

THE AUTOMOBILE EXCEPTION IN NEVADA: A CRITIQUE OF THE *HARNISCH* CASES

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I. INTRODUCTION

A. *Imagine if You Will*

A Henderson police officer, during her pre-shift briefing, is told that a white male, in his mid-to-late twenties, has been selling marijuana to teenagers at a park that is on her patrol beat. A parent who lives near the park had complained, and several other parents had confirmed, that this individual had several times offered to sell marijuana to their kids. He is described as about twenty-six to twenty-eight years of age, with spiked red hair and a pierced nose. This individual hangs out at the park, sells drugs to area teenagers, and allegedly stores his drugs under the front passenger seat of his white 1970 Volvo.

The officer drives to the park to check on the complaint. She spots a white Volvo parked in the parking lot near the picnic area, as well as a male matching the description of the suspected drug dealer—complete with spiked red hair and a nose ring. Pulling her marked patrol vehicle into the parking lot, she observes the male get out of this vehicle and begin walking toward a group of teenagers who are sitting at a table in the picnic area. After several teenagers notice the officer and start pointing at her, he turns around and observes the officer driving towards him. The teenagers flee on foot through the park and over a nearby wall into a surrounding neighborhood. The individual nervously turns around and begins walking away from the area.

The officer meets the male suspect in the parking lot, approximately fifteen feet away from his vehicle, and explains the circumstances and allegations surrounding her stop. After unsuccessful attempts to locate the teens that fled into the neighborhood, in a few minutes a backup officer arrives. The investigating officer approaches the white Volvo and notices the windows are down, the keys are in the ignition, the radio is playing, and a distinct odor of marijuana emanating from inside the vehicle. Upon closer inspection from the outside of the vehicle, the officer notices a black bag tucked underneath the

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front passenger seat. The officer asks the individual for consent to search the vehicle, and he refuses. What can and should the officer do?

B. Vehicle Searches and Effective Law Enforcement

Law enforcement officers encounter these kinds of situations on a regular basis. Although the circumstances will vary with each case, officers routinely establish probable cause that a vehicle contains items that are subject to search and seizure. Good policy would have law enforcement effectively and efficiently search these vehicles to recover contraband for the protection of society. At the same time, police must guard privacy concerns secured by the Fourth Amendment.

Reconciling these competing interests has been a judicial task throughout American history. Well over seventy-five years ago, the United States Supreme Court recognized the automobile exception to the warrant requirement.¹ In the interim period, the Court has slowly and cautiously developed this narrow exception to the warrant requirement into a balanced doctrine that protects privacy concerns while providing clear guidelines for effective law enforcement.

As we will see,² over these same years Nevada has followed federal precedent in the interpretation and application of Fourth Amendment search and seizure issues, even though the Nevada Constitution offers its own protection against unreasonable searches and seizures.³ The Nevada courts have relied on the Justices of the United States Supreme Court to provide sound and well-reasoned opinions that appropriately balance competing concerns about privacy and practicable police investigation procedures.

Despite law enforcement's relying for decades on Nevada following the Supreme Court, in 1998 the Nevada Supreme Court, ostensibly to advance state public policy but with the effect of covering its own misstatement of federal law, elected in *State v. Harnisch II*⁴ to diverge from federal precedent implementing the automobile exception to the warrant requirement.⁵ The resulting

¹ *Carroll v. United States*, 267 U.S. 132, 147 (1925).

² See *infra* notes 51-109 and accompanying text.

³ NEV. CONST. art. 1, § 18. In the twentieth century, American citizens came to receive a sort of dual protection as to a number of basic constitutional rights. Most of the rights in the federal Bill of Rights have always received independent protection in state constitutions, and during this century Americans have come to receive additional security as the limits on government power embodied in the federal Bill of Rights have been "incorporated" by the Fourteenth Amendment's protections against wrongful actions by the states. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁴ *State v. Harnisch (Harnisch II)*, 954 P.2d 1180 (Nev. 1998).

⁵ *Id.* at 1182-83. In the court's original decision, *State v. Harnisch I*, it affirmed the trial court's Fourth Amendment conclusion that the defendant's automobile was not found within the apartment's "curtilage," and held that the Fourth Amendment's "automobile exception" to the warrant requirement only applied if there were "exigent circumstances sufficient to dispense with the need for a warrant." 931 P.2d 1359, 1364-65 (Nev. 1997). In *Harnisch II*, even as it acknowledged that "this court [in *Harnisch I*] did not correctly pronounce the present status of the federal constitutional law on this issue," the Nevada Supreme Court held that in Nevada "the prosecution must demonstrate that *exigent circumstances other than the potential mobility of the automobile exist.*" 954 P.2d at 1182.

standard has produced confusion, while doing little to enhance the protection of individual privacy interests.⁶

C. *An Overview*

This Article offers a critique of Nevada's *Harnisch* cases and calls for the Nevada Supreme Court to reconsider its ruling. We begin by examining the historical development of the automobile exception, beginning with *Carroll v. United States*.⁷ There the Supreme Court reasoned that both probable cause and the exigency of the mobility of automobiles justified a search without a warrant. But almost seventy-five years later, in *Maryland v. Dyson*,⁸ the Court clarified its conclusion that the automobile exception has no separate exigency requirement.⁹ In turn, we will then examine Nevada's application of the automobile exception prior to 1998's *Harnisch II*, and the unique circumstances under which the Nevada Supreme Court contradicted both the Supreme Court and its own prior decisions in choosing to diverge from federal precedent on vehicle searches. Lastly, we will offer specific reasons to justify the reconsideration of the court's holding in *Harnisch II* and a return to the carefully developed and crafted automobile exception as it currently exists in the federal system.

II. A HISTORY OF THE AUTOMOBILE EXCEPTION

A. *The Birth of the Automobile Exception: The Carroll Doctrine*

The automobile exception was established during the era of Prohibition,¹⁰ in the Supreme Court's decision in *Carroll v. United States*.¹¹ The Court validated a warrantless search of an automobile "[u]nder the common law and agreeabl[e] to the Constitution," reasoning that under either one a "search may in many cases be legally made without a warrant."¹² *Carroll* involved two federal agents and one state officer who patrolled a major roadway between Detroit and Grand Rapids, Michigan, looking for violations of the National Prohibition Act.¹³ The officers, having established that probable cause existed to believe that the defendants were smuggling prohibited alcohol in their auto-

⁶ An analysis of the court's holding as an interpretation of the Nevada Constitution is provided *infra* at notes 110-67 and accompanying text.

⁷ *Carroll v. United States*, 267 U.S. 132 (1925).

⁸ *Maryland v. Dyson*, 527 U.S. 465 (1999). Even at that, *Dyson* merely confirmed the implications of the Court's decisions going back to *Chambers v. Maroney*, 399 U.S. 42 (1970). See *infra* notes 18-24 and accompanying text.

⁹ *Dyson*, 527 U.S. at 466-67. The Court had previously concluded that an independent exigency requirement imposed "substantial burdens on law enforcement without vindicating any significant values of privacy." *United States v. Ross*, 456 U.S. 798, 815 (1982) (quoting *Robbins v. California*, 453 U.S. 420, 429 (1981) (Powell, J., concurring)).

¹⁰ The Prohibition Era lasted from 1920 to 1933 and outlawed the manufacture, transportation, and sale of alcoholic beverages by means of the Eighteenth Amendment to the Constitution. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

¹¹ *Carroll*, 267 U.S. at 147.

¹² *Id.* at 146.

¹³ The Act, commonly known as the Volstead Act, was designed to enforce the Eighteenth Amendment. National Prohibition Act of 1919, ch. 85, 41 Stat. 305 (repealed 1935).

mobile,¹⁴ stopped and searched the vehicle, locating sixty-eight bottles of blended Scotch whiskies and Gordon gin concealed behind the upholstery of the seats.

Carroll implicitly established an exigency exception that permits warrantless searches of automobiles where contraband quickly could be put out of the reach of a search warrant. In upholding the search and subsequent seizure, the Court noted that early Congresses had recognized a distinction between goods concealed in a “dwelling house or similar place,” on one hand, and “like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.”¹⁵ There is a huge difference, the Court reasoned, between the search of a “dwelling house or other structure,” for which search warrants may readily be obtained, and “a search of a ship, motor boat, wagon or automobile,” where “the vehicle can be *quickly moved* out of the locality or jurisdiction in which the warrant must be sought.”¹⁶ Based on its reading of this history, the Court concluded that “[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”¹⁷

B. The Evolution of the Doctrine: Post-Carroll Developments

The Supreme Court in *Carroll* established the automobile exception to the warrant requirement and based it on two factors: probable cause to believe the vehicle contains contraband and the exigent circumstances presented by the mobility of automobiles, which made it impracticable to obtain a search warrant. Yet, the *Carroll* doctrine was not widely relied on by law enforcement officers for searches outside the setting of enforcing prohibition laws. In his treatise on search and seizure law, Professor LaFare explained why:

While the *Carroll* rule was frequently relied upon in the enforcement of prohibition laws, it had little impact in other areas. . . . [I]t was generally assumed that the entire interior of a vehicle was subject to a warrantless search incident to the arrest of the driver. Usually it was far easier to show grounds to arrest the driver for some past or present offense and then to justify the search as incident thereto than to show a present probability as to the location of specific objects in the car, and thus *Carroll* was seldom invoked. But when the Supreme Court held . . . that a warrantless search incident to arrest may extend only to the person of the arrestee and that area within his immediate control, . . . the continuing vitality and potential reach of the *Carroll* doctrine suddenly became important. Some courts and commentators contended that *Carroll* could not be invoked to uphold those searches formerly justified as searches of vehicles incident to arrest, for once the arrest is made the vehicle can be secured by the police and thus is no longer movable as was the car in *Carroll*. “Exigencies

¹⁴ The Court found: “[T]he facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.” *Carroll*, 267 U.S. at 162.

¹⁵ *Id.* at 151.

¹⁶ *Id.* at 153 (emphasis added).

¹⁷ *Id.* at 149.

do not exist when the vehicle and the suspect are both in police custody.” But the Supreme Court, in *Chambers v. Maroney*, did not agree.¹⁸

In 1970, the Supreme Court, in deciding *Chambers v. Maroney*,¹⁹ rejected any formidable understanding of the traditional exigency requirement as a condition for application of the automobile exception to the warrant requirement, fully twenty-eight years prior to the 1998 decision of the Nevada Supreme Court in *Harnisch II*.²⁰ Police had both stopped the suspect vehicle and arrested its occupants, and both the vehicle and suspects were driven to the local police station, where the automobile was searched and incriminating evidence found. The Court first rejected the idea that the search could be justified as incident to arrest because “[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest.”²¹ But, the Court then noted that the officers had stopped the vehicle within two miles of the location of the reported crime and had probable cause to believe the vehicle contained incriminating evidence related to the crime for which its occupants were arrested. In turn, the Court refused to distinguish between “on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.”²²

Instead, the Court underscored that there is “little to choose in terms of practical consequences between an immediate search without a warrant and the car’s immobilization until after a warrant is obtained.”²³ The Court also noted that “[t]he same consequences may not follow where there is unforeseeable cause to search a house [because] . . . for the purposes of the Fourth Amend-

¹⁸ WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2(a), at 540-41 (4th ed. 2004) (footnotes omitted).

¹⁹ *Chambers v. Maroney*, 399 U.S. 42 (1970).

²⁰ *See id.* at 51-52. As Professor Latzer observed, in *Chambers* and its progeny, the Court “reaffirmed *Carroll* but worked a subtle change: whereas the old precedent excused the warrant because of some exigency, the Burger rulings eroded the exigency requirement.” BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 68 (1991). In *Chambers*, the Court permitted a warrantless search of an automobile that had already been “towed and secured by the police.” *Id.* at 84 n.145. Thus, by 1985 the Court held that “the warrantless search of a mobile home was justified by both the ‘ready mobility’ of the vehicle (although it was parked and not about to be moved) and the reduced expectation of privacy engendered by the ‘pervasive regulation’ of such vehicles.” *Id.* at 68 (citing *California v. Carney*, 471 U.S. 386 (1985)).

²¹ *Chambers*, 399 U.S. at 47 (internal quotation omitted).

²² *Id.* at 52. Thus, in *Chambers* the Court “moved away from practicality concerns by allowing for the search of an automobile that was no longer on the road but was instead secure in a police station. As long as probable cause to search the automobile existed, mobility was not important.” ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 109 (2003). Professor Friesen thus asserts, somewhat paradoxically, that “*exigent circumstances* are not required in order to dispense with a warrant when searching an automobile, as its *potential* mobility supplies the *exigency* needed.” JENNIFER FRIESEN, 2 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 11.08, at 11-101 (4th ed. 2006) (emphasis added) [hereinafter STATE CONSTITUTIONAL LAW]. It really was not entirely clear whether the Supreme Court had “abandoned” the exigency requirement or merely redefined it.

²³ *Chambers*, 399 U.S. at 52.

ment there is a constitutional difference between houses and cars.”²⁴ The Court thus offered what became a second rationale justifying the automobile exception to the warrant requirement: the reduced expectation of privacy in automobiles.

Just three years later, in *Cady v. Dombrowski*,²⁵ the Court upheld the search of a disabled vehicle when a policeman, after arresting a law enforcement officer for driving under the influence, searched the vehicle, pursuant to a department procedure, to secure the driver’s law enforcement service revolver. The driver was a Chicago police officer and was detained at the scene of a single vehicle accident; he was subsequently arrested for driving under the influence and transported to the police station while his disabled vehicle was towed to a privately owned garage.

Because the arresting officers thought Chicago officers were required by regulation to carry their service revolvers at all times, the arresting officers attempted, but failed, to locate the revolver on the arrested person or in his vehicle. A subsequent search at the garage led to opening the trunk of the vehicle and locating items that led to the discovery of evidence connecting the arrested individual to a nearby murder. The Court not only concluded that the search was a “reasonable” exercise of a police “caretaking” function, but it also emphasized the idea that the search was justified in part by the reduced expectation of privacy in automobiles.²⁶ It noted that “[a]ll States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.”²⁷

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office.²⁸

The consequence is a constitutional difference between searches of homes and similar structures from searches of automobiles, a difference that stems in part from the “ambulatory character” of automobiles and in part because the “extensive, and often noncriminal contact with automobiles will bring local officials in ‘plain view’ of evidence, fruits, or instrumentalities of a crime or contraband.”²⁹

This new justification for the automobile exception was developed further in *Cardwell v. Lewis*.³⁰ The case concerned a murder investigation in which a vehicle was alleged to have been used to push the victim’s vehicle over an embankment. The warrantless search of the exterior of the vehicle was upheld

²⁴ *Id.* Modern commentators have recognized that “*Chambers* cannot be rationalized in terms of the oft-stated principle that a search warrant is required except in exigent circumstances.” 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.7(b), at 275 (3d ed. 2007).

²⁵ *Cady v. Dombrowski*, 413 U.S. 433 (1973).

²⁶ *Id.* at 441, 447-48. The Court emphasized that the officers’ actions were reasonable based on concern for the safety of the public, who might be endangered if someone removed a revolver from the trunk of a vehicle. *Id.* at 447.

²⁷ *Id.* at 441.

²⁸ *Id.*

²⁹ *Id.* at 442.

³⁰ *Cardwell v. Lewis*, 417 U.S. 583 (1974).

by the Court based on the automobile exception to the warrant requirement. The Court concluded that there was probable cause to justify searching this automobile³¹ and emphasized the newer justification for the automobile exception. Specifically, the Court noted:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.³²

Consistent with this new emphasis, the Court stressed that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”³³

It took some time, of course, before the reduced expectation of privacy rationale came to be viewed as a sufficient ground to fully justify the exception to the warrant requirement. The Court demonstrated that it was not ready fully to take this step in *United States v. Chadwick*.³⁴ There Amtrak railroad officials observed suspects carrying a brown footlocker, which they believed contained a large quantity of marijuana.³⁵ When the suspects arrived in Boston, and retrieved the footlocker from the baggage cart, federal agents there used a drug detector dog that signaled the presence of a controlled substance inside the footlocker. The agents followed the suspects until they met with another and loaded the footlocker into the trunk of a nearby vehicle. After an arrest of the suspects, the federal agents conducted a warrantless search of the footlocker and recovered a large amount of marijuana.

Even as it underscored the reduced expectation of privacy as an important part of the rationale for the automobile exception, the Court also stressed that the same factors do not apply to footlockers.³⁶ The Court stressed that “[l]uggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspec-

³¹ *Id.* at 592. Indeed, the federal district court had concluded that there was both sufficient probable cause to justify the arrest of the owner of the vehicle who had responded at the police station, as well as probable cause to believe that the suspect's vehicle was used in the commission of a crime. *Id.* at 586-87.

³² *Id.* at 590. For cases confirming that the reduced expectation of privacy has become the central—and, indeed, adequate—justification for the automobile exception to the warrant requirement, see *Michigan v. Thomas*, 458 U.S. 259, 261 (1982), and *California v. Carney*, 471 U.S. 386, 391-93 (1985).

³³ *Cardwell*, 417 U.S. at 591 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). The Court viewed it as basically irrelevant that the vehicle in *Cardwell* presented no threat of mobility, given that the car had been impounded well prior to the search. The Court concluded that it did not matter that “the police impounded the car prior to the examination, which they could have made on the spot,” and, thus, there was no constitutional barrier “to the use of the evidence obtained thereby.” *Id.* at 593.

³⁴ *United States v. Chadwick*, 433 U.S. 1 (1977).

³⁵ *Id.* at 3 (noting that officers testified that the trunk appeared to be “unusually heavy for its size, and that it was leaking talcum powder, a substance often used to mask the odor of marijuana or hashish”).

³⁶ *Id.* at 13. Even then, however, the Court fully acknowledged that the automobile exception had been applied “in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent.” *Id.* at 12 (internal quotation omitted).

tions and official scrutiny on a continuing basis.”³⁷ So, the Court refused to extend the automobile exception to other mobile containers, such as suitcases and footlockers. In refusing to perceive mobility as a per se justification for an exception to the warrant requirement, the Court simultaneously increased the significance of the reduced expectation of privacy rationale as the justification for the automobile exception. The Court continued on this path in its 1979 decision in *Arkansas v. Sanders*.³⁸ Police had developed probable cause to believe an individual was carrying a large quantity of marijuana in a green suitcase, which he placed in the trunk of an airport taxi. The Court reasoned that police could, without endangering themselves or risking loss of evidence, lawfully detain one suspected of criminal activity and secure the suitcase, and thus “delay the search thereof until after judicial approval has been obtained.”³⁹

The Court’s first move away from the paradox generated by its decision in *Chadwick*—that managed to preclude a search of the contents of an automobile despite the presence of probable cause—was in *United States v. Ross*.⁴⁰ There the Court concluded that if an investigator’s probable cause to search extended to the entire automobile, including its contents, the right to search would extend even to suitcases or other repositories of personal effects. In so ruling, the Court sided with Justice Powell’s concurring opinion in *Robbins v. California*, where the Justice had complained that the plurality’s dicta not only “strain[ed] the rationales” of prior cases, but also imposed “substantial burdens on law enforcement without vindicating any significant values of privacy.”⁴¹ The Court also stressed that, unlike *Chadwick* and *Sanders*, here the police had probable cause to search the entire vehicle.⁴² The Court concluded that “[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and [any] contents that may conceal the object of the search.”⁴³

The paradox of the decisions beginning with *Chadwick* was precisely that the more specific the probable cause, the more restrictive the law was regarding a warrantless search. On the other hand, a broader and more intrusive search would be permitted under circumstances that involved only a general level of probable cause. The Supreme Court finally resolved the paradoxes and incon-

³⁷ *Id.* at 13. The Court concluded: “Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects.” *Id.*

³⁸ *Arkansas v. Sanders*, 442 U.S. 753 (1979).

³⁹ *Id.* at 766. The Court extended its holding in *Sanders* even to bricks of marijuana found as part of a valid vehicle search because the bricks were “wrapped in green opaque plastic.” *Robbins v. California*, 453 U.S. 420, 422, 428 (1981). The Court affirmed that “a container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile.” *Id.* at 428. Though he concurred in the judgment, Justice Powell emphasized that the packaging “evidenced petitioner’s expectation of privacy,” and warned that the Court’s broad dicta strained “the rationales of [its] prior cases and impose[d] substantial burdens on law enforcement without vindicating any significant values of privacy.” *Id.* at 429 (Powell, J., concurring).

⁴⁰ *United States v. Ross*, 456 U.S. 798 (1982).

⁴¹ *Id.* at 815 (citing *Robbins*, 453 U.S. at 429 (Powell, J., concurring)); see *supra* note 39.

⁴² *Ross*, 456 U.S. at 817.

⁴³ *Id.* at 825.

sistencies in *California v. Acevedo*.⁴⁴ There the police stopped an individual suspected of having a quantity of marijuana in a brown bag that they had watched him place into the trunk of his vehicle. While the facts of the case appeared to be governed by the *Chadwick-Sanders* rule that precluded the warrantless search of a container inside an automobile if the probable cause was limited to the individual container, the Court stressed the “virtue of providing clear and unequivocal guidelines to the law enforcement profession,”⁴⁵ and held that “the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.”⁴⁶ The result was that “[t]he interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause.”⁴⁷

C. *The Current Automobile Exception: Probable Cause*

In the last decade, the Supreme Court has been especially clear that probable cause is sufficient to justify a warrantless search of an automobile. In *Pennsylvania v. Labron*,⁴⁸ police conducted a warrantless search of the trunk of the suspect’s vehicle and discovered contraband. In reversing a lower court’s decision that the automobile exception did not apply because of a lack of exigent circumstances, the Court confirmed that “[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.”⁴⁹ Similarly, when police performed a warrantless search of a duffle bag retrieved from the trunk of a vehicle, it reaffirmed that “the ‘automobile exception’ has no separate exigency requirement.”⁵⁰ So the Supreme Court eventually concluded that probable cause is sufficient to justify a warrantless search of automobiles and containers found within them.

III. THE HISTORY OF SEARCHING AUTOMOBILES IN NEVADA

A. *The Pre-Harnisch Decisions*

Prior to *Harnisch I*, the Nevada Supreme Court had made a practice of following the United States Supreme Court on most, if not all, of its interpretations and applications of the law governing searches and seizures.⁵¹ This practice was especially well established as to cases involving warrantless searches

⁴⁴ *California v. Acevedo*, 500 U.S. 565 (1991). In *Acevedo* the Court opted for “providing clear and unequivocal guidelines to the law enforcement profession.” *Id.* at 577 (internal quotation omitted), *quoted in* BLOOM, *supra* note 22, at 111.

⁴⁵ *Id.* at 577 (quoting *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990)).

⁴⁶ *Id.* at 576.

⁴⁷ *Id.* at 579.

⁴⁸ *Pennsylvania v. Labron*, 518 U.S. 938 (1996).

⁴⁹ *Id.* at 940.

⁵⁰ *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999).

⁵¹ It is thus no coincidence that the initial opinion in the *Harnisch I* case underscores that it is reviewing a decision “considering a motion to suppress evidence pursuant to the Fourth Amendment.” *State v. Harnisch (Harnisch I)*, 931 P.2d 1359, 1363 (Nev. 1997) (emphasis added). The court’s initial decision was in no way based on the State’s constitution.

of vehicles in Nevada. Unsurprisingly, then, the Nevada court tracked the Supreme Court's ascribing the automobile exception—at least in part—to the reduced expectation of privacy in automobiles.

In upholding the warrantless inventory search of a vehicle,⁵² the Nevada court in *Heffley v. State*⁵³ underscored that

[t]he historical difference in treatment between buildings and automobiles justifies the inventory procedure used by the police. The fundamental right of privacy connected with a man's home is understandably different and in greater need of protection than an automobile on the public right of way. In the latter case the police and other people using the public highway, as well as the owner of the vehicle, have an interest which must be protected.⁵⁴

Elsewhere, the court has noted that “the search of an automobile, while still subject to some restrictions, may be conducted much more freely than the search of a house, store or other fixed piece of property.”⁵⁵ Although neither decision required application of the automobile exception, the court clearly subscribed to the Supreme Court's view of the reduced expectation of privacy in automobiles.

Despite the abundance of relevant federal cases, research only revealed a single published decision straightforwardly applying the automobile exception in Nevada. In *Wright v. State*,⁵⁶ the court affirmed the warrantless search of an automobile based on the *Carroll-Chambers* doctrine. Two police officers observed and pulled over a vehicle that displayed stolen license plates. Having taken both occupants into custody, and based on the occupants' connection to a stolen vehicle, the officers placed them in the back of their patrol vehicle and returned to the automobile. One officer then observed, in plain view, the butt of a gun that was protruding from under the front seat. The officers then conducted a search of the vehicle. After reviewing the factual record, the court concluded that the “probable cause element of the *Carroll-Chambers* doctrine was satisfied.”⁵⁷ At least as important, the court acknowledged that the occupants had been removed from the vehicle and that there was no chance for the vehicle to be removed or its contents tampered with.⁵⁸ Even so, the court held that the arresting officers properly searched the vehicle because they had probable cause to believe that it contained items that were subject to seizure.⁵⁹ The court's 1972 holding thus tracked perfectly with the Supreme Court's 1970

⁵² As a general matter, the Nevada court has adopted the federal rule upholding inventory searches of impounded automobiles. *See, e.g., Weintraub v. State*, 871 P.2d 339, 340 (Nev. 1994) (“[P]olice officers need not comply with the Fourth Amendment's probable cause and warrant requirements when they are conducting an inventory search of an automobile in order to further some legitimate caretaking function.”). The court adopted—and ensured compliance with—the Supreme Court's ruling in favor of inventory searches in *South Dakota v. Opperman*, 428 U.S. 364 (1976). *Weintraub*, 871 P.2d at 340.

⁵³ *Heffley v. State*, 423 P.2d 666 (Nev. 1967).

⁵⁴ *Id.* at 668.

⁵⁵ *Harper v. State*, 440 P.2d 893, 896 (Nev. 1968).

⁵⁶ *Wright v. State*, 499 P.2d 1216 (Nev. 1972).

⁵⁷ *Id.* at 1224.

⁵⁸ *Id.* at 1223-24.

⁵⁹ *Id.* at 1224.

Chambers holding, where the Supreme Court admitted the lack of a traditional exigency element.

Nevada's consistent practice of complying with federal precedent is illustrated as well in *Obermeyer v. State*,⁶⁰ where the Nevada Supreme Court followed the United States Supreme Court's then-current holding in *Arkansas v. Sanders*.⁶¹ After it generally validated a standard inventory search of a vehicle that had been impounded, the court held that *Sanders* required a search warrant to search luggage that was found in the automobile. Searches of luggage found in the automobile, the court held, "must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway."⁶²

Even when it was clear that the automobile exception to the warrant requirement did not apply, inasmuch as the criminal suspect was a mere passenger and not the owner of the car, the Nevada court still held that the non-owner passenger did not have standing to bring a claim asserting an illegal search and seizure. Instead, the court underscored that the fundamental question was whether "police activity infringed upon a reasonable expectation of privacy," and answering this question was impacted by the "conclusion that cars have a lesser expectation of privacy than houses."⁶³ Moreover, considering that the automobile was stopped initially based on a well-grounded reasonable suspicion that it was a stolen vehicle, the court completely rejected the defendant's position that the vehicle stop was "a mere pretext to conduct an unreasonable search."⁶⁴

If there was an area where it appeared that Nevada might deviate from the federal standard, it related to the scope of what is known as a search "incident to arrest." In 1995, the court decided *Alejandre v. State*⁶⁵ and found that the Nevada Highway Patrol had engaged in an unconstitutional pretextual stop for the purpose of searching for evidence.⁶⁶ The court concluded, "[A] pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop."⁶⁷ Moreover, the Nevada court adopted the Ninth Circuit's "pretext" test, which inquires whether the officer normally would have made the stop under similar circumstances.⁶⁸

But less than a year later, the Nevada court, in *Gama v. State*,⁶⁹ reversed its prior holding in *Alejandre*, recognizing that its prior decision was an attempt to resolve a split among the federal circuits and acknowledging that the same

⁶⁰ *Obermeyer v. State*, 625 P.2d 95 (Nev. 1981).

⁶¹ *Arkansas v. Sanders*, 442 U.S. 753 (1979); *see supra* notes 38-39 and accompanying text.

⁶² *Obermeyer*, 625 P.2d at 97 (citing *Sanders*, 442 U.S. at 766).

⁶³ *Scott v. State*, 877 P.2d 503, 507 (Nev. 1994).

⁶⁴ *Id.* at 508.

⁶⁵ *Alejandre v. State*, 903 P.2d 794 (Nev. 1995).

⁶⁶ *Id.* at 796.

⁶⁷ *Id.* (alteration in original) (quoting *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988)).

⁶⁸ *Id.* (referring to this formulation as the "would" test, as contrasted with a "could" test).

⁶⁹ *Gama v. State*, 920 P.2d 1010 (Nev. 1996).

split had been authoritatively resolved by the Supreme Court.⁷⁰ If the vehicle stop is supported by probable cause “to believe that the driver had committed a traffic infraction,” it is “reasonable under the Fourth Amendment, even if a reasonable officer would not have made the stop absent some purpose unrelated to traffic enforcement.”⁷¹ If Nevada were properly to decide to depart from federal precedent, the “search incident” context would logically have been the place.⁷²

B. Harnisch I & II

As noted, the Nevada Supreme Court has consistently followed the interpretation and application of Fourth Amendment search and seizure issues of the United States Supreme Court. The court’s approach has served to limit confusion and to aid in providing clear and unequivocal guidelines to law enforcement personnel in Nevada. But this consistency came to a startling halt when the court, in *Harnisch II*, chose for the first time to reject governing federal search and seizure precedent.

The Nevada court initially, in *Harnisch I*,⁷³ upheld the suppression of evidence obtained in a warrantless search of a vehicle. The search was the result of an investigation into a kidnapping and robbery. The police had obtained a search warrant for Harnisch’s apartment.⁷⁴ As they executed the search warrant, Harnisch arrived at the apartment complex and parked in his assigned parking place. Police took Harnisch into custody and, after searching his apartment, searched his vehicle, including the trunk, which produced incriminating evidence that was located inside a suitcase.⁷⁵ The State defended the search as within the bounds of the search warrant because it was within the “curtilage” of

⁷⁰ *Id.* at 1012; see *Whren v. United States*, 517 U.S. 806 (1996).

⁷¹ *Gama*, 920 P.2d at 1013 (internal quotation omitted). Even in upholding a trial court’s suppression of evidence based on its being derived from an illegal search, in *State v. Greenwald*, 858 P.2d 36, 38 n.2 (Nev. 1993), the Nevada court concurred with the dissent’s argument that “the court is not bound by the arresting officer’s characterization of the search as incident to arrest or as an inventory,” and did not object at all to the dissent’s reliance on *New York v. Belton*, 453 U.S. 454 (1981). And *Belton* clearly established that officers may, “as a contemporaneous incident to that arrest, search the passenger compartment of that automobile.” *Greenwald*, 858 P.2d at 41 (quoting *Belton*, 453 U.S. at 460). The impact of *Harnisch II* on Nevada search and seizure law is illustrated by the court’s use of it to substantially qualify its commitment to the United States Supreme Court’s “incident to arrest” doctrine. See *infra* notes 105-09 and accompanying text.

⁷² A special irony of the court’s subsequent holding in *Harnisch II* is that, whereas an independent exigency requirement imposes “substantial burdens on law enforcement without vindicating any significant values of privacy,” *United States v. Ross*, 456 U.S. 798, 815 (1982), there truly is a substantial argument that citizen privacy may be adversely affected by pretextual traffic stops. See *supra* notes 51-71 and accompanying text; see also *infra* notes 128-29 and accompanying text.

⁷³ *State v. Harnisch (Harnisch I)*, 931 P.2d 1359 (Nev. 1997).

⁷⁴ Police identified Harnisch as a suspect from surveillance video and finger print evidence obtained as he attempted to cash sports betting tickets that were taken in the robbery. Detectives also located a vehicle near Harnisch’s apartment that matched the description of the one used in the kidnapping and robbery. Police were thus enabled to obtain a search warrant for Harnisch’s apartment. *Id.* at 1361-62.

⁷⁵ *Id.* at 1362.

Harnisch's apartment.⁷⁶ But the Nevada Supreme Court agreed with the trial court that the parking space was not within the "curtilage" of Harnisch's apartment unit. Though the State had only relied on the curtilage issue and *did not* even raise the claim that the search fell within a possible exception to the warrant requirement, the court raised the constitutional issue of exigency *sua sponte*.⁷⁷ In the process, the court held that the automobile exception does not apply to the search of a locked suitcase in the trunk of an automobile, and, even if it were applied, the automobile exception requires exigent circumstances to justify the search.⁷⁸

Despite these egregious errors in constitutional analysis, the court nevertheless denied the State's petition for rehearing and, in a short, *per curiam* opinion in *State v. Harnisch II*,⁷⁹ conceded that it had misstated the law and acknowledged that federal law "no longer requires the exigent circumstance prong in order to search an automobile without a warrant."⁸⁰ Rather than conceding its mistake and conforming to federal precedent, the court quickly changed direction, concluding that "[i]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."⁸¹ The court then noted that a few of its sister states had elected to require police to obtain a search warrant prior to searching a parked, immobile, unoccupied vehicle.⁸²

The Nevada Supreme Court thus concluded that "the Nevada Constitution [now] requires both probable cause and exigent circumstances in order to justify a warrantless search of a parked, immobile, unoccupied vehicle."⁸³ The new rule was justified, the court reasoned, because of Nevada's strong public

⁷⁶ *Id.*

⁷⁷ A court may raise constitutional issues *sua sponte* ("by its own accord"). *McCullough v. State*, 657 P.2d 1157, 1158 (Nev. 1983).

⁷⁸ *Harnisch I*, 931 P.2d at 1365. The court, incidentally, also rejected the potential State defense that this was a valid search incident to arrest. *Id.* at 1365-66. Reasoning that the search incident to arrest doctrine "derives from the need to disarm and prevent any evidence from being concealed or destroyed," *id.*, the court concluded that there was no need for a search incident to arrest inasmuch as Harnisch was already in custody, and there was thus no need to disarm him or prevent destruction of evidence. Given that *New York v. Belton*, 453 U.S. 454 (1981), which was cited as authority by the court, was intended to create a "bright line" rule and involved a passenger who was a "recent occupant" who was in police custody at the time of search, it is clear that the court managed, in a short page, to completely misstate Fourth Amendment law *both* as to the "automobile exception" and as to the "search incident to arrest" doctrine. *See, e.g.*, 3 LAFAYE, *supra* note 18, §§ 7.1(a)-(b), at 502-12; LATZER, *supra* note 20, at 64 (concluding that, at least since 1973, the Court had held that the "'bright line' ruling was justified by the need to give police better guidance than would be available with case-by-case adjudication").

⁷⁹ *State v. Harnisch (Harnisch II)*, 954 P.2d 1180 (Nev. 1998).

⁸⁰ *Id.* at 1182 (citing *Ornelas v. United States*, 517 U.S. 690 (1996); *California v. Acevedo*, 500 U.S. 565 (1991); *Michigan v. Thomas*, 458 U.S. 259 (1982)). Notice, however, that the Court even then fails to acknowledge that the rejection of a traditional exigency requirement in true automobile searches goes back at least to *Chambers v. Maroney*, 399 U.S. 42 (1970). *See supra* notes 19-24 and accompanying text.

⁸¹ *Harnisch II*, 954 P.2d at 1182 (alteration in original) (quoting *California v. Ramos*, 463 U.S. 992, 1013-14 (1983)).

⁸² *Id.* (citing *State v. Kock*, 725 P.2d 1285 (Or. 1986); *State v. Larocco*, 794 P.2d 460 (Utah 1990); *State v. Patterson*, 774 P.2d 10 (Wash. 1989)).

⁸³ *Id.* at 1183.

policy requiring police to obtain a warrant whenever feasible, noting that “[a]bandonment of the exigency requirement in Nevada would essentially eliminate any need for a warrant whenever a government agent wishes to search an immobile vehicle.”⁸⁴ The court did not address, however, whether valid privacy concerns could be adequately addressed by the probable cause requirement; nor did the court fully acknowledge that a strict exigency requirement as to warrantless vehicle searches had been abandoned by the United States Supreme Court almost thirty years prior to the Nevada decision in *Harnisch II*.⁸⁵

C. *Post-Harnisch Decisions*

Needless to say, this unprecedented move away from federal precedent on Fourth Amendment search and seizure issues brought a number of vehicle search cases to the State’s highest court. The first case to reach the court, *Barrios-Lomeli v. State*,⁸⁶ produced an opinion six months after *Harnisch I* was decided and six months prior to *Harnisch II*, and thus supplied the Nevada Supreme Court with its initial opportunity to attribute its decision in *Harnisch I* to its conclusion that the state constitution requires “that exigent circumstances must be present to justify a warrantless automobile search.”⁸⁷

In *Barrios-Lomeli*, the court confronted a case where a regional narcotics task force, working with an individual who had been arrested for selling drugs,⁸⁸ had arranged for the delivery of four ounces of methamphetamine. The deal was to take place in a commercial parking lot, and officers contacted the suspect, his girlfriend, and her small child at a McDonald’s eating area in a Wal-Mart. After failing to recover any methamphetamine on the suspect’s person, police quickly shifted their attention to the automobile, which was parked and unoccupied in the parking lot. Police conducted a warrantless search of the

⁸⁴ *Id.* The Nevada court also reasoned that “other states have concluded that their state constitutions require either a warrant to search a parked, immobile, unoccupied vehicle or a showing that probable cause and exigent circumstances exist to search the automobile without a warrant.” *Id.* at 1182 (citing *Larocco*, 794 P.2d at 469-70; *Patterson*, 774 P.2d at 12).

The citations are correct, but a bit misleading. In *State v. Anderson*, 910 P.2d 1229, 1235 (Utah 1996), the Utah Supreme Court observed that *Larocco* was not binding inasmuch as it was decided by a plurality of the court and concluded that, contrary to *Larocco*’s ruling, Utah courts should construe its state constitution consistently with the Fourth Amendment “except in compelling circumstances.” The court thus chose to apply a straightforward reading of the federal interpretation of the warrant requirement, directly contrary to *Larocco*. *See id.* at 1234-37; *cf. Patterson*, 774 P.2d at 13, 18-19 (Dore, J., concurring) (agreeing that exigent circumstances justified the search in the facts of the particular case, but contending Washington’s own precedents established that automobiles presented a “*per se* exigency” situation and justified warrantless searches at least in part based on the reduced expectation of privacy). This concurrence, and the Utah Supreme Court’s rejection of *Larocco* in *Anderson*, reflects the difficulties confronted by state courts as they have sought to depart from federal precedent. *See infra* notes 130-39 and accompanying text.

⁸⁵ *See supra* notes 19-24 and accompanying text.

⁸⁶ *Barrios-Lomeli v. State*, 944 P.2d 791 (Nev. 1997).

⁸⁷ *Id.* at 794.

⁸⁸ Having been arrested for the sale of a controlled substance, Adrian Obeso-Hernandez agreed to assist in arresting other narcotics traffickers in exchange for favorable consideration at his own sentencing hearing. *Id.* at 791.

vehicle and recovered four ounces of methamphetamine, which had been concealed behind the dashboard and removable stereo.⁸⁹ The State relied on the court's prior adherence to federal precedent regarding such searches, contending that the search fell within the automobile exception to the warrant requirement.⁹⁰ Despite the fact that the officers acted as they did in 1995, well before the Nevada decision even in *Harnisch I*, so that they clearly were complying with the only law they knew, the court still concluded that it was error to rely exclusively on federal law and reiterated that Nevada, based on *Harnisch I*, required a showing of exigent circumstances to justify the warrantless search of an automobile.⁹¹

Just a year after *Harnisch II*, the court decided *Fletcher v. State*,⁹² and sought to develop and clarify the exigency requirement essential to justify a warrantless search of a vehicle. In *Fletcher*, police located and arrested a man suspected of battery, kidnapping, coercion, and drug trafficking, as the suspect drove his vehicle on a public road. Having arrested the defendant for kidnapping and battery charges, the police conducted a warrantless search of his automobile based on information they had received that he sold drugs he kept in his automobile.⁹³ Police recovered two bags of cocaine that, as they had been told, were concealed behind the dashboard and steering column area.⁹⁴ Even though a police detective testified that police intended to impound the car and "were ready to perform an inventory search of Fletcher's automobile"⁹⁵—a move that raises doubts about the existence of a real exigency requiring an immediate search without a warrant—the Nevada Supreme Court emphasized that the warrantless search of Fletcher's car came "subsequent to Fletcher's roadside arrest on a separate charge."⁹⁶

So the automobile was not simply a parked, immobile, and unoccupied vehicle. The court also reasoned that because "Fletcher's vehicle was left on the roadside subject to a police inventory search and later impoundment," it created "what we conclude to be a sufficient exigent circumstance distinct from the parked, unoccupied vehicles in *Harnisch I*, *Harnisch II*, and *Barrios-*

⁸⁹ *Id.* at 792.

⁹⁰ *Id.* at 793. In concluding that it was not necessarily essential that the police seek and obtain an "anticipatory" search warrant in this case, the court made the observation in passing that clearly "probable cause existed." *Id.*

⁹¹ *Id.* at 794. In rejecting the conclusion that an exigency was presented, the court opened the door to an interesting argument for a claim of exigent circumstances. Noting that Nevada statutes permit police to detain individuals and automobiles for no longer than sixty minutes, the court concluded that this should have been sufficient time to obtain a telephonic search warrant. *See* NEV. REV. STAT. § 171.123(4) (1995). Yet, the court conceded that if "one hour would have been insufficient to secure a warrant, an exigency may have arisen." *Barrios-Lomeli*, 944 P.2d at 794. The court declined to consider the matter further, however, because the officers did not even attempt to obtain a search warrant.

⁹² *Fletcher v. State*, 990 P.2d 192 (Nev. 1999).

⁹³ *Id.* at 193-94.

⁹⁴ *Id.* at 194.

⁹⁵ *Id.* Indeed, the Nevada Supreme Court noted that the trial court had ruled the drug evidence admissible, in the alternative, "as part of a proper inventory search." *Id.*

⁹⁶ *Id.* at 195.

Lomeli.⁹⁷ The court could quite easily have viewed the seizure—not to mention the subsequent impoundment—of the automobile as precluding, rather than helping to establish, exigent circumstances. Rather than concluding that leaving the automobile on the side of the road where its occupant was arrested removed any real threat of its actual mobility, the court contended that “[i]t would be unreasonable to require the police to remain at the scene of the arrest pending the arrival of a warrant or assign an officer to accompany the tow truck to an impound yard pending the arrival of a warrant.”⁹⁸ Considering that in *Fletcher* there was no real threat of mobility, the court’s insistence that it was requiring an independent exigency to justify reliance on the automobile exception is suspect. The court simply concludes that to require police to obtain a search warrant here would be unreasonable.

Similarly, the need for any sort of special efforts to await the obtaining of a search warrant was deemed an adequate exigency in *Hughes v. State*.⁹⁹ Decided in 2000, *Hughes* concerned the investigation of a shooting that occurred at a Pahrump, Nevada, casino that resulted in a vehicle stop and arrest. Police removed the defendants from the vehicle, patted them down, and secured them in the back of the police car before searching the vehicle.¹⁰⁰ The court began by distinguishing *Hughes* from the earlier cases as concerning a roadside search, “as opposed to a search of a parked and unoccupied vehicle.”¹⁰¹ The court again determined that merely requiring “the police to remain at the scene of the arrest pending the arrival of a warrant,” or, alternatively, assigning “an officer to accompany the tow truck to an impound yard pending the arrival of a warrant,” would be sufficiently unreasonable to constitute an exigency justifying an immediate search.¹⁰²

The only difference, the court reasoned, between *Hughes* and *Fletcher*, the court’s earlier decision, was that it was quite clear in *Fletcher* that the defendant had not only been “stopped,” but actually arrested, while in *Hughes*, police could only rely on “the *imminent arrest* of appellant and the other occupants of the vehicle.”¹⁰³ But especially in light of the certainty of the arrests that were to occur in *Hughes*, the exigency was just as present in that case as it had been in *Fletcher*. Once again, however, the occupants of the vehicle in *Hughes* had been lawfully detained and were, like the defendant in *Barrios-*

⁹⁷ *Id.* Yet, this was almost precisely the scenario that the exigency requirement was taken as requiring of the police in *Barrios-Lomeli*.

⁹⁸ *Id.* In many ways, the court’s analysis was similar to the United States Supreme Court’s refusal in *Chambers* to distinguish between “on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.” *Chambers v. Maroney*, 399 U.S. 42, 52 (1970). But, of course, this is the feature of *Chambers* that prompted the Court to offer the alternative reduced expectation of privacy rationale for the automobile exception. As with the *Chambers* Court, the Nevada court in *Fletcher* failed to clarify whether it was in effect abandoning a meaningful exigency requirement or simply redefining it.

⁹⁹ *Hughes v. State*, 12 P.3d 948 (Nev. 2000).

¹⁰⁰ The police officer testified that when he searched the vehicle, officer safety was not an issue because the four suspects had been patted down for weapons and temporarily restrained. *Id.* at 950.

¹⁰¹ *Id.* at 951.

¹⁰² *Id.*

¹⁰³ *Id.* (emphasis added).

Lomeli, subject to the one-hour period prescribed by statute in which the police could have attempted to procure a search warrant.¹⁰⁴

Finally, the Nevada court concluded in *Camacho v. State*¹⁰⁵ that the *Harnisch* decisions justified an exceptionally narrow construction of the United States Supreme Court's search "incident to arrest" doctrine. In *Harnisch I*,¹⁰⁶ the court ignored the gist of the conclusions the United States Supreme Court had reached about the scope of the search "incident to arrest" doctrine as it had been articulated in *Chimel v. California*¹⁰⁷ and applied in subsequent cases.¹⁰⁸ In making decisions about the scope and application of the search incident to arrest doctrine, the Supreme Court has recognized that

the protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." This is because "Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'"¹⁰⁹

¹⁰⁴ See NEV. REV. STAT. § 171.123(4) (1995).

¹⁰⁵ *Camacho v. State*, 75 P.3d 370 (Nev. 2003).

¹⁰⁶ *State v. Harnisch (Harnisch I)*, 931 P.3d 1359, 1365-66 (Nev. 1997).

¹⁰⁷ *Chimel v. California*, 395 U.S. 752 (1969).

¹⁰⁸ As early as 1973,

the Burger Court reaffirmed *Chimel*, but by applying it to offenses indicating little likelihood that the arrestee had access to a weapon or evidence, the search-incident rule became much more valuable to law enforcement. In *Robinson*, the search of the arrestee was incident to an arrest for a motor vehicle violation, which certainly did not suggest that the defendant was armed or in possession of any contraband, but the Court admitted the drugs found in his pocket. This "bright line" ruling was justified by the need to give police better guidance than would be available with case-by-case adjudication.

LATZER, *supra* note 20, at 63-64 (citing *United States v. Robinson*, 414 U.S. 218 (1973)); accord 2 LAFAYE ET AL., *supra* note 24, § 3.7(a). For criticism of *Robinson*, see Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1089-1102 (1982).

¹⁰⁹ *New York v. Belton*, 453 U.S. 454, 458 (1981) (citation omitted) (quoting Wayne R. LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 141-42 [hereinafter LaFave, *Standardized Procedures*]); see also LATZER, *supra* note 20, at 69 (*Belton* demonstrates the Court's commitment to "a 'bright line' rule in preference to a case-by-case determination," and "obviates the need to determine whether or not the arrestee actually could obtain weapons or evidence from the automobile—even though arrestee access was the original Warren Court justification for a search incident to arrest."); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 6.04(c), at 176 (3d ed. 1993) (Based on a conclusion that "the armspan rule had been difficult to apply in cases involving automobiles," the Court determined that, after a lawful arrest, police may search "any part of the car's interior, as well as packages, clothing and other containers.").

IV. HARNISCH AS AN INTERPRETATION OF THE STATE'S CONSTITUTION

As noted above, in *Harnisch II* the Nevada court observed that “[i]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.”¹¹⁰ Indeed, the Supreme Court has clarified that state court decisions based on a state’s constitution present an “adequate and independent” ground for decision and actually preclude Supreme Court review of the state court’s decision.¹¹¹ It is thus a “bedrock of state court authority to pass on questions of state law without fear of Supreme Court reversal.”¹¹² Perhaps of greater importance is the actual approach adopted by state courts in construing their constitutions and in relating provisions of that constitution to the guarantees of the federal Bill of Rights. State courts have taken varying approaches to construing their state constitutions, ranging from the stand that they are bound by United States Supreme Court decisions as to closely-related federal guarantees—commonly called the “lockstep doctrine”¹¹³—to the view that they should give “primacy” to state constitutional guarantees, to provisions that should be construed “independently” of decisions of the Supreme Court.¹¹⁴

A. *The Implications (and Non-Implications) of Independent Decision-Making*

It is equally clear that state court “independent” decision-making need not entail frequent rejection of Supreme Court rules and doctrines. Sometimes commentators have simply assumed that state court independence also implied state court activism in invalidating decisions made by state actors. As Professor Williams observes: “Much less attention has been devoted, however, to the circumstances where state courts decide to *follow*, rather than *diverge from*, federal constitutional doctrine. This is, in fact, the clear majority of cases, and represents an important feature of the dual enforcement of constitutional norms.”¹¹⁵ At least one state supreme court has thus underscored that

¹¹⁰ State v. Harnisch (*Harnisch II*), 954 P.2d 1180, 1182 (Nev. 1998) (alteration in original) (quoting California v. Ramos, 463 U.S. 992 (1983)); see *supra* note 81 and accompanying text.

¹¹¹ E.g., Michigan v. Long, 463 U.S. 1032, 1042 (1983). For discussion of the doctrine of independent and adequate state grounds, see 1 STATE CONSTITUTIONAL LAW, *supra* note 22, § 1.07, at 1-51 to 1-57.

¹¹² LATZER, *supra* note 20, at 16.

¹¹³ The term was coined, we believe, by Professor A.E. Dick Howard. See A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 898 (1976); see also 1 STATE CONSTITUTIONAL LAW, *supra* note 22, § 1.06[2], at 1-45 to 1-47. One of the present authors has previously criticized one state’s adoption of the “lockstep” approach. Thomas B. McAfee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1 (1987).

¹¹⁴ See, e.g., Hans A. Linde, *First Things First: Rediscovering the States’ Bill of Rights*, 9 U. BALT. L. REV. 379 (1980).

¹¹⁵ Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (footnote omitted). In support of the claim that a “clear majority” of state court decisions adopted federal rules and doctrines, Williams cites the following works: LATZER, *supra* note 20, at 158; Barry Latzer, *The Hidden Conservatism of the State Court “Revolu-*

“[a]lthough we are obligated to provide a state law review, such an independent analysis is not necessarily a *different* analysis.”¹¹⁶ The only real, and legitimate, objection to decisions that follow rulings of the Supreme Court concerns the practice of some state courts to engage in what Professor Latzer calls “unreflective adoptionism.”¹¹⁷

Moving away from seeing state constitutional claims as having primacy, some state courts, as well as commentators, have taken the view that state courts should display very strong deference to decisions of the Supreme Court whenever it has decided issues raised by federal provisions that are “mirror image” provisions of corresponding state constitutional guarantees.¹¹⁸ And even critics of the “lockstep” approach sometimes contend, given that “it is difficult to tell where national identity ends and state identity begins,” in a federal system like ours “neither subnational nor national sources of meaning are likely by themselves to tell the whole story.”¹¹⁹ Commentators with such views wind up seeking a “middle position” between “unreflective lockstepping” and the view that the federal Constitution’s “history, identity, values, and judicial precedents can . . . be treated as though they were entirely external to the state constitution.”¹²⁰ Finally, even advocates of independent state court decision-making freely acknowledge that state courts can act illegitimately if they seek “to evolve an independent jurisprudence under the state constitution . . . by searching ad hoc for some plausible premise in the state constitution only when federal precedents will not support the desired result”¹²¹

tion,” 74 JUDICATURE 190, 190 (1991); Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1467 & nn.68-70 (1997).

¹¹⁶ State v. Anderson, 910 P.2d 1229, 1235 (Utah 1996).

¹¹⁷ Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991). As Justice Linde observed, such an approach involves the “non sequitur that the United States Supreme Court’s decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions.” State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983); accord, Brennan, *supra* note 3, at 502 (asserting that “decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law”). For a helpful discussion, see Williams, *supra* note 115, at 1502-08.

¹¹⁸ For judges advocating adoption of such a view, see *State v. Hunt*, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring), and *People v. Disbrow*, 545 P.2d 272, 284 (Cal. 1976) (Richardson, J., dissenting). Professor Friesen observes that many judges and attorneys “tend to treat the opinions of the United States Supreme Court as a benchmark by which to measure state constitutional rights,” and thus view state provisions as merely “supplemental,” meaning “necessary only when the federal law does not protect the right asserted.” 1 STATE CONSTITUTIONAL LAW, *supra* note 22, § 1.06, at 1-42, 1-47. Many add strong deference to the process of determining that the supplement is needed. See, e.g., *id.* § 1.06, at 1-47 to 1-51; George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 986-96 (1979); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85 (1985); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

¹¹⁹ James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don’t Mix*, 46 WM. & MARY L. REV. 1245, 1258, 1260 (2005).

¹²⁰ *Id.* at 1265-66.

¹²¹ Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 146 (1970). Professor Collins, a former clerk to Justice Linde, suggests that

Though one of this Article's co-authors has defended "independent" state constitutional decision-making against the arguments presented on behalf of strong deference to federal courts,¹²² there is little doubt that one of the grounds for state courts to "choose to follow federal doctrine,"¹²³ is precisely the judicial conclusion that federal law adequately secures the liberty protected by the rights provision under consideration. One ground for reaching this conclusion is undoubtedly an awareness that the United States Supreme Court has for a long time been engaged in a careful and thoughtful consideration of the values and liberties at stake. By contrast, a prominent scholar has noted that the Nevada Supreme Court "has only occasionally interpreted the Nevada bill of rights."¹²⁴

B. The Nevada Constitution and the Nevada Supreme Court

As previously noted, the Nevada Supreme Court has consistently followed the decisions of the United States Supreme Court construing the constitutional limitations to searches and seizures.¹²⁵ Indeed, as we have seen, the Nevada court expressed deep misgivings about the Supreme Court's ruling in *Whren v. United States*,¹²⁶ even as it adopted its holding as a matter of Nevada law in *Gama v. State*.¹²⁷ Even though it is clear that a state's constitution can supply an "adequate and independent" state ground that precludes Supreme Court review of state court decisions that vary from federal ones,¹²⁸ it is far less clear that state courts have always employed this practice wisely. Consider Professor Latzer's analysis of the Montana experience:

Montana presents a good example of the perils of case-by-case adjudication. In *State v. Sierra*, its high court ruled that police had no authority to open the suitcase of a man arrested as an illegal alien. The next year, in *City of Helena v. Lamping*, it held that the arrestee's *person* was subject to search even if possessions within his immediate control were not; thus an open cigarette pack pulled out of the defendant's pocket was fair game. In 1987 the court [faced a case where an individual was arrested for drunk driving.] [P]olice removed a leather pouch (containing cocaine) from his jacket pocket and a bank money bag (containing two bags of marijuana) from his pants leg. [The question raised was whether these were] part of the defendant's person and therefore subject to inventory, or [whether these were] protected possessions within his immediate control[.]. The court upheld the search and said it was adopting the rationale of the U.S. Supreme Court decision in *Colorado v. Bertine*, which approved on inventory grounds the search of a backpack removed from

Linde's "influence in this area is attributable to the fact that he is, in a certain sense, both critic and 'crusader.'" Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5, 5 (1989); see also Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981).

¹²² See McAfee, *supra* note 113, at 75-87 (section entitled, "The Case for Truly Independent State Court Decision-Making").

¹²³ Williams, *supra* note 115, at 1504.

¹²⁴ 2 STATE CONSTITUTIONAL LAW, *supra* note 22, § 11.08, at 11-102.

¹²⁵ See *supra* notes 51-64 and accompanying text.

¹²⁶ *Whren v. United States*, 517 U.S. 806 (1996).

¹²⁷ *Gama v. State*, 920 P.2d 1010 (Nev. 1996); see *supra* notes 69-72 and accompanying text.

¹²⁸ See *supra* note 111 and accompanying text.

the van of a drunk driver. *Bertine* suggests that possessions in the arrestee's control, even though not on his person, may be searched, and it is difficult to reconcile such reasoning with *Sierra*. The [Montana] Supreme Court made no attempt at reconciliation, leaving the impression that it overruled *Sierra sub silentio*.¹²⁹

In turn, the experience of the Connecticut Supreme Court in explicating the automobile exception to the warrant requirement is illustrative of the problems that can present themselves when state courts attempt to supply independent rulings selectively to issues presented case by case.¹³⁰ In its 1993 decision of *State v. Miller*,¹³¹ the Supreme Court of Connecticut rejected as a matter of state law the United States Supreme Court decision in *Chambers v. Maroney*,¹³² even though in 1976 the same court had found such a warrantless search to be legal.¹³³ Moreover, the same court in 1988 had in *State v. Dukes*¹³⁴ upheld a trial court refusal to suppress evidence, even though the search of the passenger compartment occurred after the suspect had been arrested, placed in the police car, and handcuffed—for driving with a suspended driver's license.¹³⁵ Several years after *Miller*, in *State v. Longo*,¹³⁶ the same court upheld a warrantless search of a closed container within an automobile, relying heavily on the United States Supreme Court decision in *United States v. Ross*.¹³⁷ A concurring opinion stated that it agreed “with the majority that *State v. Dukes*”¹³⁸ was controlling and concluded that *Dukes* “permits a warrantless search of an automobile whenever the police have probable cause to do so,” and “permits a search of any container found in the car.”¹³⁹ Again, the court's ruling in *Longo* is extremely difficult to reconcile with its ruling and rationale in *Miller*.

The experience here in Nevada has not been very different than the experiences in Montana and Connecticut. The Nevada Supreme Court has discovered, in both *Fletcher v. State*¹⁴⁰ and *Hughes v. State*,¹⁴¹ that it can apply the automobile exception even when there is no threat of actual mobility, a reality that undermines its insistence on an independent exigency to justify use of the automobile exception. Even the distinction between the facts of *Hughes* and

¹²⁹ LATZER, *supra* note 20, at 64-65 (footnotes omitted) (citing *Colorado v. Bertine*, 479 U.S. 367 (1987); *City of Helena v. Lamping*, 719 P.2d 1245 (Mont. 1986); *State v. Sierra*, 692 P.2d 1273 (Mont. 1985)).

¹³⁰ For a relatively complete treatment, see 2 STATE CONSTITUTIONAL LAW, *supra* note 22, § 11.08, at 11-104 to 11-105.

¹³¹ *State v. Miller*, 630 A.2d 1315 (Conn. 1993).

¹³² *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹³³ *State v. Schoenbneelt*, 368 A.2d 117 (Conn. 1976). The court distinguished *Schoenbneelt* on the ground that it had relied on cases applying the Fourth Amendment, though it admittedly “did not expressly disavow reliance on the Connecticut constitution.” *Miller*, 630 A.2d at 1322 & n.15.

¹³⁴ *State v. Dukes*, 547 A.2d 10 (Conn. 1988).

¹³⁵ *Id.* at 12-13.

¹³⁶ *State v. Longo*, 708 A.2d 1354 (Conn. 1998).

¹³⁷ *United States v. Ross*, 456 U.S. 798 (1982).

¹³⁸ *Dukes*, 547 A.2d 10.

¹³⁹ *Longo*, 708 A.2d at 1359 (Katz, J., concurring).

¹⁴⁰ *Fletcher v. State*, 990 P.2d 192 (Nev. 1999).

¹⁴¹ *Hughes v. State*, 12 P.3d 948 (Nev. 2000).

*Barrios-Lomeli v. State*¹⁴² is de minimis at best and supplies little in protecting individual liberties even as it frustrates efficient, consistent, and productive law enforcement. In *Barrios-Lomeli* the defendant was first contacted outside his vehicle in a commercial parking lot, while in *Hughes* the defendant was contacted inside his vehicle after being pulled over on the side of the roadway. Yet in *Barrios-Lomeli*, police easily had sufficient evidence to justify detaining the defendant in his vehicle at the time he pulled into the parking lot; instead of doing so, however, police exercised investigative and tactical restraint and waited for positive identification by their informant before conducting their search of the vehicle. The case, when compared with *Hughes*, simply illustrates the difficulty in construing the court's standard for treating a "parked, immobile, and unoccupied" vehicle *at the time the police first encounter it*. Considering that in each case there was adequate probable cause not only to search the car, but to arrest its driver, it is odd to have the right to search turn on the presence of the suspect in the vehicle.

A further irony of the Nevada court's shift from what amounted to a lock-step doctrine to an approach of "selective independence" is that its "independent" ruling on the scope of the automobile exception to the warrant requirement truly does burden law enforcement without greatly enhancing privacy.¹⁴³ By contrast, the Nevada court's holding in *Gama v. State*,¹⁴⁴ reversing *Alejandro v. State*,¹⁴⁵ left the door wide open to pretextual traffic stops for no other purpose than to conduct a warrantless search without probable cause.¹⁴⁶

The center of the issue raised by the facts and circumstances of the *Harnisch* case relates to the distinction between the need for standardized procedures that would supply some clarity to law enforcement officials versus the arguments on behalf of case-by-case adjudication.¹⁴⁷ In a careful analysis of the problem, Professor LaFave clarified that "we must resist 'the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity' lest we end up with 'a [F]ourth [A]mendment with all of the character and consistency of a Rorschach blot.'"¹⁴⁸ He also suggested that "it may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication."¹⁴⁹ In analyzing how and when we need standardized procedures, to establish "clear and certain boundaries," and the circumstances that call, instead, for case-by-case adjudication, Professor LaFave recommends consider-

¹⁴² *Barrios-Lomeli v. State*, 944 P.2d 791 (Nev. 1997).

¹⁴³ See *supra* note 9 (quoting Justice Powell, concurring in *Robbins v. California*, 453 U.S. 420, 429 (1981) (Powell, J., concurring)).

¹⁴⁴ *Gama v. State*, 920 P.2d 1010 (Nev. 1996).

¹⁴⁵ *Alejandro v. State*, 903 P.2d 794 (Nev. 1995).

¹⁴⁶ As the court itself appeared to recognize. See *supra* note 72.

¹⁴⁷ See, e.g., LaFave, *Standardized Procedures*, *supra* note 109; Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982) [hereinafter LaFave, *On Drawing Bright Lines*].

¹⁴⁸ LaFave, *On Drawing Bright Lines*, *supra* note 147, at 321 (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974)).

¹⁴⁹ *Id.*

ing the appropriate answer to four basic questions concerning the proposed constitutional rule.¹⁵⁰

The initial question to consider is the extent to which a proposed rule has sufficiently clear and certain boundaries that case-by-case evaluation seems unnecessary.¹⁵¹ Illustrative is the Supreme Court's analysis in *United States v. Robinson*:

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search a person incident to a lawful custodial arrest, while based upon 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 upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.¹⁵²

By contrast to the situation presented in *Robinson*, LaFave observes that the Court's subsequent holding in *New York v. Belton*¹⁵³ attempted to provide a "standardized procedure" in circumstances that left as many questions unanswered as the ones it answered.

In his dissenting opinion, Justice Brennan objected precisely on the grounds that the Court's new approach

leaves open too many questions and, more important, it provides the police and the courts with too few tools with which to find answers.

Thus, although the Court concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? . . . [W]hat is meant by "interior"? Does it include locked glove compartments, the interior of the door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver's compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container, even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"?¹⁵⁴

¹⁵⁰ *Id.* at 325-26. LaFave's four questions are as follows:

- (1) Does it have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary?
- (2) Does it produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle were practicable?
- (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable?
- (4) Is it not readily subject to manipulation and abuse?

Id.

¹⁵¹ *Id.* at 326.

¹⁵² *United States v. Robinson*, 414 U.S. 218, 235 (1973).

¹⁵³ *New York v. Belton*, 453 U.S. 454, 458 (1981).

¹⁵⁴ *Id.* at 469-70 (Brennan, J., dissenting). Justice Brennan further objected that the Court "does not give the police any 'bright line' answers to these questions," and "offers no guidance to the police officer seeking to work out these answers for himself." *Id.* at 470.

On the one hand, it is clear that the point of having a “standardized procedure” is “to relieve the officer from the necessity to ‘work out these answers for himself’”; on the other hand, “it is for *precisely* this reason that standardized procedures must be set out in crystal-clear language” so the rule “is one which irradiates, not one which bedazzles.”¹⁵⁵

LaFave’s second inquiry, concerning whether a “standardized procedure” produces results approximating the outcome of a case-by-case application of the underlying principle, generated a negative assessment of *Belton* as well. In *Belton*, the Court accepted “the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”¹⁵⁶ But Professor LaFave’s review of the search and seizure case law produced his conclusion that “this simply is not so,” considering the “number of commonplace events which would put the passenger compartment beyond the arrestee’s control—immediate removal of him to a patrol car or some other place away from his own vehicle, handcuffing the arrestee, closure of the vehicle, and restraint of the arrestee by several officers, among others.”¹⁵⁷

In light of further analysis, LaFave’s third proposed inquiry, concerning whether the “standardized procedure” rule responds to a need to forego case-by-case application because such an approach had proved unworkable, simply confirmed the validity of such an approach in *Robinson* while reinforcing doubts about the Court’s holding in *Belton*. For LaFave, “*Robinson* makes sense because the only alternative is to impose on the police the burden of making exceedingly difficult case-by-case judgments, risking harm to themselves and loss of evidence if they err, about the likelihood of the search being fruitful.”¹⁵⁸ By contrast, the traditional search incident to arrest doctrine, focusing on the area from which the arrestee “might gain possession of a weapon or destructible evidence,”¹⁵⁹ is actually “*easier* in automobile cases than in most other circumstances because the police can, and typically do, immediately remove the arrestee from the vehicle.”¹⁶⁰ A consequence is that the “difficulty and disarray” that the Court emphasized to justify a bright-line rule in *Belton* was, says LaFave, “more a product of the police seeing how much they could get away with (by not following the just-mentioned procedures) than of their being confronted with inherently ambiguous situations.”¹⁶¹

But it is the final inquiry that most emphatically, for LaFave, confirmed the validity of the holding in *Robinson* even as it solidified his doubts about the

¹⁵⁵ LaFave, *On Drawing Bright Lines*, *supra* note 147, at 326 (quoting *Belton*, 453 U.S. at 470 (Brennan, J., dissenting)). Professor LaFave concludes that “while I do not think that the *Belton* rule is quite as ambiguous as the dissenters assert, there is no denying that its breadth was left uncertain in a number of critical respects.” *Id.*

¹⁵⁶ *Belton*, 453 U.S. at 460 (alteration in original) (quoting *Chimel v. California*, 395 U.S. 152, 763 (1969)).

¹⁵⁷ LaFave, *On Drawing Bright Lines*, *supra* note 147, at 329 (footnotes omitted) (citing cases to illustrate each scenario).

¹⁵⁸ *Id.*

¹⁵⁹ *Chimel*, 395 U.S. at 763.

¹⁶⁰ LaFave, *On Drawing Bright Lines*, *supra* note 147, at 330.

¹⁶¹ *Id.*

Court's ruling in *Belton*. The fourth inquiry, as to whether the standardized procedure rule "is open to manipulation and abuse,"¹⁶² was specifically addressed by Justice Stevens, in a case decided simultaneously with *Belton*, concerning automobile searches incident to arrest:

After the vehicle in which respondent was riding was stopped, the officer smelled marihuana and thereby acquired probable cause to believe that the vehicle contained contraband. A thorough search of the car was therefore reasonable. But if there were no reason to believe that anything more than a traffic violation had occurred, I should think it palpably unreasonable to require the driver of a car to open his briefcase or his luggage for inspection by the officer. The driver so compelled, however, could make no constitutional objection to a decision by the officer to take the driver into custody and thereby obtain justification for a search of the entire interior of the vehicle. Indeed, under the Court's new rule, the arresting officer may find reason to follow that procedure whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant.¹⁶³

The key distinction between "automobile exception" cases and "search incident" cases is that the first of these requires probable cause to justify a search. In that sense, searches under the automobile exception do require a careful case-by-case evaluation; it is the automobile's inherent mobility that justifies permitting a warrantless search in cases of probable cause. The existence of probable cause means that the automobile exception produces results approximating what would be obtained if law enforcement had sought a search warrant. Attempting to determine whether the probable cause went to the entire automobile, or was limited to a container within it that could be seized while a warrant was obtained, just added unnecessary confusion while contributing little to assuring greater protection of privacy. Because courts already must determine if there was pre-existing probable cause to justify the search, to meaningfully apply the automobile exception, it is clear that the automobile exception does not lend itself to manipulation and abuse. As Justice Stevens argued in *Robbins*, rather than "taking the giant step of permitting searches in the absence of probable cause," the Court could have—and subsequently has—taken "the shorter step of relying on the automobile exception to uphold the search."¹⁶⁴

It is almost certainly a good thing that the Nevada Supreme Court has managed to overcome the "self-perpetuating bias" that assumes that "constitutional law means the decisions of the United States Supreme Court."¹⁶⁵ It is equally important, however, for it to realize that a "clearly stated independent

¹⁶² *Id.* at 331.

¹⁶³ *Robbins v. California*, 453 U.S. 420, 451-52 (1981) (Stevens, J., dissenting) (footnote omitted). Based on the same reasoning process, Justice Stevens concurred in the judgment in *New York v. Belton*, concluding that the search there was justified under the "automobile exception" based on probable cause, but rejecting the idea that it could be justified without probable cause as a search "incident to arrest." 453 U.S. 454, 463 (1981) (Stevens, J., concurring).

¹⁶⁴ *Robbins*, 453 U.S. at 452 (Stevens, J., dissenting).

¹⁶⁵ Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 936 (1993).

holding does not equal independent analysis,” and that its purpose must be to “enforce the actual guarantees that a state’s charter provides, not to substitute a homogenized rhetoric of judicial review.”¹⁶⁶ And it is critical as well for state courts, even as they acknowledge “the possibility of different state and federal outcomes,” to also recognize the possibility of “reflective adoption” under which “state courts conform their decisions to existing federal constitutional precedents.”¹⁶⁷

V. CONCLUSION

A. *Imagine if You Will*

Based on the information supplied at the beginning of this Article, our Henderson police officer responded to the park to check on the complaint. After being noticed by several teenagers, who were pointing at her, she saw the described drug dealer walking toward the teenagers seated at a table in the picnic area. After she explained her mission to the alleged dealer, and witnessed the teens flee for the nearby neighborhood, she approached the white Volvo. As she did so, she noticed the windows were down, the keys were in the ignition, the radio was playing, and the distinct odor of marijuana was emanating from inside the vehicle. On closer inspection, the officer noticed that a black bag was tucked underneath the front passenger seat. The officer asked to search the vehicle, but her request was refused.

B. *You Decide*

Under the clear and unequivocal guidelines of the federal automobile exception, the officer would be justified in conducting a warrantless search of this vehicle. In a few short minutes, the officer, based on probable cause, could search the contents of the black bag and either substantiate or invalidate the claims concerning it. But in Nevada things would not work out this way—at least not clearly. This is why it may be time for the Nevada Supreme Court to reconsider the interpretation and application of the automobile exception rule as it was set forth in *Harnisch* and applied in *Barrios-Lomeli*, *Fletcher*, *Hughes*, and *Camacho*. The scene painted in this hypothetical situation is simply an example of what a police officer might encounter on any given shift.

Was this 1970 Volvo simply parked, immobile, and unoccupied at the time the officer first encountered it? Or, considering that the car keys were in the ignition and that the car served as a kind of base of operation, is the temporary absence of its owner and operator largely irrelevant? Either way the officer resolves that question, do we really want police to stop the progress of their investigation, being unavailable for other high priority calls for service that occur during the time it takes to obtain a search warrant, so that the drugs can be lawfully recovered from the vehicle? Would that be an efficient use of

¹⁶⁶ *Id.* at 942, 956; accord 1 STATE CONSTITUTIONAL LAW, *supra* note 22, § 1.08[3], at 1-63 to 1-64 (summarizing reasons “to break the habit of arguing in federal jargon, *e.g.*, for or against ‘*Miranda* rights’ or ‘first amendment rights,’ and to substitute descriptive terms that do not disparage state rights”).

¹⁶⁷ Williams, *supra* note 115, at 1506.

this officer's time and resources? Are there demonstrable benefits that derive from such a rule? Would a warrantless search in this case be unreasonable? On these facts, is there a privacy interest that the State of Nevada seeks to protect that the federal Constitution does not? Should an officer rush to ensure contact with the suspect in his vehicle, despite potential investigative and safety concerns, simply to establish the vehicle as *not* being parked, immobile, and unoccupied when first "encountered"?

These are among the questions raised by the decisions made in *Harnisch* and those that followed. Such questions continue to burden law enforcement officers every day as they set out to protect the public against individuals who use their privacy to facilitate criminal endeavors. Although it *is* elementary that states may provide greater protections than required by the federal Constitution, it is at least as fundamental that such decisions should be carefully reasoned and grounded in a strong public policy. In this case, the Nevada rule appears to achieve little in advancing individual privacy interests even as it diminishes collective security interests.¹⁶⁸ We are convinced that most Nevadans would relinquish a temporary liberty interest where a trained police officer has obtained sufficient probable cause to justify a search of a vehicle. When Nevadans are out and about in their vehicles, most would prefer the short delay while police search their vehicle to having the vehicle seized while the officer tracks down a judge to confirm what the officer already knows. The federal automobile exception is rooted in good policy that balances private interests with the collective good, even as it provides law enforcement with clear and unequivocal guidelines for doing their jobs.

¹⁶⁸ At the least, *Harnisch* should supply a reminder to the Nevada Supreme Court of a principle frequently taught in a law school's first year legal writing course: don't ever forget to Shepardize! See note 84 (describing *Harnisch II*'s inaccurate reliance on a 1990 Utah plurality decision that had been rejected in 1996, well prior to the Nevada decision in *Harnisch II*).