

# PRIVACY TAKES A BACK SEAT: PUTTING THE AUTOMOBILE EXCEPTION BACK ON TRACK AFTER SEVERAL WRONG TURNS

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**Abstract:** *The automobile exception to the search warrant requirement originated in 1924, when obtaining a search warrant was a lengthy and involved process. Today, federally and in a growing number of states, search warrants can be obtained by telephone or facsimile in a matter of minutes. Yet the automobile exception, originally based upon the exigency presented by the mobility of the automobile, remains intact and was recently extended to permit the warrantless search of property belonging to passengers in automobiles. This article critically examines the development of the automobile exception and calls for a reform of that exception in light of changing technology and procedural requirements.*

## INTRODUCTION

Imagine the following: two women and a man are sitting on a park bench chatting. A police officer approaches and notices a hypodermic syringe in the man's shirt pocket. The officer asks the man why he has a syringe and, with refreshing candor, the man replies that he uses it to take drugs. With that, the officer asks the women to identify themselves. After they do so, the officer seizes a handbag that is close to one of the women on the park bench and although the woman claims it as her own, he proceeds to search the handbag, including removing her wallet and identification. Under the current law, this search would almost certainly violate the Fourth Amendment.<sup>1</sup> Yet recently in *Wyoming v. Houghton*, the United States Su-

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<sup>1</sup> See U.S. CONST. amend. IV. While some circuit courts adopted an "automatic companion" rule, permitting an automatic frisk of the companion of an arrestee, other courts have rejected this rule. Compare *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973) (per curiam) and *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971), with *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986) and *United States v. Bell*, 762 F.2d 495, 498 (6th Cir. 1985). Further, the United States Supreme Court expressly rejected a

preme Court held that a similar search did *not* run afoul of the Fourth Amendment.<sup>2</sup> In the actual case, one critical fact differs from the scenario described above. The owner of the handbag, Sandra Houghton, was riding as a passenger in a car.<sup>3</sup>

What is it about automobiles that has caused the Court to undermine the protection afforded by the warrant requirement under the Fourth Amendment? Is there any legitimacy to a rule which prohibits the warrantless search of a handbag while its owner is standing on a sidewalk but permits such a search once its owner becomes an occupant of an automobile?

This article will consider the automobile exception—the rule which eliminates the need for a search warrant when there is probable cause to believe that an automobile contains contraband or the fruits, instrumentalities or evidence of criminal activity.<sup>4</sup> In Part I, the article will examine how the seventy-five year old automobile exception, established by the United States Supreme Court in *Carroll v. United States*, has been expanded to apply to situations far beyond those which originally justified the creation of the rule. Part II will consider whether the automobile exception, as it has developed, can be justified in light of the social and technological changes that have occurred since the rule's conception. Finally, in Part III, the article will consider an alternative to the present automobile exception that would permit a limited seizure of the automobile pending the issuance of a search warrant.

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rule that would permit a frisk of a bar patron who happened to be present when a search warrant was served on the bar. See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Furthermore, the search of a companion's handbag, which included removing her wallet and identification, along with a pouch and a second wallet, exceeds the scope of a "frisk," which is the cursory pat down of the suspect's outer clothing. See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (where an officer has specific and articulable facts, the pat down of a suspect's outer clothing for the purpose of locating weapons on the suspect's person was justified). A search therefore must be justified by probable cause and a search warrant or circumstances excusing the warrant requirement.

<sup>2</sup> See 119 S. Ct. 1297, 1303 (1999).

<sup>3</sup> See *id.* at 1299. Officers stopped an automobile for speeding and a faulty brake light. See *id.* After ordering the occupants out of the vehicle and questioning the driver about a syringe he saw in the driver's pocket, the police officer retrieved a handbag from the rear seat of the car, which Ms. Houghton claimed was hers. See *id.* The officer searched the handbag and found drugs and drug paraphernalia. See *id.*

<sup>4</sup> See, e.g., *Houghton*, 119 S. Ct. 1297; *Belton v. United States*, 453 U.S. 454 (1981); *Carroll v. United States*, 267 U.S. 132 (1925).

## I. THE DEVELOPMENT OF THE AUTOMOBILE EXCEPTION

Two exceptions to the warrant requirement have grown up around the automobile. This article will focus upon the broadest exception—the automobile exception—which is also referred to as the *Carroll* doctrine. The *Carroll* doctrine permits a police officer to search an entire motor vehicle and any containers inside it if there is probable cause to believe the vehicle contains contraband or the fruits, instrumentalities or evidence of criminal activity. The other “automobile exception,” articulated by the Court in *New York v. Belton*, is an extension of the arrest power rule and is more limited in time and scope than the *Carroll* doctrine.<sup>5</sup> *Belton* permits the automatic search of the passenger compartment of a vehicle for weapons, contraband or the fruits, instrumentalities or evidence of criminal activity when an occupant of the vehicle has been arrested.<sup>6</sup> This section will first consider the origin of the *Carroll* doctrine and will then trace the expansion of that rule. Finally, this section will consider the *Belton* rule and its development.

### A. The Origin of the Carroll Doctrine

In 1924, the National Prohibition Act was in place to enforce the now-repealed Eighteenth Amendment.<sup>7</sup> That Act made it “unlawful to have or possess any liquor intended for use in violation of the Act” and gave government officers the power to confiscate and destroy alcoholic beverages.<sup>8</sup> In the specifics of the case, the “Carroll boys” were believed by the officers to be bootleggers in Grand Rapids, Michigan.<sup>9</sup> Officers had watched them traveling from Grand Rapids to Detroit across an international boundary that was known as an artery for the illegal importation of alcoholic beverages.<sup>10</sup> Later, the same men were observed driving back from Detroit to Grand Rapids.<sup>11</sup> The officers, suspecting that the automobile carried bottles of alcohol, stopped and

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<sup>5</sup> See 453 U.S. 454 (1981).

<sup>6</sup> See *id.* at 460. The arrest power justifications for permitting a warrantless search—police officer safety and preventing destruction of evidence—differ from the considerations that initially justified the automobile exception under *Carroll v. United States*. See *infra* Part I.C.

<sup>7</sup> See U.S. CONST. amend. XVIII (repealed 1933); National Prohibition Act, ch. 85, § 26, 41 Stat. 305, 315 (1919) (repealed 1933).

<sup>8</sup> See National Prohibition Act § 7.

<sup>9</sup> See *Carroll*, 267 U.S. at 132, 160 (1925).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

searched the vehicle.<sup>12</sup> They discovered several bottles of whiskey hidden in the automobile's upholstery.<sup>13</sup>

The United States Supreme Court justified the warrantless search of the automobile based on two factors: probable cause existed to believe that the vehicle contained contraband<sup>14</sup> and "it [was] not practicable to secure a warrant because the vehicle [could] be quickly moved out of the locality or jurisdiction in which the warrant [was] sought."<sup>15</sup> The Court expressly distinguished the search of a store, residence or other fixed structure, for which obtaining a search warrant is practicable, from the search of moveable items such as cars, boats and wagons, for which it is not practicable to obtain a search warrant.<sup>16</sup>

The Court's approval of an immediate warrantless search justified by the automobile's mobility implicitly recognized an exigent circumstances exception to the warrant requirement. *Carroll* created a bright-line rule that presumes exigency based upon the mobility of an automobile (or other mobile vehicle) suspected to contain contraband or other evidence of criminal activity.<sup>17</sup> Thus, the original premise of *Carroll's* automobile exception was that a warrantless search is reasonable and necessary because a search could be thwarted simply by moving the automobile out of the "locality or jurisdiction in which the warrant must be sought."<sup>18</sup> The time needed to obtain a search warrant in 1924, including travel time to and from the courthouse as well as the time to complete the actual paperwork, obviously would have permitted the vehicle to leave the jurisdiction. The alternative—police immobilization of the vehicle for several hours or days—would have violated the Fourth Amendment proscription against unreasonable seizures without a warrant.<sup>19</sup> Thus, the *Carroll* doctrine—the first recognized automobile exception—was born.

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<sup>12</sup> See *id.* at 172.

<sup>13</sup> See *id.*

<sup>14</sup> See *Carroll*, 267 U.S. at 159-62.

<sup>15</sup> *Id.* at 153.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (recognizing that the Fourth Amendment protects against unreasonable searches and unreasonable seizures).

## B. *Developments after Carroll*

As initially recognized by the Court, the warrantless search of an automobile based upon probable cause was justified entirely because the mobility of the vehicle made it impracticable to secure a search warrant.<sup>20</sup> Several decades later, the automobile exception took a series of wrong turns as the Court expanded upon and ultimately neglected the *Carroll* doctrine's rationale. In addition to citing the mobility of automobiles, the Court now justifies the *Carroll* doctrine based in part upon a reduced expectation of privacy afforded to people and their possessions in automobiles.<sup>21</sup> In another wrong turn, the Court rejected the idea that the courts should determine whether one's possessory interest or one's privacy interest in an automobile is more valuable.<sup>22</sup> In a third wrong turn, the Court rejected a rule that would only permit the seizure of containers in vehicles pending the issuance of a search warrant, instead adopting a rule permitting the warrantless search of containers within automobiles.<sup>23</sup>

### 1. Reduced Expectation of Privacy: A Wrong Turn

While the *Carroll* decision principally justified its holding based upon the exigency created by the automobile's mobility, in the 1977 decision, *United States v. Chadwick*, the Supreme Court recognized a second justification for the automobile exception: a diminished expectation of privacy.<sup>24</sup> Ironically, *Chadwick* did not involve the search of a vehicle, but instead concerned the search of a footlocker that, although seized from the trunk of an automobile, was not treated as an automobile search.<sup>25</sup> Rather, the government unsuccessfully urged the Court to extend *Carroll's* automobile exception to the warrant requirement to cover *all* movable property.<sup>26</sup>

Recognizing that it had applied the automobile exception in situations where the automobile, like the footlocker before it, was effectively immobilized by law enforcement officers,<sup>27</sup> the Court was forced to develop a rationale justifying the warrantless search of an

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<sup>20</sup> See *supra* Part I.A.

<sup>21</sup> See *infra* Part I.B.1.

<sup>22</sup> See *infra* Part I.B.2.

<sup>23</sup> See *infra* Part I.B.3.

<sup>24</sup> See *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

<sup>25</sup> See *id.* at 4, 11.

<sup>26</sup> See *id.* at 11-12.

<sup>27</sup> See *id.* at 12 (citing *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973)).

immobilized automobile which would distinguish such an immobilized automobile from an immobilized footlocker. To do so, *Chadwick* created the diminished expectation of privacy rationale as an additional justification for the automobile exception, thereby distinguishing automobiles from other movable property.<sup>28</sup> It based this diminished expectation of privacy rationale on several considerations. First, automobiles are operated on the open highway.<sup>29</sup> Second, they must be licensed, which encompasses tightly regulated operations.<sup>30</sup> Third, automobiles are periodically required to undergo official inspections and are even taken into police custody "in the interests of public safety."<sup>31</sup> The Court noted that none of these factors, which reduce the expectation of privacy that one has in an automobile, applies to footlockers.<sup>32</sup> Concluding that the owner of the footlocker has a greater expectation of privacy in the contents of the footlocker than an automobile owner has in the contents of his automobile, the Court held that "[w]ith the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant."<sup>33</sup>

Perhaps the most perplexing irony of the *Chadwick* decision is that in preserving one defendant's expectation of privacy in his footlocker, the Court articulated a new justification for automobile searches that greatly diminished the Fourth Amendment protections for anyone who rides in an automobile or places any property in an automobile. The same outcome could have been reached without compromising Fourth Amendment protections if the *Chadwick* Court had recognized that the exigency of mobility upon which *Carroll* was based ceases to exist once an object—even an automobile—has been immobilized. Thus, while maintaining the *Carroll* doctrine as originally conceived, the Court could have clarified its purpose in a way consistent with the maxim that the Fourth Amendment "protects people, not places."<sup>34</sup> The wrong turn by the *Chadwick* majority placed the automobile exception on a road which, along with other wrong turns, has led to the warrantless search of property placed within an

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<sup>28</sup> See *id.*

<sup>29</sup> See *Chadwick*, 443 U.S. at 12.

<sup>30</sup> See *id.* at 12-13.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *Chadwick*, 443 U.S. at 13.

<sup>34</sup> See *id.* at 7 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

automobile—including Ms. Houghton's purse—merely because it came to be located inside an automobile.<sup>35</sup>

Chadwick's expansion of the justifications supporting the *Carroll* doctrine is routinely invoked to legitimize warrantless searches of immobilized vehicles. For example, *California v. Carney* reaffirmed the reduced expectation of privacy justification for the automobile exception to the warrant requirement.<sup>36</sup> *Carney* stressed that "[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy . . . justified application of the vehicular exception."<sup>37</sup> The *Carney* Court clarified that the reduced expectation of privacy derives not merely from the fact that the area searched is in open view,<sup>38</sup> which would eliminate searches of trunks or other closed compartments, but also derives from "the pervasive regulation of vehicles capable of traveling on public highways."<sup>39</sup> This pervasive regulation places the public "on notice" that the vehicle may be stopped and searched.<sup>40</sup> The fervor with which the *Carney* Court reaffirmed the diminished expectation of privacy rationale is nothing short of astonishing in light of the fact that the vehicle found to have this reduced expectation of privacy was a *motor home*!<sup>41</sup>

The *Carney* majority deliberately chose to ignore a point made in Justice Stevens' dissent: "[A] citizen has a much greater expectation of privacy concerning the interior of a mobile home than of a piece of luggage such as a footlocker."<sup>42</sup> The real problem, it appears, is that the Court has never adequately addressed how or why the mere fact that a state regulates ownership and operation of vehicles, and may require periodic inspection of certain mechanical components of the vehicles, leads to the conclusion that people are abandoning or dramatically reducing their privacy interest in everything they place inside a vehicle. Why would Mr. Chadwick's expectation of privacy in his footlocker, which was sufficiently great to require a warrant prior to a

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<sup>35</sup> See *infra* Part II.B.3.

<sup>36</sup> See 471 U.S. 386, 391 (1985).

<sup>37</sup> See *id.* at 391; see also *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (holding "that the justification to conduct such a warrantless search does not vanish once the car has been immobilized"); *United States v. Matthews*, 32 F.3d 294, 298-99 (7th Cir. 1994) (upholding warrantless search of immobilized automobile based upon diminished expectation of privacy).

<sup>38</sup> See 471 U.S. at 391.

<sup>39</sup> See *id.* at 392.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 388, 393-94.

<sup>42</sup> *Id.* at 405 (Stevens, J., dissenting).

search, be reduced merely because the footlocker was placed inside a car? What is it about government regulation of automobiles that will permit the warrantless inspection of undergarments or personal papers carried in the trunk? Is it reasonable to conclude, as the *Carney* majority did, that people are sufficiently on notice that items placed inside a car are no longer private enough to receive Fourth Amendment protection?

## 2. Containers in Automobiles: Another Wrong Turn

After *Chadwick*, the Court was left with two rules that were bound to collide. On one hand, the reduced expectation of privacy and mobility of automobiles justifies the warrantless search of an automobile if probable cause exists. On the other hand, an owner of mobile property such as a footlocker has a sufficient expectation of privacy in that property to require a police officer to obtain a warrant prior to searching the property. Which rule will govern if Mr. Chadwick transports his luggage in an automobile?

For a while, it appeared that the Court was heading down a road destined to afford maximum Fourth Amendment protection to containers in vehicles. *Arkansas v. Sanders* faced the question that *Chadwick* had sidestepped: whether the police may conduct a warrantless search of a piece of luggage found inside the trunk of the vehicle, if they have probable cause to search the vehicle.<sup>43</sup> The *Sanders* Court held that the police could seize the luggage but could not open it without a search warrant.<sup>44</sup> The Court reaffirmed this holding two years later in *Robbins v. California* which condemned the warrantless search of two wrapped packages discovered in the luggage compartment during a vehicle search.<sup>45</sup> *Robbins* expanded the type of containers that would be recognized as private under the Fourth Amendment, noting that

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<sup>43</sup> See 442 U.S. 753, 766. As in *Chadwick*, the police in *Sanders* had developed probable cause to search the suitcase before the suitcase was placed into the trunk of a taxi. Compare *Sanders*, 442 U.S. at 755 (police had probable cause to believe suitcase which was placed in trunk of taxi contained marijuana), with *Chadwick*, 433 U.S. at 3-4 (federal agents had probable cause to believe footlocker contained illegal drugs). But, unlike *Chadwick*, the government in *Sanders* sought to justify the search under the automobile exception. Compare *Sanders*, 442 U.S. at 762-63 (government justified search under automobile exception), with *Chadwick*, 433 U.S. at 11 (prosecutor did not contend that the footlocker's "brief contact with the automobile's trunk" allowed a search under the automobile exception doctrine, instead arguing that the luggage itself was "mobile" and therefore, analogous to a search of an automobile).

<sup>44</sup> See *Sanders*, 442 U.S. at 766.

<sup>45</sup> See 453 U.S. 420, 428-29 (1981).

"[w]hat one person may put into a suitcase, another may put into a paper bag."<sup>46</sup>

It was not long, however, before the Court made another wrong turn with the automobile exception. One year after the *Robbins* decision, the Court backpeddled. In *United States v. Ross*, the Court approved the immediate warrantless search of a paper bag during the warrantless search of an automobile.<sup>47</sup> In so holding, the Court cited to *Carroll*, in which the whiskey found in the course of the prohibition officer's search was not carried openly in the car, but was completely hidden within the upholstery of the rumble seat.<sup>48</sup> The Court reasoned that *Carroll* would be severely undercut if police officers could not search containers inside vehicles because contraband goods are rarely placed in open view inside a vehicle.<sup>49</sup> Instead, contraband is usually enclosed in some type of container.<sup>50</sup> The *Ross* Court expressly refused to reconsider or to overrule *Sanders*.<sup>51</sup> Rather, it attempted to draw fine distinctions between situations in which officers have probable cause to believe an automobile contains contraband—which permit the warrantless search of the entire automobile and any containers found therein<sup>52</sup>—and those in which officers have probable cause to believe a particular container within an automobile contains contraband—which permit the seizure, but not the search, of the container.<sup>53</sup> This distinction drew much criticism from the dissenters. Justice Marshall pointed out that, under the anomaly created by *Ross* and *Sanders*, if an officer has probable cause to believe contraband is in a bag in a car, *Sanders* controls and a search warrant is required to search the bag. If an officer, however, has probable cause to believe that a car contains contraband, but cannot localize it in a container, *Ross* controls and the officer can search any container inside the car in which the object of his search may be found.<sup>54</sup> The anomalous result is that the less precise the officer's information, the more thorough and intrusive a search he is permitted to conduct. For example, an officer who has probable cause to believe there is heroin somewhere in an automobile, but does not know where, may search the

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<sup>46</sup> See *id.* at 426.

<sup>47</sup> See 456 U.S. 798, 801, 824–25 (1985).

<sup>48</sup> See *id.* at 804.

<sup>49</sup> See *id.* at 820.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 824.

<sup>52</sup> See *Ross*, 456 U.S. at 820–22.

<sup>53</sup> See *id.* at 824 (reaffirming the holding in *Sanders*, 442 U.S. 753 (1979)).

<sup>54</sup> See *id.* at 839–40 (Marshall, J., dissenting).

entire vehicle and all containers therein. If the same officer has probable cause to believe the heroin is in a brown suitcase in the car's trunk, the officer can locate the luggage in the trunk and seize it. Under *Sanders*, however, the officer cannot search the luggage without a warrant.

The Supreme Court completed this wrong turn for the automobile exception a decade later in *California v. Acevado* when it addressed the anomaly created by *Ross* and *Sanders*.<sup>55</sup> In overruling *Sanders*, the Court attempted to create one clear rule to be followed in all searches under the automobile exception.<sup>56</sup> Justice Blackmun wrote for the majority:

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.<sup>57</sup>

In reaching its conclusion, the *Acevado* Court relies on some questionable reasoning. For example, quoting the *Sanders* dissent, the majority notes that where the police have probable cause to seize the property, "we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases."<sup>58</sup> Yet, the Court has repeatedly rejected arguments that a warrantless search may be deemed lawful as long as a court is convinced that a warrant, if it had been sought, would likely have been issued.<sup>59</sup> As additional support for its holding, the *Acevado* majority notes that the search of containers in automobiles may often be justified under a different theory, such as search incident to arrest.<sup>60</sup> It is not logical to argue that just because a search

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<sup>55</sup> See generally 500 U.S. 565 (1991).

<sup>56</sup> See *id.* at 580.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 575 (quoting *Sanders*, 442 U.S. at 770 (Blackmun, J., dissenting)).

<sup>59</sup> See, e.g., *Katz*, 389 U.S. at 356 (refusing to validate a warrantless search which would have been within the scope of a search that could have been authorized by a judicial officer); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (invalidating warrantless search of apartment where officers had evidence based upon which a magistrate would likely have issued a search warrant).

<sup>60</sup> See *Acevado*, 500 U.S. at 575-76.

sometimes fits within one exception to the warrant requirement, the limitations that exist with respect to a different exception should be abrogated, especially where the two exceptions are not completely coextensive. The *Acevedo* Court's use of the arrest power exception to the warrant requirement as a reason to extend the *Carroll* doctrine to permit the opening of a container clearly expands the law if the container is found in an area other than the passenger compartment where the arrest power rule does not apply.<sup>61</sup> This reasoning also assumes the correctness of the arrest power rule as applied to all containers found in cars, something that this article will explore later.<sup>62</sup>

In fact, the *Acevedo* Court's attempt to resolve an anomaly merely shifted the anomaly. Currently, all containers in an automobile are subject to one rule—no warrant is needed to search them—but containers not found in an automobile are subject to a different rule.<sup>63</sup> A container in a home, or even on a public sidewalk, is subject to the *Chadwick* rule requiring a warrant prior to searching the container.<sup>64</sup> Under *Acevedo*, however, a container in a car may be opened without a warrant whenever there is probable cause to search the car in which the container is found as long as the container may contain the object of the search.<sup>65</sup> Yet, there is little reason to justify diminishing Mr. Chadwick's expectation of privacy in his footlocker merely because he places it in the trunk of a car. If anything, once a footlocker is concealed within the trunk of an automobile, it seems that its owner has made a greater effort to maintain his/her privacy interest than the owner who has placed his/her footlocker on a sidewalk.

### 3. The Court's Difficulty in Expressly Recognizing that Privacy May Require Greater Protection than Possession: A Third Wrong Turn

It is clear that the Fourth Amendment protects three individual rights.<sup>66</sup> First, it protects the right to privacy, which may be intruded upon by a search. Second, it protects the rights to possess and to use

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<sup>61</sup> See *id.*

<sup>62</sup> See *infra* Part II.C.

<sup>63</sup> Compare *Acevedo*, 500 U.S. at 580 (police may conduct warrantless search of any container in a car if supported by probable cause), with *Chadwick*, 433 U.S. at 11, 13 (containers not found during the search of an automobile require a warrant before a search may be conducted).

<sup>64</sup> See *Chadwick*, 433 U.S. at 11, 13.

<sup>65</sup> See *Acevedo*, 500 U.S. at 580.

<sup>66</sup> See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures shall not be violated . . .") (emphasis added).

one's property, which may be intruded upon by a seizure of that property. Third, it protects the right to be free to go where one likes, which may be intruded upon by the seizure of the individual. What is not clear, however, is whether the right to be protected from unreasonable searches and the right to be protected against unreasonable seizures are rights of equal value. Recognizing that the Fourth Amendment protects both privacy interests and possessory interests, is there any basis to conclude that one interest is entitled to more weight than the other? If a person's possessory interest is less valuable than his privacy interest, it would make sense to adopt a rule which permits a limited seizure—an infringement of the possessory interest—in order to protect the more valuable privacy interest.

A common sense argument can be made that the privacy interest is the one more worthy of protection. If one is deprived of the use of an automobile or the freedom to drive in the automobile, one is inconvenienced. A prolonged seizure results in greater inconvenience; a brief seizure, however, may involve only slight—or even no—inconvenience. What the individual has lost during the duration of the seizure is the right to freely use, enjoy or occupy the automobile. The seizure alone does not reveal any private fact about the individual beyond that which is openly visible. When the seizure ends, the individual fully regains the right to use, enjoy and occupy the automobile.

A search, by contrast, is more than merely inconvenient—it permanently destroys the individual's privacy interest in the thing searched. Depending upon what items an individual carries in his car, a search of the car may inform officers of the identity of the individual's associates, the type of activities the individual enjoys, the type of literature the individual reads, the type and size of undergarments the individual wears and other private—perhaps embarrassing—information. The search may be brief in duration, but the information revealed cannot be unrevealed. The individual's privacy interest in the items searched is irretrievably lost.

There are myriad decisions by the United States Supreme Court and lower courts implicitly recognizing that the interests protected by the Fourth Amendment are not of equal value and that the privacy interest outweighs the possessory or freedom interest.<sup>67</sup> *Chadwick* implicitly recognized this when it refused to permit the search of a footlocker seized by the police absent a warrant, despite the fact that the

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<sup>67</sup> See *infra* notes 68–79 and accompanying text.

time required to secure the search warrant would necessarily prolong the seizure of the footlocker.<sup>68</sup>

In *Segura v. United States*, the Court approved the use of evidence uncovered during the search of an apartment pursuant to a warrant.<sup>69</sup> Prior to the issuance of the warrant, police entered the apartment to secure it, seizing the apartment during the pendency of the warrant's arrival.<sup>70</sup> Though the entry into the apartment was assumed to be an illegal "search," the evidence obtained through the illegal "search" was not offered at trial.<sup>71</sup> The evidence offered at trial was uncovered and seized during a search pursuant to a warrant.<sup>72</sup> The fact that the apartment was initially seized without a warrant (as opposed to searched) did not invalidate the subsequent search pursuant to a valid warrant. The Court's implicit acceptance of a procedure by which police temporarily seize a premises to maintain the status quo pending the arrival of a search warrant implicitly recognizes that the violation of the individual's possessory interest in his home is reasonable because it is a less intrusive violation than the violation of his privacy interest.<sup>73</sup> Numerous lower courts have approved the seizure of a premises or item of property pending the issuance of a search warrant.<sup>74</sup> Each of these decisions clearly demonstrates a willingness to protect a privacy interest even at the expense of intrusion upon a possessory interest.

Perhaps the boldest recognition that privacy is a weightier interest under the Fourth Amendment than possession—or even freedom—is evident when one considers how the courts have applied the warrant clause of the Fourth Amendment. Arguably the seizure of an

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<sup>68</sup> See 433 U.S. at 13.

<sup>69</sup> See 468 U.S. 796, 799 (1984).

<sup>70</sup> See *id.* at 800.

<sup>71</sup> See *id.* at 798, 801–03.

<sup>72</sup> See *id.* at 803.

<sup>73</sup> The occupants of the apartment in *Segura* had been arrested and taken into custody. See 468 U.S. at 800, 801. Thus, it may be argued that they had no opportunity to exercise their possessory interest in the apartment. Other courts also have approved seizures pending warrants. See *United States v. Rodriguez*, 869 F.2d 479, 485–86 (9th Cir. 1989) ("So long as the 'seizure' of the premises was supported by probable cause, and not otherwise unreasonable, items subsequently seized under the valid warrant are not directly excludable."); *United States v. Veillette*, 778 F.2d 899, 903 (1st Cir. 1985) (approving seizure of motorcycle shop pending the issuance of a search warrant).

<sup>74</sup> See, e.g., *United States v. Hogan*, 38 F.3d 1148, 1151 (10th Cir. 1994) (upholding the warrantless seizure of a camper pending the issuance of search warrant); *Rodriguez*, 869 F.2d at 486 (approving seizure of residence from mid-afternoon to mid-evening pending issuance of a warrant); *Veillette*, 778 F.2d at 903 (approving the seizure of a shop pending the issuance of a search warrant despite an illegal entry).

individual—the custodial arrest—is the most extreme intrusion upon one's Fourth Amendment interests. A custodial arrest deprives an individual of freedom as well as the ability to use and enjoy his property and possessions. Yet, the Supreme Court has made it clear that custodial arrests for felony offenses are valid under the Fourth Amendment without a warrant as long as the arrest is supported by probable cause.<sup>75</sup> Additionally, contraband or fruits, instrumentalities and evidence of criminal activity that are in plain view may be seized without a warrant.<sup>76</sup> Where a search is required, however, to uncover a seizable object, the Court has concluded that a warrant is needed, subject only to a "few specifically established and well-delineated exceptions."<sup>77</sup> In holding that searches without prior approval by a judge or magistrate are *per se* unreasonable, the Court focused upon the need to protect individual privacy interests by interposing the deliberate, impartial judgment of a judicial officer between the citizen and the police.<sup>78</sup> By mandating a warrant for searches while not requiring a warrant for seizures—even custodial arrests—which do not require searches, the Court implicitly recognized that a search involves a greater intrusion into protected rights than a seizure, an intrusion so great as to require neutral judicial intervention unless excused by exceptional circumstances.<sup>79</sup>

In light of the foregoing, the third wrong turn by the Supreme Court occurred in *Chambers v. Maroney*.<sup>80</sup> In May of 1963, following the robbery of a service station, two men fitting the description of the robbers were arrested and the automobile in which they were riding was taken into custody.<sup>81</sup> Later, the car was searched without a warrant and evidence related to the robbery and other robberies was found.<sup>82</sup>

The petitioner in *Chambers* challenged the lawfulness of the warrantless search under the automobile exception because the exigency provided by the mobility of the automobile was effectively eliminated when the car was taken into police custody.<sup>83</sup> The petitioner contended that a warrant should have been obtained prior to searching

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<sup>75</sup> See *United States v. Watson*, 423 U.S. 411, 417 (1976).

<sup>76</sup> See *Horton v. California*, 496 U.S. 128, 130-31, 142 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

<sup>77</sup> See *Chadwick*, 433 U.S. at 13; *Katz*, 389 U.S. at 351, 357.

<sup>78</sup> See *Katz*, 389 U.S. at 356, see also *Aguello v. United States*, 269 U.S. 20, 33 (1925).

<sup>79</sup> See *supra* notes 68-78 and accompanying text.

<sup>80</sup> See generally 399 U.S. 42 (1970).

<sup>81</sup> See *id.* at 44.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 52.

the automobile.<sup>84</sup> Justice White, writing for the majority, made short work of that argument, writing:

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which is the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.<sup>85</sup>

The difficulty Justice White had in determining which is the greater interest—privacy or possession—is particularly improbable in light of the fact that, at the time the warrantless search was conducted, the vehicle's occupants were in police custody. As the occupants were not in a position to be able to enjoy their possessory interest in the car, there can be no doubt as to which interest was more valuable to these individuals. Furthermore, the development of the law up to that point made it clear that courts gave heightened protection to the individual's privacy interest, a sign that the law recognizes that interest to be the greater interest. The *Chambers* ruling is clearly wrong in light of the body of law preceding and following it.

### C. The "Other" Automobile Exception: *New York v. Belton*

Although this article is principally concerned with problems that arose as a result of the development of the *Carroll* doctrine, mention should be made of the other exception to the warrant requirement that has been applied in the context of automobiles—the bright-line arrest power rule articulated by the Supreme Court in *New York v. Belton*.<sup>86</sup> The *Belton* opinion attempted to create an easy-to-follow application of the rule articulated by the Court in *Chimel v. California* permitting a limited warrantless search incident to arrest.<sup>87</sup> In *Chimel*, the Court recognized that custodial arrest creates a situation which

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<sup>84</sup> See *id.* at 47.

<sup>85</sup> *Chambers*, 399 U.S. at 51–52.

<sup>86</sup> See generally 453 U.S. 454 (1981).

<sup>87</sup> See 395 U.S. 752, 762–63 (1969).

justifies an immediate warrantless search of the person arrested and the "grab area" of that person.<sup>88</sup> The justification for this warrantless search is twofold: first, concern for officer safety should the arrestee have access to a weapon and second, concern about possible destruction of evidence within the arrestee's reach.<sup>89</sup>

*Belton* attempted to define the scope of the grab area when the arrestee is the occupant of an automobile. The Court established a bright-line rule when the arrestee is an occupant of an automobile that permits an automatic search incident to arrest of the entire passenger area of an automobile, including all containers found inside the passenger area.<sup>90</sup> This rule, which has been heavily criticized,<sup>91</sup> applies automatically whenever the occupant of an automobile is arrested. It permits the search of containers even if they could not contain weapons or evidence of the criminal conduct which caused the suspect's arrest.<sup>92</sup> While it is difficult to dispute that an arresting officer is justified in immediately searching to preserve evidence and to protect his own safety, there is less justification for permitting an immediate warrantless search of containers that are beyond the wing-span of the arrestee, although this is clearly permitted under *Belton*. Particularly where, as in *Houghton*, an occupant of a vehicle identifies a specific container as hers and there is no probable cause prior to searching the container that would justify the arrest of the owner of the container, arrest power justification for a search of that container is very weak. In that situation, a better rule would be to permit the officer to seize the container if there is probable cause to believe it may contain contraband, but to require a warrant before permitting the search of the container. This would contract the scope of the search permitted presently under *Belton*. The limited seizure of the container, however, would serve the protective functions of the arrest power rule while maintaining some protection under the Fourth

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<sup>88</sup> See *id.* at 763.

<sup>89</sup> See *id.*

<sup>90</sup> See *Belton*, 453 U.S. at 460.

<sup>91</sup> See generally Colleen Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith*, 43 U. PITT. L. REV. 307 (1982); Robert A. Stern, Comment, *Robbins v. California and New York v. Belton: The Supreme Court Opens the Door to Container Searches*, 31 AM. U. L. REV. 291 (1982).

<sup>92</sup> See *Belton*, 453 U.S. at 461; accord *United States v. Robinson*, 414 U.S. 218, 236 (1973) (approving search of a cigarette pack on the defendant's person following his arrest for driving without a license).

Amendment for those whose only crime may be that they are riding in an automobile with someone who has engaged in criminal conduct.

## II. A CALL FOR REFORMING THE AUTOMOBILE EXCEPTION

There are at least three compelling reasons to re-evaluate and reform the automobile exception, each of which will be explored in this section. First, the original justification for the automobile exception, as articulated in *United States v. Carroll*—that the mobility of the vehicle essentially forecloses the option of securing a warrant—has lost much of its force in light of changing technologies.<sup>93</sup> Second, the alternative justification for the automobile exception first articulated in *United States v. Chadwick*—the reduced expectation of privacy rationale<sup>94</sup>—does not rationally support a search of containers and closed compartments in automobiles. Finally, the development of the automobile exception to the warrant requirement permits abusive law enforcement practices which cry out for the narrowing of the exception.

### A. *The Mobility of an Automobile No Longer Presents an Exigent Circumstance*

As previously discussed, the justification underlying the *Carroll* exception to the warrant requirement is the concern that automobiles may be quickly removed from the locality in which the warrant is sought, giving an officer insufficient opportunity to seek a warrant. The opportunity to search is fleeting: it is now or never. In 1924, when *Carroll* was decided, getting a search warrant meant driving to the local judge or magistrate, writing out an affidavit in support of a warrant, obtaining a warrant and then returning to the location to perform the search. This process could be expected to take several hours and may not have been capable of completion on the same day. Immobilizing an automobile for several hours, or even days, may have been a viable alternative in 1924, but it is not likely that it would have been considered more reasonable than a warrantless search. Immobilizing the vehicle pending the arrival of a search warrant effectively seizes both the vehicle and its occupants. The Fourth Amendment protects against unreasonable searches and seizures. A prolonged sei-

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<sup>93</sup> See generally 267 U.S. 132 (1925).

<sup>94</sup> See generally 433 U.S. 1 (1977).

zure of a vehicle and its occupants is a significant intrusion upon rights protected by the Fourth Amendment.<sup>95</sup>

Today, telephonic search warrants can be obtained both federally<sup>96</sup> and in a growing number of states.<sup>97</sup> While this does not mean that search warrants can be obtained instantaneously, it does eliminate the travel time to obtain a warrant. Telephonic search warrants often may be obtained in less than an hour.<sup>98</sup>

The availability of telephonic search warrants and the fact that cellular telephones and fax machines have become commonplace should change the analysis under the *Carroll* doctrine as to which course of action by a police officer is most reasonable under the Fourth Amendment. In *Carroll*, the alternative to an immediate search of the vehicle would have been a prolonged seizure of the vehicle and its occupants pending the arrival of a search warrant.<sup>99</sup> Both alternatives involved serious intrusions upon an individual's right to be free from unreasonable searches and seizures. Faced with a scenario that necessitates some intrusion into an individual's Fourth Amendment rights—whether it is a search or a seizure—the proper course to follow is the most reasonable (least intrusive) alternative.

*Chambers v. Maroney* implicitly recognizes that this is the approach to be followed. The opinion notes that "because of the preference for a magistrate's judgment . . . arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the greater."<sup>100</sup> Although

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<sup>95</sup> This is in contrast to the circumstances in *Chambers* where the vehicle had already been seized and its owners were lawfully in custody. See 399 U.S. at 44, 51–52. In that circumstance, prolonging for a few hours, or even days, the seizure of a vehicle is a much less significant intrusion upon the rights of the individual because its occupants could not use it regardless. See *id.*

<sup>96</sup> See FED. R. CRIM. P. § 41(c)(2).

<sup>97</sup> See, e.g., ALA. CODE § 12-21-183 (1995); ALASKA STAT. § 12.35.010 (b) (1998); ARIZ. REV. STAT. ANN. § 13-3914 (c) (1989); CAL. PENAL CODE § 1526 (b) (West 1997); KAN. STAT. ANN. § 22-2502 (1997); MICH. COMP. LAWS ANN. § 780.651 (West 1982); NEB. REV. STAT. § 29-814.03 (1995); NEV. REV. STAT. § 179.045 (2) (1997); N.Y. CRIM. PROC. L. § 690.36 (McKinney 1995); S.D. CODIFIED LAWS ANN. § 23A-35-5 (1998); UTAH CODE ANN. § 77-23-204(2) (1999); WIS. STAT. ANN. § 968.12 (3) (West 1998).

<sup>98</sup> See *United States v. Morgan*, 744 F.2d 1215, 1222 (6th Cir. 1985) (noting that even a telephonic search warrant takes at least one half hour); *United States v. Baker*, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981) (telephonic search warrants are obtainable in 20 to 30 minutes).

<sup>99</sup> As the *Carroll* decision recognized, the mobility of the vehicle made seeking a warrant "impracticable." See 267 U.S. at 153. The only practicable alternative to the immediate search would have been to immobilize the vehicle and its occupants until the search warrant had been secured.

<sup>100</sup> *Chambers*, 399 U.S. at 51.

the *Chambers* Court had difficulty in determining which is the "greater" and which is the "lesser" intrusion, the approach taken by the Court—attempting to satisfy the "reasonableness" requirement by taking the least intrusive of two alternatives—is a sound one.<sup>101</sup> Indeed, if the Fourth Amendment guarantees are to have any meaning, reason and common sense dictate that where a situation requires some immediate action that intrudes upon an interest protected thereunder, the only "reasonable" course is to choose the least intrusive alternative.

In light of the technological advances which now permit law enforcement officers to obtain search warrants in a matter of minutes, rather than the hours or days required at the time *Carroll* was decided, we face a very different set of alternatives than those faced by the *Carroll* Court. Officers may briefly immobilize a vehicle pending the issuance of a warrant or they may rely upon the *Carroll* decision and search immediately without a warrant. Undeniably, the brief seizure of the automobile and its occupants is an intrusion upon the Fourth Amendment rights of its occupants, but the brevity of the immobilization—which often will not require more than an hour—reduces the seriousness of this intrusion.<sup>102</sup> The alternative—an immediate search of the car—irreparably destroys the occupants' privacy interests in the automobile and the containers inside. There can be no serious debate as to which is the greater and which is the lesser intrusion, *Chambers* notwithstanding. The rights protected by the Fourth Amendment are more faithfully observed when only the lesser intrusion—the brief seizure—is permitted unless and until a judicial officer authorizes the greater intrusion: a search pursuant to a search warrant issued after a judicial officer concurs that there is probable cause to search.

B. *The "Reduced Expectation of Privacy" Rationale Does Not Justify  
Warrantless Searches of the Entire Automobile and All  
Containers Therein*

For more than fifty years, the sole justification for the automobile exception was the exigency presented by mobility first recognized in *Carroll*. As previously noted, however, *Chadwick* articulated a second justification: people have a diminished expectation of privacy in their

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<sup>101</sup> See *supra* Part I.B.3.

<sup>102</sup> See *Morgan*, 744 F.2d at 1222 (noting that even a telephonic search warrant takes at least one half hour); *People v. Aguirre*, 26 Cal. App. 3d Supp. 7, 11 (App. Dep't Super. Ct. 1972) (telephonic search warrant issued in 12 minutes).

automobiles.<sup>103</sup> Although the Court's reasoning is not entirely clear, it appears that this diminished expectation of privacy affects Fourth Amendment analysis by lessening the gravity of an intrusion upon the individual's privacy interests in an automobile; if a search does not compromise a highly private interest, it is easier to find that a warrantless search is "reasonable" under the circumstances.<sup>104</sup> If one has a minimal expectation of privacy in an automobile, a search of that automobile does not intrude greatly on one's Fourth Amendment rights. Therefore, the search may actually be an intrusion of lesser magnitude than a seizure would be, making it reasonable to proceed with a warrantless search.

This reasoning contains several flaws. The *Chadwick* Court based its conclusion that automobiles bear a diminished expectation of privacy on several factors. First, automobiles are operated on the open highway.<sup>105</sup> While this factor may justify recognizing a diminished privacy interest in areas exposed to public view, such as the interior of the passenger area that can be viewed through a window, it is difficult to see how the mere operation of an automobile on a public highway serves to reduce the operator's expectation of privacy in the trunk, glove box or other containers which are not exposed to public view. *Chadwick* also bases its diminished expectation of privacy rationale on the fact that automobiles must be licensed, their operation is tightly regulated, they are required to undergo periodic inspection and they may be taken into police custody for safety reasons.<sup>106</sup> Yet, none of these justifications supports logically *Chadwick's* conclusion that there is a reduced expectation of privacy in an automobile's interior compartments or in containers carried within. The procedure for obtaining a license for an automobile consists of registering it to an owner and paying a fee.<sup>107</sup> This act does not cause or require any loss of privacy in the contents of the automobile. Indeed, most jurisdictions

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<sup>103</sup> See *infra* part I.B.1.

<sup>104</sup> Cf. *Veronia School District 475 v. Acton*, 515 U.S. 646, 654-60 (1995) (considering the nature of the privacy interest as well as the character of the intrusion to determine the reasonableness of a search under the Fourth Amendment); *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) ("less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office").

<sup>105</sup> See *Chadwick*, 433 U.S. at 13.

<sup>106</sup> See *id.*

<sup>107</sup> See, e.g., CAL. VEH. CODE § 4150 (West 1987); FLA. STAT. ANN. § 319.23 (West Supp. 2000); N.Y. VEH. & TRAF. LAW § 401 (McKinney 1999); WASH. REV. CODE ANN. § 46.12.040 (West Supp. 2000).

have myriad laws regulating aspects of residential property.<sup>108</sup> Yet, it cannot be seriously urged that these regulations reduce the expectation of privacy in a person's home. Indeed, despite these requirements, one's home remains the most protected of all private areas under the Fourth Amendment.<sup>109</sup> States also regulate who can operate automobiles and have created motor vehicle codes to govern the operation of automobiles.<sup>110</sup> Again, it is quite a stretch to argue that merely because states set qualifications for drivers, speed limits and the like, an occupant of an automobile has a diminished expectation of privacy in the contents of the trunk—or a closed container within the trunk.

Perhaps the strongest support for the diminished expectation of privacy afforded to automobiles is the fact that cars are periodically required to undergo official inspections. The official inspections, however, are not wholesale searches of the automobiles and containers within for evidence of criminal activity. Rather, they are inspections narrowly tailored to serve a non-law enforcement purpose, such as inspections to determine the functioning of automobile emissions equipment<sup>111</sup> or safety-related inspections.<sup>112</sup> These inspections are aimed at the mechanical functioning of the automobile and are highly unlikely to require an official inspection of luggage areas, glove compartments or containers in the automobile. Therefore, it is not logical to contend that the mere existence of the government's authority to conduct or require automobile inspections reduces one's expectation of privacy in those areas. Further, most of those inspec-

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<sup>108</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 13113.8 (West Supp. 1999) (requiring smoke detectors in single family homes); N.Y. GEN. BUS. LAW § 389-in, o (McKinney 1999) (requiring safety glass in residential housing); WASH. REV. CODE ANN. § 48.48.140 (West 1999) (requiring smoke detectors in all dwellings).

<sup>109</sup> The Fourth Amendment pays specific attention to the right of the people to be secure in their houses. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .") (emphasis supplied); see also *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985) (finding a dog sniff outside an apartment constituted an illegal search because of the heightened expectation of privacy in one's home).

<sup>110</sup> See, e.g., CAL. VEH. CODE § 12800 (West 1987); FLA. STAT. ANN. § 322.03 (West 1995); N.Y. VEH. & TRAF. LAW § 301 (McKinney 1999); WASH. REV. CODE ANN. § 46.20.161 (West Supp. 2000).

<sup>111</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 44011 (West 1996); FLA. STAT. ANN. § 325.207 (West 1999); N.Y. VEH. & TRAF. LAW § 301 (McKinney 1999); WASH. REV. CODE ANN. 46.16.015 (West Supp. 2000).

<sup>112</sup> See, e.g., CAL. VEH. CODE § 2814 (West 1987); FLA. STAT. ANN. § 325.203 (West Supp. 1999); N.Y. VEH. & TRAF. LAW § 375 (McKinney 1996); WASH. REV. CODE ANN. § 46.64.070 (West Supp. 2000).

tions are performed by mechanics selected by the owner at a time of the owner's choosing,<sup>113</sup> a factor which further undercuts the argument that the official inspection of automobiles diminishes one's expectation of privacy so as to permit thorough police searches of the automobile and all containers within.

Finally, *Chadwick* lists the fact that cars may be taken into custody "in the interest of public safety" as a justification for reducing one's expectation of privacy in an automobile.<sup>114</sup> The problem with this reasoning is that it could apply to virtually all movable property. Indeed, it is sometimes necessary for government agents to secure and inspect even residential property for reasons of public safety, as in the immediate aftermath of a fire or an earthquake.<sup>115</sup> The possibility that this might occur is hardly sufficient to diminish one's expectation of privacy in an automobile, suitcase or home.

The flaws in the "reduced expectation of privacy" justification are even more apparent when one examines both *Chadwick* and *Acevedo*.<sup>116</sup> The former decision stressed the distinction between a footlocker, in which the owner maintained his full expectation of privacy, and an automobile, in which the occupant has a diminished expectation of privacy.<sup>117</sup> The Court stated:

The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage 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 inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.<sup>118</sup>

Yet *Acevedo*, which permits law enforcement officials to open all containers found in an automobile being searched without a warrant,

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<sup>113</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 44011.3 (West Supp. 1999).

<sup>114</sup> See 433 U.S. at 13.

<sup>115</sup> See *Michigan v. Clifford*, 464 U.S. 287, 293 (1984); *Michigan v. Tyler*, 436 U.S. 499, 509-10, 511-12 (1978); *United States v. Parr*, 716 F.2d 796, 812-13 (11th Cir. 1983). But see *United States v. Urban*, 710 F.2d 276, 279-80 (6th Cir. 1983).

<sup>116</sup> See *California v. Acevedo*, 500 U.S. 565, 579 (1991); *Chadwick*, 433 U.S. at 13.

<sup>117</sup> See *Chadwick*, 433 U.S. at 13.

<sup>118</sup> *Id.*

completely ignores this distinction.<sup>119</sup> Why should a person's privacy interest in his personal luggage be diminished by the mere fact that the luggage was placed inside an automobile? *Chadwick*, which specifically held unreasonable the warrantless search of an immobilized container,<sup>120</sup> is directly at odds with *Acevedo*, which specifically permits the warrantless search of all containers found in an automobile.<sup>121</sup> In *United States v. Ross* the Court attempted to sidestep this anomaly by urging that it would be wasteful to permit police to search the entire car until they discovered a container but then make them wait for permission from a magistrate to search the container.<sup>122</sup> Yet, whether the container is found in an automobile or on a sidewalk beside an automobile should not be a constitutionally significant factor. A far better result would have been achieved had the court adopted one rule: automobiles and movable containers (in or out of vehicles) can be briefly *seized* to permit the obtaining of a search warrant but can only be *searched* without consent upon the issuance of a valid search warrant.

### C. *The Automobile Exception Has Fostered Abusive Police Practices*

On a rainy day in May 1992, Robert Wilkins, an African-American public defender, and his family were driving a rental car outside Washington, D.C. as they returned home from a family funeral in Chicago. Maryland State Police officers pulled over Mr. Wilkins' car. They ordered the family out of the car and made them stand in the rain while they ran drug sniffing dogs through the car—over Wilkins' repeated objections.<sup>123</sup> In June of 1998, Curtis Rodriguez, also an attorney, had a similar experience in California. After photographing police stops of Latino men, Mr. Rodriguez, who was driving with fellow attorney Arturo Hernandez, was stopped by California Highway Patrol Officers. After an officer informed Mr. Rodriguez that he wanted to search his car, Mr. Rodriguez identified himself and his companion as lawyers and told the officers that he did not consent to the search, saying, "If you want to search the car, get a warrant." The officer ordered the men out of the car and searched the vehicle, finding nothing.<sup>124</sup> In both of these incidents, it appeared that the

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<sup>119</sup> See 500 U.S. at 579.

<sup>120</sup> See 433 U.S. at 515-16.

<sup>121</sup> See 500 U.S. at 579.

<sup>122</sup> See 456 U.S. 798, 821 (1982).

<sup>123</sup> See Gary Webb, *DWB*, *ESQUIRE MAG.*, Apr. 1999, at 120, 126 [hereinafter *DWB*].

<sup>124</sup> See *id.* at 120.

primary motivation for the stop and search was the ethnic background of the automobile's occupants.<sup>125</sup> It is difficult to know precisely how frequently similar scenarios are played out across the nation. Those who are subjected to similar searches and are found to have contraband may face criminal charges and then may challenge the search by bringing a motion to suppress the evidence at trial. But, because the exclusionary rule remains the primary remedy for Fourth Amendment violations,<sup>126</sup> for those victims of Fourth Amendment rights violations like Mr. Wilkins and Mr. Rodriguez, against whom no criminal charges are filed, there are no readily obtainable remedies to deter the violations.<sup>127</sup>

Abusive police practices targeting minority groups are occasionally reported, but it is likely that they are underreported.<sup>128</sup> We do know that such practices occur frequently enough that the "offense" which drew attention to Mr. Wilkins and Mr. Rodriguez is widely known as "DWB"—"driving while black" or "driving while brown."<sup>129</sup> There is no shortage of incidents in which a stop was made based, at least to some degree, upon racial profiling.<sup>130</sup>

The danger posed by the manner in which the automobile exception has developed is that it permits the police to search an automobile merely because the persons targeted by the police—including those targeted because of their race or for other improper reasons—are in an automobile. While the police are required to have probable cause to believe the automobile contains contraband to lawfully conduct the search, the very fact that no neutral and detached magistrate must first pass upon whether probable cause exists opens the door to abuse. Where the search of an automobile turns up nothing, the victims of the search rarely bother to complain. Indeed, the only truly unusual aspect of Mr. Wilkins' case is that, as an attorney, he had the motivation and the resources to file a civil rights action against the Maryland State Police.<sup>131</sup> For most other victims, especially those at

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<sup>125</sup> See *id.* at 122.

<sup>126</sup> See Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 736–40 (1998).

<sup>127</sup> See *id.*

<sup>128</sup> See, e.g., Robyn Meredith, *Near Detroit, a Familiar Sting in Being a Black Driver*, L.A. TIMES, July 16, 1999, at 28; Jan Golab, *Probable Cause*, L.A. MAG., Aug. 1999, at 74.

<sup>129</sup> See DWB, *supra* note 123, at 122.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 126. Part of the settlement of that lawsuit required the police to maintain records of their stops over a three year period. Those records revealed that, of the 732

the lower end of the economic spectrum, it is too expensive and too time consuming to proceed in court. Moreover, the victims may not even be aware that their rights have been violated. Lack of access to legal assistance and low likelihood of success on the merits remain insurmountable obstacles for the average person.<sup>132</sup> Thus, these abusive police practices continue undeterred.

Even those individuals who are charged with a crime face substantial obstacles when they challenge the legality of an automobile search that has yielded incriminating evidence. Under the current law, evidence is lawfully seized as long as there was probable cause to search the automobile *before* the search. The problem presented is that by the time the police testify at a suppression hearing, the search is over and contraband or evidence has been discovered. It is well-known that some police officers offer perjured—or exaggerated—testimony to legitimize an otherwise unlawful search.<sup>133</sup> Others, who honestly strive to give truthful testimony, will have their testimony colored by what was found during the search. When police find contraband, judges are more likely to believe that probable cause to search existed prior to the search. Thus, even a search that may have been conducted in the absence of probable cause may not be recognized at a suppression hearing as having lacked probable cause in light of subsequent events.

What the foregoing illustrates is that, under the current state of the law, there is little to discourage an officer from engaging in abusive automobile searches. If, however, the rule were modified to require a neutral magistrate to pass upon the existence of probable cause, the number of abusive automobile searches would likely decline. Fewer officers would feel free to stop drivers merely because of their race, their youth or their attitudes if the officers will then be required to telephone a magistrate to confirm the existence of probable cause *prior* to the search. Those who are stopped and are about to have their automobiles searched would have the full protection of the Fourth Amendment, a protection which the United States Supreme Court has stated “consists in requiring that those inferences [support-

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people stopped in the anti-drug Operation Pipeline, 75% were black and 5% were Hispanic. *See id.*

<sup>132</sup> *See* Perrin et al., *supra* note 126, at 738.

<sup>133</sup> *See* Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 *COLO. L. REV.* 75, 85–88 (1992). In the case of Curtis Rodriguez, prior to searching the car the officer said in a monotone “I’m in fear for my life” as a justification for the search. *See DWB, supra* note 123, at 120.

ing probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."<sup>134</sup>

### III. PUTTING THE AUTOMOBILE EXCEPTION BACK ON TRACK

The Fourth Amendment presents a tension between two competing interests: the right of individuals to be free from unreasonable government searches and seizures and the need to effectively discover, punish and deter those engaged in criminal activity. Thus, the right to be free from government searches and seizures is not absolute; the Fourth Amendment simply guarantees that we will be free from "unreasonable" searches and seizures. The Court has read the Fourth Amendment in a way which *presumes* that warrantless searches and seizures are unreasonable,<sup>135</sup> at least in the context of criminal cases.<sup>136</sup> Although one scholar has noted that there are nearly twenty exceptions that have developed to this warrant "requirement,"<sup>137</sup> and at least one sitting United States Supreme Court Justice has supported eliminating the general rule making a warrant indispensable to finding a search reasonable under the Fourth Amendment,<sup>138</sup> there can be little doubt that the individual's Fourth Amendment rights are better protected where the existence of probable cause to search or seize has been reviewed and passed upon by a judicial officer. The Court has noted:

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<sup>134</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948). See also *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.").

<sup>135</sup> See *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>136</sup> The Court has invoked the reasonableness clause, rather than the warrant clause, when the government's search or seizure serves "special needs" beyond mere criminal law enforcement. See *Veronia School District 475 v. Acton*, 515 U.S. 646, 653 (1995). The court stated:

Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. . . . A search unsupported by [a warrant and] probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

*Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

<sup>137</sup> See T. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985).

<sup>138</sup> See *California v. Acevedo*, 500 U.S. 565, 583-84 (1991) (Scalia, J., concurring).

[the absence of this judicial pre-review] bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.<sup>139</sup>

There is great value in having a neutral judicial officer review the facts known to a police officer and determine whether probable cause exists to search a place or thing. In order to safeguard our Fourth Amendment rights, the warrant requirement must not be dispensed with lightly. In *United States v. Carroll*, the Court implicitly recognized this, when it excused the warrant requirement for automobiles solely because the mobility of the automobile and the amount of time needed to obtain a warrant made it impracticable to obtain the warrant.

The late Justice Blackmun sagely noted in his concurrence in *United States v. Leon* that it may be necessary to revisit and reconsider decisions by the Court in light of changing judicial understanding about their effect in the real world of state and federal law enforcement.<sup>140</sup> As has been shown in Part II, it is now apparent that the Court's decisions modifying and extending the automobile exception have distorted the automobile exception beyond its original purpose: to permit an immediate warrantless search where it would be impracticable to secure a warrant. The Court's twists and turns have left an exception that severely and illogically diminishes an individual's Fourth Amendment rights merely because he enters or places property into an automobile. Real world experience with this contorted rule teaches that it has become a tool of abuse which can be wielded by government agents for all the wrong reasons. In an effort to preserve the protections that are specifically contained within the Fourth Amendment, it is time to set the automobile exception back on the right track.

#### A. *Recasting the Automobile Exception*

It must be borne in mind that the automobile exception eliminates only the need for a warrant; it does not remove the requirement that probable cause must exist prior to the search. Therefore, elimi-

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<sup>139</sup> *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (citing *Katz*, 389 U.S. at 358).

<sup>140</sup> See 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

nating the warrant requirement only dispenses with the pre-search review of probable cause by a neutral judicial officer. Because the warrant requirement is an important means of protecting Fourth Amendment rights, the automobile exception should be limited to situations in which it is truly impracticable to seek a warrant. Changing times, technologies and circumstances have reduced the number of situations in which it is reasonable to contend that it is impracticable to timely obtain a warrant. I, therefore, propose that the automobile exception to the warrant requirement be recast in order to preserve both the warrant requirement and the attending judicial review of probable cause whenever it would be practicable to do so.

First, recognizing that the individual rights affected by a search and the rights affected by a brief seizure are not of equal weight, I propose that when a law enforcement officer possesses probable cause to believe an automobile contains contraband or fruits, evidence or instrumentalities of criminal conduct, the officer should be permitted to stop (seize) the vehicle for a reasonable period and conduct a telephonic or facsimile search warrant that would require judicial review of probable cause.<sup>141</sup> The law enforcement officer would be required to act expeditiously in obtaining a warrant, as unreasonably prolonged seizures would run afoul of the Fourth Amendment's proscription against unreasonable seizures.

Assuming that the officer is acting expeditiously, it is undeniable that even a brief seizure by the government is an intrusion upon the protections afforded by the Fourth Amendment. When compared with the total and irrevocable destruction of one's privacy interests occurring when an automobile is searched, however, the limited seizure of the automobile is the lesser infringement. It is reasonable under the Fourth Amendment to permit the lesser infringement—temporary seizure—pending judicial review of the propriety of the greater infringement—the search of the automobile.<sup>142</sup>

Furthermore, an individual who is stopped and finds it too inconvenient to await the issuance of a search warrant may consent to the search of the automobile and thereby shorten the duration of the seizure. This may give rise to claims that consents so obtained are not voluntarily given. Such a practice may be overcome, however, by re-

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<sup>141</sup> Justice Harlan's concurring and dissenting opinion in *Chambers* recognizes that the seizure of an automobile—even for an entire day—while officers seek a search warrant will almost always involve a lesser intrusion upon an individual's Fourth Amendment rights than will an immediate warrantless search. See 399 U.S. at 63–64.

<sup>142</sup> See *United States v. Segura*, 468 U.S. 796, 798 (1984).

quiring officers, before acting upon the consent, to advise the vehicle's occupants that they have the right to refuse to consent to the search of the automobile and, if they refuse to consent, that the officers may search the car only if they obtain a search warrant from a judicial officer.

There will, of course, be situations where an immediate search of an automobile may be required by exigent circumstances. For example, where there is a probable cause to believe that an automobile contains an explosive device, an immediate search may be required in order to preserve public safety. Similarly, if there is probable cause to believe a kidnap victim is secreted in the trunk, an immediate search is necessary to protect the victim. Additionally, if it is not possible to secure the vehicle—as when there are insufficient officers to maintain its security because the automobile has been stopped in a hostile environment—an immediate search may be necessary because it may rapidly become impracticable to search later. Furthermore, other exceptions to the warrant requirement may justify an immediate search, such as where there is probable cause to arrest the occupant of an automobile, justifying an immediate *Belton* search. But, without facts sufficient to justify an immediate search on other grounds, the automobile exception based upon the *Carroll* doctrine cannot justify an immediate warrantless search.

### B. *Application of the Modified Rule*

Consider how the modified rule would have been applied to the facts in the *Houghton* case. The automobile in which Sandra Houghton was a passenger was stopped because the driver was speeding and the automobile had a faulty brake light.<sup>143</sup> One officer noticed a hypodermic syringe in the driver's shirt pocket.<sup>144</sup> An officer asked the driver why he had the syringe and, "with refreshing candor," the driver replied that he uses it to take drugs.<sup>145</sup> At that point, the fact that the driver possessed drug paraphernalia and admitted to using drugs provided the officers with probable cause to search the automobile for drugs and drug paraphernalia.

In the actual case, the officers then ordered the two female passengers out of the automobile and asked them to identify themselves.<sup>146</sup>

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<sup>143</sup> See *Wyoming v. Houghton*, 119 S. Ct. 1297, 1299 (1999).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *id.* at 1299.

They then retrieved a handbag, which Ms. Houghton identified as hers, from the rear passenger seat area. They opened it, and removed her wallet and driver's license. Upon discovering that the name upon the license did not match the name petitioner had given, the officers continued the search of her purse. They removed a pouch and wallet-type container and discovered drugs and drug paraphernalia inside.<sup>147</sup> The Court held this to be a lawful search,<sup>148</sup> building upon the *Acevedo* decision, which permits officers to search the entire automobile and all containers therein if they have probable cause to believe there is contraband anywhere in the vehicle.<sup>149</sup>

Under the proposed revision to the *Carroll* automobile exception, upon discovering the drug paraphernalia in the driver's pocket, the police officers would have probable cause to briefly seize, but not to search, the automobile and its occupants. The officers would have to await issuance of an expeditiously obtained search warrant. The police officers would not be permitted to search Ms. Houghton's handbag on the theory, as articulated by the Court, that persons in the company of drug users are more likely to have drugs concealed in their possession.<sup>150</sup> Instead, the officers would be required to present some particularized facts upon which a magistrate could find probable cause to believe that her particular handbag contains drugs or drug paraphernalia. These facts may or may not have been developed in the actual case. What is preserved, however, is a procedure that the Court has recognized as essential to the preservation of Fourth Amendment protections: a review of probable cause by a neutral and detached judicial officer.

In many jurisdictions, the fact that the driver possessed a hypodermic syringe in his pocket would have given the officers probable cause to arrest him.<sup>151</sup> At that point, the arrest power rule under *Belton* may provide officers with an additional justification to search Ms. Houghton's handbag. If the container rule in *Belton* is modified to permit only the brief seizure of the handbag when it is beyond the "grab area" of the arrestee,<sup>152</sup> subject to the issuance of a telephonic or electronic search warrant, Ms. Houghton's Fourth Amendment

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<sup>147</sup> See *id.*

<sup>148</sup> See *Houghton*, 119 S. Ct. at 1304.

<sup>149</sup> See 500 U.S. at 580.

<sup>150</sup> See *Houghton*, 119 S. Ct. at 1229.

<sup>151</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 11364 (West Supp. 1999); CAL. PENAL CODE § 836 (West 1999); N.Y. GEN. BUS. LAW § 851 (McKinney 1996).

<sup>152</sup> See *supra* Part I.C.

rights would again receive enhanced protection. Because her handbag was in the rear seat area of the passenger compartment, it was beyond the grab area of the driver, who was outside the vehicle. A modified *Belton* container rule would permit the officers to briefly seize Ms. Houghton's handbag until a telephonic or electronic search warrant issues. Alternatively, Ms. Houghton could consent to the search after being advised of her right not to consent. Again, what is gained is a neutral review of whether probable cause exists to justify a search of a passenger's handbag. Thus, Ms. Houghton's Fourth Amendment right to be free from unreasonable searches or seizures would not be curtailed merely because she stepped into an automobile.

Where police officers are motivated to make a pretextual stop of an automobile in order to take advantage of the diminished Fourth Amendment protection for its occupants, this proposed change should greatly reduce their incentive to do so. If a stop must be followed by a showing of probable cause to a magistrate and the issuance of a warrant to search, the type of abuse suffered by Mr. Wilkins, Mr. Rodriguez and others should become much more rare. Some officers may continue to make the stops in the hope of gaining consent, but if valid consent requires the officer to advise the occupant of an automobile that the occupant need not consent and that a warrant to search will be required absent that consent, the incentive to engage in abusive stops would be greatly diminished. Officers who legitimately have probable cause will find the search process lengthened by the time it takes to obtain a telephonic or facsimile warrant, but this is no more of a burden than other circumstances where the law requires a warrant. To the extent that another exception—such as a true exigency—would excuse obtaining a warrant, the search may proceed without one.

### CONCLUSION

The developments in the law of the automobile exception have left a gaping hole in the rights protected under the Fourth Amendment. The proposal contained in this article is an attempt to close that hole and to restore the rights of the people to be secure against unreasonable searches in their automobiles, while still preserving legitimate law enforcement interests. Further, by restoring the independent judgment of a neutral and detached magistrate concerning probable cause, rather than relying upon the police to police themselves, it is hoped and expected that there will be a reduction in the

practice of actual and perceived abusive, pretextual and discriminatorily motivated searches of automobiles.