CHAPTER 1

Search and Seizure

EVAN Y. SEMERJIAN

§1.1. Introduction. During the 1972 Survey year, the Supreme Court of the United States issued opinions in only four cases involving search and seizure, most of them relatively uncontroversial. By contrast, the Supreme Judicial Court decided 15 cases on this subject, many of them raising difficult questions, and some of them producing surprising results. The law of search and seizure is probably one of the most confused areas of criminal law. Even the United States Supreme Court has failed adequately to clarify the law. As Justice Harlan, concurring in the Court's 1971 decision in Coolidge v. New Hampshire, observed: “From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling.”

§1.2. Warrantless entries on land. The courts have generally extended the Fourth Amendment's protection from unreasonable searches and seizures to include the “curtilage,” or the ground and buildings immediately surrounding a dwelling and used in connection with it, but not including “open fields.” Nevertheless, the Supreme Judicial Court in Commonwealth v. Colella held that a natural resource officer, acting without a search warrant, legally entered the back yard of a dwelling and searched for stolen lobster pots. The Court reversed the trial judge's order suppressing evidence of the lobster pots found there during the

EVAN Y. SEMERJIAN is a junior partner in Hale & Dorr, Boston.


2 The search and seizure cases amount to approximately 3.5% of the Court's total caseload of 421 cases. See Tauro, The State of the Judiciary, 57 Mass. L.Q. 209 (1972).


4 Id. at 490 (concurring opinion).

§1.2. 1 Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968); Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966).


In Colella a natural resource officer (Officer Nagle) had received a complaint from a lobsterman of missing lobster pots. Just before discovering that the lobster pots were missing, the lobsterman had seen in the vicinity a blue and white boat with a "hippie flower" painted on its side. During his investigation over a period of several days, the officer eventually found the boat and various lobster buoys and lobster pots in the back yard of a dwelling situated along the Mystic River in Medford. The next day, from a position across the Mystic River, the officer observed through binoculars variously marked lobster buoys in the back yard of the dwelling. Still proceeding without a search warrant, he then crossed the river, parked nearby and approached the dwelling. When he received no response after knocking on the front and back doors, the officer entered the back yard and examined the lobster buoys and lobster pots. Later the same day the officer returned to the dwelling with the complaining lobsterman who identified his lobster pots among those piled in the back yard. On the following day (two days after the initial discovery of the boat) Officer Nagle, accompanied by other natural resource officers and the local police, had a "conversation" with the defendant at the dwelling. The defendant "'readily agreed' that the pots 'would be confiscated.'"

According to the Court, the "real questions" in the case were, (1) "whether Officer Nagle's entry on the land was an unlawful trespass or search," and (2) "whether the later taking of the lobster pots was so directly the consequence of that entry, if illegal, as to require suppressing the evidence." On the first question, the Court concluded that the authority for the officer's warrantless entry on the land derived from G.L., c. 21, §6D, which provides that

> ... natural resource officers and deputies may in the performance of their duties enter upon and pass through or over private property or lands whether or not covered by water, and may keep or dispose of sick, injured or helpless fish, birds or mammals, that may come into their possession. ...

Although there is nothing in this section which permits entry on private property to search for lobster pots believed to be stolen, and although its obvious purpose is to protect fish, birds and mammals, the Court never-
Nevertheless held that "The Legislature, in our opinion, has reasonably provided in §6D for the natural resource inspection of at least land and equipment used for purposes subject to statutory natural resource regulation."7 By this language, the Court apparently considered the duties of natural resource officers to be limited to enforcement of natural resource statutes and regulations. This construction is supported by the language of Sections 6 and 6A, authorizing the appointment of natural resource officers to "carry out the duties of the division" and "to enforce all penal laws which it is the duty of the department to enforce . . . including the laws relating to fish, birds, mammals, dogs, and fires. . . ." However, on the basis of Section 6B, which grants such officers "all the authority of police officers and constables, except the service of civil process," the Attorney General has concluded that they have "general police powers with respect to all criminal violations of the laws of the Commonwealth."8 It is of interest, however, that the Court never discussed Section 6B.

It is important to note that the Court construed Section 6D to authorize only a warrantless entry and not a subsequent search for stolen property or seizure of that property. The only statutory authority for natural resource officers to conduct searches and seizures appears in G.L., c. 130, §9, a statute pertaining to illegally taken fish.9 The Court concluded, however, that Section 9 was inapplicable:

Although this section purportedly permits warrantless searches, in instances mentioned in the section, [Chapter] 130, §10, permits an authorized officer to issue warrants to search for illegally held fish in marine fisheries matters. There is no indication, however, in this record that Officer Nagle was looking for lobsters illegally taken. He was trying to find stolen lobster pots. Chapter 21, §6D, appears to be the sole provision which deals with the warrantless entry upon land.10 (Court's emphasis).

In further support of its determination that Section 6D authorized Officer Nagle's warrantless entry, the Court relied on Thurlow v. Cross-

7 Id. at 1304, 273 N.E.2d at 877.
9 "Illegally taken fish" in this context does not mean stolen or misappropriated fish, but rather fish caught or trapped in violation of any marine fisheries law. G.L., c. 130, §9 provides: "[A] natural resource officer . . . may, without a warrant, search any boat, vessel, fish car, bag, box, locker, package, crate, any building other than a dwelling house, any motor vehicle . . . or other vehicle, or any other personal property in which he has reasonable cause to believe, and does believe, that fish taken . . . or held for transportation or sale in violation of law, may be found, and may seize any such fish . . . and may seize any boat . . . box . . . package, crate. . . . or any other personal property used in a violation of the laws relative to marine fisheries and hold the same for forfeiture. Any such . . . officer may arrest without a warrant any person found violating any provision of this chapter or of any ordinance, rule or regulation made under authority thereof, or any other provision of law relative to marine fisheries."
and Commonwealth v. Murphy, two cases upholding under Section 6D warrantless entries by natural resource officers. Both these cases, however, concerned the illegal taking of shellfish and had nothing whatever to do with stolen property.

Next, the Court considered the question whether the lobster pots found on defendant's property were in a constitutionally protected area, presumably on the implicit assumption that Section 6D does not override the requirements of the Fourth Amendment. In dealing with this question, the Court declared that even if the lobster pots were assumed to be within a "curtilage," Section 6D excluded only entry of dwellings, buildings "intimately used or connected with dwellings," and "substantially enclosed" areas. In the absence of proof that the lobster pots were within such excluded building or area, the Court held the officer's inspection was justified. The Court also observed that the "lobster pots were piled in plain view ... on open land" but seemed reluctant to rest its holding on the plain view doctrine noting that "the subject remains filled with uncertainties." However, the lobster pots did not appear to be in an open field, but on the contrary were in the back yard of a dwelling in the city of Medford "about 100 feet down the driveway" from the sidewalk. Thus the lobster pots had to be substantially closer than 100 feet to the back of the dwelling. In these circumstances, that portion of the back yard area embracing the location of the pile of lobster pots should qualify as part of the protected "curtilage" since the resident of the dwelling would reasonably expect to preserve it as a private area in conjunction with the dwelling itself.

14 Id. at 1304, 273 N.E.2d at 877. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), four Justices of the United States Supreme Court were of the opinion that "[w]hat the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." (Emphasis added). 403 U.S. at 466. Four Justices disagreed insofar as an "inadvertent" sighting of the evidence was an essential element of the plain view doctrine. The remaining member of the Court, Justice Harlan, created the "uncertainty" because he expressed no opinion as to the correctness of either view. Clearly, under the former view, the "plain view" doctrine would not apply to Colella, while under the latter view, the inspection of the lobster pots would have been within the plain view doctrine, assuming the entry under Section 6D was justified.
16 See, e.g., Wattenburg v. United States, 388 F.2d 853, 857-58 (9th Cir. 1968) (items in backyard of lodge within 35 feet thereof in constitutionally protected curtilage). See also DEPARTMENT OF JUSTICE, HANDBOOK ON THE LAW OF SEARCH AND SEIZURE 28-29 (1968), wherein the Criminal Division, in instructing law enforcement officers on the applicable rules, states: "Get a warrant when searching either houses or curtilage. You must show probable cause. . . . CURTILAGE is the open space surrounding the dwelling which the average person would consider a part of the house. . . . IF IN DOUBT TREAT THE AREA SURROUNDING
According to the Court, even if the area was constitutionally protected because of the impact of recent federal decisions on the Section 6D warrantless entry, there was still no unlawful search and seizure for the reason that:

Officer Nagle, before he went upon the premises . . . had probable cause to believe that Colella was in possession of buoys and pots not his own. The entry (not a trespass under c. 21, §6D) merely confirmed and added detail to his prior knowledge. He made no seizure when he entered. Even if the entry on the land would now be regarded as improper under recent decisions, Officer Nagle's basic and essential knowledge was not the fruit of that entry. His ultimate seizure of the lobster pots was in Colella's presence and (as we read the record) with his consent.  

Although the reasoning in this passage is not altogether clear, it is doubtful that the Court intended to reject the well-established warrant requirement for searches of curtilage. On the other hand, if the Court was upholding the seizure on the basis of consent, then further serious questions are raised.

From the facts appearing in the opinion, it is apparent that the defendant at the time of seizure was not in an environment conducive to making a free choice. He was surrounded by natural resource officers and police officers, and had no counsel. That the defendant "readily agreed" that the lobster pots "would be confiscated" is hardly a clear statement that he consented to the confiscation. Accordingly, it would have been desirable to set forth a fuller treatment of this problem in the opinion, especially in view of the absence of proof of an intelligent waiver or intentional relinquishment of the defendant's rights. It would also

THE HOUSE AS CURTILAGE. . . . YOU DON'T NEED A WARRANT TO SEARCH 'OPEN FIELDS'. . . . An area 50 to 100 yards from a defendant's residence is open field unless there is some direct relationship between that field and the defendant's dwelling that would lead a reasonable person to believe that it was part of the curtilage."

18 Indeed, the Court admonished all law enforcement officers that as a matter of "precaution and policy" search warrants ought to be secured before making inspections or entries on land, particularly when no emergency situation exists. 1971 Mass. Adv. Sh. 1299, 1305, 273 N.E.2d 874, 878. The admonition seems especially appropriate on the facts of Colella where the officer had sufficient evidence prior to the entry to establish probable cause and where, patently, no emergency existed.
have been possible to remand the case for further findings on this question, since the case was still in its interlocutory stages.  

During the Survey year the Court again dealt with a warrantless entry on private property in Commonwealth v. Spikes. In Spikes a Brockton police officer had been wounded and disarmed when he attempted to thwart an armed robbery at a Western Union office. About 45 minutes later, the police went to the defendant's home where, in the driveway, they observed a car similar to one seen in the vicinity of the robbery. An officer flashed a light into three trash barrels outside the house and in one of them found two revolvers, a set of car keys and several articles of clothing. One of the revolvers was a type used by Brockton police; the keys fit the car in defendant's driveway and the car's engine was still warm. The police then arrested the defendant at the premises.

The Court held that the warrantless search of the trash barrel was not illegal because "the trash barrel was open, and the police were on the premises to apprehend an individual who had already given evidence that he would use a gun. The police were confronted with an emergency in which their own safety was at stake." However, unlike the cases cited by the Court, the situation did not involve a search incident to a valid arrest, but rather a search followed by an arrest. Moreover, even if the search were deemed contemporaneous with the arrest under Chimel v. California, the area of such search extends only to the "arrestee's person and the area 'within his immediate control.' " If the trash barrel was within a constitutionally protected area on the defendant's premises, then it hardly seems that the search can be justified by what was ultimately found in the barrel. If there was any emergency, it appears to have been created by the search itself.

§ 1.3. Warrantless automobile searches. Carroll v. United States and its progeny have created special rules in the application of the Fourth Amendment to automobile searches. In particular, the cases have
established that warrantless searches of moving vehicles are permissible if there is probable cause to believe that seizable articles are contained therein and "exigent circumstances" are present.³ It is the immediate mobility of the vehicle rather than its inherent mobility which creates the exception to the usual warrant requirement for searches. Accordingly, if a vehicle is impounded and not movable, a search warrant is required.⁴ At the same time, however, a limited warrantless search of an automobile is permissible under the search incident to a valid arrest exception, and warrantless seizures are lawful in some instances under the "plain view" doctrine.⁵

In Commonwealth v. Wilson⁶ the Supreme Judicial Court upheld the warrantless seizure of a toy gun from the defendant's vehicle during a "stop and frisk" authorized by G.L., c. 41, §98.⁷ The police had found, near the scene of a robbery, a water pistol similar to one identified as the holdup gun in a second robbery. The police stopped the defendant's car, which matched the description of one in which suspicious activity had been observed. While they were checking the defendant's license and registration, an officer observed a water pistol on the floor between the defendant's legs. The defendant at first said he did not know how it got there, then explained that it probably belonged to his nephew. Thereafter, defendant agreed to go to the police station to talk further about the water pistol. At the station, the defendant was given a Miranda warning which he said he understood. Following a discussion of his implication in the two robberies, defendant was booked for armed robbery.

The defendant appealed his subsequent conviction for unarmed robbery contending that the toy gun and the oral and written statements made by him at the police station were the fruits of an illegal interception of his automobile without probable cause and should have been suppressed. In rejecting this argument, the Supreme Judicial Court noted that G.L., c. 41, §98 "constitutionally permits a brief threshold inquiry where suspicious conduct gives the officer 'reason to suspect' the questioned person of 'unlawful design,' that is, that the person has committed,

³ "Exigent circumstances" may exist when an automobile is "'stopped on the highway'... because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.'" (Court's emphasis). Coolidge v. New Hampshire, 403 U.S. 443, 460 (1971).


⁷ G.L., c. 41, §98 provides: "They [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design... Persons so suspected who do not give a satisfactory account of themselves... may be arrested by the police..."
is committing, or is about to commit a crime." The Court pointed to other cases in which it had upheld the interception of an automobile for the purpose of conducting a similar inquiry. The Court then held:

Upon the facts found by the judge, we think the officer had probable cause to stop the defendant's car. Once the car was stopped it was not unlawful to see the toy gun, which was in plain view. . . . Its temporary seizure was an appropriate step in the continuing inquiry, and the defendant's incredible answers to questions about the gun justified further inquiry. . . . What was done from then until the defendant was booked was done with the defendant's consent.

Although the Court did not refer to *Coolidge*, clearly the warrantless seizure of the water pistol was lawful and within the scope of even the more narrow interpretation of the "plain view" doctrine expressed by Justice Stewart in *Coolidge*. There was a "prior justification" for the intrusion, namely G.L., c. 41, §98, and the discovery of the water pistol was apparently "inadvertent."

In *Commonwealth v. Haefeli*, an appeal from a conviction for receiving stolen property, the Supreme Judicial Court again considered a motion to suppress the warrantless seizure of evidence from a car. In *Haefeli* a police officer (Officer Hughes) was investigating a theft of certain items stolen from a female victim, including her checks, credit cards, driver's license and supermarket check-cashing card. He was also investigating a series of offenses involving the passing of worthless checks by a girl using the victim's name. The officer had photographs of the girl and he knew the defendant from prior offenses. He had further information that a male, fitting defendant's description, had been seen with the girl, and he knew the registration number and the name of the owner of the car they had been using. Acting on a tip, the officer staked out a real estate office and observed the defendant and the girl arrive in this car and enter the office. He followed them in, questioned them, and when they gave false names which did not match the name of the car's owner he arrested them. Thereafter, the officer went outside to the car presumably to verify its true owner. He shined a flashlight through a closed window and saw an envelope containing checks on the floor. He then

10 Id. at 1733, 276 N.E.2d at 285.
11 403 U.S. at 466. The Supreme Court is divided on the question whether "inadvertency" is a prerequisite to a valid seizure under the "plain view" doctrine. See note 14 §1.2, supra.
entered the car, seized the checks, continued his search and discovered
the victim's check-cashing identification card in the glove compartment.

At the outset, it might be questioned what standing the defendant had
to object to the seizure. It seems fairly well established that he would
have no standing unless the car were his,13 or unless the car were in his
possession at the time of search,14 or unless he were an occupant of the
car at the time of search.15 The defendant did not qualify under any of
these circumstances, yet the Court did not mention the standing question.
Had it done so, the case might well have been decided far more simply.16

With respect to the validity of the search and seizure, the Court noted
that the officer had no warrant to search the car and that the search was
not incident to the arrest. The question, then, was "whether there were
exigent circumstances which permitted Officer Hughes to search the
automobile without a warrant."17 In considering this question, the Court
reviewed the leading United States Supreme Court cases on the subject
of warrantless automobile searches, namely *Carroll v. United States*,18
*Chambers v. Maroney*,19 and *Coolidge v. New Hampshire*.20 The Court
found that the Justices of the United States Supreme Court in *Coolidge*
were "in seemingly irreconcilable disarray as to what the law was or
ought to be"21 on this subject, found that the decisions of the United
States Courts of Appeals "are in similar disarray,"22 and concluded with
judicial resignation:

Having traveled the length of the high road of the leading Federal
judicial precedents without finding any very helpful signs pointing
out the present state of the law on the subject of warrantless searches
of automobiles, we return to our starting point and make a new start
seeking only to determine whether Officer Hughes' search of and
seizure from the automobile in this case were "unreasonable" within
the meaning of the Fourth Amendment. We hold that they were
not.23

It seems, however, that the Court greatly overstated the extent of the
"disarray." The Supreme Court in *Chambers* made it quite clear that:

14 Cotton v. United States, 371 F.2d 385 (9th Cir. 1967). Simpson v. United
States, 346 F.2d 291 (10th Cir. 1965).
16 Of course, if the government failed to raise the standing question, the Court
may have been justified in assuming that the defendant qualified.
18 267 U.S. 132 (1925).
20 403 U.S. 443 (1971).
22 Id. at 430, 279 N.E.2d. at 920.
23 Id. at 430-31, 279 N.E.2d at 920.
Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll* . . . holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.\(^{24}\)

Thus, *Chambers* did not alter the basic *Carroll* rule. All it did was add the gloss that if the *Carroll* test is met, there is no constitutional difference between either making an immediate search of the automobile and seizing its contents, or immediately seizing the entire automobile and searching it later.\(^{25}\)

Although the Supreme Judicial Court was correct in noting a "disarray" of opinions in the subsequent *Coolidge* case, the disarray had nothing to do with the issue in *Haefeli*, and *Coolidge* in no way changed the basic rules of *Carroll* and *Chambers*. Indeed, *Coolidge* did not involve a warrantless search of a vehicle stopped on a highway as did those cases, but rather a seizure of an unoccupied, parked car in the defendant's driveway after the defendant had been arrested inside the house. A majority of the *Coolidge* Court\(^{26}\) agreed that

The Court [in *Chimel v. California*] applied the basic rule that the "search incident to arrest" is an exception to the warrant requirement and that its scope must therefore be strictly defined in terms of justifying "exigent circumstances." The exigency in question arises from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee. . . . Since the police knew of the presence of the automobile and planned all along to seize it, there was no "exigent circumstance" to justify their failure to obtain a warrant. The application of the basic rule of Fourth Amendment law therefore requires that the fruits of the warrantless seizure be suppressed.\(^{27}\)

Despite the foregoing, the Supreme Judicial Court in *Haefeli* proceeded with its own rationale of "reasonableness." Thus, in the Court's view, when the defendant and the girl gave the officer false names "which did not match the name of the person he knew to be the registered owner of the automobile,"\(^{28}\) he "had reasonable grounds to suspect that the automobile was stolen or that it was being used without authority."\(^{29}\)


\(^{25}\) Id. at 52.

\(^{26}\) Justices Stewart, Harlan, Douglas, Brennan and Marshall joined in Part II (D) of the *Coolidge* opinion. 403 U.S. at 473-84.

\(^{27}\) 403 U.S. 443, 478 (1971).


\(^{29}\) Ibid.
The Court held that the officer had probable cause to search the automobile when, after placing the two suspects under arrest, the officer subsequently saw the checks on the floor of the automobile.

Given the existence of probable cause, were there “exigent circumstances” to permit a warrantless search? The Court said there were.

We hold that the situation which existed before Officer Hughes saw the checks on the floor of the automobile constituted an exigency which justified his warrantless search for anything bearing on the ownership or right to use the automobile. ... If he left the automobile while he tried to obtain a search warrant, he could not be sure that it would be there when he returned. On all of the facts, reasonableness dictated that he do just what he did. His search of the automobile was therefore lawful.

This reasoning, however, raises serious questions. In the first place, Officer Hughes already knew the name of the registered owner of the automobile, and embarking on a confirmatory search for a registration certificate was hardly the result of exigent circumstances. The car was parked, both occupants had been arrested and it was unlikely that the car would be moved. If the officer had probable cause to search it, he had time to get a warrant. In fact, the Court’s opinion quite clearly indicates that the police detective who assisted Officer Hughes in the arrest had obtained a warrant that day for search of the defendant’s apartment. He could just as easily have obtained one for search of the car.

Furthermore, although the Court stated that “the justification for his search without a warrant did not derive from the fact that he observed the checks,” the Court nevertheless used that circumstance to justify the search by stating:

In the present case, at least after seeing the checks protruding from an envelope on the floor of the automobile, Officer Hughes had probable cause to believe that the checks were the fruits of prior thefts which the police were investigating and that they were instruments of the type used in the commission of the crimes of forging, uttering and passing worthless checks which they were also investigating. (Emphasis added).

The Court then attempted to align the case with Chambers suggesting that Chambers supported the search in Haefeli:

30 Id. at 432, 279 N.E.2d at 921.
31 Ibid.
32 Id. at 435, 279 N.E.2d at 922-23.
33 Id. at 432, 279 N.E.2d at 921.
34 Id. at 433-34, 279 N.E.2d at 922.
In both cases . . . the police had reasonable cause to believe that the automobiles contained stolen goods and instruments used or to be used in the commission of a crime. Also, both automobiles were on public highways, and the drivers and all other occupants had been placed under arrest before the searches were made. 35

The pertinent inquiry, however, is not only whether the automobile is on a public highway (a circumstance which includes an unoccupied car parked against the curb) but also whether the car is immediately mobile. Moreover, it is not material that the drivers and occupants in both cases "had been placed under arrest before the searches were made" since that circumstance includes no space or time limitations. In Chambers the police stopped a moving vehicle, arrested the occupants, and searched the vehicle in a single contemporaneous operation. By contrast, in Haefeli the police interrogated and arrested the occupants inside an office, then proceeded to search an unoccupied vehicle parked in the street. This search did not qualify as a search incident to an arrest, and hardly involved the exigency of a movable car. On the facts, the car had the same constitutional status as a house. It is doubtful that the Court would have permitted a warrantless search of the defendant's house solely on the ground that the officer saw the evidence in question through a window. Contrary treatment of the car appears incorrect. 36

An analysis more consonant with the automobile search and seizure decisions of the United States Supreme Court appeared in United States v. Curwood, 37 decided by the Massachusetts federal district court during the Survey year. There, the court held that a warrantless seizure of 200 pounds of hashish from the trunk of a vehicle backed up to a loading platform was lawful under the Fourth Amendment.

In Curwood a large quantity of hashish was discovered by customs agents in false-bottomed crates shipped to Logan Airport from India. The agents repacked the hashish and delivered the shipment to the consignee's commercial premises in Andover. While a search warrant was being sought in Cambridge, an agent observing the Andover premises reported via radio that shortly after shipment two footlockers had been transferred from the storage area of the premises to the trunk of a vehicle. The agent who subsequently searched the vehicle and seized the hashish had heard the radio report and thus had probable cause to conduct the search. As to the exigency of a warrantless search, the court noted that:

The vehicle was being used for an illegal purpose; it contained contraband; it was being prepared for flight; and it was not "regularly parked in the driveway of [petitioner's] house." . . . Only when it eventually developed that the automobile was being used for a criminal purpose did the agents determine to seize it and search the con-

35 Id. at 434, 279 N.E.2d at 922.
36 Other issues raised in the decision are discussed in §1.7, infra.


§1.3

SEARCH AND SEIZURE


tents of its trunk. To hold that, under such circumstances, the agents were required to secure another search warrant, during which time the automobile likely would have departed the scene with its cargo of contraband, is to impose a standard of official conduct not prescribed by the Fourth Amendment or by the interpretive decisions of the Supreme Court.38

The key fact that the car was being prepared for flight at a loading platform created the exigency and thus legitimized the search. The tenor of the situation was one of immediate mobility, the exigent circumstance absent in Haefeli.

In Commonwealth v. Pignone39 the Supreme Judicial Court upheld the seizure of articles from an occupied, stopped vehicle. By prearrangement with a check-out clerk, the defendant in Pignone took groceries from a store without paying for some of them. Following a conversation with the store manager (presumably about this incident), the defendant attempted to drive his car from the store parking lot with the groceries, but was blocked by two police cruisers. Without a warrant and without arresting the defendant, the police entered his car and seized the groceries.

The trial judge granted the defendant’s motion to suppress the evidence seized, apparently on the theory that a warrantless search of an automobile in the absence of arrest was unconstitutional. Reversing, the Court held that the proper inquiry was whether the police had probable cause to search the car, and that the defendant did not sustain his burden of proving the contrary.40

From an evidentiary standpoint, the decision seems questionable since the defendant’s burden of going forward is usually satisfied by showing merely that the search and seizure were conducted without a warrant.41 There is no doubt that burden was satisfied since, at the hearing on the motion to suppress, the agreed statement of facts stipulated that the police had no warrant to search defendant’s vehicle.42 Contrary to the Court’s holding, therefore, the burden should have shifted to the Commonwealth to prove not only that the police had probable cause to search the vehicle but also that the search and seizure was lawful under one of the exceptions to the Fourth Amendment warrant requirement.43 Inasmuch as defendant was not placed under arrest, the search and seizure could not, as the trial judge recognized,44 be upheld on the basis of a search incident to arrest. The plain view doctrine may or may not have been applicable depending on (1) whether the groceries had been concealed in the trunk of the car or had been placed openly in the passenger

38 Id. at 1114-15.
40 Id. at 740-41, 281 N.E.2d at 573.
43 See 403 U.S. at 454-55.
compartment\(^{45}\) and (2) whether "inadvertence," most likely absent in Pignone, is essential to invoke plain view.\(^{46}\) Under the automobile exception, the police intrusion seems justifiable based on the exigent circumstances present and on the assumption that there was probable cause to search the defendant's vehicle.\(^{47}\) The defendant was alerted, sitting at the wheel of his car, preparing to drive away. If the police had left to obtain a warrant, it is unlikely that they would have found the evidence afterward.\(^{48}\)

Thus, Pignone appears to be a correct decision under the "automobile exception," again assuming the police could have established probable cause to search. It is surprising, however, that the Supreme Judicial Court cited Haefeli and that portion of Coolidge which discussed the exigency requirement, yet limited the inquiry to whether the police had probable cause to search and eschewed the question of exigent circumstances. Perhaps the Court recalled the difficulties it encountered with the application of the exigency requirement in Haefeli and was unwilling to probe further into that uncertain area. On the other hand, by disposing of the case on the ground that defendant had not established the absence of probable cause to search, the exigency question was not and need not have been decided. In any event, Pignone may unfortunately be interpreted to mean that to the extent Haefeli recognized exigency as an essential element of the "automobile exception," Pignone overruled it sub silentio and that in Massachusetts a warrantless search of an automobile is valid so long as the police can establish probable cause to search.

\$1.4. Warrantless arrest and search.\(^{49}\) It has long been the law that a warrantless search may be made incident to a lawful arrest, so long as the search is limited at the time of arrest to the person and the place where the arrest occurs.\(^{1}\) If the arrest is invalid because, for example, there is no probable cause to arrest, then the search is likewise invalid. In Commonwealth v. Stevens\(^{2}\) the Supreme Judicial Court considered the question of the legality of a warrantless arrest and search of the arrestee's person.

In Stevens an F.B.I. agent reported to the police that a reliable informant had disclosed to him that the defendant's automobile contained a large quantity of stolen jewelry. Within a half-hour the police, knowing of defendant's previous conviction for receiving stolen property, dis-

\(^{45}\) The opinion does not indicate in what part of the vehicle the groceries were located when seized by the police.

\(^{46}\) See note 11, supra.

\(^{47}\) Probable cause, or the lack of it, was never established in Pignone. "No evidence was presented at the hearing on the question whether the police had probable cause to search the defendant's vehicle." 1971 Mass. Adv. Sh. 739, 741, 281 N.E.2d 572, 573.

\(^{48}\) See 403 U.S. at 460 and text at note 24, supra.


patched two officers to arrest defendant when he left his place of business. For most of the day, the officers kept defendant's automobile and store under surveillance until that evening when the defendant left the store and drove away in his car. With neither an arrest nor a search warrant, the officers followed the defendant, stopped his car and arrested him on suspicion of receiving stolen property. Thereupon, one officer searched defendant and found a pouch containing diamond rings and unset diamonds in one of his pockets. In a preliminary hearing the defendant's motion to suppress the evidence seized from his person was denied and he appealed to the Supreme Judicial Court.

The Court began by stating the standards for a valid arrest and search of the person, namely, whether at the time of arrest the police had probable cause to believe that the defendant had committed or was committing an offense. Moreover, when the police rely on hearsay to establish probable cause to arrest, there must be a "substantial basis for crediting the hearsay." The Court declared that two requirements were necessary to establish the credibility of hearsay information. First, there should be evidence of the informant's reliability, and second, there should be disclosure of the evidence upon which the informant bases his statements of the defendant's criminal activity. On the other hand, if the informant's tip fails to meet this "two-pronged test," the arrest and search may still be valid if the tip is sufficiently corroborated by other independent sources. Thus, sufficient corroboration may exist where the police observe suspicious acts of the defendant or where the informant gives a detailed description of the appearance, conduct and expected behavior of the defendant.

Applying the foregoing criteria to the facts in Stevens, the Court held that although the informant's reliability was established by the accuracy of information previously given to the F.B.I., there was no disclosure of the evidence upon which the informant based his information that defendant's car contained stolen jewelry. Furthermore, the Court found that the independent circumstances, such as police observations of the defendant's conduct and the defendant's criminal record, were not sufficiently corroborative. The Court noted that during the hearing on the motion to suppress, defense counsel's questions, apparently intended to challenge the credibility of the hearsay information, were excluded by the trial judge upon objections by the Commonwealth. However, rather than reverse the denial of the motion to suppress, the Court determined that the inquiry into the circumstances was insufficient to establish reliability of the hearsay information and remanded the case for a resumption of the hearing.

Procedurally, the result in Stevens appears incorrect and irreconcilable.
with the Court's decision in Commonwealth v. Pignone,\textsuperscript{7} decided just two months prior to Stevens. In Stevens the defendant clearly sustained his burden of proving the absence of a search warrant and it is equally clear that the Commonwealth failed to show the existence of a search incident to a valid arrest based on probable cause. Moreover, the Commonwealth's objections were instrumental in producing a record which, on appeal, established the absence of probable cause. It would seem, then, that the Commonwealth ought to be bound by that record, yet the Court denied the defendant his apparent victory by remanding the matter to give the Commonwealth another chance. The defendant in Pignone, on the other hand, was not so fortunate. Instead of remanding, the Court simply reversed a trial judge who applied an incorrect standard in granting the defendant's motion to suppress. No opportunity was afforded the Pignone defendant to adduce evidence to meet the Court's "correct" and, in a sense, \textit{ex post facto} standard. Certainly if the Court deemed it desirable that Stevens be remanded in the interest of justice, Pignone was an even more appropriate case for remand. Furthermore, it seems rather bizarre that the Court expected that on remand of Stevens the defendant would elicit facts which could aid the Commonwealth in establishing probable cause. On the record before the Court the defendant prevailed and it is doubtful that he would renew a line of questioning which might be damaging to him.

\textsection{1.5. Plain view doctrine.} It is well established that under certain circumstances police may seize evidence in plain view without a warrant if the discovery of the evidence is inadvertent and incident to legitimate police activity, and there is a nexus between the item to be seized and criminal behavior.\textsuperscript{1} Thus, in Commonwealth v. Ross,\textsuperscript{2} a prosecution for armed robbery and related offenses, the defendant moved to suppress evidence of certain bloodstained paper money which fell from a co-defendant's wallet during a routine inventory of his possessions at the police station.\textsuperscript{3} The Supreme Judicial Court held that under the plain view doctrine the police properly seized the bills when they observed the bloodstains.\textsuperscript{4} The bills had fallen from the wallet during a legitimate police search and the bloodstains provided sufficient nexus between the bills and the stabbing of the armed robbery victim.

On the other hand, in Commonwealth v. Hawkins,\textsuperscript{5} a more difficult

\textsuperscript{7} 1972 Mass. Adv. Sh. 739, 281 N.E.2d 572. See discussion of Pignone in \textsection{1.3, supra.}

\textsuperscript{1} Coolidge v. New Hampshire, 403 U.S. 443, 465-71, 505-10 (1971); Warden v. Hayden, 387 U.S. 294, 307 (1967). On the question whether inadvertency is an essential element of the "plain view" doctrine see \textsection{1.2 note 14, supra.}


\textsuperscript{3} The Court noted that the Commonwealth did not challenge the defendant's standing to raise this point. Id. at 887, 282 N.E.2d at 79.

\textsuperscript{4} Id. at 887-88, 282 N.E.2d at 80.

situation arose. The police had obtained a search warrant authorizing a search for drugs at the defendant's apartment. During the search an officer found in a bureau drawer an envelope containing savings bonds with names and addresses thereon different from the defendant's. The officer then took the bonds to a police sergeant in another room of the apartment. By a telephone call to a person whose name appeared on some of the bonds, the sergeant confirmed that the bonds were stolen and the police arrested the defendant. Upon searching him they found an identification card in the bond owner's name. The defendant subsequently challenged the legality of the search and seizure of the bonds and identification card in a prosecution for receiving stolen bonds.

The police admitted that they had no actual knowledge that the bonds were stolen until after investigating their ownership. The Court held the seizure invalid:

The mere fact that the names on the bonds were different from that of the defendant was insufficient to provide probable cause for their seizure. . . . Once having ascertained the presence of bonds instead of drugs and without probable cause to believe they were stolen, their authority to possess the envelope and its contents ended.6 The Court apologized for this "drastic" result, but said that the bonds could not be taken "from his possession, even momentarily, to establish their ownership."7

This decision provoked a sharp dissent from Justice Braucher, who reasoned that (1) the police were justified in noting names and addresses on the bonds different from the defendant's; (2) the presence of the bonds in the defendant's apartment warranted a further threshold inquiry; (3) the removal of the bonds to an adjoining room was not a seizure; and (4) the police acquired probable cause after the telephone call to an owner named on one of the bonds.8

In a later case, Commonwealth v. DeMasi,9 the police, in the course of a search of an apartment for stolen property, had seized items not listed in the search warrant. Distinguishing Hawkins, the Court upheld the seizure of the unlisted items since the police, unlike the police in Hawkins, had prior knowledge that similar items had been recently stolen and that the defendant usually "went after" such items.

§1.6. Sufficiency of affidavit. The federal standards recited by the Supreme Judicial Court in Commonwealth v. Stevens1 for probable cause to arrest are the same as the federal standards for probable cause applicable to an affidavit for a search warrant. The leading United States Supreme Court cases on the sufficiency of affidavits include Aguilar v.

6 Id. at 542-43, 280 N.E.2d at 666.
7 Id. at 544, 280 N.E.2d at 667.
8 Id. at 544-45, 280 N.E.2d at 667-68 (dissenting opinion).

Texas\(^2\) and Spinelli v. United States\(^3\). Massachusetts statutory standards for affidavits may be found in G.L., c. 276, §§2, 2A and 2B.\(^4\)

The Supreme Judicial Court in Stevens also had occasion to determine the validity of the affidavits for search warrants for the defendant's car. The affidavits, made after the defendant was in custody, recited the defendant's arrest and the search which disclosed the pouch containing diamond rings and unset diamonds and concluded with a statement that the affiant "[has] reason to believe that there are other diamonds and stolen jewelry in [defendant's] car."\(^5\) Because the affidavits "failed to set forth sufficient grounds for the issuance of the warrants,"\(^6\) the Court ruled the warrants invalid. Instead of reversing the denial of the motion to suppress, however, the Court remanded the case for a determination of whether there was probable cause for the search of the vehicle,\(^7\) implicitly suggesting that even though the warrants were plainly invalid the searches might fall within the "automobile exception" of Chambers v. Maroney.\(^8\)

In Commonwealth v. Haefeli\(^9\) the defendant challenged the sufficiency of an affidavit for a search warrant in connection with his motion to suppress evidence of articles seized during the search of his apartment. Essentially, the affidavit recited that the affiant arrested the defendant and his female companion for receiving stolen property and for forging and passing stolen checks; that the affiant had "probable cause to believe, as a result of evidence found on these subjects (in their possession) at the time of their arrest, that these two subjects have been involved in the larcenies of mail (U.S.) on this District;"\(^10\) that these subjects, both of 901

\(^3\) 393 U.S. 410 (1969).
\(^4\) Sections 2 and 2A prescribe the form for a search warrant and direct the manner in which the police must execute a search warrant. Section 2B prescribes the form of the affidavit and the procedure for issuance of a search warrant.
\(^6\) Id. at 1099, 283 N.E.2d at 676. The United States District Court in United States v. Curwood, 338 F. Supp. 1104, 1119 (D. Mass. 1972) held invalid a similar affidavit in which the affiant stated merely, "I have determined," without setting forth the basis for his determination.
\(^8\) 399 U.S. 42 (1970). The Court's approach is similar to that of the state in Coolidge v. New Hampshire, 403 U.S. 443 (1970), where, in an attempt to justify a search made pursuant to an invalid warrant, New Hampshire sought to bring the search within one of the exceptions to the Fourth Amendment warrant requirement. In Stevens the search of the defendant's vehicle could arguably fall within the Chambers extension of the automobile exception since the defendant was stopped on a public highway, thus giving rise to a possible exigency. But see criticism of the Chambers rule in §1.8, infra. The two officers sent to arrest the defendant in Stevens maintained about a seven hour vigil outside defendant's store yet apparently neither they nor informed officers at police headquarters made an effort to obtain an arrest or a search warrant. See also criticism of the Supreme Judicial Court's remand of Stevens §1.4, supra.
Beacon Street, Boston, "had identification in the name of one Mona Lacey . . . whose apartment had been burglarized;" that "checks and identification were reportedly stolen in this break;" and that "[b]ased upon the foregoing reliable information—and upon [the affiant's] personal knowledge and belief—and attached affidavits—there is probable cause to believe that the property hereinafter described—has been stolen—or is being concealed, etc. and may be found" in their possession at those premises. The affidavit concluded with a non-specific listing of the kind of evidence sought, i.e. stolen mail, checks and identification cards, etc. 10

As articulated by the Court, the question presented was "whether the application and affidavit for the search warrant were legally sufficient to establish probable cause to believe that stolen mail, checks and identification material . . . would be found in [defendant's apartment]." (Emphasis added). 11 The Court then briefly stated the standards for construing an affidavit and held that a "judicial mind" could reasonably infer from the information in the affidavit that probable cause existed to believe that the articles stolen from the victim's apartment "could be found" in the defendant's apartment. 12 The Court's choice of the more ambiguous word "could" rather than "would" is unfortunate inasmuch as "could" is susceptible to the alternative interpretation "might." Nevertheless, the latter interpretation is apparently the one intended, for the Court subsequently stated that it was reasonable to infer from the defendant's possession of one of a number of articles stolen from the victim's apartment that the other stolen articles "might be found" in the defendant's apartment. 13 Such a probable cause standard will permit the broadest form of conjecture in search warrant affidavits and is inconsistent with the well-settled rule that probable cause must be based on more than mere suspicion or unsupported belief.

Furthermore, Haeffeli is a disappointing decision in that the Court superficially treated other fundamental deficiencies in the affidavit. In dismissing the defendant's contention that Spinelli v. United States 14 required the affiant to reveal the basis of his belief that the defendant and his female companion were involved in larcenies, the Court remarked that "the Spinelli decision is of questionable validity" 15 in view of later comments about it in United States v. Harris. 16 The Court concluded that:

The affidavit before us makes clear that the basis of the affiant's belief was in large part his experience earlier in the day in arresting the

10 Id. at 435, n.4, 279 N.E.2d at 923, n.4. The form of the affidavit, with minor variations, followed the statutory form set forth in G.L., c. 276, §2B. With respect to the phrase "and attached affidavits," the Court's opinion does not disclose the existence of any other affidavits.
11 Id. at 436, 279 N.E.2d at 923.
12 Id. at 436-37, 279 N.E.2d at 924.
13 Id. at 437, 279 N.E.2d at 924.
16 403 U.S. 573 (1971).
two persons and finding in their possession something he knew had been stolen from the Lacey apartment. That is sufficient to support the issuance of the search warrant.\textsuperscript{17}

But as a matter of logic, the mere arrest of the defendant and the discovery of stolen items in his “possession” was not sufficient to establish probable cause to believe that other stolen items were in his apartment. There were no facts recited in the affidavit to support the affiant’s belief; that belief must therefore be regarded as a mere conclusion. Such unsupported conclusions have long been held constitutionally inadequate on the basis for issuance of a search warrant.\textsuperscript{18}

In addition, neither Spinelli nor Harris altered the probable cause standards for affidavits, but involved disputes over the degree to which an informant’s tip need be corroborated, an issue not present in Haefeli. In fact, in Harris Chief Justice Burger stated that “the informant’s admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search.”\textsuperscript{19} As a minimum, then, Harris requires that the premises to be searched must somehow be implicated. In Haefeli, however, there were no circumstances to implicate the defendant’s apartment in any way. Accordingly, the Supreme Judicial Court’s attempt to minimize Spinelli with Harris is unavailing, and Harris itself suggests that Haefeli may well be wrongly decided.\textsuperscript{20}

\section{1.7. Sufficiency of search warrant.} The only published Massachusetts case dealing with the sufficiency of a search warrant during the Survey year was United States v. Curwood,\textsuperscript{1} decided by the United States District Court. There, in prosecutions for receiving and transporting illegally imported hashish, the court held that the search warrant designated with sufficient particularity the place to be searched by describing the premises as a “‘barn red wood frame, 2 story commercial structure, 208’ long and 85’ wide situated and numbered 63 Park Street,

\textsuperscript{17} 1972 Mass. Adv. Sh. 423, 437, 279 N.E.2d 915, 924. The Court’s opinion did not mention what, if anything, was found in the possession of the defendant and his female companion at the time of their arrest. Presumably, the items found were those seized without a warrant from the parked automobile after the arrest of the pair. If that search were invalid, it is difficult to see how a subsequent affidavit based on it could be valid.


\textsuperscript{19} 403 U.S. 573, 584 (1971).


§1.8 SEARCH AND SEIZURE

Andover, Mass.2 The warrant was not insufficient merely because (1) a “breezeway” interrupted the enclosed continuity of the building, (2) the building was occupied by other tenants, (3) the building varied in height, or (4) the dimensions stated included an uncovered courtyard and a parking area outside the building. The governing principle was whether the warrant on its face identified the place to be searched with enough precision to enable an officer with reasonable effort to ascertain and identify the place intended.3 In addition, the court noted that even if the description were overbroad, that fact would not necessarily invalidate the search as actually conducted, if, for example, it were restricted to that part of the building to which the warrant should have been limited.4

STUDENT COMMENT

§1.8. Warrantless automobile searches: The “automobile” exception to the Fourth Amendment. The Fourth Amendment of the United States Constitution1 has been interpreted to require a warrant for all searches “subject only to a few specifically established and well-delineated exceptions.”2 One exception is the “automobile exception,”3 first announced by the United States Supreme Court in Carroll v. United States,4 which sanctions the warrantless search of an automobile when there is a likelihood it will be driven out of reach of the police before a search warrant is obtained. When such a likelihood, denoted by the Supreme Court as an “exigency,” exists, police may search without a warrant

2 Id. at 1110.
3 Id. at 1112, citing Steele v. United States, 267 U.S. 498, 503 (1925).
4 Id. at 1111, n.11.

§1.8. 1 The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by author affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
3 Other exceptions to the warrant requirement, not discussed in this comment, are: (1) the “search incident to arrest,” exception, under which a warrantless search for weapons or destructible evidence within the area of control of the arrestee is admissible; Chimel v. California, 395 U.S. 752 (1969); (2) the “plain view doctrine” which allows the admission of evidence which comes into the plain view of a police officer while he is searching for other specific objects pursuant to a valid search warrant or of evidence which comes into the plain view of an officer whenever the officer's initial intrusion is protected by one of the other exceptions to the warrant requirement; Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23 (1963); (3) the consent exception under which a search is lawful if the party searched gives his consent to a warrantless search; Frazier v. Cupp, 394 U.S. 731 (1969); Zap v. United States, 328 U.S. 624, rev’d on rehearing on other grounds, 330 U.S. 800 (1947). Although an automobile, as well as a building, might be searched without a warrant under any of these exceptions, this comment will be concerned with the automobile exception alone.

either at the scene where the automobile is first encountered, or at police headquarters. There has been some dissatisfaction with the automobile exception in recent years. In Coolidge v. New Hampshire, its latest decision on the subject, the United States Supreme Court sought to devise workable rules that would aid both the police and the courts in determining the legality of a warrantless automobile search; yet dissatisfaction persists. Justice Harlan, concurring in Coolidge, stated:

From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty.... The Massachusetts Supreme Judicial Court's decision in Commonwealth v. Haefeli is just one illustration of the perplexity existing in state and lower federal courts with the status of the federal law governing warrantless searches. This comment will analyze the existing law of warrantless automobile searches as expressed in several United States Supreme Court opinions in an effort to isolate the sources of the present uncertainty in the state and lower federal courts. Consideration will be given to three alternative approaches to the problem.

**Federal standards of the automobile exception.** In Carroll v. United States, there was probable cause to believe that the defendants' automobile, which had been stopped on the open highway by federal prohibition agents, contained contraband liquor; therefore, probable cause to search the vehicle existed. However, since the agents had no information that a crime had been committed, they lacked probable cause to arrest the occupants. If the agents had attempted to secure a search warrant from a local magistrate, the automobile could easily have been driven out of the warrant's jurisdiction. The Court upheld the de-

5 Id.
7 See Note, 55 Minn. L. Rev. 1011, 1027-30 (1971); Comment, 47 Notre Dame Law. 668 (1972).
9 Id. at 490.
11 Federal Fourth Amendment law is binding upon the states. Ker v. California, 374 U.S. 23, 33 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). In Haefeli, the Court candidly confessed that it did not understand the federal law. "[W]e have] traveled the length of the high road of the leading Federal judicial precedents without finding any very helpful signs pointing out the present state of the law on the subject of warrantless searches of automobiles. . . ." 1972 Mass. Adv. Sh. at 430-31, 279 N.E.2d at 920.
12 267 U.S. 132 (1925).
13 The Court in Carroll did not expressly require exigency for a warrantless search. However, the rationale for the warrantless search was based on conditions (the imminent possibility of the vehicle being driven away) which amount to exigency. The later decisions of Chambers and Coolidge, relying upon Carroll,
fendants' convictions based on the evidence (liquor) discovered during the warrantless search of the automobile.

In *Chambers v. Maroney*, the police had knowledge that a specific robbery had been committed and witnesses' descriptions of the robbers provided probable cause to believe that the defendants had committed the crime. Shortly after the report of the robbery, the defendants' car was stopped by the police, who, after arresting the defendants, took their automobile to the police station and searched it without a warrant. The Supreme Court upheld the admission of evidence discovered in the search, holding that a warrantless search at the station was permissible where, under *Carroll*, the search would have been permitted at the time the automobile was first encountered by the police. In *Carroll*, the warrantless search of an automobile was upheld on the grounds of exigent circumstances created by the imminent threat of the automobile being driven away. In *Chambers*, on the other hand, the Court upheld a search despite the fact that no real possibility existed that the car would be driven away, so long as it remained in police custody. The Court in *Chambers* did not explain why the warrantless search at the police station should be permitted, when any exigency that may have existed at the scene had dissipated. Presumably in justification of the search at the police station the Court suggested that a search of the automobile at the scene, a dark parking lot, would have been dangerous. Undoubtedly, dangerous circumstances may justify delay of the search until the car has been removed to the police station; but once the car has been immobilized at the police station, clearly any exigency that may have justified a search at the scene has disappeared and a warrant should be obtained.

Admitting that all exigency has passed when a car is taken into police custody, the Supreme Court in *Coolidge* nevertheless reaffirmed the *Chambers* holding. "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." (Court's emphasis).

have expressly required exigency. "Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search." 399 U.S. at 51. "Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant. . . . [The] search . . . was therefore illegal." 403 U.S. at 464.

15 Id. at 52.
16 See note 13, supra.
17 399 U.S. at 52, n.10. *Accord*, United States v. Ware, 457 F.2d 828, 830 (7th Cir. 1972), where a warrantless search of an automobile at the police station after an arrest was justified partly on the basis of the fact that a search at the scene of arrest was impractical because the automobile was blocking traffic. In *Isaac v. State*, Ind. —, 274 N.E.2d 231, 236 (1971), a warrantless search at the police station was justified because of rain and heavy traffic at the scene.
18 403 U.S. at 463.
19 403 U.S. at 463, n.20.
This statement is hardly consistent with earlier Supreme Court decisions holding that a search of a vehicle incident to the occupant's arrest which is permissible at the scene of arrest is not permissible at police headquarters, because the latter search is conducted remotely in time and place from the scene of arrest. The search incident to arrest must be contemporaneous with arrest, and is justified . . . by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of a crime, things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.

Analogous reasoning should apply to the automobile exception, since the justification for a warrantless search no longer exists when the automobile is in police custody.

Justice Harlan, dissenting in Chambers, argued that a warrantless search of an automobile at the police station could not be justified under the Carroll exigency rationale. He suggested an "immobilization rule" under which the police would be permitted to take custody of a vehicle in all exigent circumstances, and delay the search until a warrant could be secured.

Justice White, speaking for the majority in Chambers, rejected such a rule because he considered a warrantless immobilization of a vehicle to be as much an intrusion on Fourth Amendment rights as a warrantless search of the vehicle. According to his view, immobilization is equivalent to a seizure, and the Fourth Amendment requires warrants for both searches and seizures. What Chambers seems to sanction, however, is the worst of both worlds—both a warrantless seizure of the automobile at the scene, and a warrantless search of the automobile at the police station. While Justice White did not comment on this seeming inconsistency in

---

21 376 U.S. at 367.
23 People v. Weaver, 35 Mich. App. 504, 513, 192 N.W.2d 572, 575 (1971), offers an interesting view of the possible rationale of the Chambers holding. The court maintains that to require the police to obtain warrants for all automobile searches conducted at the station would encourage searches at the scene, even in dangerous circumstances. However, it is questionable whether police are so reluctant to secure search warrants, that they would endanger themselves merely to avoid this task.
24 399 U.S. at 61-65. The "immobilization rule" is discussed in 1971 Ann. Surv. Mass. Law §18.9 at 531, and is examined infra.
25 399 U.S. at 51-52.
Chambers, he explained in his dissenting Coolidge opinion that the warrantless search at the police station must be immediate, so that the automobile could be released to the owner without delay. He maintained that when the automobile is in police custody in a Chambers situation, an immediate search without a warrant is less of an intrusion upon Fourth Amendment rights than a search delayed until a warrant is secured. In Coolidge, three searches of the automobile were conducted after it had been taken into police custody. The first occurred two days after seizure, the others eleven and fifteen months later. Justice White believed that the two latter searches were so delayed as to be outside the Chambers rule, even though a search warrant would take less than two days to secure. Notwithstanding Justice White's willingness in Coolidge to extend the period of immediacy to two days, the Supreme Court has not attempted to formulate a rule limiting the period of time within which a warrantless search can lawfully be made at the police station.

In Coolidge, the significance of one major difference between the facts of Chambers and Carroll was apparently overlooked by the Court. In the Carroll situation, there was probable cause to search the automobile, but not to arrest the occupants. In such a situation, the exigency for an immediate, warrantless search exists, absent unusual circumstances. If the police stop the vehicle, and are then required to secure a warrant before they are permitted to search, the occupants could drive away, since there is no probable cause to arrest them. In a Chambers-at-the-scene situation, police have probable cause both to search the vehicle and to arrest all the occupants. If in such situation the occupants are arrested, the exigency created by the automobile's mobility is greatly reduced, if not entirely eliminated. Even if the police leave the vehicle unattended while they secure a warrant, there is less likelihood that an accomplice or car thief will drive the vehicle away than in the Carroll situation where the unarrested occupants have free access to the vehicle. Furthermore, if the police immobilize a vehicle in the Chambers situation until a warrant is secured, the occupants will endure little inconvenience, because they are in police custody.

Coolidge was a case involving the murder of a fourteen year old girl. The New Hampshire police conducted an intensive investigation, and eventually accumulated evidence pointing to the guilt of the defendant.

26 403 U.S. at 523.
27 Other courts have not been so hesitant. In People v. Emert, 1 Ill. App.3d 993, 274 N.E.2d 364 (1971), the court suppressed evidence obtained by warrantless search conducted three days after seizure of a vehicle because such delay was unreasonable. In People v. Weaver, 35 Mich. App. 504, 192 N.W.2d 572 (1971), evidence from a warrantless search at headquarters conducted two days after seizure was suppressed.
28 An example of such an unusual circumstance would be a situation where the automobile was immobilized by a traffic accident.
29 It is possible that the occupants will receive bail before the warrant is secured. See note 57, infra.
One element of this evidence was an eyewitness report that an automobile matching the description of one of the defendant's automobiles was parked on the night of the murder near the place where the victim's body was found. For some time before the police actually arrested the defendant, they intended to search his automobile for microscopic particles which might indicate whether the victim had been in the defendant's car. The police, however, left the vehicle in the defendant's possession for a substantial period of time before they arrested the defendant. After the arrest and until the police seized the car the following day, they maintained a guard on the defendant's house and the car which had been parked in the driveway. Although the police had probable cause to search the defendant's car, the Court held that the exigency justifying a warrantless search of an automobile does not automatically exist whenever there is probable cause to search; exigency sufficient to justify a warrantless search must be established independently of the determination of probable cause. Since such exigency did not exist in Coolidge, the search was not legitimized under the automobile exception.30

The facts of the Coolidge case are unusual in the sense that rarely are police presented with a situation where there exists such a lack of exigency to search an automobile unless, of course, the automobile is in police custody.31 Except for the police, no one, including the defendant, even suspected that the car contained any evidence, since as noted above, the evidence consisted of microscopic particles. Thus, there was no reason for anyone to drive the car away for the purpose of removing evidence of the crime. The automobile was mobile, in the sense that it was operable and someone could conceivably have gained access to it and slipped by the police guard in it; however, the Court attached "no constitutional significance to this sort of mobility."32

It is submitted that the Supreme Court has not established adequate and logical guidelines to assist police and courts in evaluating the exigency or nonexigency of given circumstances. The unusual fact situation in Coolidge makes it a poor guideline for determining whether other circumstances are exigent or not.33 Two cases illustrate the inconsistency

30 403 U.S. at 464.
31 The police themselves determined that a warrant was required; indeed, they actually did secure warrants for the defendant's arrest and for the search and seizure of his automobile. The Supreme Court, reversing the New Hampshire Supreme Court ruling in State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965), held that the warrants were invalid because they were not issued by a neutral and detached magistrate as required by the Fourth Amendment, and thus the searches were carried out as if there were no warrant. The warrant had been issued by the New Hampshire Attorney General. 403 U.S. at 449-53.
32 403 U.S. at 461, n.18.
33 But cf. Cook v. Johnson, where evidence (fingerprints) from a warrantless search of a vehicle parked in the defendant's garage conducted after defendant's arrest was suppressed, the court stating that "[t]he facts of this case are strikingly similar to those in Coolidge v. New Hampshire," 459 F.2d 473, 475 (6th Cir. 1972).
which results from the lack of appropriate guidelines. In *United States v. Payne*,\(^{34}\) probable cause to search a vehicle for illegal drugs existed, but probable cause to arrest the defendants was lacking. The car was parked in a National Park, and the defendants were preparing to bed down in sleeping bags for the night when the warrantless search was carried out. The court held the search illegal on the ground that exigency was lacking; because the defendants were bedding down, there was no danger of the vehicle being driven away before a warrant could be obtained. In *United States v. Sharpe*,\(^{35}\) the defendants had been arrested. Their truck, which had been used in a train robbery, was found immobilized on an embankment, and had to be towed off. The court upheld a warrantless search, on the ground that the truck was not permanently immobile. Comparing the two cases, it would seem that a greater degree of exigency existed in *Payne* than in *Sharpe*. In *Payne*, the defendants might have arisen early and driven away in the vehicle before a warrant was secured, but in *Sharpe* the vehicle was stuck on an embankment and abandoned. Moreover, the defendants were arrested before the truck was discovered.

In *Coolidge*, by way of *dicta*, the Supreme Court did state that it was clear "that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle. . . ."\(^{36}\) The former situation describes *Carroll* and *Chambers-at-the-scene*, the latter describes *Coolidge*. In *Commonwealth v. Haefeli*,\(^{37}\) the occupants parked an automobile and went into an office. After arresting the occupants inside the office, a police officer looked through a window of the automobile, observed evidence which gave him probable cause to search and proceeded warrantlessly to search the parked vehicle. The situation of the searched vehicle in *Haefeli* lies between the two situations postulated in the *Coolidge dicta* quoted supra, since the vehicle was parked and unoccupied, but it was not on private property. *Coolidge* does not explain why there is a significant difference in automobile searches depending on whether or not the automobile is parked, unoccupied, or on private property.\(^{38}\) The distinction is not a very helpful standard for determining whether an exigency exists. A vehicle could be stopped on a public highway and no exigency might exist, if, for example, all the

\(^{34}\) 429 F.2d 169 (9th Cir. 1970).

\(^{35}\) 452 F.2d 1117 (1st Cir. 1971).

\(^{36}\) 403 U.S. at 463, n.20.

\(^{37}\) 1972 Mass Adv. Sh. 423, 279 N.E.2d 915. For the facts of this case, see §1.3., supra.

\(^{38}\) Perhaps the Court reasoned that a car on a public highway is more likely to be moved than a car parked in a private driveway; or that the usual warrant requirements for searches of homes apply to some extent to vehicles when they are parked in a private driveway. It might also be argued that an unoccupied and parked vehicle is less likely to be driven away than one occupied and stopped while in use (although if all the occupants are arrested, it is difficult to perceive a substantial difference).
occupants were arrested and the car was removed to police headquarters. On the other hand, exigency might exist where the car was occupied and parked in a private driveway if someone who either was not or could not be arrested intended to drive the vehicle away.

On the basis of the fact patterns in the cases discussed above, it is possible to define at least four degrees of exigency. The first and greatest degree of exigency is the Carroll situation, where there is probable cause to search, but not to arrest, and the occupant is in the process of driving the vehicle. In such situations, police must either make an immediate, warrantless search or in all probability lose the opportunity to search at all. The second degree of exigency exists where there is probable cause to search a vehicle which is not in the process of being driven, or immediately about to be driven, but a possibility exists that a known (though perhaps unidentified) person, who has not been or cannot be arrested by the police, would drive off in the vehicle before a search warrant could be secured. An example of this is the situation where police locate a parked, unoccupied vehicle which they have probable cause to search in connection with a crime and a known accomplice is still at large. In such a situation, there is the distinct possibility that the accomplice will attempt to gain access to the automobile while the police are securing a warrant. The exigency, however, is of a lesser degree than that of Carroll, as there is only a possibility of such attempt by an accomplice rather than a probability. The third, and probably the most common degree of exigency arises in situations similar to that in Chambers at-the-scene, and Haefeli. All occupants of the automobile have been arrested, and there was no evidence of accomplices; therefore, the possibility that someone would remove the automobile was arguably rather remote. The fourth degree is the situation of negligible exigency which arises in search at police headquarters as in Chambers, or in situations

39 In United States v. Gomori, 437 F.2d 312 (4th Cir. 1971), a police officer knew stolen furniture was being shipped in rented trucks along a certain highway. The officer stopped a rented truck along this highway one night; he determined that the truck was carrying a heavy load by observing the way it was weighted down. When the driver denied that he was carrying any load, probable cause to search the truck, but not to arrest the driver, arose. The immediate warrantless search did indeed reveal stolen furniture.

40 United States v. Ellis, 461 F.2d 962 (2d Cir. 1972); United States v. Castaldi, 453 F.2d 506 (7th Cir. 1971), cert. denied, 405 U.S. 992 (1972).

41 United States v. Payne, 429 F.2d 169 (9th Cir. 1970), should also be categorized under the second degree of exigency. The defendants were not driving, or immediately about to drive the vehicle, since they were bedding down for the night. A possibility existed, however, that they would arise and drive the vehicle away before a warrant could be secured.

42 It is true that technically the car in Haefeli was not occupied; however, the police officer had observed the defendants leave the car and he arrested them nearby. For convenience, it is appropriate here to refer to them as occupants.
§1.8 SEARCH AND SEIZURE

It is submitted that a more logical and practical rule for automobile searches can be devised, by formulating a rule based on these four degrees of exigency.

Alternative approaches. In the foregoing discussion, the current automobile exception law was criticized on three points, namely, (1) searches are permitted at the station as in Chambers, where there is no real exigency, (2) no distinction has been drawn by the Supreme Court between a search where there is no probable cause to arrest the occupants and a search where there is such probable cause and (3) there are no real guidelines to aid law enforcement officers or state and lower federal courts in the determination of exigency. The following discussion will analyze three alternative theories, any one of which, if adopted by the Supreme Court, could minimize the uncertainty in the law of warrantless automobile searches and restore a measure of consistency to court decisions involving the automobile exception.

The “auto as person” rule. This alternative was advocated by Justice White, dissenting in Coolidge. The “auto as person” rule would permit the warrantless search of an automobile whenever probable cause existed for the search, regardless of considerations of exigency. In that automobiles are utilized by persons as a more efficient personal means of transit, they are like an extension of the person. Just as a warrant is not required whenever there is probable cause to arrest and search a person, a warrant ought not to be required for an automobile search. The “auto as person” rule would simplify matters for police, who would not have to make contemporaneous decisions as to the existence of exigency, and it would also eliminate the issue of exigency for the courts, leaving only the probable cause issue common to all searches.

The “auto as person” rule, however, would tend to erode Fourth Amendment protection. While an automobile is like an extension of a person, it can also be considered an extension of a home or office since persons occupy automobiles, store personal belongings within them and often equip them with many of the conveniences of home. One distinguishing feature between an automobile and a home or office is mobility. When there is reason to believe that the automobile will be driven out of reach of the police, mobility becomes a relevant distinction. If, however, mobility is curtailed completely or is only remotely possible, no substantial distinction can be drawn between the search of an automobile and the search of a home or office. The Supreme Court has repeatedly emphasized the fundamental importance of the “right of personal se-

43 This same degree of negligible exigency exists whenever a vehicle is inoperable, as in United States v. Sharpe, 452 F.2d 1117 (1st Cir. 1971), discussed supra.
44 403 U.S. at 524-27.
46 The one exception, according to Justice White, is where the car has been taken into police custody, and the search has been delayed beyond a reasonable length of time. 403 U.S. at 523.
security against arbitrary intrusions by official power,” which right was won “by revolution on this continent.”

The “immobilization rule.” This rule, which was suggested by Justice Harlan, dissenting in Chambers, would require a search warrant in almost every instance of automobile search. Rather than making an immediate warrantless search at the scene or at the station, police would be permitted to immobilize or impound the vehicle whenever possible until a warrant could be secured. In situations where police could not both immobilize a vehicle and secure a search warrant, an immediate, warrantless search would be justified.

Justice Harlan and Justice White disagreed on the question whether a warrantless seizure (immobilization) or a warrantless search was a lesser intrusion on Fourth Amendment rights. Which is the greater intrusion would seem to depend on particular circumstances; for example, in the Chambers and Haefeli situations the “immobilization rule” seems manifestly reasonable. If the occupants of the automobile have all been arrested, it is unlikely that the immobilization of the vehicle would inconvenience the occupants. However, in the Carroll situation seizure of the vehicle by police could be a substantial intrusion upon the occupants’ rights. The inconvenience would be particularly great if the occupants were far from their home, or if suitable alternative means of transportation were unavailable. Justice Harlan suggested that the occupants could consent to an immediate search if they valued their privacy less than their right to present possession of their automobile. But such consent arguably is not really meaningful, coerced as it is by the threat of losing possession of the automobile.

In addition to a potential infringement of Fourth Amendment rights, the “immobilization rule” could operate to the disadvantage of law enforcement officers. Under the rule, the police would have the right to seize the vehicle; but if there were no probable cause to arrest the occupants, the police would not have the right to restrain them. Once a warrant is secured, the results of the search of the immobilized vehicle could provide probable cause to arrest the occupants. Meanwhile, the unrestrained occupants would have ample time to make their escape.

47 403 U.S. at 455. See cases cited 403 U.S. at 454-55, nn.4-10.
48 399 U.S. at 61-65.
49 This situation might arise when a lone police officer stops a car at night, and for some reason is unable to secure the assistance of another officer for the purpose of removing the vehicle to police custody.
50 The Fourth Amendment itself makes no distinction between a search and a seizure, insofar as warrant requirements are concerned.
51 Temporary seizure would last for “perhaps a day” according to Justice Harlan. 399 U.S. at 63.
52 Id. at 64.
53 It should be noted that police are presented with the same problem when they must secure a warrant to search a home although, ordinarily the occupant would not be alerted.
§1.8 SEARCH AND SEIZURE

A proposed rule. This rule involves a synthesis of the current Coolidge doctrine and the "immobilization rule" and rejects outright any warrantless search conducted while the automobile is in police custody. The proposed rule is intended to eliminate the logical and practical flaws in the present law by taking into account the four substantially different degrees of exigency encompassing virtually every automobile search situation. The key, therefore, to the proper application of the proposed rule is an accurate identification of the degree of exigency.

In the Carroll situation, where there is probable cause to search but not to arrest, exigency of the first degree exists, and the proposed rule would authorize an immediate warrantless search. If an immediate search at the scene was thought to be dangerous or if the evidence sought was not readily capable of seizure as, for example, microscopic evidence or finger prints, the police would be permitted to immobilize or seize the vehicle, but a search would not be authorized until a warrant was secured. In the Chambers and Haefeli situations, which are within the third degree of exigency, the police would not be authorized to make a warrantless search but the "immobilization rule" would be applied. The occupants of the vehicle in a third degree exigency situation have all been arrested; therefore, they would not be inconvenienced by a seizure of the vehicle. Moreover, the application of the "immobilization rule" in these situations may serve the purpose of clearing the way for traffic, of protecting the vehicle from exposure to theft or vandalism, or of removing the vehicle to a safer and more convenient location for conducting a search. With the automobile in police custody, a warrant can be secured with no danger of the evidence being removed or destroyed. If the arrestees are released on bail before a search warrant is secured and they refuse to consent to a continued warrantless immobilization of the vehicle, a first degree exigency arises and an immediate warrantless search would be justified.

In the second degree of exigency situation, the proposed rule would permit immobilization or seizure of the vehicle but not a warrantless search. Here, the result is the same as for the third degree of exigency but for different reasons. Immobilization in the third degree situation is permitted primarily because the arrested occupants will not be substantially inconvenienced by the seizure of their vehicle. In the second degree situation, it is allowed primarily because of the danger that the owner, a known accomplice or other person at large may gain access to the vehicle. Of

54 The same degree of exigency exists when there is probable cause to arrest only some of the occupants of a vehicle.

55 Some difficulty might arise where police for some reason could not remove the vehicle to headquarters, or could not even place a guard over it until a warrant could be secured, as when a lone police officer makes the arrest, and cannot get reinforcements. In such a situation, sufficient exigency may exist to justify a warrantless search.
course, both considerations are relevant, to some extent, in all second and third degree situations.

Often the second degree of exigency arises when the police locate, in a public area, a parked, unoccupied vehicle, which is known to have been involved in a crime. In *United States v. Ellis*, the Second Circuit Court of Appeals upheld a warrantless search in such circumstances. The defendants in *Ellis* were wanted for bank robbery. A police officer discovered in a public parking lot a car belonging to the girl friend of one of the suspected robbers. There was probable cause to search the vehicle in connection with the robbery. The court upheld defendants' conviction, and the admission of evidence from the warrantless search of the car, on the ground that exigency for the search existed at the time the officer found the car in the parking lot. The warrantless searches made by police in *Ellis*, and in a similar case, *United States v. Castaldi*, occurred after the vehicles had been seized and removed to police headquarters. Rather than permit either the actual warrantless search at police headquarters or the immediate warrantless search that the court would have allowed, the proposed rule would have permitted immobilization or seizure until a warrant could be secured.

In all situations of the fourth degree of exigency, the proposed rule, consistent with the result in *Coolidge*, would require a search warrant and the police would not be permitted to immobilize or seize the vehicle. It is important to note, however, that under the proposed rule, immobilization or seizure of a vehicle in the first, second or third degree of exigency situations would convert all those situations to a fourth degree exigency, and thus require the police to secure a search warrant.

**Conclusion.** This comment has presented three alternatives to the present automobile exception rule. The "auto as person" rule would allow police to search a vehicle without a warrant if probable cause to search existed. The rule would promote consistency and reduce complexity for police and courts, but would sacrifice a significant measure of Fourth Amendment protection. The "immobilization rule" would preserve Fourth Amendment protections relating to search, but not relating to seizure. The proposed rule would allow police to immobilize a vehicle where probable cause exists to arrest all the occupants, or where the automobile is not in use and persons who might have access to it in the future have not or cannot be arrested. The only circumstance in which a warrantless search would be permitted is where probable cause exists to search an occupied, movable vehicle, but not to arrest the occupants. It is submitted that adoption of the proposed rule would minimize the uncertainty.

56 461 F.2d 962 (2d Cir. 1972).
58 The court in *Ellis* observed that the alternative of placing a guard on the vehicle would have been "impractical at a time when police manpower was being drained in an attempt to find the two robbers still at large." 461 F.2d at 966.
§1.8 SEARCH AND SEIZURE

and confusion in the law of automobile searches by limiting the permissibility of a warrantless automobile search to the Carroll situation and by permitting immobilization in many situations where, previously, the police were required to make difficult, contemporaneous determinations of exigency.

ARNOLD E. COHEN