision, the Court held that the scope of the search was constitutionally unreasonable. In doing so the Court overruled *Rabinowitz* and *Harris* and probably made a casualty of *Cooper*.¹²⁰

The test of the scope of an incidental search is now clear: Officers may search "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."¹²¹

¹¹⁶ *Id.* at 62.

¹¹⁷ 376 U.S. at 367-68.

¹¹⁸ This was the conclusion of Justice Peters in his concurring opinion in *People v. Webb*, 66 Cal. 2d 107, 128, 424 P.2d 342, 356, 56 Cal. Rptr. 902, 916 (1967), as well as the four dissenters in *Cooper v. California*, 386 U.S. 58, 62 (1967).

¹¹⁹ 395 U.S. 752 (1969).

¹²⁰ *Cooper* relied heavily upon *United States v. Rabinowitz*, 386 U.S. at 62. In addition, the Court in *Chimel*, noting that *Rabinowitz* and *Harris* "have been relied upon less and less in our own decisions," 395 U.S. at 768, compared other cited cases and then cautioned "But see *Cooper v. California*. . . ." *Cooper* may have been cited as a now-discredited case that has enjoyed some importance.

¹²¹ 395 U.S. at 763.

Thus the "area within his immediate control" no longer includes the suspect's entire house. It is limited to "the area into which an arrestee might reach in order to grab a weapon or evidentiary items. . . ." ¹²² (emphasis added.)

The Court in *Chimel* specifically reaffirmed the holding of *Preston* that the need to seize weapons or evidence that might be destroyed is "absent where a search is remote in time or place from the arrest."¹²³ And the *Cooper* reasoning, where the car was searched in an impound garage a week after defendant was arrested, could not easily be used to satisfy a rule prohibiting searches of areas into which the accused cannot reach.¹²⁴ Thus practicability is again the test, but even that test is far more meaningful and workable than before. It is practicable to obtain a warrant whenever a search is to be conducted for items not within the immediate reach of the accused.

B. *The incidental search in California*

We begin the discussion of the California incidental search cases with the caveat that many of the leading cases have been discredited if not nullified by *Chimel v. California*¹²⁵ and *Preston v. United States*,¹²⁶ as reaffirmed by *Chimel*. It is appropriate, however, to test each case not only by the incidental search rules but by the principles governing the reasonable cause auto search under *Carroll*.

The cases before *Chimel* permitted an incidental search "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed,"¹²⁷ as well as weapons and escape tools. Evidence and instrumentalities of crime may still be sought but only if within the reach of the arrestee. The incidental search may no longer be made merely to obtain evidence against the arrestee. And presumably, as before *Chimel*, there are some arrests, principally traffic violations, that will not support an incidental search.¹²⁸ The search

¹²² *Id.*

¹²³ *Id.* at 764.

¹²⁴ See discussion note 114 *supra* for the only basis upon which *Cooper* might be justified: the impound pursuant to a statute requiring forfeiture of the automobile.

¹²⁵ 395 U.S. 752 (1969).

¹²⁶ 376 U.S. 364 (1964).

¹²⁷ *Agnello v. United States*, 269 U.S. 20, 30 (1925) and discussion in Section III.A. *supra*.

¹²⁸ *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956) (double parking); *People v. Gil*, 248 Cal. App. 2d 189, 56 Cal. Rptr. 88 (1967) (cannot look under floor mat incident to drunk driving arrest); *People v. Shapiro*, 213 Cal. App. 2d 618, 28 Cal. Rptr. 907 (1963) (equipment violation); *People v. Moray*, 222 Cal. App. 2d

must be related to the purpose of the arrest. But since some crimes neither involve the use of weapons nor do they produce contraband, a search incident to an arrest for such a crime would be unreasonable.¹²⁹

*People v. Burke*¹³⁰ should remain after *Chimel*. There, officers followed defendant and his companion who were driving slowly and looking at buildings in an area where numerous burglaries had been committed. The two men stopped, got out, and because of their suspicious behavior the officers had probable cause to arrest them. After taking defendant into custody the officers searched his car and found a pair of gloves on the front seat. They took the suspect to the police station, impounded the car, later searched the trunk at the impound lot and found stolen articles. The California Supreme Court held that the search of the interior of the car at the scene of the arrest was proper as incident to the arrest, but held unreasonable, under *Preston*, the search at the impound lot. The holding that the search at the scene of the arrest was proper is questionable under *Chimel* since defendant could not have reached weapons or evidence in his car when he was in custody in the police car. The remainder of the holding, however, was a strict application of *Preston*. The court said:

The right to make a contemporaneous search without a warrant upon lawful arrest extends to things under the accused's immediate control and, to an extent depending upon the circumstances, to the place where he is arrested. This is justified, for example, by the need to seize weapons which might be used to assault an officer as well as by the need to prevent the destruction of evidence of the crime. These justifications are ordinarily absent, however, if the accused is in custody and the search is remote in time or place from the arrest.¹³¹

*People v. Webb*¹³² is now of doubtful validity. Officers approached defendant, who was seated in his parked car, to arrest him on an outstanding warrant. Defendant pulled violently away from the curb, an officer shot at the car, defendant crashed into a parked car, his auto came to rest partially blocking traffic, and defendant was arrested.

743, 35 Cal. Rptr. 432 (1963) (failure to stop at posted stop sign and illegal left turn); *People v. Garrison*, 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (1961) (vagrancy); *People v. Anders*, 167 Cal. App. 2d 65, 333 P.2d 854 (1959) (reckless driving); *People v. Simpson*, 170 Cal. App. 2d 524, 339 P.2d 156 (1959) (vagrancy); *People v. Sanson*, 156 Cal. App. 2d 250, 319 P.2d 422 (1957) (equipment violations); *People v. Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350 (1956) (illegal "U" turn).

¹²⁹ See 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 107-08 (1961).

¹³⁰ 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964).

¹³¹ *Id.* at 579-80, 394 P.2d at 69-70, 39 Cal. Rptr. at 533-34.

¹³² 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967).

While waiting for an ambulance to arrive for an injured policeman, one of the officers removed a red balloon from the floor of defendant's car.¹³³ The threat of a crowd that had gathered, and the fact that the defendant's car was blocking traffic, made it necessary to remove and impound the car. The injured policeman went to the hospital, received attention, returned to the impound lot and there searched the car. He found several balloons and a bundle of heroin. The California Supreme Court upheld the search on the authority of *Rabinowitz*.

Webb should no longer be followed for several reasons. The first and most obvious is that *Rabinowitz* is no longer the law. Next, the court declined to follow the *Preston* holding that the incidental search is justified by the need to prevent injury, escape or the destruction of evidence, on the theory that these are only non-exclusive "examples"¹³⁴ of situations in which a search incident to an arrest is warranted. This reasoning is no longer sound since *Chimel* made it plain that the incidental search may be made only for weapons or evidence within the reach of the accused. Finally, the search at the impound lot cannot be justified under the *Carroll* exception because at the time the car was searched it was no longer movable. Since the car was in police custody it would have been reasonably practicable to obtain a warrant. This leaves only the search that turned up the red balloon at the scene of arrest. That search¹³⁵ alone may conceivably have been reasonable to prevent destruction or theft of evidence by the crowd.¹³⁶

*People v. Williams*¹³⁷ presents a factual situation that illustrates the overlap of the *Carroll* exception and the incidental search rules. Police officers chased a burglary suspect; the suspect lost control of his car, abandoned it and fled on foot. Before the suspect was arrested, the officers searched his car and found stolen suits in the trunk. Defendant was arrested a block away, the car impounded, and the stolen suits

¹³³ The decision is unclear as to whether this balloon contained contraband.

¹³⁴ The court picked up the words "for example" in the following language from *Preston*:

The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. 376 U.S. at 367.

¹³⁵ It is not clear that it was a search. The balloon may have been in plain sight on the floor, but this point was not considered in the opinion.

¹³⁶ Even that seems unlikely since the officers were able to remove the vehicle along with its other contents. This reasoning does not deny the validity of the impound which was probably necessary to preserve evidence and remove the car from the traffic lanes of the highway. See CAL. VEH. CODE § 22651 (b) (West Supp. 1970).

¹³⁷ 67 Cal. 2d 226, 430 P.2d 30, 60 Cal. Rptr. 472 (1967).

were taken into custody at the impound garage. The California Supreme Court upheld the search as properly incident to defendant's arrest. The conclusion is probably sound but, under *Chimel*, for the wrong reason. After the defendant fled on foot there was no danger that he would immediately obtain weapons or destructible evidence in the car that was then in police custody. The search was therefore not reasonable as incident to the arrest. Under *Carroll*, however, the car was movable because the defendant was at large when the search was made. Since the officers had reasonable cause to believe the movable car contained the fruits of a burglary, their search at the scene was reasonable. Finally, the officers were not unreasonable in waiting until after they impounded the car to seize the evidence they had *already discovered* in a reasonable search.

Williams must, however, be distinguished from *People v. Teale*,¹³⁸ where defendant was arrested in New Orleans for murder, the car impounded, and a perfunctory search made which disclosed no evidence. The car was then sent to California where a scientific examination revealed incriminating blood stains and other evidence. As an alternative ground¹³⁹ for upholding the admission of the evidence, the court held that if the examination in California constituted a search, it was reasonable as a "continuation of the search lawfully begun at the time and place of the arrest."¹⁴⁰ The search at the place of arrest, however, had not turned up the evidence. The evidence was discovered in California. The relevant search is therefore the California search. *Preston* clearly enunciated that the right to search at the scene of arrest does not decide the reasonableness of a search at a later time and at another place.

The combination of *Chimel* and *Preston* has the effect of invalidating many California auto search cases decided before one or both of those decisions. Cases involving searches remote in time and place from the arrest are closer to the facts of *Preston* than to those of *Chimel*, but actually are controlled by both cases. Remoteness in time and place is merely one way of saying that the accused could not have reached for evidence or weapons at the time and place of the search. Thus the cases discussed below should be viewed in light of *Preston* and *Chimel* and without dismissing the possibility that *Carroll* might provide an alternative basis for a search.

¹³⁸ 70 Cal. 2d —, 450 P.2d 564, 75 Cal. Rptr. 172 (1969).

¹³⁹ The principal ground was that the car itself constituted evidence of the crime and the scientific examination of an item of evidence was therefore not a search.

¹⁴⁰ 70 Cal. 2d at —, 450 P.2d at 573, 75 Cal. Rptr. at 181.

In *People v. Baker*,¹⁴¹ officers stopped defendant's car, arrested defendant for drunk driving, impounded the car, booked defendant at the station, then returned to the car, searched it and found a revolver. The court treated the officers' conduct as a search, rather than an inventory of the car's contents, and held the search reasonable. This case would seem to be a blatant disregard of the *Preston* rule.¹⁴² *People v. Odegard*¹⁴³ is another example of this disregard. Police arrested defendant for possession of concealed weapons, impounded his car, searched the car at the garage and found evidence connecting defendant with a recent robbery. The court held the search reasonable on the theory that "[s]ince the officers had lawful custody of the car,¹⁴⁴ the articles found therein were properly in their possession and no new seizure occurred."¹⁴⁵ This reasoning was discredited by *Cooper* where the Supreme Court pointed out that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it."¹⁴⁶ And in *People v. Upton*¹⁴⁷ the court said: "[N]or do we think that the Constitution permits an . . . unreasonable search of a car simply because the police had statutory authority to impound it under Vehicle Code, Sections 22650 and 22651."¹⁴⁸ *People v. Prochnau*¹⁴⁹ attempted to distinguish an impound authorized by the Vehicle Code¹⁵⁰ from the impound made by the officers in the *Preston* case who took a car into custody because they did not want to have it on the street.¹⁵¹ As seen in *Cooper*, however, lawful custody of a car does not obviate the application of the Fourth Amendment.

In *People v. Robinson*¹⁵² officers stopped defendant's car in front of

¹⁴¹ 135 Cal. App. 2d 1, 286 P.2d 510 (1955).

¹⁴² See also *People v. Felli*, 156 Cal. App. 2d 123, 318 P.2d 840 (1957) (hour elapsed between arrest and search; search held reasonable).

¹⁴³ 203 Cal. App. 2d 427, 21 Cal. Rptr. 515 (1962).

¹⁴⁴ Under CAL. VEH. CODE § 22651 (h) (West Supp. 1970) an officer is permitted to impound a car when he takes its owner before a magistrate.

¹⁴⁵ 203 Cal. App. 2d at 432, 21 Cal. Rptr. at 518.

¹⁴⁶ 386 U.S. 58, 61 (1967). But see *People v. Simpson*, 170 Cal. App. 2d 524, 339 P.2d 156 (1959) where an obvious search at an impound garage was treated as an inventory to avoid the constitutional problems. As a search the holding would be a clear violation of the *Preston* rule.

¹⁴⁷ 257 Cal. App. 2d 677, 65 Cal. Rptr. 103 (1968).

¹⁴⁸ *Id.* at 682, 65 Cal. Rptr. at 107. Inspection upheld as a proper investigation to determine ownership of a suspected stolen car.

¹⁴⁹ 251 Cal. App. 2d 22, 59 Cal. Rptr. 265 (1967).

¹⁵⁰ CAL. VEH. CODE § 22651 (h) (West Supp. 1970). See note 144 *supra*.

¹⁵¹ Another ground for upholding the seizure in *Prochnau* was that it occurred in the course of an inventory of the contents of the car rather than pursuant to a search.

¹⁵² 62 Cal. 2d 889, 402 P.2d 834, 44 Cal. Rptr. 762 (1965).

the police station, arrested defendant for drunkenness, booked him inside the station, then searched the car and discovered evidence of forgery. The California Supreme Court upheld as incident to the arrest a search made "for the purpose of discovering evidence of the crime."¹⁵³ This holding is no longer controlling. Under *Chimel* the search to discover evidence that the defendant cannot immediately destroy is no longer permissible. Many other California cases involving auto searches made after the suspect has been ordered outside the car,¹⁵⁴ conducted in an impound garage,¹⁵⁵ or made at another place some distance away from the place of arrest¹⁵⁶ are now probably invalid.

IV. AUTO INSPECTIONS UNDER THE VEHICLE CODE

Incriminating evidence is often discovered in the course of auto inspections authorized by the Vehicle Code. If the inspection is lawful, not only under the Vehicle Code but also under the Fourth Amendment, evidence discovered may be seized. The California Vehicle Code empowers police officers¹⁵⁷ to inspect automobiles in a wide variety of situations.¹⁵⁸ Since evidence revealed in an authorized

¹⁵³ *Id.* at 894, 402 P.2d at 837, 44 Cal. Rptr. at 765.

¹⁵⁴ *People v. Wigginton*, 254 Cal. App. 2d 321, 62 Cal. Rptr. 104 (1967) (defendants ordered out and frisked before car searched); *People v. Sanders*, 250 Cal. App. 2d 123, 58 Cal. Rptr. 259 (1967) (after arrest police loosened bolts of pan fastened to car and found marijuana); *People v. Jackson*, 241 Cal. App. 2d 189, 50 Cal. Rptr. 437 (1966) (search of trunk after defendant arrested); *People v. Witt*, 159 Cal. App. 2d 492, 324 P.2d 79 (1958) (defendants ordered out before car searched); *People v. Borbon*, 146 Cal. App. 2d 315, 303 P.2d 560 (1956) (occupants frisked outside car before car searched).

¹⁵⁵ *People v. Cooper*, 256 Cal. App. 2d 500, 64 Cal. Rptr. 282 (1967).

¹⁵⁶ *People v. Tambini*, 275 Cal. App. 2d —, 80 Cal. Rptr. 179 (1969) (car searched two blocks from place of arrest); *People v. Loomis*, 231 Cal. App. 2d 594, 42 Cal. Rptr. 124 (1965) (car searched down street from place of arrest).

¹⁵⁷ Some sections distinguish California Highway Patrolmen from other officers in granting powers. *E.g.* CAL. VEH. CODE §§ 1650 (West Supp. 1970), 2409 (West 1960).

¹⁵⁸ An officer may stop and inspect the safety of a vehicle load, §§ 2802, 2803; or a car being operated unsafely, § 2804. He may require the driver of an apparently unsafe car to submit the car to appropriate tests, § 2806, inspect to determine whether the driver is in legal possession of the load, § 2810, check size, weight, equipment, and make tests, § 2813, or check mechanical equipment, § 2814.

A car owner must keep a registration card with the car (not necessary to keep in plain sight), § 4454, must present it on demand of an officer, § 4462, and the officer may inspect it to determine the registered owner and whether the car has been stolen, § 2805.

For violation of parking laws §§ 22500, 22504, 22652, an officer may remove a car from the highway or impound it if not practicable to move it and park it, § 22654. He may remove a car from a railroad track, § 22656, a stolen car from private property, § 22653, an abandoned car, § 22702, a car involved in a hit-and-run, § 22655, and

auto inspection is admissible against the accused, the motives of the officers conducting the inspection should not escape scrutiny. The courts should vigorously guard against the possibility that a Vehicle Code inspection will be used as a subterfuge to search for evidence of crime. We do not lack examples of police attempts at evasion of Fourth Amendment principles. In *People v. Molarius*,¹⁵⁹ officers followed defendants' car on a bare suspicion that they had been involved in a series of recent burglaries. The officers stopped defendants when they made an illegal "U" turn. The officers claimed that they had also stopped them for possession of burglary tools. The defendants, however, were not charged with that crime. A search revealing codeine was held unlawful. The court declared:

It is clear that the charge of vagrancy and the holding of appellants under the traffic violation charge without releasing them on citation and agreement to appear, were subterfuges to detain them in jail while the automobile was searched.¹⁶⁰

In *Wirin v. Horrall*,¹⁶¹ the court condemned the action of the Los Angeles Police Department in establishing roadblocks for the purpose of conducting indiscriminate searches of persons and automobiles without probable cause to believe any violation of law had occurred. The court quoted from a speech made by Judge Irving Lehman of the New York Court of Appeals in a 1930 address before the New York Bar Association:

They [the police] regard themselves in a sense as soldiers engaged in a warfare against crime, and in that warfare they sometimes apply the maxim of 'inter arma, silent leges.' In the din of war the voice of law is drowned. We have complacently accepted that maxim in warfare against external and avowed enemies. I fear that many complacently accept it as a necessary incident of what we choose to call the warfare of the State against crime . . . [S]uggestions that the court should not hamper public officers by restricting them to the use of lawful methods seem to many of our citizens in accord with practical common sense. Our boasted guarantees of liberty, it would seem, are so precious they must be kept for special occasions and not subjected to

may remove a car under all the circumstances set forth in § 22651, most importantly when he arrests a person in control of the car and takes the person before a magistrate, § 22651 (h). Private persons employed in traffic work when authorized by the Sheriff or Chief of Police may remove cars interfering with traffic, driveways, and otherwise causing traffic obstructions, § 22657, and a property owner may remove a car to the nearest public garage, § 22658. An officer or employee who removes a car must impound and store it unless otherwise provided by law, § 22850.

¹⁵⁹ 146 Cal. App. 2d 129, 303 P.2d 350 (1956).

¹⁶⁰ *Id.* at 132, 303 P.2d at 352.

¹⁶¹ 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

the wear and tear of daily use. Not so may the courts treat these guarantees. In a court of law no argument based on expediency can ever justify a lawless invasion of a legal right.¹⁶²

The three most important and frequently encountered auto inspections are: 1) The inspection to determine ownership or whether the car has been stolen, 2) the inventory of the contents of the automobile after or in preparation for an impound, and 3) the roadblock inspection.

A. *Inspection to determine ownership*

The Vehicle Code requires owners of cars to maintain a registration card with the car¹⁶³ and drivers to present evidence of registration upon demand of a police officer.¹⁶⁴ A police officer has the right to inspect a car for the purpose of determining whether a vehicle is stolen and to investigate title and registration.¹⁶⁵ Thus when an officer reasonably believes a car might be stolen he may investigate to determine ownership¹⁶⁶ and may impound the car if the circumstances strongly indicate that the car is stolen.¹⁶⁷ The investigation properly may include demanding evidence of registration from the car occupant,¹⁶⁸ shining a flashlight into the car to locate the registration,¹⁶⁹ inspecting the inside of the

¹⁶² *Id.* at 505-06, 193 P.2d at 474-75. See also *People v. Dickerson*, 273 Cal. App. 2d —, —, 78 Cal. Rptr. 400, 403 n.4 (1969) where Justice Kaus observed:

The court appears to have ignored: 1. that the natural desire of a police officer to see a criminal brought to justice may cause him to be less than candid in connection with a collateral inquiry which does not go to what appears to him to be the only relevant question: was the defendant a thief? 2. That law enforcement is often a "competitive enterprise" *Terry v. Ohio*, 392 U.S. 1, 12 [20 L.Ed. 2d 889, 900, 88 S.Ct. 1868]; *Johnson v. United States*, 333 U.S. 10, 14 [92 L.Ed. 436, 440, 68 S.Ct. 367]; and 3. that a police officer who has conducted an illegal search and seizure may be subject to criminal, civil and disciplinary sanctions.

¹⁶³ CAL. VEH. CODE § 4454 (West Supp. 1970).

¹⁶⁴ CAL. VEH. CODE § 4462 (West Supp. 1970).

¹⁶⁵ CAL. VEH. CODE § 2805 (West 1960). This section refers only to California Highway Patrol officers, but it has been held that other officers also have the right to conduct such investigations. See *People v. Grubb*, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965).

¹⁶⁶ *People v. Grubb*, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965).

¹⁶⁷ *People v. Myles*, 189 Cal. App. 2d 42, 10 Cal. Rptr. 733 (1961); *People v. Nebbitt*, 183 Cal. App. 2d 452, 7 Cal. Rptr. 8 (1960).

¹⁶⁸ CAL. VEH. CODE § 4462 (West Supp. 1970).

¹⁶⁹ *People v. Cacioppo*, 264 Cal. App. 2d 392, 70 Cal. Rptr. 356 (1968) (flashlight beam revealed narcotic pills on floor and further examination disclosed marijuana). The point was made in a rhapsodical exchange between counsel and the court:

Defendant contends that darkness creates its own legal sanctuary and tells us

Now black and deep the night begins to fall
A shade immense! Sunk in the quenching gloom,
Magnificent and vast, are heaven and earth.
Order confounded lies; all beauty void,
Distinction lost, and gay variety

car,¹⁷⁰ and even inspecting the trunk¹⁷¹ if the initial investigation gives further cause for suspicion. Evidence found in a reasonable inspection to determine ownership may be seized.¹⁷²

It is said that an inspection to determine ownership under the Vehicle Code, if based upon reasonable grounds to believe a car may be stolen, involves "no unreasonable search in the constitutional sense."¹⁷³ However, the constitutional prohibition of unreasonable searches is not overcome merely by pointing to a Vehicle Code section authorizing the inspection. "[T]he question . . . is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment."¹⁷⁴

The investigating officer must base his inspection on reasonable grounds to suspect that the car may have been stolen. *California Ve-*

One universal blot! (Thompson, *The Seasons, Autumn*, L.113)
And more acceptably

'Tender is the Night. . . .
I cannot see what flowers are at thy feet,
Nor what soft incense hangs upon

The boughs,
But, in embalmed darkness, guess each Sweet.' (Keats, *Ode to a Nightingale*)
In the harsh light of reality we respond:

'Oh, treacherous night! thou lendest thy ready
veil to every treason, and teeming mischiefs thrive
beneath thy shade.' (A. Hill)

and
'Under thy mantle black, there hidden lie,
light shunning theft, and traitorous intent, abhorred
bloodshed, and the felony, shameful deceit, and
danger imminent, foul, horror, and eke hellish detriment.'—Spenser
Perforce 't[h]is night methinks is but the daylight sick.'

(*The Merchant of Venice*, V.C. 1597)
The judgment of conviction is affirmed.

Id. at 397-98, 70 Cal. Rptr. at 359-60.

¹⁷⁰ *People v. Grubb*, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965) (officers entered car to find registration slip and found "billy"); *People v. Evans*, 240 Cal. App. 2d 291, 49 Cal. Rptr. 501 (1966) (officers stopped car with different front and rear license plates and saw suspicious articles in plain sight inside; further search thereby justified as a search incidental to an arrest).

¹⁷¹ *People v. Evans*, 240 Cal. App. 2d 291, 49 Cal. Rptr. 501 (1966).

¹⁷² *People v. Grubb*, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965) (illegal "billy"); *People v. Drake*, 243 Cal. App. 2d 560, 52 Cal. Rptr. 589 (1966) (marijuana); *People v. Galceran*, 178 Cal. App. 2d 312, 2 Cal. Rptr. 901 (1960) (marijuana).

¹⁷³ *People v. Prochnau*, 251 Cal. App. 2d 22, 29, 59 Cal. Rptr. 265, 270-71 (1967) (narcotics found in registration inspection; further search revealed sawed off shotgun); *People v. Drake*, 243 Cal. App. 2d 560, 52 Cal. Rptr. 589 (1966) (marijuana found in inspection to determine ownership). These cases suggest, but do not clearly state, that an inspection to determine ownership does not constitute a search at all. It seems clear that prying into closed areas constitutes a search and that the inspection must meet Fourth Amendment standards of reasonableness. *Cooper v. California*, 386 U.S. 58, 61 (1967).

¹⁷⁴ *Cooper v. California*, 386 U.S. 58, 61 (1967).

hicle Code Section 4454, which now provides that the registration card must be maintained with the car, formerly required that the card be visible from outside the car. Before the amendment, inspections were frequently justified by the officer's inability to see the registration card in plain sight.¹⁷⁵ This ground no longer being available, the inspection must now be justified by other facts that afford a reasonable basis for suspicion of auto theft. Such facts include missing license plates,¹⁷⁶ barely legible plates,¹⁷⁷ different plates on the front and rear of the car,¹⁷⁸ suspicious conduct of car occupants,¹⁷⁹ and evasive and untrue answers to proper police questions.¹⁸⁰ Each step of the investigation must be reasonable. Officers must have a reasonable basis for stopping a car¹⁸¹ and for proceeding with a further investigation of the car's interior.¹⁸²

Several California cases have relaxed the requirement that an inspection for ownership be based on reasonable cause to believe the car may be stolen. A regrettable example is *People v. Simons*,¹⁸³ discussed earlier. The court upheld the search as a proper inspection to determine ownership and added that because the service station proprietor had suggested that the car owner "acted odd", the search was further justified to see if there were stolen articles or contraband. Judicial common sense is sadly lacking in this decision. Initially the officer had no legitimate

¹⁷⁵ *People v. Prochnau*, 251 Cal. App. 2d 22, 59 Cal. Rptr. 265 (1967) (narcotics and sawed off shotgun found); *People v. Lozano*, 250 Cal. App. 2d 58, 58 Cal. Rptr. 102 (1967) (stolen coins found in search for registration slip); *People v. Guerrero*, 247 Cal. App. 2d 687, 56 Cal. Rptr. 71 (1967) (stolen purses under floor mat).

¹⁷⁶ *People v. Galceran*, 178 Cal. App. 2d 312, 2 Cal. Rptr. 901 (1960).

¹⁷⁷ *People v. Cacioppo*, 264 Cal. App. 2d 392, 70 Cal. Rptr. 356 (1968).

¹⁷⁸ *People v. Evans*, 240 Cal. App. 2d 291, 49 Cal. Rptr. 501 (1966).

¹⁷⁹ *People v. Airheart*, 262 Cal. App. 2d 673, 68 Cal. Rptr. 857 (1968).

¹⁸⁰ *People v. Nebbitt*, 183 Cal. App. 2d 452, 7 Cal. Rptr. 8 (1960).

¹⁸¹ *People v. Cacioppo*, 264 Cal. App. 2d 392, 70 Cal. Rptr. 356 (1968) (license plate barely legible); *People v. Prochnau*, 251 Cal. App. 2d 22, 59 Cal. Rptr. 265 (1967) (parole violation); *People v. Myles*, 189 Cal. App. 2d 42, 10 Cal. Rptr. 733 (1961) (traffic violation); *People v. Nebbitt*, 183 Cal. App. 2d 452, 7 Cal. Rptr. 8 (1960) (equipment violations); *People v. Dore*, 146 Cal. App. 2d 541, 304 P.2d 103 (1956) (defendant tried to run down officers).

¹⁸² *People v. Airheart*, 262 Cal. App. 2d 673, 68 Cal. Rptr. 857 (1968) (investigation raised suspicion that the car was stolen); *People v. Evans*, 240 Cal. App. 2d 291, 49 Cal. Rptr. 501 (1966) (defendant's suspicious statements justified further investigation); *People v. Grubb*, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965) (possibly abandoned car); *People v. Moulton*, 210 Cal. App. 2d 673, 27 Cal. Rptr. 132 (1962) (car with warm motor near scene of burglary justified suspicion car was stolen or was getaway car); *People v. Nebbitt*, 183 Cal. App. 2d 452, 7 Cal. Rptr. 8 (1960) (driver's suspicious statements); *People v. Galceran*, 178 Cal. App. 2d 312, 2 Cal. Rptr. 901 (1960) (auto registered in irregular manner in name of person not present and driver not licensed which raised suspicion that car was stolen).

¹⁸³ 208 Cal. App. 2d 83, 25 Cal. Rptr. 57 (1962).

reason to inspect for ownership. His testimony that he did not see the registration slip on top of the dashboard approaches the inherently improbable. His search of the shaving case for registration was certainly unwarranted. And the report that the car owner "acted odd" was an insufficient basis for the belief that the car contained stolen articles or contraband.

In *People v. Drake*,¹⁸⁴ officers investigated a car parked three or four feet from a curb.¹⁸⁵ The left door was open about an inch and a half, and the registration indicated that the car was owned by a person who lived two miles away. Even though the "hot-sheet" did not indicate that the car was stolen, the officer proceeded to check the ignition to see if it was "hot-wired" but found a bag of marijuana before he "got that far." The car owner was found asleep in a house across the street. The court held that the officers' actions were a proper response to a reasonable belief that the car was stolen and hurriedly abandoned. It is difficult to understand the manner in which a slightly opened door of a car parked three to four feet from the curb, registered to a person who lives two miles away, affords a reasonable basis for a belief that the car is stolen. There is no indication in the decision that the car was in fact "hot-wired", stolen or abandoned.

B. *Impound and inventory*

The Vehicle Code gives a police officer the right to remove an auto from the highway¹⁸⁶ or from private property¹⁸⁷ under certain specifically enumerated circumstances.¹⁸⁸ An officer has no authority to remove from the highway an unattended vehicle¹⁸⁹ or the vehicle of an arrested person¹⁹⁰ except as provided by the Vehicle Code. Most frequently invoked is the provision which authorizes a police officer to remove from the highway the auto of an arrested person whom the officer is by law required or permitted to, and does take, before a magistrate without unnecessary delay.¹⁹¹ The vehicle must be taken to the near-

¹⁸⁴ 243 Cal. App. 2d 560, 52 Cal. Rptr. 589 (1966).

¹⁸⁵ In violation of CAL. VEH. CODE § 22502 (West Supp. 1970).

¹⁸⁶ CAL. VEH. CODE §§ 22651, 22652, 22654 (West Supp. 1970).

¹⁸⁷ CAL. VEH. CODE § 22653 (West 1960).

¹⁸⁸ These include an officer's right to remove an auto obstructing traffic, CAL. VEH. CODE § 22651 (a) & (b), a stolen auto, § 22651 (c), a driveway, § 22651 (d), or access to a fire hydrant, § 22651 (e), etc. (West Supp. 1970). See also §§ 22651, 22652, 22653 and 22654.

¹⁸⁹ CAL. VEH. CODE § 22650 (West 1960); *People v. Fritz*, 253 Cal. App. 2d 7, 16, 61 Cal. Rptr. 247, 253 (1967).

¹⁹⁰ 28 OP. ATT'Y GEN. 185 (1956).

¹⁹¹ CAL. VEH. CODE § 22651 (h) (West Supp. 1970). See *People v. Marchese*, 275

est garage or other place of safety.¹⁹² The police officer has actually been considered an involuntary bailee of the car he impounds.¹⁹³

Police agencies often contract with private garage owners for the storage of impounded autos. To protect the car owner, the garage operator and the police officers from false theft claims, standard practice often requires an officer to inventory the contents of the impounded car.¹⁹⁴ Although recognized by California courts, the right to inventory is not authorized by statute. The inventory may be made either before¹⁹⁵ or after¹⁹⁶ the car is taken to a garage or other place of safety.

If it is not abused, the right to inventory the contents of an impounded car is a reasonable precaution against theft claims. The problem arises when the inventory is used as a pretext for a search for incriminating evidence. The problem is critical because California courts do not view an inventory as a search.¹⁹⁷ The cases should be decided on the basis of the *motivation* which actuated the officer, not by what he had a *right* to do. The purpose of the Fourth Amendment exclusionary rule is to deter lawless police invasions of privacy.¹⁹⁸ An unreasonable search for evidence should not be excused because an officer may have had the right, which he did not exercise, to make an inventory. If he actually made an inventory the question is whether he had a right to do so, and whether he properly exercised that right. But if the facts show that he conducted a search, the admissibility of evidence should be judged by the constitutional standards governing searches, not by

Cal. App. 2d —, 80 Cal. Rptr. 525 (1969); *People v. Roth*, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (1968).

¹⁹² CAL. VEH. CODE § 22850 (West Supp. 1970).

¹⁹³ *People v. Roth*, 261 Cal. App. 2d 430, 436, 68 Cal. Rptr. 49, 53 (1968), under CAL. CIV. CODE §§ 1813, 1815, 1816 and 1817 (West 1954).

¹⁹⁴ The Highway Patrol has a standard inventory checklist. See *People v. Roth*, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (1968). *People v. Ortiz*, 147 Cal. App. 2d 248, 250, 305 P.2d 145, 147 (1956) may be the first case to speak of the inventory as a protection to the owner, bailee, or officer.

¹⁹⁵ *People v. Marchese*, 275 Cal. App. 2d —, 80 Cal. Rptr. 525 (1969); *People v. Norris*, 262 Cal. App. 2d Supp. 897, 68 Cal. Rptr. 582 (1968), and *People v. Ortiz*, 147 Cal. App. 2d 248, 305 P.2d 145 (1956) (inventory made while car on street prior to impounding).

¹⁹⁶ *People v. Cook*, 275 Cal. App. 2d —, 80 Cal. Rptr. 528 (1969) ("quick check" at scene, full inventory at garage); *People v. Roth*, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (1968) (inventory at garage).

¹⁹⁷ *People v. Marchese*, 275 Cal. App. 2d —, 80 Cal. Rptr. 525 (1969); *People v. Norris*, 262 Cal. App. 2d Supp. 897, 68 Cal. Rptr. 582 (1968); *People v. Roth*, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (1968); *People v. Ortiz*, 147 Cal. App. 2d 248, 305 P.2d 145 (1956). Apparently the Supreme Court of the United States takes the same view. *Harris v. United States*, 390 U.S. 234, 236 (1968).

¹⁹⁸ *Linkletter v. Walker*, 381 U.S. 618 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961).

inventory rules.

In *Preston*, officers searched a car at an impound garage. Since there was no evidence that the inspection was intended as an inventory, it was treated as a search and its validity was tested by constitutional search principles. The California Supreme Court followed *Preston* in *People v. Burke*,¹⁹⁹ where an auto inspection at an impound lot was viewed as an unreasonable search. The court could have overlooked the unlawful search on the basis of an unexercised right to inventory but it properly refused to do so.²⁰⁰ Conceding the propriety of the impound under the Vehicle Code,²⁰¹ the court pointed out: "The officers were authorized by these [Vehicle Code] sections to remove defendant's car from the highway and impound it but the sections do not purport to authorize the making of a search."²⁰²

While some cases have involved legitimate inventories which revealed incriminating evidence,²⁰³ others have excused obvious searches by calling them inventories. In *People v. Simpson*,²⁰⁴ officers arrested the defendant, and three others who were asleep in a parked car, for vagrancy. The suspects were taken to the police station and the car was left on the street. At the station, an officer recognized defendant and, with no basis for the question, asked defendant if he had been implicated in a burglary and possession of marijuana on a prior occasion. Only after this question was asked did another officer suddenly decide that he suspected the four of transporting marijuana. Thereupon two officers left the station, the first intending to search the car, the second intending to impound it. The second officer testified at the preliminary hearing that he had intended to search the car but at the trial he said his intention was to impound it. Marijuana was found in the car. The court treated as an inventory pursuant to an impound what appeared to be an unreasonable search. There was no thought of impounding

¹⁹⁹ 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964).

²⁰⁰ That the court considered and rejected the right to inventory is shown by Justice Schauer's dissent approving the inspection as an inventory.

²⁰¹ CAL. VEH. CODE §§ 22651 (h) and 22850 (West Supp. 1970).

²⁰² *People v. Burke*, 61 Cal. 2d at 580, 394 P.2d at 70, 39 Cal. Rptr. at 534.

²⁰³ *People v. Marchese*, 275 Cal. App. 2d —, 80 Cal. Rptr. 525 (1969) (California Highway Patrol form used to inventory wrecked car); *People v. Norris*, 262 Cal. App. 2d Supp. 897, 68 Cal. Rptr. 582 (1968) (inventory of wrecked car on street after owner taken to hospital); *People v. Roth*, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (1968) (California Highway Patrol Form 180 used to inventory contents of wrecked car found to contain marijuana in tobacco pouch; somewhat questionable was the asserted need to open the pouch in the course of the inventory); *People v. Ortiz*, 147 Cal. App. 2d 248, 305 P.2d 145 (1956) (inventory on street before impound after "drunk auto" arrest).

²⁰⁴ 170 Cal. App. 2d 524, 339 P.2d 156 (1959).

the car until one officer had the groundless suspicion that it might contain incriminating evidence.

In *People v. Garcia*,²⁰⁵ officers stopped defendant, arrested him on outstanding traffic warrants, searched his car, and found four cases of stolen whiskey. The court treated the search as an inventory and upheld the seizure. Citing the Vehicle Code section²⁰⁶ which authorizes an officer to impound the car of an arrestee whom he takes before a magistrate, the court noted that an inventory may be made pursuant to an impound. The problem with that reasoning is that there is no indication the officers impounded the car and no evidence that an inventory was made. The evidence was found in an apparently unreasonable search that was neither incident to the arrest nor based on reasonable cause to believe the car contained items subject to seizure.²⁰⁷

People v. Garrison,²⁰⁸ on the other hand, conforms to the intention of the Fourth Amendment. Defendant and his companion were arrested as they entered defendant's car. Officers impounded the car, searched it four days later, and found evidence of forgery. The court held the search unlawful. The search was neither incidental to the arrest four days earlier nor, since the car had been impounded, was it subject to search as a movable vehicle under *Carroll*. The court viewed the officers' conduct as a search for evidence of forgery and refused to treat it as an inventory for the purpose of avoiding the Fourth Amendment.

Several California cases have not found it necessary to implement the inventory rule to excuse an otherwise unreasonable search. These cases hold that "[S]ince the officers had lawful custody of the car [by impounding it], the articles found therein were properly in their possession and no new seizure occurred."²⁰⁹ This rationale ignores the principal that "lawful custody of an automobile does not of itself dispense with Constitutional requirements of searches thereafter made of

²⁰⁵ 214 Cal. App. 2d 681, 29 Cal. Rptr. 609 (1963).

²⁰⁶ CAL. VEH. CODE § 22651 (h) (West Supp. 1970).

²⁰⁷ See also *People v. Cook*, 275 Cal. App. 2d —, 80 Cal. Rptr. 528 (1969) ("real quick check" of car before taking owner to hospital should not have qualified as inventory since no inventory made until the next day); *People v. Myles*, 189 Cal. App. 2d 42, 10 Cal. Rptr. 733 (1961) (inventory used as alternative basis for upholding seizure where there was no evidence that an inventory was actually made).

²⁰⁸ 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (1961).

²⁰⁹ *People v. Odegard*, 203 Cal. App. 2d 427, 432, 21 Cal. Rptr. 515, 518 (1962); see also *People v. Garcia*, 214 Cal. App. 2d 681, 684-5, 29 Cal. Rptr. 609, 611 (1963); *People v. Myles*, 189 Cal. App. 2d 42, 48, 10 Cal. Rptr. 733, 736 (1961) (alternate ground of decision).

it.”²¹⁰ And in *People v. Upton*,²¹¹ the court stated: “[N]or do we think that the Constitution permits an otherwise unreasonable search of a car simply because the police have statutory authority to impound it under Vehicle Code Sections 22650 and 22651.”²¹²

The constitutionality of California Vehicle Code Sections 22651(h) and 22850, which authorize an officer to impound the car of an arrestee whom he takes before a magistrate, has not been challenged in California appellate courts. Some cases, however, may involve situations affording no rational basis for an impound. For example, if a man is arrested in his car which is properly parked in his driveway or on the street, the mere fact that the officer takes the arrestee before a magistrate provides no rational basis for impounding the car. Distinguishing *Preston*, the Supreme Court in *Cooper v. California*²¹³ recognized that there are circumstances of arrest that do not warrant an impound. The *Cooper* Court reasoned that *Preston* did not suggest that the inventory was, “[D]one other than for Preston’s convenience or that the police had any right to impound the car and keep it from Preston or whom-ever he might send for it.”²¹⁴ In the absence of a reasonable basis for the application of Sections 22651(h) and 22850 in particular cases, the provisions might well be of doubtful constitutionality.

Another danger to which the courts should be alert is the use of the right to impound as a subterfuge for a search. We have seen cases in which a purported inventory pursuant to an impound was or should have been treated as a search. In other cases, the propriety of the impound itself may be subject to attack. *People v. Molarius*²¹⁵ is an example. Officers arrested defendants for making an illegal “U” turn and for vagrancy, took the defendants to jail, and then searched their car. Holding the search unreasonable, the court said: “It is clear that the charge of vagrancy and the holding of appellants under the traffic violation charge *without releasing them on citation and agreement to appear were subterfuges to detain them in jail while the automobile was searched.*”²¹⁶ (emphasis added.) The failure to release on citation should now more frequently be considered evidence of bad faith by an officer in light of the 1967 enactment of California Penal Code Section

²¹⁰ *Cooper v. California*, 386 U.S. 58, 61 (1967).

²¹¹ 257 Cal. App. 2d 677, 65 Cal. Rptr. 103 (1968).

²¹² *Id.* at 682, 65 Cal. Rptr. at 107.

²¹³ *Cooper v. California*, 368 U.S. at 61.

²¹⁴ *Id.* Cf. *People v. De La Torre*, 257 Cal. App. 2d 162, 64 Cal. Rptr. 804 (1967) (state has legitimate interest in conducting safety check roadblocks).

²¹⁵ 146 Cal. App. 2d 129, 303 P.2d 350 (1956).

²¹⁶ *Id.* at 132, 303 P.2d at 352.

853.6. That Section permits an arresting officer to immediately release on citation and promise to appear, any person arrested for a misdemeanor who does not demand to be taken before a magistrate. A 1969 amendment adds Subdivision (i) which requires that if an arrestee is not released on citation before being booked, the police must, at the time of booking, make an immediate investigation of the arrestee's background to determine whether he should be released on citation. Penal Code Section 853.6 should diminish the effectiveness of the impound under Vehicle Code Sections 22651 (h) and 22850.

C. *The roadblock inspection*

There are few California cases dealing with roadblock inspections that reveal incriminating evidence. California Vehicle Code Section 2814 authorizes the establishment of random auto safety and equipment inspections. *People v. De La Torre*²¹⁷ held Section 2814 constitutional as authorizing a roadblock established to conduct safety checks²¹⁸ rather than to search for evidence.

The constitutional "right to free movement"²¹⁹ may not be unreasonably restricted. In particular, the roadblock may not be used as a device to conduct unreasonable searches for evidence. The leading case is *Wirin v. Horral*²²⁰ where the court held that a cause of action was stated by a complaint seeking an injunction restraining the Los Angeles Police Department from the indiscriminate stopping and searching of autos and persons without cause to believe that any law had been violated. The court said:

Persons lawfully within the United States of America are entitled to use the public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law.²²¹

²¹⁷ 257 Cal. App. 2d 162, 64 Cal. Rptr. 804 (1967).

²¹⁸ See *City of Miami v. Aronovitz*, 114 So. 2d 784 (Fla. 1959) (roadblock for purpose of checking drivers' licenses held not an unreasonable search).

²¹⁹ *Edwards v. California*, 314 U.S. 160, 178 (1941) (concurring opinion of Justice Douglas); *Crandall v. Nevada*, 73 U.S. 35 (1867); Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 CALIF. L. REV. 907 (1963); Note, *Use of Police Roadblock to Inspect Drivers' Licenses*, 6 WAYNE L. REV. 417, 418-19 (1960); Note, 22 S. CAL. L. REV. 181 (1949).

²²⁰ 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

²²¹ *Id.* at 501, 193 P.2d at 472. See also *People v. Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956) (Court held unreasonable stopping of car leaving California for Mexico without cause to believe that the driver had committed any violation of law).

CONCLUSION

Although the automobile search presents problems unique in the general law of search and seizure, fundamental Fourth Amendment principles are the same. If evidence is seized in the course of a search made without a warrant the search is unreasonable unless it falls within an established exception to the requirement that a warrant be obtained. These exceptions apply only when it is not practicable to obtain a warrant. There are two principal exceptions that apply to the automobile search.

First, under *Carroll v. United States*, a "movable" automobile may be searched when officers have reasonable cause to believe that the car contains items subject to seizure. An automobile is movable only when the officer reasonably believes that it may be moved. It is not considered movable when it is in police custody in an impound garage.

Second, subject to narrow limitations, an automobile may be searched without a warrant if incident to a valid arrest or pursuant to a valid arrest warrant. The scope of the incidental search, under *Chimel*, cannot exceed those areas within the arrestee's physical reach. The search at an impound garage or at other places after the defendant has been arrested and removed is not incident to the arrest.

Although the reasonable automobile search and the search incident to a valid arrest are two distinct principles, they are both governed by a test of practicability. Thus under *Preston* and *Chimel*, reasonable searches will become invalid if a search warrant is not obtained when it is practicable to do so.

The threat of subterfuges to Fourth Amendment guarantees still lies in the area of automobile inspections and inventories. The fruits of what would otherwise constitute an unreasonable search may not be lost if the police can show that they were accidentally discovered, not in a search for evidence, but in the course of a legitimate vehicle inspection or inventory. The continuing problem is that such inspections and inventories can be and often are used to disguise unreasonable searches.