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## **Cops and Cars: How the Automobile Drove Fourth Amendment Law**

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# ARTICLES

## COPS AND CARS: HOW THE AUTOMOBILE DROVE FOURTH AMENDMENT LAW

TRACEY MACLIN\*

### ABSTRACT

*This Article discusses Professor Sarah A. Seo's new book, Policing the Open Road: How Cars Transformed American Freedom. I focus on Professor Seo's analyses of Carroll v. United States and Brinegar v. United States. Carroll is important because it was the Court's first car case. Moreover, understanding Carroll (and Brinegar, which solidified and expanded Carroll's holding) is essential because—nearly one hundred years later—its logic continues to direct how the modern Court resolves Fourth Amendment claims of motorists. Put simply, a majority of today's Justices view motorists' Fourth Amendment rights essentially the same way that a majority of the Justices did in 1925. Specifically, Part I highlights Seo's major assertions regarding Carroll; Carroll's influence on another controversial search and seizure decision, Terry v. Ohio, which upheld an officer's power to stop and frisk a person he suspects is armed and dangerous; and finally, Carroll's connection to the police authority upheld by the Justices that permits the discretionary and discriminatory policing that currently pervades America's highways and roads.*

*Part II of this Article focuses on the modern Court's understanding of motorists' privacy. Carroll's vision of how the Fourth Amendment applies to searching cars was not inescapable. While many lawyers and law students today might not believe it, not so long ago several members of the Burger Court took the view that cars should be treated like other effects under the Fourth Amendment—which meant the warrant requirement would apply to cars. Though a majority of Justices never embraced the view that warrants are required to search the interior of vehicles, in a series of cases the Court went back and forth on whether warrants were needed to search private containers found in vehicles. Part II examines these cases and the Court's flawed norm that motorists have diminished privacy interests in closed containers found in cars when police have probable cause to search. One could view these cases as adopting a narrower view of motorists' privacy rights than the view embraced*

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by Carroll. More importantly, the understanding that currently permits warrantless searches of suitcases and purses under the automobile exception, if meant to be a neutral principle, would also allow warrantless searches of computers and cell phones found in cars. I examine whether today's Court is likely to apply the automobile exception to searches of computers, cell phones, and other electronic devices found in vehicles.

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Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.

—*Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

[T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

...

We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.

—*Brinegar v. United States*, 338 U.S. 160, 181-82 (1949)  
(Jackson, J., dissenting).

All in all, the case should be reversed for purposes of justice, for the man apparently is guilty and no one seems to deny that.

—Harry Blackmun, Internal Memorandum on  
*Cardwell v. Lewis*, 417 U.S. 583 (1974) (No. 72-1603) Page 3.  
Harry Blackmun Papers, Manuscript Division,  
Library of Congress, Box 182, Folder 9.

## INTRODUCTION

Police officers have always kept a close watch on motorists' actions and movements. As a result, motorists' liberty to travel without government disturbance and the state's power to investigate criminality have shared an uneasy coexistence. For example, at the start of the twentieth century, certain sectors of society saw the automobile as a place for illicit behavior. A lawyer for the American Social Hygiene Association stated that:

[T]he automobile prostitute . . . is the bane of law enforcement officials. . . . Few city police departments, or country sheriffs . . . are sufficiently equipped with motorcycle police to patrol the city streets and country roads, and the prostitute may indefinitely vary the scene of her operations, or the car itself may be used if necessary.<sup>1</sup>

On another occasion, a juvenile judge asserted that "the automobile has become a house of prostitution on wheels."<sup>2</sup> The convenience and efficiency of automobile travel, as contrasted with travel by train, made enforcement of the 1910 Mann Act, which criminalized transporting women across state lines for prostitution "or any other immoral purpose," more difficult for federal agents.<sup>3</sup>

Just as automobiles made investigating Mann Act offenses more arduous, a decade later, cars made enforcing the Eighteenth Amendment's nationwide ban on alcohol more complicated for law enforcement generally. During Prohibition, police officers not only scrutinized bootleggers but also directed their investigations "to people not used to being policed."<sup>4</sup> In other words, Americans from all walks of life were subject to police surveillance, intrusive seizures, and expansive searches, which had previously been directed at the so-called criminal element of society.<sup>5</sup> It did not help relations between police and the citizenry that automobiles were seized and subjected to invasive searches based on flimsy grounds or that the methods employed by the police were sometimes random

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<sup>1</sup> DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 131* (1994) (omissions in original) (quoting BASCOM JOHNSON, *NEXT STEPS 4-5* (1918)).

<sup>2</sup> *Id.*; see also JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 137* (2014) (noting that "nothing would exemplify the connections between consumer culture, youth culture, sex, and immorality more than that great emblem of American ingenuity, economic power, and consumerism—the automobile").

<sup>3</sup> PLILEY, *supra* note 2, at 137 ("Because of the privacy and independence afforded by cars, Bureau agents often had more difficulty tracking down suspects, retracing the journeys to interview witnesses, and determining exactly what had happened in the car.").

<sup>4</sup> SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 119* (2019).

<sup>5</sup> *Cf.* LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE*, at xix (2016) ("In many places, men and women flagrantly violated the law. Among them, a small, affluent group of self-proclaimed avant-garde challenged the constricting norms they associated with Prohibition in a new world of vibrant, experimental, and permissive leisure.").

and violent.<sup>6</sup> Indeed, because enforcement of the Eighteenth Amendment often required police to undertake actions that violated the Fourth Amendment's guarantee against unreasonable searches and seizures, one legal commentator urged the Supreme Court to "recognize frankly that the 4th Amendment is inconsistent with the 18th" and "that the 4th Amendment has actually been repealed, where enforcement of the Volstead Act is concerned."<sup>7</sup>

In modern times, some police officers have been forthright about their reasons for stopping and investigating certain motorists:

A patrolman ran a warrant check on a car with a broken rear taillight and four young blacks in it. He found the car had a warrant, and stopped the car and checked the driver for warrants. The driver was not wanted, and the patrolman did not cite him for the rear taillight because, as he put it, the man had the "right attitude." Later the patrolman said he investigated the car in the first place because there were blacks in it, and with blacks "there is always a greater chance of something wrong."<sup>8</sup>

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<sup>6</sup> See Beverly Gage, *America's Long Hangover*, THE NATION (Apr. 27, 2016), <https://www.thenation.com/article/americas-long-hangover/> [<https://perma.cc/F7KE-2SJK>] ("Prohibition itself turned out to be a law-enforcement extravaganza, in which the police, politicians, and judges had to figure out how to force people to obey a law that they didn't much like. In the end, most Americans concluded that highly coercive policing, a massive administrative apparatus, and a hefty tax burden were too high a price to pay for slightly healthier livers and supposedly cleaner, more godly behavior."). See generally WESLEY M. OLIVER, *THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION* 39 (2018) (noting that the "new effort at vice regulation led to indiscriminate searches that eroded the trust the public had in the police. Prohibition created enormous opportunities for corrupt officers, and liquor searches by honest officers involved intrusions on privacy, destruction of property, and not infrequent acts of physical violence"). For an example of a particularly aggressive police stop of an automobile, consider the arrest of Fred Gibbons:

A man named Fred Gibbons was driving through [Ritzville, Washington,] when the sheriff—apparently on a tip from a bootlegger—jumped on Gibbons' automobile, pushed a gun in his face, and forced him to drive to the County Court House, where a justice of the peace issued a warrant. Gibbons had a few bottles of liquor in a suitcase and was charged with unlawful possession. The [Washington] Supreme Court reversed his conviction, [ruling that the arrest of Gibbons was illegal].

NORMAN H. CLARK, *THE DRY YEARS: PROHIBITION AND SOCIAL CHANGE IN WASHINGTON* 156-57 (1965) (citing *State v. Gibbons*, 203 P. 390, 391-96 (Wash. 1922)).

<sup>7</sup> Frederic A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 CENT. L.J. 113, 122-23 (1924). This view did not go unchallenged. See Thomas E. Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748, 749 (1925) ("[T]he Eighteenth Amendment is merely an enlargement of the federal power to deal with liquor offenses and was never intended to alter in any way the constitutional safeguards and personal guarantees.").

<sup>8</sup> MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 170 (1988).

In December 1986, Sheriff Harry Lee of Jefferson Parish, Louisiana, announced that his deputies would routinely stop black motorists driving in white neighborhoods. The Sheriff stated that his deputies would

stop everybody that we think has no business in the neighborhood. . . . It's obvious that two young blacks driving a rinky-dink car in a predominately white-neighborhood—I'm not talking about on the main thoroughfare, but if they're on one of the side streets and they're cruising around—they'll be stopped.<sup>9</sup>

A North Carolina State Trooper, C.J. Carroll, told a defense lawyer that he patrolled two areas of Durham “for the purpose of looking for Hispanic males.”<sup>10</sup> The defense lawyer

further inquired, if all her client had done was exit the store with a carton of beer, why did Trooper Carroll stop him. Trooper Carroll responded: “Everyone knows that a Hispanic male buying liquor on a Friday or a Saturday night is probably already drunk”; “Mexicans drink a lot because they grew up where the water isn't good”; and that he did not care what happened in court “as long as I get them [(i.e. Hispanic males)] off the road and in jail for one night.” Finally, when asked if he targets Hispanics, Trooper Carroll stated: “I'm not targeting Hispanics. Most of my tickets go to blacks.”<sup>11</sup>

Under our constitutional system, the Supreme Court is in charge of protecting motorists from unreasonable searches and seizures. The Court, however, has been consistently bad at defending motorists' Fourth Amendment rights. To be sure, the Court has issued opinions where individuals have prevailed against the government in “car” cases.<sup>12</sup> But for almost a century, the Court has steadily

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<sup>9</sup> J. Michael Kennedy, *Sheriff Rescinds Order to Stop Blacks in White Areas*, L.A. TIMES, Dec. 4, 1986, pt. 1, at 18. After his announcement, Sheriff Lee apologized and rescinded his order. *Id.*

<sup>10</sup> *State v. Villeda*, 599 S.E.2d 62, 64 (N.C. Ct. App. 2004). Thanks to Professor Gabriel Chin for alerting me to this case.

<sup>11</sup> *Id.* (alteration in original).

<sup>12</sup> *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (holding that “the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy” in the rental vehicle); *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) (holding that dog sniff conducted after completion of traffic stop violated Fourth Amendment because there was no basis for prolonging the stop); *United States v. Jones*, 565 U.S. 400, 402 (2012) (finding that attaching GPS device to vehicle constitutes search within Fourth Amendment); *City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) (finding that suspicionless checkpoints to detect narcotics violated Fourth Amendment because otherwise “law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check”); *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979) (“[W]e hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations.”), *abrogated by*

rejected Fourth Amendment claims pressed by individuals in cases involving automobiles. Often in explaining its rulings, the Court claims that car cases are different from other search-and-seizure issues.<sup>13</sup> But a close analysis of the Court's reasoning discloses that something else motivates the Justices' results. In fact, the Court's logic in car cases is often based on fictitious claims about motorists' privacy interests, intellectually dishonest reasoning, and a candid desire to expand the discretion and power of law enforcement officers to stop and search motorists. Along the way, the Court has permitted law enforcement officers to stop and interrogate motorists near the southern border based on their Mexican ancestry<sup>14</sup> and, most unfortunately, turned a blind eye to pretextual traffic stops targeting black and Hispanic drivers for suspicionless criminal investigations.<sup>15</sup>

Professor Sarah Seo's new book, *Policing the Open Road: How Cars Transformed American Freedom*, vividly and expertly describes America's history of "policing cars . . . as it fast became an automotive society."<sup>16</sup> Professor Seo's book outlines the "practical, theoretical, and legal problems of policing everybody who drove."<sup>17</sup> Because of the eventual ubiquity of cars and the pervasive regulation of motorists, police were afforded "discretion to administer the massive traffic enforcement regime and deal with the sensitivities of 'law-abiding' citizens who kept violating traffic laws."<sup>18</sup> Discretionary police

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California v. Acevedo, 500 U.S. 565 (1991); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (finding that, except in exceptional circumstances, it is unreasonable under Fourth Amendment to stop car and detain driver to check his or her license and registration); Coolidge v. New Hampshire, 403 U.S. 443, 480 (1971) (plurality opinion) (finding warrantless search of car unreasonable because law enforcement officials had time and means to secure a warrant to authorize the search).

<sup>13</sup> See, e.g., Arizona v. Gant, 556 U.S. 332, 343 (2009) (explaining that second prong of its holding—that police may search interior of car incident to arrest "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle'"—is attributable to "circumstances unique to the vehicle context" (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring))); Cady v. Dombrowski, 413 U.S. 433, 442 (1973) (stating that cars are different from houses not only due to their mobility but also because of "fact that extensive, and often noncriminal contact with automobiles . . . bring[s] local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband"). Tellingly, *Gant* "deemed it unnecessary to state or even hint at what these unique circumstances are" that made cars different for purposes of a search incident to arrest. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 7.1(d), at 719 (5th ed. 2012).

<sup>14</sup> United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976) (holding that stopping vehicle at fixed checkpoint near border even though there is "no reason to believe the particular vehicle contains illegal aliens" is consistent with Fourth Amendment).

<sup>15</sup> Whren v. United States, 517 U.S. 806, 819 (1996) (holding that probable cause renders stop reasonable under Fourth Amendment, despite argument that stop was pretextual).

<sup>16</sup> SEO, *supra* note 4, at 8.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

power “profoundly altered what it meant to live free from state intrusion in the Automotive Age.”<sup>19</sup> Seo’s book illuminates the nexus between this history of policing cars and “the history of American criminal justice and its troubled present.”<sup>20</sup>

More specifically, *Policing the Open Road* is required reading for Fourth Amendment buffs.<sup>21</sup> Judges, lawyers, law professors, and law students interested in understanding the history of American search and seizure law should read this book. Seo’s hypothesis is direct: “Examining the spate of car cases in state and federal courts that began in the 1920s and persisted throughout the century reveals a startling revelation: Fourth Amendment jurisprudence evolved not just to limit police discretion, as we have learned, but also to accommodate it.”<sup>22</sup> Of course, her thesis is at odds with the traditional descriptions of the Supreme Court’s search and seizure doctrine. Under the standard interpretations, the Warren Court, starting in the early 1960s, commenced the “due process revolution,”<sup>23</sup> which was designed to protect the constitutional rights of criminal suspects. Seo’s book proffers an alternative account: “[I]n fact, American courts did more to encourage and sustain, rather than to check, the police’s growing authority.”<sup>24</sup> Without questioning the significance and correctness of the Warren Court’s renowned cases, such as *Mapp v. Ohio*,<sup>25</sup> Seo contends that “[o]nce we examine the celebrated decisions alongside the underbelly of criminal procedure—the thousands of car cases that justified police action—the judicial endorsement of greater discretionary policing becomes undeniable.”<sup>26</sup>

According to Seo, judicial approval of police discretionary power to investigate motorists was no accident. As in other Fourth Amendment contexts, the critical issue was whether police would need a judicial warrant to seize or search a vehicle.<sup>27</sup> After the Court’s 1925 landmark ruling in *Carroll v. United States*<sup>28</sup> effectively eliminated the need for police to seek judicial authorization before searching or seizing automobiles—as they must do before entering homes or seizing personal papers—judges deferred to the police when defendants challenged searches or seizures of their cars.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974) (coining term “fourth amendment buff”).

<sup>22</sup> SEO, *supra* note 4, at 17.

<sup>23</sup> FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 28 (1970).

<sup>24</sup> SEO, *supra* note 4, at 18.

<sup>25</sup> 367 U.S. 643 (1961).

<sup>26</sup> SEO, *supra* note 4, at 18.

<sup>27</sup> *Id.* at 16 (“At stake in this legal question was the very legitimacy of discretion at the heart of police governance. Requiring officers to get a warrant from a magistrate would hold up their efforts to proactively investigate crime. Conversely, eliminating the warrant requirement would allow the police to act according to their own judgement.”).

<sup>28</sup> 267 U.S. 132 (1925).

When faced with the exigencies of automobility—and especially when those caught red-handed, not the wrongly suspected, were typically the ones who brought Fourth Amendment challenges—judges tended to side with order and security and conclude that zealous and intrusive police action for the sake of the public welfare was reasonable and did not compromise the values of a democratic society.<sup>29</sup>

Rather than protecting motorists, judges interpreted the Fourth Amendment's text—which, *inter alia*, mandates a right of the people to be free from “unreasonable” searches and seizures—as a tool for investigation.<sup>30</sup> As in other Fourth Amendment contexts where judges employ a reasonableness model to decide cases, a reasonableness theory in car cases did not encourage principled judicial results. Judges found it “difficult to pin down a definition of reasonable policing, let alone flesh out a coherent theory for determining reasonableness, when patrolling the byways and highways presented a myriad of unexpected situations and often involved split-second decision-making.”<sup>31</sup> Rather than announce “neutral principles,”<sup>32</sup> judges did what judges often do in Fourth Amendment cases—defer to the police.<sup>33</sup>

Professor Seo explains that the reasonableness model utilized by judges to resolve car cases eventually “accumulated into judicial rules, which became more numerous, more specific, and more complex.”<sup>34</sup> Fourth Amendment rules for vehicles became a procedural regime “in the sense that they direct *how* the police should police, unlike substantive rights, which secure the right to be free from government, including police, intrusion.”<sup>35</sup> Seo wonders why “the justices settled on procedural rights [in car cases] to protect individuals from the police, rather than, for example, a substantive privacy right not to have one's car searched.”<sup>36</sup> In the next paragraph, she answers the question: the Court rejected

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<sup>29</sup> SEO, *supra* note 4, at 19.

<sup>30</sup> The Fourth Amendment provides:

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.

<sup>31</sup> SEO, *supra* note 4, at 19.

<sup>32</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

<sup>33</sup> SEO, *supra* note 4, at 19 (“[R]easonableness functioned as a deferential standard. This deference, in turn, gave the police even more power.”); *id.* at 220 (“In the history of twentieth-century criminal procedure, jurists applied the reasonableness standard to empower, not to limit, police discretion.”). Because of the deference judges gave to law enforcement interests in car cases, Seo believes that “[f]rom the perspective of cars, the Due Process Revolution was not much of an overthrow of the existing order.” *Id.* at 19.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 19-20.

substantive rights—and declined to impose a warrant requirement for certain searches associated with cars—because substantive protection would have limited the “discretionary policing that the ‘law-abiding’ wanted.”<sup>37</sup> The choice of procedure over substance meant that “minorities and the poor . . . received rules regulating the police’s ever-growing power.”<sup>38</sup> The consequence “was not protection of individuals’ privacy in their cars but the empowerment of highway patrollers and traffic cops who could take advantage of the thicket of procedures to exercise their power in discretionary, even discriminatory, ways.”<sup>39</sup> In the end, motorists were subject to discretionary policing, and *everyone* lost some of their freedom.

*Policing the Open Road* offers insights and astute analysis on many of the Court’s important Fourth Amendment car cases. Space constraints preclude me from commenting on all of the cases and topics Seo probes. Instead, I focus on Professor Seo’s analyses of *Carroll v. United States* and *Brinegar v. United States*.<sup>40</sup> *Carroll* is important because it was the Court’s first car case. Furthermore, understanding *Carroll*—and *Brinegar*, which solidified and expanded *Carroll*’s holding—is essential because—nearly one hundred years later—its logic continues to direct how the modern Court resolves motorists’ Fourth Amendment claims.<sup>41</sup> Put simply, a majority of today’s Justices view motorists’ Fourth Amendment rights essentially the same way that a majority of the Justices did in 1925. Specifically, Part I of this Article highlights Seo’s major assertions regarding *Carroll*; *Carroll*’s influence on another controversial search and seizure decision, *Terry v. Ohio*,<sup>42</sup> which upheld an officer’s power to stop and frisk a person he suspects is armed and dangerous; and finally, *Carroll*’s connection to the police authority upheld by the Justices that permits the discretionary and discriminatory policing that currently pervades America’s highways and roads.

Part II focuses on the modern Court’s understanding of motorists’ privacy. *Carroll*’s vision of how the Fourth Amendment applies to searching cars was not inescapable. While many lawyers and law students today might not believe it, not so long ago several members of the Burger Court took the view that cars should be treated like other effects under the Fourth Amendment—which meant the warrant requirement would apply to cars. Though a majority of Justices never embraced the view that warrants are required to search the interior of vehicles, in a series of cases the Court went back and forth on whether warrants were needed to search private containers found in vehicles. Part II examines

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<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 338 U.S. 160 (1949).

<sup>41</sup> *Cf.* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 987 (2003) (describing *Carroll* as having “lasting influence” on approval of warrantless automobile searches).

<sup>42</sup> 392 U.S. 1 (1968).

these cases and the Court's flawed norm that motorists have diminished privacy interests in closed containers found in cars when police have probable cause to search. Remarkably, the modern Court has embraced a *narrower* view of motorists' privacy rights than the view announced in *Carroll*. More importantly, the understanding that currently permits warrantless searches of suitcases and purses under the automobile exception, if meant to be a neutral principle, would also allow warrantless searches of computers and cell phones found in cars.

### I. BAD FROM THE BEGINNING—*Carroll v. United States*

Professor Seo begins her analysis of the automobile's impact on Fourth Amendment doctrine at the right place: *Carroll v. United States*. What makes Seo's book so good is that she explores and offers insights into *Carroll* not offered in other studies of this seminal ruling. While the facts in *Carroll* are familiar to constitutional criminal procedure professors, law school casebooks typically provide only a passing reference to *Carroll*.<sup>43</sup> There is no discussion of *Carroll* in the casebooks describing it as a controversial ruling<sup>44</sup> and there is certainly nothing that links *Carroll* to the discretionary and race-based policing of motorists that exists today.

*Carroll* was a Prohibition case. The Eighteenth Amendment's nationwide ban on "the manufacture, sale, or transportation of intoxicating liquors"<sup>45</sup> was highly controversial, and it deeply divided Americans. The federal government's efforts at enforcing Prohibition were equally divisive, if not more so.<sup>46</sup> "During

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<sup>43</sup> See, e.g., YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 376 (15th ed. 2019). Law students learn that *Carroll* announced the rule that police may search a vehicle found traveling on the road when there is probable cause that the vehicle contains contraband or evidence of criminality and it is impractical to obtain a warrant.

<sup>44</sup> In a recent law review article, two scholars described *Carroll* as "venerable." Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 906 (2015). For a highly critical assessment of *Carroll* from an originalist perspective, see generally Thomas J. Snyder, *My Car Is My Castle: The Failed Historical Roots of the Vehicle Exception to the Fourth Amendment*, 93 S. CAL. L. REV. (forthcoming 2020) (on file with the Boston University Law Review). Professor Robert Post provides a magnificent and extremely informative analysis of *Carroll*, relying on the papers of members of the Taft Court, contemporaneous legal scholarship, and other search and seizure rulings from the Taft Court. See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 116-37 (2006). For anyone interested in understanding the Justices' motivations in *Carroll*, Professor Post's article is essential reading.

<sup>45</sup> U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

<sup>46</sup> Post, *supra* note 44, at 11 ("In contrast to the enforcement of state and local prohibition laws that predated prohibition, federal efforts to enforce the Eighteenth Amendment were so conspicuously ineffectual that widespread violation of prohibition became, in [President Warren] Harding's words, a 'nation-wide scandal' that was 'the most demoralizing factor in our public life.'" (footnotes omitted)).

the 1920s the Supreme Court, under the leadership of Chief Justice William Howard Taft, was at the storm center of prohibition enforcement.<sup>47</sup> The Taft Court was “grimly committed to the success of prohibition.”<sup>48</sup> At the same time, the Taft Court accepted the Fourth Amendment’s exclusionary rule, which required that evidence obtained by unconstitutional searches and seizures by federal officers not be used in federal criminal trials. The upshot was that “prohibition sparked a virtual ‘doctrinal explosion’ of Fourth Amendment jurisprudence.”<sup>49</sup> And the Prohibition cases of the Taft Court

reflected a sharp break with earlier decisions interpreting the Fourth Amendment. Most conspicuously, the Court abandoned the rule of liberal construction of the protections afforded by the Fourth Amendment. Instead, it interpreted the amendment to permit a variety of intrusive enforcement actions by prohibition authorities.

The most obvious result of the Supreme Court decisions was to limit the occasions when enforcement agents had to obtain warrants.<sup>50</sup>

Put simply, Prohibition enforcement was a game changer for the Fourth Amendment.<sup>51</sup>

Shortly after the start of Prohibition, federal Prohibition agents and a Michigan law enforcement officer were looking for bootleggers on the road between Detroit and Grand Rapids when an Oldsmobile Roadster drove past.<sup>52</sup> One of the feds, Fred Cronenwett, suspected that George Carroll was in the Roadster.<sup>53</sup> Cronenwett had encountered Carroll and two others, John Kiro and a man named Kruska, a few months earlier during an undercover operation.<sup>54</sup>

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<sup>47</sup> *Id.* at 7.

<sup>48</sup> *Id.* at 42.

<sup>49</sup> *Id.* at 117 (footnote omitted).

<sup>50</sup> KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* 68 (1994). Query whether modern law students understand the nexus between the enforcement of Prohibition and the Fourth Amendment rules they learn. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (holding that wiretapping of Roy Olmstead’s bootlegging operations did not constitute Fourth Amendment search or seizure), *overruled by Katz v. United States*, 389 U.S. 347 (1967); *Carroll v. United States*, 267 U.S. 132, 162 (1925) (holding warrantless search of automobile based on probable cause constitutional); *Hester v. United States*, 265 U.S. 57, 58-59 (1924) (holding that police trespass on person’s private property to seize liquor in open fields was not search under Fourth Amendment).

<sup>51</sup> *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 842-43 (2004) (“The National Prohibition Act of 1919 changed everything. . . . The federal courts began to hear a regular run of Fourth Amendment cases as federal agents investigated illegal alcohol schemes.”).

<sup>52</sup> *Carroll*, 267 U.S. at 135.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 134-35.

The three had arrived at the meeting in an Oldsmobile Roadster.<sup>55</sup> Cronenwett proposed to buy whiskey from Carroll.<sup>56</sup> The three left, purportedly to obtain the whiskey, but “in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day.”<sup>57</sup> The sale never occurred.

When Cronenwett again saw the Oldsmobile Roadster on the highway, he suspected that “the Carroll boys” were up to no good.<sup>58</sup> After stopping the Roadster occupied by Carroll and Kiro, the officers searched the car, but initially found no liquor.<sup>59</sup> “They were about to let the duo go when Cronenwett struck something hard, so hard that it ‘was practically solid,’ in the cushion of the back seat.”<sup>60</sup> Inside, the officers found sixty-eight bottles of “blended Scotch whiskey” and “Gordon gin.”<sup>61</sup> Carroll and Kiro were arrested notwithstanding Carroll’s offer to Cronenwett to “[t]ake the liquor and give us one more chance and I will make it right with you.”<sup>62</sup>

After the defendants were convicted of violating the Volstead Act,<sup>63</sup> they appealed to the Court contending that the seizure and search of the Oldsmobile and their subsequent arrest violated the Fourth Amendment. Specifically, the defendants argued that stopping the vehicle constituted a “seizure,” which was the equivalent of an arrest for constitutional purposes and required a judicial warrant based on probable cause of criminality. The common law allowed warrantless arrests if police had probable cause of a felony or had personally observed a misdemeanor that was a breach of the peace. Counsel for the defendants, however, reminded the Court that one agent had testified that the officers “‘had no reason to believe that the [defendants] were transporting liquor’ before stopping and searching the Oldsmobile. And without a lawful seizure or arrest, the officers could not conduct a warrantless search.”<sup>64</sup>

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<sup>55</sup> *Id.* at 135.

<sup>56</sup> *Id.* (noting that Cronenwett used alias and sought to buy three cases of whiskey for \$130 per case).

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

<sup>58</sup> *Id.* at 160.

<sup>59</sup> SEO, *supra* note 4, at 114.

<sup>60</sup> *Id.*

<sup>61</sup> *Carroll*, 267 U.S. at 136.

<sup>62</sup> *Id.*

<sup>63</sup> The Volstead Act, officially known as the National Prohibition Act, was enacted by Congress to implement the Eighteenth Amendment’s nationwide ban on the manufacture, sale, or transportation of intoxicating liquors. National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 305 (1919), *repealed by* Liquor Law Repeal and Enforcement Act, Pub. L. No. 74-347, 49 Stat. 872, 872 (1935) (repealing Titles I and II and amending Title III of Volstead Act).

<sup>64</sup> SEO, *supra* note 4, at 115 (alteration in original) (quoting Brief of Plaintiffs in Error on Reargument at 2, *Carroll*, 267 U.S. 132 (No. 15), 1924 WL 25789, at \*2 [hereinafter Plaintiffs’ Brief]).

Without disputing the defense's legal position, the government urged the Justices to ignore the common law rule of arrest because cars were different: "The use of such motor vehicles by criminals . . . demands that our ancient law be so amended as to cope with these modern facilities . . ." <sup>65</sup> The government told the Court that "a lower standard than even probable cause was necessary when cars were involved." <sup>66</sup> Counsel for defendants rejoined that if the Court adopted the government's position "[s]earches of vehicles on the highway will[,] if promiscuously permitted[,] lead to great abuses." <sup>67</sup> Thus, the Justices confronted a dilemma:

Because cars provided both the getaway and a cover for hiding things, officers not only had insufficient time to get a warrant but also usually had only mere suspicion, short of probable cause or knowledge, that a car was transporting illicit goods. And because so many people drove and their cars looked, well, standardized, any rule on the police's authority when applied to the automobile would affect the lawbreaking and the law-abiding alike. <sup>68</sup>

While the advent of the automobile raised thorny concerns for Fourth Amendment rules, Professor Seo intimates that another dynamic may have been on the Justices' minds in *Carroll*. Eleven years before the Court decided *Carroll*, it ruled in *Weeks v. United States* <sup>69</sup> that evidence obtained from an illegal search or seizure was inadmissible in federal court. <sup>70</sup> Professor Seo states that the exclusionary mandate announced in *Weeks* "soon proved as divisive as Prohibition itself." <sup>71</sup> Indeed, she believes that the issue "of exclusion became synonymous with the substantive matter of outlawing liquor." <sup>72</sup> *Carroll* was argued twice. The case "first appeared on the docket for the 1923 term, but the justices asked the parties to argue the case again the following year." <sup>73</sup> In their brief on reargument, the defendants remarked, "We cannot believe that this court is contemplating overruling the principle announced in *Weeks v. United States*." <sup>74</sup>

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<sup>65</sup> Substituted Brief for the United States on Reargument at 77, *Carroll*, 267 U.S. 132 (No. 15), 1924 WL 25788, at \*77 (statement of N.Y.C. Police Commissioner R.E. Enright).

<sup>66</sup> SEO, *supra* note 4, at 115.

<sup>67</sup> Plaintiffs' Brief, *supra* note 64, at 13.

<sup>68</sup> SEO, *supra* note 4, at 115-16.

<sup>69</sup> 232 U.S. 383 (1914), *overruled by* *Mapps v. Ohio*, 367 U.S. 643 (1961).

<sup>70</sup> *Id.* at 398-99.

<sup>71</sup> SEO, *supra* note 4, at 120.

<sup>72</sup> *Id.* at 120; *see also* ARTHUR W. BLAKEMORE, NATIONAL PROHIBITION 514 (2d ed. 1925) (noting that "as the federal courts have been bound to follow" *Weeks*, "state courts have felt free to disregard it"); Atkinson, *supra* note 7, at 749 (stating that "prohibition plus the violent criticism of the legal principles announced in the *Weeks* case has made the doctrine a virtual battle-ground" in state courts (footnote omitted)).

<sup>73</sup> SEO, *supra* note 4, at 123.

<sup>74</sup> Plaintiffs' Brief, *supra* note 64, at 15. Professor Post offers another reason for the reargument in *Carroll*. According to Post, the Justices had originally voted to affirm the

As one legal chronicler of Prohibition recognized before *Carroll* was decided, “[o]ne of the most important practical difficulties in the enforcement of prohibition is that involved in the transportation of liquor by vehicle.”<sup>75</sup> There were too many automobiles that looked alike. And if police “cannot stop and search vehicles which they strongly suspect of illegal transportation[,] they cannot stop the traffic at all and the [federal prohibition] law will be made nugatory.”<sup>76</sup> Although judges in prohibition cases “seem[ed] to agree that an automobile cannot be searched without cause[,] still many courts are seizing on various elements of suspicion as justifying such searches and holding further that the finding of liquor may be itself a sufficient justification.”<sup>77</sup> *Carroll* would not embrace this position, but it came close to doing so.

Furthermore, Professor Seo suggests that a more nuanced dilemma confronted Chief Justice Taft, the author of *Carroll*:

The difficulty of the case for Taft stemmed from the fact that the Eighteenth Amendment was the law of the land. The American people had voted to make it part of the US Constitution. Certainly, the police had to respect constitutional limits on their actions. But citizens had to obey the law as well. On the one hand, the Fourth Amendment was on the line. On the other hand, noncompliance eroded the Eighteenth. Many judges, including Taft, were originally against National Prohibition. But once it was ratified, they believed that the rule of law demanded obedience, which, it quickly became clear, depended on greater police enforcement. At stake was the rule of law. The dilemma was that it cut both ways.<sup>78</sup>

Solicitor General James Beck provided Taft with a way to resolve *Carroll* without seemingly having to choose between protecting the Fourth Amendment

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convictions, and Justice McReynolds was assigned the opinion. Post, *supra* note 44, at 123 n.406. McReynolds changed his mind (and vote), which “evidently caused the case to be reargued.” *Id.* After reargument, Taft took over writing the opinion. *Id.* Professor Post’s research also reveals that the Justices were divided about the result in *Carroll* and, at one point during deliberations, a majority of Justices had voted in favor of the defendants. *Id.* Finally, Post’s examination of Taft’s papers reveals the Chief Justice’s determination to uphold the search and his animosity toward automobiles. *See id.* (noting that after majority agreed to affirm convictions, Taft wrote to his brother: “I am rejoiced because I think it important to establish the correct principle in respect to the search of this instrument of evil the automobile”); *id.* at 125 n.408 (quoting Taft’s personal correspondence two years before *Carroll* was decided: “[T]he automobile is the greatest instrument for promoting immunity of crimes of violence that I know of in the history of civilization” and “is the greatest instrument to promote immunity from punishment for crime that we have had introduced in many, many years, and we haven’t as yet neutralized its effect”).

<sup>75</sup> BLAKEMORE, *supra* note 72, at 475-76.

<sup>76</sup> *Id.* at 476.

<sup>77</sup> *Id.*

<sup>78</sup> SEO, *supra* note 4, at 123.

or enforcing Prohibition.<sup>79</sup> The government's brief "reframed *Carroll* as a case not about liquor but about how the automobile had completely transformed American society."<sup>80</sup> Rather than debate the soundness of Prohibition or the importance of the Fourth Amendment, the Court should focus on the car. The government urged the Justices to look beyond the fact that the search of Carroll's vehicle facilitated enforcement of Prohibition; future cases could involve more violent offenses with criminals fleeing in cars. The advent of the automobile necessitated that the Court rethink "the well-settled rules of the common law' regarding an officer's authority to search and to seize."<sup>81</sup> Whether intentional or not, Solicitor General Beck's<sup>82</sup> strategy fit nicely with Chief Justice Taft's view that the automobile was an "instrument of evil"<sup>83</sup> that should be "neutralized."<sup>84</sup>

Ultimately, as Seo explains, *Carroll* made new law. Typically, when the Court issues an opinion granting police additional powers to invade constitutional freedom, the Court will offer platitudes about the importance of the right at stake and warn that it will not tolerate government abuse of the newly granted power. Chief Justice Taft followed that script in *Carroll* when he offered throwaway dicta that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."<sup>85</sup> And he also stated that "[i]n cases where the securing of a warrant is reasonably practicable, *it must be used*."<sup>86</sup> The latter remark suggested that whether police needed a warrant to search a car "depended

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<sup>79</sup> During the 1920s, some lawyers, legal commentators, and even a few federal judges openly questioned the compatibility of Fourth Amendment rights and effective enforcement of the Eighteenth Amendment. See Post, *supra* note 44, at 118-19. For example, in 1924, the Fourth Circuit wrote: "The constitutional expression, 'unreasonable searches,' is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic and legal conditions. The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments." *Milam v. United States*, 296 F. 629, 631 (4th Cir. 1924). More directly, for some, the need to enforce the Eighteenth Amendment meant diminishing the scope and meaning of the Fourth Amendment.

<sup>80</sup> SEO, *supra* note 4, at 124.

<sup>81</sup> *Id.*

<sup>82</sup> Interestingly, James Beck opposed federal prohibition on federalism grounds. JAMES M. BECK, *THE REVOLT AGAINST PROHIBITION* 14-15 (1930) ("[T]he leaders of prohibition showed scant respect for the Constitution when they wrote this illegitimate amendment into that noble instrument and thus destroyed its perfect symmetry and turned a wise compact of government into a mere police code.").

<sup>83</sup> Post, *supra* note 44, at 123 n.406.

<sup>84</sup> *Id.* at 125 n.408.

<sup>85</sup> *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). A few lines later, Taft added that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search" unless officers have probable cause that the vehicle contains contraband or illegal merchandise. *Id.* at 154.

<sup>86</sup> *Id.* at 156 (emphasis added).

on the exigencies of the situation”—in other words, the validity of a car search “turned on whether the officer had enough time” to get a warrant from a magistrate.<sup>87</sup>

After acknowledging the obvious difference between a search of a home or other structure—for “which a proper official warrant readily may be obtained”—and a search of a ship, wagon, or automobile—for which it is impractical to

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<sup>87</sup> SEO, *supra* note 4, at 137. A few years later, two rulings, also involving prohibition enforcement, suggested that the Court would not take seriously Taft’s admonition that warrants “must be used” when officers may practically obtain them: *Husty v. United States*, 282 U.S. 694 (1931), upheld a warrantless search of a parked car for alcohol by federal officers on the grounds that the officers “could not know when Husty would come to the car or how soon it would be removed.” *Id.* at 701. “Even though several officers took part in the search, the Court did not think it was necessary for one of them to secure a warrant while leaving the car under the watchful eye of the others.” JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 91 (1966). *Scher v. United States*, 305 U.S. 251 (1938), held that where an officer has probable cause to search a car observed driving on the road, “[p]assage of the car into [a private] garage closely followed by the observing officer did not destroy th[e] right” to search. *Id.* at 255. *Scher*, written by Justice McReynolds, who dissented in *Carroll*, offered no discussion on why it was impractical for the officer to obtain a warrant. *See id.*

By the end of the century, the Burger and Rehnquist Courts stopped pretending that *Carroll* demanded warrants to search vehicles in the absence of exigent circumstances. Thus, despite purporting to follow “the *Carroll* doctrine,” *see California v. Acevedo*, 500 U.S. 565, 579-80 (1991), the modern Court has summarily revoked the notion that a warrant “must be used” unless an exigency makes it impractical to obtain one. For the Burger Court rulings, *see Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (per curiam) (holding that authority to conduct warrantless search of car “does not vanish once the car has been immobilized; nor does it depend upon [whether the particular facts show] that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant”) and *Florida v. Meyers*, 466 U.S. 380, 382 (1984) (per curiam) (following *Thomas* to rule that warrantless search of car that had been impounded and immobilized in a secured area was valid when based on probable cause). For the Rehnquist Court rulings, *see Pennsylvania v. Labron*, 518 U.S. 938, 939 (1996) (per curiam) (explaining that ruling below “rests on an incorrect reading of the automobile exception to the Fourth Amendment’s warrant requirement) and *Maryland v. Dyson*, 527 U.S. 465, 465 (1999) (per curiam) (same).

All of this hand-wringing on whether *Carroll* mandated warrants is unnecessary because, as Justice Scalia once acknowledged, *Carroll* was never serious about requiring police to get warrants when practical. *See Acevedo*, 500 U.S. at 583 (Scalia, J., concurring) (“Cases like *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), have taken the ‘preference for a warrant’ seriously, while cases like *United States v. Ross*, 456 U.S. 798 (1982), and *Carroll v. United States*, 267 U.S. 132 (1925), have not.”).

Several years ago, I wrote that “[t]he *Carroll* Court actually endorsed the warrant preference rule, although based on the facts it found that the exigencies of the moment justified an exception.” Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 784 (1991). Seo’s analysis convinces me that there is an alternative (and better) interpretation of *Carroll*. *See infra* notes 92-125 and accompanying text.

obtain a warrant “because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought”<sup>88</sup>—the penultimate passage in *Carroll* proclaimed a rule of reasonableness: the constitutional validity of stopping and searching a car turns on whether the officer “shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.”<sup>89</sup> In support of this rule, Taft suggested that Congress had authorized a warrantless search of a car based on probable cause in order to enforce the Prohibition Act but required a judicial warrant to search a dwelling.<sup>90</sup> Taft found that distinction consistent with the Fourth Amendment because the provision “does not denounce all searches or seizures, but only such as are unreasonable.”<sup>91</sup>

A careful reading of *Carroll* reveals that the legal rule announced by Chief Justice Taft “went beyond what existing laws permitted.”<sup>92</sup> When *Carroll* was litigated, the constitutional validity of an arrest turned on whether police had followed common law rules on arrest. Those rules permitted a warrantless arrest only if the suspect had committed a felony or if the suspect had committed a misdemeanor in the presence of the officer that was a breach of the peace.<sup>93</sup> “The Volstead Act made transportation of illegal liquor a misdemeanor, unless the accused had been guilty of two previous violations of the Act, in which case he was guilty of a felony.”<sup>94</sup> There was no evidence in *Carroll* that the officers who arrested the defendants had any reason to believe the defendants were guilty of a felony under the Act. Moreover, those officers had no basis for believing that

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<sup>88</sup> *Carroll*, 267 U.S. at 153.

<sup>89</sup> *Id.* at 156.

<sup>90</sup> *Id.* at 147.

<sup>91</sup> *Id.*

<sup>92</sup> SEO, *supra* note 4, at 138.

<sup>93</sup> See Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 549-50 (1924). Another Prohibition-era treatise, written prior to *Carroll*, described the authority of officers to stop and search cars as follows:

There is no Supreme Court decision on the subject. The test to be applied is this: if, under the facts of a case, the officer has a reasonable ground to believe by the evidence of his senses that a crime is being committed in the illegal transportation of intoxicating liquor, and he does believe it, he has a right to arrest both the defendant and the automobile and search them for evidence of a crime.

WILLIAM J. MCFADDEN, *THE LAW OF PROHIBITION* 223 (1925).

The modern Court has not yet addressed whether the “in the presence” requirement for a valid misdemeanor arrest is a constitutional requirement. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001) (“We need not, and thus do not, speculate whether the Fourth Amendment entails an ‘in the presence’ requirement for purposes of misdemeanor arrests.”); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (stating that “requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment” (first citing *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir. 1974); then citing 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 5.1 (1978))).

<sup>94</sup> Post, *supra* note 44, at 127.

the defendants were committing a “breach of the peace” in their presence. Thus, under the common law, the seizure of Carroll’s vehicle and the arrest of the defendants were illegal and unconstitutional.<sup>95</sup>

Rather than follow common law rules, however, Taft ruled that the authority to seize and search Carroll’s vehicle turned on “[t]he rule for determining what may be required before a seizure may be made by a competent seizing official”<sup>96</sup> and not on whether the defendants were committing a felony or misdemeanor. More directly, Taft was willing to ignore common law rules for arrest and uphold the seizure if another basis could be found to justify the officers’ intrusion. Taft found such a basis by reading the Volstead Act to permit seizures when an officer “shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.”<sup>97</sup> But this was “a very strained reading of the Volstead Act.”<sup>98</sup> The Volstead Act only provided that when an officer:

*shall discover* any person in the act of transporting in violation of the law, intoxicating liquors in any . . . automobile . . . , it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the . . . automobile . . . , and shall arrest any person in charge thereof.<sup>99</sup>

There is an obvious difference between the expression “shall discover” and the concept of “probable cause to believe,” as Justice McReynolds noted in his dissent.<sup>100</sup> In sum, *Carroll* was “constructed on the premise that the Volstead Act authorized searches and seizures made with probable cause” when in fact the statute provided no such authorization, and that this “statutory authorization did not contravene the Fourth Amendment.”<sup>101</sup>

Furthermore, as Professor Seo explains, “Under the common law for misdemeanors, warrantless arrests required actual knowledge through personal observation, not cause *for believing*. The difference in adding the phrase ‘for

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<sup>95</sup> *Id.* at 132 (noting that in “absence of congressional authorization, the defendants’ arrest was undoubtedly illegal under common law principles”); *see also* MURCHISON, *supra* note 50, at 70 (observing that *Carroll* altered the law because it “allowed officers to make arrests for misdemeanors that did not involve a breach of the peace”).

<sup>96</sup> *Carroll*, 267 U.S. at 155.

<sup>97</sup> *Id.* at 156.

<sup>98</sup> Post, *supra* note 44, at 131.

<sup>99</sup> National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 315 (1919) (emphasis added), *repealed by* Liquor Law Repeal and Enforcement Act, Pub. L. No. 74-347, 49 Stat. 872, 872 (1935) (repealing Titles I and II and amending Title III of Volstead Act).

<sup>100</sup> *Carroll*, 267 U.S. at 166 (McReynolds, J., dissenting) (“[T]he words ‘shall discover . . . in the act of transporting in violation of the law’ cannot mean, shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things.” (omission in original)).

<sup>101</sup> Post, *supra* note 44, at 134 n.441.

believing' was the difference between knowledge and suspicion."<sup>102</sup> By contrast, *Carroll* permitted officers to seize a vehicle if they suspected a misdemeanor was occurring, "[a]nd with a suspicion-based seizure of a car and its driver, the same officer could then conduct a warrantless search."<sup>103</sup> Thus, *Carroll* altered constitutional law principles in at least three ways: it permitted an arrest under circumstances that did not comply with common law rules of arrest, it eliminated the need for a warrant to search and seize a "traveling 'effect,'" and it "relaxed the standard from knowledge to belief."<sup>104</sup>

*Carroll* nicely proves the old English proverb that "necessity is the mother of invention." There was no established common law power to detain a person short of probable cause. Cars were making enforcing Prohibition especially difficult.<sup>105</sup> "It was nearly impossible for officers to have knowledge of illegal activity, based on personal observation, when evidence was usually hidden inside what were essentially movable containers."<sup>106</sup> So, *Carroll* "created a new category of seizures short of an arrest—the vehicle stop—which solved several law enforcement challenges."<sup>107</sup> Today, law students are taught that *Carroll* established the "automobile exception." Rather than create an "exception" to the warrant requirement, however, *Carroll sub silentio* altered substantive Fourth Amendment law.

Because of the logistics and realities of transporting objects in cars, when police stop suspects under conditions similar to *Carroll*, they have, at best, a *suspicion*—rather than knowledge—of criminal conduct. And because the Constitution requires probable cause to issue a judicial warrant, magistrates should not issue warrants under these circumstances.<sup>108</sup> I learned from Seo's analysis that *Carroll* did not turn on whether police have sufficient time to obtain a warrant or even whether they have probable cause as traditionally understood.

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<sup>102</sup> SEO, *supra* note 4, at 138.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Chief Justice Taft was well aware that he was altering common law principles. In a letter to his son, Taft acknowledged that *Carroll*'s holding created "some rather new principle." Post, *supra* note 44, at 123 n.406. And while he was drafting the *Carroll* opinion, Taft told Justice Van Devanter: "I shall try to steer away from the suggestion that we are introducing any new law and new principle of constitutional construction, but are only adapting old principles and applying them to new conditions created by the change in the National policy which the 18th Amendment represents." *Id.* As Seo notes, "Taft's private admissions were closer to the truth that *Carroll* had created an entirely new rule." SEO, *supra* note 4, at 138.

<sup>105</sup> See H.R. DOC. NO. 71-722, at 23 (1931) (concluding that "smuggling by motor trucks and automobiles is well organized and is the main factor in land transportation").

<sup>106</sup> SEO, *supra* note 4, at 138.

<sup>107</sup> *Id.*

<sup>108</sup> *Cf. id.* at 138-39 (noting that because investigation of bootleggers using automobiles rarely involved "knowledge of illegal activity, based on personal observation . . . Taft did not craft a warrant exception based only on whether an officer had time to get a warrant. He also wanted to enable Prohibition agents to investigate suspicious situations").

“*Carroll* addressed the lack of both time and legal cause with a lower standard that empowered officers to pull over any car that seemed reasonably questionable to them.”<sup>109</sup> Put another way, *Carroll* “constitutionally legitimized police discretion”<sup>110</sup> to stop and search vehicles while pretending to adhere to the traditional standard of probable cause.<sup>111</sup>

In addition to creating new law, Chief Justice Taft and the majority in *Carroll* also fell prey to a phenomenon that afflicts modern judges. The reasonableness model embraced by *Carroll* contained a significant degree of what one *Carroll*-era commentator labeled “judicial charity.”<sup>112</sup> As Seo observed, “Whether the reasonableness standard would truly serve as a restraint on arbitrary policing depended on how closely courts would scrutinize the police’s actions.”<sup>113</sup> *Carroll* proved that judges “did not have to be too attentive.”<sup>114</sup> The “gaping hole” in the government’s claim that there was a legal basis to stop and search *Carroll*’s vehicle was the testimony of one of the officers who stated that the officers “‘had no reason to believe that the [defendants] were transporting liquor’ before they searched the Roadster.”<sup>115</sup> Nevertheless, the *Carroll* Court found probable cause for the seizure based on the government’s submissions that the officers knew the defendants’ identities and their vehicle; that Detroit was a well-known source for introducing liquor into the country;<sup>116</sup> and that the

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<sup>109</sup> *Id.* at 139.

<sup>110</sup> *Id.*

<sup>111</sup> Professor George Thomas disagrees that *Carroll* “reduced the formulation from probable cause to suspicion.” E-mail from George Thomas, Bd. of Governors Professor of Law, Rutgers Law Sch., to Tracey Maclin, Professor of Law, Bos. Univ. Sch. of Law (Aug. 16, 2019, 2:23 PM) (on file with author). According to Thomas, “[t]he formulation in *Carroll* and subsequent cases stayed with probable cause though I will gladly agree that there was NOT probable cause on the facts in *Carroll*.” *Id.* Thomas believes that Chief Justice Taft should have ruled that

police did not need a warrant or knowledge of a misdemeanor to search a car stopped on the open road as long as they have probable cause but they did not have probable cause in [*Carroll*]. But the finding of probable cause in *Carroll* started a downhill slide to today.

*Id.*

<sup>112</sup> SEO, *supra* note 4, at 140 (quoting *Has the Rest of the Constitution Been Repealed by the Eighteenth Amendment?*, BALT. SUN, Mar. 4, 1925, at 10).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 141 (alteration in original). In the *Carroll* opinion, Chief Justice Taft never directly confronts this claim. Instead, he notes that defendants’ counsel emphasized “the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared.” *Carroll v. United States*, 267 U.S. 132, 160 (1925). That statement, in Taft’s view, was constitutionally irrelevant. *Id.* (“We do not perceive that [the statement] has any weight.”).

<sup>116</sup> The problem with the Court taking judicial notice of the fact that “Grand Rapids is about 152 miles from Detroit and that Detroit and its neighborhood along the Detroit River . . . is one of the most active centers for introducing illegally into this country spirituous

defendants, a few months earlier, had promised to deliver liquor to a federal officer, but failed to do so.<sup>117</sup> “This was, to say the least, a very loose definition of probable cause.”<sup>118</sup> *Carroll*’s willingness to find probable cause on these facts “signaled that courts could and would defer to officers’ claimed need for an investigatory search rather than perform a vigorous, independent review.”<sup>119</sup>

For Seo, *Carroll* “heralded the beginning of the problem of police discretion in constitutional criminal procedure.”<sup>120</sup> She concedes that discretionary policing was around before *Carroll* was decided.<sup>121</sup> However, *Carroll* “marked a turning point”<sup>122</sup> because the reasonableness model it embraced required judges to “decide whether an exercise of discretion was reasonable[,] . . . a bedeviling question that would be litigated time and time again.”<sup>123</sup> Under this legal model, not surprisingly, “courts’ interpretation of the reasonableness standard would make space for the police’s power to grow.”<sup>124</sup>

#### A. *The Nexus Between Carroll and Terry*

When reading Seo’s book, I did not expect to find, in a chapter critiquing *Carroll*, a discussion of another contentious Court ruling expanding police discretion and search authority, i.e., *Terry v. Ohio*, which authorized police to frisk a person for weapons when an officer reasonably suspects that the person

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liquors for distribution into the interior,” see *Carroll*, 267 U.S. at 160, is that this geographic area encompassed “eighteen large cities with a combined population of more than eighteen millions [sic] of people within this 136 mile zone adjacent to an ocean or an international boundary.” Forrest R. Black, *A Critique of the Carroll Case*, 29 COLUM. L. REV. 1068, 1087 (1929).

<sup>117</sup> *Carroll*, 267 U.S. at 160. The majority’s conclusion that probable cause existed for the stop and search prompted the dissent to exclaim: “Has it come about that merely because a man once agreed to deliver whiskey, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!” *Id.* at 174 (McReynolds, J., dissenting).

<sup>118</sup> Post, *supra* note 44, at 135 (quoting Thomas Regnier, *The “Loyal Foot Soldier”: Can the Fourth Amendment Survive the Supreme Court’s War on Drugs?*, 72 UMKC L. REV. 631, 645 (2004)); see also MURCHISON, *supra* note 50, at 70 (stating that *Carroll* was “willing to find probable cause on extremely thin evidence. . . . What was missing was any evidence indicating that the defendants had whiskey at the time they were searched. In short, the evidence would have existed anytime the defendants drove the automobile in the Detroit area”); Lerner, *supra* note 41, at 987 (“The evidence that alcohol was concealed in *Carroll*’s trunk was, to put it mildly, underwhelming . . .”).

<sup>119</sup> SEO, *supra* note 4, at 141.

<sup>120</sup> *Id.* at 142.

<sup>121</sup> *Id.* (“To be sure, discretionary policing as a practice existed long before *Carroll*.”).

<sup>122</sup> *Id.* at 141.

<sup>123</sup> *Id.* at 142.

<sup>124</sup> *Id.*

is armed and dangerous.<sup>125</sup> Prior to *Terry*, the lawfulness of an officer's authority to detain or frisk a person without probable cause was uncertain at best. Professor Seo chronicles that, in 1939, Harvard Law Professor Sam Warner was tasked with "mak[ing] a study of the law of arrest to ascertain whether the police did, or could, operate within its limitations and, if not, what changes were necessary to make it both a practical standard of police conduct and a safeguard of personal liberty."<sup>126</sup> Three years later, Warner produced a model law—the Uniform Arrest Act—that states could adopt. Warner's model statute rewrote the law of arrests. Inter alia, "the act narrowed the definition of arrest by taking out detentions, interrogations, and frisks."<sup>127</sup> Put simply, the Act gave police more authority than then-existing law recognized. Interestingly, Seo explains that Warner cited "just one authority" to support his revamping of common law principles regarding arrest: *Carroll*. Paralleling the logic of the government's brief in *Carroll*—which urged the Court to focus not on liquor but on how cars were impacting society—Warner read *Carroll* "as a case about the need for the law to adapt to modern society."<sup>128</sup> The relevant question in *Carroll*, according to Warner,

was "not whether [the Volstead Act] extends the powers of peace officers beyond what they were at the time the Constitution was adopted, but whether the extensions are reasonable." If the constitutional scope of police practices was based not on historic practices but reasonableness in light of contemporary conditions, then the Uniform Arrest Act "should certainly be constitutional" . . . .<sup>129</sup>

The connections between *Carroll*, the Uniform Arrest Act, and *Terry* are undeniable. Seo convincingly connects the dots:

[*Terry*] first distinguished a "stop" from an arrest and a "frisk" from a full-blown search, and then applied the standard of reasonableness. Like his predecessor, Chief Justice Earl Warren crafted a rule that split the baby. . . . Warren, like Taft before him, created an intermediate police option just short of arrest. In fact, *Terry* cited *Carroll* in holding that when "a police officer observes unusual conduct which leads him reasonably to conclude"—a phrase that was reminiscent of *Carroll*'s "reasonable or probable cause for believing"—that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, [the officer may perform a frisk for weapons]. . . . *Terry* created

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<sup>125</sup> *Terry v. Ohio*, 392 U.S. 1, 31 (1968) (holding that "[s]uch a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken").

<sup>126</sup> SEO, *supra* note 4, at 143.

<sup>127</sup> *Id.* at 147.

<sup>128</sup> *Id.* at 148.

<sup>129</sup> *Id.* (second alteration in original) (quoting Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 322-23 (1942)).

another category of searches and seizures that did not require the police to have actual knowledge but only “reasonable suspicion.”<sup>130</sup>

Eventually, *Terry* and its progeny would significantly expand police authority to detain and search persons in myriad contexts where police lacked probable cause to make an arrest or undertake a full-scale search. Indeed, *Terry* is viewed “as a touchstone of modern Fourth Amendment jurisprudence.”<sup>131</sup> The expanded police power and discretion afforded by *Terry* was justified in the name of “reasonableness.”<sup>132</sup> Steering *Terry* “was the logic of *Carroll* that the transformations in modern America necessitated a new relationship between citizens and the police.”<sup>133</sup> Further, in “an automotive society, case law on

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<sup>130</sup> *Id.* at 151.

<sup>131</sup> John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 753 (1998).

<sup>132</sup> *Id.* at 823 (discussing Justice Brennan’s letter to Chief Justice Warren, during deliberations of *Terry*, wherein Brennan wrote that *Terry* “was about ‘reasonableness’ of stops and frisks under the Reasonableness Clause of the Fourth Amendment, not about the presence or absence of the probable cause required by its Warrant Clause”). Moreover,

Brennan explained that because street stops and frisks are not police activities that were, or ever could be, approved by judges in advance—i.e., because a “stop-and-frisk warrant” is an impossibility—the reasonableness of stops and frisks is not to be judged by the presence or absence of probable cause. Probable cause is a component of the Fourth Amendment’s Warrant Clause, and thus a measure of reasonableness in situations where police are engaged in warrant-type activity. But probable cause is not relevant, Brennan wrote, in determining the constitutional reasonableness of police activity that is not of the warrant type.

*Id.* (footnotes omitted). Of course, Brennan’s explanation of the relationship between probable cause and the Warrant Clause is a bit misleading. The Court’s prior precedents that did not impose a warrant requirement to undertake certain searches or seizures—for example, warrantless arrests, searches involving exigent circumstances, and car searches—have nonetheless required probable cause to validate the police intrusion. *See, e.g.,* *United States v. Watson*, 423 U.S. 411, 423-24 (1976) (warrantless arrests); *Warden v. Hayden*, 387 U.S. 294, 309 (1967) (exigent circumstances). Therefore, the inapplicability of the Warrant Clause to the facts in *Terry* did not automatically justify jettisoning the probable cause rule. One could argue that the Court’s approval of frisks on less than probable cause was inconsistent with *Carroll* if one believes that the privacy and dignity of the body merit the same constitutional protection afforded a vehicle or suitcase.

As the Court applied and expanded *Terry*, “Justice Marshall came to regret his vote in *Terry*.” Barrett, *supra* note 131, at 827 n.465. While Justice Brennan never explicitly disavowed his vote or influence on the outcome in *Terry*, he did articulate the inherent problem with a reasonableness test for deciding search and seizure cases. *See United States v. Sharpe*, 470 U.S. 675, 720-21 (1985) (Brennan, J., dissenting) (“[T]he Court has moved a step or two further in what appears to be ‘an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable’—a balancing process in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales.” (citation omitted) (quoting *United States v. Place*, 462 U.S. 696, 721 (1983) (Blackmun, J., concurring))).

<sup>133</sup> SEO, *supra* note 4, at 155.

policing the public generally and case law on policing cars specifically built on each other.”<sup>134</sup> In sum, *Carroll* and *Terry* “were mutually reinforcing.”<sup>135</sup> Today, motorists experience the impact of this combined power. Police routinely stop motorists on suspicion of a traffic violation or some other offense and arrest the driver or a passenger after a few questions.<sup>136</sup> And it does not matter that the police are wrong about the law and the motorist committed no traffic violation; the stop is constitutionally valid (and so is the subsequent arrest).<sup>137</sup> “That an arrest could begin with suspicion amounted to an astounding expansion of the police’s power.”<sup>138</sup> This is, however, the reality of policing in modern America, where cars are everywhere and police watch them.

#### B. *Carroll Leads to Greater Police Authority*

Although only two Justices dissented in *Carroll*, it was a controversial ruling.<sup>139</sup> A few years after it was announced, one legal scholar, “in a devastating

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<sup>134</sup> *Id.* at 153.

<sup>135</sup> *Id.*

<sup>136</sup> See generally Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions than Answers*, CHAMPION, Nov. 2007, at 34 (discussing common police practices regarding interrogation during traffic stops).

<sup>137</sup> Thus, even when police initiate a traffic stop based on an erroneous view of the traffic law and the motorist committed no offense, the Court has upheld the stop and later arrest of the motorist and his passengers. See, e.g., *Heien v. North Carolina*, 574 U.S. 54, 67 (2014) (holding that reasonable suspicion for traffic stop can rest on mistaken understanding of the scope of a legal prohibition). There are several problems with *Heien*, including that “the principle it endorsed . . . applies to enforcement of laws concerning serious and non-serious offenses alike,” and “*Heien*’s reasoning will likely be applied beyond the context of investigative stops.” Wayne A. Logan, *Cutting Cops Too Much Slack*, 104 GEO. L.J. ONLINE 89, 92 (2015-2016). Equally troublesome is the combined impact of *Heien* and *Whren v. United States*, 517 U.S. 806 (1996). As discussed below, *Whren* authorized pretextual traffic stops provided the police had probable cause of an *actual* traffic violation. See *infra* notes 176-88 and accompanying text.

As bad as *Whren* was standing in isolation, “there still had to be a violation of law,” an “actual, real, hard, passes muster with a court, violation of law,” but now with *Whren* plus *Heien* the pretext license has been broadened to instances where the unfortunate object of police scrutiny has merely come “close to a violation.”

2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.2(b), at 13 (5th ed. 2012 & Supp. 2018) (quoting Scott H. Greenfield, *Heien v. North Carolina: Close Enough*, SIMPLE JUST. (Dec. 16, 2014), <https://blog.simplejustice.us/2014/12/16/heien-v-north-carolina-close-enough/> [<https://perma.cc/TGE9-PL95>]).

<sup>138</sup> SEO, *supra* note 4, at 154.

<sup>139</sup> See, e.g., Black, *supra* note 116, at 1098 (disapproving, contemporaneously, result in *Carroll*); cf. LANDYNSKI, *supra* note 87, at 87 (stating that *Carroll* and its early progeny “have generated powerful judicial controversy”); SEO, *supra* note 4, at 140 (noting that “[m]uch of the legal commentary . . . criticized [*Carroll*] for giving discretionary *carte blanche* to prohibition officers,” and that a Mississippi judge denounced *Carroll* as “erroneous” and

critique,”<sup>140</sup> condemned *Carroll* for, inter alia, permitting “exploratory” searches and argued that the discretion to search cars afforded by *Carroll* “condones a more reprehensible practice than that exercised by British officials in colonial times.”<sup>141</sup> Yet despite its problems, *Carroll* could be read narrowly as only allowing warrantless searches of cars when Congress authorized such searches. In 1948, Justice Jackson’s majority opinion in *United States v. Di Re*<sup>142</sup> did just that: “[T]he *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so.”<sup>143</sup> Assuming without deciding that a warrantless search of a car based on probable cause was constitutional in the absence of congressional approval, *Di Re* ruled that the assumed right to search a car did not include the right to search passengers found inside the car.<sup>144</sup>

One year later, however, the Court confronted the issue that *Carroll* and *Di Re* left open: Does the Constitution permit a warrantless search of a car in the absence of congressional authorization? *Brinegar v. United States*, which involved a factual scenario that resembled *Carroll*, gave the Court the chance to address this question and to determine whether *Carroll* was correctly decided.<sup>145</sup>

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warned that it “would make petty tyrants of policemen, harass and discommode citizens, and speedily become intolerable”).

<sup>140</sup> LANDYNSKI, *supra* note 87, at 90.

<sup>141</sup> Black, *supra* note 116, at 1097-98.

<sup>142</sup> 332 U.S. 581 (1948).

<sup>143</sup> *Id.* at 585.

<sup>144</sup> The government argued that the authority to search a car for contraband items includes the authority to search occupants of the car “because common sense demands that such [authority] exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person.” *Id.* at 586. The Court viewed this position as an extension of *Carroll* and ruled that “a person, by mere presence in a suspected car,” does not “lose[] immunities from search of his person to which he would otherwise be entitled.” *Id.* at 587.

<sup>145</sup> Seo smartly juxtaposes *Brinegar* with *Wolf v. Colorado*, 338 U.S. 25 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961). The common view of *Wolf* is that a unanimous Court held the Fourth Amendment applicable to the states through the Fourteenth Amendment’s Due Process Clause but rejected the position that the Due Process Clause requires state courts to exclude evidence that would be inadmissible in federal courts because it was obtained in violation of the Fourth Amendment. The Justices “heard argument for the two cases on the same day in October, and they issued decisions in both cases on the same June day.” SEO, *supra* note 4, at 159. According to Seo, “[j]uxtaposing the two cases reveals a jurisprudential map of how the Court ultimately drew the boundary between arbitrary police power and lawful discretionary power.” *Id.* at 160. Pairing the cases demonstrates “that the distinction between houses and cars mattered when the justices determined what the police could and could not do.” *Id.* Put differently, “the constitutional definition of arbitrary policing would depend on whether or not the police were policing cars.” *Id.*

Like most judges and scholars, Seo reads *Wolf* as applying the Fourth Amendment to the States. *See id.* at 161 (“In other words, according to *Wolf*, the due process clause encompassed

While parked beside a highway, federal officers recognized Virgil Brinegar's Ford drive past. One of the agents had arrested Brinegar "about five months earlier for illegally transporting liquor; had seen [Brinegar] loading liquor into a car or truck in Joplin, Missouri, on at least two occasions during the preceding six months," which was perfectly legal because Missouri was not a "dry" state; "and knew [Brinegar] to have a reputation for hauling liquor."<sup>146</sup> When Brinegar's Ford drove past, the officers observed it to be "'heavily loaded' and 'weighted with something.'"<sup>147</sup> After forcing Brinegar's car off the road, one officer greeted Brinegar by asking, "Hello, Brinegar, how much liquor have you got in the car?" Brinegar replied: "Not too much."<sup>148</sup> A search of the Ford revealed several cases of liquor. After Brinegar was convicted of illegally transporting into a "dry" state, he appealed to the Court contending that the police intrusion violated the Fourth Amendment because the officers lacked probable cause to search his car.

Seo writes that the Justices were "conflicted about how much power the police had claimed under *Carroll*'s automobile exception."<sup>149</sup> Initially, the Court voted five-to-four to affirm the conviction.<sup>150</sup> Justice Rutledge agreed that *Carroll* controlled the case but told his colleagues that he would overrule it.<sup>151</sup> Eventually, however, Rutledge and Justice Douglas, both considered strong proponents of civil liberties, changed their votes in favor of the government, while Justice Jackson, a highly respected conservative jurist, switched his vote in favor of Brinegar. Seo believes the "flip-flopping votes reflected [the Court's] uncertainty" regarding *Carroll*.<sup>152</sup> In the end, Rutledge authored an opinion finding probable cause under the facts; Jackson dissented.

Despite his strong civil liberties credentials,<sup>153</sup> Justice Rutledge "did not even consider the question of whether the warrantless search of an automobile was constitutionally reasonable when not authorized by legislation; he simply

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the right to be free from unreasonable searches and seizures." I disagree. The conventional understanding of *Wolf* is not an accurate reading of *Wolf*. For greater detail, see TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 44-52*, 70-82 (2013).

<sup>146</sup> *Brinegar v. United States*, 338 U.S. 160, 162 (1949).

<sup>147</sup> *Id.* at 163.

<sup>148</sup> *Id.*

<sup>149</sup> SEO, *supra* note 4, at 164.

<sup>150</sup> Chief Justice Vinson and Justices Black, Burton, Jackson, and Reed voted to affirm. Justices Douglas, Frankfurter, Murphy, and Rutledge voted to reverse. See Voting Sheet of Justice Robert Jackson, *Brinegar*, 338 U.S. 160 (No. 12), Robert H. Jackson Papers, Library of Congress, Manuscript Division.

<sup>151</sup> SEO, *supra* note 4, at 164.

<sup>152</sup> *Id.*

<sup>153</sup> On Rutledge's commitment to civil liberties while on the Court, see generally JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* (2004). Ferren describes Rutledge's opinion in *Brinegar* as "his least felicitous effort." *Id.* at 357.

assumed that it was.”<sup>154</sup> On the other hand, an aspect of Rutledge’s opinion is remarkably candid. He twice acknowledges that the “troublesome line posed by the facts in the *Carroll* case and this case is one between mere suspicion and probable cause.”<sup>155</sup> Nonetheless, Rutledge explains, “That line necessarily must be drawn by an act of judgment” formed under the totality of the facts.<sup>156</sup> It also matters that neither case involved searching a “home or any other place of privacy.”<sup>157</sup> Put differently, after admitting that the facts in *Carroll* and *Brinegar* “may have fallen just short of probable cause,”<sup>158</sup> Rutledge rules that cases like *Carroll* and *Brinegar* must be resolved “in deference to the officers’ ‘act of judgment.’” After all, the agents’ suspicions were dead on: *Brinegar* was, in fact, transporting illegal liquor. So were the *Carroll* brothers.”<sup>159</sup> Seo rightly describes this as an “ends-justify-the-means logic.”<sup>160</sup> Equally noteworthy, both *Carroll* and *Brinegar* approve car searches “primarily because of the driver’s *past* record, not because of any real evidence that the automobile was being used in the commission of a crime *at the time*.”<sup>161</sup>

By contrast, Justice Jackson’s dissent will long be remembered as “the most eloquent opinion” he wrote in a Fourth Amendment case.<sup>162</sup> Jackson saw

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<sup>154</sup> LANDYNSKI, *supra* note 87, at 94; *see also* Eldon D. Wedlock, Jr., *Car 54—How Dare You!: Toward a Unified Theory of Warrantless Automobile Searches*, 75 MARQ. L. REV. 79, 86 (1991) (“[I]n *Brinegar v. United States*, the statutory limits of the *Carroll* rule were surpassed for the first time.” (footnote omitted)). Justice Rutledge cites *Carroll* for the legal norm that warrantless searches of cars are constitutionally reasonable when based on probable cause. *See Brinegar v. United States*, 338 U.S. 160, 164 (1949) (“The *Carroll* decision held that, under the Fourth Amendment, a valid search of a vehicle moving on a public highway may be had without a warrant, but only if probable cause for the search exists.”).

<sup>155</sup> *Brinegar*, 338 U.S. at 176. A page later, he writes: “The question presented in the *Carroll* case lay on the border between suspicion and probable cause.” *Id.* at 177.

<sup>156</sup> *Id.* at 176.

<sup>157</sup> *Id.*

<sup>158</sup> SEO, *supra* note 4, at 166. Justice Burton went even further in his willingness to uphold the stop and search. He argued that police officers “are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation.” *Brinegar*, 338 U.S. at 179 (Burton, J., concurring). In other words, Burton was willing to permit seizures and searches of vehicles on less than probable cause. *See id.*

<sup>159</sup> SEO, *supra* note 4, at 166.

<sup>160</sup> *Id.* She adds:

[F]or the majorities in both *Carroll* and *Brinegar*, the exigencies of crime control took priority. Their deference to law enforcement indicated that the public’s interest in a crime-free, and alcohol-free, community far outweighed a vigorous review of the police’s actions when they investigated cars. It is hard to overstate the implications of the *Brinegar* decision.

*Id.* at 167.

<sup>161</sup> LANDYNSKI, *supra* note 87, at 96.

<sup>162</sup> *Id.* at 95.

Rutledge's opinion as an "extension" of *Carroll*, which he thought "already ha[d] been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion."<sup>163</sup> Unlike Rutledge, Jackson did not let Brinegar's guilt sway his understanding of the Fourth Amendment. Despite this, Seo notes that "[o]ne takeaway from [*Brinegar*] was that actions that skirted the boundary of illegality might not count as arbitrary if the police got the right person."<sup>164</sup> While perhaps susceptible to this view—" [a]fter all, [Jackson] had initially voted to affirm [Brinegar's] conviction"<sup>165</sup>—in the end, Jackson came to a different conclusion. For Jackson, freedom from unreasonable searches and seizures was just as important as freedom of speech and religion.<sup>166</sup> Because the judiciary was best positioned to protect Fourth Amendment freedoms, Jackson believed that it was incumbent to see that "a search against Brinegar's car must be regarded as a search of the car of Everyman."<sup>167</sup> In other words, while Brinegar "was guilty, he represented every innocent person who had been pulled over and searched without lawful reason."<sup>168</sup>

### C. *From Arbitrary Policing to Discriminatory Policing*

By the midpoint of the twentieth century, arbitrary policing was alive and well.<sup>169</sup> Of course, during this time, discriminatory policing was also pervasive, if not more prevalent.<sup>170</sup> "Still, most jurists understood arbitrary and discriminatory policing as distinct concepts: arbitrariness selected its victims at random, whereas discrimination targeted specific groups."<sup>171</sup> Justice Jackson's dissent in *Brinegar* focused on the former; he believed that *Carroll* and *Brinegar* afforded police too much discretion to stop and search innocent motorists.

Nearly fifty years later, however, "the problem of arbitrary policing had narrowed to discriminatory policing."<sup>172</sup> And by the end of the twentieth

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<sup>163</sup> *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting).

<sup>164</sup> SEO, *supra* note 4, at 168.

<sup>165</sup> *Id.*

<sup>166</sup> *Brinegar*, 338 U.S. at 180 (Jackson, J., dissenting) (noting that Fourth Amendment freedoms "are not mere second-class rights but belong in the catalog of indispensable freedoms").

<sup>167</sup> *Id.* at 181.

<sup>168</sup> SEO, *supra* note 4, at 169. She adds: "The idea of Everyman suggested that implicit in the definition of arbitrariness was a distinction between the guilty and the innocent. In other words, to become a problem of arbitrary policing, it had to affect the law-abiding." *Id.*

<sup>169</sup> *Id.* at 156-58, 171-82 (detailing examples of alleged arbitrary and random stops of motorists, including "secret roadblocks" in Los Angeles).

<sup>170</sup> *Cf., e.g., id.* at 169 ("To be sure, midcentury Americans recognized, to varying degrees, that the police picked on racial minorities. Organizations such as the NAACP were calling attention to police lawlessness against black citizens."); *id.* at 183-90 (detailing examples police of abuse, violence, and killings of black motorists from 1930s to 1950s).

<sup>171</sup> *Id.* at 169.

<sup>172</sup> *Id.* at 262.

century, police learned to use the law to their advantage. For example, “police have raised traffic stops to an art form.”<sup>173</sup> Police employ the traffic code and regulations governing vehicle equipment and condition “as a pretext to stop drivers they want to question and even to search them.”<sup>174</sup> Of course, these stops are not about enforcing the traffic law but instead are “fishing expeditions” for criminal conduct. Seo nicely describes the evolution of the law of policing automobiles:

At midcentury, the problem was the potential for police action without basis in law, so Everyman needed the exclusionary rule to deter unlawful policing. At century’s end, the problem had become police action that *did* have a basis in law but that departed from normal practice. Put simply, police treated minorities differently.<sup>175</sup>

In 1996, *Whren v. United States*<sup>176</sup> presented the Court the opportunity to address this problem. The defendants in *Whren* argued that using a traffic stop as a pretext to conduct an investigation for other crime violated the Fourth Amendment.<sup>177</sup> The Court, not surprisingly, disagreed. A unanimous Court held that a traffic stop based on probable cause is constitutionally permissible regardless of police motive—even motive based on racial stereotypes or bias—because the subjective intent of the police is irrelevant. “[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent”<sup>178</sup> of law enforcement.

*Whren* is not only “notorious for its effective legitimation of racial profiling in the United States.”<sup>179</sup> It is a constitutional disgrace.<sup>180</sup> Rather than rehash

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<sup>173</sup> DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 30 (2002); see Gary Webb, *DWB*, ESQUIRE, Apr. 1999, at 118 (describing federal Operation Pipeline program, which teaches state and local police how to use traffic stops for drug interdiction purposes); *id.* at 125 (describing one police instructor’s view: “‘If they [drivers] refuse [a police request to search the car], the stuff’s in the trunk,’ our [California Highway Patrol] instructor tells us matter-of-factly. A refusal justifies calling out the dogs and letting a drug-sniffing canine take a walk around your car. . . . Most drivers consent.”).

<sup>174</sup> HARRIS, *supra* note 173, at 30.

<sup>175</sup> SEO, *supra* note 4, at 262.

<sup>176</sup> 517 U.S. 806 (1996).

<sup>177</sup> *Id.* at 810.

<sup>178</sup> *Id.* at 814.

<sup>179</sup> Chin & Vernon, *supra* note 44, at 884.

<sup>180</sup> Criticism of *Whren* is vast and cogent. See 1 LAFAYE, *supra* note 13, § 1.4(f), at 176 n.86 (citing articles criticizing *Whren*). The adverse effect *Whren* has on black motorists was demonstrated when, in order to protect the Fourth Amendment rights of blacks living in Ferguson, Missouri, the federal government required that Ferguson police officers refrain from exercising police authority—pretextual traffic stops—that a unanimous Supreme Court had ruled was constitutional. See Consent Decree at 20, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. Mar. 17, 2016) (“[Ferguson Police Department] officers will not conduct pretextual stops except where the actual reason for the stop is to investigate a felony.”).

*Whren*'s many flaws, I will highlight Seo's contribution to understanding how *Whren* fits within the history of policing cars. One argument that the *Whren* defendants proffered was that police department policy barred the plainclothes officers from making routine traffic stops. Essentially, the defendants contended that a traffic stop cannot be constitutionally reasonable when officers violate their own departmental rules. The Court responded that this argument—to equate violation of departmental rules with constitutional wrongs—would make the traffic code “a dead letter at the option of the police department.”<sup>181</sup>

The Court's rejection of this claim, as Seo explains, “did not consider how police departments did effectively repeal traffic laws when they issued a policy or adopted a general practice of non-enforcement.”<sup>182</sup> Moreover, *Whren* ignored “how selective enforcement was unavoidable because the laws as well as their violations were so numerous.”<sup>183</sup> Ultimately, *Whren*'s approval of pretextual stops and the inevitable racial profiling that encourages such stops directly follows from *Carroll* and *Brinegar*. In 1925, *Carroll* demonstrated that the Court would not closely scrutinize police decisions to stop and search bootleggers. The Court's ruling licensed lower courts to do the same. Nearly twenty-five years later, when confronted with the “ditch[ing]”<sup>184</sup> and search of an automobile based on facts that straddled the line “between mere suspicion and probable cause”<sup>185</sup> and knowing that law enforcement perceived *Carroll* “as blanket authority to stop and search cars on suspicion,”<sup>186</sup> *Brinegar* explained that the Court would defer to an “act of judgment” by police.<sup>187</sup> In light of this history, no one should be surprised that *Whren*, employing the same “reasonableness” model embraced by *Carroll* and *Brinegar*, would allow racial profiling via traffic stops to proceed unabated by Fourth Amendment rules.

Seo writes that search and seizure doctrine “had not evolved over the twentieth century to deal with lawful, but racially motivated, policing. It developed to allow ‘reasonable’ investigations during vehicle stops. But by enabling discretionary policing, the Fourth Amendment had also created opportunities for racial profiling.”<sup>188</sup>

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<sup>181</sup> Transcript of Oral Argument at 8, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 195296, at \*8. Seo helpfully notes that during oral argument, one Justice remarked: “[T]he police don't have the authority to tell the legislature which traffic laws are to be repealed.” SEO, *supra* note 4, at 263 (quoting Transcript of Oral Argument, *supra*, at 8).

<sup>182</sup> SEO, *supra* note 4, at 263.

<sup>183</sup> *Id.* at 263. Due to the ubiquitous nature of traffic and vehicular rules, “no driver can go for even a short drive without violating *some* aspect of the traffic code. And since there are no perfect drivers, everyone's a violator.” HARRIS, *supra* note 173, at 31.

<sup>184</sup> *Brinegar v. United States*, 338 U.S. 160, 187 (1949) (Jackson, J., dissenting).

<sup>185</sup> *Id.* at 176 (majority opinion).

<sup>186</sup> *Id.* at 183 (Jackson, J., dissenting).

<sup>187</sup> *Id.* at 176 (majority opinion).

<sup>188</sup> SEO, *supra* note 4, at 264.

This description insinuates that “the Fourth Amendment” is responsible for the race-based traffic stops that exist today. Seo is being politic. The Fourth Amendment did not create *Carroll*, *Brinegar*, and *Whren*; the Justices of the Supreme Court did. They are the ones to credit (or blame) for the degree of discretion police can employ and the minimal constitutional liberty motorists possess.

II. FROM BAD TO WORSE:  
SEARCHING CARS TO SEARCHING CONTAINERS IN CARS

Some scholars and judges may scoff at the claim that *Carroll* is responsible for the racial profiling that currently occurs on America’s roads. Professor Seo’s research and analysis, however, persuades me that the discretionary authority that *Carroll* gave police was a harbinger of what was to come and that *Whren* is simply another manifestation of the power granted in *Carroll*. The results in *Carroll* and *Whren* are based on a “reasonableness” theory of the Fourth Amendment that affords police wide discretion to stop or search vehicles. To be sure, *Carroll*’s holding could have been cabined if the Justices were willing to do so. Justice Jackson, for one, tried to restrain the scope of *Carroll*. And it would not have required much judicial ingenuity to limit the police authority afforded by *Carroll* (and its extension in *Brinegar*).

There are sound and neutral principles to justify why police, in most circumstances, should have to obtain warrants before searching vehicles. From a textualist perspective, a person’s vehicle is “one of his ‘effects’ and hence within the express protection of the Fourth Amendment.”<sup>189</sup> As Justice Scalia noted in a different context, “The text of the Fourth Amendment reflects its close connection to property,”<sup>190</sup> and no one disputes that vehicles, despite being subject to pervasive governmental regulation, are property of their owners. Accordingly, because there is no doubt that the amendment protects effects as well as persons, homes, and papers, and because the Warrant Clause does not differentiate “between searches conducted in private homes and other searches,”<sup>191</sup> the burden should fall to the government to show why a warrantless vehicle search was necessary under the specific facts of a case.

Furthermore, if the Constitution does not permit warrantless searches of, say, suitcases, footlockers, packages placed in the mail, or other effects seized by the police, notwithstanding probable cause that those effects harbor evidence of criminality, it is not self-evident why a similar rule should not apply to vehicles under the control of the police. “If moveable property outside automobiles generally can be detained while a warrant is sought and searched only after such

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<sup>189</sup> *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting).

<sup>190</sup> *United States v. Jones*, 565 U.S. 400, 405 (2012).

<sup>191</sup> *United States v. Chadwick*, 433 U.S. 1, 8 (1977).

warrant has been obtained (absent exigent circumstances), the same rule should apply to automobiles.”<sup>192</sup>

Indeed, there was a time when several of the Justices (but never five or more in a single opinion) appreciated that cars should be treated like other effects for purposes of the Fourth Amendment. Ironically, it was Justice Harlan, “The Great Dissenter of the Warren Court,”<sup>193</sup> in a car case at the start of the Burger Court, who recognized this parallel logic<sup>194</sup> and scolded his colleagues for “shunting aside th[e] vital Fourth Amendment safeguard” that is the warrant requirement in a scenario where the police could have easily obtained a warrant to authorize searching a car.<sup>195</sup> One year later, *Coolidge v. New Hampshire*,<sup>196</sup> held a search of an automobile unconstitutional when the facts gave police ample time and

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<sup>192</sup> Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 976 (2006).

<sup>193</sup> See TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 249 (1992) (discussing letter from friend of Justice Harlan labeling him “the Great Dissenter”).

<sup>194</sup> *Chambers v. Maroney*, 399 U.S. 42, 64 (1970) (Harlan, J., concurring in part and dissenting in part) (“The Court’s endorsement of a warrantless invasion of [automobile] privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment’s mandate of ‘adherence to judicial process.’” (citing, for example, *Katz v. United States*, 389 U.S. 347 (1967))); *id.* at 61 (“The Court has long read the Fourth Amendment’s proscription of ‘unreasonable’ searches as imposing a general principle that a search without a warrant is not justified by the mere knowledge by the searching officers of facts showing probable cause. . . . Fidelity to this established principle requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented.”).

<sup>195</sup> *Id.* at 64 n.9. In *Chambers*, the occupants of a vehicle were arrested for an armed robbery. The vehicle was seized and taken to a police station, where it was searched. Evidence from the search was admitted at trial. The Court upheld the search, though conceding that “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.’” *Id.* at 51 (majority opinion). Notwithstanding this logic, which at the time was the constitutional rule for searching packages placed in the mail, *see United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970), *Chambers* found, for Fourth Amendment purposes, 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.” *Chambers*, 399 U.S. at 52. Following the “reasonableness” theory of *Carroll*, the Court concluded that “[g]iven probable cause to search, either course is reasonable under the Fourth Amendment.” *Id.*

Justice Harlan’s opinion noted, *inter alia*, that this conclusion was inconsistent with the Court’s previous “insistence in other areas that departures from the warrant requirement strictly conform to the exigency presented.” *Id.* at 63 (Harlan, J., concurring in part and dissenting in part).

<sup>196</sup> 403 U.S. 443 (1971).

means to obtain a warrant.<sup>197</sup> In explaining this result, *Coolidge* famously stated that the “word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.”<sup>198</sup> Indeed, *Coolidge* adopted a measured and traditional view of *Carroll*: “*Carroll*, on its face, appears to be a classic example of the doctrine that warrantless searches are *per se* unreasonable in the absence of exigent circumstances. Every word in the opinion indicates the Court’s adherence to the underlying rule and its care in delineating a limited exception.”<sup>199</sup> Of course, today’s Justices have not embraced *Coolidge*’s approach to cars and warrants.<sup>200</sup> But to comprehend Fourth Amendment history and doctrine, one should know that Justice Harlan and the *Coolidge* plurality offered an alternative vision for applying the Fourth Amendment to cars.

While fidelity to Fourth Amendment norms would favor the approaches urged by Justice Harlan and *Coolidge*, one must concede that there is a neutral principle for treating cars differently from other effects. If *Chambers* had announced a contrary rule,

it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some

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<sup>197</sup> *Id.* at 460 (plurality opinion) (noting that “police had known for some time of the probable role of the Pontiac car in the crime,” and thus failure to obtain warrant was unjustified). Justice Stewart’s opinion cited several factors why the warrantless search was unreasonable: the police had known for some time the car’s involvement in the murder; the defendant knew he was a suspect, but “there was no indication that he meant to flee”; on the night the car was seized, it was not being used “for any illegal purpose” and was regularly parked in the driveway of the defendant’s home; the objects the police sought from the car “were neither stolen nor contraband nor dangerous”; and finally, after the defendant was arrested in his home, there was no way he could have accessed the vehicle, and his “premises were guarded throughout the night by two policemen.” *Id.* at 460-61. For good measure, Justice Stewart remarked that if the logic of *Carroll* permits a search of a car under these conditions, “then it would permit as well a warrantless search of a suitcase or a box.” *Id.* at 461 n.18. But Stewart noted that no precedent “suggests such an extension of *Carroll*.” *Id.*

<sup>198</sup> *Id.* at 461-62 (opinion of the court). In light of his separate opinion in *Chambers*, it is not evident why Justice Harlan did not join this portion of Justice Stewart’s opinion. Regarding *Chambers*’s holding, Justice Stewart conceded that there was no exigency justifying the warrantless search there. *Id.* at 463 n.20 (noting that a magistrate was “easily available” and any exigent circumstances had passed). Nonetheless, he explained that the “rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station.” *Id.* By contrast, *Coolidge* concerned “the prior question of *whether* the initial intrusion is justified.” *Id.* For Stewart, there was an obvious difference between seizing and searching a car on the open highway and entering private property to seize and search a vehicle “not then being used for any illegal purpose.” *Id.*

<sup>199</sup> *Id.* at 479.

<sup>200</sup> It bears noting that *Coolidge*’s ruling has never been formally disavowed. That said, the results in *Maryland v. Dyson* and *Pennsylvania v. Labron* have effectively made *Coolidge* a dead letter. See *supra* note 87.

central location until warrants could be secured. Moreover, once seized automobiles were taken from the highway the police would be responsible for providing some appropriate location where they could be kept, with due regard to the safety of the vehicles and their contents, until a magistrate ruled on the application for a warrant. Such a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments. No comparable burdens are likely to exist with respect to the seizure of personal luggage.<sup>201</sup>

This position, of course, is not mandated by constitutional text but instead reflects federalism values.<sup>202</sup> In essence, the financial costs that states would incur if *Carroll*'s admonition about obtaining warrants had been taken seriously would be too much.

Whatever one thinks about the merits of this conclusion, these costs concerns are irrelevant when deciding the authority of police to search containers and other effects found in cars. The Justices have not disagreed. Yet the Court has ruled repeatedly that warrantless searches of containers discovered in cars are permissible based on probable cause.<sup>203</sup> Seo, again, traces this development to *Carroll*:

By century's end, the logic of *Carroll* had reached its fullest potential. [Rulings from the 1980s to the 1990s] established brighter-line rules that gave the police a great deal of discretionary authority. The inevitability of case-by-case adjudication under the standard of reasonableness also favored the police, especially when evidence of guilt could slant the ex post facto narrative told in court.<sup>204</sup>

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<sup>201</sup> *Arkansas v. Sanders*, 442 U.S. 753, 765 n.14 (1979) (citation omitted), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

<sup>202</sup> The Court took a similar approach in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), when it rejected an arrestee's claim that he should have been afforded a judicial determination of probable cause within twenty-four hours of his arrest. *Id.* at 58 (deeming forty-eight-hour window to determine probable cause constitutional). The Court explained that states should have the flexibility to combine a probable cause hearing with other pretrial proceedings, thus elevating federalism concerns over an individual's interest in obtaining a prompt judicial determination of probable cause for his arrest. *Id.* at 53-54.

<sup>203</sup> *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."); *California v. Acevedo*, 500 U.S. 562, 580 (1991) (holding that police may search containers in vehicles when they have probable cause to believe it contains contraband or evidence); *United States v. Johns*, 469 U.S. 478, 488 (1985) (holding search of packages taken from a vehicle—three days after being placed in warehouse—to be reasonable because government "was entitled to seize the packages and could have searched them immediately without a warrant"); *United States v. Ross*, 456 U.S. 798, 800 (1982) (holding that police stopping vehicle with probable cause "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant").

<sup>204</sup> SEO, *supra* note 4, at 254.

Ultimately, Seo explains that the Justices extended *Carroll*'s logic to the very different issue of a warrantless search of a container found within a car because motorists had "a lesser expectation of privacy in a motor vehicle."<sup>205</sup> Seo is again being diplomatic in her characterization of the Court's reasoning. Nobody—including the Justices—sincerely believes that motorists have diminished privacy interests in purses, wallets, and suitcases placed in cars. As the remainder of this Part explains, what propelled the results in these cases were fictional claims regarding motorists' privacy in their effects, intellectually dishonest reasoning, and an effort to make car searches easier.<sup>206</sup>

A. *Fictional View of Motorists' Privacy*

Generally speaking, the notion that motorists possess a lesser expectation of privacy in their vehicles has not withstood scrutiny.<sup>207</sup> Extending this belief to

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<sup>205</sup> *Id.*

<sup>206</sup> The important cases are *Acevedo*, *Chadwick*, *Ross*, and *Sanders*. Professor LaFave expertly describes and critiques these cases and all of the Court's other vehicle search cases. 3 LAFAVE, *supra* note 13, § 7.2, at 721-90.

<sup>207</sup> Justice Blackmun was an early proponent of the view that motorists have "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." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (opinion of Blackmun, J.). Blackmun's assertions were particularly reckless because *Lewis* addressed whether paint scrapings from the exterior of an automobile and an observation of the tread of a tire was unreasonable without a warrant. *Id.* at 589. Rather than confine his remarks about motorists' privacy to the facts, however, Blackmun's view of motorists' privacy was stated in general terms to include the interior of the car and containers therein. Professor Lewis Katz has nicely summarized why this view is, at best, a legal fiction:

[T]he driver or occupant of a vehicle who places objects under the seat, in a locked or unlocked glove compartment, or in a trunk does not surrender his expectation of privacy in those items. Although *Katz v. United States*, 389 U.S. 347 (1967),] recognized that one surrenders his privacy in that which he places in public view, *Katz* and *Chadwick* specifically recognize that an individual may protect his privacy by taking precautions. That is exactly what the occupant of an automobile does when he places items out of sight, whether or not in closed compartments.

[A]lthough the automobile is primarily used for transportation, it can also be used as a repository for personal effects. There are probably few Americans who have not at one time or another used their cars for storage, albeit unwisely. All personal effects so stored are entitled to fourth amendment protection; constitutional guarantees are not reserved only for valuable possessions carefully protected by their owners. Most Americans view the automobile as more than merely a means of transportation.

Finally, the high degree of government regulation does not support the excessive diminution of fourth amendment protection of the automobile which accompanies application of the automobile exception. A legitimate interest in securing compliance with safety and traffic regulations should not be used to justify a reduced expectation of privacy in the entire vehicle.

Lewis R. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 570-72 (1982) (footnotes omitted).

*containers* discovered inside of a car makes no sense if a court intends to protect privacy interests. If a briefcase, purse, or a two-hundred-pound footlocker carried by a pedestrian cannot be subjected to a warrantless search notwithstanding probable cause that it contains evidence of criminality, a warrantless search should not be permitted the moment the pedestrian puts his or her effect in a car and becomes a motorist. The Court, however, has decided otherwise.

For example, *Wyoming v. Houghton*<sup>208</sup> addressed whether police can search a passenger's purse found inside a car when they have probable cause to search the car for drugs but lack particularized cause that the purse contains drugs. Speaking for a majority, Justice Scalia announced a per se rule that where there is probable cause to search for contraband inside a car, it is reasonable for the police to examine passengers' packages and containers without a showing of individualized probable cause for each one. Justifying this result under a "balancing" analysis,<sup>209</sup> Scalia asserts that passengers, like drivers, have a reduced expectation of privacy with regard to property transported in cars. Specifically, he states that cars "seldom serv[e] as . . . the repository of personal effects, are subjected to police stop and examination to enforce 'pervasive' governmental controls '[a]s an everyday occurrence,' and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny."<sup>210</sup>

Who believes this? People routinely place property and effects—such as wallets, purses, knapsacks, and envelopes—in cars fully expecting that those

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Indeed, the Court itself has, on occasion, acknowledged that motorists expect and deserve Fourth Amendment protection while on the road. *See* *United States v. Ross*, 456 U.S. 798, 823 (1982) ("Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened."); *Arkansas v. Sanders*, 442 U.S. 753, 764 (1979) ("[A] suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them."), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991); *cf.* *Delaware v. Prouse*, 440 U.S. 648, 662 (1979) ("Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.").

<sup>208</sup> 526 U.S. 295 (1999).

<sup>209</sup> At the start of his analysis section, Scalia read "the historical evidence to show that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers *within* an automobile." *Id.* at 300.

<sup>210</sup> *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (alteration in original) (citations omitted) (first quoting *Cardwell*, 417 U.S. at 590 (opinion of Blackmun, J.); and then quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

items will remain private. Purses and knapsacks often contain a passenger's (and driver's) most intimate and private items, and there is no everyday type of regulation of vehicular traffic that calls for routine inspection of a passenger's purse or knapsack.<sup>211</sup> Equally unconvincing is Scalia's final reason for a reduced privacy interest—containers in cars are “exposed to traffic accidents” that reveal their contents to public viewing. As Professor LaFave notes, this is another “invented” justification.<sup>212</sup> In my view, it has no basis in the real world.

B. *Intentionally Misleading Reasoning*

Professor Seo briefly mentions *California v. Acevedo*<sup>213</sup> and describes it as one of a series of bright-line rules meant to give police “a great deal of discretionary authority.”<sup>214</sup> For me, *Acevedo* is the exemplar of the modern Court's intellectually dishonest reasoning in car cases. Examining the government's argument in *United States v. Chadwick*<sup>215</sup> and Justice Blackmun's dissent in *Chadwick* is essential to understand the degree of *Acevedo*'s misleading reasoning. As described below, although Blackmun dissented in *Chadwick*, he wrote for a majority of the Court in *Acevedo*.

In *Chadwick*, federal officers in Boston had probable cause that a two-hundred-pound footlocker that had just arrived on a train contained marijuana. The officers watched the suspects load the footlocker into the trunk of Chadwick's car, which was waiting outside South Station. While “the trunk of the car was still open and before the car engine had been started,” all of the suspects were arrested.<sup>216</sup> The officers then took the footlocker to the Federal Building in Boston and, an hour and a half after the arrests, opened the footlocker and found marijuana.

At the Supreme Court, the Solicitor General argued that the Warrant Clause protects only interests traditionally identified with the home.<sup>217</sup> The government contended that the Warrant Clause was adopted mainly to counter unjustified intrusions into private homes on the authority of general warrants and writs of assistance.<sup>218</sup> Relying on this history, the government submitted that only homes, offices, and private communications implicate interests that lie at the

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<sup>211</sup> See 3 LAFAVE, *supra* note 13, § 7.2(d), at 782 (critiquing *Houghton* and noting that it is “more accurate” to say purses and knapsacks rarely contain items other than personal effects and there is no regulation requiring passengers “to open the containers they have with them”).

<sup>212</sup> *Id.*

<sup>213</sup> 500 U.S. 565 (1991).

<sup>214</sup> SEO, *supra* note 4, at 254.

<sup>215</sup> 433 U.S. 1 (1977).

<sup>216</sup> *Id.* at 4.

<sup>217</sup> Brief for the United States at 16, *Chadwick*, 433 U.S. 24 (No. 75-1721), 1977 WL 189820, at \*16 (noting that Court had never presumptively required a warrant “in a context other than a search of the home”).

<sup>218</sup> *Id.* at 23 (arguing that Fourth Amendment was adopted “against background of a history of lawless entry into a man's home under the guise of authority”).

core of the Fourth Amendment.<sup>219</sup> In all other contexts, the government insisted that less significant privacy interests are at stake and that the reasonableness of a challenged search should turn on whether probable cause exists.<sup>220</sup> As a fallback position, the government argued that the reasoning of the automobile cases demonstrates the reasonableness of allowing warrantless searches of luggage, including the footlocker.<sup>221</sup> In the government's view, luggage was analogous to cars for Fourth Amendment purposes.<sup>222</sup>

The *Chadwick* majority rejected both of the Solicitor General's arguments. Chief Justice Burger, a law-and-order conservative,<sup>223</sup> wrote the majority opinion concluding that the warrantless search violated the Fourth Amendment. Regarding the government's claim that luggage was analogous to cars, the Chief Justice explained that the automobile exception was based "in part on [an automobile's] inherent mobility, which often makes obtaining a judicial warrant impracticable," and the "diminished expectation of privacy which surrounds the automobile."<sup>224</sup> Justice Blackmun—who, unlike Burger, was the darling of the

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<sup>219</sup> *Id.* at 12 (arguing that such an intrusion so impinges on privacy as to be considered per se unreasonable in only those very limited circumstances).

<sup>220</sup> *Id.* at 44 (noting that probable cause should be key consideration of Court in determining constitutionality of search).

<sup>221</sup> *Id.* at 45-46 ("We submit that no different result is required because the agents searched a footlocker rather than a vehicle.").

<sup>222</sup> As noted in *Chadwick*, the government did not argue that the footlocker's brief time in the trunk of the car "makes this an automobile search" case and thus justifies the warrantless search under the *Carroll-Chambers* exception. See *Chadwick*, 433 U.S. at 11.

<sup>223</sup> See, e.g., MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 7 (2016) (explaining that, unlike other Justices appointed by Republican Presidents, Chief Justice Burger "never" moved leftward in his voting patterns and that Burger and William Rehnquist "were the two most reliably conservative justices of the Burger Court"); EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER 1969-1986*, at 9 (2000) (noting that as member of U.S. Court of Appeals for the District of Columbia Circuit, "Burger became a leading voice for conservative positions on a generally liberal court—particularly on matters relating to criminal procedure").

<sup>224</sup> In contrast to cars, Chief Justice Burger explained that the contents of luggage are not open to public view or subject to regular inspection, and thus luggage is intended as a repository of personal effects. *Chadwick*, 433 U.S. at 13. The mobility of the footlocker did not justify a warrantless search because once officers had seized and immobilized it, "it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Id.* Two years later, the Court granted certiorari in *Sanders* to clarify "whether [*Chadwick*] applied to a piece of luggage in a moving automobile stopped on probable cause." *Arkansas v. Sanders*, Supreme Court Case Files Collection, Box 59, Powell Papers, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia (letter to Chief Justice Burger, dated May 11, 1979).

*Sanders* was a close replay of the facts in *Chadwick*. Police had probable cause that Sanders's green suitcase contained marijuana. Police watched as Sanders arrived at an airport, met a companion, retrieved the green suitcase from the baggage service, got in a taxi while the companion placed the suitcase in the trunk of the taxi, and joined Sanders in the taxi. After

liberals when he retired<sup>225</sup>—however, dissented in *Chadwick*. Although he did not adopt all of the government’s arguments, Blackmun did accept the government’s claim that the Warrant Clause was inapplicable here; he believed that “a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place.”<sup>226</sup> Blackmun conceded that merely seizing the footlocker and awaiting a magistrate’s authorization for a search would have been a less intrusive alternative. However, the mere fact that a warrant could have been obtained did not make the warrantless search unreasonable. Why not? According to Blackmun, “[A] warrant would be routinely forthcoming in the vast majority of situations where the property has been seized in conjunction with the valid arrest of a person in a public place.”<sup>227</sup> Therefore, requiring police to obtain a warrant “would [not] have much practical effect in protecting Fourth Amendment values.”<sup>228</sup>

Though he dissented in *Chadwick* and *Arkansas v. Sanders*,<sup>229</sup> Justice Blackmun wrote for a majority in *Acevedo*. At stake was whether police must obtain a warrant to search a closed container found in a vehicle simply because they lack probable cause to search the entire car.<sup>230</sup> Nine years earlier, *United States v. Ross*<sup>231</sup> left this issue undecided.<sup>232</sup> The facts in *Acevedo* mirrored the

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the taxi left the airport, police stopped it and took the suitcase from the trunk and opened it. Inside was marijuana. The Court ruled the search unconstitutional and held that “the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations.” *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991). Put simply, *Sanders* ruled that the automobile exception did not authorize police to search personal luggage.

<sup>225</sup> See, e.g., Ruth Marcus, *Justice Blackmun Announces Retirement*, WASH. POST, Apr. 7, 1994, at A1 (describing Justice Blackmun as a “passionate liberal voice”); *Retired Justice Blackmun Sees a Blight of Increasing Racism*, N.Y. TIMES, May 30, 1995, at A14 (describing Justice Blackmun as Court’s “leading liberal”).

<sup>226</sup> *Chadwick*, 433 U.S. at 19 (Blackmun, J., dissenting). This was the same position Blackmun took dissenting in *Sanders*. *Sanders*, 442 U.S. at 769 (Blackmun, J., dissenting) (“The luggage, like the automobile transporting it, is mobile. And the expectation of privacy in a suitcase found in the car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk.”).

<sup>227</sup> *Chadwick*, 433 U.S. at 20 (Blackmun, J., dissenting).

<sup>228</sup> *Id.*

<sup>229</sup> 442 U.S. 753 (1979), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

<sup>230</sup> *Acevedo*, 500 U.S. at 573.

<sup>231</sup> 456 U.S. 798 (1982).

<sup>232</sup> *Ross* addressed “the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.” *Id.* at 800. The Court, speaking through Justice Stevens, held that police “may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant ‘particularly describing the place to be searched.’” *Id.* (quoting U.S. CONST. amend. IV). While *Ross* cast doubt on some of *Sanders*’s reasoning, it did not disturb

facts in *Sanders*.<sup>233</sup> Police observed Acevedo place a brown paper bag in the trunk of his car and drive away. Police had probable cause that the bag contained marijuana. Police stopped the car, searched the bag, and found marijuana. A California appellate court correctly ruled that *Sanders* and *Ross* controlled.

Justice Blackmun, however, reasoned that the dichotomy created in *Ross*, which allows a warrantless search of a container discovered during the course of a general search of a car but disallows the same search where there is only probable cause to search the container, is logically unsound.<sup>234</sup> According to Blackmun—and this is where the misleading reasoning starts—separate rules for containers “may enable the police to broaden their power to make warrantless searches and disserve privacy interests.”<sup>235</sup> How does the *Ross* dual-track rule undermine motorists’ privacy interests? “If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*.”<sup>236</sup>

Blackmun’s reasoning for abandoning *Ross*’s dual-track rule would be amusing if it were not found in the United States Reports. Police need probable cause *before* they begin a search. As any diligent law student in a criminal procedure class knows, an otherwise illegal search cannot be justified in order to validate a lesser intrusion. Thus, just as a search cannot be validated by what

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*Sanders*’s holding. *Id.* at 824 (noting that decision is consistent “with the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins [v. California]*, 453 U.S. 420 (1981), relied”). As Professor LaFave notes, “This meant that if there was only probable cause to search a particular container in the vehicle but not probable cause to search the vehicle generally, *Ross* did not control and a warrant was required to search the container, but not to seize it.” 3 LAFAVE, *supra* note 13, § 7.2(d), at 769 (footnote omitted).

<sup>233</sup> Justice Blackmun misleadingly writes that the facts in *Acevedo* “closely resemble the facts in *Ross*.” *Acevedo*, 500 U.S. at 572. In *Ross*, police had probable cause that *Ross* was selling drugs “kept in the trunk of a car.” *Ross*, 456 U.S. at 800. By contrast, in both *Sanders* and *Acevedo* police had probable cause that a particular container in the car contained drugs. In both cases, there was no probable cause that other parts of the vehicle contained drugs.

<sup>234</sup> Justice Blackmun acknowledged that closed containers seized by the police, whether “found after a general search of the automobile . . . [or] found in a car after a limited search for the container[,] are equally easy for the police to store and for the suspect to hide or destroy.” *Acevedo*, 500 U.S. at 574. And he also recognized that no reason exists to distinguish the privacy expectations of containers based on whether the police had probable cause to search the entire vehicle or only probable cause to search a specific container. *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 574-75.

it reveals,<sup>237</sup> so too the police are not free to conduct an extensive search in order to demonstrate legal grounds for a lesser intrusion.<sup>238</sup>

Justice Blackmun offers another reasoning for abandoning the dual-track rule. He asserts that the dichotomy created in *Ross* provided only minimal protection of privacy interests because once police officers obtain probable cause to seize property, “a warrant will be routinely forthcoming in the overwhelming majority of cases.”<sup>239</sup> What is wrong with this argument? For starters, the government made the same argument in *Chadwick* and lost. Indeed, Blackmun’s statement has never been the law. The Court stated long ago that warrantless searches are unconstitutional “notwithstanding facts unquestionably showing probable cause.”<sup>240</sup> Despite this well-established norm, *Acevedo* ruled that the Fourth Amendment does not compel a warrant for a car search that extends only to a closed container found inside a car, thus expressly overruling *Sanders*.<sup>241</sup>

To be sure, *Acevedo* does not permit willy-nilly searches of cars whenever police have probable cause. It reaffirmed *Ross*’s admonition that “[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.”<sup>242</sup> But Blackmun’s holding is a gift to the police because it makes searching containers found in cars easier. Although he asserts otherwise,<sup>243</sup> Blackmun’s ruling in *Acevedo* is an *extension* of *Carroll*. In *Sanders*, the Arkansas Attorney General contended that

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<sup>237</sup> This is a long-standing principle. See *Johnson v. United States*, 333 U.S. 10, 16-17 (1948) (finding search without warrant to be invalid when probable cause only existed after entering property without warrant); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (noting that search warrant “serves a high function” and without exigencies it is imperative, even if evidence is uncovered).

<sup>238</sup> Professor LaFave calls Blackmun’s reasoning “unmitigated poppycock, for if any point is solidly grounded in Fourth Amendment jurisprudence, it is that the police cannot ‘bootstrap’ themselves into probable cause; a search may not be justified by what turns up in that search.” 3 LAFAVE, *supra* note 13, § 7.2(d), at 773.

<sup>239</sup> *Acevedo*, 500 U.S. at 575 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)).

<sup>240</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (quoting *Agnello v. United States*, 269 U.S. 20, 33 (1925)).

<sup>241</sup> *Acevedo*, 500 U.S. at 579 (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). Seo writes that *Acevedo* “explicitly overrul[ed]” *Chadwick*. SEO, *supra* note 4, at 253. That is mistaken. *Acevedo* dealt with the scope of the automobile exception under *Carroll* and its progeny. *Chadwick*, by contrast, did not address the validity of the search of the footlocker under the automobile exception because the government never made that argument. See *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“The Government does not contend that the footlocker’s brief contact with Chadwick’s car makes this an automobile search . . .”). Further, the footlocker’s contact with Chadwick’s vehicle was fleeting at best, and so there was no need to address the automobile exception in *Chadwick*.

<sup>242</sup> *Acevedo*, 500 U.S. at 580 (quoting *Ross*, 456 U.S. at 824).

<sup>243</sup> Blackmun states that *Acevedo*’s holding “neither extends the *Carroll* doctrine nor broadens the scope of the permissible automobile search delineated in *Carroll*, *Chambers*, and *Ross*.” *Id.* at 580.

the warrantless search of the suitcase was proper “not because the property searched was luggage, but rather because it was taken from an automobile lawfully stopped and searched on the street.”<sup>244</sup> Writing for the Court in *Sanders*, Justice Powell characterized this argument as an *extension* of *Carroll* because it “allow[s] warrantless searches of everything found within automobile, as well as the vehicle itself.”<sup>245</sup> Yet this is the rule embraced in *Acevedo*,<sup>246</sup> and it demonstrates that the modern Court’s view of motorists’ privacy interests is the same—if not narrower—than it was nearly one hundred years ago.<sup>247</sup>

Obviously, *Acevedo* mirrors Justice Blackmun’s dissents in *Chadwick* and *Sanders*. But he needed four additional Justices to obtain a majority to overrule *Sanders*.<sup>248</sup> What caused the other Justices to join Blackmun’s opinion? Evidently, several of the Justices believed that pre-*Acevedo* law placed a premium on police

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<sup>244</sup> *Sanders*, 442 U.S. at 762.

<sup>245</sup> *Id.*

<sup>246</sup> Justice Blackmun took this position at least since his *Chadwick* and *Sanders* dissents. Indeed, in 1982, he told his colleagues during the Conference discussion in *Ross* that he was prepared to “go through *Carroll* and let them go whole hog.” DEL DICKSON, *THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 462 (2001). In other words, whenever the police had probable cause, they were permitted to “go whole hog” and search not only the entire vehicle but also any container found within the vehicle. Justice Blackmun joined Justice Stevens’s opinion in *Ross* not because he agreed with the logic of *Ross* but only so that there would be “an authoritative ruling” from the Court. *Ross*, 456 U.S. at 825 (Blackmun, J., concurring).

<sup>247</sup> If further proof is needed that *Acevedo* extends, rather than simply applies *Carroll*, consider the following. In his *Coolidge* opinion, in the interest of providing clarity regarding the scope of the automobile exception, Justice White proposed that the Court “treat searches of automobiles as we do the arrest of a person.” *Coolidge v. New Hampshire*, 403 U.S. 443, 527 (1971) (White, J., concurring in part and dissenting in part). The *Coolidge* majority disagreed and had this response:

[I]f we take the viewpoint of a judge called on only to decide in the abstract, after the fact, whether the police have behaved “reasonably” under all the circumstances—in short if we simply ignore the warrant requirement—*Carroll* comes to stand for something more. The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants. *Carroll* held such an interference to be reasonable without a warrant, given probable cause. It may be thought to follow *a fortiori* that the seizure and search here—where there was no stopping and the vehicle was unoccupied—were also reasonable, since the intrusion was less substantial, although there were no exigent circumstances whatever. Using reasoning of this sort, it is but a short step to the position that it is *never* necessary for the police to obtain a warrant before searching and seizing an automobile, provided that they have probable cause. And Mr. Justice White appears to adopt exactly this view when he proposes that the Court should “treat searches of automobiles as we do the arrest of a person.”

*Id.* at 479 (opinion of the court).

<sup>248</sup> Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Souter joined Blackmun’s opinion. Justice Scalia filed a separate opinion concurring in judgment. *See Acevedo*, 500 U.S. at 581-85 (Scalia, J., concurring in judgment). Justices White, Marshall, and Stevens dissented.

ignorance and was plagued by contradictions. Justice Blackmun stated that the *Ross* and *Sanders* rules created a contradiction such that “the more likely the police are to discover drugs in a container, the less authority they have to search it.”<sup>249</sup> Justice Scalia thought it made no sense to require a warrant to search a briefcase “when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile.”<sup>250</sup> But Scalia also agreed with Justice Blackmun that it was anomalous to permit a warrantless search of a locked glove compartment in a car but require a warrant to permit search of an unlocked briefcase found in a car.<sup>251</sup> Accordingly, *Acevedo* announces “one clear-cut rule to govern automobile searches and eliminate[s] the warrant requirement for closed containers” found in automobiles.<sup>252</sup>

These concerns are misplaced. There is nothing strange or contradictory about pre-*Acevedo* law if one keeps in mind the basic adage that a warrantless intrusion must be “strictly circumscribed by the exigencies which justify its initiation.”<sup>253</sup> In the context of a private container taken from a car, the warrantless *seizure* of the container is justified because of its potential mobility. A warrantless *search*, however, is not justified because the container is—as Justice Blackmun concedes—“easy for the police to store”<sup>254</sup> and retains sufficient expectations of privacy to warrant a magistrate’s finding of probable cause before a search is permitted.<sup>255</sup> Indeed, as Chief Justice Burger instructed, there is nothing unusual about requiring police to obey the requirements of the Warrant Clause before undertaking a *search* of an object, even though *seizure* of that same object is permissible without a warrant.<sup>256</sup> These are norms criminal procedure students learn in law school.

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<sup>249</sup> *Id.* at 577 (majority opinion).

<sup>250</sup> *Id.* at 581 (Scalia, J., concurring in judgment).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 579 (majority opinion). It is not so evident that Justice Blackmun’s “clear-cut” rule will produce certainty for police and judges and eliminate the supposed confusion caused by the dual track of *Ross* and *Sanders*. As Professor Yale Kamisar remarked shortly after *Acevedo* was decided:

If the police only have probable cause to search a specified container in a vehicle, they no longer need a warrant to open that container, but they still cannot search the entire vehicle. Thus the police still have to ascertain which kind of probable cause they have. For resolution of that issue determines the scope of the warrantless search they may make.

Yale Kamisar, Professor of Law, Remarks at the U.S. Law Week’s 13th Annual Constitutional Law Conference: Arrest, Search and Seizure (Sept. 6, 1991) (on file with author).

<sup>253</sup> See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).

<sup>254</sup> *Acevedo*, 500 U.S. at 574.

<sup>255</sup> *Id.*

<sup>256</sup> *United States v. Chadwick*, 433 U.S. 1, 13 (1977) (finding seizure reasonable “to guard against any risk that evidence might be lost,” even though search unreasonable without warrant). Justice Stevens later echoed this difference between searches and seizures:

[I]f there is probable cause to believe [a container holds] contraband, the owner’s possessory interest in the container must yield to society’s interest in making sure that

The real issue at stake in *Acevedo* is never framed by the Court. That is: Should the Warrant Clause apply to personal effects? The result in *Acevedo* is predictable if the focus is on the automobile. Justice Blackmun decries a “curious” dichotomy 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.”<sup>257</sup> But this dichotomy is curious only because both containers were found in a vehicle. If the focus is on the container itself instead of its location, the dichotomy disappears. The answer to the question never asked in *Acevedo* is that because the Fourth Amendment protects *effects* as well as persons and homes and because the Warrant Clause does not distinguish “between searches conducted in private homes and other searches,”<sup>258</sup> warrantless searches of private containers are per se unreasonable.

C. *Promoting Law Enforcement Interests (at the Expense of Fourth Amendment Interests)*

Justice Blackmun played an important role in the Court’s narrow vision of motorists’ privacy. In 1974, he introduced (with scant analysis) the norm that motorists have a lesser expectation of privacy in their vehicles in *Cardwell v. Lewis*<sup>259</sup> and then applied the same faulty reasoning to closed containers seventeen years later in *Acevedo*. In between, the Court decided that a warrantless search of a motor *home* found parked in an off-the-street lot near a courthouse was reasonable where supported by probable cause. *California v. Carney*<sup>260</sup> explained that the “twofold” reasons for the automobile exception

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the contraband does not vanish during the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate.

Texas v. Brown, 460 U.S. 730, 749-50 (1983) (Stevens, J., concurring).

<sup>257</sup> *Acevedo*, 500 U.S. at 580.

<sup>258</sup> *Chadwick*, 433 U.S. at 8.

<sup>259</sup> 417 U.S. 583 (1974).

<sup>260</sup> 471 U.S. 386 (1985).

applied to a motor home.<sup>261</sup> First, the motor home is “readily mobile.”<sup>262</sup> Second, “the expectation of privacy with respect to one’s [motor home] is significantly less than that relating to one’s home or office.”<sup>263</sup> This diminished privacy, the Court elaborated, derives “not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways.”<sup>264</sup> Really?

In New Jersey, my home state, every car must pass an inspection to be eligible for a state registration sticker. The inspection includes, *inter alia*, inserting a thin rod into the exhaust pipe to measure engine emissions. (State inspections never involved opening glove compartments, the trunk, or even a visible examination of the passenger compartment of the vehicle.) So the Court wants the public to believe that because a state official sticks a pollution control device in the exhaust pipe of a motor home, the owner of that vehicle has a reduced expectation of privacy interest in the cupboards, stuffed chairs, bunk beds, and

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<sup>261</sup> The vote in *Carney* was six-to-three. Chief Justice Burger’s opinion was joined by Justices White, Blackmun, Powell, Rehnquist, and O’Connor. Powell’s vote to join the majority was noteworthy in light of his authorship of *Sanders*. Interestingly, Powell, in a memorandum to himself, noted that he was initially “inclined” to vote for *Carney*. He noted: “I do not regard the fact that this particular home, found in a parking lot, probably was being driven from place to place. Tens of thousands of people, often seeking employment, move about the country in vehicles used as residences.” *California v. Carney*, Supreme Court Case Files Collection, Box 83, Powell Papers, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia (memorandum for the file, dated August 15, 1984). But Powell changed his mind after the oral argument, in part, based on the Solicitor General’s presentation. *See id.*

Equally notable is that Justice White, after joining the majority opinion in *Carney* dissented in *Acevedo* six year later. Justice White’s dissent in *Acevedo* simply noted his agreement “with most of Justice Stevens’ [dissenting] opinion and with the result he reaches.” *Acevedo*, 500 U.S. at 585 (White, J., dissenting). Justice Stevens filed a dissent in *Carney* joined by Justices Brennan and Marshall. Professor Seo does not discuss *Carney*.

<sup>262</sup> *Carney*, 471 U.S. at 393. The “mobility” justification does not pass the straight-face test. *Chadwick* and *Ross* rejected mobility as a justification for excusing the warrant requirement. *Chadwick*, 433 U.S. at 13 (rejecting mobility of footlocker as justification for “dispensing with the added protections of the Warrant Clause”); *see also* *United States v. Ross*, 456 U.S. 798, 811 (1982) (restating *Chadwick*’s rejection of mobility for basis of warrantless search). As Justice Stevens’s dissent noted:

It is perfectly obvious that the citizen has a much greater expectation of privacy concerning the interior of a mobile home than a piece of luggage such as a footlocker. If “inherent mobility” does not justify warrantless searches of containers, it cannot rationally provide a sufficient justification for the search of a person’s dwelling place.

*Carney*, 471 U.S. at 405-06 (Stevens, J., dissenting).

<sup>263</sup> *Id.* at 391 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)).

<sup>264</sup> *Id.*

refrigerator of the vehicle against a warrantless police search?<sup>265</sup> Nobody believes that.<sup>266</sup> Instead, what drove the result in *Carney* was the Court's desire to promote law enforcement. As Chief Justice Burger admitted, "the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable."<sup>267</sup> *Carney* is another example in a long list of cases in which the Justices proffered the feeble claim that "expectations of privacy are lower in automobiles than in most other places"<sup>268</sup> in order to make police searches easy.<sup>269</sup>

If the Court's conclusion that motorists have reduced privacy in containers found in vehicles lacks credibility, how should people react when police invoke

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<sup>265</sup> *Id.* at 393 (asserting that "there is a reduced expectation of privacy stemming from [the motorhome's] use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling").

<sup>266</sup> As Professor LaFave rightly notes, "[W]hy the privacy of the living area [of a motor home] is reduced by [regulation and inspection of motor vehicles regarding licensing and safety] is never explained" by *Carney*. 3 LAFAVE, *supra* note 13, § 7.2(b), at 738.

<sup>267</sup> *Carney*, 471 U.S. at 393. The Chief Justice's apparent concerns about the motor home and its occupants becoming unavailable were groundless because the vehicle was parked "a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application," and there was "no indication of any imminent departure." *Id.* at 404 (Stevens, J., dissenting).

<sup>268</sup> Joseph Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 459 (1978).

<sup>269</sup> There is an aspect of this phenomenon in *Ross* as well. The essence of *Ross*'s logic boiled down to the following comments: "When a legitimate search is under way . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross*, 456 U.S. 798, 821 (1982). So too in *Houghton*:

Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car.

To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime.

*Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999).

As Professor LaFave has commented, the "best that can be said" about the Court's refusal to require warrants when police want to search closed containers found in vehicles is that a warrant requirement might result in a "mechanical routine" where judges would issue warrants with little to no "magisterial scrutiny." 3 LAFAVE, *supra* note 13, § 7.2(b), at 737. On the other hand, when requiring warrants "for a comparatively small group of police activities highly intrusive in nature, . . . the tendency will be to give these warrant requests close examination." *Id.*

the automobile exception to search computers, cell phones, and other electronic devices? Eventually, the Court will be asked to extend the logic of *Carroll* and its progeny to digital equipment. The lower courts have already seen such cases.<sup>270</sup> For example, in *United States v. Burgess*,<sup>271</sup> police had probable cause to search a motor home for narcotics. They seized a laptop computer and two external hard drives and later conducted a warrantless forensic search that revealed child pornography. Defending the search, the government argued:

1) the expectation of privacy of computer contents has been likened to that of a suitcase or briefcase; 2) the automobile exception to the warrant requirement permits, with probable cause, the search of containers found in the automobile—even locked suitcases and briefcases; therefore 3) police may (with probable cause, but without a search warrant) search computers and hard drives found in automobiles.<sup>272</sup>

Of course, this argument also applies to cell phones found in vehicles.<sup>273</sup>

The government makes a valid point. Essentially, the automobile exception as interpreted by the modern Court means that if probable cause supports the search, the search is constitutional. Factors that purported to be important in the

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<sup>270</sup> See, e.g., *United States v. Mayo*, No. 2:13-cr-00048, 2013 WL 5945802, at \*9 (D. Vt. Nov. 6, 2013) (concluding that cell phones are not analogous to containers and cannot be searched pursuant to automobile exception); *United States v. Davis*, 787 F. Supp. 2d 1165, 1171 (D. Or. 2011) (stating that automobile exception did not justify warrantless search of phone contents); *United States v. James*, No. 1:06-cr-00134, 2008 WL 1925032, at \*4 (E.D. Mo. Apr. 29, 2008) (concluding that it was permissible to search cell phone without warrant during traffic stop under automobile exception), *aff'd in part sub nom.* *United States v. Dinwiddie*, 618 F.3d 821 (8th Cir. 2010); *United States v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1213-14 (D. Kan. 2008) (finding automobile exception applied to search of cell phone); *United States v. Galante*, No. 94-cr-00633, 1995 WL 507249, at \*3 (S.D.N.Y. Aug. 25, 1995) (ruling that cell phone is considered container and can be searched without warrant if found in automobile that officer may search); *Chung v. State*, 475 S.W.3d 378, 387 (Tex. Ct. App. 2014) (ruling that cell phone could not be searched pursuant to automobile exception); see also Andrew Wrona, *How Far Can the Automobile Exception Go? How Searches of Computers and Similar Devices Push It to the Limit*, 43 J. MARSHALL L. REV. 1119, 1136-37 (2010) (advocating for “[a]n exception to the automobile exception” for computers and “other mass storage devices”).

<sup>271</sup> 576 F.3d 1078 (10th Cir. 2009).

<sup>272</sup> *Id.* at 1088 (citations omitted). The Tenth Circuit in *Burgess* commented that “[n]othing in *Acevedo* suggests either [a search of a laptop at the scene by simply turning on the computer and examining its contents, or a later forensic search] would be impermissible without a warrant.” *Id.* at 1091. However, the court chose not to decide the issue because it found that the search of the laptop and hard drives had been authorized by a valid warrant. *Id.* at 1090-92.

<sup>273</sup> See, e.g., *State v. Boyd*, 992 A.2d 1071, 1083 (Conn. 2010) (finding warrantless search of cell phone reasonable under automobile exception); *Hawkins v. State*, 723 S.E.2d 924, 925-26 (Ga. 2012) (finding cell phone sufficiently analogous to container for purposes of warrantless search).

past, such as the mobility of the vehicle, the practicality of obtaining a warrant, and the privacy associated with the area or object searched, are now irrelevant. All that matters is whether the search was based on probable cause.

Similarly, a straightforward application of *Acevedo* would permit warrantless searches of electronic devices found within vehicles. In addition to claiming that the *Ross* dichotomy “failed to protect privacy,”<sup>274</sup> Justice Blackmun asserted that pre-*Acevedo* law “confused courts and police officers and impeded effective law enforcement.”<sup>275</sup> According to Blackmun, judges and cops were confused because the dual-track approach of *Ross* was “the antithesis of a clear and unequivocal guideline”<sup>276</sup> and encouraged “‘the perverse result of allowing fortuitous circumstances to control the outcome’ of various searches.”<sup>277</sup> If judges and officers were unable to know when a paper bag or suitcase discovered in a vehicle was subject to a warrantless search, introducing an electronic device into the picture will not induce certainty for decision-makers. And if the *Ross* dichotomy “impeded effective law enforcement”<sup>278</sup> when applied to searches of paper bags and suitcases, efficient law enforcement will not be promoted if police cannot search computers and cell phones, which are more likely to contain evidence related to drug trafficking or terrorism than a brown paper bag. In sum, whether one focuses on the automobile exception generally or the specific logic of *Acevedo*, which provided “one clear-cut rule to govern automobile searches”<sup>279</sup>—namely, that “police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained”<sup>280</sup>—electronic devices are covered by the automobile exception.

Though a “mechanical application”<sup>281</sup> of *Acevedo* would support a warrantless search of a computer or cell phone, I doubt a majority of the Justices will authorize the search of digital devices under the automobile exception. In *Riley v. California*,<sup>282</sup> the Court addressed whether police may search a cell phone under the “search incident to arrest” exception to the warrant requirement. Writing for a unanimous Court, Chief Justice Roberts acknowledged that a “mechanical application” of the Court’s search incident to arrest cases would support a warrantless search of a cell phone. However, the Chief Justice concluded that neither of the historical interests served by the search incident to arrest exception—protecting officer safety and preventing the destruction of evidence—supported searching a cell phone. That is because the data on the

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<sup>274</sup> *California v. Acevedo*, 500 U.S. 565, 576 (1991).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 577.

<sup>277</sup> *Id.* at 578 (quoting *United States v. Chadwick*, 433 U.S. 1, 22 (1977) (Blackmun, J., dissenting)).

<sup>278</sup> *Id.* at 576.

<sup>279</sup> *Id.* at 579.

<sup>280</sup> *Id.* at 580.

<sup>281</sup> *Riley v. California*, 573 U.S. 373, 386 (2014).

<sup>282</sup> 573 U.S. 373 (2014).

phone cannot be used to harm police or assist an escape and, after police secure the phone, the arrestee cannot destroy evidence on the phone.<sup>283</sup>

After explaining that the traditional interests behind the search incident to arrest exception cannot justify a cell phone search, Chief Justice Roberts acknowledged that searches incident to arrest are also permitted due to “an arrestee’s reduced privacy interests upon being taken into police custody,”<sup>284</sup> and that lower courts have applied the Court’s precedents to approve “searches of a variety of personal items carried by an arrestee,” such as wallets, purses, and address books.<sup>285</sup> Following that approach, the Solicitor General in *Riley* argued that “a search of all data stored on a cell phone is ‘materially indistinguishable’ from searches of these sorts of physical items.”<sup>286</sup> This time, the Court was not buying it: “That is like saying a ride on horseback is materially indistinguishable from a flight to the moon.”<sup>287</sup> Ultimately, *Riley* found that “[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person.”<sup>288</sup> The vast amount of data and intimate details and information that cell phones can store make them uniquely different for privacy concerns from nondigital containers.

*Riley*’s logic and conclusion is relevant when deciding whether the automobile exception authorizes a search of a computer or cell phone.<sup>289</sup> Indeed,

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<sup>283</sup> *Riley* explained that “[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape. . . . Once an officer has secured a phone and eliminated any potential physical threats, . . . data on the phone can endanger no one.” *Id.* at 387. Regarding the interest in preventing the destruction of evidence, *Riley* noted that “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.” *Id.* at 388.

<sup>284</sup> *Id.* at 391.

<sup>285</sup> *Id.* at 392.

<sup>286</sup> *Id.* at 393 (quoting Brief for the United States at 26, *United States v. Wurie* (2014) (No. 13-212), 2014 WL 828012, at \*26).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> In *Wertz v. State*, 41 N.E.3d 276 (Ind. Ct. App. 2015), the court remarked:

The State’s proposed distinction would require us to conclude that a *cellphone* found next to a driver in the passenger seat of his vehicle could be searched without a warrant, regardless of the Supreme Court’s decision in *Riley*. But such an outcome is unthinkable if the Court meant what it said in *Riley*. Although the State is correct that *Riley* dealt only with the search-incident-to-arrest exception, *Riley*’s discussion of Fourth Amendment protections afforded to electronic devices that store private information transcends the search-incident-to-arrest exception. The analysis in *Riley* easily transfers to other circumstances where an exception to the warrant requirement would otherwise exist, including the automobile context.

*Id.* at 282 (citing *United States v. Kim*, 103 F. Supp. 3d 32, 54-57 (D.D.C. 2015) (applying *Riley* to the search of a computer under the border exception to the warrant requirement); *Chung v. State*, 475 S.W.3d 378, 387 (Tex. Ct. App. 2014) (relying on *Riley* and holding that officer’s warrantless search of cell phone was not justified under automobile exception to

*Riley* and *Carpenter v. United States*<sup>290</sup>—another opinion authored by Chief Justice Roberts addressing the privacy of electronic data<sup>291</sup>—strongly suggest that “the seismic shifts in digital technology”<sup>292</sup> that allow vast sums of data and personal information to be accessed and stored by the government have affected how some of the Justices envision Fourth Amendment privacy interests in the twenty-first century. Indeed, *Carpenter* is a game changer, and its significance for digital privacy cannot be understated.<sup>293</sup> Enormous amounts of personal data that reveal nearly everything about a person can be stored on electronic chips.

warrant requirement)). The Ninth Circuit also relied upon *Riley* in deciding that cellphones could not be searched under the automobile exception. *See* *United States v. Camou*, 773 F.3d 932, 942 (9th Cir. 2014) (“Given the Court’s extensive analysis of cell phones as ‘containers’ and cell phone searches in the vehicle context, we find no reason not to extend the reasoning in *Riley* from the search incident to arrest exception to the vehicle exception.”).

<sup>290</sup> 138 S. Ct. 2206 (2018).

<sup>291</sup> *Carpenter* addressed whether the government “conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user’s past movements.” *Id.* at 2211. In a five-to-four ruling, the Court held that a person does have a legitimate expectation of privacy in the record of his physical movements as captured through cell site location information (“CSLI”). *Id.* at 2217. The Court also ruled that the government needs a warrant to access such information. *Id.* at 2221.

This is not the forum for a detailed analysis of *Carpenter*. Essentially, *Carpenter* creates an exception to the third-party doctrine, which establishes that a person has no legitimate expectation of privacy in information he voluntarily conveys to third parties, even if the information is revealed on the assumption that it will be used only for a limited purpose. *Id.* at 2216. While Chief Justice Roberts’s opinion insists that the government sought an *extension* of the third-party doctrine to access CSLI, what *Carpenter* does is craft an exception to the Court’s precedents due to the “new phenomenon” and “unique” nature of CSLI and then balances the competing interests. *Id.* at 2216-17. “We decline to extend *Smith* [*v. Maryland*, 442 U.S. 735 (1979),] and [*United States v. Miller*, 425 U.S. 435 (1976),] to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.” *Carpenter*, 138 S. Ct. at 2217. Two points about this passage are worth highlighting: First, why is CSLI data “unique”? Is it significantly different from credit card data or web browsing data? Second, when the description of CSLI as “unique” is combined with the language which states that “the fact that information is held by a third party does not by itself *overcome* the user’s claim to Fourth Amendment protection,” *id.* (emphasis added), this passage indicates that the Court is balancing competing interests rather than following the bright-line rule of the third-party doctrine. For a comprehensive and critical assessment of *Carpenter*, see generally Evan Caminker, *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, 2018 SUP. CT. REV. 411 (2019).

<sup>292</sup> *Carpenter*, 138 S. Ct. at 2219.

<sup>293</sup> *See* Orin S. Kerr, *Implementing Carpenter*, in *THE DIGITAL FOURTH AMENDMENT* (forthcoming) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3301257](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301257) [<https://perma.cc/XE3G-LX3Z>] (describing *Carpenter* as “a blockbuster for the Digital Fourth Amendment”); *id.* (manuscript at 6) (“*Carpenter* signals a major break from the traditional understanding. For the first time, the Fourth Amendment is no longer about places and things.”).

The Justices know this, and it would be naïve to think that it does not influence their thinking about the Fourth Amendment. And the Justices understand that laptop computers and cell phones “differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person”<sup>294</sup> or found in his vehicle.

Of course, under the logic of *Riley* and *Carpenter* the challenged police search of a computer need not be particularly intrusive or disclose sensitive information. *Riley*’s result and reasoning rested primarily on the Court’s concern for *potential* invasions of privacy rather than the specific information disclosed by the challenged searches. The cell phone searches in *Riley* and its companion case, *United States v. Wurie*, did not come close to the concerns discussed in Chief Justice Roberts’s opinion. None of the searches disclosed whether Riley or Wurie were predisposed to “certain symptoms of disease,” whether either had “frequent visits to WebMD,”<sup>295</sup> or “detailed information about all aspects of [Riley’s or Wurie’s] life”<sup>296</sup>—harms listed by the Chief Justice if police were allowed to routinely search cell phones incident to arrest. Nevertheless, the searches were deemed unconstitutional because the Court focused on the “*possible* intrusion on privacy” that a cell phone search would entail.<sup>297</sup>

Similarly, in *Carpenter*, the CSLI data obtained by the government merely showed that Carpenter’s phone was located in certain neighborhoods. “[T]here was no evidence that the records revealed anything interesting or private beyond the phone being in the general neighborhood of several robberies around the time they occurred.”<sup>298</sup> In other words, the CSLI data did not identify precisely where Carpenter or his phone were located, let alone provide “an intimate window into [Carpenter’s] life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual association.’”<sup>299</sup>

As noted above, the automobile exception has evolved into a categorical rule under the modern Court: probable cause to support a search makes the search constitutional. Therefore, when police follow this categorical rule, searching a computer or cell phone found in a car is reasonable. Yet the pre-*Riley* search incident to arrest norm was also a “categorical rule,”<sup>300</sup> just as pre-*Carpenter* third-party-doctrine law established a categorical rule—namely, when a person discloses information to a third party, the revealed information is no longer

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<sup>294</sup> *Riley v. California*, 573 U.S. 373, 393 (2014).

<sup>295</sup> *Id.* at 395-96.

<sup>296</sup> *Id.* at 396.

<sup>297</sup> *Id.* at 394 (emphasis added).

<sup>298</sup> Kerr, *supra* note 293 (manuscript at 12).

<sup>299</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

<sup>300</sup> *Riley*, 573 U.S. 373, 386 (2014) (describing holding in *United States v. Robinson*, 414 U.S. 218 (1973), as “categorical rule”).

protected under the Fourth Amendment.<sup>301</sup> What the Chief Justice wrote in *Carpenter* is pertinent: “When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents.”<sup>302</sup> And the Justices will not extend the automobile exception to authorize the search of cell phones or computers. When the Court is confronted with a search of an electronic device pursuant to the automobile exception, I predict that a majority of the Justices will engage in a balancing analysis—similar to what occurred in *Riley* and *Carpenter*—and will carve out an exception to the automobile exception for certain electronic devices, such as cell phones and computers. The result will not be a “neutral principle.” Nor will it be easily reconciled with *Acevedo*. But life tenure does not require that the Justices be consistent in the rulings they issue.

#### CONCLUSION

Once the automobile became available to many Americans, it was inevitable that police would focus their attention on motorists. “[T]he multitude of traffic laws that everyone disregarded at one point or another gave the police what amounted to a general warrant to stop anyone.”<sup>303</sup> As the twentieth century unfolded, enforcing Prohibition and other crime control ventures, like the War on Drugs, provided additional reasons for police to target, stop, and search motorists.

Since 1925, the Supreme Court’s resolution of Fourth Amendment cases involving motorists have played a significant role in defining freedom in America. The Court’s rulings have not been welcomed by all. In 1966, a perceptive scholar of the Court’s Fourth Amendment rulings wrote, “[C]ases involving automobile searches . . . have generated powerful judicial controversy.”<sup>304</sup> Thirty years later, Professor David A. Sklansky, another discerning scholar of the Court, advised that how the Court “handles controversies over vehicle stops—what it says and what it does not say—has a good deal to tell us about its broader understandings of the role of the Fourth

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<sup>301</sup> *Carpenter*, 138 S. Ct. at 2232 (Kennedy, J., dissenting) (“[T]he fact that information was relinquished to a third party was the entire basis for concluding that defendants in [prior precedents] lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.”); *id.* at 2262 (Gorsuch, J., dissenting) (explaining that pre-*Carpenter* rulings “announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it”).

<sup>302</sup> *Id.* at 2222 (majority opinion).

<sup>303</sup> SEO, *supra* note 4, at 213; *see also* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 223 (1989) (“The police officer’s unconditional power creates the danger that the discretion to arrest for a traffic violation will be exercised as a pretext to enable the officer to search.”).

<sup>304</sup> LANDYNSKI, *supra* note 87, at 87.

Amendment.”<sup>305</sup> Discussing four car stop cases from the 1996 Term, Sklansky noted:

[T]he four cases reveal a strong degree of consensus on the Court about the proper application of the Fourth Amendment, and that the consensus results not from a settled body of doctrine but rather from shared, largely unspoken understandings. These understandings strongly favor law enforcement and, more troublingly, disregard the distinctive grievances and concerns of minority motorists stopped by the police. In ways the vehicle stop cases help to illustrate, this disregard is deeply embedded in the structure of current Fourth Amendment law, and over the long term it limits the protection the Amendment provides to all of us.<sup>306</sup>

On the other hand, law enforcement officers have learned to employ many of the Court’s rulings as a “sword” to investigate motorists.<sup>307</sup>

*Policing the Open Road* expertly studies these controversies and more. Professor Seo’s book is a highly informative study of the Court’s car cases spanning nearly a century. Further, Seo’s insights will very likely help us understand how the Court resolves future controversies. Although technology is changing automobile travel, cars will be with us for the foreseeable future. And where there are cars, there will also be cops, which means motorists will be stopped and searched.<sup>308</sup> For anyone interested in learning about how the Court’s

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<sup>305</sup> David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 272.

<sup>306</sup> *Id.* at 273.

<sup>307</sup> DAVID K. SHIPLER, *THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES* 41 (2011) (describing reliance on reasonable suspicion standard rather than probable cause standard contained in memo for special unit of Washington D.C. police department that uses traffic stops to look for guns: “For too long police officers have been trained to view the Constitution of the United States and its judicial interpretations as placing rigid restrictions on what law enforcement personnel can do on the street while shielding criminals from detection. . . . The members of the . . . Gun Recovery Unit have viewed the Constitution and its associated case law as a law enforcement sword rather than a shield” (alterations in original)).

<sup>308</sup> For the October 2019 Term, the Court granted certiorari to decide whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary. *Kansas v. Glover*, 139 S. Ct. 1445, 1445 (2019) (mem.). Last Term, the Court chose not to review an issue that it is likely to see again: whether police are permitted to stop a vehicle in the absence of reasonable suspicion or probable cause that the driver has committed a traffic offense or other crime on the ground that the stop is merely “information seeking.” *Nebraska v. Sievers*, 911 N.W.2d 607, 619 (Neb. 2018), *modified on rehearing*, 920 N.W. 443 (Neb. 2018), *cert. denied*, 139 S. Ct. 2746 (2019) (mem.). Professor Michael Gentithes has written an informative article examining how witness stops exacerbate racial profiling. *See generally* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420816](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420816) [<https://perma.cc/D364-YYZ9>].

rulings have shaped and mostly restricted the liberty and privacy of motorists, *Policing the Open Road* is required reading.