WARRANTLESS AUTOMOBILE SEARCHES AND TELEPHONIC SEARCH WARRANTS: SHOULD THE "AUTOMOBILE EXCEPTION" BE REDRAWN?

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Introduction

Traditionally, "searches conducted outside the judicial process, without prior approval by judge or magistrate, [were] *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[1] When one of these exceptions existed, however, the permissible scope of a search could be quite broad. Indeed, prior to 1969, if a suspect was arrested while at home, his entire premises could be searched for evidence of the alleged criminal activity.[2]

In 1969, the United States Supreme Court rendered its decision in *Chimel v. California*.[3] In *Chimel*, the Court limited searches incident to arrests to the area within the immediate control of the suspect, from which the suspect could grab a weapon or destructible evidence. As a result of *Chimel*, any police search beyond this limited area must now be independently authorized through the procurement of a search warrant.

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1. Katz v. United States, 389 U.S. 347, 357 (1967). The excepted searches included searches incident to valid arrests, pat-down searches of suspects, searches of automobiles, searches of buildings while in "hot pursuit," emergency searches for injured persons, searches and seizures of objects in plain view, and consensual searches.

2. Prior to Chimel v. California, 395 U.S. 752 (1969), the Court upheld, when incident to a valid arrest, searches of areas within the possession or under the control of the person arrested. Thus, a thorough search of an entire four room apartment following an arrest was sustained as incident to the arrest. Harris v. United States, 331 U.S. 145 (1947). Similarly, the Court upheld a one and one-half hour search of an office as incident to arrest, stating that the test for the validity of such a search "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." United States v. Rabinowitz, 339 U.S. 56, 66 (1950). In spite of the Court's positive assertion in Rabinowitz, however, the permissible scope of searches incident to arrests was far from clear until the definitive word was handed down in Chimel v. California, 395 U.S. 752 (1969). The *Chimel* decision provides an instructive historical review of the Court's inconsistent decisions on the scope of searches incident to arrests. *Id.* at 755-65.

3. 395 U.S. 752 (1969).

The restrictions imposed by *Chimel* severely hamstrung police in their efforts to obtain important evidence lawfully, because the procurement of the necessary search warrant often involved lengthy delays, making a legal search of the premises impracticable.[4] In an effort to alleviate some of these additional burdens, and at the same time comply with the mandate of the Supreme Court, the California Legislature in 1970 enacted Penal Code sections 1526(b)[5] and 1528(b).[6] These statutes effectively allow a police officer to obtain a search warrant while remaining on the scene of the crime.

Section 1526(b) provides, in pertinent part, that "[i]n lieu of a written affidavit . . . the magistrate may take an oral statement under oath which shall be recorded and transcribed." Once transcribed, the statement shall serve as the affidavit on the face of which any subsequent challenges to the warrant are weighed.[7] Section 1528(b) permits the magistrate to "orally authorize a police officer to sign the magistrate's name on a duplicate original warrant. . . ," thus enabling a warrant to be obtained without a face-to-face meeting of the magistrate and his affiant. The duplicate original warrant serves as the official search warrant which is then executed and returned by the peace officer. The magistrate records the time of issuance on the original warrant, which is filed with the duplicate after it is returned by the officer. In this way the officer may effectively search pursuant to a valid warrant in cases where he formerly would have been compelled to conduct a warrantless search or refrain from searching altogether. Arizona adopted simi-

4. CAL. PENAL CODE § 1525 (West Supp. 1979) requires that a search warrant be issued only upon probable cause supported by affidavit. Thus, in order to obtain a search warrant, officers were required to post a guard on the premises, consult the district attorney, prepare a written affidavit and visit a magistrate for issuance of the warrant.

5. CAL. PENAL CODE § 1526(b) (West Supp. 1979) states: "In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court."

6. CAL. PENAL CODE § 1528(b) (West Supp. 1979) states: "The magistrate may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate original warrant shall be deemed to be a search warrant for the purposes of this chapter, and it shall be returned to the magistrate as provided for in Section 1537. In such cases, the magistrate shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant and the duplicate original warrant with the clerk of the court as provided for in Section 1541."

7. The requirement of affidavits supporting the existence of probable cause is a creature of statute; the Fourth Amendment itself does not require that probable cause be established by affidavit. United States v. Mendel, 578 F.2d 668, 673 (7th Cir. 1973), *cert. denied*, 439 U.S. 964 (1978).

lar statutes in 1971,[8] and in 1977 the Federal Rules of Criminal Procedure were amended to allow for such a procedure.[9]

The warrants provided for in Penal Code sections 1526(b) and 1528(b) are commonly referred to as "telephonic search warrants" (TSWs). If used effectively, the TSW procedure can greatly reduce the time lag inherent in the acquisition of a search warrant,[10] because the police officer no longer needs to appear personally before the magistrate with a written affidavit.[11] The officer may now remain on the scene of the intended investigation and communicate with the magistrate by radio or telephone. In addition, the acquisition of search warrants is streamlined by allowing the clerical task of transcribing the oral statement to take place *after* the warrant has been issued.[12]

Through the use of TSWs, officers may now search pursuant to valid warrants in instances where formerly only warrantless searches could be conducted. The advantages of a search pursuant to a TSW over a warrantless search are threefold: first, the intervention of a neutral and detached magistrate enables probable cause determinations to be made prior to the search rather than relying on an after-the-fact judgment.[13] Second, the use of oral affidavits allows the officer's probable cause statement to be effectively "frozen" prior to the search, again dispensing with the need to rely on hindsight. Third, since a search

8. ARIZ. REV. STAT. ANN. §§ 13-3914(C), 13-3915(C) (1978). These sections were adopted from CAL. PENAL CODE §§ 1526(b) (West) and 1528(b) (West), respectively and therefore closely parallel the California legislation.

9. FED. R. CRIM. P. 41(c)(2). Comparable amendments are under consideration in other jurisdictions. *See* Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 258-63 (1974); Nakell, *Proposed Revisions of North Carolina's Search and Seizure Law*, 52 N.C.L. REV. 277, 306-11 (1973). In addition, it has been strongly recommended that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE 95 (1973).

10. According to one commentator, the San Diego District Attorney's Office estimated that 95 percent of the TSWs take less than 45 minutes to obtain. See Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. L. REV. 691, 694 n.23 (1973).

11. People v. Aguirre, 26 Cal. App. 3d Supp. 7, 10, 103 Cal. Rptr. 153, 155 (1972). *See* notes 33-36 and accompanying text *infra*.

12. People v. Peck, 38 Cal. App. 3d 993, 998, 113 Cal. Rptr. 806, 809 (1974). *See* note 39 and accompanying text *infra*.

13. "By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime,' *Johnson v. United States*, 333 U.S. 10, 14 (1948), we minimize the risk of unreasonable assertions of executive authority. *See McDonald v. United States*, 335 U.S. 451, 455-56 (1948)." Arkansas v. Sanders, 99 S. Ct. 2586, 2590 (1979).

pursuant to a valid warrant carries with it a presumption of legality,[14] the prosecution no longer need bear the burden of proving the adequacy of the probable cause. Additionally, there are advantages to the use of oral affidavits over written ones:

> [o]ral testimony before the magistrate will often be more likely . . . to assure that the magistrate will make an independent judgment based on the facts and not rely on the mere conclusions of the officer . . . [and] oral presentation makes it possible for the magistrate to explore any points not adequately covered or left ambiguous by the witness' statement.[15]

Unfortunately, however, the use of TSWs in California has been limited at best; only in San Diego is the procedure regularly employed.[16] The reasons for this reluctance include the unwillingness of many magistrates to have their probable cause determinations recorded verbatim, the inexperience of police officers with the drafting and use of affidavits, especially in urgent situations, and, arguably, the peace officer's realization that hindsight is often more forgiving than foresight.[17]

Clearly, the TSW procedure is not without drawbacks; in dispensing with the face-to-face meetings between magistrate and affiant, the procedure has dispensed with demeanor evidence at the application stage of the warrant process.[18] The procedure has also opened up the possibility of having an oral transmission misunderstood, leading to the preparation of a written transcription which does not accurately reflect the reporting officer's statement.[19] Finally, the absence of a written rec-

14. Theodor v. Superior Court, 8 Cal. 3d 77, 101, 501 P.2d 234, 251, 104 Cal. Rptr. 226, 243 (1972).

15. United States v. Mendel, 578 F.2d 668, 672 (7th Cir. 1978).

16. Because the federal TSW statutes only became effective on October 1, 1977, little case law exists regarding their use by federal officers. It should be noted, however, that the federal statute requires the magistrate to determine that the "circumstances make it reasonable to dispense with a written affidavit" before the oral procedure can be used. FED. R. CRIM. P. 41(c)(2)(A). Once this decision is made, failure to use a written affidavit cannot be the grounds of a motion to suppress, absent a finding of bad faith. *Id.* 41(c)(2)(G).

17. Limitations on the use of TSWs are often a matter of policy. For example, in Los Angeles County, TSWs are used only in emergency situations. R.J. CHRYSTIE & R. SCHIRN, SEARCH WARRANTS: A MANUAL IX-1 (1977) (Publication of the California District Attorneys Association and the Los Angeles County District Attorneys Office). Similarly, TSWs are used in San Diego only (1) during non-business hours, court holidays, nighttime or weekends, (2) in emergencies (where the evidence may be immediately destroyed), and (3) where premises have been secured and the officers need to conduct a search. BELL, TELEPHONIC SEARCH WARRANTS 13. These restrictions are self-imposed and not the result of legislative or judicial intervention.

18. It is questionable how much weight magistrates actually give to demeanor evidence, and how much weight should be given to this evidence. Police officers are accustomed to the warrant application procedure, and it is therefore unlikely that their demeanor will be a true index of their credibility. See Comment, *supra* note 10, at 701-03.

19. This danger can be minimized, however, if the oral affidavit is recorded and pre-

ord regarding the issuance of the warrant may hamper the ability of a magistrate to properly determine the existence of probable cause in certain complex situations.[20]

But whatever the motivation behind resistance to the use of TSWs, their rapid availability may result in serious Fourth Amendment implications. It is the aim of this note to examine the constitutional implications of using TSWs in one of the areas where search warrants are not generally required: in the search of automobiles.[21] This writer does not envision an abandonment of traditional warrants in favor of the TSW; indeed, the disadvantages previously recited indicate the dangers such a development would entail. It is suggested, however, that while exigent circumstances by definition preclude the procurement of traditional search warrants, the rapid availability of TSWs allows for the protection of Fourth Amendment interests in all but the most immediate of exigencies. As stated by one commentator, "rapid availability of a warrant could mean that some search situations now considered sufficiently exigent to justify dispensing with a warrant—such as some searches of mobile vehicles—might no longer carry their emergency character. As a result, the reason for excusing the failure to obtain a search warrant in those situations would no longer exist."[22] In light of the TSW procedure now available, the limits of the exigent circumstance exception to the search warrant requirement must be redrawn.

Although there are other exceptions to the search warrant requirement which are based on the existence of exigent circumstances, such as the warrantless pat-down search of a suspect conducted for the protection of the officer and of destructible evidence, warrantless searches of buildings by officers in "hot pursuit" of one or more suspects, and emergency searches of crime scenes conducted to ensure that injured parties will be discovered and cared for, the patent immediacy of these exceptions demonstrates the absurdity of any delay in the procurement of a warrant, no matter how short.

This note will examine the possible implications of the availability of TSWs on the automobile exception by studying each of the three justifications for a warrantless search of an automobile: the "*Carroll*

served on a tape so that any apparent discrepancies can be checked. If electronic recording facilities are not available, and time permits, a stenographic or longhand record can be made and read back to the officer. Clearly, an electronic recording provides the best protection against inaccurate transcripts.

20. The complexity of an affidavit is determined, *inter alia*, by the description of the area to be searched, the nature of the items to be seized, the basis of the affiant's knowledge, whether an informer is being used, and the nature of the search and seizure. In most cases complex warrant applications are the result of extended investigations, where the use of oral affidavits is seldom an indispensable factor. Comment, *supra* note 10, at 703-05.

21. Although this exception is commonly referred to as the "automobile exception," it generally applies to all motor vehicles.

22. Nakell, *supra* note 9, at 311.

Doctrine," the plain view exception, and the search incident to an arrest doctrine. The discussion will commence with an analysis of the mechanics of TSWs and an examination of judicial interpretations of the TSW statutes. Each of the three justifications will then be analyzed under both federal and California jurisprudence, and finally, the ramifications of TSWs will be explored.

I. The Mechanics of the TSW

The procedure for obtaining a TSW closely resembles that required for acquiring a traditional warrant. There are, however, three differences, relating to the oral nature of the affidavit,[23] the lack of a requirement that the affiant be in the presence of a magistrate, and the use of the duplicate original search warrant.[24]

In the telephonic procedure, the officer contacts the magistrate who activates a recording device.[25] The magistrate immediately places his affiant under oath and the affiant recites the probable cause in support of the search warrant. In the event the magistrate does not find sufficient probable cause in the officer's statement, he may question the officer until satisfied that probable cause does, indeed, exist. Once this determination is made by the magistrate, he states that sufficient probable cause exists for the issuance of a warrant. The affiant then proceeds to read his proposed duplicate original warrant, prepared beforehand, to the magistrate. A duplicate original warrant is the search warrant form filled out and executed by the officer. Its use allows the officer to serve and execute a search warrant without going to the magistrate for

23. Several states allow the use of oral testimony to supplement or supplant a written record. *See, e.g.*, Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971) (Arkansas); United States v. Berkus, 428 F.2d 1148, 1150-52 (8th Cir. 1970) (Minnesota); Pennsylvania *ex rel.* Fieling v. Sincavage, 313 F. Supp. 967, 970 (W.D. Pa. 1970), *aff'd*, 439 F.2d 1133 (3d Cir. 1971) (Pennsylvania); Naples v. Maxwell, 271 F. Supp. 850, 854 (S.D. Ohio 1967), *cert. denied*, 393 U.S. 1080 (1969) (Ohio).

24. *See* CAL. PENAL CODE § 1528(b) (West Supp. 1979).

25. The federal statute appears to require that the magistrate make the recording, the Arizona and California laws do not. In Los Angeles County, the district attorney's office records the oral affidavit, prepares the written transcript, and has the issuing magistrate certify the written record. *See* R.J. CHRYSTIE & R. SCHIRN, *supra* note 17, at IX, 1-4. In Alameda and San Diego counties, the magistrate (or a certified court reporter) records and oversees the affidavit's transcription, and certifies its accuracy. *See* Jensen, *The Oral Search Warrant*, 1 POINT OF VIEW 6 (1970) (Publication of the Alameda County District Attorney's Office).

The California and federal statutes favor the use of electronic voice recording devices, but if none is available, the California statute requires the use of a certified reporter while the federal statute requires only a stenographic or longhand record. The Arizona law requires that the statement "be recorded on tape, wire, or other comparable method." It makes no mention of an alternate means of recording the affidavit. ARIZ. REV. STAT. ANN. § 13-3914(c).

his signature.[26] If changes are required, both the original warrant and the duplicate original warrant are changed in the identical manner.[27] The magistrate then states that the search warrant, as read by the affiant, shall issue, and recites the time of day of its issuance to prevent the officer from making a search which precedes the warrant's issuance.[28] The magistrate must also state that he is authorizing the affiant to sign his name to the duplicate original search warrant.[29] At this point, the officer may so sign and execute the warrant. As soon as possible after the search the duplicate original warrant is taken to the magistrate for his signature and the recording thereon of the time of its issuance. The recording of the magistrate-affiant conversation is transcribed and both the tape and transcription are certified by the magistrate and filed with the clerk of the court,[30] along with the original warrant, the duplicate original warrant and the return to the search warrant.[31] It is upon this record that the merit of any subsequent challenge to the validity of the search warrant is determined.[32]

A. Judicial Interpretations

The first appellate-level interpretation of the TSW took place in 1972 in *People v. Aguire*.[33] The *Aguire* court interpreted Penal Code section 1526 as not requiring a face-to-face meeting between the affiant and magistrate. Instead, the court suggested that the oral affidavit could be transmitted to the magistrate "by means of telephones, two-way radios or face-to-face communication",[34] provided that the communication is recorded.[35] The court of appeal also held that it was not prejudicial error for the magistrate to administer the oath to his affiant following the statement rather than at the start.[36]

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26. *See* note 6 *supra.*

27. Although the affidavit may be oral, the warrant must be written. The officer must present a written search warrant at the time of his search. Bowyer v. Superior Court, 37 Cal. App. 3d 151, 165, 111 Cal. Rptr. 628, 637 (1974). *See* note 41 and accompanying text *infra.*

28. Without the required time notations an officer could complete the duplicate warrant without prior judicial approval, and then apply for the warrant after the search had been completed. This would be a clear violation of the Fourth Amendment. For this reason, CAL. PENAL CODE § 1534(b) (West Supp. 1979) states: "If a duplicate original search warrant has been executed, the peace officer who executed the warrant shall enter the exact time of its execution on its face."

29. CAL. PENAL CODE § 1528(b) (West Supp. 1979).

30. *Id.* § 1526(b).

31. *Id.* § 1528(b).

32. *See* note 38 and accompanying text *infra.*

33. 26 Cal. App. 3d Supp. 7, 103 Cal. Rptr. 153 (1972).

34. *Id.* at 10, 103 Cal. Rptr. at 155.

35. *Id.* at 11, 103 Cal. Rptr. at 155.

36. *Id.* A federal court held that the failure to administer the oath prior to the statement was reversible error because the immediate administration of the oath impresses the affiant with the importance of his statement. United States v. Shorter, 600 F.2d 585 (6th Cir.

The constitutionality of TSWs was upheld by the California Court of Appeal in 1974 in *People v. Peck*.[37] In the same year, the California Supreme Court held that when a TSW is challenged, the sufficiency of probable cause must be determined by examining only that testimony which was recorded and transcribed.[38] However, the actual transcription of the oral testimony need not take place prior to the execution of the search warrant.[39] Thus, considerable time may be saved through the use of oral affidavits, even in non-exigent situations.[40] The California Court of Appeal has held that the warrant itself must be in written form, however.[41]

California courts have ruled that there is neither a prerequisite of exigent circumstances for a TSW to be used,[42] nor a requirement that the procedure be resorted to where a TSW can be practically obtained.[43] In *People v. Smith*,[44] for example, the court justified a warrantless search by exigency, even though it recognized that the officer could have obtained a TSW, as he had "almost an hour to wait."[45] Though there is substantial case law supporting judicial reluctance towards requiring the use of a TSW whenever practicable, this case law antedates the TSW statutes and must be re-examined in light of these statutes.

1979). Arizona courts have yet to decide whether the oath must be given prior to the statement. They have, however, held that failure to *record* the oath is not reversible error so long as the statement itself is recorded. State v. Mead, 120 Ariz. 108, 110, 584 P.2d 572, 574 (1978).

37. 38 Cal. App. 3d 993, 113 Cal. Rptr. 806 (1974).

38. People v. Hill, 12 Cal. 3d 731, 759-760 n.29, 528 P.2d 1, 22-23 n.29, 117 Cal. Rptr. 393, 414-15 n.29 (1974). The Arizona Supreme Court ruled similarly in State v. Robertson, 111 Ariz. 427, 428, 531 P.2d 1134, 1135 (1975). However, in United States v. Turner, 558 F.2d 46, 51 (2d Cir. 1977), the Second Circuit left open the question of whether the recording and transcribing of oral testimony is constitutionally required.

39. People v. Peck, 38 Cal. App. 3d at 998, 113 Cal. Rptr. at 809. A federal court recently ruled in accord with *Peck* on this point, stating "[i]t is inconceivable that such a time-consuming, cumbersome, and pointless procedure was intended, especially in view of the likelihood that time will be of the essence when a search warrant is being sought." United States v. Mendel, 578 F.2d 668, 671 (7th Cir. 1978).

40. Although TSWs are not restricted to emergency situations as a matter of law, People v. Peck, 38 Cal. App. 3d at 1000, 113 Cal. Rptr. at 810, as a matter of policy they often are so restricted. *See* note 17 *supra*.

41. Bowyer v. Superior Court, 37 Cal. App. 3d at 165, 111 Cal. Rptr. at 637.

42. People v. Peck, 38 Cal. App. 3d at 1000, 113 Cal. Rptr. at 810.

43. In State v. Million, 120 Az. 10, 15-16, 583 P.2d 897, 902-03 (1978), the Arizona Supreme Court refused to invalidate a warrantless search on the ground, *inter alia*, that a TSW could have been obtained, citing Cardwell v. Lewis, 417 U.S. 583 (1974). *See* Chambers v. Maroney, 399 U.S. 42 (1970); notes 74 & 92-109 and accompanying text *infra*. *See also State v. Million*, 27 Ariz. App. 490, 556 P.2d 338 (1976).

44. 67 Cal. App. 3d 638, 136 Cal. Rptr. 764 (1977).

45. *Id.* at 648, 136 Cal. Rptr. at 769.

II. The Automobile Exception

A. The Carroll Doctrine

The automobile exception originated in *Carroll v. United States*,[46] a case involving the warrantless search of an automobile suspected of being used to transport alcohol in violation of the National Prohibition Act. In *Carroll*, the defendants, who were known to the arresting officers as dealers in illegal whiskey, were seen driving along their customary smuggling route in a car which they were known to have used in their illicit enterprise. After stopping the suspects, the officers conducted an immediate warrantless search of the defendants' car which revealed some 68 bottles of contraband whiskey.

The United States Supreme Court, in upholding the *Carroll* search and seizure, carved out an exception to the search warrant requirement. Simply stated, the exception applies whenever police have probable cause to believe that a vehicle contains evidence of a crime, and also have reason to believe that the vehicle and/or the evidence may be removed before a warrant can be obtained. If both of these factors are present, the officers may search the vehicle without a warrant.

1. Probable Cause

Not only does probable cause allow a warrantless search to be conducted, it also determines the permissible scope of such a search. California courts, in dealing with the automobile exception, have defined the requisite probable cause as existing "when an officer is aware of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched."[47] Thus, in some cases, only a partial search of the vehicle will be justified, while in others, the probable cause may extend to the car as a whole. "[T]here is a recognized and protectible privacy interest in concealed areas of a car, and the search of a car like all other searches must be properly circumscribed to be 'reasonable' within the meaning of the Fourth Amendment. . . ."[48] Therefore, when the police have probable cause to search only the passenger compartment of a vehicle, this license does not automatically extend to the trunk[49] or glove compartment of the car.[50]

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46. 267 U.S. 132 (1925).

47. People v. Dumas, 9 Cal. 3d 871, 885, 512 P.2d 1208, 1218, 109 Cal. Rptr. 304, 314 (1973); Wimberly v. Superior Court, 16 Cal. 3d 557, 571, 547 P.2d 417, 526-27, 128 Cal. Rptr. 641, 650-51 (1976).

48. Wimberly v. Superior Court, 16 Cal. 3d at 571, 547 P.2d at 426, 128 Cal. Rptr. at 650.

49. *Id.*

50. Although a warrantless search of the glove compartment of a locked automobile

The probable cause requirement for a valid warrantless search is the same as that required for obtaining a written search warrant.[51] Thus, the use of TSWs in automobile stops and searches introduces an effective check on the sufficiency of the probable cause prior to the search.

2. Exigency

The second requisite of a lawful warrantless automobile search is the existence of exigent circumstances[52] such that the procurement of a search warrant is "an impossible or impractical alternative."[53] The *Carroll* Court indicated that the requisite exigency did not exist where the officer could practicably secure a warrant prior to the search: "[i]n the cases where the securing of a warrant is reasonably practicable, it must be used. . . ."[54] In the years following *Carroll*, this standard was reaffirmed in several cases, including *Trupiano v. United States.*[55] The *Trupiano* Court held that when a search warrant could have been obtained but was not, the evidence seized in the warrantless search had to be excluded as evidence tainted by an unreasonable search.[56] *Trupiano* involved a raid on an illegal distillery by government agents following several weeks of observation and infiltration of the criminal enterprise. The nighttime raid resulted in several arrests and a thorough warrantless search of the premises, under circumstances where a "warrant could easily have been obtained."[57] The Court found the searches unconstitutional, reasoning that "law enforcement agents must secure and

was recently upheld by the Supreme Court in South Dakota v. Opperman, 428 U.S. 364 (1976), the search in that case was not an investigatory search, but a routine inventory search. The Court stated that "[t]he probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations." *Id.* at 370 n.5. In a dissenting opinion joined by Justices Brennan and White, Justice Marshall vehemently condemned the plurality decision, arguing that "the Constitution does not permit such searches as a matter of routine; absent specific consent, such a search is permissible only in exceptional circumstances of particular necessity." *Id.* at 392.

51. The *Carroll* Doctrine focuses on the presence of probable cause to search, and not on the mere presence of an automobile. "Automobile or no automobile, there must be probable cause." Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973).

52. Briefly stated, exigent circumstances exist "[w]here it is not practicable to secure a warrant to search a vehicle for contraband goods because the vehicle can be quickly moved out of the locality or jurisdiction. [In such a case] the vehicle may be searched by a proper official then having probable cause to believe that the vehicle contains such goods." Travis v. United States, 362 F.2d 477, 480-81 n.3 (9th Cir. 1966).

53. People v. Dumas, 9 Cal. 3d at 884, 512 P.2d at 1218, 109 Cal. Rptr. at 314.

54. 267 U.S. at 156.

55. 334 U.S. 699 (1948).

56. *Id.* at 705-10.

57. *Id.* at 704.

use search warrants whenever reasonably practicable."[58] Reiterating their statement from *Johnson v. United States*,[59] the Court argued that "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present evidence to a magistrate. These are never very convincing reasons. . . ."[60]

The requisites of a valid warrantless search were revised in 1950 when the "reasonable practicability" language of *Trupiano* was overruled. The Court, in *Rabinowitz v. United States*,[61] felt it "fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. . . ."[62] In *Rabinowitz*, officers executed an arrest warrant on the defendant who was charged with selling, possessing and concealing forged and altered government obligations with the intent to defraud. After arresting the defendant in his office, the police searched the office for approximately one and one-half hours without a warrant. The Court upheld the search as being incident to a lawful arrest,[63] but in doing so had to overrule the *Trupiano* language regarding the securing of search warrants whenever reasonably practicable. That it was feasible to secure a warrant in this case was evident from the fact that the officers had procured an arrest warrant prior to their arrival. In overruling *Trupiano*, the Court reasoned that because a warrantless search incident to arrest may be considered reasonable, the authority for such a search must flow from the lawful custody of the suspect.[64] This being so, the validity of warrantless searches must turn on their reasonableness under all of the circumstances, and not solely on the practicability of obtaining a search warrant.[65] "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[66]

Justices Black[67] and Frankfurter[68] both dissented from the majority decision in *Rabinowitz*, neither wishing to overrule *Trupiano*. In Justice Frankfurter's dissent, joined by Justice Jackson, the history and purpose of the Fourth Amendment was traced. Justice Frankfurter

58. *Id.* at 705.
59. 333 U.S. 10, 15 (1948).
60. 334 U.S. at 706.
61. 339 U.S. 56 (1950).
62. *Id.* at 65.
63. The scope of the *Rabinowitz* search greatly exceeds that presently allowed in a search incident to an arrest, as laid down in Chimel v. California, 395 U.S. 752 (1969). *See* note 72 and accompanying text *infra*.
64. 339 U.S. at 65-66.
65. *Id.*
66. *Id.* at 66.
67. *Id.*
68. *Id.* at 68.

concluded that before the privacy rights protected by this amendment could legally be infringed upon by a search, a determination of the existence of probable cause must be made by a judicial officer, subject only to a few necessary exceptions, and that "[t]he exceptions cannot be enthroned in the rule."[69] Frankfurter argued that the conduct of the arresting officers *prior* to the arrest is no less relevant than their conduct in making the arrest,[70] and "[i]n any event. . . the presence or absence of an ample opportunity for getting a search warrant becomes very important."[71]

Analyzing *Rabinowitz* in light of more recent case law, it is interesting to note that the scope of the *Rabinowitz* search greatly exceeded that which the Court proscribed for searches incident to arrest in *Chimel v. California.*[72] In fact, it was as a result of *Chimel* that the first TSW statutes were enacted, permitting precisely the type of search that was undertaken in *Rabinowitz*. With the rapid availability of TSWs, perhaps the time has come to abandon *Rabinowitz* and return to *Trupiano's* practicability standard. However, despite procedural changes which have arguably outmoded *Rabinowitz*, its holding is still in force. The Court continues to focus on the reasonableness of the search.[73]

As evidence of the continuing validity of *Rabinowitz*, the Supreme Court, in 1974, held that the failure to obtain a search warrant at the first practicable moment would not invalidate a warrantless search, because "the exigency may arise at any time and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation, necessitating prompt police action."[74] Where, for example, a suspect's vehicle is stopped while under surveillance, the police are not required to attempt to obtain a search warrant. On the other hand, the availability of TSWs may alter this rule.

3. TSWs and Carroll Searches

The rapid availability of the TSW significantly relaxes burdensome police procedures that have traditionally accompanied the procurement of a search warrant. Because the burden on police officers is reduced, the protection afforded to personal liberties should be increased accordingly. The existence of the TSW procedure will proba-

69. *Id.* at 80.
70. *Id.* at 84.
71. *Id.*
72. 395 U.S. 752 (1969).
73. *Chimel* actually overruled *Rabinowitz* with respect to searches incident to arrests. Although it is not clear from *Chimel* how much of *Rabinowitz* was invalidated, the portion pertinent here—the materiality of ample opportunity to get a warrant—was reiterated in Cardwell v. Lewis, 417 U.S. 583 (1974), discussed in the next paragraph.
74. Cardwell v. Lewis, 417 U.S. 583, 595-96 (1974).

bly lead to a redefinition of the meaning of exigency, perhaps resulting in a return to the *Trupiano* "reasonable practicability" standard.

Measuring the exigency of a situation based on the officer's opportunity to obtain a warrant appears to be particularly suited to the use of TSWs, because TSWs can drastically reduce the time lag inherent in the procurement of a search warrant. But even TSWs may involve some delay, and when the situation confronting an officer is such that even a short delay[75] would be imprudent, a warrantless automobile search could still be conducted.

TSWs can often be obtained during ongoing surveillance activities, as well as in automobile stop and search situations, with no appreciable cost to effective law enforcement. The use of the TSW procedure allows an officer not only to obtain a search warrant, but to simultaneously observe the suspect vehicle. Since officers maintain a supply of search warrant forms in their vehicles, the acquisition of TSWs during surveillance allows judicial intervention without endangering the ongoing investigation. Indeed, if a situation necessitates action before the TSW application is complete, the police can discontinue the application procedure and search the automobile, relying on the *Carroll* Doctrine.

This is precisely what occurred in *State v. Arellano*,[76] where police had a parked automobile under surveillance in connection with a narcotics investigation. While the officers were attempting to obtain a TSW, the car was moved by the defendant and his accomplices, at which point the officers stopped and thoroughly searched the vehicle without a warrant.[77] The Arizona Supreme Court upheld the search, stating that the circumstances were exigent, and that the exigency was not created by the officers, but rather was forced upon them. On the other hand, where officers are able to obtain a TSW while maintaining surveillance, the additional burden imposed by requiring TSW acquisition during surveillance is negligible and the burden is outweighed by the desirability of protecting the suspect's Fourth Amendment rights. Under such circumstances the TSW procedure should, in the opinion of this author, be obligatory.[78]

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75. *See* notes 10-12 and accompanying text *supra*.

76. 110 Ariz. 434, 520 P.2d 306 (1974).

77. *Id.* Although the opinion does not detail the extent of the search, it does note that the confiscated marijuana was found in the trunk under the floorboard.

78. The *Trupiano* Court would probably have favored such a requirement. In dealing with a warrantless search of an illegal distillery, the Supreme Court stated ". . . the property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant; especially is this so since one of them was on hand at all times to report and guard against such a move." 334 U.S. at 706. Had the Court envisioned a procedure allowing the officer to procure a warrant while maintaining surveillance, they doubtlessly would have espoused such a requirement.

The TSW procedure would also significantly heighten the protection given personal liberties in the typical automobile stop and search. In many, if not most, automobile stop situations, immediate action by the investigating officer is not required. The officer can detain the suspect and immobilize the suspect's vehicle while obtaining advance judicial approval for a search. Admittedly, requiring the officer to obtain a TSW in those situations would increase the administrative burden on law enforcement,[79] but the accompanying augmentation of constitutional protections should outweigh this concern.[80] Certainly constitutional rights should not be sacrificed in deference to the alleviation of ministerial tasks.

One objection to the TSW procedure is that the potentially innocent suspect is delayed at the scene of the stop for the period of time required for the warrant's acquisition. Typically, a stop and search situation involves the potential infringement of two of the suspect's interests: his interest in moving on, and his privacy interest in the contents of his automobile.[81] If the officer detains the suspect while obtaining a TSW, the suspect's freedom of movement is restricted. On the other hand, if a warrantless search is immediately made, the suspect's privacy is invaded. One solution is to allow the suspect to select which of these interests shall be compromised. He may either consent to a warrantless search, thus minimizing any delay, or, if he values his privacy, he may insist upon judicial intervention.[82]

It is well settled that where a suspect consents to a warrantless search, the search is valid.[83] Purported consent alone is not sufficient, however, since it must be established that the consent was freely given

79. For example, if police were required to obtain TSWs for routine automobile searches, the influx of calls would probably mandate that large cities maintain a magistrate exclusively for the issuance of TSWs. The required use of TSWs would also increase the time officers would spend at the scene of the intended search, reducing the number of officers available to answer other calls.

80. The constitutional protections inherent in the use of search warrants include: the intervention of a neutral and detached magistrate, the "freezing" of an officer's probable cause statement *prior* to the search, and specificity concerning the focus of the search and its location.

81. Although "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building," Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973), *quoted in* Cardwell v. Lewis, 417 U.S. 583, 590 (1974), the Fourth Amendment *does* protect searches of automobiles.

82. Justice Harlan espoused this argument in his dissent in Chambers v. Maroney, 399 U.S. 42 (1970). *See* notes 104-06 and accompanying text *infra*.

83. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Vale v. Louisiana, 399 U.S. 30, 35 (1970). Note that the burden of proof of valid consent is on the prosecution. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). For a discussion of when one may validly consent to the search of another's property, see 2 W. LAFAVE, SEARCH AND SEIZURE, 691-759 (1978).

and was not "the product of duress or coercion, express or implied."[84] Voluntariness is a question of fact to be determined not by any single factor, but rather by the totality of the circumstances.[85] It should be noted that "[w]hile knowledge of the right to refuse to consent is one factor to be taken into acount, the government need not establish such knowledge as the *sine qua non* of effective consent."[86]

It has been argued that consent to search is not voluntary if it is given in response to a threat of immobilization for an indefinite period of time, such as that required for the procurement of a TSW. The Ninth Circuit, however, has held to the contrary. In *United States v. Agosto*,[87] the defendants were told that if they did not consent to an immediate search of their premises, the premises would be put under guard until a warrant could be obtained. The court, in looking at the totality of the circumstances, found that such a statement by police did not negate voluntariness as a matter of law.[88] In fact, in a California case where the defendant was given a similar choice, the court held that this "was tantamount to advising the defendant that he had a right to refuse consent."[89]

The voluntariness of the consent becomes a more important issue as the defendant's surroundings at the time of the consent become less familiar. "The psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness . . . [and] the court must be aware of the 'vulnerable subjective state' of the defendant . . . ."[90] Therefore, while a suspect may take some comfort in being in his own vehicle, when he is stopped late at night on a lonely, dark, and infrequently traveled road, it may be argued that his consent to search is not the result of a voluntary decision, but is rather a product of his strange and oppressive surroundings. This was the situation

84. Schneckloth v. Bustamonte, 412 U.S. at 227.

85. Among the factors bearing on the validity of consent are: claim of authority; show of force by police and other coercive surroundings; a threat to seek or obtain a search warrant; prior illegal police action; the consentor's maturity, sophistication, mental or emotional state; prior or subsequent refusal of consent; a confession or other cooperation; consentor's denial of guilt; the giving of *Miranda* warnings; right to counsel; "implied" consent by engaging in certain activities; deception as to police identity; and deception as to police purpose. For a general discussion of these factors, *see* 2 W. LAFAVE, *supra* note 83, at 636-90. Note also that "[w]hether defendant intended to give his consent is not determinative" where the officer reasonably interpreted defendant's words and actions as granting consent. People v. Wheeler, 43 Cal. App. 3d 898, 903, 118 Cal. Rptr. 205, 207 (1974). *But cf.*, Bumper v. North Carolina, 391 U.S. 543, holding that a mere expression of acquiesence may not be enough to sustain a finding of voluntary consent. *Id.* at 548-49.

86. Schneckloth v. Bustamonte, 412 U.S. at 227.

87. 502 F.2d 612 (9th Cir. 1974).

88. *Id.* at 614.

89. People v. Gurtenstein, 69 Cal. App. 3d 441, 451, 138 Cal. Rptr. 161, 166 (1977).

90. United States v. Rothman, 492 F.2d 1260, 1265 (9th Cir. 1973) (quoting Schneckloth v. Bustamonte, 412 U.S. at 229).

in *United States v. Walling*,[91] where the court held that the defendant's consent to a search of the trunk of his automobile was voluntary. It may follow from *Walling* that in any automobile stop and search situation consent in the face of a threat of indefinite immobilization will be found to be voluntary and therefore effective.

4. The Chambers Stationhouse Search

In 1970, the Supreme Court extended the scope of warrantless automobile searches, effectively dispensing with the requirement that exigent circumstances exist at the time of the search. In *Chambers v. Maroney*,[92] the Court upheld a warrantless search of an automobile after it had been removed to the stationhouse and was being held there under police control. Though the exigencies involved in an automobile stop and search situation do not continue after the automobile has been removed to the police station, the *Chambers* Court nevertheless based their endorsement of the warrantless stationhouse search on the automobile exception.

The Court chronicled the development of the automobile exception since *Carroll v. United States*,[93] noting that courts had consistently upheld automobile searches in circumstances where a warrantless search of a home or office would not have been justified.[94] The distinction between buildings and vehicles was necessary, because "the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforseeable; moreover, the opportunity to search is fleeting since a car is readily movable"[95] and can be driven out of the locality or jurisdiction in which the warrant must be sought. "This is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened."[96]

The inherent mobility of automobiles alone did not provide a sufficient basis for the *Chambers* opinion, because the car was under police control at the time of its search.[97] However, since a warrantless search of the car would have been constitutionally permissible if conducted at the scene of the stop, and since it was not unreasonble under the circumstances to remove the car to the stationhouse,[98] the Court

91. 486 F.2d 229 (9th Cir. 1973).
92. 399 U.S. 42 (1970).
93. 267 U.S. 132 (1925).
94. 399 U.S. at 48-51.
95. *Id.* at 50-51.
96. Cardwell v. Lewis, 417 U.S. at 590.
97. The *Chambers* Court held that the stationhouse search was too far removed in time and place from the defendant's arrest to be justified as a search incident to arrest. 399 U.S. at 47.
98. "All occupants in the car were arrested in a dark parking lot in the middle of the

held that police did not lose their right to search the automobile without a warrant when they first transported it to the stationhouse.[99] The Court reasoned that the exigency inherent in the mobility of an automobile exists even after the car has been removed to the stationhouse. The Court found only the retention of the car while the warrant was being sought to have been an unconstitutional infringement of the rights of the car owner.[100]

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which is the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.[101]

Thus, the *Chambers* majority, unwilling to determine whether immediate search or indefinite seizure poses the greater intrusion upon constitutional rights, equated the two, allowing either course to be followed. Moreover, since the exigency present at the scene was found to retain its full force after the vehicle was removed to the stationhouse, the *Chambers* majority found the later search to be constitutionally indistinguishable from an indefinite seizure for the procurement of a search warrant.[102] In other words, "the existence of exigent circumstances is to be determined as of the time of the seizure rather than the time of the search,"[103] and a warrantless stationhouse search is permissible regardless of the lapse of time which arguably attenuates any exigency.

In a separate opinion, Justice Harlan dissented from the *Chambers* majority's "lesser-greater non-distinction."[104] Justice Harlan felt it was "clear that a warrantless search involves the greater sacrifice of Fourth Amendment values."[105] Also, Harlan believed that the choice of

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night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the stationhouse." *Id.* at 52 n.10.

99. This section will not discuss inventory searches, as these searches are routine listings of personal property and need no exigency or probable cause to validate them.

100. 399 U.S. at 52.

101. *Id.* at 51-52.

102. *Id.* at 52.

103. United States v. Collins, 549 F.2d 557, 560 (8th Cir. 1977), *cert. denied*, 431 U.S. 940 (1977).

104. Justice Harlan's opinion, concurring in part and dissenting in part, begins at 399 U.S. 55.

105. *Id.* at 63.

whether the vehicle should be immediately searched or held until a warrant could be obtained should be left to the vehicle's occupants. The occupants could consent to an immediate search, thus avoiding any delay, or insist that their privacy interest be protected by the intervention of a neutral magistrate.[106] Justice Harlan's argument appears to be the most reasonable solution to the lesser-greater problem. Certainly personal rights are afforded greater protection by allowing the individual suspect to choose which of his rights is to be infringed. When the Court allows the police to make this choice, it effectively dispenses with the search warrant requirement in automobile search situations. Faced with the choice, the officers are certain to prefer the more expedient alternative and conduct a warrantless search.

Had the *Chambers* Court decided that the immobilization of the automobile pending the procurement of a warrant entailed the lesser infringement of personal rights, warrantless searches of automobiles based on exigency would have been effectively halted. In the words of one commentator:

> If the police have authority to make warrantless seizure of the automobile and maintain custody pending issuance of a warrant, and if one views such activity as a "lesser" violation of the Fourth Amendment, under what theory could an immediate search on the highway ever be justified? In other words, most automobile cases involve a seizure followed by a search. In the theory advanced, exigencies might justify warrantless seizures, but never could justify warrantless searches.[107]

It can hardly be doubted that the Court wished to avoid so drastic a result as the virtual elimination of the *Carroll* Doctrine from the exceptions to the search warrant requirement. Instead, the Court ensured *Carroll's* continued validity by refusing to draw a lesser-greater distinction. As a result, whenever exigency exists at the time of an automobile stop,[108] the police do not need a warrant to search, regardless of how attenuated the exigency has become.[109]

The continued vitality of the *Carroll* Doctrine as expanded by the *Chambers* decision is evidenced by a 1975 *per curiam* opinion in which

106. *Id.* at 64. *See* notes 82-91 and accompanying text *supra.*

107. Williamson, *The Supreme Court, Warrantless Searches, and Exigent Circumstances*, 31 OKLA. L. REV. 110, 131 (1978).

108. "The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station." Coolidge v. New Hampshire, 403 U.S. 443, 463 n.20 (1971). Thus, if the officer could not have searched initially, he may not search later by relying on *Chambers.*

109. Even if enough time passes between seizure and search, during which a warrant could have been obtained, this alone would not invalidate the search. "The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." Cardwell v. Lewis, 417 U.S. at 595-96.

the Court upheld another warrantless stationhouse search of an automobile. The case, *Texas v. White*,[110] involved a search of the defendant's car after it had been driven by an officer to the stationhouse where the defendant had refused consent to search. In reaching its decision, the Court cited *Chambers*, holding that "[t]here, as here, '[t]he probable cause factor' that developed at the scene 'still obtained at the stationhouse.' "[111]

Justice Marshall, joined by Justice Brennan,[112] countered the majority opinion in a strong dissent, arguing that the case was factually distinguishable from *Chambers*, and that *Chambers* should not be extended beyond its facts. The dissent distinguished *Chambers* by finding that in that case the circumstances justified the removal of the car to the stationhouse prior to the search,[113] while the police officers lacked any apparent justification for the warrantless removal of the defendant's car in *Texas v. White*.[114]

> The seizure and removal of the car here were not for the purpose of immobilizing the car until a warrant could be secured, nor were they for the purpose of facilitating a safe and thorough search of the car. In the absence of any other justification, I would hold the seizure of petitioner's car unlawful and exclude the evidence seized in the subsequent search.[115]

The majority apparently expands the allowable grounds for removing a vehicle to the police station prior to a warrantless search.

The first California case to apply *Chambers* to an on-the-scene search was *People v. Laursen*.[116] In *Laursen*, the defendant abandoned his car at the scene of an attempted armed robbery and commandeered another vehicle for the getaway. Police at the scene of the crime imme-

110. 423 U.S. 67 (1975).

111. *Id.* at 68.

112. *Id.* at 69.

113. For an outline of the circumstances present in *Chambers*, see note 98 *supra*.

114. "In this case, the arrest took place at 1:30 in the afternoon, and there is no indication that an immediate search would have been either impractical or unsafe for the arresting officers. . . . Since, then, there was no apparent justification for the warrantless removal of respondent's car, it is clear that this is a different case from *Chambers*." 423 U.S. at 70 (Marshall, J., dissenting).

115. *Id.* at 72. Commentators have also questioned the rationale used by the majority in *Texas v. White*. "One could quarrel not so much with the result but with the careless non sequitur that supported it. The key issue in the *Chambers* extension of *Carroll* was not whether the probable cause still obtained at the stationhouse . . . , but rather whether the *exigency* 'still obtained at the stationhouse.' The *Chambers* battle was fought over that element of the doctrine, not over the element of probable cause." Moylan, *The Automobile Exception: What It Is And What It Is Not—A Rationale In Search Of A Clearer Label* 27 MERCER L. REV. 987, 1011 (1976).

116. 8 Cal. 3d 192, 501 P.2d 1145, 104 Cal. Rptr. 425 (1972). Prior to *Laursen*, *Chambers* was applied to an air freight search. People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

diately searched the passenger compartment of the car for evidence of the defendant's identity, but because they did not have the tools necessary to gain access to the trunk, they impounded the car and subsequently made a warrantless search of the trunk at the impound garage. In upholding the warrantless search, the Court, citing *Chambers*, first stated that "there is no distinction of constitutional proportion between an immediate search on probable cause without a warrant and the automobile's immobilization until one is secured."[117] The court then held that the impounding of the vehicle was reasonable under the circumstances.[118] Having justified the impounding of the car, the court could find "no inconvenience or invasion of defendant's rights which further infringed any constitutional prohibition by the fact that the vehicle was removed from the scene of the crime to an impound garage beyond that which would have resulted had a warrant authorizing the impound and search first been obtained."[119] Thus, the California courts have adopted *Chambers* where the impounding of the vehicle is found to have been reasonable.

a. The TSW and the Stationhouse Search

It is interesting to speculate whether *Chambers* and its progeny would have reached the same conclusion had TSWs been available at the time those cases were decided. The *Chambers* majority did state that "which is the 'greater' and which is the 'lesser' intrusion . . . may depend on a variety of circumstances."[120] Certainly one of these circumstances, and indeed a very forceful circumstance, is the duration of the car's immobilization. Now that this duration can be significantly reduced through the use of TSW,[121] the degree of infringement of one's constitutional rights can be correspondingly diminished. Thus, the minimization of the period of immobilization, coupled with the desirability of an independent judgment by a magistrate, may very well justify a reconsideration of *Chambers*, favoring the temporary seizure over a warrantless search.[122] In any event, the availability of TSWs strengthens the logical appeal of Harlan's dissent in *Chambers*,[123] and

117. 8 Cal. 3d at 201, 501 P.2d at 1151, 104 Cal. Rptr. at 431.

118. *Id.* at 202, 501 P.2d at 1151, 104 Cal. Rptr. at 431.

119. *Id.*

120. 399 U.S. at 51-52.

121. *See* note 10 *supra.*

122. In his dissenting opinion in Texas v. White, 423 U.S. 67, 69 (1975), Justice Marshall stated that "the basic premise of *Chambers'* conclusion that seizures pending the seeking of a warrant are not constitutionally preferred to warrantless searches was that *temporary seizures are themselves intrusive.*" *Id.* at 71-72 (emphasis added). Thus, Marshall believes the duration of the seizure is *not* critical. Later in his argument, Marshall stated "*Chambers* took such time elements out of the equation . . . 'equating' the intrusiveness of a search and a *relatively brief seizure.*" *Id.* at 72 n.*, (Marshall, J., dissenting) (emphasis added).

123. Chambers v. Maroney, 399 U.S. at 55 (Harlan, J., dissenting).

impairs the continued validity of the "lesser-greater non-distinction."[124]

5. Privacy Considerations

Although the *Chambers* Court stressed the mobility of the automobile as the grounds for the car/home distinction, later cases have focused on the difference in an individual's expectation of privacy in the car and the home.[125] In its plurality opinion in *Cardwell v. Lewis*,[126] the Court stated that "the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."[127]

The difference between one's expectation of privacy in their car, on the one hand, and their person or building, on the other,[128] led the Court, in *Almeida-Sanchez v. United States*,[129] to conclude that "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building."[130] But it is not clear why a lesser privacy interest in one's car should justify a lesser standard of constitutional protection. The real issue is whether a reasonable expectation of privacy in one's automobile is significant enough to be afforded constitutional protection, not whether this privacy interest equals the privacy interest in one's home.

Courts have repeatedly held that the reasonable expection of privacy in an automobile is insufficient to protect the vehicle from warrantless government intrusion. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."[131] In addition, "[a]utomobiles are consistently left with casual

124. *See id.* at 51.

125. The *Chambers* opinion merely mentioned privacy considerations. "[T]his Court [does not] require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." 399 U.S. at 50.

126. 417 U.S. 583 (1974) (warrantless stationhouse search of the *exterior* of a car).

127. *Id.* at 591.

128. In a literal sense, one's expectation of privacy is immaterial, since privacy protection stems from rights guaranteed by the Fourth Amendment. Subjectively, the degree of privacy protection one expects may well be greater or less than that which one is entitled to by right. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382-88 (1974).

129. 413 U.S. 266 (1973) (Powell, J., concurring).

130. *Id.* at 279.

131. Cardwell v. Lewis, 417 U.S. 583, 590 (1973).

bailees who have complete control over the car for extended periods of time;"[132] they periodically undergo official investigation and are often taken into police custody in the interests of public safety.[133]

This is not to say that automobiles have no protection under the Fourth Amendment, indeed, a search under the Fourth Amendment, even of an automobile, is a serious invasion of privacy[134] and the officers must have probable cause before they can lawfully search a suspect's car. Also, as previously noted,[135] "there is a recognized and protectible privacy interest in concealed areas of a car"[136] and absent consent, officers must have specific probable cause with respect to these areas before searching them without a warrant.[137] These areas do not, however, enjoy the degree of protection extended to a house or office, although perhaps they should.[138]

As modern society has become increasingly more dependent on the automobile, the car has evolved into much more than a mere vehicle for transportation. It is closer to being a "repository for personal effects,"[139] taking on some of the same functions, and therefore privacy expectations, that apply to homes.[140] Although the validity of the distinction between the reasonable expectation of privacy in one's car and

132. Comment, *Aftermath of Cooper v. California*, 1968 U. ILL. L.F. 401, 410.

133. South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

134. United States v. Ortiz, 422 U.S. 891, 896 (1975).

135. *See* notes 48-50 and accompanying text *supra*.

136. Wimberly v. Superior Court, 16 Cal. 3d 557, 571, 547 P.2d 417, 426, 128 Cal. Rptr. 641, 650.

137. For a discussion of consent, *see* notes 83-91 and accompanying text *supra*.

138. In Chimel v. California, 395 U.S. 752, the Court held that, absent another exception to the search warrant requirement, homes and offices could only be subject to a warrantless search when the search is incident to a lawful arrest, and the scope is limited to the area within the arrestee's immediate control. Since concealed areas of cars enjoy greater privacy protection than exposed areas of cars, why should the concealed areas of one's car receive any less protection than one's office, especially when the car is in police custody? The requirement of a search warrant would offer these concealed areas added protection in accordance with the actual expectation of privacy held therein.

It should also be noted that in a recent case, the Supreme Court decided that passengers of an automobile lacked standing to challenge a warrantless search of the car in which they were riding since (1) they asserted neither a property nor a possessory interest in the car searched, nor an interest in the property seized, and (2) they failed to show that they had any legitimate expectation of privacy in the areas searched. Rakas v. Illinois, 439 U.S. 128 (1978). Thus, the status as a mere invitee does not alone assure a passenger of Fourth Amendment protections. *See also* Pollard v. State, 388 N.E. 2d 496, 502-03 (Ind. 1979).

139. Cardwell v. Lewis, 417 U.S. 583, 590.

140. *See* Jesmore, *Toward the Preservation of Personal Privacy*, 4 HASTINGS CONST. L.Q. 723, 737 n.85 (1977). As to whether self-contained mobile homes are more like cars than homes in regards to the owner's expectation of privacy, *see* United States v. Miller, 460 F.2d 582 (10th Cir. 1972), where the court sustained the warrantless search of a mobile home, relying on *Carroll* and *Chambers*.

in one's home has been widely accepted, it may be argued that this distinction has lost its validity.

a. The TSW and Privacy Considerations

The shift in emphasis from mobility to privacy considerations broadens the scope of permissible warrantless searches. Under the former analysis, as extended by *Chambers*, the mobility of the automobile at the time of the stop was deemed to continue, justifying a later warrantless search at the stationhouse. The legality of this later search was dependent upon a "variety of circumstances,"[141] including the duration of the delay required for the acquisition of the search warrant. Thus, the rapid availability of TSWs may affect the determination of "which is the 'greater' and which the 'lesser' intrusion."[142]

However, under the expectation of privacy analysis, the inquiry involves the determination of one threshhold issue: is the expectation of privacy in the place to be searched sufficiently great so that probable cause alone will not justify a warrantless intrusion.

Because the privacy analysis involves this threshold issue, rather than a balancing test, the impact of the availability of TSWs on the analysis is less apparent than under the mobility rationale. Where the privacy interests involved are insufficient to mandate the procurement of a traditional search warrant, the increased accessibility of the TSW may be irrelevant. But if this threshold issue is broken down into its own balancing test, the TSW's advantages become evident.

While the privacy analysis has never incorporated a true balancing test, in certain areas it has resembled a sliding scale, ranging from the unprotected areas in plain view to areas, such as one's home, which receive the maximum protection. In addition, the delay and inconvenience to police activities inherent in the acquisition of a search warrant, to a certain degree, have been "balanced" against the privacy interests, and a line drawn allowing warrantless searches in some areas but not in others. The introduction of the TSW into this equation should produce a different result. Just as "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building,"[143] the acquisition of a TSW is far less burdensome than the acquisition of a traditional search warrant. Once the inconvenience inherent in obtaining a warrant is diminished, the sides of the equation must be rebalanced, and the range of protected privacy interests must be increased accordingly. The expedience and convenience of the TSW

141. Chambers v. Maroney, 399 U.S. at 51-52.
142. *Id.* at 51.
143. Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring).

should result in the elimination of warrantless searches in all areas enjoying even minimal privacy expectations.

B. The Plain View Doctrine

> As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment.[144]

The plain view exception to the search warrant requirement was formally promulgated by Justice Stewart in *Coolidge v. New Hampshire*.[145] Recognizing that "[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant,"[146] Stewart set out to delimit the parameters of the doctrine. He defined three necessary conditions for a valid plain view seizure: prior valid intrusion, inadvertent discovery, and evidence which is immediately apparent as such.

"What the plain view cases have in common is that the police officer in each of them had a prior justification for an intrusion . . . ."[147] This justification serves as the threshold element of plain view analysis; if not satisfied, the search cannot be condoned under plain view rationale. The *Coolidge* opinion listed four examples of prior valid intrusions: intrusions pursuant to a warrant to search for other items, intrusions pursuant to a valid warrantless search for other items, intrusions due to a search incident to arrest, and valid intrusions where the officer had not intended a search.[148] These illustrations were not intended by the Court to be exhaustive, but rather were meant to serve as examples of prior valid intrusions.

The existence of a prior valid justification for entry preserves constitutionally protected privacy interests. Since the officer must be lawfully at his vantage point in order for the plain view doctrine to apply, items within his purview are, by definition, beyond one's reasonable expectation of privacy, and therefore may be seized without violating privacy rights.[149] Also, because only items left in open view may be seized, this doctrine does not allow "general, exploratory rummaging in a person's belongings."[150]

144. 1 W. LAFAVE, SEARCH AND SEIZURE 240 (1978).

145. 403 U.S. 443 (1971).

146. *Id.* at 465.

147. *Id.* at 466.

148. "[T]he plain view doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." Coolidge v. New Hampshire, 403 U.S. at 466.

149. *See* note 129 *supra*.

150. Coolidge v. New Hampshire, 403 U.S. at 467.

The second condition precedent to a valid plain view seizure required in some jurisdictions, but not in California,[151] is inadvertence. The *Coolidge* opinion, recalling the standard of *Trupiano v. United States*,[152] reasoned that so long as the plain view doctrine does not validate general searches, "it would often be a needless inconvenience"[153] to require police to procure a warrant covering an inadvertent discovery. "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it . . . . [t]he requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable . . . ."[154]

Coolidge also described the *type* of things which may be seized under the plain view rationale:

> Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.[155]

a. The TSW and Plain View Searches

Although the *Coolidge* opinion does not set forth precisely how "immediately apparent" the evidence must be, courts have generally applied a standard of probable cause. In a statement typical of the general trend, the Supreme Court of Alabama articulated the standard: "[f]or an item in plain view to be validly seized, the officer must possess some judgment at the time that the object to be seized is contraband and that judgment must be grounded upon probable cause."[156]

Although the plain view exception appears to be a logical solution to the dilemma of inadvertently discovered evidence, it is beyond question that constitutional rights would be better protected through the use of a search warrant. In *Coolidge*, Justice Stewart was influenced by his belief that "the inconvenience of procuring a warrant to cover an inadvertant discovery is great."[157] Since this inconvenience is considerably reduced by the use of TSWs, it may be time to abandon the plain view exception in favor of the use of TSWs whenever practicable.

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151. Since this portion of the *Coolidge* decision was joined by only four justices (Stewart, Douglas, Brennan & Marshall, JJ.) some jurisdictions, including California, have rejected this requirement. *See* North v. Superior Court, 8 Cal. 3d 301, 307-08, 502 P.2d 1305, 1308, 104 Cal. Rptr. 833, 836 (1972).

152. 334 U.S. 699 (1948).

153. 403 U.S. 468.

154. *Id.* at 470.

155. *Id.* at 466.

156. Shipman v. State, 291 Ala. 484, 488, 282 So. 2d 700, 704 (1973). *Accord*, People v. Murray, 77 Cal. App. 3d 305, 143 Cal. Rptr. 502 (1978).

157. 403 U.S. at 470.

The advantages of a TSW over a warrantless plain view seizure stem from the weaknesses inherent in the plain view doctrine. First, the inadvertent nature of the discovery loses much of its importance when a TSW is used. The inadvertence requirement exists due to the fear that police will utilize the plain view doctrine to circumvent search warrant requirements when they anticipate what evidence will be left in plain view.[158] If an officer is required to obtain the approval of a magistrate prior to seizing even plain view evidence, much of the motivation to fabricate inadvertence disappears. Nevertheless, there will be occasions when an officer, suspecting the presence of contraband at a certain premises, but lacking sufficient probable cause to justify the issuance of a warrant, may attempt to engineer a "prior valid intrusion" to gain admittance and effectuate a cursory search, hoping to spot the contraband in plain view.[159] Once contraband in plain view is spotted, of course, the officers have sufficient probable cause for the acquisition of a warrant. It is doubtful that the availability of TSWs will solve this problem; indeed, it is likely that this practice can only be checked through internal enforcement of policies set by the police department itself. But abandonment of the plain view doctrine in favor of TSWs would result in shifting the responsibility for the initial determination of the evidentiary value of the items seized from the officer on the scene to a neutral and detached magistrate. That a magistrate's judgment is preferred over that of an officer involved in the case is beyond question;[160] the use of TSWs would thus operate as an effective check on illegal seizures. The fact that this check would preclude seizure of the item is another of the advantages of using the TSW, for mere exclusion of evidence at trial often does not remedy the invasion of privacy involved in its seizure and impoundment. While the privacy invasion and inconvenience involved in a plain view seizure is sometimes minimal, in other instances the interference can be considerable. In *North v. Superior Court*,[161] for example, the California Supreme Court allowed the plain view seizure of an automobile, because it was parked on a public street and was evidence of a kidnapping. In a case such as this, a TSW could have been obtained prior to the automobile's seizure with minimal, if any, danger to effective law enforcement. Certainly the property rights of the vehicle's owner would have been better protected had the probable cause for its seizure been tested by an impartial magistrate prior to its impoundment. The other advantages of seizures pur-

158. *Id.* at 470-71.

159. Police officers are often accused of this practice. A typical example is the timing of the execution of an arrest warrant so as to apprehend the suspect in his home, since, given the valid intrusion to arrest, the plain view doctrine supersedes one's reasonable expectation of privacy.

160. *See* note 13 *supra.*

161. 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).

suant to search warrants over warrantless seizures[162]—including the "freezing" of the officer's probable cause statement and the presumed sufficiency of probable cause—also counsel reevaluation of the plain view doctrine in light of the new TSW procedure.

C. Search Incident to Arrest

Under the *Carroll-Chambers* rule, searches of automobiles are based in part on the existence of probable cause to search. The Court also allows warrantless searches where there is probable cause to *arrest*.[163]

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing a 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 affect an escape from custody, is not to be doubted.[164]

The history of search incident to arrest has been one of "remarkable instability,"[165] characterized by constant shifting of constitutional standards.[166] The current scope of the search incident to arrest was partially delineated in *Preston v. United States*,[167] a case involving the warrantless stationhouse search of defendant's automobile. In *Preston*,

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162. *See* note 80 *supra*.

163. The *Carroll* Court distinguished the right to search from the right to arrest: "[t]he 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." 267 U.S. at 158-59. Similarly, the California Supreme Court ruled that "[i]t follows that probable cause to arrest a traffic offender, no matter how persuasive, is neither a necessary nor a sufficient condition for a warrantless search of his vehicle for contraband. To justify that search, there must be independent probable cause to believe the vehicle does in fact contain contraband." People v. Superior Court (Kiefer), 3 Cal. 3d 807, 815, 478 P.2d 449, 453, 91 Cal. Rptr. 729, 733 (1970).

164. Agnello v. United States, 269 U.S. 20, 30 (1925).

165. Chimel v. California, 395 U.S. 752, 770 (1969) (White, J., dissenting).

166. This history is chronicled in *Chimel*, 395 U.S. at 755-60. The important cases in the development include: Weeks v. United States, 232 U.S. 383 (1914) (recognizing a traditional right to search the *person* of the accused); Carroll v. United States, 267 U.S. 132 (1925) (upon arrest, whatever is found on one's person or *in his control* may be seized as evidence); Marron v. United States, 275 U.S. 192 (1927) (upholding officer's right to contemporaneously search the place of arrest); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (warrantless search of an arrestee's office unlawful where no crime had been committed in the officer's presence and search warrant could have been obtained); Harris v. United States, 331 U.S. 145 (1947) (sustaining extensive warrantless search of four-room apartment after occupant had been taken into custody pursuant to an arrest warrant); Trupiano v. United States, 334 U.S. 699, 708 (1948) (right to search incident to arrest "grows out of the inherent necessities of the situation at the time of the arrest" and that "there must be something more in the way of necessity than merely a lawful arrest"); Rabinowitz v. United States, 339 U.S. 56, 66 (the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.").

167. 376 U.S. 364 (1964).

the Court refused to uphold such a search as incident to arrest because of its remoteness in time and place from the actual arrest.[168] "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."[169]

The leading case on the present status of searches incident to arrests is *Chimel v. California*.[170] There, officers appeared at the defendant's house with a warrant for his arrest and waited there for his return. Upon arriving home, the defendant was arrested, after which the police thoroughly searched the entire house, including the attic, garage, and a small workshop. The search lasted approximately one hour. The Court excluded the fruits of this search, restricting the permissible scope of the search incident to the area within the arrestee's immediate control. A broader search could have violated the arrestee's Fourth Amendment rights and could not have been justified in the absence of another exception to the search warrant requirement.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[171]

In justifying a search incident to arrest, all that need be shown is (1) that the person searched was lawfully arrested and (2) that the scope of the search was limited to the area within the arrestee's immediate con-

168. For a similar California holding, *see* Mestas v. Superior Court, 7 Cal. 3d 537, 498 P.2d 977, 102 Cal. Rptr. 729 (1972).

169. 376 U.S. at 367.

170. 395 U.S. 752 (1969).

171. *Id.* at 762-63. The Court also held, that although *Harris* and *Rabinowitz* could be factually distinguished from the case at bar, the rationale supporting them would justify the search conducted in *Chimel*, and therefore the two cases had to be overruled. "*Rabinowitz* and *Harris* have been the subject of critical commentary for many years, and have been relied upon less and less in our decisions. It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are not longer to be followed." *Id.* at 768.

trol.[172] A separate showing of exigency is unnecessary, as exigency is assumed to flow from the arrest.

The limitations on searches incident to arrests apply not only to the time, place and scope of the warrantless search, but also to the items which may be the focus of the search:

> It is now settled that as an incident to a lawful arrest, a warrantless search limited both as to time . . . and place . . . may be made (1) for instrumentalities used to commit the crime, the fruits of the crime, and other evidence thereof which will aid in the apprehension or conviction of the criminal; (2) for articles the possession of which is itself unlawful, such as contraband or goods known to be stolen; and (3) for weapons which can be used to assault the arresting officer or to effect an escape.[173]

1. The TSW and Search Incident to Arrest

In applying the *Chimel* line of reasoning to automobile searches, it becomes apparent that the limits of such a search will often be narrower than those associated with the *Carroll* Doctrine. While the search of an automobile pursuant to a finding of probable cause to arrest—an exigent situation by definition—is limited as to time, place, and scope, a *Carroll* search is limited only in scope. Thus, while a warrantless stationhouse search of an automobile is too remote in time and place to be incidental to the arrest, the search may withstand Fourth Amendment scrutiny under the *Carroll-Chambers* rule. One reason for this apparent inconsistency is the difference in rationale for the two search warrant exceptions; under the search incident to arrest analysis, a warrantless search is legitimated by the mobility of the *arrestee*—once safely in custody, access to any weapons or evidence in the automobile is precluded. Under the *Carroll-Chambers* analysis, however, the mobility of the *automobile* justifies the warrantless search, and confinement of the arrestee does not preclude access to the automobile by

172. The search for items on the person of the arrestee is subject to different limitations under federal and California law. Federal courts allow full-body searches of the suspect whenever he is to be taken into custody, and permit the arresting officer to search for evidence as well as weapons. The fact that the suspect is arrested is itself justification for a full-body search and the officer need not point to any subjective fear that the suspect is armed or dangerous. *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). California courts require a more exacting standard and vary the permissible extent of the search of an arrestee according to the stage of detention involved. When the suspect is merely stopped and not taken into custody, "a pat-down search for weapons . . . must be predicated on probable cause for believing that a weapon is secreted on the [arrestee]." People v. Superior Court (Simon) 7 Cal. 3d 186, 206, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972).

173. People v. Superior Court (Kiefer), 3 Cal. 3d 807, 812-13, 478 P.2d 449, 451, 91 Cal. Rptr. 729, 731 (1970) (citations omitted). *See also* United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The *Robinson* Court allowed the inspection of a crumpled cigarette package found on the person of the defendant.

others. However, as noted in the discussion of *Chambers* and its progeny, the rapid availability of TSWs mitigates the mobility problems associated with automobiles, and it is certainly arguable that the effective use of TSWs should result in the placing of time, place and scope restrictions on warrantless stationhouse searches of automobiles also. Since the TSW allows an officer to obtain a warrant without considerable delay, the burden imposed on policemen, by requiring them to secure the car until they can obtain a warrant, is dramatically lessened by the TSW. Thus, just as removal of the arrestee from the vicinity of the automobile precludes a search of the automobile as incident to arrest, the removal of the car to a police garage should preclude a finding of exigency. Indeed, it appears that all but the most urgent automobile searches would lose their true "exigent" status with the enactment of TSW statutes, and therefore, such a search should be subjected to time, place and scope restrictions.

The availability of the TSW does not affect the scope of a search incident to an arrest as limited by *Chimel*. In fact, it was because of the *Chimel* decision that TSWs were developed to allow officers on the scene to obtain the necessary warrant and exceed the *Chimel* restrictions. But the availability of TSWs should also result in extension of the *Chimel* limitations to all non-consensual warrantless searches, including those of automobiles.

Conclusion

The TSW represents a long-needed tool for effective law enforcement. When used to its full potential, it enables officers to obtain prompt advance judicial approval of searches, thereby minimizing the threat of exclusion of evidence at trial. At the same time, the use of the TSW ensures the maximum protection of Fourth Amendment rights, especially in areas previously enjoying only minimal safeguards. Unfortunately, however, much of the potential benefit of the TSW remains unrealized, and absent a judicial mandate requiring their use, this situation is unlikely to change.

As illustrated in the preceding sections, much of the justification for warrantless automobile searches loses its validity in the face of the rapid availability of the TSW. The TSW provides a viable alternative to the warrantless *Carroll* search; it suggests the means of drawing the *Chambers* lesser-greater distinction and it affords greater protection to one's right to privacy, at a minimal cost to law enforcement efficiency. Indeed, the TSW was designed to create a practical and expedient method of search warrant acquisition. Now that this procedure exists, exceptions to the search warrant requirement should be re-drawn to reflect its potential impact on Fourth Amendment protections.