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Search and Seizure- The Inventory Search of an Automobile

RECENT DECISIONS

Search and Seizure—THE INVENTORY SEARCH OF AN AUTOMOBILE—*Cabbler v. Commonwealth*, 212 Va. 520 (1971).

The fourth amendment to the United States Constitution protects the right of an individual to be free in his person and effects from unreasonable search and seizure.[1] The drafters of the provision had fresh memories of the disregard for their individual liberties and sought to place definite restrictions on the activity of government officials.[2] Their fear of the general warrant prompted them to further provide that any warrant be issued only upon probable cause determined by a magistrate and limited in scope.[3] The interpretation of the mandate of the amendment has been that all searches conducted without a warrant issued in strict compliance with its provision are unreasonable per se.[4] However, this general prohibition is tempered by well defined exceptions, which, because of "exigent circumstances," bring them within the general provisions of the Constitution.[5]

In defining the circumstances that permit warrantless intrusions, the courts have undertaken to balance the conflicting demands of the individual for privacy, and of society for protection from criminal activity.[6] Perhaps re-

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[1] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] United States v. Rabinowitz, 339 U.S. 56 (1950) (Frankfurter, J., dissenting):

> It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution .... *Id.* at 69.

For additional material placing the fourth amendment in historical perspective, *see* Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding*, 11 ARIZ. L. REV. 457, 460-75 (1969).

[3] See note 1 *supra*.

[4] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967):

> Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Id.* at 357.

See also Morris v. Commonwealth, 208 Va. 331, 157 S.E.2d 191 (1967).

[5] *See, e.g.*, the catalogue of exceptions and the cases cited in Wheeler v. Goodman, 330 F. Supp. 1356, 1361-62 (W.D.N.C. 1971). And see notes 17-24 *infra*.

[6] *E.g.*, Chapman v. United States, 365 U.S. 610, 615 (1961).

membering the foundering fathers' abhorrence for warrantless intrusions, the courts have been reluctant to expand the limited exceptions[7] and have in fact reaffirmed their belief in strict compliance with the terms of the amendment.[8] This reasoning places the burden on the intruding representative of society to establish that his particular acts were justified under the circumstances.[9]

In *Cabbler v. Commonwealth*,[10] the Supreme Court of Virginia held that a police inventory and removal of the contents of an automobile taken into custody for safekeeping, and not for reasons incident to the arrest of the accused,[11] is a permissible police function and not a violation of the accused's fourth amendment rights. Based on these findings the court ruled that the fruits of the inventory were admissible as evidence in a subsequent trial for an offense unrelated[12] to the arrest of the accused.

On September 2, 1969, Cabbler was arrested in Community Hospital in Roanoke, Virginia, and charged with shooting into an occupied dwelling, a felony. After his arrest, the arresting officer advised Cabbler that his automobile, parked outside the hospital, would be removed to the city garage for safekeeping until his release from custody. "The car, before being stored in the City Garage, was taken to the police property room where the contents of the car were to be removed, inventoried and stored for safekeeping. It was then that the police discovered the stolen goods that resulted in Cabbler's later convictions." [13] The inventorying officer found articles of clothing, which had been stolen from local stores, in the locked trunk of Cabbler's car.

The Virginia Court found that it had been the long standing policy of the Roanoke police to take custody of an accused's property, including automobiles, when an arrest is made away from the accused's home. Since 1965,

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[7] *E.g.*, Jones v. United States, 357 U.S. 493, 499 (1958).

[8] Chimel v. California, 395 U.S. 752 (1969).

[9] United States v. Jeffers, 342 U.S. 48 (1951):

> In so doing the [Fourth] Amendment does not place an unduly oppresive weight on law enforcement officers . . . . *Id.* at 51.

See also McDonald v. United States, 335 U.S. 451, 456 (1948); Morris v. Commonwealth, 208 Va. 331, 157 S.E.2d 191 (1967).

[10] 212 Va. 520, 184 S.E.2d 781 (1971).

[11] Brief for Appellee, Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1971):

> As pointed out above, in the statement of facts, the taking into custody of the defendant's vehicle was in no way connected with his arrest for a shooting incident . . . . *Id.* at 5.

[12] Cabbler was arrested for shooting into an occupied dwelling and was subsequently convicted of larceny based on the evidence discovered in the locked trunk of his car. The police were not looking for the stolen goods but came across them inadvertently in the course of the inventory. 212 Va. at 521, 184 S.E.2d at 782.

[13] *Id.*

after claims for reimbursement were filed by the owners of such safeguarded automobiles, the police began removing, inventorying, and separately storing the contents of all such automobiles. In holding that the practice was permissible, the court based its decision on the "public policy of the Commonwealth" to protect a citizen's rights in his property, and the reasonableness of the practice within the meaning of the fourth amendment.[14]

Since the trial of the *Cabbler* case, the United States Supreme Court in *Coolidge v. New Hampshire*[15] has reexamined pertinent aspects of the fourth amendment, and the *Cabbler* holding should be analyzed in light of the *Coolidge* guidelines.[16]

The warrantless inventory procedure endorsed in *Cabbler* cannot be explained by any of the exceptions to the warrant requirement mentioned in *Coolidge* or the additional exceptions that have become recognized by the courts. Cabbler had not given his consent[17] to the inventory. It was not conducted incident to his arrest[18] nor based on probable cause that the automobile contained evidence.[19] The automobile was not inventoried as a re-

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14 *Id.* at 523, 184 S.E.2d at 783.

15 403 U.S. 443 (1971).

16 In *Coolidge*, after disallowing a warrant to search and seize the accused's automobile which had been towed by the police from his driveway following his arrest, the Court examined the subsequent search and seizure in light of the rules governing warrantless intrusions. The Court found that despite the existence of probable cause to search, the actions by the police did not fit any of the exceptions to the warrant requirement suggested by the State. Search incident to arrest was rejected because it was not contemporaneous with the arrest of the accused and was not conducted in the immediate vicinity of the arrest. Second, the Court rejected the applicability of the general automobile exception described in Carroll v. United States, 267 U.S. 132 (1925), because the opportunity to search was not fleeting. Finally, the Court rejected the seizure of evidence under the plain view doctrine since the seizure of the automobile was not inadvertent.

17 The report of the case reveals that Cabbler made no protest or complaint after being advised that the car would be removed to the city garage. However, he was not informed that the contents would be removed and inventoried. 212 Va. at 521, 184 S.E.2d at 782. The consent exception to the warrant requirement has been recognized in Henry v. Commonwealth, 211 Va. 48, 175 S.E.2d 416 (1970).

18 *E.g.*, Chimel v. California, 395 U.S. 752 (1969), where the Court limited the search incident to arrest to the area within the immediate control of the arrestee. See note 11 *supra*. And see Kirkpatrick v. Commonwealth, 211 Va. 269, 176 S.E.2d 802 (1970).

19 *E.g.*, Kirby v. Cox, 435 F.2d 684 (4th Cir. 1970). The police were not seeking evidence, therefore Carroll v. United States, 267 U.S. 132 (1925), does not apply. In *Carroll*, the search of an automobile was allowed because the mobility of the car on the open road made the opportunity to search fleeting and the searching officer had sufficient probable cause to believe that car contained contraband. Neither of these two conditions were present in *Cabbler*.

sult of the "hot pursuit" of a criminal;[20] nor was it abandoned property,[21] or seized as evidence pending forfeiture proceedings.[22] No emergency situation threatened destruction of evidence[23] or injury to persons.[24] However, *Coolidge* suggests another possibility that might encompass the *Cabbler* situation; the warrantless seizure of the stolen goods taken from the locked trunk of Cabbler's car may have been pursuant to the "plain view" doctrine.[25]

The plain view doctrine, while not one of the exceptions to warrant searches mentioned above, is a warrantless intrusion into the privacy of an individual.[26] The doctrine permits an official to seize articles which he recognizes as evidence within his plain view if the original transgression of the fourth amendment barrier of privacy was for a recognized legitimate purpose. It is not a warrantless search, but rather it is a justification for the seizure of articles once either a proper search is underway or the officer's

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[20] *E.g.*, Warden v. Hayden, 387 U.S. 294 (1967). *See also* Hester v. United States, 265 U.S. 57 (1924).

[21] If the property is abandoned, the fourth amendment does not protect it from intrusion since the accused has no interest of privacy to be protected. *E.g.*, Abel v. United States, 362 U.S. 217 (1960).

[22] Cabbler's car was not seized as evidence of a crime, therefore the exception described in Cooper v. California, 386 U.S. 58 (1967), does not apply. In *Cooper*, a warrantless search of an automobile was justified because it was "closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." *Id.* at 61. See Carter v. Commonwealth, 209 Va. 317, 163 S.E.2d 589 (1968), *cert. denied* 394 U.S. 991 (1969). In *Cabbler*, the car came into police custody because there was no one available to drive it away. And see Preston v. United States, 376 U.S. 364 (1964), where, for the convenience of the owner, the arresting officer took the car to the station rather than leaving it on the street. The Court disallowed the subsequent search of the car. In Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), the Court reaffirmed the distinction between cars impounded as evidence and those removed for the convenience of the owner and disallowed the search because the police were not required to keep the car and had no probable cause to believe it contained evidence. *Cabbler* seems more closely analogous to *Preston* and *Dyke*, than to *Cooper*. *See generally* One 1963 Chevrolet Pickup Truck v. Commonwealth, 208 Va. 506, 158 S.E.2d 755 (1968), *cert. denied* 391 U.S. 964 (1968).

[23] *E.g.*, United States v. Jeffers, 342 U.S. 48, 52 (1951); Johnson v. United States, 333 U.S. 10, 15 (1948).

[24] *E.g.*, Vauss v. United States, 370 F.2d 250 (D.C. Cir. 1966); United States v. Barone, 330 F.2d 543 (2nd Cir. 1964), *cert. denied* 377 U.S. 1004 (1964).

[25] *E.g.*, Carter v. Commonwealth, 209 Va. 317, 163 S.E.2d 589 (1968), *cert. denied*, 394 U.S. 991 (1969). For an analysis of the plain view doctrine as expressed in *Coolidge*, see Kuipers, *Suspicious Objects, Probable Cause, and the Law of Search and Seizure*, 21 DRAKE L. REV. 252, 263-67 (1972).

[26] For one Court's interpretation of the nature of the intrusion, see Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971).

presence is justified by "exigent circumstances." [27] Therefore, an essential element of the plain view doctrine is the "prior justification" for the original intrusion.[28]

In addition to the necessary "prior justification," the seizure under plain view must be inadvertent. The rationale of this requirement is to avoid what the court in *Coolidge* termed "*planned* warrantless seizure[s]." [29] A planned warrantless seizure would not be a plain view seizure but rather an illegal search, because the fabricated nature of the seizure would vitiate[30] the circumstances under which the official could act without a warrant.[31] Therefore, if the official's presence is legitimate under the "prior justification" test, and the seizure not anticipated under the inadvertence test, the fourth amendment has not been violated. A requirement that the official ignore evidence under these circumstances would place an unreasonable restriction on effective police practice without a commensurate preservation of individual freedom. The underlying philosophy of the rule is that the real violation of privacy is the presence of the official within the individual's zone of privacy. Since his presence has been justified, the additional intrusion of seizing objects, which he recognizes as evidence that comes into plain view, is incidental.[32]

Considering the second requirement first, the seizure in *Cabbler* was un-

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[27] *E.g.*, Harris v. United States, 390 U.S. 234 (1968) where the evidence fell into plain view when the police officer opened the door of a car impounded as evidence. And see Ker v. California, 374 U.S. 23, 43 (1963); United States v. Lee, 274 U.S. 559, 563 (1927).

[28] Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. *Id.* at 466.

[29] *Id.* at 471 n.27.

[30] But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure (footnote omitted). *Id.* at 471. In developing this point the Court seems to resurrect the distinction between "mere evidence" and contraband which had been put to rest in Warden v. Hayden, 387 U.S. 294 (1967). Mr. Justice White criticized the Court for drawing this distinction. Coolidge v. New Hampshire, 403 U.S. 443, 519 (1971) (White, J., concurring and dissenting).

[31] Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever . . . in the absence of "exigent circumstances." *Id.* at 470.

[32] "As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement." *Id.* at 467.

anticipated. There was no evidence in the case to indicate that the Roanoke police suspected that the car contained stolen goods, or that the inventory was used as a guise in order to search the car. This was not a "planned warrantless seizure." [33]

Therefore, to explain the warrantless seizure it must be shown that there was no intrusion recognizable in fourth amendment terms; *i.e.*, Cabbler had no right of privacy in the situation, or, in the alternative, that the intrusion was justified under the circumstances.

It has been consistently held that the fourth amendment protects the accused's right of privacy in his automobile.[34] The cases from *Carroll v. United States*[35] to *Coolidge* have recognized that the seizure of articles found in an automobile must be in compliance with the fourth amendment. Cabbler had a reasonable expectation of privacy in the automobile which was not altered when it was taken into protective custody.[36] Consequently, since the inventory was allowed, the intrusion must have been justified under the circumstances; *i.e.*, the two underlying reasons given for the inventory procedure, the protection of Cabbler's property and the protection of the police from possible liability, must supply the requisite "prior justification" to allow the plain view doctrine to authorize the seizure.

The "prior justifications" which have provided warrantless foundations for the operation of the plain view doctrine have been limited to either the well recognized exceptions to the warrant requirement[37] or "where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." [38]

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[33] See note 29 *supra*.

[34] Coolidge v. New Hampshire, 403 U.S. 443 (1971): "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461-62. Preston v. United States, 376 U.S. 364 (1964); Rios v. United States, 364 U.S. 253 (1960); Henry v. United States 361 U.S. 98 (1959).

[35] 267 U.S. 132 (1925).

[36] Katz v. United States, 389 U.S. 347 (1967), where the Court held that an individual had a reasonable expectation of privacy while making a call from a public telephone booth. "For the Fourth Amendment protects people, not places." *Id.* at 351. And see Cooper v. California, 386 U.S. 58, 61 (1967).

[37] See notes 5 and 17-24 *supra*.

[38] Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). To support this category of "exigent circumstances" the Court cites four cases: Frazier v. Cupp, 394 U.S. 731 (1969), where the incriminating evidence was found in a duffle bag which the accused shared with a friend, after the friend had given the police permission to search; Harris v. United States, 390 U.S. 234 (1968), where the evidence was discovered while the police were taking measures to protect the car while it was in police custody after being impounded as evidence; Lewis v. United States, 385 U.S. 206 (1966), where the accused sold incriminating evidence to an undercover agent; and, Ker v. California 374 U.S. 23 (1963), where the police seized evidence as a result of being in the accused's home based on probable cause to arrest.

The first group of "exigent circumstances," with the exception of consent searches and searches of abandoned property, involve grave circumstances compelling immediate action to preserve evidence, capture a fleeing suspect, or protect the safety of persons.[39] It might be argued that the "prior justification" in the *Cabbler* case, the protection of property, fits the general tenor of this group of exceptions.[40] However, the situation presented in *Cabbler* does not contain the urgency that is characteristic of this group. The urgency to search or seize is the essential element which provides the authority for this type of warrantless intrusion.[41] To hold otherwise would grant the authority to search, without fourth amendment restrictions, any automobile in custody, for whatever reason, based on the otherwise legitimate obligations to protect private property. Such reasoning has not been endorsed by the United States Supreme Court.[42]

While lacking the requisite urgency to fit the first category of "exigent circumstances," the facts in *Cabbler* may supply a sufficient "prior justification" under the general provisions of the second category.[43] The reasoning of a majority of courts which have considered the issue supports this contention.[44] The basis for their reasoning is that once the automobile comes into police custody, the police have a duty[45] to protect its contents. Given

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39 See notes 17-24 *supra.*

40 For an argument that Cooper v. California, 386 U.S. 58 (1967), may be authority for including the inventory conducted in *Cabbler* in the exceptions, see 29 WASH. & LEE L. REV. 197, 203-07 (1972). In Cooper v. California, *supra* at 61-62 (1967), the Court stated: "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." But see note 22 *supra,* for a possible distinction between *Cooper* and *Cabbler.*

41 United States v. Broomfield, 336 F. Supp. 179 (E.D. Mich. 1972):

> The cases cited by Justice Stewart [in Coolidge] as constituting "exceptions" which justify the initial intrusion . . . can be characterized by the term, and the presence of, "exigent circumstances." That is to say, that "plain view *alone*" (emphasis added) is not a sufficient basis to justify a warrantless search, there must also be, contemporaneously, an urgency or immediacy that is pervading and compelling. *Id.* at 183.

42 Cooper v. California 386 U.S. 58 (1967):

> While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," . . . the reason for and nature of the custody may constitutionally justify the search. *Id.* at 61.

43 See note 38 and text *supra.*

44 *See* W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 372 (1972):

> That items of evidence found in searches of vehicles, lawfully in police custody, when such searches are not made for the purpose of seeking evidence of crime, may not be suppressed is becoming the increasingly accepted view.

See also 29 WASH. & LEE L. REV. 197, 204 n.66 (1972).

45 United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972), where the court held that evidence discovered during an inventory of articles in plain view inside an impounded

this duty, the inventory procedure is a reasonable means of fulfilling the duty[46] and protecting the police from possible liability for lost articles. Applying the conclusions of these cases to the plain view doctrine, the presence of the officer within the accused's fourth amendment zone of privacy is for a legitimate purpose, because the transgression is not to seize evidence but to protect the property of the accused. Therefore, the reasoning goes, since his presence is legitimate, based on the duty to protect the property, the seizure of objects recognized as evidence within plain view does not violate the fourth amendment. This theory supports the opening of the trunk to Cabbler's car and the seizure of the clothing found therein.

While representing the majority view, such reasoning has been subject to some critical comment[47] and has been rejected by a minority of courts.[48] As an example of the minority view, the Supreme Court of California in *Mozzetti v. Superior Court*[49] reasoned:

> In weighing the necessity of the inventory search as protection of the owner's property against the owner's rights under the Fourth Amendment, we observe that items of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner.[50]

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car was admissable. The court cited the lack of intent to discover evidence, the need to protect the property of the accused and the desirability of protecting the police from claims for lost property. United States v. Boyd, 436 F.2d 1203 (5th Cir. 1971), where the car had been demolished and could not be secured if left on the street. There the court said: "Once the car was taken to headquarters the 'officers were under a duty to itemize the property [therein] and store it for safekeeping.'" *Id.* at 1205. Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), where the accused was arrested for prowling and his car was impounded to protect it. The court stated: "The police have as much a duty to protect the property of a suspect as they have to protect the property of the rest of us . . . ." *Id.* at 392.

[46] People v. Robinson, 36 App. Div. 2d 375, 320 N.Y.S.2d 665 (1971). The accused's automobile was impounded after a lawful arrest and the incriminating evidence, a pistol, was found in the trunk during a routine inventory search. The court stated:

> The "search" of a vehicle *which has been lawfully impounded* for the purpose of inventorying its contents is calculated to safeguard them for the benefit of their rightful owner as well as to protect the police against possible dishonest claims of misappropriation of the vehicle's contents . . . [is] in furtherance of a wholly reasonable and legitimate purpose [and therefore is valid]. 320 N.Y.S.2d at 668.

[47] See Stroud, *The Inventory Search and the Fourth Amendment*, 4 IND. LEG. F. 471 (1970); Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. REV. 626, 639-42 (1969-70); 29 WASH. & LEE L. REV. 197 (1972).

[48] Mayfield v. United States, 276 A.2d 123 (D.C. Ct. App. 1971); Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

[49] 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

[50] *Id.* at 707, 484 P.2d at 89, 94 Cal. Rptr. at 417.

As for the protection of the police from claims of loss, the court examined the law of California and determined that the police were involuntary bailees and as such they were not liable for ordinary negligence in safeguarding the contents of the automobile, and that "it cannot be urged seriously that they [the police] fail to adequately fulfill their duty by rolling up the windows and locking the doors of vehicles taken into custody." [51]

In holding that there is no difference in result between an "inventory" and a "search" of an automobile, the California Supreme Court emphasized the nature of the inventory as a random search, looking for nothing in particular and everything in general, and characterized the random search as the "precise invasion of privacy which the Fourth Amendment was intended to prohibit." [52] Such reasoning seems the better view, especially when the inventory is viewed from the point of individual liberties. By labeling the intrusion an inventory, the police no longer need comply with the warrant and probable cause provisions of the fourth amendment.[53] The police, without probable cause, or for that matter even a hint that the automobile may contain seizable evidence, may now conduct a random intrusion under circumstances that a magistrate would never permit.[54] In fact, under the guidelines of *Coolidge,* the police may be penalized if they do have a suspicion that evidence does exist.[55] Considering the intent and purpose of the fourth amendment, it would be a true paradox to allow a random intrusion in those cases where probable cause does not exist and to disallow the intrusion where the police have a mere suspicion that evidence exists but do not have probable cause.[56] Such reasoning places fourth amendment guarantees in a semantical strait jacket, an approach that has been rejected by the United States Supreme Court in *Camara v. Municipal Court.*[57]

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[51] *Id.* at 708, 484 P.2d at 90, 94 Cal. Rptr. at 418.

[52] *Id.* at 711, 484 P.2d at 92, 94 Cal. Rptr. at 420.

[53] The inventory procedure is usually conducted without a warrant and is justified largely because the police are not looking for evidence. People v. Robinson, 36 App. Div. 2d 375, 320 N.Y.S.2d 665 (1971); Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1971).

[54] In *Cabbler,* if the police had, instead of inventorying the contents of the car, sought a warrant to search it, their lack of probable cause to believe it contained evidence would probably have prohibited one from being issued by a magistrate.

[55] The police may run afoul of the *Coolidge* "inadvertent" test. See note 30 and accompanying text *supra.*

[56] The routine police inventory of the contents of an automobile is clearly distinguishable from the "stop and frisk" situation where the police are allowed to make a pat down search based on less than probable cause. Terry v. Ohio, 392 U.S. 1 (1968).

[57] 387 U.S. 523, 530 (1967). In *Camara* the Court applied the fourth amendment to administrative inspections conducted under municipal health and safety laws. The Court felt that fourth amendment principles should govern the intrusion despite the fact that it was not a search for evidence in the traditional sense. The Court balanced

In *Camara,* the Court, faced with a balancing of interest problem similar to that faced by the Virginia Court in *Cabbler,* found that probable cause was the very basis of reasonableness, and that the warrant procedure is the proper mechanism with which to balance the needs of society and the privacy of the individual.[58] The Court held that the interest of the public to be free from disease and unsafe conditions could provide the necessary probable cause for the issuance of a warrant to inspect a dwelling only because "it is doubtful that any other canvassing technique [than an inspection] *would achieve acceptable results.*" [59]

With this view in mind, it can be argued that the Virginia Court misapplied the reasonableness standard[60] in *Cabbler* in light of *Mozzetti's* findings that there are other less offensive means of protecting the accused's property.[61]

Thus in *Cabbler,* since it can be argued that the property of the accused could have been protected by means other than an inventory, the "prior justification" for the procedure vanishes, thus invalidating the seizure of the goods under the plain view doctrine.

The conclusion must be that if the inventory does not fit one of the established exceptions to the warrant requirement, and fails to qualify under the plain view doctrine, the only remaining explanation for the Virginia

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the social need to be free from health and safety hazards against the individual's right to privacy and concluded that when the inspecting officials had probable cause to believe a building contains a hazard, a suitably restricted warrant could be issued. And see Terry v. Ohio, 392 U.S. 1, 17-18 n.15 (1968), where the Court disregarded semantical differences between a search and the "stop and frisk" situation and held that the fourth amendment governed the intrusion.

[58] Camara v. Municipal Court, 387 U.S. 523 (1967):

> [R]easonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. *Id.* at 539.

[59] *Id.* at 537 (emphasis added).

[60] In addition, the "reasonableness test" itself is in doubt in the wake of Chimel v. California, 395 U.S. 752 (1969). There the Court embraced the approach proposed by Mr. Justice Frankfurter in his dissenting opinion in United States v. Rabinowitz, 339 U.S. 56, 83 (1950), and rejected reasonableness as "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." Chimel v. California, *supra* at 764-65. By so holding, the Court has breathed new life into the probable cause and warrant requirements of the fourth amendment and cast doubt on the propriety of creating yet another exception to those requirements. For a thorough treatment of *Chimel's* possible effect on automobile searches, see Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches,* 17 U.C.L.A. L. Rev. 626 (1969-70).

[61] The *Camara* holding strongly implies that if the public health and safety could be adequately protected by a procedure that did not intrude into the privacy of the individual, then probable cause would vanish and the inspection would be unreasonable whether under warrant or not. See note 59 *supra.*

Court's acceptance of the procedure is that an additional exception has been created.[62] The question is whether such action is justified in light of the possibilities for abuse that exist when departures are made from the warrant procedure.[63]

The argument is not that an unreasonable burden be placed on police conduct, but rather that consistent principles of fourth amendment law be applied to all intrusions into the privacy of the individual despite the terminology that is employed to describe the intrusion.[64] The objection to the inventory procedure used in *Cabbler* is that a practice designed to protect property and the police from liability may at the same time go too far and allow diminution of one's right to be free from random searches.[65]

F. P.

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[62] The Virginia Supreme Court did not indicate which approach it used to reach its conclusion that the inventory was a reasonable and acceptable police procedure. Other state courts have attempted to determine whether or not the procedure is a search, with varying results. *Compare* Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971) (a search, evidence not admissable) *with* People v. Robinson, 36 App. Div. 2d 375, 320 N.Y.S.2d 665 (1971) (not a search, evidence admissable). The Virginia Court avoided this problem by not addressing the point. In defense of the Virginia approach, the answer to the search question should not be determinative of the constitutional issue involved. The answer to this central question must turn on the justification for and the nature of the warrantless intrusion. See notes 57 & 58 *supra*.

[63] Beck v. Ohio, 379 U.S. 89 (1964), where the Court discussed the problems inherent when arrests are made without probable cause. Their warning against such unrestricted police conduct is pertinent here:

> But "good faith on the part of the arresting officers is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. *Id.* at 97.

[64] United States v. Mitchell, 458 F. 2d 960, 964 (9th Cir. 1972) (Ely, J., dissenting); People v. Robinson, 320 N.Y.S.2d 665, 671 (1971) (Gulotta & Brennan, JJ., dissenting).

[65] A possible solution to the *Cabbler* situation would be to inform the car owner that its contents will be inventoried if it is taken into protective custody. Armed with the facts, the owner could make an informed choice between police custody or his own measures to protect the car pending his release. Or, as an alternative, the police inventory could be limited to articles likely to be stolen, such as those in open view within the car. In any event, the inventory should not be allowed to extend to articles already secure in the locked trunk of the car.