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Chief Justice Roger Traynor and The United States Supreme Court: Contrasting Approaches to Search and Seizure

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Chief Justice Roger Traynor and The United States Supreme Court: Contrasting Approaches to Search and Seizure

Gordon Van Kessel*

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I. INTRODUCTION

The United States Supreme Court's journey on the road to creating clear, rational, and workable search and seizure rules has not been a happy one. From 1914 when the Court adopted the exclusionary rule for federal courts and began developing search and seizure standards,1 to 1961 when it imposed the exclusionary rule on the states,2 the Court created a body of doctrine regarded by judges and scholars as confusing, irrational, and incomplete.3 Over the following three decades, the Court proceeded in a

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1. See Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that the exclusionary rule applies in federal prosecutions to bar the use of evidence secured through searches and seizures in violation of the Fourth Amendment).
2. See Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment is enforced against the states by the same sanction of exclusion as against the federal government).
3. See Roger J. Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 DUKE L.J. 319, 329 (1962) (discussing how many of the present federal rules are confusing, underdeveloped or over-refined) [hereinafter Traynor, Mapp at Large]; Rex A. Collings, Jr., Toward Workable Rules of Search and Seizure - an Amicus Curiae Brief, 50 CAL. L. REV. 421, 422 (1962) (stating that the federal law is incomplete and decisions are not always rational or consistent).

In People v. Cahan, 44 Cal. 2d 434, 450, 282 P.2d 905, 915 (1955), the case adopting the California rule, Justice Traynor, mindful of the criticisms of the federal rules as arbitrary and confusing, declared that California was not bound by decisions applying the federal rule. Cahan, 44 Cal. 2d at 450, 282 P.2d at 915. Dissenting Justice Spence, charged that neither federal nor state courts had developed workable rules of search and seizure. Id. at 456, 282 P.2d at 918 (Spence, J., dissenting).
hesitant and haphazard fashion, often announcing ambiguous and inconsistent standards, and in many significant areas leaving important questions unanswered for years.\(^4\) Fourth Amendment literature is replete with accusations that the Supreme Court’s search and seizure decisions are unclear or irrational and their rules imbalanced or unworkable.\(^5\) The Supreme Court itself, as well as individual justices, have often voiced frustration with the Court’s Fourth Amendment jurisprudence.\(^6\)

I submit that, under the leadership of Justice Roger Traynor,\(^7\) the California Supreme Court better performed the task of developing search

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4. See infra notes 507-824 and accompanying text.

5. See Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 349 (1974) (stating that “[t]he clarity and consistency, the law of the fourth amendment is not the Supreme Court’s most successful product”); Craig M. Bradley, Two Models of the Fourth Amendment, 83 MICH. L. REV. 1468, 1468 (1985) (describing the Supreme Court’s Fourth Amendment jurisprudence as “a mass of contradictions and obscurities”); Roger B. Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 IND. L.J. 329, 329 (1973) (stating that “[t]he fourth amendment cases are a mess”); Wayne R. LaFave, Search and Seizure: “The Course of True Law... Has Not... Run Smooth,” 1966 U. ILL. L.F. 255, 255 (stating that “no area of the law has more bedevilled the judiciary” than Fourth Amendment jurisprudence); Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383, 383 (1988) (discussing the Court’s continuous and unsuccessful struggle to develop a coherent analytical framework); Lloyd L. Weinreb, Generalities of the Fourth Amendment, 42 U. CHI. L. REV. 437, 437 (1974) (criticizing the Court’s inconsistent treatment of the reasonableness and warrant clauses, accusing the Court of doing nothing more than announcing “the latest shift of emphasis to one clause or the other, according to a result reached on other grounds,” resulting in the “absence of a continuously developing rationalization of the amendment”).

6. California v. Acevedo, 500 U.S. 565, 577 (1991) (describing the rule governing the search of containers found in automobiles as “the antithesis of a ‘clear and unequivocal’ guideline”); Cady v. Dombrowski, 413 U.S. 433, 440 (1973) (stating that “this branch of the law is something less than a seamless web”); Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971) (stating that “it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony”).

Justice Frankfurter, concurring in Chapman v. United States, 365 U.S. 610 (1961), noted that “[f]or true law pertaining to searches and seizures . . . has not—to put it mildly—run smoothly.” Id. at 618 (Frankfurter, J., concurring). In 1971, Justice Harlan called for an “overhauling” of the Fourth Amendment law. Coolidge, 403 U.S. at 490-91 (Harlan, J., concurring). Justice O’Connor, objecting to a public safety exception to the Miranda rule, contended that such exception would force the Court to develop a new doctrine on public safety exigencies similar to the “hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence.” New York v. Quarles, 467 U.S. 649, 664 (1984) (O’Connor, J., concurring). Justice Scalia, concurring in California v. Acevedo, 500 U.S. 565 (1991), described the Court’s holding as “the continuation of an inconsistent jurisprudence that has been with us for years” and warned that “[t]here can be no clarity in this area unless we make up our minds.” Id. at 583 (Scalia, J., concurring).

7. Traynor served as Associate Justice of the California Supreme Court from 1940 to 1964, when he was elevated to Chief Justice. His most important contributions to the development of search and seizure standards occurred in the space of the first few years following California’s adoption of the exclusionary rule in 1955, while he held the position of Associate Justice. Accordingly, this Article will refer to him as Justice, rather than as Chief Justice.

Traynor retired from the court in 1970, and became a member of the distinguished Sixty-Five Club faculty at Hastings College of the Law in 1971. Coincidentally, this is the same year I left criminal trial practice for a teaching career at Hastings. I was fortunate to have served as a law clerk for Associate Justice Raymond Peters when Traynor was Chief Justice and, for over a decade at Hastings, to have had Justice Traynor as a colleague and friend.
and seizure standards, and that the California experience can guide and enlighten courts in the search for reasonable and workable search and seizure rules. The United States Supreme Court often has followed the lead of Justice Traynor and the California Supreme Court in resolving difficult search and seizure problems. However, in many areas the Court’s failure to consider, or outright rejection of, the Traynor approach has led to unworkable or irrational rules.

In April 1955, six years before Mapp v. Ohio imposed the exclusionary rule on the states, the California Supreme Court adopted its own exclusionary rule as a judicially created rule of evidence. Abandoning his earlier opposition to the rule, Justice Traynor authored the court’s opinion in People v. Cahan which declared that products of unlawful searches and seizures would no longer be admissible in California courts. At this time, the federal rules of search and seizure were confusing and inconsistent, and California search and seizure law was unclear or non-existent. Noting the current chaotic state of search and

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9. See, e.g., infra notes 185-197, 214-229, 244-263 and accompanying text.


12. Id. at 445, 282 P.2d at 911.


14. See Monrad G. Paulsen, Criminal Law Administration: The Zero Hour Was Coming, 53 CAL. L. REV. 103, 108 (1965) (stating that the federal cases “are far from satisfactory. A great many technical rules have been formulated which lack the underpinning of sound reason.”).

15. See Paulsen, supra note 14, at 108 (explaining that California had almost no case law respecting the legality of arrests, searches and seizures). Justice Spence, dissenting in Cahan, warned that neither the federal nor state courts which had adopted the exclusionary rule had found satisfactory answers to problems in developing “workable rules.” Cahan, 44 Cal. 2d at 456, 282 P.2d at 918 (Spence, J., dissenting).
Contrasting Approaches to Search and Seizure

seizure law, Traynor concluded that the court’s immediate task was to develop clear and workable rules of search and seizure. Traynor wrote that adoption of the exclusionary rule, “opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.” Thus began a “long overdue clarification of standards of reasonableness in law enforcement.” Following Cahan, the California Supreme Court, with Traynor taking the leading role, began the development of rules of search and seizure that were both workable and balanced in accommodating individual privacy and effective law enforcement.

During the first year after Cahan, the California Supreme Court decided twenty-one search and seizure cases, with Justice Traynor writing eighteen of the court’s opinions. Most of Traynor’s opinions were short, with few footnotes. During the fifteen years between Cahan and Traynor’s retirement in January 1971, he wrote fifty opinions for the court on search and seizure issues, averaging five pages each with 1-1/3 footnotes. From 1955 through August of 1962, nearly 700 appellate decisions dealt with

Shortly after Cahan, Professor Edward Barrett noted that California search and seizure rules were “ill-defined,” police discretion in determining reasonableness of searches was rarely subject to check, and law enforcement groups preferred the ambiguity of seldom-litigated rules. Edward L. Barrett, Jr., Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan, 43 CAL. L. REV. 565, 587 (1955) [hereinafter Barrett, Exclusion of Evidence].

In broad areas involving commonly used tactics of the best police departments, and justified by them as essential to the control particularly of organized criminal operations, it is not possible to know whether the police are acting legally or illegally. Id. at 576; Comment, The Cahan Case: The Exclusionary Rule, and the Law of Search, Seizure, and Arrest in California, 3 UCLA L. REV. 55, 57 (1955) (observing that “[u]nfortunately the California case law respecting the right of peace officers to search and seize, both with and without a warrant, is unduly technical and most uncertain”).

17. Cahan, 44 Cal. 2d at 451, 282 P.2d at 915.
18. Traynor, Mapp at Large, supra note 3, at 323.
19. Collings, supra note 3, at 421. On February 24, 1956, the court handed down nine cases involving search and seizure questions, with Traynor writing the opinion for the court in all nine. Paulsen, supra note 15, at 108.

The authors of an article reviewing the two years following Cahan concluded that:

It is interesting to note that Justice Traynor has written the majority opinion in almost every important search and seizure case. The rules laid down by him have been clear and concise and have been consistently and logically followed in later opinions. California district courts of appeal are seldom reversed in search and seizure cases now, in tribute to their willingness to follow the supreme court’s “workable rules” and to Justice Traynor’s clarity in laying them down.

Note, Two Years with the Cahan Rule, 9 STAN. L. REV. 515, 537 (1957).
20. The averages are based on complete opinions. Some dealt with other issues, and no effort was made to include only those parts devoted to search and seizure.
search and seizure questions. In 1962, Traynor reflected that following Cahan, hundreds of search and seizure cases came before California appellate courts and "compelled detailed articulation of what is reasonable and what is unreasonable." In 1965, Justice Walter Schaefer wrote,

In the years that intervened between Cahan and Mapp, the California court decided forty-five search and seizure cases, with Chief Justice Traynor writing the opinion of the court in twenty-three. These cases presented most of the possible variations, and they produced what is, in my opinion, the most valuable body of search and seizure law that is available.

Thus, Justice Roger Traynor led the court in writing on a clean slate, within a relatively brief period, a comprehensive body of "workable rules governing searches and seizures" which was largely accepted as balanced, rational, and workable. What can we learn from Justice Traynor and the California experience?

Traynor viewed the exclusionary rule's primary objective as the protection of privacy through encouraging law enforcement officials to act reasonably. Traynor believed that this goal could be achieved by providing officers with a clear, practical guide to proper law enforcement and then denying to them the fruits of unlawful searches and seizures. This Article contends that the United States Supreme Court should follow Traynor's lead. Clearly focusing on these objectives, the Court would recognize the need for a number of changes in current search and seizure rules. Viewing the exclusionary rule's purpose as primarily to discourage illegal searches and seizures, rather than to compensate the victims of such searches, the Court should loosen standing rules and allow defendants to object to evidence procured through unreasonable searches that violate the rights of other suspects. Also, focusing on police conduct would lead to reliance on apparent, rather than on actual, authority to consent and to

22. Traynor, Mapp at Large, supra note 3, at 327.
24. When the California Supreme Court adopted its exclusionary rule in 1955, six years before it was imposed on the states by Mapp v. Ohio, the court approached the task of developing search and seizure standards feeling largely unfettered by federal law. See infra note 45.
26. See infra notes 191-197 and accompanying text.
27. See infra notes 184-197 and accompanying text.
a more expansive definition of Fourth Amendment seizures which does not require touching or submission to authority.\textsuperscript{28}

Regarding the search and seizure rules primarily as a means of guiding and controlling police conduct, the Court should reject complex or technical rules in favor of clear, practical standards.\textsuperscript{29} The Court should recognize that in pronouncing search and seizure standards, it is laying down a code of conduct for law enforcement officials who daily are faced with varying complex, volatile, and often dangerous situations and who therefore require guidance from practical rules that can be easily understood and quickly applied.\textsuperscript{30} Traynor emphasized the need to avoid "needless refinements and distinctions," and California Supreme Court cases following \textit{Cahan} took a practical, common sense approach, usually upholding natural police responses to suspicious circumstances, particularly when they involved only slight or minor intrusions into privacy.\textsuperscript{31} Focusing on the goal of promoting reasonable police conduct, the United States Supreme Court should reject complex and technical rules and should be reluctant to hold as unreasonable, police conduct which is a natural reaction to suspicious circumstances and which involves only slight or minor intrusions of privacy.\textsuperscript{32}

The search for simple, practical, and rational rules demands clarification of the dimensions of the warrant clause, particularly with respect to search incident to arrest and to the search of movable containers outside the contexts of homes or automobiles.\textsuperscript{33} Currently, a search incident to the arrest of one inside a home is limited to the arrestee's person and the area from which the arrestee might gain possession of a weapon or destructible evidence.\textsuperscript{34} No further search is permitted even with full probable cause to believe that evidence of the crime for which the person is arrested is located in the house.\textsuperscript{35} On the other hand, following an arrest in a public place or in an automobile, the Supreme Court's "workable rule" allows police automatically to conduct a search incident without any suspicion and unlimited in scope by any requirement of cause to discover

\textsuperscript{28} See infra notes 198-263 and accompanying text.
\textsuperscript{29} See infra notes 308-312 and accompanying text.
\textsuperscript{30} See infra note 308 and accompanying text.
\textsuperscript{31} See infra notes 403-430 and accompanying text.
\textsuperscript{32} See infra note 467 accompanying text.
\textsuperscript{33} See infra notes 468-472 and accompanying text.
\textsuperscript{34} Chimel v. California, 395 U.S. 752, 763 (1969).
\textsuperscript{35} See infra notes 519-522 and accompanying text.
Some courts are using this "workable rule" to expand searches of homes as incident to the arrest of an occupant. The approach of Justice Traynor and the California Supreme Court would allow a search of the entire premises as incident to the arrest of an occupant, but would guard against exploratory searches by requiring reasonable cause to believe that evidence of the crime for which the suspect was arrested would be found on the premises and limiting the search to areas likely to contain such evidence. With guidelines to guard against abuses, the Traynor approach would be worth considering as to both home and automobile searches.

With respect to automobile searches, Traynor initially adopted the simple, workable approach taken by the United States Supreme Court in 1925: If police have probable cause to believe that an automobile contains contraband, they need not obtain a warrant in order to search it. However, both Traynor and the United States Supreme Court sank into the search and seizure quicksand when they attempted to distinguish automobile from other movable container searches and then to further distinguish all container searches from seizures and inspections of "evidence" or "instrumentalities" of crime in plain view. Consequently, neither Traynor nor the United States Supreme Court succeeded in developing rational, workable standards with respect to searches of movable containers outside the context of homes or offices.

The simplest and most reasonable approach would treat movable containers the same whether they are found in an automobile, on a person, or unattended. In general, a search warrant should not be required for the search of a movable container found in a public place. In fact, the Court might explicitly recognize what has become the practical result of the many exceptions to the warrant requirement: In order that a search be reasonable, the Fourth Amendment demands a warrant only for intrusions comparable in seriousness to home or office searches, electronic interception of conversations, or invasions of the body of a suspect. This

37. See infra notes 539-541 and accompanying text.
38. See infra note 543 and accompanying text.
39. See infra note 555 and accompanying text.
41. See infra notes 594-747 and accompanying text.
42. See infra notes 594-747 and accompanying text.
43. See, e.g., Katz v. United States, 389 U.S. 347, 358 (1967) (holding that a search warrant is required to make an electronic interception of a conversation reasonable, even when based on probable cause).
simple rule, based on probable cause, would largely eliminate the irrational
and unworkable distinctions that have developed around the concept of
plain view. Once an article is seizable by reason of probable cause to
believe it contains contraband or otherwise is associated with criminal
activity, it would be subject to inspection either on the ground that the
same probable cause renders the container's search reasonable or, if the
object's appearance or other factor advertises its contents, on the ground
that the inspection invades no legitimate expectation of privacy and, thus,
is not a search under the Fourth Amendment.

To meet its responsibility of clarifying unsettled and confusing areas
of the law, the Court also should, in its opinions, offer guides to
application of the rules in other contexts, such as by the use of example
or analogy. Moreover, the Court should face up to and overrule unwork-
able or unreasonable decisions rather than subject them to capital punish-
ment on the installment plan through slow, painful creation of exceptions
and distinctions. An unhealthy respect for bad precedent too often has led
to formal, artificial bows to its skeletal remains at the same time the Court
has disregarded its principles. Much of the mischief perpetrated by the
United States Supreme Court in the search and seizure area can be traced
directly to the Court's practice, when discovering that it has made bad law,
to distinguish it away rather than to overrule it outright.45 In many areas,
the Court has announced a sweeping new rule without clearly thinking
through its consequences.46 When the Court has later discovered that the
rule's application has led to illogical or unworkable results, the Court's
reluctance to overrule bad precedent has resulted in the creation of
precedential ghosts in the form of subtle, illogical, and often unworkable
distinctions which return to haunt courts and law enforcement officials.

II. CHIEF JUSTICE ROGER TRAYNOR

California's exclusionary rule was adopted and its search and seizure
standards developed under the direction and leadership of Justice Roger
Traynor, who has been ranked among the greatest American jurists of the
twentieth century. Serving thirty years on the California Supreme Court,

interest involved, some bodily intrusions may not be justified even when based upon a judicial finding of
probable cause).
45. See infra notes 812-813 and accompanying text.
46. See infra note 815 and accompanying text.
the last six as Chief Justice, he wrote opinions which still have great influence in numerous areas of American law. His contributions have been widely acknowledged by such greats as Justice Henry Friendly, who found Traynor to be the ablest judge of his generation in the United States, and Illinois Supreme Court Justice Walter Schaefer, who concluded that Traynor’s impact on the law exceeded that of any other American judge.

Justice Traynor’s decisions demonstrate caution and moderation, and most important, a healthy respect for competing interests and reasonable contrary arguments. While Traynor often is regarded as an activist judge, he was not a narrow-visioned activist intent on implementing his own personal agenda. When faced with the conflicts between individual rights and state concerns in effective law enforcement that typify major criminal procedure battles, Traynor demonstrated an ability to balance interests with an eye to both reason and practical experience. He was fond of using the United States Supreme Court’s well-turned phrase to remind everyone, including its author, that “[t]here is no war between the Constitution and common sense.”

47. In 1983, as Senior Judge of the United States Court of Appeals for the Second Circuit, Justice Friendly looked back on Traynor’s judicial career.

My thesis is simply stated: For the thirty years of his service on the Supreme Court of California, from 1940 to 1970, Roger Traynor was the ablest judge of his generation in the United States. I say this without hesitation, qualification, limitation, or fear of successful contradiction. . . . [N]o other judge of his generation matched Traynor’s combination of comprehensive scholarship, a sense for the “right” result, craftsmanship, and versatility. He illuminated and modernized every field of law that he touched, and, in the course of his long judicial service, he touched almost all . . .

. . . He was like a great oak—sturdy, unbending, growing high and casting its branches wide.

He left the fabric of the law immensely stronger and richer than he found it.


48. Walter V. Schaefer, A Judge’s Judge, 71 CAL. L. REV. 1050, 1050 (1983) [hereinafter Schaefer, Judge’s Judge]. On the occasion of Traynor’s elevation to Chief Justice, Schaefer wrote:

Making allowance for the tendency of each generation to exaggerate its own problems and the significance of its own achievements, I have been unable to think of any other twenty-five-year span that has produced such important changes in so many areas of constitutional and common law. Nor do I know of any other judge whose work has been so significant in so many areas of the law.

Schaefer, Justice Traynor, supra note 23, at 11-12.

49. See, e.g., infra note 60 and accompanying text (describing Traynor’s role in the development of California’s liberal discovery rules).

Certainly, he was sympathetic and attentive to the rights of the individual. As pointed out by his colleague, Justice Stanley Mosk,

Justice Traynor was frequently light-years ahead of the United States Supreme Court and of other state courts, particularly in developing law designed to protect the individual whose home was invaded by authorities or whose health was impaired by harmful products. In short, his prevailing concern was to make our system of justice responsive to the rights of the individual in an urban and mechanized society.

Traynor argued, for example, that California’s practice of affording counsel on appeal to an indigent defendant only after the District Court of Appeal made an independent investigation of the record and determined that there was merit in the request for review violated the equal protection of the laws as established by the Supreme Court in Griffin v. Illinois. Traynor reasoned that the system allowed the wealthy the benefit of lawyers to argue their appeals, but denied indigents appointed counsel unless the merits of the appeal passed a preliminary screening of the record by the Court of Appeals. Traynor’s argument was subsequently adopted by the United States Supreme Court.

Yet Traynor often was sympathetic to state interests in effective law enforcement, particularly when it came to the adoption of rules which might impede the factfinder in arriving at a reliable verdict. For example, in the trial context, Traynor demonstrated a moderate and cautious approach to the expansion of constitutional rights for criminal defendants which might frustrate or inhibit the jury’s truth-determining function. In rejecting the argument that California’s constitutional provision allowing comment on a defendants’ failure to testify violated the Fifth Amendment privilege against self-incrimination, Traynor believed that the rule merely

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51. Stanley Mosk, A Retrospective, 71 CAL. L. REV. 1045, 1045 (1983). At the time of Justice Mosk’s observation, he was the only surviving colleague of Chief Justice Traynor on the California Supreme Court. Eleven years later, he remains a member of that court.


54. Brown, 55 Cal. 2d at 70-71, 357 P.2d at 1076, 9 Cal. Rptr. at 820. Traynor felt that this discrimination was inconsistent with the equality principles announced in Griffin, 351 U.S. at 18 (1955). However, Griffin on its facts could well have been read as an access case and limited to situations in which indigents were excluded from any appellate review whatsoever.

allowed the judge or prosecutor to call the jury's attention to facts that ordinarily have significance and relevance to the defendants' guilt and that are clearly apparent to the jury in any event. On this issue, the United States Supreme Court disagreed, but cogent arguments can be made that the Court was wrong in rejecting Traynor's position.

Traynor's inclination toward balance and moderation is most strikingly illustrated in his approach to reconciling the conflicting goals of truth discovery and Fifth Amendment restrictions on using the accused as a source of testimonial evidence. It is no exaggeration to state that Traynor almost single-handedly pioneered California's liberal discovery rules for the benefit of criminal defendants. Beginning in 1956, he led the court in the development of judicially created rules of criminal procedure requiring the prosecution to disclose to the defense all evidence it possessed or could reasonably obtain relevant to the defendant's guilt or punishment. However, recognizing the strong interest of the public in truth discovery, Traynor felt that criminal discovery should be a two-way-street. In Jones v. Superior Court, Traynor stated that criminal discovery was not a one-way street and opened the door to prosecutorial efforts to obtain discovery from defendant. Prosecution discovery, he reasoned, at least to some extent, should not be inconsistent with the privilege against self-incrimination.

In summary, Justice Traynor's distinguished legal work in relation to the administration of criminal justice was aptly described by Professor Monrad Paulsen:

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60. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (en banc).
61. Id. at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.
62. Id. at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882. His colleagues, Justices Dooling and Peters, strongly objected, contending that two-way-street criminal discovery would violate the defendant's privilege against self-incrimination. See id. at 62-64, 372 P.2d at 922-24, 927, 22 Cal. Rptr. at 882-84, 887 (Dooling, J. & Peters, J. dissenting); see also Mosk, supra note 51, at 1048-49.

Later, the dissenting justices had their way. The court refused to adopt judicially created rules of prosecution discovery for fear they would collide with the defendant's privilege against self-incrimination. See People v. Coliże, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981); Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974) (en banc); Gordon Van Kessel, Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation, 4 Hastings Const. L.Q. 855 (1977).
He has not copied the precedents but has cut new paths by asking questions: What is this rule to do? What considerations of policy are involved in this case? What can we do that is just, fair, and practical?63

III. DEVELOPMENT OF THE RULES

A. General Approach: Detailed Development by the States or by the United States Supreme Court?

Justice Traynor and the Cahan64 majority went about their work assuming they could write on a clean slate. They anticipated, wrongly as it turned out, that the United States Supreme Court would leave states largely free to develop their own search and seizure standards unbound by the confusing and uncertain federal rules. For example, the California Supreme Court stated:

In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them.65

Thus, Traynor began optimistically, looking forward to “the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in suppression of crime.”66

After Mapp v. Ohio,67 however, Traynor faced the question “whether the federal rules governing police investigations and arrests have

63. Paulsen, supra note 14, at 120.
65. Id. at 450-51, 282 P.2d at 915.
66. Id. at 451, 282 P.2d at 915. Following the court’s experience in developing search and seizure rules in California, Traynor continued to be optimistic about the development of such rules at the federal level following Mapp: “It should be possible to develop with clarity as well as constitutional nicety rules that will operate realistically without frustrating either the exclusionary rule or law enforcement.” Traynor, Mapp at Large, supra note 3, at 332.
superseded our own.\textsuperscript{68} Believing in the importance of leaving states “[f]ree from entangling alliances with confusing federal rules that have no clear constitutional basis,”\textsuperscript{69} and in local development of search and seizure standards, he hoped that the United States Supreme Court would refrain from imposing upon the states detailed rules of criminal procedure. Traynor thought it important to retain local control over the job of policing the police:

Perhaps there will be no automatic extension of all federal rules to state prosecutions in the wake of \textit{Mapp}. There is no substitute for close evaluation of the local context to determine what is unreasonable.\textsuperscript{70}

Traynor’s expectation that the United States Supreme Court would refrain from imposing on the states all its search and seizure standards, even those declared to be based on the Fourth Amendment, also rested on the recognition that many such standards were announced when the Fourth Amendment’s exclusionary rule applied only to the federal courts. At that time, the Court “could not have known that basing its decision on the Constitution, rather than on the Court’s power to prescribe rules of evidence for the federal courts, might one day have the consequence of imposing the rule upon the states.”\textsuperscript{71} Accordingly, he felt that opinions written before Fourth Amendment standards were imposed on the states “may have to be reinterpreted in the light of ‘the demands of our federal system.’”\textsuperscript{72} Furthermore, Traynor assumed that it would be impractical for the United States Supreme Court to undertake such a burden.

In the main such a responsibility can hardly be shifted from state courts conversant with the local scene to the United States Supreme Court, particularly since the latter would be in no position to take on so onerous a burden. . . . There is little chance that the . . . Court would be willing and able to receive fifty . . . processions [of state court cases] marching through its doors, calling upon it to

\begin{footnotes}
\footnote{68. People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 659, 30 Cal. Rptr. 18, 19 (1963).}
\footnote{69. Traynor, \textit{Mapp at Large}, supra note 3, at 331.}
\footnote{70. \textit{Id.} at 329-30.}
\footnote{71. People v. Thayer, 63 Cal. 2d 635, 639, 408 P.2d 108, 110, 47 Cal. Rptr. 780, 782 (1965).}
\footnote{72. \textit{Id.} at 639, 408 P.2d at 110, 47 Cal. Rptr. at 782 (quoting \textit{Ker v. California}, 374 U.S. 23, 33 (1963)).}
\end{footnotes}
give the details that make up the rules that govern the officials who search and seize. 73

Finally, Traynor read the Fourth Amendment as setting forth “no more than the basic outlines of lawful law enforcement,” 74 and believed that “[t]he United States Supreme Court has not interpreted [that amendment] as requiring that court to lay down as a matter of constitutional law precise rules of police conduct.” 75

If a state adopts rules of police conduct consistent with the requirements of the Fourth Amendment and if its officers follow those rules, they do not act unreasonably within the meaning of the amendment although different rules may govern federal officers. 76

Accordingly, Traynor, writing for the court, found that the Fourth Amendment did not embody the rigid federal rule requiring full probable cause for automobile stops, and upheld the more flexible California rule which allowed police to stop and question motorists on less than probable cause required for arrest. 77 The California rule, he felt, represented a reasonable accommodation of interests. “It strikes a balance between a person’s interest in immunity from police interference and the community’s interest in law enforcement.” 78 Similarly, Traynor believed that the United States Supreme Court’s prohibition on seizures of “mere evidence,” as opposed to contraband or instruments or fruits of crime, was without purpose or rational basis. 79 He thus regarded it as a federal procedural rule rather than a constitutional command. 80 Traynor seemed to be writing a brief to the United States Supreme Court urging it to respect “the demands of our federal system” and distinguish “between constitutional and supervisory rules [which] separate fundamental civil liberties, which the states must respect, from federal procedural rules, which the states may ignore.” 81 These views on federalism had the support of Judge Henry

73. Traynor, Mapp at Large, supra note 3, at 327.
75. Id.
76. Id. at 452, 380 P.2d at 660, 660, 30 Cal. Rptr. at 20.
77. Id. at 451-52, 380 P.2d at 660-61, 30 Cal. Rptr. at 20-21.
79. See infra notes 324-331 and accompanying text.
81. Id. at 639, 408 P.2d at 110, 47 Cal. Rptr. at 782.
Friendly, who believed that in applying the Bill of Rights to the states, "the Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment or play in the joints. The 'specifics' simply are not that specific."  

However, the United States Supreme Court was not deterred, and strode forward into the murky field of defining the details of search and seizure standards. While the Court agreed with Traynor concerning the reasonableness of flexible rules governing stops and detentions, and the irrationality of the "mere evidence" rule, it decided to accept the burden of developing detailed and pervasive Fourth Amendment standards applicable to all state criminal prosecutions.

There were alternative paths. The Court might have developed details of search and seizure rules for the federal courts based on existing federal statutes, the common law, or the Court's supervisory powers, and thus avoided "[laying] down as a matter of constitutional law precise rules of police conduct." The Court's detailed rules for federal courts would have guided, though not commanded, parallel state law development which would have to conform only to "the basic outlines of lawful law enforcement." Alternatively, the Court could have taken the Harlan-Frankfurter fundamental fairness approach and read Fourteenth Amendment due process as incorporating only core or fundamental Fourth Amendment values. The Court then could have developed detailed search and seizure rules founded on the Fourth Amendment while not obligating the states to follow it "jot-for-jot and case-for-case."

Mapp v. Ohio left the matter somewhat murky. While the Court found that the Fourth Amendment's right of privacy was enforceable against the states by the same sanction of exclusion as against the federal government and that this sanction was commanded by the Constitution, the Court did not state whether it viewed the Fourteenth Amendment as

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83. See Terry v. Ohio, 392 U.S. 1, 30-31 (1968).
86. Id.
87. Id.
90. Id. at 655, 660.
incorporating all Fourth Amendment guarantees or only basic rights residing at the core of the Fourth Amendment. However, two years after Mapp, the Court made clear that alternatives to incorporation of all Fourth Amendment standards were unacceptable. In Ker v. California, the Court interpreted Mapp as holding that the exclusionary rule was enforceable against the States through the Fourteenth Amendment by application of the same Constitutional standard prohibiting unreasonable searches and seizures. "The standard of reasonableness is the same under the Fourth and the Fourteenth Amendments," and thus, the reasonableness of a search or seizure must be judged by the "federal constitutional standard." The Court viewed reasonableness as a substantive determination to be made by the Court "in light of the 'fundamental criteria' laid down by the Fourth Amendment and in [Supreme Court] opinions . . . applying that Amendment." Concurring in Ker, Justice Harlan objected to the single Constitutional standard governing both federal and state prosecutions. Harlan noted that until today, federal searches and seizures had been governed by the Fourth Amendment reasonableness standard, whereas state searches and seizures had been judged by the more flexible concept of fundamental fairness embraced within Fourteenth Amendment due process. Harlan described Ker as eliminating this distinction such that "[h]enceforth state searches and seizures are to be judged by the same constitutional standards as apply in the federal system." This approach, Harlan argued, will lead to diluting Fourteenth Amendment standards in the interest of leaving states "at least some elbow room in their methods of criminal law enforcement."

Nevertheless, Ker left the door ajar to some state participation in the development of the specifics of the rules. Voicing respect for "a healthy Federalism," Ker read Mapp as implying "no total obliteration of state laws relating to arrests and searches in favor of federal law." The

92. Id. at 30-31.
93. Id. at 33.
94. Id. at 34.
95. Id. at 33. The Court held that the officer's conduct was not unreasonable "under the standards of the Fourth Amendment as applied to the states through the Fourteenth Amendment." Id. at 41.
96. Id. at 44 (Harlan, J., concurring).
97. Id.
98. Id. at 45.
100. Ker, 374 U.S. at 31.
101. Id.
supervisory authority of the Supreme Court would affect only federal
criminal prosecutions, and \textit{Mapp} . . . established no assumption by
this Court of supervisory authority over state courts . . . .\textsuperscript{103} The Court stated:

The States are not thereby precluded from developing workable
rules governing arrests, searches and seizures to meet "the practical
demands of effective criminal investigation and law enforcement"
in the States, provided that those rules do not violate the
constitutional proscription of unreasonable searches and seizures
and the concomitant command that evidence so seized is
inadmissible against one who has standing to complain.\textsuperscript{104}

Thus, the Court left open the possibility of using its supervisory
authority to develop the details of search and seizure law and of leaving
the states free to create their own rules as long as they did not violate the
fundamental values of the Fourth Amendment. In other contexts as well,
there remained the possibility that the Court would refrain from imposing
each aspect of a particular Constitutional guarantee on the states through
Fourteenth Amendment due process. When, in 1963, the Court in \textit{Gideon}
v. \textit{Wainwright}\textsuperscript{105} held that the Sixth Amendment right to counsel was
fundamental and applied to the states through the due process clause,
Justice Harlan still contended that when the Court holds a right or
immunity of the Bill of Rights to be implicit in the concept of ordered
liberty, and thus valid against the states, it does not mean that the entire
body of federal law is automatically carried over and applied in full sweep
to the states.\textsuperscript{106} However, the Court soon clearly rejected this approach
as well. During the 1960s, the Court approved the "bag and baggage"
approach to incorporation with respect to the Fourth,\textsuperscript{107} Fifth\textsuperscript{108} and

\begin{footnotes}
\item[102.] \textit{Id.}
\item[103.] \textit{Id.}
\item[104.] \textit{Id.} at 34.
\item[105.] 372 U.S. 335 (1963).
\item[106.] \textit{Id.} at 352 (Harlan, J., concurring). Justice Douglas also concurred, but objected to Harlan's view that
the Fourteenth Amendment applies to the states only "a watered-down" version of a Bill of Rights guarantee
that has been determined to be fundamental. \textit{Id.} at 346-47 (Douglas, J. concurring).
\item[107.] \textit{See} Aguilar v. Texas, 378 U.S. 108, 110 (1964) (holding that the same standards for obtaining a
warrant apply to the states as to the federal government).
\item[108.] \textit{See} Malloy v. Hogan, 378 U.S. 1, 3, 10 (1964) (rejecting the notion that Fourteenth Amendment due
process applies to the states only a "watered-down, subjective version of the individual guarantees of the Bill
of Rights," and holding that the Fifth Amendment privilege applies to the states "under the applicable federal
standard").
\end{footnotes}
Sixth Amendments.109 By 1969, the end of the Warren Court activist era, it was apparent that nearly all search and seizure standards developed by the Court were based on the Fourth Amendment and, hence, binding upon the states. Thus, when Chimel v. California110 established new Fourth Amendment restrictions on the scope of searches incident to arrest, Justice Harlan concurred reluctantly, noting that the Court had decided that "every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement."111 It was now clear that the Court had rejected Traynor's view that the Fourth Amendment's protection was limited to "fundamental civil liberties"112 and established "no more than the basic outlines of lawful law enforcement,"113 and that Traynor was surprised and most likely disappointed by the Court's view that the Fourth Amendment required it to "lay down as a matter of constitutional law precise rules of police conduct."114

B. Interests Protected by Search and Seizure Rules

The contrast between the views of Traynor and the Supreme Court as to the nature of interests encompassed within the Fourth Amendment's exclusionary rule is reflected in their different approaches to the application of the Fourth Amendment to interception of conversations. Federal cases prior to the California Supreme Court's decision in Cahan115 made clear that the Fourth Amendment was not implicated by the interception of conversations, whether by wiretapping bugging or eavesdropping, without some physical trespass.116 Cahan involved the surreptitious and

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109. Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that Fourteenth Amendment due process guarantees the right to a jury trial in all criminal cases which, were they to be tried in federal court, would come within the Sixth Amendment's guarantee).
111. id. at 769 (Harlan, J., concurring). In 1970, Justice Harlan observed that "[w]ith few exceptions the Court has 'incorporated,' each time over my protest, almost all the criminal protections found within the first eight Amendments to the Constitution, and made them 'jot-for-jot and case-for-case' applicable to the States." Williams v. Florida, 399 U.S. 78, 131 (1970) (Harlan, J., concurring and dissenting).
113. Traynor, Mapp at Large, supra note 3, at 329-330.
116. Goldman v. United States, 316 U.S. 129, 135 (1942) (stating that with respect to the nonrespiratory use of a detectaphone, "[w]e hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment"); Olmstead v. United States, 277 U.S. 438, 464 (1928) (stating, in reference to wire tapping: "The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."); see Irvine v. California, 347 U.S. 128, 132 (1954) (finding for the first
trespatory installation of dictographs, and the court did not indicate whether a trespass was necessary to bring about Fourth Amendment protections, nor did the court clarify whether the illegal search was the trespass involved in installing the dictographs or the later eavesdropping. For some time after Cahan, the California Supreme Court left the question unanswered, and the lower California courts generally followed the federal approach which required a technical trespass.

Traynor, however, strongly suggested in Cahan and in his later writings that physical trespass was not necessary to bring about application of California’s exclusionary rule. The Cahan opinion focused on privacy rather than property rights. The court emphasized the need to protect “the privacy of homes” from government invasions and maintaining “an atmosphere of freedom as against a feeling of fear and repression for society as a whole.” Also, Traynor cited and relied on the dissenting opinions of Justices Holmes and Brandeis in Olmstead v. United States, the leading federal case holding that a trespass was required in the context of wiretapping and electronic eavesdropping. Shortly after Cahan, Traynor declined the Attorney General’s invitation to adopt Olmstead’s property-based rules as the standard in California, and instead, looked to whether the particular intrusion constituted an “unreasonable invasion of privacy.” Moreover, Traynor’s writings after Cahan pointed out that the Fourth Amendment protects privacy rather than property rights, and suggested that California should reject the federal rule.

117. See People v. Tarantino, 45 Cal. 2d 590, 595, 597, 290 P.2d 505, 509-10 (1955) (holding inadmissible recordings made pursuant to a surreptitiously installed microphone, but relying on the fact that the agent installing it had committed an obvious trespass).
119. See infra note 126 and accompanying text.
120. See infra notes 121-124 and accompanying text.
122. Id. at 449, 282 P.2d at 914 (quoting Justice Frankfurter’s dissent in Harris v. United States, 331 U.S. 145, 173 (1947)).
124. Id. at 445-46.
125. People v. Malotte, 46 Cal. 2d 59, 63, 292 P.2d 517, 519 (1956). An undercover police officer’s call to the defendant was recorded by means of a recording device connected to an induction coil designed to record the conversation without making physical connection with the telephone circuit. Id. Bypassing Olmstead, Traynor concluded that “[w]hen a person discusses the commission of a crime with another, face to face or at a distance through the use of any means of communication, there is no unreasonable invasion of privacy when the other uses the conversation against him.” Id.
1962, Traynor strongly criticized the United States Supreme Court’s reliance on property and trespass concepts:

Eloquent declarations of the past have condemned unreasonable searches and seizures as invasions of the four walls that constitute a man’s castle. However clearly such declarations have sounded the fourth amendment’s concern with a man’s right to privacy, their emphasis on the castle has not merely restricted the right to property connotations but has deadened inquiry what constitutes the right in a modern context.

There has been no lack of signs that the right to privacy transcends property connotations and that even in a property sense it needs redefinition.

Confusion enough has resulted from over-refined preoccupation with trespass to property instead of with invasion of the right to privacy itself.

Thus, it is clear that Traynor had hoped that the United States Supreme Court would abandon property interest and trespass standards as touchstones of Fourth Amendment analysis. Traynor was gratified in 1967 when the Court eventually did so.

C. Nature of the Exclusionary Rule

Traynor’s initial optimism was reinforced by his clear perception of both the nature and purpose of the newly adopted exclusionary rule. Cahan emphasized the tentative, even experimental, character of the rule, describing it as a “judicially declared rule of evidence,” thereby implying that it could be modified, even supplanted, by legislative action. Thus, Traynor proceeded in a cautious manner, avoiding the temptation to flex judicial muscle and encase the exclusionary rule within the California Constitution. Professor Barrett admired Traynor’s restrained approach.
While Barrett believed that the new exclusionary rule would “force a clarification, judicially or legislatively, of the applicable rules, and provide a mechanism for their enforcement,”\textsuperscript{129} he cautioned that this “is not necessarily an argument for the desirability of the rule as a permanent matter—a full scale legislative consideration of the problem might end up with elimination of the exclusionary rule.”\textsuperscript{130} Nevertheless, Barrett believed that “even should this happen, the decision would have served a useful purpose.”\textsuperscript{131} Thus, when Traynor referred to the California exclusionary rule as “no more than a judicially created rule of evidence,”\textsuperscript{132} he clearly had in mind the benefits of an experimental, flexible approach to developing search and seizure rules which would leave room for and encourage significant legislative participation in the difficult area of balancing the need for effective law enforcement with protection of individual privacy.

In \textit{Mapp}, on the other hand, the Supreme Court plainly stated that the exclusionary rule was of constitutional dimension, and in fact was commanded by the Fourth and Fourteenth Amendments.\textsuperscript{133} The Court rejected the suggestion that the exclusionary rule, was “one of evidence” rather than “of constitutional origin.”\textsuperscript{134} Two years after \textit{Mapp}, the United States Supreme Court in \textit{Ker v. California}\textsuperscript{135} interpreted \textit{Mapp} as holding that the exclusionary rule was enforceable against the states through the Fourteenth Amendment.\textsuperscript{136} The Court explained that the Fourth Amendment was enforceable against the states by the same sanction of exclusion as is used against the federal government.\textsuperscript{137} In 1965, the Court again characterized \textit{Mapp} as requiring exclusion of illegally obtained evidence under the command of the due process clause of the Fourteenth Amendment.

\begin{itemize}
\item \textsuperscript{129} Barrett, \textit{Exclusion of Evidence}, supra note 15, at 587.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Traynor, \textit{Mapp at Large}, supra note 3, at 339. One purpose of resting the rule on such an infirm need may have been to prevent its use in habeas corpus proceedings by prisoners who had been convicted by the use of illegally obtained evidence. Barrett, \textit{Exclusion of Evidence}, supra note 16, at 566 n.5. Traynor noted that since the \textit{Cahan} rule was only a rule of evidence, it could not be used to collaterally attack a judgment of conviction which had become final before adoption of the rule. Traynor, \textit{Mapp at Large}, supra note 3, at 339.
\item \textsuperscript{133} The Court described the “exclusion doctrine” as an “essential part of the right to privacy” which is “embodied in the Fourth Amendment and is enforceable against the States.” \textit{Mapp} v. \textit{Ohio}, 367 U.S. 643, 656, 660 (1961). The Court characterized the exclusionary rule as “an essential part of both the Fourth and Fourteenth Amendments.” Id. at 657.
\item \textsuperscript{134} Id. at 649.
\item \textsuperscript{135} 374 U.S. 23 (1963).
\item \textsuperscript{136} Id. at 30-31.
\item \textsuperscript{137} Id.
\end{itemize}
Amendment. Thus, it is not surprising that judges and scholars took the Court at its word. Traynor, for example, concluded that the *Mapp* Court had found the rule "part and parcel of the Constitution," and Professor Francis Allen saw *Mapp* as unequivocally holding that the rule is not a "mere rule of evidence," but is commanded by the Fourth and Fourteenth Amendments.

However, a decade after *Mapp*, the Court shifted the exclusionary rule to a less stable foundation, describing it as "a judicially created remedy designed to safeguard the Fourth Amendment rights . . . rather than a personal constitutional right of the party aggrieved." Over two decades after *Mapp*, the Court admitted that it has not been consistent in its characterization of the nature of the exclusionary rule. Acknowledging that it once thought of the rule as "a necessary corollary of the Fourth Amendment," the Court characterized the rule, not as a constitutional right of the party aggrieved, but as "a judicially created remedy designed to safeguard Fourth Amendment rights . . . ." This characterization of the rule seems to parallel the language the Court used thirty-five years earlier in *Wolf v. Colorado* when, speaking through Justice Frankfurter, the Court described the exclusionary rule in federal cases as a product of "judicial implication" and not part of the Fourteenth Amendment. Justice Black concurred in *Wolf*, pointing out what to him was the "plain implication" of the Court’s opinion: "[T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Thus, the Court now seems

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138. *Linkletter v. Walker*, 381 U.S. 618, 619 (1965). The Court repeated *Mapp*’s statement that the exclusionary rule was "an essential part of both the Fourth and Fourteenth Amendments." *Id.* at 634.

139. *Traynor, Mapp at Large*, supra note 3, at 339.


141. *United States v. Calandra*, 414 U.S. 338, 348 (1974); *see Stone v. Powell*, 428 U.S. 465, 494-95 (1976) (stating that the rule is not a personal constitutional right of an accused. It is calculated to deter unlawful police conduct, not to redress injury to the privacy of victims of unlawful searches or seizures).


143. *Id.*

144. 338 U.S. 25 (1949).

145. *Id.* at 33. The Court held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.*

146. *Id.* at 39-40 (Black, J., concurring). Justice Black repeated the same proposition in *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), and in his concurring opinion in *Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (Black, J., concurring), where he was "still not persuaded that the Fourth Amendment, standing alone, would be enough" to support the exclusionary rule. *Mapp*, 367 U.S. at 661.

While Justice Frankfurter in *Wolf* did not use identical language, he pointed out that the rule was not to be found in the Constitution and suggested that it might not survive congressional repeal. *Wolf*, 338 U.S. at 33.
to have returned the rule to its original, more flexible foundations, an approach closely coinciding with that taken by Justice Traynor and the California Supreme Court in Cahan.

D. Purpose of the Exclusionary Rule

_Cahan_ clearly focused on the exclusionary rule's deterrent, as opposed to remedial purpose. The fundamental objective of the rule was not to compensate victims of unlawful searches or seizures or even to punish police who engage in such practices, but to remove incentives for unlawful searches and seizures and thereby to discourage police from conducting them. Traynor later elaborated on the notion of deterrence:

> [T]he raison d'être of the exclusionary rule is the deterrence of lawless law enforcement . . . . The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward.

The United States Supreme Court did not so clearly perceive the purpose of the exclusionary rule. To be sure, the Court in _Mapp_, quoting from _Elkins v. United States_, stated that the purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” However, the Court relied heavily on the Fifth Amendment privilege against self-incrimination, suggesting that use of unlawfully seized evidence against an accused was tantamount to compelling the accused to be a witness against himself in violation of that guarantee. The Court reaffirmed the central premise of _Boyd v. United States_, quoting with approval Boyd's view that the Fourth and Fifth Amendments run “almost

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147. See infra notes 148-149 and accompanying text.
148. People v. Cahan, 44 Cal. 431, 448 282 P.2d 905, 913 (1955) (asserting that “the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them”).
149. Traynor, Mapp at Large, supra note 3 at, 334-35. Professor Barrett believed that the deterrent rationale of _Cahan_ rested on the assumption that the police perception that their illegal activities will result in failures of convictions will have greater effect on police practices than more direct remedies. Barrett, Exclusion of Evidence, supra note 16, at 582.
152. 116 U.S. 616 (1886).
into each other,” and that “any forcible and compulsory extortion of a [person’s] own testimony or of [a person’s] private papers to be used as evidence to convict [that person] of crime” is condemned by both amendments. This “intimate relation” between the two guarantees assures “in either sphere . . . that no man is to be convicted on unconstitutional evidence.” Indeed, the Court characterized the exclusionary rule as a “most important constitutional privilege, namely, the exclusion of evidence which an accused had been forced to give by reason of the unlawful seizure.” Consequently, it was tempting to view the new right created by Mapp, not as a right to privacy, but rather as a “privilege against conviction by unlawfully obtained evidence.” This apparently was the view of Justice Black who added the essential fifth vote and was persuaded that the Fifth Amendment, rather than the Fourth, was the true basis of the exclusionary rule. Black had described the exclusionary rule for the federal courts as “not a command of the Fourth Amendment but . . . a judicially created rule of evidence which Congress might negate,” and was “still not persuaded that the Fourth Amendment, standing alone, would be enough [to support the rule].” However, Black reasoned that when the Fourth Amendment is “considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which . . . requires the exclusionary rule.”

The Court in Mapp also relied on what it had earlier described as “the imperative of judicial integrity,” a notion that courts participate in unlawful police conduct by admitting in evidence the fruits of such searches, and on Justice Brandeis’ language in his Olmstead dissent that “[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” The Court concluded that its decision gave “to the courts, that judicial integrity so necessary in the true administration of justice.”

154. Id. at 647.
155. Id. at 657 (quoting Bram v. United States, 168 U.S. 532, 543-44 (1897)).
156. Id.
157. Id. at 656.
158. Allen, supra note 140, at 35.
159. Id. at 25.
161. Mapp, 367 U.S. at 661 (Black, J., concurring).
162. Id. at 662 (Black, J., concurring).
163. Id. at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).
164. Id. at 659 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).
165. Id. at 660.
Subsequently, in a series of cases decided during the 1970s, the United States Supreme Court separated Fourth Amendment from Fifth Amendment protections and clearly rejected the integrated approach first articulated by Boyd and resurrected in Mapp. The Court accomplished this severance primarily by restricting the Fifth Amendment privilege against self-incrimination to instances of personal compulsion. Rejecting Boyd's suggestion that "any forcible and compulsory extortion of a man's private papers to be used as evidence to convict him of crime" violated both amendments, the Court narrowed coverage of the Fifth Amendment to protection of possession, rather than ownership, and to protection only against compulsion from the person. The Court described the privilege as "an intimate and personal one" which "adheres basically to the person, not to information that may incriminate him."

Emphasizing the distinct operation of the Fourth and Fifth Amendments, the Court in Andresen v. Maryland, held that the Fifth Amendment does not prevent search of a person's office and the seizure and introduction into evidence of a person's private business papers. The Court further reformulated the concept of compulsion. In Boyd and earlier cases, "the unlawfulness of the search and seizure was thought to supply the compulsion of the accused necessary to invoke the Fifth Amendment." However, in Andresen the Court pointed out that the statements previously made on private business papers were made voluntarily. At the time of the search and seizure, Andresen "was not asked to say or to do anything," and thus, there was no compulsion involved in either the creation or the seizure of the papers. The Court stated that "the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence," and no compulsion is involved when the papers are introduced at trial.

167. Id.
168. Id. at 327.
169. Id. at 328. "It is extortion of information from the accused himself that offends our sense of justice."
170. Id.
173. Andresen, 427 U.S. at 473.
174. Id.
175. Id. at 473-74.
176. Id. at 474.
without any compulsion against the person other than the inherent psychological pressure to respond to unfavorable evidence.  

The Court also firmly rejected the notion that the Fifth Amendment independently protects privacy. While the Fifth Amendment may incidentally protect privacy through its prevention of compelled testimonial self-incrimination, it offers no protection of private information absent such compulsion. 

"[T]he Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'" While the Court recognized that "the Fifth Amendment protects privacy to some extent, . . . unless incriminating testimony is 'compelled,' any invasion of privacy is outside the scope of [its] protection." Clearly then, since Boyd, the Court has separated the Fourth and Fifth Amendments such that their protections are now distinct. A search or seizure rarely, if ever, will implicate the privilege against self-incrimination, and a violation of that privilege seldom will amount to a search or seizure.

During the course of distinguishing the Fourth from the Fifth Amendment, the Court abandoned its suggestion that the exclusionary rule was intended as a remedy for the violation of a defendant's privacy. Over a decade after Mapp, the Supreme Court concluded that exclusion of illegally obtained evidence is neither intended nor able to cure the violation of Fourth Amendment rights. Also, the Court recognized that the primary rationale for the exclusionary rule is deterrence of illegal police conduct, and that judicial integrity concerns play only a limited role in its justification. Nonetheless, in a number of contexts the Court has continued to lose sight of the central purpose of the exclusionary rule. This can be seen in the Court's irrational standing rules, its confusing approach

177. Id. at 473.
179. Id. at 401 (citing United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).
181. See infra note 182 and accompanying text.
183. Stone, 428 U.S. at 492. The Court stated that:

Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. . . . [W]e have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

Id.
to consent, and its unduly restrictive definition of Fourth Amendment seizures.

1. Standing Rules

Traditional federal standing rules focused on property interests and required that a defendant claim either ownership or possession of the property seized or a substantial possessory interest in the premises searched.184 In 1960, the Court made it easier to move to suppress evidence by granting standing to anyone charged with possession of the items seized, as well as to anyone legitimately on the premises searched.185 Such persons automatically were viewed as aggrieved by the unlawful search or seizure under both the Fourth Amendment and Federal Rule of Criminal Procedure 41(e).186 However, the Court later discarded these automatic standing rules, along with traditional standing rules based on property interests, in favor of the expectation of privacy standard rooted in Katz v. United States.187 The Court shifted the focus of the standing inquiry from whether the accused had a property right in the items seized to whether the accused had a legitimate expectation of privacy in the area or place searched.188 In this way, the Court tightened the test for standing, but maintained the requirement that defendants establish that they were personally aggrieved by the search or seizure. A defendant could not claim standing by asserting the privacy rights of co-conspirators or

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However, in order to allow an accused to object to seizures of narcotics when the defendant had no possessory interest in the premises searched, the Court recognized a fictitious property interest in contraband which entitled the accused to utilize the exclusionary rule but not to move for the return of the contraband. See United States v. Jeffers, 342 U.S. 48, 53-54 (1951) (accepting the defendant's argument that the contraband was "his property, for purposes of the exclusionary rule").


186. FED. R. CRIM. P. 41(e).


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"Fourth Amendment rights are personal rights which ... may not be vicariously asserted."  

Shortly after Cahan, Traynor wrote People v. Martin which rejected federal standing rules and adopted a vicarious standing principle allowing defendants to assert the rights of other persons. Thus, if the police discover evidence that incriminates a defendant in the course of an illegal arrest or search of some other person, the defendant will have standing to move for its suppression. The defendant "need only show that the state obtained the evidence illegally, whether in violation of his rights or those of third parties, which is to say that he must show that the state obtained the evidence in the course of a search and seizure that was unreasonable." Traynor believed that this broad standing principle was mandated by the very rationale of the exclusionary rule. "[Defendant's] right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law." As Traynor later noted,

[The federal] rules have rested on property concepts, with an admixture of tort concepts. Standing to object has depended on whether the defendant could show that he had a property interest in the premises searched or the evidence seized. The exclusionary

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190. Alderman, 394 U.S. at 174. Furthermore, these personal standing requirements cannot be avoided by relying on either the Court's supervisory power or due process to allow an accused to assert the rights of third parties. United States v. Payner, 447 U.S. 727, 731 (1980).
193. Id. at 759-61, 290 P.2d at 856-57.
194. Id. at 761, 290 P.2d at 857.
195. Traynor, Mapp at Large, supra note 3, at 335. By the early 1960s, California's vicarious standing rule was regarded by Traynor as "commonplace to any attorney engaged in criminal trials." People v. Ibarra, 60 Cal. 2d 460, 465, 385 P.2d 487, 491, 34 Cal. Rptr. 863, 867 (1963).
196. Martin, 45 Cal. 2d at 761, 290 P.2d at 857; see People v. Maddox, 46 Cal. 2d 301, 305, 294 P.2d 6, 8-9 (1956).
rule ordinarily operated when such an interest existed, but otherwise failed to operate. This limitation may well have lessened its deterrent effect. . . . [Focusing] on a relation between the defendant and the property involved . . . suggests, though perhaps unintentionally, that the objective of the exclusionary rule is to make amends to the defendant. What should be of primary concern is not the grievances of selected guilty defendants such as landowners or the gentry of invitees, but the grievousness of official lawlessness.  

2. Consent: Actual or Apparent Authority

During the seven years following Cahan, the California courts decided approximately ninety cases involving problems of consent to search, most of which were consistent with federal cases. However, very soon after Cahan, Traynor came to grips with a consent issue which, for decades after Mapp, remained a vague and troubled area of federal law. In judging the validity of consent searches, should courts ask whether the person whose privacy was invaded voluntarily consented to the search, or whether police acted reasonably under the circumstances? In particular, can valid consent be based on a reasonable, though mistaken, belief that the person granting permission has authority to do so?

In People v. Gorg, Traynor announced the principle that a search is valid if based on the consent of a third person whom the officers reasonably and in good faith believe has authority to consent, even though that person may not actually have such authority. In Gorg, the defendant occupied a room with a bath in the home of Don Stevens, in exchange for gardening work. Following the defendant’s arrest for shoplifting, police learned that the defendant had been arrested for

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197. Traynor, Mapp at Large, supra note 3, at 335.
201. Id. at 783, 291 P.2d at 473.
202. Id. at 778-79, 291 P.2d at 470.
narcotics offenses and went to his residence. When the officers arrived, Stevens showed them a bucket containing growing plants which he had discovered while cleaning in defendant's bathroom. Analysis proved that the plants were marijuana, and the officers returned to the residence later that day. They did not have a search warrant but Stevens gave them permission to enter and to search the entire house. Marijuana was discovered in bureau drawers in defendant's room. Noting that the officers were unaware, as Stevens may have been, that Stevens had no right to enter the room and bath rented to the defendant, the court upheld the search of the defendant's room, stating:

[W]hether [the defendant] was in fact a tenant, servant, or guest, [the owner] believed that he had at least joint control over [defendant's] quarters and the right to enter them . . . and authorize a search thereof. Under these circumstances the officers were justified in concluding that [the owner] had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly.

Holding that the lack of actual authority of the person giving consent does not necessarily make the search unlawful, the court looked primarily to reasonable reliance on the part of the police and focused on the deterrent purpose of the exclusionary rule—to discourage unreasonable activity by peace officers—rather than to enforce rights under the law of trespass or landlord and tenant. As Traynor later described his approach in Gorg, "Once it is determined that [police] conduct is not unreasonable in the circumstances, it is not rendered unreasonable in the event that it is deemed to have involved a civil trespass."

Traynor emphasized the Fourth Amendment's reasonableness clause and focused on the limited purpose of the exclusionary rule—to promote reasonable, good faith police conduct.

203. Id. at 778-79, 291 P.2d at 470-71.
204. Id., 291 P.2d at 471.
205. Id.
206. Id.
207. Id.
208. Id. at 783, 291 P.2d at 473.
209. Id.
210. Traynor, Mapp at Large, supra note 3, at 337.
[W]e are not concerned with enforcing defendant's rights under the law of trespass and the landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." And when as in this case the officers have acted in good faith with the consent and at the request of a homeowner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.211

However, the concept of good faith was not given free reign. In People v. Roberts,212 the court stated that police could not base entry into an apartment on a good faith belief that the apartment manager had authority to consent to the search.213

At the federal level, the validity of Gorg was questioned shortly after Mapp,214 and federal law on the subject remained unclear for decades. In Schneckloth v. Bustamonte,215 the United States Supreme Court adopted the general test to determine the voluntariness of consent to search which had been articulated by Traynor years earlier: whether apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact to be determined in the light of all circumstances, and whether a person was advised of the right to refuse consent is merely one factor to be considered and is not determinative.216 However, Schneckloth did not clearly answer the question of whether the inquiry should focus on actual or apparent consent. On the one hand, the Court required the prosecutor to demonstrate "that consent was in fact voluntarily given," and listed as relevant factors the suspect's youth, lack of education, and low intelligence, which often are

211. Gorg, 45 Cal. 2d at 783, 291 P.2d at 473 (citation omitted).
212. 47 Cal. 2d 374, 303 P.2d 721 (1956).
214. Collings, supra note 3, at 448.
216. Id. at 248-49 (adopting the essence of Traynor's standard set out in People v. Michael, 45 Cal. 2d 751, 753, 290 P.2d 852, 854 (1955)).

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unknown to the officer at the time of requesting consent.\textsuperscript{217} On the other hand, the Court rejected a "waiver" approach to consent searches.\textsuperscript{218}

The following year, the Court affirmed that police may rely on the consent of a third party who possesses common authority over the premises, but expressly reserved the question of the validity of reasonable but mistaken reliance on the consent of a third party.\textsuperscript{219} It was not until 1990 that the United States Supreme Court provided a clear answer. In \textit{Illinois v. Rodriguez},\textsuperscript{220} the Court held that a warrantless entry into a dwelling is valid when based on the consent of a third party whom the police at the time of entry reasonably believe possesses common authority over the premises, but who, in fact, does not.\textsuperscript{221} Finally, the Court unequivocally abandoned the waiver approach and focused on the reasonableness of the officer's reliance on consent:

\begin{quote}
What [a defendant] is assured by the Fourth Amendment \ldots is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable." \ldots [The] issue \ldots is not whether the right to be free of searches has been \textit{waived}, but whether the right to be free of \textit{unreasonable} searches has been \textit{violated}.\textsuperscript{222}
\end{quote}

While not citing \textit{Gorg}, the Court adopted Traynor's objective test: whether facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.\textsuperscript{223}

Unfortunately, the Court added a comment that again muddied the waters of the law of consent searches. After pointing out that the validity of consent searches must be judged by the foregoing objective standard, the Court continued, "If not, then warrantless entry without further inquiry is unlawful \textit{unless authority actually exists}. But if so, the search is valid."\textsuperscript{224}

\begin{thebibliography}{99}
\bibitem{217} \textit{Id.} at 226.
\bibitem{218} \textit{Id.} at 241.
\bibitem{220} 497 U.S. 177 (1990).
\bibitem{221} \textit{Id.} at 185-86.
\bibitem{222} \textit{Id.} at 183, 187 (emphasis added).
\bibitem{223} \textit{Id.} at 185-86; \textit{Gorg}, 45 Cal. 2d at 783, 291 P.2d at 473.
\bibitem{224} \textit{Rodriguez}, 497 U.S. at 188-89 (emphasis added).
\end{thebibliography}

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The Court made no effort to explain this qualification of its otherwise reasonable approach to consent searches, but its language suggests that in a case where the person expressing permission to search has actual authority to consent but the police have no reasonable belief that he or she does, the police nevertheless do not act unlawfully in conducting the search. This result flies in the face of the obvious unreasonableness of the search when viewed from the perspective of the searching officers. Just as facts undisclosed to the magistrate cannot validate an otherwise insufficient search warrant, the fact that the police unreasonably rely on one who actually has authority to give consent should not render lawful an otherwise unreasonable search. In such a case, the search should be unreasonable and unlawful despite the fact the authority for the search existed and the search would have been lawful had the searching officers been aware of it. Suppose, for example, a police officer requests consent to search a home, and the owner mumbles, “I don’t care if you do it.” However, the officer understands the response as, “I don’t care to have you do it,” but undertakes to search anyway, erroneously believing that the search is justified by exigent circumstances. The search would be unreasonable from the perspective of the officer and the evidence should be suppressed in order to serve the deterrent purpose of the exclusionary rule.

The prosecution might respond that in this case the person with authority to consent actually intended to give consent and thus waived or abandoned the expectation of privacy. The short answer to this argument is that the Court rejected this approach in Michigan v. Tyler. The Court in Tyler held that official entries into fire-damaged premises must be made pursuant to the warrant procedures governing administrative searches, and rejected the argument that defendants’ later convictions for arson demonstrated that they had abandoned any expectation of privacy by setting fire to and leaving the premises. Refusing to justify a search on the ground of abandonment by arson when that arson has not yet been proved, the Court stated that a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that conviction. Thus, as an owner’s abandonment of a dwelling cannot justify a search of the dwelling without a warrant when acts of abandonment are unknown to

227. Id. at 505.
228. Id. at 506; see Michigan v. Clifford, 464 U.S. 287, 297 (1984) (distinguishing Tyler from a factual situation in which a warrantless search was conducted several hours after the entry to extinguish the fire, and involved the heightened privacy interest which attaches to a home).
the officers at the time of the search, the fact that the consentor actually had authority to give consent should not render lawful an otherwise unreasonable search.

Fundamentally, however, the principle that actual authority prevails over apparent authority rests on the requirement of personal standing, the view that the actual waiver or abandonment of expectation of privacy deprives the consentor of standing to complain of the unreasonable search or seizure. As noted above, this narrow standing rule conflicts with the purpose of the exclusionary rule. The Court should have relied on Traynor's approach in *Gorg* and simply focused on the reasonableness of police conduct.

3. Defining Fourth Amendment Seizures

Traynor recognized and accommodated law enforcement’s need to investigate by allowing police to approach citizens to seek interviews both at their homes and out of doors. He found nothing unreasonable “for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes,” as long as the officers do not invade the privacy of a suspect’s home by demanding that the suspect open the door. However, he believed that police should not be immune from the exclusionary rule when they attempt or threaten to conduct illegal searches or seizures and the evidence is discovered as a direct result of such illegal attempt or threat. In such case, the exclusionary rule serves a useful purpose. In *Badillo v. Superior Court*, drug agents surrounded a house in which the defendant was located. An agent knocked on the door and received no response. The agent then forced the door open and entered the house. Shortly thereafter, the defendant ran out the front door, pursued by the agent. The defendant threw a package of

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229. See supra notes 200-211 (discussing Traynor’s approach in *Gorg*).
230. People v. Michael, 45 Cal. 2d 751, 754, 290 P.2d 852, 854 (1955); see People v. Simon, 45 Cal. 2d 645, 650, 290 P.2d 531, 534 (1955) (stating that “[t]here is, of course, nothing unreasonable in an officer’s questioning persons outdoors at night”).
231. See People v. Shelton, 60 Cal. 2d 740, 746-47, 388 P.2d 665, 668-69, 36 Cal. Rptr. 433, 436-37 (1964) (holding that the right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door).
232. 46 Cal. 2d 269, 294 P.2d 23 (1956).
233. Id. at 271, 294 P.2d at 27.
234. Id.
235. Id.
236. Id.
heroin toward another agent who recovered it. Justice Traynor, writing for the court, found that the heroin must be suppressed since it was the product of a warrantless entry into the house which was not based on reasonable cause and was therefore illegal. Answering the government’s argument that the defendant abandoned the heroin, Traynor pointed out that the “defendants flight out the front door and attempted disposal of the evidence was the direct result of [the agent’s] illegal entry, and accordingly, the evidence was obtained in violation of constitutional guarantees.” Following Badillo, the California Supreme Court characterized this issue as follows: “whether there was a threat of such an invasion capable of execution and sufficient to cause defendants’ flight and disposal of [contraband, such that] the evidence eventually obtained was the product of an attempted illegal act of the officer.” Flight or disposal of evidence was deemed “tainted” when it was found to be “a direct response to unlawful police action.” Such unlawful action might be no more than “a threat of an illegal search capable of being carried out. ...” or an “attempted illegal invasion of [defendant’s] constitutional rights.”

For decades, the United States Supreme Court left undecided the point at which a show of authority by the police amounts to a seizure within the meaning of the Fourth Amendment. In Terry v. Ohio, the Court held that a person is “seized” whenever that person is accosted by an officer and restrained from walking away. Twelve years later, the Court held that a person is seized “only when by means of physical force or show of authority his freedom of movement is restrained.” The test was described as an objective one: whether, in view of all the circumstances surrounding the incident, a reasonable person would believe that he or she

237.  Id.
238.  Id. at 272, 294 P.2d at 25.
239.  Id. at 273, 294 P.2d at 25 (citing Silvertone Lumber Co. v. United States, 251 U.S. 385, 392 (1920), which established the “fruit of the poisonous tree” doctrine for the federal courts).
242.  Stout, 66 Cal. 2d at 192, 424 P.2d at 709, 57 Cal. Rptr. at 157.
244.  392 U.S. 1 (1968).
245.  Id. at 16; see Brown v. Texas, 443 U.S. 47, 50 (1979).
246.  United States v. Mendenhall, 446 U.S. 544, 553 (1980). The lead opinion did not carry a majority, but the concurring justices seemed to accept the test, disagreeing only with its application. The Court clearly affirmed the test eight years later in Michigan v. Chesternut, 486 U.S. 567, 573-74 (1988).
was not free to leave.\textsuperscript{247} Factors indicating a seizure include the threatening presence of several officers, the display of weapons, the physical touching of the suspect, and the use of language or tone indicating compliance with the officer’s requests.\textsuperscript{248} Where the show of authority fails to result in the submission or apprehension of the suspect, the Court suggested that a seizure would be found when such show of authority was sufficient to meet the objective test, that is, where “police conduct . . . was . . . ‘so intimidating’ that [defendant] could reasonably have believed that he was not free to disregard the police presence and go about his business.”\textsuperscript{249}

However, in \textit{California v. Hodari},\textsuperscript{250} the Court held that to constitute an arrest or other Fourth Amendment seizure, there must be either the application of physical force, or submission to an officer’s show of authority to restrain the subject’s liberty.\textsuperscript{251} In \textit{Hodari}, two Oakland police officers on patrol in an unmarked car, but with “Police” marked jackets, saw four to five youths huddled around a parked car.\textsuperscript{252} The youths panicked and took flight when they saw the officers approach.\textsuperscript{253} One officer left his car and gave chase, eventually turning south on 62nd Ave.\textsuperscript{254} Hodari came out of an alley on 62nd running north.\textsuperscript{255} Looking behind, as he ran, he did not turn and see the officer until he was almost upon him, whereupon Hodari tossed away what appeared to be a small rock.\textsuperscript{256} A moment later, the officer tackled and handcuffed him.\textsuperscript{257} The rock Hodari discarded was found to be crack cocaine.\textsuperscript{258} The Court concluded that the police chase, though conveying the message to Hodari that he was not free to leave and amounting to a show of authority under \textit{Mendenhall v. United States},\textsuperscript{259} did not constitute a seizure under the Fourth Amendment because Hodari had not yet either been touched or

\textsuperscript{247} See Chesternut, 486 U.S. at 574 (regarding as irrelevant the subjective, but uncommunicated, intent of an officer to arrest or detain).
\textsuperscript{248} Id. at 575.
\textsuperscript{249} Id. at 576.
\textsuperscript{251} Id. at 626-27.
\textsuperscript{252} Id. at 622.
\textsuperscript{253} Id. at 622-23.
\textsuperscript{254} Id. at 623.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} 446 U.S. 544, 554 (1980).
submitted to authority.\textsuperscript{260} Since there was no seizure, the evidence was regarded as the product of the suspect's abandonment of privacy interests rather than of a seizure under the Fourth Amendment.\textsuperscript{261}

It is unfortunate that the United States Supreme Court did not follow the lead of Justice Traynor. By requiring a touching or a submission to authority in \textit{Hodari}, the Court embraced a criteria having little relation to the purpose of the exclusionary rule. A clearly unreasonable police pursuit which strikes fear in the heart of a suspect will be outside the strictures of the Fourth Amendment until the police succeed in contacting the suspect or the suspect decides to stop. For example, if without reasonable suspicion of criminal activity a uniformed police officer commands a person to "halt" or "stop," and the suspect drops evidence and then stops, the evidence will be admitted since it was abandoned prior to the seizure. However, if the suspect immediately stops and then drops the evidence, the evidence will be suppressed as the product of the unlawful seizure.\textsuperscript{262} A rule which allows Fourth Amendment protections against unreasonable police intrusions to turn on the often haphazard and unpredictable reactions of suspects lacks a rational basis and poorly serves the purpose of deterring unreasonable police conduct. The Court should have followed Justice Traynor's approach which clearly focuses on the reasonableness of police conduct and does not depend on circumstances beyond the control of those whom the exclusionary rule is intended to influence.\textsuperscript{263}

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\textsuperscript{260} \textit{Hodari}, 449 U.S. at 625-26.
\textsuperscript{261} \textit{Id.} at 627-29.
\textsuperscript{262} See \textit{United States v. Wood}, 981 F.2d 536, 537, 540-41 (D.C. Cir. 1992) (holding that a suspect was seized within the meaning of the Fourth Amendment when he "froze in his tracks" and dropped a handgun in response to a police officer's command to "halt right there . . . stop"); see also \textit{United States v. Coggins}, 986 F.2d 651, 654 (3d Cir. 1993) (holding that the suspect was seized when he complied with officer's order to stay put by sitting down, though he almost immediately reconsidered and ran off).
\textsuperscript{263} See supra notes 230-243 and accompanying text.
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IV. DEVELOPMENT OF SEARCH AND SEIZURE STANDARDS

A. Taking the Middle Road: Accommodating Privacy and Law Enforcement Interests in Investigative Stops, Frisks, and Detentions

At the time Cahan was decided, federal law greatly restricted police stops and detentions through the application of tort law concepts. If police restricted a suspect's liberty of movement sufficiently to commit the tort of false imprisonment, the restriction could be justified only by demonstrating that police had probable cause to make a formal arrest. Although the position of the United States Supreme Court was not entirely clear, it appeared to favor the proposition that an arrest occurs at the time the police stop a person or automobile for investigation. Traynor read Supreme Court cases as allowing "no middle ground" and summarized the federal approach as follows:

[A]n arrest occurs when an automobile is stopped during the course of a criminal investigation, and if the officer does not have reasonable cause to arrest the occupant at that time, the arrest is unlawful. Anything the officer learns as a result of stopping the automobile is inadmissible in evidence and cannot justify a search.

265. See infra note 267 and accompanying text.
266. See infra note 267 and accompanying text.
267. See Collings, supra note 3, at 435 (stating that "[t]he federal decisions involving problems of the right to investigate are in a state of complete confusion . . . Thus, it may be that any stopping of a car or detaining of a person by police constitutes an arrest").
268. In Henry v. United States, 361 U.S. 98 (1959), officers, while investigating a theft from interstate shipment, observed the defendant carry some cartons from his residence and load them in an automobile. Id. at 99. Officers stopped the car, saw cartons without addresses on them, and heard one of the occupants say "Hold it; it is the G's." Id. The officers took the cartons and occupants to their office and detained them for two hours until learning that the cartons contained stolen merchandise, whereupon they placed the occupants of the car under arrest. Id. at 99-100. The government conceded that an arrest took place at the time the car was stopped, and the Court agreed, stating, "That is our view on the facts of this particular case." Id. at 103. Since the officers lacked probable cause to make the arrest at the time the car was stopped, the Court held that the cartons were unlawfully seized and were inadmissible. Id. at 104; see Brinegar v. United States, 338 U.S. 160, 166 (1949); Rios v. United States 364 U.S. 253, 256 (1960). See generally Edward L. Barrett, Jr., Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. CT. REV. 46, 58-65 [hereinafter Barrett, Personal Rights].
270. Id. at 450, 380 P.2d at 659, 30 Cal. Rptr. at 19.
One of Traynor's most significant achievements following Cahan was the development of a well-defined right on the part of law enforcement officers to make limited investigative stops and detentions on grounds short of reasonable cause to arrest, including a limited right to frisk a suspect based on facts demonstrating danger to the officers. In People v. Simon, the California Court found lacking reasonable cause to arrest and search two young suspects, one of whom was a minor carrying alcohol, who were walking in a warehouse district at 10:40 p.m. However, in dictum Traynor stated, "There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night, and it is possible that in some circumstances even a refusal to answer could, in the light of other evidence, justify an arrest." Traynor continued, as if anticipating the Supreme Court's decision in Terry v. Ohio and its progeny: "Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here would not be so justified."

From the Simon dicta developed police authority to stop and detain for reasonable investigation, as well as the right to pat down or frisk for weapons. People v. Martin established that a chain of reasonable police conduct may result in a lawful seizure of contraband discovered in the course of such investigation. Police patrolling a "lover's lane" saw, with the aid of their spotlight, two men sitting in the front seat of a parked car. As they made a U-turn to investigate, the car sped away at a high rate of speed. The officers pursued and stopped the car. Using a flashlight the officers saw each man with his hands over the middle of the front seat. Officers ordered the occupants to put their

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272. Id. at 649, 290 P.2d at 534.
273. Id. at 650, 290 P.2d at 534 (citations omitted).
275. Simon, 45 Cal. 2d at 650, 290 P.2d at 534. Traynor soon after pointed out that "[i]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes." People v. Michael, 45 Cal. 2d 751, 754, 290 P.2d 852, 854 (1955).
276. 46 Cal. 2d 106, 293 P.2d 52 (1956).
277. Id. at 108, 293 P.2d at 53.
278. Id. at 107, 293 P.2d at 52.
279. Id.
280. Id.
281. Id., 293 P.2d at 52-53.
282. Id., 293 P.2d at 53.
The sudden flight of the two occupants gave reasonable grounds for believing that they were guilty of some crime, and left no doubt as to the reasonableness and necessity for further investigation. After stopping the car, the officers were justified in ordering "hands front," and in the interest of their own safety, the officers were justified in searching the men for weapons before questioning them. Upon discovery of the bag, the officers had reasonable cause to believe that the bag was the reason for suspects' flight and, thus, had reasonable cause to remove it from the car.

In a companion case, People v. Blodgett, police observed the defendant and his companions entering a cab at 3:00 a.m. in front of an Oakland hotel, and decided to investigate. The investigation resulted in suspicion that the defendant was concealing contraband and justified a later search. Justice Traynor, writing for the majority, stated that, "There is nothing unreasonable in an officer's questioning persons outdoors at night."

The California Courts of Appeal applied these stop, detention, and frisk principles in many contexts, so that by the time the Supreme Court decided Terry v. Ohio, California had a well-developed body of rules

283. Id.
284. Id. at 107-08, 293 P.2d at 53.
285. Id. at 108, 293 P.2d at 53.
286. Id.
287. Id.
288. id.
289. 46 Cal. 2d 114, 293 P.2d 57 (1956).
290. Id. at 115-16, 293 P.2d at 58.
291. Id. at 116-17, 293 P.2d at 58.
292. Id. at 117, 293 P.2d at 58; see People v. Duncan, 51 Cal. 2d 523, 528, 334 P.2d 858, 861 (1959) (upholding the authority of officers to question and then make an arrest on the basis of probable cause that developed during the course of questioning); Martin, 46 Cal. 2d at 108, 293 P.2d at 53.
governing stops, detentions, other police activities falling short of a full arrest:

[C]ircumstances short of probable cause to make an arrest may still justify an officer’s stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make an arrest, the officer may arrest the suspect and conduct a reasonable incidental search.295

After Mapp,296 Traynor was fearful that the United States Supreme Court would apply to states the federal rules which looked upon any police stop as equivalent to a full arrest requiring ordinary probable cause. He sought to justify California’s approach, arguing that it was less technical, more practical, and in some respects more supportive of the right to privacy.

It might be possible, for example, to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well. If questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of their personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. It would then not be possible for a guilty defendant to magnify slight detention for questioning, based on probable cause to question, into an arrest lacking the validity that proceeds from a higher level of probability, probable cause to arrest.

... We have upheld the authority of officers not only to question but also to make a subsequent arrest on the basis of probable cause that developed in the course of the questioning. When questioning prompts flight or obvious attempts to conceal or dispose of something, such action in sequence of the initial suspicious circumstances constitutes probable cause for arrest. It would seem highly unrealistic to hold such an arrest invalid on the ground that arrest actually coincided with the initial police questioning and that the then suspicious circumstances fell short of probable cause for arrest. Such technicality would invite the circumvention of building up suspicious circumstances to probable cause for arrest, and the eventual consequence might be lower standards of arrest. Surely there is a middle ground between the excesses of questioning on mere suspicion and of invalidating an arrest that followed upon questioning on suspicion reasonably generated by the immediate circumstances.

On the first occasion after Mapp to address this issue, Traynor maintained the California rule, arguing that it was consistent with the Constitution and to some extent actually supported privacy interests:

It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified.

However, detentions could not be justified on the basis of vague or insubstantial suspicions. In People v. Reulman, for example, a police officer observed the defendant driving a Cadillac in an alleyway near the location where police had discovered a narcotics kit. The defendant appeared nervous and wary of the officers. He parked his car adjacent

297. Traynor, Mapp at Large supra note 3, at 333-34 (emphasis added, footnotes omitted); see Barrett, Personal Rights, supra note 268, at 65-70. In many ways Traynor appears to have been greatly influenced by the concepts and arguments of Professor Edward Barrett, who was then teaching at Traynor's alma mater, Boalt Hall, and who, incidentally, was the author's faculty advisor while writing for the California Law Review.
300. Id. at 94, 396 P.2d at 707, 41 Cal. Rptr. at 291.
301. Id.
to where the kit was found and walked aimlessly in the vicinity.\textsuperscript{302} The court found detention of the defendant unjustified by these facts, and noted that the officer’s feeling that the defendant “did not belong in the Cadillac” was “not impressive [and added] little to create any real suspicion.”\textsuperscript{303} Furthermore, Traynor refused to extend authority to detain for investigation to allow officers to invade the privacy of a suspect’s home.\textsuperscript{304}

The right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door. A suspect has no duty to cooperate with officers in securing evidence against him, and in the absence of probable cause to make an arrest, he is entitled to have a magistrate determine whether there is justification for invading the privacy of his home.\textsuperscript{305}

Again, Traynor took the “middle ground,” accommodating individual right to privacy and government need for limited investigatory methods, and recognizing the benefits of a flexible analysis which would justify intrusions short of arrest by suspicion short of traditional probable cause.

Fortunately, the United States Supreme Court in \textit{Terry v. Ohio}\textsuperscript{306} and its progeny adopted the Traynor approach which justified limited intrusions into privacy on the basis of circumstances short of full probable cause.\textsuperscript{307} We would be confronting a vastly different legal landscape in the numerous contexts of limited police investigative techniques had the Supreme Court either demanded full probable cause for stops or detentions or held that until a suspect has been formally arrested, there has been no search or seizure within the Fourth Amendment.

\textbf{B. Focus on Promoting Reasonable Police Conduct and Rejection of Complex and Technical Rules}

The \textit{Cahan}\textsuperscript{308} court looked forward to developing “workable rules governing searches and seizures” and sought to avoid “needless refine-

\begin{itemize}
\item \textsuperscript{302} \textit{Id.}
\item \textsuperscript{303} \textit{Id.} at 96, 396 P.2d at 708-09, 41 Cal. Rptr. at 292-93.
\item \textsuperscript{304} People v. Shelton, 60 Cal. 2d 740, 746-47, 388 P.2d 665, 668-69, 36 Cal. Rptr. 433, 436-37 (1964).
\item \textsuperscript{305} \textit{Id.} at 746, 388 P.2d at 668, 36 Cal. Rptr. at 436 (citations omitted).
\item \textsuperscript{306} 392 U.S. 1 (1968).
\item \textsuperscript{307} \textit{Id.} at 27.
\item \textsuperscript{308} People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
\end{itemize}
ments and distinctions.” In seeking “workable rules,” Traynor focused on encouraging reasonable, good faith law enforcement practices rather than demanding that police comply with technical or complex rules and make no mistakes in investigating and suppressing crime. The virtues of Traynor’s approach become apparent when contrasted with the United States Supreme Court’s decisions in such areas as “mere evidence,” good faith failure to comply with knock and announce requirements, and minor or technical violations of search and seizure standards.

1. Rejection of the Federal Mere Evidence Rule

At the time of Cahan, and for years thereafter, the federal mere evidence rule prohibited searches for, as well as seizures of, objects having evidentiary value only, whether under a warrant or incident to a valid arrest. The rule appeared to be based on property concepts, and in particular upon the theory that the sovereign may seize only objects that are illegal to possess or as to which the sovereign may assert a claim on the ground they were wrongfully obtained or used. Thus, the rule did not apply to contraband or to stolen goods since the defendant was not the rightful owner. However, the rule was not thought to apply to instruments used to commit crime, to fruits of crime generally, or to records that the defendant was required by law to keep. These exceptions cut the rationale for the rule away from property interests without providing an alternative rational basis for the rule. By 1965, the United States Supreme Court, as Traynor put it, had distinguished the rule “to the point

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309. Id. at 450-51, 282 P.2d at 915.
310. See infra notes 313-337 and accompanying text.
311. See infra notes 338-356 and accompanying text.
312. See infra notes 357-467 and accompanying text.
314. Gouled, 255 U.S. at 309.
316. See Marron v. United States, 275 U.S. 192, 199 (1927) (upholding the seizure of the defendant’s business ledger and utility bills on the ground they were convenient, if not necessary, for the operation of defendant’s illegal liquor business, and therefore instrumentalities of the crime); see also Abel v. United States, 362 U.S. at 237-39 (upholding the seizures of a forged birth certificate, a vaccination certificate, and a bank book, on the ground that they were documents used to establish a false identity and hence were a means to commit espionage and failure to register as an alien).
of extinction . . . by the use of technical exceptions and without discussion of policy."\textsuperscript{318}

Shortly after \textit{Mapp v. Ohio},\textsuperscript{319} Traynor spoke out against the mere evidence rule, referring to arguments offered in its support as "explanations in the dark."\textsuperscript{320} First, he was puzzled by the characterization of an object as having evidentiary value only.

The real thick of the thing is the disputation as to what is "evidentiary value only." . . . The apple and the arrow may be admissible, and also the bow; but the quiver, is it no more than an \textit{only}?

Should any state court in its right mind risk losing it in the pursuit of learning whatever the total message is of a federal rule of such elaborate obfuscation?\textsuperscript{321}

Moreover, Traynor could not abide the rule's lack of reason and purpose, its restrictions on proper law enforcement practices, and its detrimental effect on reliable fact-finding.

Suppose for example that there falls on the ears of police a cry of "Don't shoot!" and then what sounds like a shot, then the fall of a body. The police enter the suspected house and find a corpse with a bullet wound. They search for and find the gun. The circumstances make it reasonable for them to continue their search, regardless of whether it is incident to the arrest of the eventual defendant or whether he has already made his escape. Surely there would be no constitutional condition that they could seize only the gun that was the instrument of the crime and that they must keep their distance from other evidence that would be "of evidentiary value only" on matters of such high relevance as motive, premeditation, provocation, self-defense, or the identity of the killer.\textsuperscript{322}

\textsuperscript{318}. People v. Thayer, 63 Cal. 2d 635, 642, 408 P.2d 108, 112, 47 Cal. Rptr. 780, 784 (1965).
\textsuperscript{320}. Traynor, \textit{Mapp at Large}, supra note 3, at 330.
\textsuperscript{321}. \textit{Id.} at 330-31.
\textsuperscript{322}. \textit{Id.} at 331. Others have been equally critical of the rule. \textit{See generally Comment, Limitations on Seizure of "Evidentiary" Objects - A Rule in Search of a Reason}, 20 U. CHI. L. REV. 319 (1953); Yale Kamisar, \textit{The Wire Tapping-Eavesdropping Problem: A Professor's View}, 44 MINN. L. REV. 891, 914 (1960).
In 1965, Traynor faced the question of the rule’s status, and, in particular, the validity of a California statute which rejected the rule\(^{323}\) in the face of the Supreme Court’s pronouncement that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.\(^{324}\) Noting the rule’s basis in ancient property concepts,\(^{325}\) Traynor found it anachronistic to determine admissibility of evidence on the basis of the sovereign’s right of replevin at common law, and believed that emphasis on property rights leads to “technical rules that are entirely unrelated to the real issues of individual privacy and law enforcement.”\(^{326}\) Traynor pointed out that the rule protected not private papers, but anything of only evidentiary value.\(^{327}\) Traynor found it “impossible to understand why the admissibility of seized items should depend on whether they are merely evidentiary or evidentiary plus something else.”\(^{328}\) In conclusion, Traynor found the mere evidence restriction on police seizures “a dubious technical rule”\(^{329}\) which “creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant.”\(^{330}\) Accordingly, he regarded the mere evidence restriction as a federal procedural rule rather than a constitutional standard to be applied to the states.\(^{331}\)

Less than two years later, the United States Supreme Court announced that the mere evidence rule was in fact a “Fourth Amendment ruling,” but agreed with Traynor that the rule was an irrational anachronism and should be discarded.\(^{332}\) Citing People v. Thayer\(^{333}\) as the leading case exemplifying judicial opposition to the rule,\(^{334}\) the Court labelled it “wholly irrational,”\(^{335}\) attributed its perpetuation “more to chance than

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\(^{323}\) California Penal Code § 1524 as amended in 1957 permitted the issuance of a warrant “[w]hen the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.” CAL PENAL CODE § 1524 (West 1982).

\(^{324}\) People v. Thayer, 63 Cal. 2d 635, 639, 408 P.2d 108, 110, 47 Cal. Rptr. 780, 782 (1965).

\(^{325}\) He noted that the rule allowed seizure of private papers—even personal books and diaries—which were instruments of crime. Id. at 638, 408 P.2d at 110, 112, 47 Cal. Rptr. at 782, 784.

\(^{326}\) Id. at 637, 408 P.2d at 109, 47 Cal. Rptr. at 781.

\(^{327}\) Id. at 637, 408 P.2d at 109, 47 Cal. Rptr. at 781.

\(^{328}\) Id. at 637, 408 P.2d at 109, 47 Cal. Rptr. at 781.

\(^{329}\) He noted that the rule allowed seizure of private papers—even personal books and diaries—which were instruments of crime. Id. at 638, 408 P.2d at 110, 112, 47 Cal. Rptr. at 782, 784.

\(^{330}\) Id. at 642, 408 P.2d at 112, 47 Cal. Rptr. at 784.

\(^{331}\) Id. at 642, 408 P.2d at 112, 47 Cal. Rptr. at 784.

\(^{332}\) Id. at 637, 408 P.2d at 109, 47 Cal. Rptr. at 781.


\(^{334}\) Warden. 387 U.S. at 300 n.6.

\(^{335}\) Id. at 302.
to considered judgment,” and found “no viable reason to distinguish intrusions to secure ‘mere evidence’ from intrusions to secure fruits, instrumentalities, or contraband.” Again, the Supreme Court advanced its search and seizure standards by looking to the Traynor approach.

2. Reasonable Good Faith Failure to Comply with Statutory Knock and Announce Requirements

California, like most states and the federal government, prescribes the means by which officers can enter homes to make arrests or execute search warrants. For example, Penal Code section 844 allows an officer making an arrest to break open the door or window of the house in which the person to be arrested is located “after having demanded admittance and explained the purpose for which admittance is desired.” After Cahan, it was unclear whether an officer must comply with section 844 by demanding admittance and explaining the purpose when the result might be the escape of the suspect or destruction of evidence. Federal law on the issue was also unclear.

In People v. Maddox, Traynor once again looked to the “primary purpose” of the exclusionary rule, and found that the requirements of section 844 should be waived where the officer has reasonable cause to believe that a felony is being committed and reasonably believes that compliance with the section may increase the officer’s peril or enable the suspect either to escape or to destroy evidence.

Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is

336. Id. at 308.
337. Id. at 310.
341. See Miller v. United States, 357 U.S. 301, 313-14 (1958); Collings, Toward Workable Rules, supra note 3, at 450.
343. Id. at 306, 294 P.2d at 9. “The answer to this question must be sought in the basic reasons for the exclusionary rule.” Id. at 305, 294 P.2d at 8.
344. Id. at 306, 294 P.2d at 9.
entitled to be more quickly than he would, had he complied with section 844.345

Traynor concluded that evidence should not be excluded for failure to comply with the formal requirements of section 844 when the facts known to the officer "are not inconsistent with a good faith belief . . . that compliance . . . is excused."346

Furthermore, Traynor led the court in developing the doctrine of substantial compliance in the context of knock and announce requirements. Shortly after Cahan, Traynor focused on whether the officers "substantially complied" with section 844,347 and in Maddox, Traynor refused to demand strict, technical compliance with the statute, reasoning that "since the officer's right to invade the defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees."348 However, officers must state their purpose as well as their identity. Merely identifying themselves as officers would not constitute substantial compliance unless the circumstances made their purpose clear to the occupants or demand for admission would be futile.349 Furthermore, the requirements were held to apply to entries through unlocked and even open doors as well as to efforts to apprehend parole violators and other fugitives from justice.350 Finally,

345. Id.
346. Id. at 306-07, 294 P.2d at 9. Furthermore, the court found that § 844 was a codification of the common law and should be interpreted as subject to common law exceptions which included cases where compliance with formalities of the section would increase the officers peril or frustrate the arrest. Id. at 306, 294 P.2d at 9.

In People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955), the court supplied an alternative basis for this result. It found that failure to comply with the knock and announce requirements is unrelated and collateral to the product of the search, thus rendering the exclusionary rule inapplicable. Id. at 763, 290 P.2d at 859. Where the officer already has cause to make the arrest and therefore to conduct a search incident thereto, the product of the search in no way depends on compliance with the statutory formalities. Id. at 763, 290 P.2d at 858-59. Nevertheless, the Martin court concluded that the officers had "substantially complied" with § 844. Id. at 762-63, 290 P.2d at 858. In Maddox, the court noted but moved away from the collateral violation rationale, preferring to ask whether the officers acted reasonably in light of facts excusing compliance with the section. Maddox, 46 Cal. 2d at 305-07, 294 P.2d at 8-10.

347. Martin, 45 Cal. 2d at 762-63, 290 P.2d at 858-59 (1955).
348. Maddox, 46 Cal. 2d at 306, 294 P.2d at 9; see also People v. Marshall, 69 Cal. 2d 51, 55-56, 442 P.2d 665, 667, 69 Cal. Rptr. 585, 587 (1968) (holding that by persistently knocking, demanding entry, and identifying themselves for several minutes . . . the officers "substantially complied with the notice requirements of the statute").
350. See People v. Bradley, 1 Cal. 3d 80, 87-88, 460 P.2d 129, 133-34, 81 Cal. Rptr. 457, 461-62 (1969) (discussing entry through an open door); Rosales, 68 Cal. 2d at 303, 437 P.2d at 492, 66 Cal. Rptr. at 4 (discussing entry through an unlocked door).
failure to comply cannot be justified by a general assumption that certain
classes of persons, such as narcotics violators, are more likely to resist
arrest, attempt to escape or to destroy evidence.\textsuperscript{351} Traynor regarded
unannounced forcible entry as “a serious disturbance of [the security of
people in their homes that] cannot be justified on a blanket basis.”\textsuperscript{352}
These principles soon were applied in a number of cases.\textsuperscript{353}

In 1963, the United States Supreme Court relied on \textit{Maddox} in
upholding a California law with respect to warrantless entries to arrest. In
\textit{Ker v. California},\textsuperscript{354} the Court quoted with approval Traynor’s language
in \textit{Maddox} which stated that “[s]uspects have no constitutional right to
destroy or dispose of evidence [and that] since the demand and explanation
requirements . . . are a codification of the common law, they may rea-
sonably be interpreted as limited by the common law rules that compliance
is not required if the officer’s peril would have been increased or the arrest
frustrated had he demanded entrance and stated his purpose.”\textsuperscript{355}
Following Traynor once more, the High Court concluded that “the officer’s
method of entry, sanctioned by the law of California, was not unreasonable
under the standards of the Fourth Amendment.”\textsuperscript{356}

\begin{footnotes}
\begin{footnotenum}
\footnotenumitem[352] Gastelo, 67 Cal. 2d at 589, 432 P.2d at 708, 63 Cal. Rptr. at 12.
\footnotenumitem[353] For example, in People v. Hammond, 54 Cal. 2d 846, 357 P.2d 289, 9 Cal. Rptr. 233 (1960), an
informer had just purchased heroin from the defendant in his home and reported to the police that the defendant
was in the process of preparing heroin for sale, was under the influence of heroin, and had a gun. \textit{Id.} at 849,
357 P.2d at 291, 9 Cal. Rptr. at 235. Officers then broke into the home, arrested the defendant and seized heroin.
\textit{Id.} The entry and search was upheld on the ground that the officers had reasonable cause to believe the
defendant was in the process of committing a felony, was armed, and was under the influence of a narcotic. \textit{Id.}
853, 357 P.2d at 293-94, 9 Cal. Rptr. at 237-38. Thus, they could have concluded in good faith that compliance
with the knock and announce requirements of \textsection{844} might allow defendant to attempt to dispose of heroin or
use the gun. \textit{Id.} at 854, 357 P.2d at 294, 9 Cal. Rptr. at 238; see People v. Carrillo, 64 Cal. 2d 387, 391, 412
\footnotenumitem[355] \textit{Id.} at 39-40.
\footnotenumitem[356] \textit{Id.} at 41.
\end{footnotenum}
\end{footnotes}
3. Giving Substance to the Reasonable or Probable Cause Standard While Avoiding Technical Requirements

Prior to Cahan, California courts had defined reasonable cause in a manner similar to the federal probable cause standard. Shortly after Cahan, the court gave substance to the reasonable or probable cause requirement in a number of cases, each of which relied principally on the reasonableness clause of the Fourth Amendment and kept the purpose of the exclusionary rule clearly in focus. Arguments founded on legal technicalities were viewed with suspicion and were usually dismissed outright. In People v. Brown, Justice Traynor, writing for the court, rejected the argument that whenever an arrest is technically valid under California law, it can be used to support a search incident even in the absence of reasonable cause for arrest. Two officers parked on a street corner observed defendant walk in front of their vehicle carrying a coin purse in her right hand and clenching her left hand in a fist. They went up to her, grabbed her hands, and when she refused to reveal what she had in her left hand, took a small object from her left hand which contained heroin. Traynor pointed out that the officers had no reasonable cause to arrest defendant, but the prosecution argued that the language of California Penal Code section 836(2) governing warrantless arrests, provided that an arrest, even if made without reasonable cause, was legal if defendant was later found to have committed a felony. Traynor concluded, however, that searches must be found "reasonable" without regard to the technical legality of the arrest. Focusing primarily on the reasonableness clause and on the deterrent purpose of the exclusionary rule, Traynor stated that:

358. See People v. Nagle, 25 Cal. 2d 216, 222, 153 P.2d 344, 347 (1944) (stating that reasonable cause may exist although there is some room for doubt); People v. Kilvington, 104 Cal. 86, 92, 37 P. 799, 801 (1894) (holding that reasonable cause amounts to a state of mind that would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the arrested person is guilty of a crime); see also Collings, supra note 3, at 440 (observing that "the federal test of 'probable cause,' a term which is synonymous with reasonable cause, appears to be the same as the California test").
360. Id. at 642-43, 290 P.2d at 529-30.
361. Id. at 641, 290 P.2d at 529.
362. Id.
363. Id. at 642, 290 P.2d at 529; see CAL. PENAL CODE § 836(2) (West Supp. 1994).
364. Brown, 45 Cal. 2d at 643, 290 P.2d at 530.
[A] search, whether incident to an arrest or not, cannot be justified by what it turns up. . . . Whether or not the arrest of a guilty defendant is lawful, it is clearly unreasonable if the officer has no 'reasonable cause' to believe the defendant guilty, and a search incident thereto can be no more reasonable than the arrest itself.\textsuperscript{365}

This approach, which was consistent with the federal view, reflected the court's rejection of legal technicalities and its focus on the objective of encouraging reasonable police conduct.\textsuperscript{366}

Officers and magistrates who must decide whether searches are justified are not limited by ordinary technical rules of evidence. In \textit{People v. Boyles},\textsuperscript{367} the court followed the federal rule\textsuperscript{368} and affirmed both the propriety of basing reasonable cause on information from third parties such as informers and the principle that evidence supporting reasonable cause is not limited to evidence that would be admissible at the guilt trial.\textsuperscript{369} Likewise, it is immaterial that the supporting evidence lacked independent proof of the corpus delicti and, thus, could not support a conviction.\textsuperscript{370}

Traynor also gave substance to the reasonable cause requirement in other contexts. Following the federal approach, Traynor rejected an invitation to allow arrests and searches based on the subjective, but unarticulated, feelings of police:

\begin{quote}
[T]o permit an officer to justify a search on the ground that he "didn't feel" that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions
\end{quote}

\textsuperscript{365} \textit{Id.} at 643-44, 290 P.2d at 530.

\textsuperscript{366} \textit{See} \textit{Harris v. United States}, 331 U.S. 145, 150-51 (1947) (stating that search and seizure incident to a valid arrest is an ancient and integral part of law enforcement); \textit{United States v. Rabinowitz}, 339 U.S. 56, 60 (1950) (holding that, in order for a warrantless search incident to an arrest to be valid, the arrest must also be valid).


\textsuperscript{368} \textit{Boyles}, 45 Cal. 2d at 656, 290 P.2d at 537-38. However, consistent with federal law, the court found that ordinarily reasonable cause may not be based solely on information from an anonymous informant. \textit{See} \textit{Willson v. Superior Court}, 46 Cal. 2d 291, 294, 294 P.2d 36, 38 (1956) (stating that, "Although information provided by an anonymous informant is relevant on the issue of reasonable cause, in the absence of some pressing emergency . . . an arrest may not be based solely on such information" (emphasis added)); \textit{see also Brinegar}, 338 U.S. at 171-76 (providing the federal rule of evidence pertaining to searches).

were. Innocent people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up.  

The police should not be the ultimate judges of the propriety of Fourth Amendment intrusions. In Boyles, the court demanded that the officer "testify to the facts or information known to him on which his belief is based" since "the court and not the officer must make the determination whether the officer's belief is based upon reasonable cause."  

In Priestly v. Superior Court, Traynor strengthened the exclusionary rule in the context of searches based on information from informers. When the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, the identity of the informer must be disclosed on the defendant's request, in order to give the defendant a fair opportunity to present impeaching evidence concerning "the truth of the officer's testimony and the reasonableness of his reliance on the informer."  

If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. 

Traynor regarded the standard as consistent with the federal rule and found it "sound and workable." It would not impede law enforcement, but would "compel independent investigations" to verify information from informers or to uncover other evidence. However, the United States

372. Boyles, 45 Cal. 2d. at 656, 290 P.2d at 537; see People v. Haven, 59 Cal. 2d 713, 717, 381 P.2d 927, 929, 31 Cal. Rptr. 47, 49 (1963) (holding that the officers' testimony was "barren of the details" as to the information earlier received such that the trial court was unable to determine whether the officers acted reasonably).
374. Id. at 818, 330 P.2d at 43; Coy v. Superior Court, 51 Cal. 2d 471, 473, 334 P.2d 569, 570-71 (1959).
375. Priestly, 50 Cal. 2d at 818, 330 P.2d at 43.
376. Id. at 817, 330 P.2d at 42; see id. at 816, 330 P.2d at 41-42 (citing Roviaro v. United States, 353 U.S. 53, 61 (1957) to describe the federal rule with regard to searches based on informers' information).
377. Id. at 817, 330 P.2d at 42.
378. Id. at 818, 330 P.2d at 43.
Supreme Court changed course in 1967, holding that disclosure of an informant’s identity is not invariably required on the question of probable cause to arrest or search “if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant.” The Court emphasized that the officers had described “with specificity” what the informer said and the “underlying circumstances” from which they concluded that the informant was credible or that the informant’s information was reliable. California soon followed the new federal rule, but demanded a showing of “underlying circumstances or ... factual proof in court as to reliability and credibility.”

In grappling with the totality of circumstances approach to a reasonable cause, Traynor was reluctant to allow arrests or searches based on suspicious conduct when there may be other legitimate explanations for a defendant’s acts, and a suspect’s prior criminal record or reputation for criminal activities was not allowed to substitute for specific, factual reasons for individual intrusions. In People v. Sanders, Traynor, writing for the majority, concluded that the defendant’s reputation as a bookmaker could not be used to bootstrap observations of the defendant’s conduct into probable cause when that conduct was consistent with innocent as well as criminal activities. Police entered the defendant’s record store in search of a man they had arrested there for bookmaking the day before. Finding no one, they looked through a hole in a door into a private room observing the defendant standing behind a desk with a pencil and pads of paper with writing on them. They entered, arrested the defendant, and searched the premises. Though the pads of paper were described as the kind used by bookmakers and another person had been arrested for bookmaking at the shop the day before, the papers were ordinary pads used by lawful businesses and the previously arrested person was not shown to have used the shop for bookmaking. Accordingly,

380. Id. at 304.
383. 46 Cal. 2d 247, 294 P.2d 10 (1956).
384. Id. at 249-51, 294 P.2d at 11-12.
385. Id. at 248, 294 P.2d at 11.
386. Id. at 248-49, 294 P.2d at 11.
387. Id. at 249, 294 P.2d at 11.
388. Id. at 249-50, 294 P.2d at 11-12.
the defendant's conduct observed by the officers was "perfectly consistent with the lawful conduct of his record business," and the fact that he had a record or reputation for bookmaking could not elevate otherwise innocent conduct into probable cause for warrantless entry into a private business office.

Likewise, in People v. Privett, furtive conduct, even in conjunction with a defendant's criminal record, was not allowed to substitute for specific, factual evidence of criminal conduct. The defendant and another, both with burglary records, were seen going in and out of the defendant's home over a three day period. Seven or eight officers in "rough clothing" came across the front lawn, saw the defendant looking at them, and knocked on the door. When the lights went out and there was no response, the officers kicked in the front door. Finding no probable cause for the entry, the court observed that while evasive conduct may under proper circumstances justify an arrest or search, the conduct here was perfectly consistent with innocent activity.

The observed approach to a private home in the nighttime of a party of seven or eight roughly dressed men and their knocking on the door might reasonably lead the most innocent of persons to extinguish the lights hoping that they would depart, and their subsequent announcement that they were police officers might reasonably arouse a degree of skepticism that would lead the occupants to make no immediate response or indeed any response at all, except possibly to telephone for the aid of those whom they knew with certainty to be police.

Shortly after Mapp, Traynor faced the issue of probable cause to arrest one who was told by a suspect to destroy evidence and who there-
after refused to produce the evidence for the police. Finding no probable cause to arrest for attempting to destroy or conceal evidence of crime, Traynor concluded that refusal to produce evidence on request does not give reasonable cause to arrest for attempt to conceal.

To hold otherwise would make it a crime for a person merely to assert the right to have a magistrate determine whether police officers are entitled to seize evidence from his home. . . . Were there a right to arrest persons for insisting on search warrants and to conduct warrantless searches and seizures as incidental to such arrests, search warrants would become pointless niceties except when no one could be found at home.

4. Defining Reasonableness in the Context of Slight or Minor Privacy Intrusions

In looking forward to developing “workable rules governing searches and seizures,” the Cahan court emphasized the need to focus on the reasonableness of the police conduct and to avoid “needless refinements and distinctions.” Cases following Cahan took a practical, common sense approach, and tended to allow natural police responses to suspicious circumstances, particularly when they involved only slight or minor intrusions into privacy.

People v. Roberts clearly illustrates this approach. Police officers saw a man standing in front of a store display window at 10:00 p.m. The man got into his car, and as he drove away, officers noted the license number. The next night the store was burglarized and five table model radios were among the items taken. Police found the car was registered to a woman residing in an apartment house. They interviewed the apartment manager who told them the woman lived in a

400. Id. at 174, 383 P.2d at 450-51, 32 Cal. Rptr. at 42-43.
401. Id.
402. Id. at 174, 383 P.2d at 451, 32 Cal. Rptr. at 43.
404. Id. at 450-51, 282 P.2d at 915.
405. 47 Cal. 2d 374, 303 P.2d 721 (1956).
406. Id. at 376, 303 P.2d at 722.
407. Id.
408. Id.
409. Id.
specified apartment with a sickly man who did not work often. Officers knocked on the door but there was no answer. Hearing moans or groans which sounded like a person in distress, the officers asked the manager to admit them. Inside, they looked for the person who made the sounds but could find no one. However, they noticed a table model radio that "stood right out as being a new radio." They picked it up, turned it over, and noted the serial number. The radio was later found to be one of those taken in the earlier burglary. On the basis of these facts, police procured a search warrant for the apartment and seized the radio. Writing for a unanimous court, Chief Justice Gibson reasoned that the officers had a right to enter if they reasonably believed someone was in distress, and once inside, they could search as necessary to look for someone in distress. At this point, the new radio was in plain sight. The court concluded that:

Under the circumstances, there appears to be no reason in law or common sense why one of the officers could not pick up the radio and examine it for the purpose of dispelling or confirming his suspicions. The fact that abuses sometimes occur during the course of criminal investigations should not give a sinister coloration to procedures which are basically reasonable.

Traynor's rejection of the mere evidence rule led to an expansion of the Roberts principle, allowing reasonable examination of suspicious objects that are in plain sight, in addition to stolen property or contraband. In People v. Gilbert, witnesses to a robbery at the Alhambra Bank saw stolen currency and coins being placed in a brown Alpha Beta Market shopping bag. Later, police, without a search warrant, police lawfully

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410. Id.
411. Id.
412. Id.
413. Id.
414. Id.
415. Id.
416. Id.
417. Id.
418. Id. at 380, 303 P.2d at 724.
419. Id.
420. Id.
421. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).
422. Id. at 697, 408 P.2d at 369, 47 Cal. Rptr. at 913.
entered an apartment in fresh pursuit of a suspect. In the course of their search for the suspect, they saw, on a coffee table, a note book containing a drawing of the area of the Alhambra Bank. Police also saw an Alpha Beta shopping bag in which they found rolls of coins bearing the name Alhambra Bank. On a dresser, the officers observed a photography studio envelope in which they discovered a photograph of the defendant.

Citing Roberts, Traynor wrote for a unanimous court upholding the seizures and admitting the evidence. The court concluded the officers had acted reasonably. They did not enter to conduct an exploratory search to find evidence, but rather, in fresh pursuit to search for a suspect and to make an arrest.

The search was also properly limited to, and incident to, the purpose of the officers' entry. While the officers were looking through the apartment for their suspect they could properly examine suspicious objects in plain sight.

The California Supreme Court later relied on Traynor's rejection of the mere evidence rule, together with his analysis in Gilbert, for the general principle that when officers are lawfully searching for suspects, they can properly examine suspicious objects in plain sight, without confining such seizures to stolen property or contraband.

Recent United States Supreme Court cases contrast sharply with California's liberal, non-technical approach toward the examination of suspicious containers. In Arizona v. Hicks, police responded to a report that a bullet was fired through the defendant's apartment floor, injuring a

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423. Id. at 705-06, 408 P.2d at 374, 47 Cal. Rptr. at 918.
424. Id. at 706, 408 P.2d at 374, 47 Cal. Rptr. at 918.
425. Id.
426. Id.
427. Id. at 707, 408 P.2d at 375, 47 Cal. Rptr. at 919.
428. Id.
429. Id.
430. Id. (citing People v. Roberts, 47 Cal. 2d 374, 378-80, 303 P.2d 721, 723-24 (1956)). The court also stated that the police could "look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit." Id.
431. See supra notes 323-331 and accompanying text.
432. See supra notes 421-430 and accompanying text.
person in the lower apartment.\textsuperscript{435} The police entered the defendant’s apartment searching for the one responsible, for other victims, and for weapons.\textsuperscript{436} They found and seized weapons, including a sawed-off rifle, and a stocking-cap mask.\textsuperscript{437} An officer noticed two sets of expensive stereo components which “seemed out of place” in the squalid and ill-appointed apartment.\textsuperscript{438} Suspecting they were stolen, the officer read and recorded their serial numbers, moving some components, including a B&O turntable, in order to do so.\textsuperscript{439} An officer phoned the station with the serial numbers and was advised that the turntable had been stolen in an armed robbery.\textsuperscript{440} Officers seized the turntable and later determined that the serial numbers on the other equipment also matched those taken in the same robbery.\textsuperscript{441} The officers obtained a search warrant, and the equipment was seized and offered in evidence at the defendant’s trial for robbery.\textsuperscript{442}

Justice Scalia, writing for the Court, characterized the issue as “whether probable cause is required in order to invoke the plain-view doctrine.”\textsuperscript{443} Answering in the affirmative, he concluded that the evidence should be suppressed.\textsuperscript{444} Although the mere recording of the serial numbers did not constitute a seizure since it did not “meaningfully interfere” with defendant’s possessory interest in either the numbers or the equipment, moving the stereo equipment constituted a “search” unrelated to the objectives of the authorized intrusion.\textsuperscript{445} Scalia reasoned that moving the equipment was a new invasion of defendant’s privacy, exposing to view portions of the apartment or its contents, and was unjustified by the exigent circumstances that validated the entry.\textsuperscript{446}

\footnotesize
\begin{itemize}
  \item \textsuperscript{435} Id. at 323.
  \item \textsuperscript{436} Id.
  \item \textsuperscript{437} Id.
  \item \textsuperscript{438} Id.
  \item \textsuperscript{439} Id. In his dissent, Justice Powell explained that the officer was able to read serial numbers of some components without moving them since there was a foot between the components and wall, but to read the serial number on the B&O turntable, the officer had to “turn it around, or turn it upside down.” Id. at 332 (Powell, J., dissenting).
  \item \textsuperscript{440} Id. at 323.
  \item \textsuperscript{441} Id.
  \item \textsuperscript{442} Id. at 324.
  \item \textsuperscript{443} Id. at 326.
  \item \textsuperscript{444} Id. at 326-27.
  \item \textsuperscript{445} Id. at 324-25.
  \item \textsuperscript{446} Id. at 325.
\end{itemize}
Moving [an object] even a few inches is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to [defendant] . . . . A search is a search, even if it happens to disclose nothing but the bottom of a turntable.\textsuperscript{447}

Furthermore, Scalia concluded that the search could not be justified on the basis of reasonable suspicion to believe the object was contraband or evidence of crime.\textsuperscript{448} Suspicion could be unrelated to the object of the initial entry, but full probable cause was required to either seize or search the equipment.\textsuperscript{449}

In Justice O’Connor’s view, which she believed to be consistent with the approach taken by the “overwhelming majority” of state and federal courts, police must have probable cause for seizing or searching an object in plain view, but need only reasonable suspicion for conducting a “cursory inspection” of an item in plain view.\textsuperscript{450} Such limited inspection, which could not involve “exploratory rummaging,” would be restricted to items the police reasonably suspect as evidence of crime.\textsuperscript{451} However, Scalia and the majority rejected O’Connor’s argument that a cursory inspection, as opposed to a full-blown search, should require only reasonable suspicion.\textsuperscript{452} Scalia asserted that “a truly cursory inspection” is not a search at all.\textsuperscript{453} Noting cases that allowed warrantless seizures of suspicious objects, Justice Scalia recognized that police may make warrantless seizures in public places of objects such as weapons and contraband in plain view, and argued that this same principle may apply to home seizures where police are lawfully present during an unrelated search.\textsuperscript{454} However, in Scalia’s view, “[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require.”\textsuperscript{455} With respect to cases allowing seizures for investigative purposes on reasonable suspicion only, Scalia recognized that seizures on less that probable cause can be justified “where . . . the seizure

\textsuperscript{447}. Id. (emphasis added).
\textsuperscript{448}. Id. at 326-27.
\textsuperscript{449}. Id. at 326.
\textsuperscript{450}. Id. at 336 (O’Connor, J., dissenting) (citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 6.7(b), at 717 (2d ed. 1987) [hereinafter LAFAVE, SEARCH AND SEIZURE]).
\textsuperscript{451}. Id. at 334 (O’Connor, J., dissenting).
\textsuperscript{452}. Id. at 328-29.
\textsuperscript{453}. Id. at 328.
\textsuperscript{454}. Id. at 326-27.
\textsuperscript{455}. Id. at 327.
is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime."^{456} Scalia found no "special operational necessities" in the present case.^{457}

Pointing to the practical necessities of the situation, Justice Powell asked, what should the officers have done assuming their suspicion that the equipment was stolen was both reasonable and based on specific articulable facts?^{458} Scalia gave a straightforward, but simplistic, answer: If the police have probable cause, they can seize or search the object.^{459} If not, it may well be that . . . no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.^{460}

Scalia’s absolutist approach avoids careful analysis of the nature the privacy interest protected and the weight of countervailing government interests. Is the privacy interest protected here at all significant when weighed against the need to investigate? Justice Powell certainly was on point when he noted that distinguishing between looking at a serial number on an object and moving or picking up the object to see the serial number amounts to "trivializing the Fourth Amendment" and creates uncertainties which will hinder law enforcement without enhancing privacy.^{461}

Furthermore, is this not a case where the "search" is less intrusive that a seizure would be? Seizing and detaining personal articles until a search warrant is obtained often can involve a greater intrusion into liberty and security interests than an immediate search of the article.^{462} Assuming

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456. See id. (citing United States v. Cortez, 449 U.S. 411 (1981), which upheld an investigative detention of an automobile on the basis of reasonable suspicion, and United States v. Place, 462 U.S. 696, 709 & n.9 (1983) which held that Terry principles allow warrantless seizure and detention of a suspected drug dealer’s luggage on basis of reasonable suspicion to permit exposure to a trained dog, but the ninety-minute detention there was unlawful).

457. Id. at 327.

458. Id. at 329.

459. Id.

460. Id.

461. Id. at 333 (Powell, J., dissenting).

462. For example, see United States v. Place, 462 U.S. 696 (1983), where agents stopped Place at an airport concourse with reasonable suspicion that his suitcases contained narcotics. Id. at 698-99. When he refused consent to search, the agents seized his luggage in order to take it to a judge and obtain a warrant. Id. They allowed Place to go on his way. Id. The bags were taken to another airport where, 90 minutes after the seizure, a trained narcotics dog reacted positively to the luggage. Id. Since it was late Friday afternoon, the agents held
police had reasonable suspicion, but not probable cause, that the turntable had been stolen in a recent robbery, and thus could "seize" but not "search" it, might they post a guard in the home to stand over the turntable but order it not moved until the robbery victim could arrive and identify it? If so, have the privacy interests of the suspect been protected to any greater degree? Arguably, they have been significantly diminished. On the other hand, if police could not conduct even this minor seizure on reasonable suspicion, is not the line drawn an unreasonable one: An all-or-nothing distinction between viewing and writing down the serial number on an object which requires no probable cause at all, and moving an object a few inches to see the serial number which requires full probable cause?

The Court's restrictions on such minor intrusions become all the more difficult to understand when contrasted with police authority in other investigatory contexts. Based on reasonable suspicion, police can seize for investigation, persons and property in public places and conduct limited searches of persons and automobiles for weapons. When making an arrest in a home, police may search any area in the home which they reasonably suspect may harbor an individual who may pose a danger to them. Furthermore, without any reasonable suspicion, officers executing a search warrant may seize and detain persons who happen to be on the premises. Given the numerous situations in which police may, on the basis of no more than reasonable suspicion, seize and detain individuals and their property and conduct limited searches of homes, it is difficult to understand why the Fourth Amendment prevents police from moving a piece of stereo equipment a few inches to observe its serial number when they have reason to suspect that it had been stolen.

In this area as well, the High Court might find Traynor's approach instructive. Clearly focusing on the goal of promoting reasonable police conduct, the United States Supreme Court should reject complex and technical rules and should be reluctant to hold as unreasonable police

the bags until Monday morning when a warrant was obtained and cocaine found in the luggage. Id. The court upheld the initial detention but found its length - 90 minutes - unreasonable, stating that police could have arranged to meet Place with a trained dog at the first airport. Id. at 706, 709.

Assuming that police had used a trained dog at the time of the initial detention and thus gained probable cause to search the luggage at that time, the length of the detention of the luggage until a search warrant was procured may have been the same, and the intrusion on Place's liberty and privacy interests identical.

467. See supra notes 421-430 and accompanying text.
conduct which is a natural reaction to suspicious circumstances and which involves only slight or minor intrusions into privacy.

C. Relationship Between The Reasonableness and Warrant Clauses in the Contexts of Homes, Cars and Containers

With respect to intrusions into the sanctity of the home, Traynor did not hesitate to read the warrant clause into the reasonableness requirement. He emphatically rejected the argument that the installation of listening devices into private residences could be made lawful by the authorization of the chief of police or the district attorney.468 "[Constitutional] provisions protect the people from unreasonable invasions of their privacy by the police, and the determination of what is reasonable cannot be left to [the police]."469 In the context of home searches, Traynor agreed with, and incorporated into California law, decisions of the United States Supreme Court which demanded authorization by a neutral magistrate and which struck down warrantless searches despite facts unquestionably demonstrating probable cause.470 In cases dealing with home searches, he often quoted the following well-known passage from the United States Supreme Court's opinions regarding the importance of prior review by a neutral and detached magistrate.

[The] protection [of the Fourth Amendment] consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers. . . . The right of officers to thrust

469. Id. at 594, 290 P.2d at 509 (emphasis added).
470. "'Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.'" Id. at 594 (quoting McDonald v. United States, 335 U.S. 451, 455 (1948)); see People v. Marshall, 69 Cal. 2d 51, 56, 442 P.2d 665, 667, 69 Cal. Rptr. 585, 587 (1968) (stating that the delay and inconvenience necessary to obtain a warrant are never very convincing reasons to by-pass the constitutional requirement); People v. Privett, 55 Cal. 2d 698, 703, 361 P.2d 602, 605, 12 Cal. Rptr. 874, 877 (1961) (opinion by Dooling, J., with Traynor, J., concurring) (stating that "'[t]he sanctity of a private home is not only guaranteed by the Constitution . . . but it is traditional to our Anglo-Saxon heritage. 'A man's home is his castle' is, and should be, more than an empty phrase.'").
themselves into a home is also a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.\(^\text{471}\)

Thus, the court established a presumption that warrantless searches and seizures are invalid. Once a defendant establishes that an arrest was made or search conducted without a warrant, the burden rests with the prosecution to show proper justification.\(^\text{472}\) In contrast, with respect to searches or seizures outside the home or office context, Traynor generally relied on the reasonableness requirement rather than the warrant clause. This general reliance on reasonableness, however, often collides with the requirement of a warrant for home searches, particularly in the context of an arrest of a suspect in the suspect’s home and search of the home as incident to such arrest.

1. The Search Incident Exception to the Warrant Requirement

_Cahan\(^\text{473}\)_ did not indicate whether the court would follow what was then the federal rule of reasonableness announced in _United States v. Rabinowitz_.\(^\text{474}\) _Rabinowitz_ empowered law enforcement officers, incident to the arrest of an occupant, to search the occupant’s entire home without a search warrant based on the view that “the relevant test is not whether it is reasonable to secure a search warrant, but whether the search was reasonable.”\(^\text{475}\) The California court did not leave the issue unanswered for

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475. _Id._ at 66. A careful reading of the record in _Cahan_ suggests to Professor Barrett that the court would reject the broad federal rule. Barrett, _Exclusion of Evidence, supra_ note 15, at 572. Looking to the record in _Cahan_, Barrett speculated that “perhaps unintentionally” the court cast doubt on the search incident justification. _Id._
long. Less than a year after Cahan, the court adopted what was then the federal approach, holding that the fact that there is ample time to procure a search warrant will not invalidate a search incident to a lawful arrest. The court declined to follow the earlier rule of Trupiano v. United States which would "[require] a search warrant solely on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest." Furthermore, the court was not concerned that the police might fail to obtain an arrest warrant. As long as the arrest was based on probable cause and the method of entry was not unlawful, a search of the premises was justified as incident to the arrest despite the absence of an arrest warrant.

Also, the California Supreme Court lost no time in defining when a search is incident to an arrest. Justice Traynor rejected the technical requirement, which then appeared to be the prevailing view in the federal courts, that a search incident to an arrest must follow, rather than precede, the arrest. In People v. Simon, a police officer observed the defendant, age twenty-one, and a friend, who had a bottle of liquor,
walking in a warehouse district at 10:40 p.m. The officer stopped the men, searched them, and found a marijuana cigarette on the defendant. The officer testified that he stopped the men because he suspected they were in possession of an alcoholic beverage. Justice Traynor rejected the defendant’s argument that the search must always follow the arrest. If an officer has reasonable cause to justify an arrest before he makes a search incident, the officer may conduct the search incident either before or after the arrest. It was not until 1980 that the United States Supreme Court agreed with Traynor and declared that a search incident to a valid arrest does not become invalid merely because it precedes, rather than follows, the arrest.

An arrest, however, may not be used as a pretext to conduct a search, and police may not delay a formal arrest until the defendant is taken to the place of the search in order to justify the search as incident to the arrest. Moreover, a search incident must not only be justified by reasonable cause, it must also be closely linked, both spatially and temporally, with the arrest. In People v. Gorg, following the defendant’s arrest for shoplifting, police learned that he had been twice arrested for narcotics offenses. They went to the house where the defendant was renting a room and searched the room, discovering drugs. Rejecting the argument that police could reasonably search a person’s dwelling after arresting the person in some other place for a crime involving theft, Justice Traynor, writing for the court, cautioned that “[e]ven if the object of the search was to recover other stolen articles, it was not incidental to the arrest, for it was at a distance from the place thereof and was not
contemporaneous therewith." Thus, early on, Justice Traynor adopted the general approach of the United States Supreme Court requiring that a search incident to arrest have a spatial and temporal nexus with the arrest. For example, an arrest outside a house would not justify entry and search of the home, and a search of a home could not be justified by an arrest in the home three hours later. However, as incident to an arrest in a home, police could search the entire premises, including the garage which is under the immediate control of the arrestee, in order to find evidence connected with the crime.

On the other hand, California decisions demanded that a search incident bear some reasonable relationship to the arrest, in the sense that officers have some reason for the search other than the mere fact of arrest. Otherwise, the search becomes an unlawful exploratory search. For example, the search of Gorg’s home for narcotics following his arrest for shoplifting elsewhere, in addition to violating the temporal and spatial nexus principle, failed to qualify as a search incident to arrest because its

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492. *Id.* at 781, 291 P.2d at 472; see *People v. Burke*, 61 Cal. 2d 575, 580, 394 P.2d 67, 70, 39 Cal. Rptr. 531, 534 (1964) (holding that the search of a car trunk at police impound lot was too remote in time and place from the arrest of the occupants).

493. See *Stoner v. State of California*, 376 U.S. 483, 486 (1964) (stating that a search must not be conducted at a place remote from the arrest); *United States v. Rabinowitz*, 339 U.S. 56, 61 (1950); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (holding that a search must be substantially contemporaneous with the arrest).

494. See *People v. Henry*, 65 Cal. 2d 842, 845, 423 P.2d 557, 560, 56 Cal. Rptr. 531 (1967) (Traynor, J., concurring) (holding that the search of a hotel room is not incident to arrest when the arrest occurs several feet from the hotel entrance); *People v. Sandoval*, 65 Cal. 2d 303, 307 n.1, 419 P.2d 187, 189 n.1, 54 Cal. Rptr. 123, 125 n.1 (1966).


496. *People v. Dixon*, 46 Cal. 2d 456, 459, 296 P.2d 557, 559 (1956). During the search of the defendant’s apartment following her arrest therein, police saw defendant take something from her dress and move it toward her mouth. *Id.* at 458, 296 P.2d at 558. They seized it and found it was a key to one of the apartment garages which she rented. *Id.* at 458, 296 P.2d at 558-59. The police then searched the garage, discovering heroin. *Id.* at 458, 296 P.2d at 559. Remanding the case to the trial court, Justice Traynor instructed that if the court found that the officers had reasonable cause to enter the defendant’s apartment and arrest her, “the contemporaneous search of the garage would be a lawful search as an incident to that arrest since the garage was on the premises and under defendant’s control.” *Id.* at 459, 296 P.2d at 559.

The Courts of Appeal, however, resisted limits on search incident authority. The search of an apartment, garage and car was found to be incident to an arrest which took place in the backyard. *People v. Smith*, 166 Cal. App. 2d 302, 305-06, 333 P.2d 208, 210 (1958). Search of the defendant’s home was found to be a valid search incidental to his arrest on the street in front of his house, where he was seen going in and out of his house and making deliveries of narcotics to occupants of cars. *People v. Montes*, 146 Cal. App. 2d 530, 532-33, 303 P.2d 1064, 1066 (1956). However, the search of a suspect’s apartment was not deemed incident to his arrest on a public street 95 feet away from his apartment. *Hernandez v. Superior Court*, 143 Cal. App. 2d 20, 24, 299 P.2d 678, 681 (1956).
purpose was not limited to a search for stolen property—the subject of defendant’s arrest. The court explained that since the search of the defendant’s home occurred two days after his arrest and after police had discovered that he had a narcotics arrest record and after police learned that his landlord had found a bucket containing marijuana in his bathroom, “[t]he conclusion is inescapable that the . . . search was not made to discover other stolen articles, and that it had no reasonable relation to defendant’s arrest.” Later cases suggested that this relationship standard demands that police have cause to believe that evidence of the crime for which defendant was arrested would be found on the premises. The effect of this limitation on police search incident powers becomes more evident in the automobile context.

In *People v. Blodgett*, officers approached a double-parked cab and, observing suspicious conduct, ordered the passengers out and searched under the rear seat. As to whether the search might be valid as incident to an arrest, Traynor stated that while the cab driver could have been arrested for double-parking, “the search of his cab cannot be justified on that ground, for it had no relation to the traffic violation and would not have been incidental to an arrest therefor.” Similarly, an arrest of a driver for an unlawful U-turn could not justify the search of the car since

499. *See People v. Winston*, 46 Cal. 2d 151, 162, 293 P.2d 40, 46 (1956) (opinion by Spence, J., with Traynor, J., concurring) (stating that the Court regarded as “well settled” the rule that a search incident to a valid arrest is valid “if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible”); *see also People v. Van Eyk*, 56 Cal. 2d 471, 477-78, 364 P.2d 326, 330, 15 Cal. Rptr. 150, 154 (1961) (opinion by Gibson, J., with Traynor, J., concurring) (upholding the search of the defendant’s apartment for a receipt connecting him to the crime for which he was arrested, stating that the receipt “was not discovered as the result of a general or exploratory search but at the specific direction of [the officer] who had reason to believe that such a receipt might be there. . . . Accordingly, its seizure was proper under the rule that a reasonable search of the area under the control of the accused to obtain things used as a means of committing the crime is justified as an incident to his arrest.”); *People v. Smith*, 166 Cal. App. 2d 302, 305, 333 P.2d 208, 210 (1958) (stating that the officers had a reasonable belief that contraband might be found on the property searched and thus were not conducting an “exploratory search”).

The court most likely viewed this relationship requirement as a beneficial aspect of federal search incident principles worth adopting, rather than a deviation from them. See, e.g., *People v. Winston*, 46 Cal. 2d 151, 162, 293 P.2d 40, 46 (1956) (stating that during a search incident, “seizure . . . of evidence related to the crime is permissible,” and quoting Agnello v. United States, 269 U.S. 20, 30 (1925), that the justification for such search is “to find and seize things connected with the crime”).

500. 46 Cal. 2d 114, 293 P.2d 57 (1956).
501. Id. at 116, 293 P.2d at 58.
502. Id.
it bore no relation to the traffic violation or vagrancy charge for which the occupants were arrested.\textsuperscript{503}

In summary, the search incident to arrest rules formulated by the California Supreme Court under the leadership of Justice Traynor required that the arrest be supported by probable cause and that the search be closely linked, both spatially and temporally, with the arrest.\textsuperscript{504} While the scope of the search can include the entire premises or automobile in which the arrest took place, the search must bear a reasonable relationship to the arrest, in that it is supported by reasonable cause to believe that evidence of crime for which the defendant was arrested would be found in the search.\textsuperscript{505} Traynor felt that permitting a warrantless search when incidental to a lawful arrest on the premises "strikes a balance between the community's interest in law enforcement and its interest in preserving the privacy of homes."\textsuperscript{506}

Studying the United States Supreme Court's development of search incident standards, one is immediately struck by the uncertainty and inconsistency of the Court's decisions. The Court first voiced approval of a search incident to the arrestee's person in 1914.\textsuperscript{507} Later, the Court expanded this authority to include "whatever is found . . . in [the arrestee's] control"\textsuperscript{508} and then to "the place where the arrest is made."\textsuperscript{509} Over the next four decades, the Court gyrated between opposing rules and principles. Initially, search incident authority was not qualified by any requirement that police obtain a search warrant when practicable.\textsuperscript{510} However, in 1931, the Court indicated that despite a lawful arrest, police could not search the place of arrest if they had the opportunity to obtain a search warrant.\textsuperscript{511} The Court again reversed direction in 1947, rejecting any requirement for a search warrant when a search follows a valid arrest in a home.\textsuperscript{512} Then a few years later, the Court reversed directions yet again and required a search warrant.
“whenever reasonably practicable,” despite a valid arrest.¹³ Two years later in 1950, the Court once again did an about face, ruling that “[t]he test . . . is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”¹⁴

For the next nineteen years, the Court maintained this broad reasonableness standard with respect to the place of the arrest. However, while no search warrant was required if the search was incident to a valid arrest, the Court strongly suggested that to be reasonable, the search incident could not go beyond its valid purpose which was to discover evidence of the crime for which the suspect is arrested. Many times, the Court clearly set forth this limited purpose of a search incident, suggesting that it must have a reasonable relationship to the crime for which the suspect is arrested and not be a general exploratory search for the purpose of discovering evidence of other criminal conduct.¹⁵

In 1969, the Supreme Court, in *Chimel v. California,*¹⁶ limited the scope of a search incident to the arrest of one inside a home to the arrestee’s person and the area within the arrestee’s immediate control.¹⁷ This area was defined as the area from which the arrestee might gain possession of a weapon or destructible evidence.¹⁸ This new rule dramatically reduced the legitimate scope of a search incident to the arrest of one in a home or office. Authority to search the place of the arrest no longer included the right to search rooms other than the one in which the arrest occurs, or even through all closed or concealed areas in that room itself. The Court took its rationale from *Terry v. Ohio*¹⁹ and other stop and frisk cases: The scope of a Fourth Amendment intrusion must be “‘strictly tied to and justified by’ the circumstances which render its initiation permissible.”²⁰ However, the real thrust of *Chimel* was the shift in the Court’s view of the proper purpose of the search incident

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¹³. *Trupiano v. United States*, 334 U.S. 699, 705, 708 (1948) (stating that the search incident authority “grows out of the inherent necessities of the situation” and demands “something more in the way of necessity than merely a lawful arrest”).


¹⁵. See *Agnello v. United States*, 269 U.S. 20, 30 (1925) (stating that the justification for a search incident to arrest is “to find and seize things connected with the crime”); see also *Rabinowitz*, 339 U.S. at 61 (citing *Agnello*, 269 U.S. at 30); *Harris v. United States*, 331 U.S. 145, 151 (1947) (upholding an extensive search of a home on the ground that the agents were looking for items used in connection with the mail fraud offense for which the defendant was arrested).


¹⁷. *Id.* at 763.

¹⁸. *Id.*

¹⁹. 392 U.S. 1 (1968).

²⁰. *Id.* at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).
justification in relation to the importance of a search warrant. The purpose of search incident to arrest was narrowed from the interest in discovering evidence relating to the crime for which the suspect was arrested to the need to prevent the suspect from hiding or destroying evidence or gaining a weapon with which the suspect could harm officers or effect an escape.  

Officials could search for evidence only if necessary to preserve it from loss or destruction by the arrestee, not to preserve it from future loss at the hands of others, and certainly not merely to acquire it for use as evidence.

However, many on the Court were clearly frustrated with the Court’s search incident jurisprudence. As Justice White remarked, “[f]ew areas of the law have been as subject to shifting constitutional standards over the last fifty years as that of the search ‘incident to an arrest.’” Thus, it was not long before the Court, in its search to avoid “fine subtle distinctions,” began moving away from strictly limiting the scope of the search according to the justification for its initiation as in the stop and frisk cases, and toward broad sweeping “workable” rules.

With respect to searches of articles found on the arrestee’s person, the Court unhinged the scope of the search from the demand that it be strictly tied to the reasons supporting it. A valid custodial arrest, the Court decided, permits a full search of the arrestee, which includes a thorough search of the arrestee’s clothing and articles discovered on the arrestee’s person. Such search authority “while based on the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found on the person of the suspect.” Thus, it is irrelevant that the arresting officer has no reason to suspect the arrestee of being armed or of destroying evidence. The Court thereby untied the scope of search incident from the rationale justifying the initial intrusion.

This “workable rules” approach was next applied in the context of an arrest of an occupant of an automobile. New York v. Belton declared a “workable rule” in this context: “[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a

522. Id.
523. Id. at 770 (White, J., dissenting).
contemporaneous incident of that arrest, search the passenger compartment of that automobile,” which is defined as the interior of the passenger compartment, but not the trunk.\textsuperscript{528} The search may include all containers, whether open or closed, found anywhere therein and it need not be shown that the container might possibly hold a weapon or evidence of criminal conduct for which the suspect was arrested.\textsuperscript{529} Thus, courts need not litigate “in each case the issue of whether or not there was present one of the reasons supporting the authorization for the search of the person incident to a lawful arrest.”\textsuperscript{530}

The Court soon applied Belton’s workable rule approach in other contexts. In formulating rules governing the inventory of an arrestee’s possessions, the Court relied on the benefits of Belton’s “single familiar standard.”\textsuperscript{531} The Court anticipated that this standard would not require officers to make fine and subtle distinctions as to which containers may be searched and which must be sealed.\textsuperscript{532} Police may fully search the personal effects of a person lawfully arrested as part of routine administrative procedures at the police station incident to booking and jailing the arrestee.\textsuperscript{533} The same approach was applied to automobile inventories. As long as the inventory is conducted pursuant to standardized procedures and for a regulatory rather than investigatory purpose, it may be conducted on the street at the time of the vehicle stop rather than at the station and may include opening all closed containers found in the vehicle regardless of the lack of suspicion or reason for individual intrusions.\textsuperscript{534}

The Court then used Belton’s “familiar standard” in the Terry v. Ohio stop and frisk context. In Michigan v. Long,\textsuperscript{535} the Court concluded that Terry principles allow police who have detained an occupant of an automobile, and who reasonably believe that the occupant is dangerous and may gain immediate control of a weapon, to conduct a warrantless search

528. Id. at 460-61 n.4.
529. Id. at 461.
530. Id. at 459 (quoting Robinson, 414 U.S. at 235).
531. Id. at 458 (citing Dunaway v. New York, 442 U.S. 200, 213-214 (1979)).
532. Id. at 458.
534. Colorado v. Berdine, 479 U.S. 367, 372-73 (1987); see Florida v. Wells, 495 U.S. 1, 4 (1990) (holding that police discretion to open closed containers in the course of vehicle inventory must be regulated by standardized criteria or established routines in order to prevent such searches from becoming a ruse for general rummaging in the search to discover incriminating evidence. However, such criteria need not take an “all or nothing” form, and officers may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of such criteria as the nature of the search and the characteristics of the container).
of the car’s passenger compartment, limited to those areas where a weapon may be hidden. In defining the proper scope of the search, the Court looked to Belton’s “area search” rule, noting that it was developed because lower courts had not derived a workable definition of the “area within the immediate control of arrestee” in the automobile context. The Court justified the adoption of a similar “workable rule” covering the narrow compass of the passenger compartment of an automobile on the ground that roadside encounters between police and suspects are “especially hazardous.”

It appears that a number of lower courts are having great difficulty defining “the area within the immediate control of arrestee” with respect to arrests outside the automobile context. Some courts have used Belton to justify the search of the entire room in which the suspect was arrested, even after the suspect has been removed from it or has been disabled by handcuffs or other physical restraints. Courts often refer to the fact that the Belton rule gives police automatic search authority with respect to a designated area and does not demand cause to believe weapons or evidence of crime are present or limit the scope of search to discovery of such evidence. Consequently, Belton’s “workable rule” is currently undermining the limits imposed by Chimel on the scope of home searches following an occupant’s arrest. The Supreme Court someday may hold that the room in which an arrest takes place should be considered the functional equivalent of the passenger compartment of an automobile and authorize a search of the entire room or office in which an arrest takes place regardless of whether police can point to a concern for weapons or to reasons justifying a search for evidence.

536. Id. at 1049.
537. Id. at 1048-49 (quoting Belton, 453 U.S. at 460).
538. Id. at 1049.
539. See United States v. Anderson, 813 F.2d 1450, 1456 (9th Cir. 1987) (holding that an arrest in a hotel room allows a search of the whole room and a closed suitcase).
540. See United States v. Fleming, 677 F.2d 602, 607 (7th Cir. 1982) (holding that the search of a room where a person was arrested was justified as incident to the arrest, though the person had been removed five minutes earlier and was handcuffed, provided that the area searched was within the immediate control of the person when arrested and nothing happened between the time of the arrest and the search to make the search unreasonable); see also United States v. Turner, 926 F.2d 883, 887-88 (9th Cir. 1991) (adopting the Seventh Circuit’s standard in Fleming); Gay v. Florida, 607 So. 2d 454, 461-62 (Fla. Dist. Ct. App. 1992) (holding that an arrest of defendant at his place of employment—a video rental shop—allowed the search of a container found in the shop five minutes after defendant had been removed from the scene).
541. See State v. Murdock, 445 N.W.2d 618, 626 (Wis. 1990) (holding that the area in a home immediately surrounding place where the suspect was arrested could be searched, after the suspect had been handcuffed and placed face down on the floor, without regard to whether the suspect could actually gain access to the area searched).
Chimel, of course, rejected the distinction between the room in which the suspect is arrested and the entire house, characterizing it as "highly artificial." However, so is Belton’s "workable rule." Nevertheless, limits on searches following arrests are less definable in the context of homes than in the contexts of automobiles or personal inventories. The room in which the suspect is arrested may not be easily identifiable. Is it the room in which the person is caught, where the person is handcuffed, or where the person happens to be when informed that he or she is under arrest? What are the room’s parameters when the room opens through an alcove to another room or to a hallway?

Perhaps we should look to the approach of Justice Traynor and the California Supreme Court. While allowing a search of the entire premises, the California standard at least would guard against "exploratory searches" by requiring reasonable cause to believe that evidence of the crime for which the suspect is arrested would be found on the premises and limiting of the search to areas likely to contain such evidence.

On the other hand, adoption of Traynor’s search incident rule might be viewed as an unequal exchange which unduly enhances police authority to make warrantless searches. Allowing police to search the entire premises in which the suspect is arrested, even when limited to a search for weapons and evidence for which police have cause to search, often may be more intrusive than an automatic search without cause limited to the room in which the suspect is arrested. Furthermore, a rule that regards a home arrest as justifying a search of the entire home for evidence of the crime for which the suspect was arrested may encourage police to make home arrests in order to avoid search warrants. This is especially true when a warrantless search, not being circumscribed by the particularity requirements of the Fourth Amendment’s warrant clause, may give police more latitude than if they had procured a search warrant. Justice Traynor himself had misgivings as to the breadth of the search incident rules in relation to the rules governing warrant-based searches.

[In the case of a search incident to a valid arrest] the police are not required to call upon a magistrate in advance for a judicial determination of probable cause. Once they have made an arrest

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542. Chimel, 395 U.S. at 766. The Court agreed with Justice Jackson’s dissenting opinion in Harris v. United States, 331 U.S. 145, 197 (1946), who could find “no practical limit” once the search is allowed to go beyond “the person arrested and the objects upon him or in his immediate physical control.” Id. at 766 n.11.

543. See supra notes 488-506 and accompanying text.
and obtained the evidence, their very success may serve as a retroactive make weight for probable cause and thus tilt the scales for a judicial finding of such cause. Moreover, searches and seizures without a warrant, though always subject to the requirement of reasonableness, are not under the constraint of specifications "particularly describing the place to be searched and the persons or things to be seized." We can better appreciate the need for a correlation once we perceive that a limited search and seizure under a warrant may culminate in a valid arrest and that further search and seizure beyond the warrant specifications may then be legitimated as incident to the valid arrest. In other words, the police may have a shorter reach if they are armed with a warrant than if they are not. Understandably they may prefer to go unarmed.

So patent a discrepancy suggests how great is the need for a review of warrant requirements to determine whether they are unrealistically rigid in relation to the alternative of warrantless searches and seizures. Such a review would logically entail a converse inquiry, whether the sanctions of warrantless searches and seizures incident to a valid arrest are unduly lax.544

Nevertheless, later United States Supreme Court decisions strengthening the warrant requirement for home entries and enhancing the importance of warrants generally have in some respects made Traynor's concerns less weighty. First, the Court has made it clear that there is no "murder scene" or serious crime exception to the search warrant requirement which would allow a warrantless "emergency search" for evidence when there is no indication that the evidence would be destroyed or removed before police could obtain a search warrant.545 Second, in 1984, the Court adopted a good faith rule covering warrant-based searches according to which evidence need not be suppressed when obtained by officers acting in reasonable reliance on a search warrant later found to be defective.546 This good faith exception to the exclusionary rule encourages police to procure warrants in those cases where the Fourth Amendment does not demand a warrant or it is unclear as to

544.  Traynor, Mapp at Large, supra note 3, at 333.
545.  Mincey v. Arizona, 437 U.S. 385, 395 (1978); see Thompson v. Louisiana, 469 U.S. 17, 21 (1984) (per curiam) (finding unjustified the warrantless search of a murder scene though it lasted only two hours and was conducted on the same day as the murder).
whether one is required.\textsuperscript{547} Third, the Court's insistence that, absent exigent circumstances, police must obtain an arrest warrant for the arrest of a suspect in the suspect's own home,\textsuperscript{548} and a search warrant for a suspect's arrest in the home of another,\textsuperscript{549} severely restricts warrantless home entries for the purpose of making routine arrests. In the case of an arrest of a suspect in the suspect's own home, an arrest warrant guarantees that probable cause to believe the suspect has committed a crime was reviewed and affirmed by a magistrate.\textsuperscript{550} In the case of an arrest in the home of a third person, a search warrant demands that a magistrate also find probable cause to believe that the suspect is present on the premises to be searched.\textsuperscript{551} As a result of these decisions, police authority to make routine home arrests usually must be founded on a warrant issued by a magistrate and supported by an affidavit spelling out probable cause.

Despite these protections, in most cases searching a home for evidence of a crime will be more intrusive than searching a home for a suspect. However, police already have entered the home for the valid purpose of making an arrest, and the Supreme Court has taken the view that the principal intrusion involved in a home search is the entry itself rather than the extent or scope of the ensuing search.\textsuperscript{552} Also, the Court has authorized rather extensive searches for weapons and confederates in the course of a home search for a suspect. When the police are in hot pursuit of a suspect who has committed a dangerous felony, they may search enclosed areas and containers for weapons that the suspect may have used or is about to use to resist or escape.\textsuperscript{553} Similarly, the Court has held that

\textsuperscript{547} Police officers will have an incentive to obtain warrants in doubtful cases, since they will know that as long as they reasonably rely on a warrant, the evidence will not be suppressed on the ground that probable cause later is found lacking.


\textsuperscript{550} Payton, 445 U.S. at 586.

\textsuperscript{551} Steagald, 451 U.S. at 214 n.7.

\textsuperscript{552} See Payton, 445 U.S. at 589 (relying on Judge Leventhal's view that an entry to arrest and an entry to search for and seize property implicates the same interest in preserving the privacy and sanctity of the home and justifies the same level of Constitutional protection).

While the area legally searched may be broader when a search warrant is being executed, the difference is more theoretical than real because the police may need to check the entire premises for safety reasons and sometimes they ignore the restrictions on searches incident to arrest. . . Differences between search and arrest warrants are not a matter of kind but of degree since they share same fundamental characteristic-breath of entrance into one's home. In no case is the zone of privacy more clearly defined than when bounded by the unambiguous dimensions of one's home.

\textit{Id.}

\textsuperscript{553} See Warden v. Hayden, 387 U.S. 294, 298 (1967) (holding that while searching a house for a suspect in a robbery that had occurred five minutes before, police could search the washing machine, the bathroom flush tank, the bureau in the defendant's room, and under the defendant's mattress).
with an arrest warrant for a suspect in a robbery committed with an accomplice, police may enter the suspect’s house and, as incident to the arrest of the suspect, conduct a “protective sweep” of the areas of the house that the officers have a reasonable belief may harbor an individual posing a danger to the officer or to others. Thus, where police enter a suspect’s home with an arrest warrant and lawfully search for confederates and weapons, as well as for the subject of the warrant, a further search for evidence often may not be significantly more intrusive as long as the search is conducted only after the suspect’s arrest and is limited in scope to areas and containers which may conceal evidence of the crime for which the arrest was made. Police have already entered the home and searched for the suspect and possibly for weapons and confederates. Furthermore, whenever police have probable cause to believe that a suspect has committed a serious felony, they will usually have cause to believe that the suspect’s home may contain weapons, contraband, or other evidence of the crime. At this point, securing the home by police presence inside and outside and detaining unarrested occupants may be as intrusive as an immediate warrantless search for evidence.

If the Supreme Court were to adopt Traynor’s search incident rule allowing search of the entire premises in which the suspect is arrested, it should establish guidelines to guard against abuses. First, the requirement of a warrant for entry into homes to make arrests should not be weakened by insubstantial exceptions. Second, the good faith rule applicable to warrant-based arrests should cover only authority to arrest. It should not provide a shield for overly broad searches incident to arrests. Third, the Court should demand that the ensuing search incident, for evidence of the crime for which the suspect was arrested, be supported by probable cause. As in the case of an automobile search based upon probable cause, the scope of the search should be determined by what a magistrate could authorize, particularly describing the place to be searched and things to be seized. Only the prior approval of the magistrate should be waived. Thus, an arrest for outstanding traffic warrants would not justify a search incident for evidence, and an arrest for simple battery with a baseball bat would justify only a search for the bat. Fourth, the search incident for evidence should be limited to the time of the arrest and not authorize later

554. Maryland v. Buie, 494 U.S. 325, 327 (1990) (holding that following the defendant’s arrest on an arrest warrant in his home, police could enter the basement to search for additional suspects in order to protect the safety of the officers).

warrantless entries or searches. Finally, no search for evidence should be allowed if a suspect was not discovered and arrested in the home. Without an actual arrest in the home, there would be no authority for an incidental search of the home for evidence.

With such boundaries, the Traynor approach would be worth considering with respect to both automobile and home searches. Belton's "workable rule" allowing an automatic search of the car in which one is arrested, unlimited by any requirement of cause to believe that the search may reveal evidence of crime, is as underprotective of the automobile occupant's privacy as the current limitation on searches incident to home arrests is overprotective of the home occupant's privacy.

2. Seizing or Securing a Home While Seeking a Search Warrant

The general warrant requirement for home searches, in conjunction with the restrictions Chimel places on searches incident to an arrest in a home, raises the question whether, when faced with a threat of loss or destruction of evidence, police are permitted to secure a home, and if so, in what manner? At the time Traynor faced this question, searches incident to home arrest were not limited by Chimel and thus the matter was less urgent. However, Traynor did offer some guidance. In People v. Edgar, the defendant was in jail awaiting trial on extortion charges when he told his mother during her visit with him that "there were pictures at home that might be important to his case and asked her to hide them until he told her what to do with them." A deputy sheriff overheard the conversation and informed police who went to Edgar's home, arriving a few minutes before his mother. Police obtained the photographs by illegally threatening the mother with arrest. Writing for the court, Traynor found that the illegal coercion which produced the photographs was the equivalent of a warrantless search, and that the photographs must be suppressed. The prosecution, however, asserted that it was necessary for the officers to act without a search warrant in order to prevent Edgar's mother from disposing of the pictures. Traynor found no such

556. See supra notes 516-522 and accompanying text.
558. Id. at 173, 383 P.2d at 450, 32 Cal. Rptr. at 42.
559. Id.
560. Id. at 174, 383 P.2d at 450-51, 32 Cal. Rptr. at 42-43.
561. Id. at 174-75, 383 P.2d at 451, 32 Cal. Rptr. at 43.
562. Id. at 175, 383 P.2d at 452, 32 Cal. Rptr. at 44.
necessity. The police, Traynor reasoned, "could have kept his mother under surveillance, and forewarned of what Edgar wished her to do, they were confronted with no substantial risk that she would succeed in putting the pictures beyond their reach before a warrant could be obtained." 563

In People v. Marshall, 564 police, acting without a warrant but with probable cause to arrest the defendant for selling marijuana to an informant moments earlier, entered the defendant’s apartment to arrest him. 565 After discovering that the occupants had fled, they continued to search and found marijuana in a brown paper bag in a bedroom closet. 566 Traynor concluded that, although the entry was proper, "[h]aving ascertained that no one was in the apartment, the officers could not legally search it without a warrant." 567 He pointed out that "a short period of watching" would have prevented the possibility of material change in the situation during the time necessary to secure a warrant. 568 Thus, in the course of limiting the police in conducting warrantless home searches, Traynor informed police of what they could do when confronted with the prospect of immediate loss or destruction of evidence.

To this day, the United States Supreme Court has not provided a clear answer to these issues. The Court missed a number of opportunities to point the way. In Chimel, for example, the Court could have provided some guidance through its answer to Justice White, who in dissent sought to justify the search of Chimel’s home on the ground that his valid home arrest provided "an exigent circumstance justifying police action before the evidence [could] be removed." 569 Justice White believed that it was "unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search." 570 White asserted that Chimel’s wife must have known of the robbery for which Chimel was arrested and would have removed the evidence had the police simply

563. Id. at 175-76, 383 P.2d at 452, 32 Cal. Rptr. at 44.
565. Id. at 54-55, 442 P.2d 667, 69 Cal. Rptr. at 587.
566. Id. at 55, 442 P.2d 667, 69 Cal. Rptr. at 587.
567. Id. at 61, 442 P.2d 671, 69 Cal. Rptr. at 591.
568. Id. (citing Taylor v. United States, 286 U.S. 1, 6 (1932)).
570. Id. at 774 (White, J., dissenting).
arrested him and later returned with a search warrant. White further noted that there were three officers at the scene, and assuming two would be needed to bring Chimel to the station and obtain a search warrant, only one could have been left to guard the house. White continued:

However, if he not only could have remained in the house against petitioner's wife's will, but followed her about to assure that no evidence was being tampered with, the invasion of her privacy would be almost as great as that accompanying an actual search. Moreover, had the wife summoned an accomplice, one officer could not have watched them both.

Justice White apparently assumed that if prevented from searching incident to arrest, police either would have to leave the premises, thereby allowing confederates to remove or destroy evidence, or would likely be frustrated in any effort to secure the house until an warrant was obtained. Yet the majority did not think it important to disabuse anyone of these assumptions.

One year later, Vale v. Louisiana provided the Court with another opportunity to guide law enforcement officers and lower courts. With arrest warrants for Vale, police went to his home and observed a car drive up. Vale came outside, conducted a narcotics transaction with the driver, and walked quickly toward the house as the police approached. Vale was arrested on the front steps of his home. A cursory sweep of the home revealed no one, but Vale's mother and brother arrived within two to three minutes. Police then searched the house, discovering narcotics in the rear bedroom. The Court held the search unlawful because it was not incident to Vale's arrest. Even under pre-Chimel

571. Id. at 775 (White, J., dissenting).
572. Id. at 775 n.5 (White, J., dissenting).
573. Id.
574. The majority noted and rejected other arguments put forward in Justice White's dissent. Id. at 766 n.12. It also summarily rejected the state's argument that obtaining a search warrant would have been unduly burdensome. It did not however, suggest what the officers could have done to secure the home until obtaining a warrant. Id. at 768 n.16.
576. Id. at 32.
577. Id.
578. Id.
579. Id. at 33.
580. Id.
581. Id at 33-34.
law, a home search was not regarded as incident to an arrest if the arrest was conducted outside the home.\textsuperscript{582} Furthermore, the majority argued that the search was not justified by an emergency, in the form of a need to prevent the destruction of evidence, since no one was in the house when the officers first entered and, since the officers had procured arrest warrants for Vale, they could have obtained a search warrant for the house.\textsuperscript{583} However, the Court failed to respond to Justice Black's dissent which pointed out that the arrest warrants were based on an increase in bond for an earlier charge and police did not have the grounds for a search warrant for the house until they observed the narcotics transaction.\textsuperscript{584} Nor did the Court suggest the proper police response to a situation in which they reasonably believe that confederates or other third parties are likely to hide or destroy evidence.

For well over a decade, the Court provided no guidance to police and courts facing this not infrequent problem.\textsuperscript{585} Finally in 1984, the Court grappled with the question, yet failed to provide clear, workable rules.\textsuperscript{586} The most the justices could muster in \textit{Segura v. United States}\textsuperscript{587} was a judgment with a plurality opinion by Chief Justice Burger stating that police do not violate the Fourth Amendment when they enter the premises with probable cause, arrest the occupants who have legitimate possessory interests in the contents of the premises, take the occupants into custody for a reasonable period and thereafter secure the premises from within to preserve the status quo while other officers in good faith are in the process of obtaining a warrant.\textsuperscript{588} Burger found that entry and internal securing of premises while police seek to obtain a search warrant does not constitute an impermissible seizure of all contents of the premises.\textsuperscript{589} He noted that here, the securing was from within and that, arguably, the wiser course would have been to depart and secure premises from outside by stakeout.\textsuperscript{590} However, while the internal securing may have constituted an illegal search, it was no more interference with defendant’s possessory

\begin{thebibliography}{9}
\bibitem{582} Id.
\bibitem{583} Id. at 35.
\bibitem{584} Id. at 40 (Black, J., dissenting).
\bibitem{585} See Rawlings v. Kentucky, 448 U.S. 98, 106 (1980) (noting that it was an open question whether police could detain persons on the premises while a search warrant was being sought).
\bibitem{587} Id.
\bibitem{588} Id. at 798 (plurality opinion).
\bibitem{589} Id. at 810 (plurality opinion).
\bibitem{590} Id. at 811 (plurality opinion).
\end{thebibliography}
interests in the contents of the apartment than a perimeter stakeout. In other words, the initial entry and internal securing, legal or not, did not affect the reasonableness of the seizure. Intrusions on possessory interests occasioned by seizures can vary in nature and extent. Here, the persons whose possessory interests were interfered with by the occupation were already under arrest and in custody throughout the entire period. Thus, the actual interference with their possessory interests was virtually non-existent. Chief Justice Burger’s opinion, therefore, provides little guidance for future cases. It was not an opinion of the Court. Furthermore, it emphasized the limited intrusion on possessory interests due to the fact that the occupants were under arrest during the entire seizure and failed to confront the more difficult situation where the residents are absent or present but not under arrest.

3. *The Automobile and Plain View Exceptions to the Warrant Requirement*

The automobile and plain view exceptions to the warrant requirement provide another fertile ground for instructive contrasts between the approaches of the California Supreme Court under Traynor’s leadership and the United States Supreme Court. They demonstrate that much of the mischief perpetrated by the United States Supreme Court in the search and seizure area can be traced directly to the Court’s practice of shifting between different rationales for its rules and leaving broad areas unresolved. These cases also provide an example of the Court’s tendency to announce a sweeping new rule without clearly thinking through its consequences. Then, when the Court discovers that the rule’s application has led to illogical or unworkable results, the Court’s reluctance to overrule it outright has led to the creation of subtle, illogical and often unworkable distinctions or exceptions that soon return to haunt courts and law enforcement officials.

With respect to the automobile exception to the warrant requirement, Traynor initially followed the approach taken by the Supreme Court in *Carroll v. United States*. Carroll relied on exigent circumstances to justify warrantless searches of automobiles based on reasonable or

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591. *Id.*
592. *Id.* at 813 (plurality opinion).
593. *Id.*
probable cause alone: "Since an automobile may readily be moved from place to place, its search without a warrant is not unreasonable if the officer has reasonable cause to believe it is carrying contraband." Ordinarily, however, vehicle searches would not be permitted absent such reasonable cause or the valid arrest of an occupant. The result was a rather simple and workable standard: If police have probable cause to believe that an automobile contains contraband, they need not obtain a search warrant in order to search it. However, in Preston v. United States, the Court held that a search of an automobile at the police station some time after the arrest of the driver could not be justified as a search incident to that arrest. The California Supreme Court read Preston as modifying Carroll, such that police could search an automobile on the highway but, absent exigent circumstances, could not search it without a warrant later at the police station.

Not until 1970 did the United States Supreme Court put the matter to rest by adopting the rule, founded on the Carroll mobility rationale, which had been clearly stated by Traynor in 1956. In Chambers v. Maroney, the Court upheld the search of a car at the police station following the arrest of its occupants for armed robbery on the basis of probable cause to believe that the car contained evidence of the crime.

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596. Id. at 256, 294 P.2d at 15.
598. Id. at 368. The arrest was for vagrancy, and apparently the officers had no cause to believe that the car contained evidence of criminal activity. Id. at 365.

A few years later, the Court in Cooper v. California, 386 U.S. 58 (1967), upheld the warrantless search of a car held for forfeiture under state law following defendant's arrest for narcotics offenses. Id. at 62. In Cooper, the Court viewed Preston as dealing primarily with a search incident to an arrest where seizure and impound of the car were unrelated to the charge against the accused. Id. at 61.

599. See People v. Terry, 61 Cal. 2d 137, 152, 390 P.2d 381, 391, 37 Cal. Rptr. 605, 615 (1964) (applying the Traynor approach in Gale, the court approved the later warrantless search of the car on reasonable cause). Compare People v. Burke, 61 Cal. 2d 575, 580, 394 P.2d 67, 39 Cal. Rptr. 531, 534 (1964) (holding invalid the later warrantless stationhouse search of the car, the court distinguished Terry, stating that the search in Terry was justified by a need to prevent removal of evidence by the defendant and noting that it was decided "only a few days before Preston") with People v. Webb, 66 Cal. 2d 107, 126-27, 424 P.2d 342, 355, 56 Cal. Rptr. 902, 915 (1967) (finding, after an exhaustive review of the confusing and conflicting cases on the subject, that the stationhouse search justified on the ground that in view of the conditions at the scene of arrest, it was reasonable for the officers to interrupt the search of the car until it could be moved to a safer location as well as on the ground that, as in Cooper v. California, 386 U.S. 58 (1967), the car was subject to forfeiture, though forfeiture proceedings were never instituted). See also People v. Terry, 70 Cal. 2d 410, 427, 454 P.2d 36, 48, 77 Cal. Rptr. 460, 472 (1969).
600. See supra notes 594-596 and accompanying text.
602. Id. at 52.
The High Court read *Carroll* as allowing the search of an automobile on probable cause wholly apart from a search incident justification on the basis that the car is moving, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.\(^6\) Since the car could be searched immediately based upon reasonable cause for believing it contained contraband under *Carroll*, it could be searched later at the station since the same probable cause factor existed in both situations, as did the mobility of the automobile, "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured."\(^5\) However, "[f]or constitutional purposes," the Court saw "no difference between on the one hand the seizing and holding of a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant."\(^4\) Given probable cause to search, the Court regarded either course as reasonable.\(^6\) While the mobility rationale arguably fails to justify stationhouse car searches, the *Chambers* rule allowing warrantless automobile searches based on probable cause was relatively clear and workable. With probable cause, police could search an automobile without a warrant either when it was seized or later after it had been impounded without regard to the arrest of its occupants.

However, in *Coolidge v. New Hampshire*,\(^6\) the Court created a monster which for decades has haunted courts and law enforcement officials. *Coolidge* held that neither the automobile nor the plain view exceptions to the warrant requirement applied where a suspect was arrested in the suspect's home and where the suspect's car, parked in the suspect's driveway, thereafter was impounded and searched at the police station without a valid warrant but with probable cause to believe it contained evidence of crime.\(^6\) Following the murder of a young girl, the investigation headed by the state attorney general focused on *Coolidge*.\(^6\) A warrant for the search of his Pontiac was signed and issued by the attorney general acting as justice of the peace under a New Hampshire law which authorized all justices of the peace to issue search warrants.\(^6\) *Coolidge*

\(^6\) Id. at 51.
\(^6\) Id. at 52.
\(^6\) Id.
\(^6\) Id.
\(^6\) 403 U.S. 443 (1971).
\(^6\) Id. at 447-49, 462, 472-73.
\(^6\) Id. at 447.
\(^6\) Id.
was arrested in his home on the day the warrant was issued.\textsuperscript{611} Two and
one-half hours after he had been taken into custody, his car, which was
parked in his driveway, was towed to the police station.\textsuperscript{612} At the station,
Coolidge's car was searched and vacuumed two days after the seizure and
twice more over a year later.\textsuperscript{613} Vacuum sweepings, including particles
of gun powder taken from the car were introduced in evidence at
Coolidge's trial to prove that the victim had been in the automobile.\textsuperscript{614}

After rejecting the argument that the automobile search was a valid
search incident to arrest,\textsuperscript{615} the Court turned to the automobile search
exception. The Court recognized that police may make a warrantless search
of an automobile where they have probable cause to believe that contra-
band goods are concealed therein\textsuperscript{616} and that police may also seize the
car and take it to the station and search it there without a warrant.\textsuperscript{617}
However, the Court viewed the automobile exception as limited to a
movable vehicle or other "means of transportation" situations where it is
not practicable to secure a warrant because the vehicle can be quickly
moved out of the locality or jurisdiction in which the warrant must be
sought.\textsuperscript{618} Here, the automobile exception did not apply since the
opportunity for obtaining a warrant was not "fleeting."\textsuperscript{619} This was not
the open highway situation involved in the usual car stop. Not only did the
police have probable cause for some time before the search, there was no
evidence to indicate that the car might be moved or the evidence inside
destroyed.\textsuperscript{620} Coolidge had been arrested, police were on guard at the
house, and his wife had been sent elsewhere to spend the night.\textsuperscript{621} Thus,
there was no way in which anyone could have destroyed evidence in the
car. Curiously, the Court also noted that the objects for which there was
probable cause to search were neither stolen, nor contraband, nor
dangerous.\textsuperscript{622}
Finally, the Court rejected the argument that the intrusion could be justified as a seizure of an instrumentality of the crime in plain view. A section of the opinion commanding only a plurality regarded the plain view doctrine as having two limits: (1) Plain view alone cannot justify entry into a home for the purpose of seizing evidence, and (2) the discovery of the evidence in plain view must be inadvertent. Here, the plain view exception did not apply since the discovery was not inadvertent and the items seized did not involve contraband or objects dangerous in themselves.

Coolidge stirred the pot of search and seizure law with respect to the automobile exception to the warrant requirement. The Court previously had established that automobile searches were subject to the probable cause, but not the warrant requirement, whether the search took place on the highway or later at the police station impound lot. In Chambers v. Maroney, the Court saw no constitutional difference between warrant-based car searches, where the car was seized and held while the probable cause question was being presented to a magistrate, and immediate car searches without a warrant. As to which is the greater intrusion, the Court responded that it is “a debatable question . . . depend[ing upon] a variety of circumstances.”

Coolidge, however, implicitly rejected this reasoning and found opportunity to obtain a warrant a critical factor in car search cases, at least where such opportunity existed prior to the car’s seizure and where the objects of the search were not stolen, contraband or dangerous articles. This approach conflicted with the privacy intrusion analysis of Chambers, as well as with the Court’s earlier abandonment of the “mere evidence” rule but appeared to follow Chambers in judging exigent circumstances by looking to the time of the seizure rather than to the time of the search. Chambers, the Court recently recognized, had “refined the exigency requirement . . . when it held that the existence of exigent circumstances was to be determined at the time the automobile is seized.”

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623. Id. at 464.
624. Justice Harlan concurred on another ground. See id. at 490-92 (Harlan, J., concurring).
625. Id. at 468-69.
626. Id. at 472.
629. Id.
630. Id. at 51-52.
Chambers and Coolidge, the car was securely held at the police station at the time of the search, and the Court has consistently rejected any requirement of exigency for warrantless stationhouse automobile searches.\textsuperscript{632} However, this approach runs counter to the rule that the opportunity to obtain a warrant must be judged at the point immediately prior to the search.\textsuperscript{633} The Court has failed to explain why the time element for determining the existence of exigent circumstances should be different in the case of automobiles than in the context of homes or movable objects such as luggage or packages. The Court later placed the automobile exception on firmer ground by recognizing a lesser expectation of privacy in cars than in homes\textsuperscript{634} and rejecting inherent mobility as its principal foundation,\textsuperscript{635} but has not overruled Coolidge on its facts. Nor has the Court explained why it might not apply when the objects sought include contraband or stolen property.\textsuperscript{636}

Coolidge also threw a monkey wrench into the law of plain view seizures. The case led most lower courts to assume that the inadvertency limitation on the plain view seizures was constitutionally mandated, and they developed a significant body of law on the subject of reasonable anticipation of the presence of evidence.\textsuperscript{637} Indeed, as late as 1983, a plurality opinion by Justice Rehnquist applied the inadvertency requirement, but held it satisfied in that case.\textsuperscript{638} However, some lower courts did not regard that portion of Coolidge setting forth the inadvertency rule as binding authority.\textsuperscript{639} California, for example, refused to follow the Coolidge inadvertency rule in a case that was factually nearly identical to Coolidge because the Court found the Coolidge rule irrational and unnecessary. The California court pointed out that "the judgment of


\textsuperscript{633} See Arkansas v. Sanders, 442 U.S. 753, 763 (1979) (stating that, "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control" (emphasis added)); see also United States v. Chadwick, 433 U.S. 1, 13 (1976); South Dakota v. Opperman, 428 U.S. 364, 367 (1976); Cady v. Dombrowski, 413 U.S. 433, 446-447 (1973).


\textsuperscript{635} See Chadwick, 433 U.S. at 13.

\textsuperscript{636} Distinctions between such articles and "mere evidence" were eliminated by the Court in Warden v. Hayden, 387 U.S. 294 (1967) and Andresen v. Maryland, 427 U.S. 463 (1976).

\textsuperscript{637} See 2 LAFAVE, SEARCH AND SEIZURE, supra note 450 § 5.3(b), at 490-91; Comment, The Plain View Doctrine After Horton v. California: Fourth Amendment Concerns and the Problem of Pretext, 96 DICK. L. REV. 467, 473-77 (1992) [hereinafter Comment, Plain View After Horton].


\textsuperscript{639} See Comment, Plain View After Horton, supra note 637, at 473.
an equally divided United States Supreme Court is without force as precedent."

Also confusing was the United States Supreme Court's reference to the fact that Coolidge did not involve contraband or objects dangerous in themselves, suggesting that the inadvertency requirement would not apply if such objects were involved. As noted, the Court earlier had rejected the "mere evidence" rule of Gouled v. United States.641 Was the Court returning to distinctions between contraband, instrumentalities, and "mere evidence" or was the Court referring to the presence of objects that may create an emergency, justifying immediate seizure without warrant? Founding the distinction on an emergency rationale would not be unreasonable, but it does not seem that the presence of "contraband" invariably would present a situation calling for an immediate warrantless search.

Nearly two decades after creating confusion in the plain view area, the United States Supreme Court rejected inadvertency as a necessary condition to plain view seizures, and adopted the California view. Noting that the plurality opinion in Coolidge was not binding precedent, the Court in Horton v. United States642 found no reason to impose the rule since it would do little to protect Fourth Amendment values.643 However, not content with merely rejecting the inadvertency requirement, the Court sowed confusion anew by explaining the requirements for plain view seizures: (1) An officer must not violate the Fourth Amendment in arriving at the place from which the evidence is plainly viewed; (2) the incriminating character of the evidence must be "immediately apparent;" and (3) the officer must have a lawful right of access to the object itself.644 The Court used these requirements to distinguish Coolidge, and to avoid overruling it.645 The incriminating character, and thus probative value, of Coolidge's car, the Court reasoned, was not immediately apparent

641. 255 U.S. 298, 310 (1921).
642. 496 U.S. 128 (1990). A coin collector was robbed by two masked men armed with a machine gun and a "stun gun." Id. at 130. Police had probable cause to believe that the defendant committed the crime, and obtained a search warrant for his home. Id. at 130-31. The affidavit referred to police reports describing weapons as well as proceeds, but the warrant issued by the magistrate authorized the search only for proceeds. Id. On executing the warrant, police did not find the stolen property but did find weapons in plain view and seized them. Id. at 131. The officer testified that while he was searching for the rings, he was also interested in finding other evidence connecting the defendant to the robbery, and thus the seized evidence was not discovered "inadvertently." Id.
643. Id. at 136.
644. Id. at 136-37.
645. Id.
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but remained uncertain until after the interiors were swept and examined. 646 Furthermore, the seizure of the car was accomplished by means of a warrantless trespass on Coolidge’s property. 647 Therefore, “the absence of inadvertence was not essential to the Court’s rejection of the State’s ‘plain view’ argument in Coolidge.” 648 Recently, citing Horton, the Court reaffirmed that plain view seizures are justified only “if they are unaccompanied by unlawful trespass.” 649

In clarifying one area of plain view doctrine by adopting the California approach, the Court planted confusion in other areas. Specifically, what relevance was it that the officers trespassed on defendant’s property? If, for example, the officers had looked inside Coolidge’s car and had seen the bloody clothing or a plastic bag of drugs, could they have seized the car or examined it without a warrant? What if officers trespassing in the open fields come across bloody clothing which they have probable cause to believe connects the defendant to a recent murder; can they seize it without a warrant? If so, can they take it to the station and examine it without a warrant? Trespass alone has never been a reason to reject plain view of evidence in the open fields cases. 650 In fact, the Court has regarded the trespass factor as having little relevance to the propriety of police conduct under the Fourth Amendment. 651 The crucial requirement is simply that the plain view seizure must not be the product of an unlawful search and that the police must not be engaged in a search in violation of the Fourth Amendment when they come upon the contraband.

Furthermore, what is the meaning of “immediately apparent”? In Coolidge, the officers had probable cause to believe the car contained seizable evidence. 652 Thus, “immediately apparent” appears to require more than probable cause, but how much more? In United States v. Jacobsen, 653 the Court seemed to demand “virtual certainty” for application of the plain view doctrine. Federal Express agents had opened a damaged package and discovered plastic bags containing white powder. 654 They placed the bags back in the package and called federal

646. Id. at 137.
647. Id.
648. Id.
651. Id.
654. Id. at 111.
agents who came and examined the package, removed the bags, and examined the powder.\textsuperscript{655} Since the Federal Express actions were private in character, they lacked state authority and thus did not violate the Fourth Amendment. However, the actions of the federal agents had to "be tested by the degree to which they exceeded the scope of the private search."\textsuperscript{656} Had the white powder been in plain view at the time the federal agents arrived, there would have been no further search, but it was not entirely clear that powder was visible to the agent before he removed the tube from the box.\textsuperscript{657} Yet the Court concluded that even if the powder was not itself in plain view,\textsuperscript{658} there was no government search since there was a virtual certainty that nothing else of significance was in the package and that an inspection of the package would not reveal anything more than that which the agent had already been told.\textsuperscript{659} Following Jacobsen, the Tenth Circuit required that in order to rely on plain view the police must be virtually certain of what they will find inside a package, i.e., that the contents of the package be a "foregone conclusion."\textsuperscript{660} Later, however, the Supreme Court equated "immediately apparent" with probable cause.

In Arizona v. Hicks,\textsuperscript{661} the Court rejected the argument that plain view seizures of articles in the home are justified on less than probable cause.\textsuperscript{662} The Court stated that "[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause."\textsuperscript{663} In Minnesota v. Dickerson,\textsuperscript{664} the Court decided that officers may seize

\begin{itemize}
\item 655. Id. at 111-12.
\item 656. Id. at 115.
\item 657. Id. at 118.
\item 658. Id. at 118-19. The powder was still enclosed in the many containers and covered with papers. Id.
\item 659. See Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979) (suggesting that not all containers and packages deserve full protection of the Fourth Amendment, and giving as examples "a kit of burglar tools or a gun case which by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance"); see also Texas v. Brown, 460 U.S. 730, 743-44 (1983) (upholding the seizure of a tied-off balloon and later search of the balloon without a warrant under the plain view doctrine). In Brown, Justice Stevens believed that ordinarily probable cause that a container conceals contraband would not authorize a warrantless search, but the balloon here could be one of those rare single-purpose containers which by their very nature could not support a reasonable expectation of privacy. Id. at 750-51. Unlike a suitcase or paper bag, a balloon of this kind might be used only to transport drugs. Id. at 751. Thus, the officer could have concluded that it contained heroin "with a degree of certainty that is equivalent to the plain view of the heroin itself." Id.
\item 660. United States v. Corral, 970 F.2d 719, 725 (10th Cir. 1992).
\item 662. Id. at 326-27.
\item 663. Id. at 327.
\item 664. 113 S. Ct. 2130 (1993).
\end{itemize}
contraband based on plain feel, as well as plain view, provided its incriminating character is immediately apparent, but warned that the plain view doctrine will not apply if the police lack probable cause to believe that the object in plain view is contraband, "i.e., if 'its incriminating character [is not] immediately apparent.'" Recently, the Court stated that plain view seizures can be justified only if they meet the probable cause standard, that is, "there is probable cause to associate the property with criminal activity." While suggesting that "probable cause" is the equivalent of "immediately apparent," the Court did not overrule Jacobsen and other authorities which clearly indicated that probable cause alone was not sufficient to invoke the plain view doctrine. At least one lower court has continued to rely on these older authorities in holding that plain view demands more than probable cause.

Confusion now abounds. In Coolidge, the Court assumed that police had probable cause to believe that Coolidge's car contained evidence of the crime. It even appeared that the officers had cause to believe that the car was more than a mere container of evidence since there was reason to believe that it might have been used in the victim's abduction and murder. Thus, it seems that the incriminating character of the car was "immediately apparent" to the officers at the time of the seizure. Yet we are left with the Court's announcement in Horton that although Coolidge's discussion of plain view is not binding precedent, "the decision nonetheless is a binding precedent." Does the "immediately apparent" meaning of this statement, that the Coolidge result on its facts is entitled to binding precedent, mean that the California Supreme Court decision on nearly identical facts holding the other way is inconsistent with the Fourth Amendment? Much of this uncertainty could have been avoided by the Court merely overruling Coolidge rather than allowing the ghosts of bad

665. Id. at 2136-37 (citing Horton v. California, 496 U.S. 128, 136 (1990)).
667. Texas v. Brown, 460 U.S. 730 (1983); see id. at 749-50 (Stevens, J., concurring) (stating that ordinarily probable cause that a container conceals contraband would not authorize a warrantless search). In his plurality opinion in Walter v. United States, 447 U.S. 649 (1980), Justice Stevens rejected the contention that labels on boxes which gave probable cause to believe that the films contained therein were obscene was enough to invoke the plain view doctrine. Id. at 658 n.11. Justice Stevens' opinion for the Court in United States v. Jacobsen, 466 U.S. 109 (1984) relied on and affirmed the foregoing principles. Id. at 121.
670. Id. at 447 (plurality opinion).
precedent, with its subtle, illogical and unworkable distinctions, to turn search and seizure law into a house of horrors.

4. Other Movable Containers and Plain View

The Court’s reluctance to overrule decisions announcing illogical or unworkable rules has led to even greater confusion with respect to searches of movable containers of evidence outside the home or office context. The history of Chief Justice Burger’s opinion in United States v. Chadwick provides a good example of the confusion created by the Court’s water-torture overruling technique.

Prior to Chadwick, federal courts had tended to treat searches of movable containers, such as packages and luggage, as similar to searches of automobiles. In the vehicle context, as long as the car was initially seized on the highway or in a situation where it would be impractical to obtain a warrant, a warrantless search could be made later at the police station even though the police could easily have obtained a warrant at the station. Following this approach, lower courts routinely held that containers and packages found during a legitimate warrantless search of an auto also could be searched without a warrant. Even outside the automobile context, warrantless searches of luggage, packages, and other movable containers were allowed if the searching officer had probable cause to believe that the article contained seizable items though it might be securely in police custody at the time of the search. Reviewing the authorities in 1974, after Coolidge but before Chadwick, Professor Anthony

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 Earlier, however, several justices in Coolidge stated that they “found no case that suggests [an extension of the automobile exception] to ‘containers’ that are equally movable, e.g., trunks, suitcases, boxes, briefcases, and bags.” Coolidge, 403 U.S. at 461 n.18 (plurality opinion).
676. See, e.g., Hernandez v. United States, 353 F.2d 624, 627-28 (9th Cir. 1965), cert. denied, 384 U.S. 1008 (1966); United States v. Zimmerman, 326 F.2d 1, 4-5 (7th Cir. 1963); Romero v. United States, 318 F.2d 530, 532 (5th Cir. 1963), cert. denied, 375 U.S. 946 (1963). However, there was some authority to the effect that warrantless searches of containers other than vehicles required a showing of likelihood that the object would be moved during the period necessary to obtain a warrant. See Corngold v. United States, 367 F.2d 1, 3 (9th Cir. 1966); cf. Nugent v. United States, 409 U.S. 1065, 1066 (1972) (White, J., dissenting from denial of rehearing); Coolidge, 403 U.S. at 461 n.18 (plurality opinion).
Amsterdam concluded that "[a]pparently, warrantless searches of other highly mobile articles—such as luggage deposited for shipment out of rail or air terminals—are also permissible when there is probable cause to believe that they contain criminally related objects." \textsuperscript{677}

The Court in \textit{Chadwick}, however, concluded that containers and movable property outside the home or vehicle context should be treated similarly to homes rather than to automobiles.\textsuperscript{678} The Court viewed the \textit{Chambers} automobile search principles as not applicable to movable containers other than cars—in this case a locked footlocker.\textsuperscript{679} With probable cause to believe that a footlocker carried by the defendants contained contraband, police arrested the defendants after they loaded it into a car trunk, but before they could drive off.\textsuperscript{680} Defendants and the footlocker were taken to the station where, an hour and a half after its seizure, the footlocker was searched without a warrant.\textsuperscript{681} Rejecting the government’s contention that the search of movable luggage should be considered analogous to the search of an automobile,\textsuperscript{682} the Court declared that one’s expectation of privacy in personal luggage and other personal effects is "substantially greater" than in an automobile.\textsuperscript{683} The Court also rejected the argument that the search was justified as incident to the defendants’ arrest.\textsuperscript{684} The search of the footlocker was remote in time and place from the arrest, and the fact that a person arrested in public is in possession of property as to which there is probable cause to believe contains contraband or evidence, does not justify search of the property after it "comes under the exclusive dominion of police authority."\textsuperscript{685}

Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize

\textsuperscript{678} United States v. Chadwick, 433 U.S. 1, 13 (1977).
\textsuperscript{679} \textit{Id.} at 11-13.
\textsuperscript{680} \textit{Id.} at 3-4.
\textsuperscript{681} \textit{Id.} at 4.
\textsuperscript{682} \textit{Id.} at 11-12.
\textsuperscript{683} \textit{Id.} at 13. The Court also noted that secure storage facilities are usually available for luggage and that such "may often not be the case when automobiles are seized." \textit{Id.} at 13 n.7.
\textsuperscript{684} \textit{Id.} at 15.
\textsuperscript{685} \textit{Id.}
a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.\textsuperscript{686}

Soon after Chadwick, the Court expanded its principles. In Arkansas \textit{v. Sanders},\textsuperscript{687} police observed the defendant arrive at an airport with a suitcase, which they had probable cause to believe contained marijuana, and watched as the defendant’s companion placed the suitcase in the trunk of a taxi cab.\textsuperscript{688} Police stopped the taxi several blocks from the airport, seized the suitcase and opened it, discovering marijuana.\textsuperscript{689} Holding that Chadwick required police to obtain a warrant to search the suitcase, the Court announced that its principles were not limited to where the vehicle was parked at the curb and the container searched at the station, but also applied where the car was moving and the police stopped it, seized the luggage, and searched it at the scene.\textsuperscript{690} Furthermore, the Court concluded that Chadwick’s protection was not limited to luggage, but applied to all closed or opaque containers: “[A] diary and a dish pan are equally protected by the Fourth Amendment.”\textsuperscript{691} However, the Court vacillated on the question of whether Chadwick applied to packages found in a car lawfully searched under the Chambers automobile exception. The Court first answered in the affirmative, stating that “closed pieces of luggage found in a lawfully searched car are protected to the same degree as are closed pieces of luggage found anywhere else.”\textsuperscript{692} Then, one year later, in United States \textit{v. Ross},\textsuperscript{693} the Court executed an about-face, holding that “once probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”\textsuperscript{694} The Court rejected Chadwick’s distinction between automobile compartments and separate containers, stating that: “Certainly, the privacy interests in a car’s trunk or

\textsuperscript{686} Id. (emphasis added).
\textsuperscript{687} Id. at 753 (1979).
\textsuperscript{688} Id. at 755.
\textsuperscript{689} Id.
\textsuperscript{690} Id. at 763-64.
\textsuperscript{691} Robbins \textit{v. California}, 453 U.S. 420 (1981); see United States \textit{v. Ross}, 456 U.S. 798, 822 (1982) (stating that “[i]just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case”).
\textsuperscript{692} Robbins, 453 U.S. at 425.
\textsuperscript{693} 456 U.S. 798 (1982).
\textsuperscript{694} Id. at 825.
glove compartment may be no less than those in a movable container."

After cutting away Chadwick's principal foundation, the Court left its skeletal remains hanging in the wind to frighten and confuse travelers who must take the perilous journey through the land of cars and containers. Rather than clarifying the law by overruling Chadwick and Sanders, the Court distinguished them. The Court in Ross pointed out that "the suspected locus of the contraband" was the luggage, not the automobile, and police had no probable cause to search anything in the automobile except the luggage. On the other hand, in Ross the officers had probable cause to search "the entire vehicle" on the ground that an informant had said that the defendant had narcotics in the trunk of his car. The result of this attempt to distinguish rather than overrule a confusing and unworkable rule was that the more the police knew of the specific location and packaging of contraband, and thus the greater probability of discovering contraband in a particular container in an automobile, the less freedom they had to search it. In Ross, the probable cause was based on an informant's tip that the defendant was selling narcotics which he kept in the trunk of his car. This justified the warrantless searches of a brown paper bag and a zippered leather pouch which were found in the trunk of the defendant's car. In Chadwick, on the other hand, the probable cause arose principally from a dog sniff of the defendants' luggage, which was thereafter placed in the trunk of a defendant's car. Similarly in Sanders, the probable cause centered on defendant's suitcase which was placed in the trunk of a taxi. Apparently, if the police in Ross had been told that defendant kept the narcotics in a brown bag in the car trunk, police would have needed a warrant to search the bag. Luckily for them, they had not been informed of the brown bag but only of the presence of narcotics in the trunk.

Fourteen years after Chadwick, the Court recognized these anomalies and abandoned the Chadwick-Sanders rule with respect to searches of containers found in automobiles. In California v. Acevedo, the Court

696. Ross, 456 U.S. at 813.
697. Id.
698. Id.
699. Id. at 817.
701. See supra notes 687-689 and accompanying text.
adopted "one clear-cut rule": "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." Police saw the defendant leave an apartment carrying a brown paper bag which they believed contained marijuana, place the bag in the trunk of a car, and start to drive away. They stopped the car, opened the trunk, and searched the bag, discovering marijuana. The Court noted that while the police had probable cause to believe the bag in the trunk contained marijuana, they did not have probable cause to believe that there was contraband in any other part of the car and, thus, had no probable cause to search the entire vehicle. Rejecting the Chadwick-Sanders rule respecting the search of a containers in cars, the Court upheld the search of the bag on the ground that containers found in an automobile may be searched without a warrant if the search is supported by probable cause. Thus, the Court finally eliminated the "curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile."

However, the Supreme Court viewed Chadwick as generally demanding a search warrant for the search of a container outside the automobile context, even with full probable cause to believe that it contained contraband or seizable evidence, and Acevedo maintained this aspect of Chadwick's warrant requirement. Though Ross had rejected any distinction between expectations of privacy in car compartments and separate containers, Acevedo maintained the warrant requirement for searches of containers not found in automobiles. While a paper bag or a briefcase carried on the street is protected by the general warrant

703. Id. at 1991.
704. Id. at 1984-85.
705. Id. at 1985.
706. Id. at 1991.
707. Id.
708. Id.
709. See Walter v. United States, 447 U.S. 649, 658 (1980) (holding that although labels on boxes gave probable cause to believe that a package contained obscene films, a search warrant was required absent consent or exigent circumstances). Chadwick held that authority to possess a package is distinct from authority to examine its contents. Id. at 654; see United States v. Jacobsen, 466 U.S. 109, 120 n.17 (1984) (refusing to sanction warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search, noting that according to Chadwick, "[a] container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant").
requirement, it loses this protection as soon as it is placed in a car, even if the owner locks it in the glove compartment or trunk. Thus, by keeping alive the *Chadwick* rule with respect to containers not found in vehicles, the Court drew another curious line between a container that coincidentally turns up in an automobile and one that does not. The Court in *Ross* had recognized that it was arguable that the same exigent circumstances that permit a warrantless search of an automobile would justify the warrantless search of a movable container,\(^{713}\) but the Court put that question to one side "[i]n deference to the rule of *Chadwick* and *Sanders*.\(^{714}\) The *Acevedo* Court answered the question as to containers in cars, but in distinguishing cases involving container searches outside the automobile context,\(^{715}\) the *Acevedo* Court left in place *Chadwick*’s warrant requirement for movable containers generally and left us still struggling under the weight of Chief Justice Burger’s baggage.\(^{716}\)

Movable container searches and plain view seizures also bedeviled Justice Traynor and the California Supreme Court. In *People v. Marshall*,\(^{717}\) decided after *Preston*\(^{718}\) but prior to *Chambers*,\(^{719}\) police sent an informant to the defendant’s apartment to purchase marijuana.\(^{720}\) The informant soon returned with marijuana in a cellophane bag and told the officers waiting outside that, when in the defendant’s bedroom, the defendant had given it to him after taking it from a brown paper bag that contained more cellophane bags of marijuana.\(^{721}\) The officers entered to arrest the defendant, but found no one after a cursory search of the living room, bedroom, and bathroom.\(^{722}\) An open window indicated that the occupants had fled.\(^{723}\) One officer detected a sweet odor similar to that of the marijuana produced by the informant and recognized it as similar to marijuana soaked in wine.\(^{724}\) The officer noted that the odor came

\(^{713}\) *Ross*, 456 U.S. at 809.

\(^{714}\) *Acevedo*, 111 S. Ct. at 1988 (citing *Ross*, 456 U.S. at 809-10).

\(^{715}\) *Id.* at 1988-89.

\(^{716}\) *Id.* Justice Scalia in concurrence described the Court’s holding as “the continuation of an inconsistent jurisprudence that has been with us for years” and warned that “[t]here can be no clarity in this area unless we make up our minds.” *Id.* at 1993 (Scalia, J., concurring).

\(^{717}\) *Id.* at 55, 442 P.2d at 667, 69 Cal. Rptr. at 587 (1968).

\(^{718}\) *Preston* v. United States, 376 U.S. 364 (1974); see *supra* note 597.

\(^{719}\) *Chambers* v. Maroney, 399 U.S. 42 (1970); see *supra* note 601.

\(^{720}\) *Marshall*, 69 Cal. 2d at 54, 442 P.2d at 667, 69 Cal. Rptr. at 587.

\(^{721}\) *Id.*

\(^{722}\) *Id.* at 55, 442 P.2d at 667, 69 Cal. Rptr. at 587.

\(^{723}\) *Id.*

\(^{724}\) *Id.*
from an open cardboard box on the floor inside an open bedroom closet. The officers discovered a closed brown paper bag which they opened to find twenty-one plastic bags of wine-soaked, sweet-smelling marijuana. Justice Traynor, writing for the court, found that the officers had properly entered the apartment to arrest the defendant, but he concluded that they acted unlawfully in seizing and searching the brown paper bag without a warrant. The plain view doctrine did not apply since "in plain smell" is plainly not the equivalent of "in plain view." The paper bag itself was not contraband, and only by prying into its interior could the officer "be sure that he was seizing contraband and nothing more." Traynor reasoned that relying on odor might mislead officers and lead to fruitless invasions of privacy. Furthermore, prior to discovery of the marijuana, the officers were satisfied that the occupants had departed. Thus, even if the marijuana had been in plain view, it was found during an unlawful search for evidence, rather than in the course of a lawful search for suspects.

Although the result in Marshall rests comfortably on the proposition that plain view does not apply when police are searching in violation of the Fourth Amendment and do not come upon an article "from a lawful vantage point," the California Supreme Court relied on Marshall’s dicta limiting inspection of articles discovered in the course of a lawful search to require a warrant for the search of packages outside the context of homes and automobiles. The court, with Traynor concurring, declined to limit Marshall to dwelling houses, and applied Marshall to luggage, packages, and other containers shipped through common carriers.

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725. Id.
726. Id.
727. The case was decided prior to Payton v. New York, 445 U.S. 573 (1980), at a time when it was lawful for police to enter a home without a warrant for the purpose of making an arrest.
729. Id. at 59, 442 P.2d at 670, 69 Cal. Rptr. at 590.
730. Id. at 58-59, 442 P.2d at 669, 69 Cal. Rptr. at 589.
731. Id. at 59, 442 P.2d at 670, 69 Cal. Rptr. at 590.
732. Id. at 60, 442 P.2d at 670, 69 Cal. Rptr. at 590.
733. Id.
734. Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993); see Soldal v. Cook County, 113 S. Ct. 538, 548 (1992) (holding that if the officer’s presence in the home itself entails a violation of the Fourth Amendment, no amount of probable cause will justify seizure of an item in plain view).
735. See People v. McGrew, 1 Cal. 3d 404, 413, 462 P.2d 1, 8, 82 Cal. Rptr. 473, 479 (1969) (holding that closed footlockers containing wrapped packages of marijuana consigned to shipment by United Airlines could not be opened by police without a search warrant); see also Abt v. Superior Court, 1 Cal. 3d 418, 421, 462 P.2d 10, 11, 82 Cal. Rptr. 481, 483 (1969) (holding that the probability that a carton of brick-shaped tinfoil-wrapped packages shipped with an airline would contain marijuana is not sufficient to justify a search without
Thus, probable cause to believe that such articles contained contraband was not enough. A search warrant was required.

However, shortly after Traynor's retirement, the United States Supreme Court decided *Chambers v. Maroney.* In light of *Chambers,* the California Supreme Court reconsidered and rejected the requirement of a warrant for the search of a container consigned to a common carrier for shipment. The court reasoned that the rationale of *Chambers* (that there is no constitutional difference between seizing and holding an automobile while presenting the probable cause to a magistrate and carrying out an immediate search without a warrant) applies equally to goods or chattels consigned to common carriers. The California court believed that the United States Supreme Court had drawn the line between "things readily moved" and a "fixed piece of property," and saw a box or package consigned to a common carrier as "no less movable than an automobile." As noted previously, the United States Supreme Court in *Chadwick* rejected the notion that the *Chambers* automobile exception governed the search of movable containers generally. In later cases the Court relied on *Chadwick* and its progeny for the proposition that an officer's authority to possess a package is distinct from the authority to examine its contents, and a container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant. Unless inside an automobile, closed, opaque containers generally remain subject to the warrant requirement.

Thus, we once more confront the curious line between containers found inside and those discovered outside automobiles. The rationale for this distinction rests on weak foundations. The Supreme Court first pointed to

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736. See supra note 7.
737. See supra note 601 and accompanying text.
738. People v. McKinnon, 7 Cal. 3d 899, 910, 500 P.2d 1097, 1104, 103 Cal. Rptr. 897, 904 (1972).
739. Id.
740. Id. at 909, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
741. Id. However, first class mail historically had been accorded special treatment and would remain protected by the warrant requirement. Id. at 909 n.3, 500 P.2d at 1104 n.3, 103 Cal. Rptr. at 904 n.3.
742. See supra notes 678-683 and accompanying text.
743. See Walter v. United States, 447 U.S. 649, 654 (1980) (holding that though labels on boxes gave probable cause to believe that films inside were obscene, a search warrant was required absent consent or exigent circumstances).
mobility and the impracticability of obtaining a warrant, but after finding this factor inadequate, the Court shifted to differences in expectations of privacy. Yet the Court has backed away from this explanation also. Consequently, the curious line which developed from Burger's baggage—Chadwick and its progeny—remains because of the Court's reluctance to overrule precedent, except on the installment plan. In this area, neither the United States Supreme Court nor the California Supreme Court has developed rational, workable standards.

Courts should consider returning to the simple standard that has its roots in Carroll v. United States and that Traynor adopted for automobile searches one year after Cahan. If police have probable cause to believe an automobile contains contraband, they need not obtain a search warrant in order to search it either at the scene or later at the police station. The same standard should govern the search of other movable containers outside the home or office context. In fact, a strong argument can be made that reasonableness, rather than the warrant clause, should govern the search of automobiles and all movable containers outside the context of serious intrusions such as home or office searches, electronic interception of conversations, and invasions of the body of the suspect. To think of the reasonableness clause as governing all searches and seizures, but demanding a warrant to make reasonable particularly intrusive ones, is more consistent with the result of most Supreme Court search and seizure decisions than the general rule, which won out in the final hours of the Warren Court in the late 1960's, and which demands

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747. See California v. Carney, 471 U.S. 386, 391 (1985) (holding that the pervasive schemes of regulation which necessarily lead to reduced expectation of privacy and the exigencies attendant to ready mobility justify searches without warrants if based on probable cause); see also United States v. Chadwick, 433 U.S. 1, 13 (1976) (holding that a person's expectation of privacy in personal luggage is substantially greater than in an automobile).
748. See United States v. Ross, 456 U.S. 798, 823 (1982) (stating that certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container).
752. As Justice Scalia has pointed out, the general preference for warrants is illusory since the warrant requirement has "become so riddled with exceptions that it [is] basically unrecognized." California v. Acevedo, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring).
warrants for all searches and seizures, "subject only to a few specifically established and well-delineated exceptions."\textsuperscript{754} As a general matter, the greater the expectation of privacy, the more protections afforded by the Constitution. Where the Court has found a lesser expectation of privacy, it has applied less stringent Fourth Amendment protection.\textsuperscript{755} Conversely, Fourth Amendment reasonableness requires that "when a State seeks to intrude upon an area in which our society recognizes a significant heightened privacy interest, a more substantial justification is required to make the search reasonable."\textsuperscript{756} Homes, for example, traditionally have been accorded heightened protection. The Court has stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,"\textsuperscript{757} and has emphasized "that 'at the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home.'"\textsuperscript{758} On the other hand, only a strained reading of the Fourth Amendment's prohibition on unreasonable searches and seizures could lead one to conclude that the search of a paper bag or other container found or carried in a public place is a greater invasion of privacy than a search of the same container which its owner had securely locked in a car trunk or glove compartment.\textsuperscript{759}

While people are not shorn of all Fourth Amendment protections when they step from their homes onto the public walkways\textsuperscript{760} or from the sidewalks into their automobiles,\textsuperscript{761} the Supreme Court has clearly held that neither a warrant nor probable cause, nor indeed any measure of individualized suspicion, is an independent component of reasonableness in every circumstance.\textsuperscript{762} The Court recently affirmed that ""reason-

\begin{footnotes}
\item[754] The Supreme Court has continued to claim that the general rule requiring warrants is subject to only a few exceptions: "Time and again, this Court has observed that searches and seizures 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." Minnesota v. Dickerson, 113 S. Ct. 2130, 2135 (1993).
\item[756] Id.
\item[759] See supra notes 709-716 and accompanying text.
\item[760] Terry v. Ohio, 392 U.S. 1, 6 (1968).
\end{footnotes}
ableness is still the ultimate standard' under the Fourth Amendment."\(^{763}\) According to the balancing test used to determine reasonableness, "a search of the house or office is generally not reasonable without a warrant issued on probable cause."\(^{764}\) Other particularly intrusive searches, such as the interception of conversations by means of wiretapping or electronic devices and non-emergency intrusions into the body of suspects, undoubtedly should remain on this list, but the list should not include searches of movable containers found in public places, any more than it now encompasses the arrest and search of a suspect in a public place.\(^{765}\) These standards would provide clear, workable guidelines for law enforcement while protecting the privacy of citizens through the necessity of a warrant for home searches and comparably serious intrusions and the requirement of probable cause for automobile and other movable container searches.

These simple rules also would help clarify the plain view doctrine. With probable cause alone justifying the search of a movable container, there would be little need to draw fine lines between degrees of cause, asking whether police only reasonably believed, or were virtually certain, of the presence of contraband. Despite the Supreme Court's recent indications that probable cause may be the equivalent of "immediately apparent,"\(^{766}\) the Fifth Circuit has continued to read the Court's precedent as requiring a warrant even if labels on a container identify its contents and its owner orally informs the police of the container's contents.\(^{767}\) Nor would courts have to inquire whether police were virtually certain, not only that the containers held contraband, but that it contained nothing else. Two years after Traynor's retirement, the California Supreme Court in Guidi v. Superior Court\(^ {768}\) largely rejected the limitation of Marshall\(^ {769}\) on plain smell seizures and upheld the seizure and search of a closed shopping bag which was discovered in a house during the course of a lawful search for suspects, emitted an odor of hashish, and had previously

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766. See supra notes 661-667 and accompanying text.
768. 10 Cal. 3d 1, 513 P.2d 908, 109 Cal. Rptr. 684 (1973).
been described to the police as containing contraband.\textsuperscript{770} Seizure of the bag was justified as seizure of evidence in plain view because the bag was "highly portable" and its contents were described to police by an informant as consisting "solely of the proffered hashish and nothing else."\textsuperscript{771} The Court warned that the rule may not apply when "contraband is believed to be hidden among several items within a container" or with respect to containers which are "less portable."\textsuperscript{772} The United States Supreme Court in \textit{United States v. Jacobsen}\textsuperscript{773} seems to have ascribed to a similar limitation on plain view seizures in suggesting that plain view requires not only a virtual certainty that the article contains contraband, but a virtual certainty that nothing else of significance is in the container and that inspection of it would not reveal anything more than what is already known to the police.\textsuperscript{774}

Furthermore, under a conventional probable cause standard, courts would not have to ask whether cause for a seizure stems from the container's outward appearance alone or from information previously gathered by the police. The rationale of the plain view doctrine rests on the notion that if the condition of an article renders its contents "immediately apparent," seizure of the article is a reasonable Fourth Amendment intrusion and its inspection involves "no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment."\textsuperscript{775} Yet courts have applied plain view to closed, opaque containers where police previously observed a suspect place contraband in it or have been told by an informant that the particular article contains contraband. The Court of Appeals for the District of Columbia Circuit, in a opinion written by then Judge, now Justice, Ruth Bader Ginsburg, found that the plain view doctrine allowed the police to seize and open a "black purse" containing drugs on the ground that an

\begin{itemize}
\item \textsuperscript{770} The court stopped short of overruling \textit{Marshall}, but found that the odor of contraband could be used to corroborate other information supporting a plain view seizure and directed that to the extent inconsistent with its views, \textit{Marshall} "is no longer to be followed." \textit{Guidi}, 10 Cal. 3d at 17 n.18, 513 P.2d at 919 n.18, 109 Cal. Rptr. at 695 n.18. The United States Supreme Court appears also to allow "plain smell" seizures. \textit{See United States v. Place}, 462 U.S. 696, 707 (1983) (subjecting luggage to a "dog sniff" does not constitute a search since it does not compromise any privacy interest); \textit{see also Minnesota v. Dickerson}, 113 S. Ct. 2130, 2136 (1993) (allowing a tactile discovery to support a "plain view" seizure, the Court concluded that police may seize contraband "detected" during a lawful pat-down for weapons).
\item \textsuperscript{771} \textit{Guidi}, 10 Cal. 3d at 17, 513 P.2d at 919, 109 Cal. Rptr. at 695.
\item \textsuperscript{772} \textit{Id.} at 17-18, 513 P.2d at 920, 109 Cal. Rptr. at 696..
\item \textsuperscript{773} 466 U.S. 109 (1984).
\item \textsuperscript{774} \textit{Id.} at 130.
\item \textsuperscript{775} \textit{Dickerson}, 113 S. Ct. at 2137; \textit{see Soldal v. Cook County}, 113 S. Ct. 538, 546 (1992) (stating that when an item in plain view is seized, no invasion of privacy occurs).
\end{itemize}
officer, viewing a drug transaction through binoculars from the window of a third floor apartment, had witnessed a suspect place packets of drugs in the bag.  

The Court emphasized that “[n]o considerable time span separated the sighting of the packets from the search.” Yet how much time must elapse to render plain view inapplicable? How much more strict is such a standard than one founded on probable cause which would allow police to search the bag as long as the delay and other circumstances rendered reasonable their belief that the bag still contained the drugs? On the other hand, what if the officers had not witnessed the drugs being placed in the bag, but were told of it by an informant? The California Supreme Court in Guidi allowed the plain view seizure and inspection of a closed shopping bag based in part on the fact that an informant previously had described the bag as containing hashish. These cases indicate that once officers have information that a container holds contraband, they may open it though its physical characteristics fail to reveal its contents. This result is difficult to square with the rationale of the plain view doctrine—that an inspection of an article in plain view is not a search within the meaning of the Fourth Amendment since it does not invade any legitimate expectation of privacy. A simple, straightforward rule allowing the search of a movable container on probable cause would lead to similar results but would be more rational and offer greater clarity. Such a rule would assume the inspection of the containers in these cases were searches under the Fourth Amendment, but would find these searches reasonable if, from any legitimate source, police have probable cause to believe they contain contraband or other seizable items.

Finally, a rule based on probable cause would not lead courts to embark on the fruitless course of asking whether an object is merely a container of evidence, is itself evidence, or is an instrumentality of the crime. The California Supreme Court, with Traynor concurring, drew this distinction in People v. Teale. After Traynor’s departure, the court named the rule the instrumentality exception to the warrant requirement, regarding it as “implicit” in Coolidge and other United States
Supreme Court decisions. According to this principle, when police lawfully seize an object which they reasonably believe "is itself evidence" of the commission of crime, any later examination of the object for the purpose of determining its evidentiary value does not constitute a "search" under the Fourth Amendment. The source of this rule lies in the notion that properly seized items of evidentiary value, such as firearms or other weapons, can be subjected to inspection and scientific testing without the approval of a judge or magistrate. The rule has been applied primarily to cases of automobiles used in the commission of violent crimes, but the court, in Guidi, also applied the rule to a bag containing drugs.

However, the California Supreme Court in Teale required that courts distinguish a "container for evidence of the charged crime," which is not subject to plain view seizure, from "an object reasonably believed to be itself evidence of the charged crime," which is subject to seizure and detailed examination under the plain view doctrine. In Guidi, the California court founded the distinction on principles of relevance. The Guidi court drew a line between an object which was "merely a container concealing items of evidentiary value" and one which was "itself . . . evidence of a crime and additionally contained within it other items of evidentiary value." The court concluded that since the shopping bag containing the drugs in that case matched an earlier description of a bag containing drugs, it was "relevant evidence" even absent its contraband contents. The court later emphasized the "instrumentality" aspect of

781. Griffin, 46 Cal. 3d at 1025, 761 P.2d at 110, 251 Cal. Rptr. at 650.
782. See People v. Teale, 70 Cal. 2d 497, 511, 450 P.2d 564, 572, 75 Cal. Rptr. 172, 180 (1969). Later cases rejected the "no search" rationale and rested the rule on the reasonableness of the intrusion. See, e.g., Guidi, 10 Cal. 3d at 18-19 n.19, 513 P.2d at 921 n.19, 109 Cal. Rptr. at 697 n.19; People v. Minjares, 24 Cal. 3d 410, 422, 591 P.2d 514, 520, 153 Cal. Rptr. 224, 230 (1979). However, the court returned to the "no search" rationale in People v. Griffin, 46 Cal. 3d 1011, 761 P.2d 103, 251 Cal. Rptr. 643 (1988). The court held that when a seized automobile is itself evidence, any later examination for the purpose of determining its evidentiary value does not constitute a search. Id. at 1025, 761 P.2d at 110, 251 Cal. Rptr. at 650.
783. Griffin, 46 Cal. 3d at 1023-25, 761 P.2d at 109-12, 251 Cal. Rptr. at 649-51.
784. When a car has been used in a kidnapping or when a rape or murder has occurred in the vehicle, it is viewed as evidence of the crime, rather than as a mere container of evidence and is subject to warrantless seizure and inspection. See People v. Teale, 70 Cal. 2d 497, 510-11, 450 P.2d 564, 572, 75 Cal. Rptr. 172, 180 (1969); see also People v. Rogers, 21 Cal. 3d 542, 549, 579 P.2d 1048, 1052-53, 146 Cal. Rptr. 732, 736-37 (1978); North v. Superior Court, 8 Cal. 3d 301, 305-06, 502 P.2d 1305, 1307, 104 Cal. Rptr. 833, 835 (1972).
785. Guidi v. Superior Court, 10 Cal. 3d 1, 18-19, 513 P.2d 908, 920-21, 109 Cal. Rptr. 684, 696-97 (1973); see People v. Farley, 20 Cal. App. 3d 1032, 1037-38, 98 Cal. Rptr. 89, 93 (1971) (holding that the rule applies to examination of a paper bag found in a car believed to be stolen).
786. Teale, 70 Cal. 2d at 511 n.10, 450 P.2d at 572 n.10, 75 Cal. Rptr. at 180 n.10.
788. Id. at 14, 513 P.2d at 917, 109 Cal. Rptr. at 693.
the article in order to avoid conflict with Chadwick and other federal container cases. Holding that a tote bag found in a car used in a robbery could not be searched without a warrant, the court regarded Chadwick as narrowing the exception to apply "only to a scientific examination of the object itself, for example for fingerprints, bloodstains, or the taking of tire impressions or paint scrapings." However, after Chadwick's demise, the court returned to the broader rule, finding that the exception applied to cases where the vehicle is itself evidence or the instrumentality of a crime.

Distinguishing between evidence and a container of evidence is as workable and rational as the "mere evidence" rule disparaged by Justice Traynor and long ago abandoned by the California and the United States Supreme Courts. When based on relevance, the rule leads to absurd results. If police gain probable cause from a reliable informant that X is carrying drugs in a specifically described briefcase, the rule would regard the briefcase as evidence in plain view and would allow its warrantless inspection on the theory that no privacy interest is invaded. On the other hand, if police knew that at a certain time X would be carrying drugs, but were not informed of how X would be carrying them, the plain view doctrine would not apply. Furthermore, if the informant describes the car or house in which X has the drugs, the rule logically would subject the car or house to a warrantless inspection which would not be regarded as an invasion of privacy.

A more fundamental objection to the rule is that a standard based on relevance has few rational limits. A container of contraband always has "evidentiary value" and is "relevant evidence," regardless of whether or not the police were aware of its precise nature at the time of the seizure. Even the "mere evidence" rule criticized by Justice Traynor

790. See People v. Griffin, 46 Cal. 3d 1011, 1025, 761 P.2d 103, 110, 251 Cal. Rptr. 643, 650 (1988) (allowing the examination of the interior of a truck in which the victim was murdered on the ground that the truck "was itself evidence"). The court described Minjares as a case "where the car trunk was merely a container of evidence." Id.
791. See supra notes 313-337 and accompanying text.
792. According to modern liberal relevancy rules, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See FED. R. EVID. § 401; CAL. EVID. CODE § 210 (West 1966). In all my years as a criminal defense lawyer, prosecutor, and evidence professor, I have never run across a case in which contraband was ruled admissible, but its container was excluded as irrelevant.
was more restrictive since it excluded from seizure those objects having "evidentiary value only."^793

Even if limited to instrumentalities, as opposed to evidence of crime, the exception fails for the same reasons that Justice Traynor opposed the "mere evidence" rule.^794 Admitting the apple, the arrow, and the bow, but not the quiver, would require relying on "explanations in the dark."^795 The attempt to limit the rule to "scientific examination" also fails.\(^\text{796}\) Scientific examinations and tests usually involve the same entry into a vehicle or other container as an ordinary search, and often an even more intrusive inspection. Also, is not a box or other container of contraband an instrumentality of the crime, and is not the purpose of opening such container in part ultimately to verify the nature of the drugs by scientific examination? At bottom, the instrumentality exception is merely a device to allow police greater search and seizure powers and to avoid exclusion of important evidence in cases of violent crimes, as opposed to cases of possessory or "victimless" offenses.

The simple rule based on probable cause proposed in this Article would go far toward dispensing with the irrational and unworkable distinctions that have developed around the concept of plain view. Once an object is seizable by reason of probable cause to believe it contains contraband or otherwise is associated "with criminal activity,"^797 it should be subject to inspection either on the ground that the same probable cause renders the container's search reasonable or, if the object's appearance, smell, or other characteristics advertise its contents, on the ground that the inspection invades no legitimate expectation of privacy and, thus, is not a search under the Fourth Amendment.^798

^793. See supra notes 313-314 and accompanying text.
^794. See supra notes 320-322 and accompanying text.
^795. See supra notes 320-321 and accompanying text.
^798. On the other hand, seizures on less than probable cause may be justified when based on "operational necessities." See Soldal, 113 S. Ct. at 546 n.9 (citing Arizona v. Hicks, 480 U.S. 321, 327 (1987)). In such cases, unless probable cause develops during the period of lawful seizure, police cannot search absent consent or a search warrant. See United States v. Place, 462 U.S. 696, 709 (1983).
D. Clarifying the Law: Providing Signposts to the Future and Eliminating the Skeletons of Bad Precedent

Following the adoption of the exclusionary rule in 1955, the California Supreme Court faced a formidable task. The court had declared that evidence must be excluded if obtained in violation of search and seizure rules which to a great extent were confusing or non-existent. However, under Traynor’s leadership, the court quickly undertook the “long overdue clarification of standards of reasonableness in law enforcement,” and within a relatively brief period, the court had written a clear and comprehensive body of search and seizure law. In 1962, Traynor reflected that appellate court opinions after Cahan had resulted in a “detailed articulation of what is reasonable and what is unreasonable.”

In contrast, the United States Supreme Court’s search and seizure rules were confusing, irrational, and incomplete when it imposed the exclusionary rule on the states in 1961. Over the next three decades the Court proceeded haphazardly, often announcing confusing or inconsistent standards and, in many significant areas, leaving important questions unanswered for years. In 1965, Professor Wayne LaFave listed circumstances necessary for the exclusionary rule to be effective in improving police performance. These circumstances included development of search and seizure law “in some detail and in a manner sufficiently responsive to both the practical needs of enforcement and the individual right of privacy” and in a manner understandable by the front-line lower-echelon police officer. At that time, Professor LaFave believed that deficiencies existed in these respects.

The United States Supreme Court has taken decades, but eventually has clarified the rules in many areas. In other areas, however, ambiguity and

799. See supra notes 10-13 and accompanying text.
800. Traynor, Mapp at Large, supra note 3, at 323.
801. See supra notes 18-24 and accompanying text.
803. Traynor, Mapp at Large, supra note 3, at 327.
804. Id.
805. See Wayne J. LaFave, Improving Police Performance Through the Exclusionary Rule-Part I: Current Police and Current Court Practices, 30 Mo. L. Rev. 391, 395-96 (1965) [hereinafter LaFave, Police Performance]. LaFave also believed that the rules must be effectively communicated to the police and that the police desire to obtain convictions must be sufficiently great to induce them to comply with these requirements. Id.
806. Id.
807. Id.
confusion abound. It is not surprising that the Court has not been as successful as the California Supreme Court in developing a coherent body of search and seizure rules. Grappling with cases from fifty states and the federal courts, the United States Supreme Court faced a more difficult task. In fact, shortly after *Mapp*, Justice Traynor opined that the United States Supreme Court would refrain from undertaking the onerous burden of developing detailed search and seizure rules for the states.

There is little chance that the . . . Court would be willing and able to receive fifty [processions of state court cases] marching through its doors, calling upon it to give the details that make up the rules that govern the officials who search and seize.  

Also, the nine federal justices appeared more ideologically divided than the seven California Supreme Court jurists, and also lacked a unifying leader able to achieve the compromises necessary for the pronouncement of clear, consistent rules.

Whatever the reasons for the Court's failures, we now have a *fait accompli*, and whether or not the Court should be condemned for failing to leave development of the details of the rules largely to the states, the Court should recognize that its imposition on the states of search and seizure standards as a detailed, comprehensive code of conduct for law enforcement obliges the Court to clarify unsettled or confusing areas of the law. To meet this responsibility, the Court should, in its opinions, offer guides to the application of the rules in other contexts, such as by the use of example or analogy. The Court's inability to issue advisory opinions should not stand in the way of helpful pointers to state and lower courts or present an excuse for the Supreme Court to stand aloof while judges, lawyers, and police, flounder in a sea of constitutional uncertainty.

While the United States Supreme Court has stated that a federal court has no authority "to give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before it," the Supreme Court very often has provided helpful pointers or guides through analogizing or distinguishing factual situations not directly involved in the case under

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808. Traynor, *Mapp at Large*, *supra* note 3, at 327.
consideration. For example, in Berkemer v. McCarty,\textsuperscript{810} the Court, in holding that roadside questioning of a motorist detained pursuant to a routine traffic stop is not a custodial interrogation under \textit{Miranda v. Arizona},\textsuperscript{811} analogized such a routine traffic stop to a "\textit{Terry}" stop, strongly suggesting that \textit{Miranda} would not apply to stops, frisks, and detentions in the investigation of ordinary, non-traffic crimes.\textsuperscript{812} Lower courts have not missed the point and have generally followed the Supreme Court's "guide by analogy."

Furthermore, the Court should face up to and overrule unworkable or unreasonable decisions rather than subject them to capital punishment on the installment plan through the slow, painful creation of exceptions and distinctions. An unhealthy respect for bad precedent too often has led the Court to disregard the principles of its decisions at the same time it is formally bowing to their skeletal remains. Much of the mischief perpetrated by the United States Supreme Court in the search and seizure area can be traced directly to the Court's practice, when discovering that it has made bad law, to distinguish it away rather than to reject it outright.\textsuperscript{813}

The Court in some areas has announced a sweeping new rule without clearly thinking through its consequences.\textsuperscript{814} When later the Court has discovered that the rule's application has led to illogical or unworkable results, the Court's reluctance to overrule bad precedent has resulted in the creation of precedential ghosts in the form of subtle, illogical and often unworkable distinctions that later return to haunt courts and law enforcement officials.

Traynor had no fear of striking out in new directions even when a novel approach required overruling long-established precedent. For example, early in his judicial career, Traynor persuaded all his colleagues to reject the collateral estoppel mutuality requirement, overruling three prior decisions.\textsuperscript{815} The new rule came to be recognized in \textit{Restatement (Second) of Judgments} and eventually was accepted throughout the

\begin{itemize}
\item \textsuperscript{810} 468 U.S. 420 (1984).
\item \textsuperscript{811} 384 U.S. 436 (1966).
\item \textsuperscript{812} \textit{See} Berkemer, 486 U.S. at 440 (1984) (stating that "[t]he comparatively non-threatening character of \textit{Terry} stops and detentions explains the absence of any suggestion in our opinions that \textit{Terry} stops are subject to the dictates of \textit{Miranda}").
\item \textsuperscript{813} \textit{See}, \textit{e.g.}, supra notes 642-672 and accompanying text.
\item \textsuperscript{814} \textit{See} supra notes 667-748 and accompanying text.
\item \textsuperscript{815} Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942) (en banc).
\end{itemize}
country. Later in his career, Traynor again persuaded all of his colleagues to adopt a rule of strict liability in tort for defective products which marked the beginning of a national trend. Traynor also did not hesitate to overrule even his own precedent. In adopting an exclusionary rule for California in 1955, he led the Court to overrule a decision he had written little more than a decade earlier, despite the prospect that such overruling would likely lead to bitter accusations from many politicians and law enforcement officials. In summary, Traynor was not afraid to take forward steps, as long as they were careful ones, and though he stepped with caution, he always looked to the future.

Traynor spoke out strongly against overruling on the installment plan. He urged judges to face up to and overrule erroneous rules and decisions rather than to overrule them slowly and painfully by exceptions and distinctions. The technique of overruling precedents bit by bit through a process of distinguishing them away piecemeal found no place in his jurisprudence. He welcomed “frank renunciation” of unsatisfactory precedents which “deserve liquidation,” and expressed sympathy for advocates who face unfirm authority which has been left wounded but still demanding an uncertain degree of respect. “It must be cold comfort to bewildered counsel to ruminate that the precedent on which he relied was never expressly overruled because it so patently needed to be.” Thus,

816. See Friendly, Ablest Judge, supra note 47, at 1043.
817. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (en banc). Traynor was not content always to wait for legislative remedies. Appellate judges, he wrote, should discard

the superstition that once the courts have allowed a precedent to live beyond its time they are bound to continue its social security indefinitely unless an impatient legislature steps in to decree otherwise. 

Such superstition invited two hazards. One is that the legislators will never rush to the execution. The other is that they will.

819. See Roger J. Traynor, Comment on Courts and Lawmaking, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 50 (Paulsen ed. 1959) [hereinafter Traynor, Comment on Courts and Lawmaking] (stating that whatever our admiration for ancient arts, few of us would turn the clock back to live out what museums preserve. . . . The main preoccupation of [the] . . . law must be with the future); see also Roger J. Traynor, Better Days in Court for a New Day's Problem, 17 VAND. L. REV. 109 (1963) (asserting that tried and half-true formulas will not serve [the judge] for all their show of stability. He must compose his own mind as he leaves antiquated compositions aside to create some fragments of legal order out of disordered masses of new data. There should be modern ways for such a task, in fairness not only to him but to those who must seek out his judgment and abide by his decisions).

821. Traynor, Comment on Courts and Lawmaking, supra note 819, at 54.
Traynor made no attempt in *Cahan* to distinguish the facts of earlier cases, including the case he authored, and to draw fine, uncertain lines which would avoid outright overruling at the high price of leaving the law indefinite or unprincipled. 822

Traynor took the right approach. The United States Supreme Court should face up to erroneous decisions and overrule them. The Court has described *stare decisis* as the preferred and usually the wise policy, but not an inexorable command which binds the Court to follow decisions which are "unworkable or badly reasoned" 823 or which have "proved unstable in application [and are] a continuing source of confusion." 824 An unhealthy respect for bad precedent too often has led to formal, artificial bows to its skeletal remains while disregarding its substance in practice. *Stare decisis* should be respected, but not worshipped, particularly with respect to constitutional rules which stand as the last word, aloof from the democratic process.

822. Although an activist in overruling precedent, Traynor was a practical activist with a keen eye to the effect that new decisions may have on the administration of justice. For example, he thought to moderate the harsh effects of the court's abandonment of prior decisions by using the doctrine of prospective overruling, according to which the overruling of an earlier decision would be accompanied by an announcement that the new rule would not be given retroactive effect. Traynor applied this principle to decisions altering common law principles, such as *Muskopf v. Coming Hosp. Dist.*, 55 Cal. 2d 211, 221, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961), as well as to decisions construing the California Constitution, and *Forster Shipbuilding Co. v. County of Los Angeles*, 54 Cal. 2d 450, 458-59, 353 P.2d 736, 740-41, 6 Cal. Rptr. 24, 28-29 (1960). He reasoned that the "California Constitution permits an appellate court to apply an overruling decision prospectively only, even though it thereby temporarily preserves a mistaken interpretation of the Constitution." *Forster*, 54 Cal. 2d at 459, 353 P.2d at 741, 6 Cal. Rptr. at 29.

Traynor used a similar approach in dealing with the question whether *Cahan*'s exclusionary rule should be applied retroactively to collateral attacks on final criminal convictions. To Traynor, the question presented a conflict between the policy in favor of finality of judgments and the policies designed to discourage lawless law enforcement. He reasoned that the latter policy, which underlies the exclusionary rule, would be adequately protected at trial and on appeal and would not be further promoted by destroying the finality of judgments. *In re Harris*, 56 Cal. 2d 879, 885, 366 P.2d 305, 309, 16 Cal. Rptr. 889, 893 (1961) (Traynor, J., concurring). This approach was largely adopted by the United States Supreme Court when faced with the question of the retroactive effect of *Mapp*. *Linkletter v. Walker*, 381 U.S. 618, 621-22, 639-40 (1965). Traynor also sought to mitigate the effects of the exclusionary rule by a harmless error analysis, according to which the admission of illegally obtained evidence which is merely cumulative of other undisputed evidence is not ground for reversal. *See People v. Parham*, 60 Cal. 2d 378, 385, 384 P.2d 1001, 1005, 33 Cal. Rptr. 497, 501 (1963); *see also* *People v. Tarantino*, 45 Cal. 2d 590, 602-03, 290 P.2d 505, 513-14 (1955) (Traynor, J., dissenting). Traynor reasoned that the illegally obtained evidence "may be... only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial." *See Parham*, 60 Cal. 2d at 385, 384 P.2d at 1005, 33 Cal. Rptr. at 501. Traynor's approach to harmless error also was embraced by the United States Supreme Court. CITE???


Six years before the United States Supreme Court imposed the exclusionary rule on the states, the California Supreme Court adopted its own exclusionary rule as a judicially created rule of evidence. At this time, both the federal and California rules of search and seizure were confusing, unclear, or non-existent. In view of the chaotic state of search and seizure law, Justice Traynor and the California Supreme Court faced the task of developing clear and workable rules of search and seizure, and immediately undertook the "detailed articulation of what is reasonable and what is unreasonable," and the "long overdue clarification of standards of reasonableness in law enforcement." Under Traynor's leadership, the California Supreme Court wrote a comprehensive body of search and seizure rules on a clean slate within a relatively brief period, which rules were largely accepted as balanced, rational, and workable.

In contrast, the United States Supreme Court's journey through the land of search and seizure has been a long and bumpy one. Following the adoption of the exclusionary rule for federal courts in 1914, the Supreme Court proceeded in a hesitant and haphazard fashion, often announcing ambiguous and inconsistent standards and in significant areas leaving important questions unanswered for years. While the Court followed the lead of Justice Traynor in resolving some difficult search and seizure problems, in many areas the Court rejected or failed to consider the Traynor approach and created a body of doctrine regarded by many judges and scholars as confusing, irrational and incomplete. For example, Traynor took the view that the exclusionary rule's primary objective is the protection of privacy through encouraging law enforcement officials to act reasonably by providing them with a clear, practical guide to proper law enforcement and then denying them the fruits of unlawful searches and seizures. Although the United States Supreme Court has

825. See supra notes 12-13 and accompanying text.
826. See supra notes 14-15 and accompanying text.
827. Traynor, Mapp at Large, supra note 3, at 327.
828. Id. at 323.
829. See supra notes 17-25 and accompanying text.
830. See supra note 1 and accompanying text.
831. See supra notes 3-4 and accompanying text.
832. See supra note 7 and accompanying text.
833. See supra notes 5-6 and accompanying text.
834. See supra notes 147-149 and accompanying text.
pointed to deterrence as the primary purpose of the exclusionary rule,\textsuperscript{835} it has not been entirely faithful to this view. Focusing on influencing police conduct by discouraging illegal searches and seizures would lead to expansion of standing rules to allow a defendant to object to evidence procured through unreasonable searches that violate the rights of other suspects, to reliance on apparent, rather than on actual, authority to consent, and to a more expansive definition of Fourth Amendment seizures which does not require touching or submission to authority.

Regarding the search and seizure rules primarily as a means of guiding and controlling police conduct also would lead to rejection of complex or technical rules in favor of clear, practical standards. Traynor emphasized the need to avoid "needless refinements and distinctions,"\textsuperscript{836} and cases following \textit{Cahan}\textsuperscript{837} took a practical, common sense approach, usually upholding natural police responses to suspicious circumstances, particularly when they involve only slight or minor intrusions into privacy.\textsuperscript{838} Focusing on the goal of promoting reasonable police conduct, the United States Supreme Court should reject complex and technical rules, and should be reluctant to view as unreasonable police conduct which is a natural reaction to suspicious circumstances and which involves only slight or minor privacy intrusions.

The search for simple, practical, and rational rules demands a clarification of the dimensions of the warrant clause, particularly with respect to search incident to arrest\textsuperscript{839} and to searches of movable containers outside the contexts of homes and automobiles.\textsuperscript{840} Currently, a search incident to a home arrest is limited to the arrestee's person and the area from which the arrestee might gain possession of a weapon or destructible evidence.\textsuperscript{841} This rule applies even when police are lawfully inside and have probable cause to believe that evidence of the crime for which the person is arrested is located in the house.\textsuperscript{842} On the other hand, following an arrest in a public place or in an automobile, the Supreme Court's "workable rule" allows police automatically to conduct a search incident without any suspicion and unlimited in scope by any

\textsuperscript{835} See supra notes 150-151 and accompanying text.
\textsuperscript{836} See supra note 309.
\textsuperscript{837} People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
\textsuperscript{838} See supra notes 404-433 and accompanying text.
\textsuperscript{839} See supra notes 474-555 and accompanying text.
\textsuperscript{840} See supra notes 673-798 and accompanying text.
\textsuperscript{841} See supra notes 516-518 and accompanying text.
\textsuperscript{842} See supra note 522.
requirement of cause to discover evidence of crime relating to the arrest. The Court should consider the approach of Justice Traynor which would allow a search of the entire premises as incident to the arrest of an occupant, but would guard against exploratory searches by requiring reasonable cause to believe that evidence of the crime for which the suspect was arrested would be found on the premises and by limiting the search to areas likely to contain such evidence. With guidelines to guard against abuses, the Court should consider the Traynor approach as to both home and automobile searches.

However, neither Traynor nor the United States Supreme Court developed a satisfactory approach to searches of movable containers. A clear and rational approach would treat searches of movable containers outside the context of homes or offices the same, whether they are found in an automobile, on a person, or unattended. This simple rule allowing the search of such containers on probable cause would eliminate the irrational and unworkable line between articles found inside and those discovered outside automobiles, as well as the confusing distinctions that have developed under the plain view doctrine. In general, a search warrant should not be required for the search of an automobile or other movable container found in a public place. In fact, the Court might explicitly recognize what has become the practical result of the many exceptions to the warrant requirement: For a search to be reasonable, the Fourth Amendment demands a warrant only for intrusions comparable in seriousness to home or office searches, electronic interception of conversations, or invasions of the body of a suspect.

To further meet its responsibility of clarifying unsettled and confusing areas of the law, the Supreme Court should offer guides to application of the rules in other contexts. Most important, the Court should face up to and overrule unworkable or unreasonable decisions rather than subject them to capital punishment on the installment plan through slow, painful creation of exceptions and distinctions. Much of the confusion and uncertainty in the search and seizure area has come from the Court's attempt to distinguish away bad law rather than to overrule it outright.
These criticisms of the Supreme Court’s development of search and seizure standards have focused on the substance of the standards, as well as on the process of articulating them, but this Article does not contend that today’s Fourth Amendment jurisprudence is a disaster, any more than it presents the rules developed by Justice Traynor and the California Supreme Court as a model of perfection. It has taken decades, but eventually the United States Supreme Court addressed most major areas of search and seizure law and embraced many clear and workable rules governing traditional law enforcement activities. Thanks largely to the lead of Justice Traynor, there is less validity now than thirty years ago to the charge that the Supreme Court’s Fourth Amendment jurisprudence as a whole suffers from significant gaps and from confusing unworkable rules which offer police little guidance in criminal investigations.

Nevertheless, in a number of contexts the Court has left current rules complex, arbitrary, or irrational, often as the result of rejecting or ignoring Traynor’s approach. While we must accept the fact that “the rules governing police searches can never be precise,” it is vital that the Court continue to pursue clarity, utility, and balance in the formation of rules governing the conduct of law enforcement officials. The demise of the California exclusionary rule following the departure of Justice Traynor illustrates how public confidence in the criminal justice system in general, and acceptance of the exclusionary rule in particular, can fade when search and seizure standards are perceived as unworkable or unbalanced. After Traynor’s retirement, the California Supreme Court redefined many search and seizure rules, expanding the types of police conduct deemed unreasonable under California law. These restrictions on police investigative techniques provided ammunition to criminal defendants seeking suppression of reliable evidence and were strongly resented by a large segment of the public who perceived the search and seizure standards enforced by the exclusionary rule as overly protective of criminal defendants. Prosecutors and victims’ rights organizations sponsored an initiative which, by popular vote, increased criminal penalties and

848. See supra note 8 and accompanying text.
849. In 1991, Professor Kamisar criticized the Supreme Court for shrinking the scope of the Fourth Amendment while expanding the scope of searches deemed reasonable, yet observed that by a process of “great clarification and simplification,” the law of search and seizure has become “a body of realistic workable rules.” Yale Kamisar at the Constitutional Law Conference, sponsored by U.S. Law Week, Sept. 6-7, 1991, 50 CRIM. L. REP. (BNA) 1086, 1089 (1991). Kamisar believed that this shrinking of protections has been “almost always in favor of the police [but] may be the price we have to pay to keep the exclusionary rule on the books.” Id.
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eliminated a number of procedures favoring defendants, including the California exclusionary rule in criminal cases. With few exceptions, California courts were deprived of the power to suppress reliable evidence unless mandated by federal law. The federal exclusionary rule, although resting on thin doctrinal grounds and the subject of continued debate, is not as vulnerable to public and law enforcement pressures and is likely to be with us in some form for the foreseeable future. However, this independence from the democratic process only increases the Supreme Court’s responsibility to provide clear, rational and workable rules.

Furthermore, we should keep in mind that the exclusionary rule is rigid and absolute, standing immune from proportionality considerations such as the severity of the violation, the seriousness of defendant’s crime, and the importance of the evidence in the case. Following Mapp’s call to apply the exclusionary rule to “all evidence obtained by searches and seizures in violation of the Constitution. . .”, the Supreme Court has suppressed evidence discovered from searches involving minor or slight invasions of privacy, as well as from good faith attempts to follow Fourth Amendment standards, and has affirmed that its decisions “recognize no exception to the rule that illegally seized evidence is inadmissible at trials. . .” Except with respect to the good faith rule in the context of warrant-based searches, the Court has passed over opportunities to narrow application of the exclusionary rule to cases in which police fail to act in good faith.

851. The Victim’s Bill of Rights (popularly known as Proposition 8), adopted June 8, 1982 and effective June 9, 1982, amended the California Constitution to provide that, with limited exceptions, “relevant evidence shall not be excluded in any criminal proceeding . . .” CAL. CONST., art. I, §28(d) (1982).

852. See In re Lance W., 37 Cal. 3d 873, 886-87, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639 (1985) (holding that except to the extent compelled by the federal constitution, Proposition 8 eliminated judicially created remedies for violation of state constitutional search and seizure provisions through exclusion of evidence).

853. See supra notes 141-146 and accompanying text.


855. In 1965, Professor Wayne J. LaFave observed that “there does not appear to be any basis for assuming that the Court will in any way make inroads on the Mapp holding in the years ahead.” LaFave, Police Performance, supra note 805, at 392.


or in which the violation is flagrant, or at least substantial.\textsuperscript{859} The exclusionary rule, as currently applied, is an automatic, per se rule of inadmissibility which operates with respect to all violations of the Fourth Amendment, regardless of the extent or purposefulness of the police misconduct or of the seriousness of the defendant's crimes. Some have urged the adoption of a doctrine of "comparative reprehensibility" which would balance the seriousness of the police misconduct against the gravity of defendant's crimes and would deny suppression where defendant's conduct is more reprehensible than that of the police. The idea of proportionality considerations as a limit on the operation of the exclusionary rule has been around for some time and is the subject of renewed interest.\textsuperscript{860} However, it raises serious practical and philosophical problems\textsuperscript{861} and has not gained a foothold in the opinions of Supreme Court justices.\textsuperscript{862} In this light, the quest for clear, practical, and balanced search and seizure standards takes on particular importance and demands the Court's continued attention. Justice Traynor has been of great assistance in this endeavor. He still can be.

\textsuperscript{859} For example, Americans for Effective Law Enforcement and the International Association of Chiefs of Police, in an appendix to their amicus brief to the Court in 1972, argued that the exclusionary rule should be narrowed to encompass only willful, flagrant and substantial violations, and cited sixteen published cases of serious crimes in which evidence was suppressed for what they viewed as insubstantial violations by the police. Brief for Americans for Effective Law Enforcement, Inc., and the International Association of Chiefs of Police, as Amici Curiae in support of the Petitioners, California v. Krivda, 409 U.S. 33 (1972).

Many judges and scholars have urged that the rule be narrowed to apply only to flagrant, deliberate, or substantial violations. See, e.g., Friendly, Bill of Rights, supra note 82, at 953 (suggesting that the exclusionary rule should be applied only to "evidence obtained by flagrant or deliberate violation of rights"); Charles A. Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Tex. L. Rev. 736, 744 (1972) (arguing to save the exclusionary rule "for drastic cases in which the conduct of the police was outrageous"); A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(2) (1975) (proposing that "a motion to suppress evidence . . . shall be granted only if the court finds that the violation upon which it is based was substantial. . . . ").

Only two federal courts of appeal have thus far extended the good faith rule to warrantless searches. See United States v. Beck, 729 F.2d 1329, 1331 (11th Cir. 1984), cert. denied, 469 U.S. 981 (1984); United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981).

\textsuperscript{860} See John H. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A. J. 479, 482 (1922); Cameron & Lustiger, supra note 854, at 142-52.

\textsuperscript{861} Kamisar, supra note 854, at 10.

\textsuperscript{862} While the Court has pointed to the rule's lack of balance, see Stone v. Powell, 428 U.S. 465, 489-90 (1976), it has not suggested that at suppression hearings the seriousness of the Fourth Amendment violation should be weighed against the gravity of defendant's crime.

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