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THE AUTOMOBILE EXCEPTION: A CONTRADICTION IN FOURTH AMENDMENT PRINCIPLES

This Comment discusses the "automobile exception" to the fourth amendment warrant requirement. After reviewing the historical development of the exception, the author suggests that warrantless searches of vehicles are inconsistent with fourth amendment values. The author concludes that, in the absence of a true exigency, warrantless searches of vehicles should be prohibited. Instead, vehicles should be temporarily seized until a search warrant is secured.

The fourth amendment to the United States Constitution guarantees to the people the right to be secure from unreasonable searches and seizures. The United States Supreme Court, in interpreting the amendment, normally requires that searches and seizures be made pursuant to a warrant. The warrant requirement provides protection by requiring that the reasonableness of the search be determined by a neutral magistrate rather than by a law enforcement officer who is personally involved in the "competitive enterprise of ferreting out crime." Warrantless searches are deemed reasonable by the Court only in the case of a "few specifically established and well delineated exceptions." The ex-

1. The fourth amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. Const. amend. IV.


4. Katz v. United States, 389 U.S. 347, 357 (1967); see also Arkansas v. Sanders, 442 U.S. 753 (1979), where the Court, in determining that luggage contained in an automobile does not fall within the "automobile exception" stated that "the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and 'the burden is on those seeking the exemption to
ceptions to the warrant requirement most often recognized are: (1) search incident to a lawful arrest;5 (2) moving vehicles;6 (3) emergency circumstances;7 (4) hot pursuit;8 (5) stop and frisk;9 and (6) loss or destruction of evidence.10

All but one of these exceptions involve exigent circumstances which make it impossible or impracticable to secure a search war-
rant. This is not necessarily true of the second exception, commonly known as the "automobile exception." This exception allows a warrantless search of a vehicle stopped on a street or highway if there is probable cause to believe that the vehicle contains evidence of a crime. Warrantless search of a home or other constitutionally protected area is not allowed solely on the basis of probable cause.

The divergent treatment of automobiles was initially allowed because of the exigency that a vehicle could be removed from the jurisdiction before a search warrant could be secured. However, in practice, warrantless searches of vehicles are permitted where the vehicle has been immobilized and is under police control. In such situations there is no real exigency and it is no longer impracticable to secure a warrant. To justify the warrantless search of an automobile under nonexigent circumstances, the Supreme Court relies upon the diminished expectation of privacy.

11. For a discussion of how warrantless searches are generally limited by the exigency that gave rise to the exception see note 113 infra.
12. Although primarily applied to automobiles, the exception can reasonably be applied to any vehicle capable of fleeing the jurisdiction before a warrant can be secured. See United States v. Lee, 274 U.S. 558 (1927) (applied to a motorboat engaged in running illegal liquor). Until recently the Supreme Court, while upholding searches of automobiles in circumstances where a search of a home or other location might not be upheld, did not acknowledge the existence of an "automobile exception." South Dakota v. Opperman, 428 U.S. 364, 382 (1976). However, it now appears that the Court does recognize the existence of an "automobile exception" which both the majority and dissent refer to in Arkansas v. Sanders, 442 U.S. 753, 760-68 (1979). It is not clear whether the exception refers to all valid warrantless automobile searches or is limited to those warrantless automobile searches that fall within the more traditional definition of the automobile exception. See Moylan, The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label, 27 MERCER L. REV. 987 (1976) (discussing cases within the traditional automobile exception and how they differ from other automobile search cases that are analyzed and justified under other rationales such as search incident to arrest, stop and frisk, the plain view doctrine, and inventory searches).
15. Id.
16. See, e.g., Texas v. White, 423 U.S. 67 (1975) (per curiam), where the car was stopped in the middle of the day on a main road but was not searched until after being removed to the station house. No discussion of exigency was included. See also Chambers v. Maroney, 399 U.S. 42, 52 (1970), where the Court upheld a search of a vehicle under non-exigent circumstances. The Court acknowledged the need for exigency but under the facts of the case there was little or no possibility of the car being moved.
that an individual enjoys in an automobile\textsuperscript{18} and the administrative difficulties involved in the temporary seizure of a vehicle until a warrant can be secured.\textsuperscript{19} These justifications for allowing an exception to the warrant requirement are at best questionable.\textsuperscript{20}

The automobile exception should be discarded. Instead, in the absence of either a true exigency\textsuperscript{21} or consent, the warrantless search of a vehicle should be prohibited and a policy favoring temporary seizure of the vehicle until a search warrant is secured should be instituted.\textsuperscript{22} Temporary seizure is consistent with the Supreme Court's holding that the value being protected under the fourth amendment is the privacy interest of the individual.\textsuperscript{23} Search, not seizure, intrudes on privacy interests.\textsuperscript{24} Until a container has been opened and examined its contents are private to the individual.

Proscribing warrantless searches of a vehicle in the absence of true exigency or consent is also consistent with the Court's warrant requirement for personal luggage contained in an automobile. Presently, upon probable cause, warrantless search is permissible for the integral parts of an automobile but not for

\begin{enumerate}
\item[20.] See text accompanying notes 124-40 infra.
\item[21.] As pointed out in the cases involving searches of luggage, exigencies completely unrelated to the item's inherent mobility may exist that could justify a warrantless search of the luggage. See Arkansas v. Sanders, 442 U.S. 753, 763-64 n.11 (1979); United States v. Chadwick, 433 U.S. 1, 15 n.9 (1977) (exigency would be present where there is reason to believe that the luggage contains some immediately dangerous instrumentality). This would also be true of vehicles. Also, when law enforcement personnel are unable to control a vehicle, a true exigency would exist. Chambers v. Maroney, 399 U.S. 42, 64 n.9 (1970) (Harlan, J., concurring in part, dissenting in part) (warrantless searches allowed where it was impracticable to immobilize the vehicle). See text accompanying notes 137-39 infra.
\item[22.] See Chambers v. Maroney, 399 U.S. 42, 63-64 (1970) (Harlan, J., concurring in part, dissenting in part). Cf. United States v. Chadwick, 433 U.S. 1, 13 (1977) (prohibiting the "greater intrusion" of warrantless search of luggage where temporary seizure was sufficient to guard against loss of evidence). See also Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances, 31 OKLA. L. REV. 110, 113, 144-45 (1978) (proposing that the exigency model be abandoned, except in a very limited number of cases, in favor of defensive seizure and the securing of a warrant for the subsequent search).
\item[23.] United States v. Chadwick, 433 U.S. 1, 7 (1977); Cardwell v. Lewis, 417 U.S. 583, 591 (1974) ("[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.") (emphasis added); Katz v. United States, 389 U.S. 347, 353 (1967) ("[T]he Fourth Amendment protects people—and not simply 'areas' . . . . The Government's activities . . . violated the privacy upon which he justifiably relied.") (emphasis added); Warden v. Hayden, 387 U.S. 294, 305-06 (1967).
\item[24.] See text accompanying notes 152-55 infra.
\end{enumerate}
pieces of luggage found therein.\textsuperscript{25} This disparate treatment requires police officers to make subjective determinations whether any particular item or area of a vehicle can be searched without a warrant. Prohibiting warrantless searches in favor of temporary seizure of the vehicle until a search warrant can be obtained would provide a clear, consistent standard for law enforcement personnel. More importantly, it would assure that an individual would not be subjected to “unfettered governmental intrusion every time he entered an automobile.”\textsuperscript{26}

This Comment will review the development of the automobile exception.\textsuperscript{27} It will examine the justifications for the exception and the extensive problems involved in its application. Finally, the Comment will discuss the proposed replacement policy of prohibiting warrantless searches of the vehicle in favor of temporary seizure until a warrant can be secured.

**Development of the Automobile Exception**

During Prohibition\textsuperscript{28} America’s drinkers turned to bootleggers for a supply of illegal liquor. The highways and seaways became the arteries of supply, with the bootleggers’ fast-moving vehicles the means of delivery. In response, the federal and state governments fielded an army of prohibition agents to stem the flow.\textsuperscript{29} The National Prohibition Act provided for the seizure of any vehicle transporting liquor in violation of the law as well as the seizure of the illegal liquor itself.\textsuperscript{30} The constitutionality of a warrantless search and seizure of a vehicle transporting illegal liquor

\textsuperscript{25} See Arkansas v. Sanders, 442 U.S. 753, 762-65 (1979), in which the Court refused to uphold a warrantless search of luggage contained in the trunk of an automobile under the automobile exception. The Court distinguished permitting warrantless searches of the integral parts of the vehicle on the basis of a diminished expectation of privacy in an automobile and administrative difficulties.

\textsuperscript{26} Delaware v. Prouse, 440 U.S. 648, 663 (1979).

\textsuperscript{27} For a discussion of the automobile exception and case development, see Moylan, supra note 12; Williamson, supra note 22; Yackle, The Burger Court and the Fourth Amendment, 26 KANSAS L. REV. 337, 404-15 (1978); Note, Warrantless Searches and Seizures of Automobiles, 87 HARR. L. REV. 835 (1974); Note, Misstating the Exigency Rule: The Supreme Court v. The Exigency Requirement in Warrantless Automobile Searches, 28 SYRACUSE L. REV. 981 (1977).

\textsuperscript{28} Prohibition went into effect on January 16, 1919 and was repealed on December 5, 1933.


\textsuperscript{30} National Prohibition Act, ch. 85, § 26, 41 Stat. 315 (1919) (repealed in 1933 by U.S. Constr. amend. XXI).
on the open road was soon tested in *Carroll v. United States*.\(^{31}\)

In upholding the convictions of two bootleggers under the National Prohibition Act, a majority of the Court in *Carroll* concluded that Congress intended to provide for the warrantless search of an automobile for contraband if the search was made on the basis of probable cause and without malice.\(^{32}\) The Court further found that the requirement of a warrant for the search of a dwelling but not for the search of an automobile was consistent with the fourth amendment because the amendment prohibits only those searches that are unreasonable.\(^{33}\) Since a vehicle can be quickly moved from a jurisdiction before a warrant is obtained, it is not unreasonable to permit warrantless searches of vehicles while requiring warrants for the search of permanent structures.\(^{34}\)

However, the Court emphasized the fact that, although warrantless searches of moving vehicles for contraband are not prohibited by the fourth amendment, not every car may be subjected to search. The rights of people traveling the highways must be balanced against the need for effective law enforcement.\(^{35}\) People have the right to use the public highways free of interruption.\(^{36}\) An officer should only be allowed to interrupt this free passage if there is probable cause to believe that a vehicle is carrying contraband or illegal merchandise.\(^{37}\) Without probable cause the search would be illegal and the evidence inadmissible at trial.\(^{38}\)

In the years immediately following *Carroll* the automobile ex-

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32. Id. at 147.
33. Id. The Court, in determining what constituted an unreasonable warrantless search, reviewed extensive federal legislation authorizing warrantless searches for and seizure of goods subject to forfeiture. This legislation included the fledgling nation’s first statute regulating the collection of duties. This statute, passed by the same Congress that proposed the Bill of Rights, provided for the warrantless search of ships or vessels which were believed to conceal goods subject to duty and authorized the warrantless seizure of such goods. Yet the statute required the issuance of a warrant to enter a dwelling or permanent structure to search for similar goods concealed therein. Different treatment of mobile vehicles and permanent structures was not considered violative of the fourth amendment by the very Congress that created it. Id. at 150-51.
34. Id. at 153. It should be noted that at no time did the *Carroll* opinion intimate that motor vehicles were being singled out for special treatment under the fourth amendment for any reason other than mobility. In fact, in discussing what would constitute an illegal seizure by authorities, the Court after dealing with the requirement of probable cause said: "In cases where the securing of a warrant is reasonably practicable, it must be used." Id. at 156.
35. Id. at 153-54.
36. Id. at 154. Here the Court implied that the primary interest being protected is freedom of movement. This is contrary to later cases emphasizing privacy as the interest to be protected.
37. Id. at 156.
38. Id.
ception was used in relatively few cases. Those cases added little to the doctrine established in Carroll. However, in 1970, with Chambers v. Maroney the automobile exception entered a new era. The principal question before the Court was whether evidence seized from an automobile in which the petitioner had been riding at the time of his arrest could be used against him. The major difference between Chambers and earlier cases was that in Chambers the automobile was searched after it was taken to the police station rather than at the scene of the arrest.

In upholding the validity of the search and the admissibility of the evidence obtained therefrom, Mr. Justice White, writing for the seven man majority, reiterated that probable cause is the minimum requirement for any search to be valid and that generally the judgment of a magistrate is also required. Only in exigent circumstances can the independent judgment of the magistrate be dispensed with.

It is clear that probable cause for the search and seizure existed both at the time the automobile was stopped and at the station house when the search was made. It is also

39. Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931); United States v. Lee, 274 U.S. 559 (1927). For a view that the limited use of the exception was occasioned by the Court's greater use of the search incident to arrest exception in cases where the opportunity to use both exceptions coincided, see Moylan, supra note 12 at 987, 1000-01. Judge Moyland, of the Maryland Court of Special Appeals, points out that only with the circumscription of the search incident to arrest perimeters in Chimel v. California, 395 U.S. 752 (1969), was it necessary for the Court to rely more heavily on the motor vehicles exception.

40. One notable exception was Scher v. United States, 305 U.S. 251 (1938), where the Court without comment applied the Carroll doctrine absent a specific legislative provision for warrantless search or seizure. The Court also extended the doctrine to apply where a vehicle had already been driven into the defendant's garage and stopped. Id. at 253. The Court reasoned that since the car could have been stopped and searched just before it entered the garage, its passage therein, closely followed by the officer, did not change the officer's right to search. Thus, it appeared from Scher that both vehicles on the open road and, under some circumstances, stationary but inherently mobile vehicles fall within the exception.


42. Under Rakas v. Illinois, 439 U.S. 128 (1978), petitioner probably would not be allowed to contest the validity of the search. The Court there determined that a passenger did not have a sufficient expectation of privacy in a vehicle to have his fourth amendment rights violated by its search. Id. at 146.

43. 399 U.S. at 43-45.

44. Id. at 51.

45. Probable cause to stop and search the vehicle was found because witnesses at the scene of a robbery had seen a similar car with four men in it speed away. Id. at 46, 48-49. It is evident that the facts giving rise to probable cause would not change on the trip to the station house.
clear that, under *Carroll*, exigency in the mobility of the automobile existed at the time the car was stopped. However, the Court went on to find that the exigency still obtained at the station house because "the opportunity to search is fleeting since a car is readily movable." Since at the time of the search the car was under police control at the police station with all the suspects in custody, it is difficult to imagine how these circumstances were exigent.

Although the Court grounded the decision on "exigent circumstances," the lack of exigency under the facts of the case indicates that the Court was really swayed by other considerations. This has been confirmed by subsequent decisions acknowledging that there was no real danger of the car being removed. The Court has justified the *Chambers* warrantless search in retrospect, not on the basis of exigency, but on the basis of a diminished expectation of privacy in an automobile and on the basis of the administrative burden that would be imposed by requiring seizure of the vehicle until a search warrant can be obtained. Thus, in an opinion in which the Court initially stated that the judgment of the magistrate as to probable cause could only be dispensed with under exigent circumstances, the Court held that evidence obtained from a warrantless search under nonexigent circumstances should not be excluded.

Mr. Justice Harlan, dissenting in *Chambers*, stressed that the existence of probable cause alone is not sufficient to justify warrantless searches. There must be some exigency that requires an exception to the warrant requirement and that exception should "be no broader than necessitated by the circumstances

46. *Id.* at 52.
47. *Id.* at 51. The only indication why the Court viewed an automobile in police custody at the police station as being "readily movable" came when the opinion stated that the mobility of the automobile still obtains "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured." *Id.* at 53. That the Court found that mobility still obtained could imply that the Court did not see the fourth amendment as permitting warrantless seizure with a denial of access until a search warrant is secured. However, it does not appear from the rest of the opinion that the Court believed this to be the case. In three places the opinion referred to "immediate" searches without warrants and temporary seizure of the vehicle until a warrant could be secured as constitutionally permissible alternatives. *Id.* at 51-52. If the Court believed that the police could not deny access to the vehicle under the fourth amendment, it could not have considered the temporary seizure of the vehicle constitutionally permissible.
48. *Id.* at 44.
The dissent criticized the majority’s position as being inconsistent with the Court’s requirement that warrantless intrusions be limited by the exigencies presented.

According to the dissent, temporary seizure of an automobile until a search warrant can be obtained and warrantless search of a vehicle create different degrees of intrusion into fourth amendment values. In a situation such as that in Chambers, the “lesser” intrusion is a temporary seizure of the vehicle until the search warrant can be secured since the suspects are already in custody and the temporary immobilization of the vehicle creates very little inconvenience. Even when no arrest is made the temporary immobilization of the vehicle is preferable because a warrantless search violates the individual’s interest in privacy protected by the fourth amendment. Moreover, when a vehicle is temporarily seized rather than searched without a warrant, an individual has an opportunity to consent to the search of his property, thereby making his own determination of what is the lesser intrusion. Absent such consent, however, allowing the “greater” intrusion of warrantless search of the automobile where a “lesser” intrusion is available is inconsistent with the Court’s preference for the warrant requirement.

In the term following the Chambers decision, the Court in Coolidge v. New Hampshire, once again was presented with the question whether evidence seized in a “warrantless” automobile search made after the vehicle was in police custody was admissible in court. Mr. Justice Stewart, in a plurality opinion, explained the Chambers holding and distinguished Coolidge from Chambers. As explained by Justice Stewart, Chambers held “only that where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police sta-

52. 399 U.S. at 61 (Harlan, J., concurring in part, dissenting in part).
53. Id. at 62-63 (Harlan, J., concurring in part, dissenting in part).
54. Id. at 63-64 (Harlan, J., concurring in part, dissenting in part).
55. Id.
56. See id. at 64 (Harlan, J., concurring in part, dissenting in part).
57. Id.
58. 403 U.S. 443 (1971).
59. The searches were made pursuant to a warrant that was subsequently found invalid because it was not issued by a neutral magistrate. Id. at 448-53. When the Court determined that the warrant was invalid, the state attempted to justify the searches under the automobile exception, as searches incident to arrest, and under the plain view doctrine.
Since the plurality did not find exigent circumstances that would have justified a warrantless search under Carroll when the vehicle was initially stopped, the subsequent search at the police station could not be justified under Chambers.

**Coolidge** is the only case in which the Supreme Court invalidated a warrantless automobile search on lack of exigency. In Coolidge the Court refused to allow a warrantless search unless there was an actual possibility that the vehicle could be moved. Although the Court acknowledged the inherent mobility of the automobile, it attached no constitutional significance to that mobility. In previous cases the Court did not always acknowledge this distinction and instead apparently relied on the inherent mobility of the vehicle to justify warrantless searches where there was no real possibility of removal.

In *Cardwell v. Lewis*, also a plurality opinion, a new rationale for justifying warrantless searches of motor vehicles was advanced. In Cardwell, the plurality held that a warrantless seizure of an automobile at a public parking lot and the subsequent warrantless examination of its exterior at a police impoundment area did not violate the petitioner's fourth amendment rights.
This holding was based in part upon the finding that:
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.68

However, the rationale that the warrantless search was justified because of the "lesser" expectation of privacy in the vehicle commanded no more support than did Mr. Justice Stewart's four man dissenting opinion.69 The dissent emphasized that automobiles have been treated differently for fourth amendment purposes only because of their mobility and that the Carroll doctrine is only applicable where it is not practicable to obtain a warrant because of the vehicle's mobility.70 Not finding exigency under the facts in Cardwell, the dissenting Justices would have held the automobile exception inapplicable.71

Cardwell is the most recent case in which the Court addresses the question whether warrantless search and seizure of an automobile can be upheld under the automobile exception. As the exception has developed from Carroll to Cardwell the requirement of probable cause has remained constant. However, the use of the exception is no longer limited to situations in which legislative authority exists for the warrantless search and seizure72 or to searches for contraband.73 Nor is the use of the exception limited to searches made under present exigency. Instead the Court has

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68. Id. at 590. Under previous decisions, an individual was entitled to the same fourth amendment protection for an automobile as for other effects, but, because of necessity caused by mobility, warrantless intrusions were allowed. However, under Cardwell the right to fourth amendment protection is dependent on the individual having a privacy interest. Id. at 591. Since the Court determined that an individual has a "lesser expectation of privacy" in an automobile, there may be a question whether an individual has any right to fourth amendment protection in an automobile; and, if so, to what extent there is a right. The Cardwell opinion states that it does not mean that every part of the interior of the vehicle is without fourth amendment protection. Id. at 591. However, the opinion does not tell us what parts of the vehicle are protected or to what extent.

69. Both the plurality and dissenting opinions had support from four Justices. Mr. Justice Powell concurred only on technical grounds. Id. at 597.

70. Id. at 597-98.

71. Id. at 598-99.

72. Scher v. United States, 305 U.S. 251 (1938) (Court without comment applied exception where legislation did not authorize warrantless search and seizure).

73. Chambers v. Maroney, 399 U.S. 42, 62 n.7 (1970) (Harlan, J., concurring in
allowed warrantless searches of vehicles in police custody based on the exigency at the time of the original seizure of the vehicle.\textsuperscript{74}

The cases agree that a vehicle's mobility on occasion necessitates warrantless searches or seizures. \textit{Cardwell} and \textit{Coolidge}, however, may be at variance on whether or not warrantless searches of an automobile are justified because an individual enjoys a diminished expectation of privacy in an automobile. \textit{Cardwell} clearly supports warrantless automobile searches on this basis,\textsuperscript{75} while \textit{Coolidge} may be read to imply that warrantless searches are not justifiable solely on this basis.\textsuperscript{76} It is difficult to tell how much influence either decision will have on subsequent holdings of the Court because neither opinion enjoyed the support of a majority of the Justices. This is especially true since \textit{Cardwell} dealt with the examination of the exterior of a vehicle and any discussion regarding a diminished expectation of privacy in the interior of the vehicle was dictum.\textsuperscript{77}

The transition from \textit{Carroll} to \textit{Cardwell} indicates that the right which the Court is protecting in automobile search cases has changed. In the early cases the Court held that the fourth amendment protected the right of an individual to travel free from unreasonable interference.\textsuperscript{78} More recently the Court has determined that the value to be protected is an individual's privacy interest in his vehicle and its contents.\textsuperscript{79} This shift in emphasis was important in the two most recent Supreme Court cases involving the automobile exception. These cases, \textit{United States v. Chadwick},\textsuperscript{80} and \textit{Arkansas v. Sanders},\textsuperscript{81} do not deal with the search and seizure of an automobile but the search of personal luggage.

\textsuperscript{74} Although the \textit{Chambers} decision itself does not state that a subsequent warrantless search may be made without exigency, later cases explaining \textit{Chambers} make it clear that this is the case. \textit{See text accompanying notes 49-51 & 60-62 supra.}

\textsuperscript{75} \textit{Cardwell v. Lewis, 417 U.S. 583, 590-91 (1974).}

\textsuperscript{76} \textit{Coolidge's} emphasis on mobility as the underlying basis for the automobile exception coupled with its analysis of both prior and contemporaneous exigency by inference may be seen as being contrary to \textit{Cardwell's} position that the automobile, because of its lesser expectation of privacy, is inherently inferior for fourth amendment purposes. 443 U.S. at 459-60.

\textsuperscript{77} In \textit{Cardwell} the diminished expectation rationale did not play a part in the Court's determination that the warrantless seizure of the car was valid. The Court concentrated on whether probable cause and exigent circumstances were present. \textit{Cardwell v. Lewis, 417 U.S. 583, 593-96 (1974).}

\textsuperscript{78} \textit{Brinegar v. United States, 338 U.S. 160, 176-77 (1949); Carroll v. United States, 267 U.S. 132, 154 (1925).}

\textsuperscript{79} \textit{See generally} cases cited note 23 supra.

\textsuperscript{80} 433 U.S. 1 (1977).

\textsuperscript{81} 442 U.S. 753 (1979).
In a number of lower court decisions the automobile exception was extended by analogy to the search and seizure of movable pieces of luggage. The constitutionality of this practice was addressed by the Supreme Court in 1977 in United States v. Chadwick. Chadwick involved the warrantless search of a locked footlocker that had been placed in the trunk of a stationary car. The car engine had not been started nor had the trunk of the car been closed when the federal narcotics agents arrested the defendants and seized the footlocker. The footlocker was removed to the federal building where it was searched ninety minutes later without a warrant or consent.

Because the defendants did not contest the validity of the initial seizure of the footlocker, the Supreme Court's analysis was limited to the validity of the subsequent warrantless search at the federal building. Chief Justice Burger, writing for the seven-man majority, first rejected the government's contention that the fourth amendment's warrant clause protected only privacy interests identified with the home, office and private communications. The Court then examined the government's argument that the automobile exception rationale should be extended to luggage because luggage is capable of being moved. After acknowledging the traditional mobility justification for the automobile exception, the majority explained that automobile searches are allowed when there is no actual mobility because of an individual's lesser expectation of privacy in the vehicle. The Court distinguished searches of luggage from searches of automobiles on the basis that those factors that tend to diminish an individual's lesser expectation of privacy in his motor vehicle do not exist for an individual's luggage. On the contrary, an individual's expecta-

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82. United States v. Valen, 479 F.2d 467 (3d Cir. 1973); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).
83. 433 U.S. at 3-5.
84. The Court criticized and rejected the government's contention on the bases of a historical analysis of the fourth amendment and a review of prior Supreme Court decisions. Id. at 6-11. For a view that the government's core privacy argument may have had some merit insofar as it was based on previous Supreme Court decisions, see Note, United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable, supra note 4, at 447-49.
85. The government did not contend, as it had in the lower courts, that the footlocker's brief contact with the automobile made it subject to the automobile exception directly. 433 U.S. at 5-6, 11.
86. Id. at 12.
87. Factors which the Court found tended to diminish an expectation of pri-
tion of privacy in luggage is great because it is used as a repository for personal effects.88

In addition, the majority found that the footlocker's inherent mobility alone would not permit the abandonment of the warrant clause. The seizure of the footlocker, plus the availability of adequate storage facilities for the footlocker, was sufficient to protect the evidence until a warrant could be secured.89 The majority opinion acknowledged that, at least for searches of personal luggage, the "greater intrusion" is a warrantless search rather than a temporary seizure while obtaining a search warrant.90

The Court in Chadwick did not determine whether luggage in an automobile stopped on the open road was subject to warrantless search under the automobile exception.91 Subsequent to Chadwick there were conflicting lower court decisions on whether such a search is constitutional.92 The Supreme Court addressed the question in Arkansas v. Sanders93 in which the police stopped a taxi on a city street and, without a warrant or consent, immediately searched the suitcase of one of the passengers. The defendant conceded the validity of the seizure of the suitcase and the only question before the Court was the constitutionality of the search.94 The five-man majority opinion by Mr. Justice Powell questioned whether the validity of the search of the suitcase should be governed by Chadwick or by Carroll and Chambers. In determining whether the search could be justified under the automobile exception, the Court considered both the mobility of the vehicle and the diminished expectation of privacy in an automobile as the underlying justifications for the exception.95 The Court, noting that this was the first time that the question of a search of luggage found in an automobile as opposed to search of an "integral part" of the vehicle was before the Court, declined to extend the exception to warrantless searches of luggage.96

vacant were the transportation function, vehicle registration, and traffic regulation. Id. at 12-13.
88. Id. at 13.
89. Id.
90. Id.
91. See note 85 supra.
92. Compare United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979) (search of two unlocked brief cases at police station upheld under Chambers), and United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977) (search of closed suitcase at scene of arrest distinguished from Chadwick), with United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (search of closed suitcase at scene found unconstitutional in accordance with Chadwick), and United States v. Vallieres, 443 F. Supp. 186 (D. Conn. 1977) (subsequent search of two suitcases at federal building unconstitutional).
94. Id. at 761-62.
95. Id. at 761.
96. Id. at 763-65.
946
Court reasoned that once the officer had seized the piece of luggage and had it within his control it was no longer mobile.\textsuperscript{97} An individual does not necessarily have any lesser expectation of privacy in luggage located in an automobile than in luggage located elsewhere.\textsuperscript{98}

The Court also distinguished warrantless searches of the automobile itself from warrantless searches of luggage contained therein based on the greater burden imposed on law enforcement agencies impounding a vehicle. The seizure and storage of luggage is far less burdensome than the seizure and storage of an automobile.\textsuperscript{99} The majority opinion concluded that in order for the police to search personal luggage there must exist some exigent circumstances other than the mere location of the luggage in an automobile on the highway.\textsuperscript{100}

Chief Justice Burger, in a concurring opinion joined by Mr. Justice Stevens, found the search unconstitutional but would not have called the automobile exception into question because the search was limited to the suitcase and did not involve a general search of the vehicle.\textsuperscript{101} Chief Justice Burger felt that the question of the validity of a luggage search incidental to a general search of a vehicle should be left for the proper case.\textsuperscript{102} However, it would appear from the general language of the majority opinion that the majority Justices intended their holding to apply to a general search of an automobile as well as to a search directed at a specific piece of luggage.\textsuperscript{103}

It is clear that this was the interpretation placed on the majority opinion by the dissenting Justices.\textsuperscript{104} Mr. Justice Blackmun, joined by Mr. Justice Rehnquist, argued that the search should have been upheld under the automobile exception. They criticized the majority for carving out an exception to an exception, arguing that this would create extensive problems for law enforcement personnel. The police officer would be required to distinguish between “luggage” and “integral parts of the automobile” and between “personal luggage” and “containers and pack-

\begin{footnotes}
\textsuperscript{97} Id. at 763-64.
\textsuperscript{98} Id. at 764-65.
\textsuperscript{99} Id. at 765 n.14.
\textsuperscript{100} Id. at 766.
\textsuperscript{101} Id. at 767 (Burger, C.J., concurring).
\textsuperscript{102} Id. at 768 (Burger, C.J., concurring).
\textsuperscript{103} Id. at 763.
\textsuperscript{104} Id. at 768 (Blackmun, J., dissenting).
\end{footnotes}
ages." The dissent proposed the adoption of a clear-cut rule allowing police officers to seize and search any personal property found in an automobile whenever the automobile would be subject to a warrantless search under Carroll and Chambers.\textsuperscript{106}

\textbf{JUSTIFICATION FOR THE AUTOMOBILE EXCEPTION}

With Sanders the Court has created a double standard. A vehicle may be validly searched without a warrant under Carroll and Chambers. But, absent a true exigency, luggage and probably other personal effects contained therein cannot be searched without a warrant. Under the fourth amendment an individual is protected from unreasonable searches and seizures of all "effects."\textsuperscript{107} Yet the Court is allowing disparate treatment of the automobile and at least some effects found within it.

The Court has justified warrantless searches of automobiles on three bases. The traditional rationale is that because of a vehicle's mobility it can be readily removed from the jurisdiction before a warrant can be secured.\textsuperscript{108} More recently the Court has relied upon the diminished expectation of privacy that an individual enjoys in an automobile\textsuperscript{109} and the administrative burden involved in temporarily seizing a vehicle.\textsuperscript{110}

\textit{Mobility}

There are two anomalies present in the application of the automobile exception based on the exigency of mobility. First, both luggage and automobiles are readily movable. However, the Supreme Court refuses to allow mobility alone to justify warrantless searches of luggage\textsuperscript{111} and at the same time allows mobility to justify warrantless searches of vehicles.\textsuperscript{112} Second, the Supreme Court in most instances limits warrantless searches by the exigency giving rise to the exception.\textsuperscript{113} This has not been the case with the automobile exception.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{105} Id. at 772 (Blackmun, J., dissenting).
\item \textsuperscript{106} Id.
\item \textsuperscript{107} See note 1 supra.
\item \textsuperscript{108} Carroll v. United States, 267 U.S. 132, 153 (1925).
\item \textsuperscript{111} United States v. Chadwick, 433 U.S. 1, 13 (1977).
\item \textsuperscript{112} Chambers v. Maroney, 399 U.S. 42, 51 (1970).
\item \textsuperscript{113} E.g., Chimel v. California, 395 U.S. 752, 763 (1969) (limiting searches incident to arrest to area in which individual could gain control of a weapon or destructible evidence); Terry v. Ohio, 392 U.S. 1, 26 (1968) (limiting "stop and frisk" search to the extent necessary to detect weapons).
\item \textsuperscript{114} See notes 48-49 and accompanying text supra. See generally cases cited
\end{itemize}
In the search and seizure of an automobile on the open road several distinct acts take place. First the vehicle is stopped by the police. Then it is temporarily seized for purposes of the search, searched, and if necessary, permanently seized. In *Carroll* and other early cases, the Court did not look at the individual steps of the process but considered the search and seizure as one complete act. The initial mobility of the vehicle thereby justified the whole process. This was a reasonable approach in the early cases as the searches and seizures were essentially simultaneous and could be viewed as one continuous act.

However, *Chambers* and subsequent cases involved searches and seizures which were not conducted simultaneously. Instead, the police seized the vehicle, removed it to the station house, and searched it some time later. Under these circumstances, warrantless searches and seizures are separate but related acts and the Supreme Court makes a separate determination of the validity of each act. If separate determinations of constitutionality are made for search and seizure, exigent circumstances can be examined at each point in time to determine if the warrantless intrusion is justified under an exception to the warrant requirement. Although the Court follows this analysis to determine the validity of searches of luggage found within the automobile, it

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Note 16 *supra*. For discussions of how the Court has allowed warrantless searches of automobiles without real exigency, see Williamson, *supra* note 22, at 111-13; Note, Misstating the Exigency Rule: The Supreme Court v. The Exigency Requirement in Warrantless Automobile Searches, *supra* note 27, at 990-98 (1977).

115. If consent were given, temporary seizure would not be necessary. Absent consent, however, temporary seizure is necessary to effectuate the search of the item.

116. The Court in the earlier cases talked about the justification for the search alone. *Brinegar v. United States*, 338 U.S. 160, 164 (1949); *Carroll v. United States*, 267 U.S. 132, 153 (1925). This would be consistent with considering the process as one continuous act. If the Court does not analyze the situation as a series of acts, but as a search followed by seizure if contraband is found, then only the search would have to be justified. The discovery of the contraband would necessitate the seizure.


118. Often the validity of either the search or the seizure will, at least in part, be dependent upon the validity or non-validity of the other. In *Coolidge*, a subsequent search was found invalid because the prior seizure was invalid. In *Chambers*, a subsequent search was justified in part on the validity of the prior seizure. However, as may be inferred from *Chadwick* and *Sanders*, it is possible to have a valid warrantless seizure and still not have a valid subsequent search.

119. In both *Chadwick* and *Sanders* the Court refused to validate a search under nonexigent circumstances but stated that where true exigency exists a war-
does not apply it to the search of the automobile itself. Instead, the Court has allowed a search some time after the initial seizure of the vehicle under nonexigent circumstances, if an exigency existed at the time the vehicle was seized.\textsuperscript{120} A subsequent search, however, cannot then be realistically justified on the basis of exigency since the vehicle is in police custody and can no longer be removed from the jurisdiction.

Once search and seizure are analyzed separately in noncontemporaneous situations, such as Chambers, it rationally follows that they may be analyzed separately for contemporaneous search and seizure on the open road as well. A functioning vehicle on the open road is obviously mobile and capable of being removed from the jurisdiction. This exigency coupled with probable cause should justify the initial warrantless intrusion of temporarily stopping and seizing the vehicle. However, once the vehicle is stopped, further warrantless intrusion may not be justified. Exigency exists only if the vehicle can still be removed from the district. This depends upon who has control of the vehicle.

In the situation in which an officer has sufficient temporary control over a vehicle to search it, but not to hold it until a search warrant can be obtained\textsuperscript{121} exigency still exists, not because the object to be searched is an automobile but because the police officer is incapable of exercising control over the object until a warrant can be secured. An immediate warrantless search in such situations should be justified. However, in a situation in which the police officer can exercise effective control over the vehicle,\textsuperscript{122} exigency no longer exists and a warrantless search should not be allowed. To allow a warrantless search when the police exercise effective control over a vehicle violates the Court's policy that exceptions be limited by the exigency.\textsuperscript{123}

\begin{footnotes}
\item[120] A subsequent search, however, cannot then be realistically justified on the basis of exigency since the vehicle is in police custody and can no longer be removed from the jurisdiction.
\item[121] Such a situation might exist where a vehicle could not be adequately protected and any delay would provide the suspect or accomplices with an opportunity to remove the vehicle or evidence.
\item[122] In none of the cases from Carroll to Cardwell, with the possible exception of Chambers, where conditions interfering with a contemporaneous search were mentioned, is there any indication that the police officer's control of the vehicle was threatened.
\item[123] See note 113 supra.
\end{footnotes}
Diminished Expectation of Privacy

The second rationale given for justifying warrantless searches of automobiles is that an individual enjoys a diminished expectation of privacy in an automobile. The primary value to be protected under the fourth amendment is privacy. In determining whether a privacy interest should be protected against warrantless searches the Court looks to see whether an individual has a justified privacy expectation in that article. If an individual has a diminished expectation of privacy, a warrantless search may be more readily justified.

In no case has a majority of Supreme Court Justices relied upon the diminished expectation of privacy rationale to uphold a warrantless search in an automobile exception case. However, the Court has relied on a diminished expectation of privacy in upholding warrantless searches of automobiles in other contexts, such as inventory searches and border searches. Whether an individual has a diminished expectation of privacy in a vehicle is arguable. The automobile is pervasive within our society. It is used not only for transportation but for work, recreation and socializing. It is used to carry important papers between one's place

124. See generally cases cited note 23 supra.
125. See Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring) (two-fold test developed to determine whether an individual's privacy interest was covered by the fourth amendment). An individual must have a subjective expectation of privacy. That expectation of privacy must also be one society would recognize as reasonable. Id. at 361.
126. In Cardwell the four-man plurality relied in part on the "lesser" expectation of privacy rationale to uphold a warrantless search of the exterior of an automobile. Also, in Chadwick and Sanders the Court distinguished searches of luggage from searches of the automobile itself on this basis. It must be remembered, however, that as far as the expectation of privacy in automobiles is concerned, the statements are dicta, as they were not essential to the holding that the warrantless search of the luggage was invalid.
127. Cases which upheld warrantless searches of automobiles by relying at least in part on the lesser expectation of privacy in a motor vehicle are: United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (upholding constitutionality of "checkpoint" stop at some distance from border); South Dakota v. Opperman, 428 U.S. 364, 367-69 (1976) (police inventory search); Cady v. Dombrowski, 413 U.S. 433 (1973) (evidence discovered inadvertently while police officer searching for a gun reasonably believed to be a danger to the public found admissible primarily on grounds of plain view doctrine).
of business and home. Many people use it to seek a moment of solitude, a time to be alone with their thoughts. It is not reasonable to assume that an individual loses an expectation of privacy at these times simply because he is in an automobile.

Because someone uses their automobile for transportation and is subject to safety and traffic regulations, it does not necessarily follow that he has any lesser expectation of privacy in other aspects of his automobile. A person's general expectation of privacy in his home is not lessened because he is subject to building codes and zoning regulations. He is subjected to these intrusions only to the extent that it is necessary to carry out the purpose of the codes and regulations. So it should be with the automobile.

There are indications that the Supreme Court is aware that individuals do maintain a justified privacy expectation in their motor vehicles and that under some circumstances warrantless searches even of "integral parts" of the vehicle should not be allowed. In Cardwell the Court pointed out that the diminished expectation of privacy did not mean that every part of the interior of the vehicle would be denied fourth amendment protection. Also, the Court's treatment of personal luggage in automobiles may call into question whether a warrantless search in a high privacy area such as a glove compartment is valid. Since a person's expectation of privacy in a glove compartment, particularly if it is locked, may be very great, the same rationale that was used

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129. See United States v. Edwards, 554 F.2d 1331, 1338 (5th Cir. 1977) (judges' draft opinions carried in automobiles).

130. The individual seeking solitude in a drive might be compared to the night stroller in Papachristou v. City of Jacksonville, 405 U.S. 156, 163-64 (1972).

131. See Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (one has lesser expectation of privacy because car's function is transportation and it travels the highway in plain view); Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (states require vehicle registration and licensing of operators, as well as regulate the condition and manner of operation, thereby diminishing expectation of privacy).

132. 417 U.S. at 591.

133. In a recent California court of appeal decision the court found that an immediate warrantless search of the trunk of a vehicle parked on a city street was invalid. The court based its decision on the fact that the trunk is a part of the car in which an individual has a particularly high privacy interest. Absent genuine "urgency" the car must be impounded until a search warrant can be obtained. The court felt that Chadwick and Sanders had cast considerable doubt on the Chambers' principle that there is no constitutional difference between immediate warrantless search and impoundment. People v. Rodriguez, 102 Cal. App. 3d 510; 162 Cal. Rptr. 533 (1980), hearing granted, (June 19, 1980). Under California law the supreme court may order a cause transferred to itself for hearing and decision within a maximum of 90 days after a decision by a court of appeal. By granting the hearing the court of appeal decision is automatically vacated and is of no force or effect either as a statement of law or as a judgment. Cal. Rules of Court §§ 28(a), 976(d) (West 1980); 5 Cal. Jur. Appellate Review § 434 (3d ed. 1973).
in Chadwick and Sanders may be used to invalidate a warrantless search of at least that part of the vehicle.

Perhaps the Court's strongest recent statement regarding privacy expectations in an automobile was in Delaware v. Prouse.\textsuperscript{134} Prouse involved a random stop to check a driver's license and car registration. Upholding a motion to suppress evidence on the ground that random stops of a vehicle are unconstitutional unless there is a reasonable suspicion that the operator is unlicensed, Mr. Justice White stated:

> An individual operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. . . . Undoubtedly, many [people] find a greater sense of security and privacy in travelling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.\textsuperscript{135}

\textbf{Administrative Burdens of Temporary Seizure}

The majority opinion in Sanders justified allowing warrantless searches of automobiles partly on the basis of the greater administrative burden involved in the seizure of automobiles. The Court viewed a policy favoring temporary seizure of automobiles over immediate warrantless search as requiring local law enforcement agencies of all sizes to provide personnel and equipment for impounding seized automobiles. The temporary seizure of the automobiles could thereby impose severe, even impossible, burdens on police departments. However, because luggage is more readily stored in a much smaller area, its seizure does not impose comparable burdens.\textsuperscript{136}

There is no indication, however, that such difficulties actually

\footnotesize{\textsuperscript{134} 440 U.S. 648 (1979). It should be noted that Justice White was the author of the majority opinion in Chambers allowing search after the vehicle was completely under the dominion and control of police; joined in the plurality opinion of Cardwell upholding a warrantless search on the basis of diminished expectation of privacy in an automobile; and wrote an opinion in Coolidge which stated "searches of vehicles on probable cause but without a warrant have been deemed reasonable . . . without requiring proof of exigent circumstances beyond the fact that a movable vehicle is involved." Coolidge v. New Hampshire, 403 U.S. 443, 524 (1971) (White, J., concurring and dissenting). The more favorable attitude towards individual rights in automobiles in Prouse may indicate a willingness to give more protection to individual rights in automobile exception cases in the future.\textsuperscript{135} 440 U.S. at 662-63.\textsuperscript{136} Arkansas v. Sanders, 442 U.S. 753, 765-66 n.14 (1979).}
existed in the police departments involved in cases where the Supreme Court approved warrantless searches of automobiles. Rather, it would appear that the Court has taken the position that since additional administrative difficulties would be imposed on some police departments, it will not require any police department to detain a vehicle until a search warrant can be obtained even though "a warrantless search involves the greater sacrifice of Fourth Amendment values."^{137}

In determining whether warrantless searches should be allowed, a better approach would be to determine the capabilities of the individual police department. If a police department does not have the necessary personnel or facilities to temporarily seize a vehicle then a true exigency exists and a warrantless "on-the-spot search" is reasonable if based upon probable cause.^{138} However, when there are sufficient police personnel and facilities to temporarily seize a vehicle, the greater intrusion of warrantless search should not be permitted.^{139}

An approach which necessitates an analysis of an individual police department's capabilities might be criticized as providing different standards for different police departments: one for the larger, highly organized police department and another for the smaller, less sophisticated enforcement agency. On closer examination this is not the case. The standard for all departments would be temporary seizure of the vehicle until a search warrant can be obtained. Deviation from this standard would be allowed only on consent or exigent circumstances. The lack of personnel or facilities to carry out a temporary seizure creates an exigent circumstance in which an immediate warrantless search may be justified. Therefore, any agency, large or small, rural or metropolitan, would have to conform to the "lesser intrusion" whenever possible.^{140}

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139. See id. at 64. A California court of appeal recently determined that a warrantless search of a vehicle was invalid by considering the sufficiency of police personnel and facilities in the particular case. Finding the resources adequate to seize the car, the court held impoundment to be "[t]he proper and only legitimate procedure." People v. Rodriguez, 102 Cal. App. 3d 510, 522, 162 Cal. Rptr. 535, 542 (1980), hearing granted, (June 19, 1980). See note 133 supra for the effect of the granting of a hearing.

140. It is possible, though highly improbable, that an enforcement agency could by its own actions create the circumstances necessitating warrantless searches. However, it is absurd to imagine an agency cutting down either on personnel or facilities in order to accomplish this.
DISCARDING THE AUTOMOBILE EXCEPTION

Both individual rights and law enforcement objectives suffer from use of the automobile exception. Individuals are subjected to nonexempt warrantless searches while law enforcement officers must apply a standard fraught with inconsistencies which require them to make subjective choices. Officers must decide whether an individual has a justified expectation of privacy in an object, how great that expectation is, and whether that object is an “integral part” of a vehicle. Based on all these factors, officers must decide whether a warrantless search is permissible or whether the object must be temporarily seized until a search warrant is obtained. It is a determination that in many cases is difficult for courts to make, yet police officers must make it on the spot in situations which are often stressful, confused and in many instances dangerous. The possibility for error is great. Mistakes are made that both violate individual rights and result in the exclusion of important evidence. A clear, consistent standard calling for the temporary seizure of a vehicle and its contents until a warrant can be secured would protect individual rights and enhance effective law enforcement.

Inconsistencies in Present Law

There are at least two areas in which police officials must make a subjective choice in the application of the automobile exception. The first involves determining which items found in a stopped vehicle are protected from warrantless search under Chadwick and Sanders and which, given probable cause, may be validly searched without a warrant under Carroll and Chambers.

If a container, used as a repository for personal effects, is permanently attached to a pickup truck, a police officer, given proba-

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141. Under the present standard for warrantless automobile searches courts presented with strikingly similar fact patterns reach contradictory results. See, e.g., United States v. Dien, 609 F.2d 1038 (2d Cir. 1979) (search of closed cardboard boxes lawfully seized in search of van found to be illegal); State v. Kahlon, 172 N.J. Super. 331, 411 A.2d 1178 (1980) (search of closed cardboard box found in automobile trunk found not to be illegal); Daigger v. State — Ark. — , 595 S.W.2d 653 (1980) (woman’s purse located between front seats of vehicle not protected from warrantless search; distinguished from Sanders by location of purse in passenger compartment rather than trunk); Bradford v. State — Ind. App. —, 401 N.E.2d 77 (1980) (purse taken from passenger compartment of vehicle protected from warrantless search).

142. See generally cases cited notes 92 & 141 supra.
ble cause, would probably be able to conduct a warrantless search of the container as an integral part of a mobile vehicle under *Carroll* and *Chambers*. Yet if the container is not attached to the truck, the officer may not be able to conduct a search without a warrant under *Chadwick* and *Sanders*. The individual's privacy expectations in the two objects, identical save for the fact that one is attached to the truck while the other is not, would seem to be similar if not the same. Yet only one would appear to be protected by the warrant clause. The significant difference must lie in the fact that the police officer can easily remove one container to a storage room but seizing the other would require impounding the vehicle. Assuming that this is a valid distinction, there remains the question of how much effort is required of the police officer to remove the container. If the container, instead of being permanently attached to the truck, is temporarily attached in a manner that allows removal, the cases give no guidance whether the police officer should remove it and secure a warrant or search it as an “integral” part of the vehicle. In fact, the degree of effort necessary to remove the container may itself be another factor a police officer must consider in determining whether a warrantless search is allowed.

In addition to having to decide whether a particular item is an integral part of the vehicle, the police officer must also decide, even for unattached items, whether there is a sufficient expectation of privacy in the item for it to fall under the protection of *Chadwick* and *Sanders*. Personal luggage is clearly covered, but it is not clear whether paper bags, cardboard boxes or other containers are protected. In each instance the police officer has to make a subjective determination of the expectation of privacy in a particular item.

In considering expectations of privacy the police officer is confronted with another problem. Some “integral parts” of an automobile may also enjoy a great expectation of privacy. As pointed out by Mr. Justice Blackmun in his dissent in *Sanders*, there is probably very little difference between the expectation of privacy in a locked glove compartment and the expectation of privacy in a piece of luggage found in the car. People may carry personal papers in the glove compartment, in the console or even in the shelves provided in some cars under the dash. These areas would seem to be analogous to personal luggage since they act as repositories for personal effects. The expectation of privacy in these ar-

144. See generally cases cited note 141 supra.
eas, especially if they are closed, would seem to be similar to that enjoyed in luggage, rather than to that enjoyed in the open, more visible areas of the vehicle. Yet, a temporary seizure of these areas requires the impoundment of the entire vehicle with all of the burdens involved. The police officer is confronted with the question of whether the courts will uphold a warrantless search under the automobile exception because of the administrative burdens involved in temporarily seizing the vehicle or find the search unreasonable because it violated a justified privacy expectation.

In addition to making a determination whether certain items within a vehicle may be searched without a warrant, the police officer must also make a second subjective determination—whether the vehicle itself is subject to search without a warrant. Many vehicles in the United States are not used exclusively or even primarily for transportation. The house trailer, the self-contained camper, the camper on the back of a pickup truck, and even the house boat are all used for homes as well as for transportation. A police officer must determine whether a particular "vehicular home" is more closely analogous to a dwelling than to a mode of transportation. An individual's expectation of privacy in his or her home is very great. However, when the "home" is mobile, it is subject to the same containment problems as an automobile. It is unclear whether a warrantless search would be justified on the grounds of the "vehicle's" mobility and the burden involved in temporary seizure or whether a warrant would be required in light of the individual's justified privacy expectations.

The possibilities for inconsistency, confusion and the resultant appeals of convictions are infinite under the present approach. As stated by Mr. Justice Blackmun in his dissenting opinion in Sanders, the "heightened possibilities for error will mean that many convictions will be overturned, highly relevant evidence again will be excluded and guilty persons will be set free." Moreover, under the present approach, many individuals, whether they are innocent or guilty, will have their fourth amendment

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147. See generally cases cited note 141 supra.

148. 442 U.S. at 772 (Blackmun, J., dissenting).
rights violated because of the inability of police officers to apply a standard beset with inconsistencies. It would be better to adopt the clear-cut rule that, absent truly exigent circumstances, including circumstances where law enforcement personnel are unable to effect a temporary seizure of the vehicle, a warrant is required to search an automobile or its contents. Under such a standard, both the fourth amendment protection of individuals' rights and a clear-cut model for police enforcement could be achieved.

Temporary Seizure of Automobiles

In order to determine whether temporary seizure until a warrant can be secured or immediate warrantless search is preferable in fourth amendment terms, it is necessary to look at the values being protected by the amendment. By looking at these values, a determination may be made as to which procedure is the "greater" or "lesser" violation of the rights intended to be protected. The Court has determined that warrantless search is the "greater" intrusion for personal luggage taken from a vehicle149 but the majority of the Court has been equivocal regarding automobiles.150

In the early automobile exception cases the Court stated that the value to be protected by the fourth amendment is the right of an individual to travel free from unreasonable interference.151 Allowing an immediate warrantless search of a vehicle stopped on the highway on the sole basis of probable cause is consistent with protecting this value. A temporary seizure on the road with a rapid concomitant search interferes far less with freedom of travel than seizure of the vehicle with removal to the station house until a search warrant can be secured.

The Court has now shifted its emphasis to the protection of an individual's privacy interest as the primary purpose of the fourth

150. Id. at 13-14 n.8 (noting that Chambers Court was unwilling to determine whether immediate warrantless search of temporary seizure until a warrant is secured was the greater intrusion). See also Chambers v. Maroney, 399 U.S. 42 (1970):

[...A]rguably, 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 the "lesser" intrusion is itself a debatable question . . . . 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. Id. at 51-52.
151. See note 78 supra.
A seizure interferes primarily with an individual's possessory interest in an item. A search interferes not only with a possessory interest during the time necessary to accomplish the search, but with a privacy interest in its contents. As the Court recognized in Chadwick, an individual's principal privacy interest is not in a container which is exposed to view but in its contents. Therefore, a search of the interior is a far greater intrusion than seizure and detention of the container. This is also true of automobiles.

The primary intrusion involved in the temporary seizure of an automobile is the denial of its use and possession. Although this may involve a substantial infringement of an individual's rights, these rights have not been singled out for particular fourth amendment protection as has privacy. Moreover, if an individual feels that he will suffer a greater deprivation of his rights by temporary seizure, he is free to consent to an immediate search, thus avoiding the need for the temporary detention. Absent the individual's own determination that a search would be less violative of his rights, the Court's current emphasis on privacy mandates that warrantless search is the greater violation of an individual's fourth amendment protections. Therefore, in the absence of consent or truly exigent circumstances, a vehicle should be temporarily seized until a warrant for the "greater intrusion" of search can be obtained.

Temporary seizure of the vehicle until a search warrant can be secured would involve difficulties. These would include administrative problems, particularly for the smaller law enforcement agencies. Although this burden could be greatly reduced by taking the resources of the agency into account in determining whether exigent circumstances exist, it would be unrealistic to assume there would not be an added burden on the police departments.

Even in the most highly organized department there would be additional administrative burdens involved in impounding more automobiles. The seeking of additional warrants would create more paper work and administrative demands. But the right of

152. See generally cases cited note 23 supra.
153. 433 U.S. at 13-14 n.8.
154. Id.
individuals to be secure from unreasonable searches and seizures must be balanced against these administrative difficulties.

Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard for the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.\textsuperscript{156}

The warrant clause should function to protect citizens from the "over-zealous" law enforcement official.\textsuperscript{157} This protection should not be eliminated solely because administrative burdens will be increased.

The administrative difficulties involved in temporary seizure would in some measure be offset for law enforcement personnel by added consistency. Rather than having to deal with the ambiguities inherent in the present approach, the police officer would be provided with a clear-cut standard. Although possibly more demanding initially, temporary seizure in all but truly exigent circumstances would be more consistent and leave less room for error. This could result in fewer appeals and more stable convictions.

Limiting warrantless searches that are currently allowed under the automobile exception would in no way affect warrantless searches of automobiles allowed by other established exceptions. A police officer would still be able to search the vehicle to the extent allowed by a search incident to arrest, "stop and frisk" an occupant of the automobile believed to be carrying a weapon, search where evidence is threatened with loss or destruction, and seize evidence that is in plain view.\textsuperscript{158} The availability of other exceptions would mitigate the impact of limiting the automobile exception because enforcement personnel would in many cases still be able to conduct a warrantless search whenever the exigency behind one of the other exceptions is present.\textsuperscript{159}

\textsuperscript{156} Mincey v. Arizona, 437 U.S. 385, 393 (1978).
\textsuperscript{158} See notes 5 & 7-10 supra, for a listing and explanation of other exceptions to the warrant requirement. In order to apply the plain view doctrine there must be an inadvertent discovery of evidence by an individual who is legally entitled to be where the discovery is made. Cady v. Dombrowski, 413 U.S. 433 (1973) (initial intrusion justified by concern for safety of general public); Coolidge v. New Hampshire, 403 U.S. 433 (1971) (search under plain view doctrine not justified because of lack of inadvertence); Harris v. United States, 390 U.S. 234 (1968) (initial intrusion justified to safeguard owner's property).
\textsuperscript{159} Justice Blackmun, dissenting in Chadwick, felt it was likely that another exception would be available for the warrantless search of luggage in "most" instances. United States v. Chadwick, 433 U.S. 1, 21 (1977) (Blackmun, J., dissenting).
Some of the burdens involved in temporary seizure may be alleviated by the availability of telephonic search warrants. This practice is currently allowed under the federal rules and in a limited number of states. If more states were to adopt this practice, the administrative difficulties and delay involved in procuring a warrant for the search of an automobile would be significantly decreased.

CONCLUSION

The automobile exception has been distorted over the years to such an extent that it is no longer limited by the exigency that necessitated its adoption. It should be dropped in favor of temporarily seizing a vehicle until a search warrant can be obtained. This would be consistent with protecting the privacy interests of individuals.

The original justification for the exception was the mobility of the vehicle. The Supreme Court no longer requires a threat that the vehicle will be removed in order to permit a warrantless search. The Court has developed two additional justifications for not requiring warrants for the search and seizure of an automobile. The validity of the first of these, a generalized diminished expectation of privacy in an automobile, is questionable. Because an individual uses his car for transportation and is subject to regulation in its operation, he does not necessarily lose his expectation of privacy in other aspects of his car. The second justification is that temporary seizure of the vehicle would impose a severe burden on law enforcement agencies. However, a policy of temporary seizure need not necessarily impose an unmanageable burden on the police. Warrantless searches should be allowed whenever it is difficult or impossible for police to secure a warrant. If there are insufficient staff or facilities to keep the suspects in custody, protect the vehicle, and secure a warrant, a true exigency exists and a warrantless search would be justified.

Despite administrative difficulties which may arise, temporary seizure is preferable to the present practice. The automobile exception contains inconsistencies which result in the exclusion of evidence and the overturning of convictions. A policy requiring the temporary seizure of an automobile in the absence of true ex-

gency would provide a clear standard for law enforcement personnel.

Even more importantly, such a standard would assure that persons are not stripped of their fourth amendment rights when they step into an automobile. People should and do have a reasonable expectation of privacy in an automobile. If there is no true exigency, they should be entitled to the same fourth amendment protection in an automobile as they are entitled to in other constitutionally protected areas.

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