AS TIME GOES BY: THE ELIMINATION OF CONTEMPORANEOITY AND BREVITY AS FACTORS IN SEARCH AND SEIZURE CASES

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Introduction

The Burger Court campaign to limit the protection afforded by the fourth amendment, now well into its second decade, has not been disguised. A target of this campaign has been the fourth amendment warrant clause. The Court has explicitly created a limited good faith exception to the requirement of a warrant supported by probable cause,1 exempted searches by school officials from the requirement of a warrant,2 and liberalized the requirements for obtaining a search warrant based on informants’ tips.3 Beyond this open assault, the Court has weakened, in more subtle ways, the protection afforded by the warrant requirement. It has begun to evaluate government conduct constituting a search or seizure4 by asking whether the conduct was “reasonable” in light of existing exceptions to the warrant requirement, rather than by asking whether the conduct met the specific requirements of the existing exceptions. This approach

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is at odds with the longstanding principles that any governmental activity that constitutes a search or seizure is per se unreasonable unless supported by a warrant or within one of the few "specifically established and well-delineated" exceptions to the warrant requirement\(^5\) and, that these exceptions must be narrowly tailored to the circumstances that justify their creation.\(^6\) Thus, without announcing a new rule or exception, the Court has broadened the exceptions and weakened fourth amendment protections.

Perhaps the most significant example of this subtle weakening is the elimination of the contemporaneity and brevity elements of various exceptions to the warrant requirement. The Supreme Court has long recognized that if special circumstances necessitate creating an exception to the general rule requiring a warrant, the resulting search or seizure must occur only at the time in which those circumstances are present,\(^7\) and must be as short as possible in duration.\(^8\) Thus, contemporaneity and brevity have been crucial factors in the decisions that created and developed the exceptions to the warrant requirement.

\(^5\) Katz v. United States, 389 U.S. 347, 357 (1967). Arguably, Katz was merely stating an established principle when it laid down this rule. However, it has been suggested that Katz in fact overstated the principle. Lewis, The Burger Court and Searches Incident to a Lawful Arrest: The Current Perspective, 7 Cap. U.L. Rev. 1, 9 n.47 (1977). Whether the origin of the rule is in Katz or in earlier cases, the rule has been recognized as settled law. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . ., subject only to a few specifically established and well-delineated exceptions."); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) ("Thus the basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); see also Project, supra note 4, at 265–66 & n.34.


\(^8\) Florida v. Royer, 460 U.S. at 500; see also Terry v. Ohio, 392 U.S. 1. For example, the exception created to permit police in "hot pursuit" of a suspect to follow him into otherwise constitutionally protected areas and to search those areas where the suspect may be hiding, Warden v. Hayden, 387 U.S. 298–99, by definition permitted the police to search only within the immediate time frame of the suspect's flight and pursuit. Welsh v. Wisconsin, 466 U.S. 740, 750 (1984). The exception permitting a warrantless search based on consent of the suspect requires the search to take place contemporaneously with the grant of consent. W. LaFave & J. Israel, Criminal Procedure 212–13 (1985).
The critical role of these two factors in limiting the scope of warrantless searches is evident in three areas that this Article examines in detail: warrantless automobile searches, searches incident to arrest, and investigative detentions. When it was created, the exception permitting a warrantless search of an automobile at least implicitly restricted the search to the time period during which the special circumstances that justified the exception were present.\textsuperscript{9} Similarly, the exception created to permit police, upon arrest, to search a suspect and the area within his immediate control specifically required that the search be contemporaneous in time and place.\textsuperscript{10} Finally, the investigative detention exception, which permits seizure of a person or container without a warrant and with less than probable cause, from its inception included a requirement that the seizure be brief.\textsuperscript{11}

Contemporaneity and brevity, however, have proved less important to the Burger Court. The Court has eliminated the requirement of contemporaneity in evaluating the reasonableness of warrantless searches of automobiles and instead permits police to conduct warrantless searches at their convenience whenever probable cause exists.\textsuperscript{12} Arguably, the Court has likewise eliminated the requirement of contemporaneity in the context of a search incident to arrest.\textsuperscript{13} Moreover, the Court has begun to disregard the brevity requirement in favor of permitting prolonged investigative detention of a suspect.\textsuperscript{14}

This Article will examine in detail each of the exceptions to the warrant requirement mentioned above—the automobile exception, the search incident to arrest exception, and the investigative detention exception. The rationales that justified creating the exceptions, and the limits originally placed on them, will first be explored. Next, the cases that have undermined the contemporaneity or brevity requirement within each exception

\textsuperscript{11} Terry v. Ohio, 392 U.S. 1, 26, 30 (1968). See also United States v. Place, 462 U.S. 696 (1983).
will be examined. Finally, the Article will demonstrate that the "de-emphasis," or elimination, of the contemporaneity and brevity requirements represents an unjustified expansion of the narrowly tailored exceptions to the warrant requirement, permitting unreasonable and unnecessary infringements of citizens' rights to privacy.

I. The Automobile Exception

The automobile exception\(^\text{15}\) generally permits police to search automobiles without obtaining a warrant whenever there is probable cause to believe that the car is being used for criminal purposes. The exception was created in *Carroll v. United States*, in recognition of the difficulties that would result if a search of the inherently mobile automobile were postponed while police sought a warrant, and necessarily included a requirement that the search take place only when the exigency of mobility was present; subsequent cases interpreted the exception to permit immediate, on-the-scene searches, but not delayed searches.\(^\text{16}\) The Burger Court, however, has completely eliminated any requirement of contemporaneity by expanding the exception to permit delayed searches in special circumstances\(^\text{17}\) and, in more recent cases, by replacing the need for special circumstances with a blanket rule permitting delayed searches.\(^\text{18}\)

\(^{15}\) It has been suggested that the term "automobile exception" is confusing because it is used to refer to the exception created in *Carroll* despite the fact that automobile searches can occur under numerous other exceptions, including those for inventory searches and searches incident to arrest. See Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 Mercer L. Rev. 987, 987-88 (1976). Nevertheless, those exceptions justify the search of an automobile only because, by chance, a car was involved in a special set of circumstances. The exception in *Carroll* specifically depends upon the presence of an automobile, and thus can accurately be dubbed the "automobile exception." Because the exception typically is referred to as the automobile exception, I will continue that use here.

\(^{16}\) *Carroll v. United States*, 267 U.S. at 146-47 created the exception. See infra text accompanying notes 29-32. Ramon v. Cupp, 423 F.2d 248, 249 (9th Cir. 1970) and United States *ex rel. Darby v. Mazurkiewicz*, 431 F.2d 839, 842 (3d Cir. 1970) interpreted *Carroll* to permit immediate, but not delayed, searches.


The automobile exception was created in *Carroll v. United States*. In *Carroll*, the defendants were convicted of transporting intoxicating liquor in an automobile in violation of the National Prohibition Act. At trial, the court admitted into evidence two bottles of liquor seized in a warrantless search of their car.

The Supreme Court, in addressing the defendants' contention that a warrant was required for the search, examined the legislative history of the amendment to the National Prohibition Act which prohibited searches of private dwellings without a warrant. The Senate version of the amendment originally prohibited the warrantless search of any property, but eventually was modified to allow warrantless searches of automobiles. This was done, the Court explained, because "[i]t is impossible to get a warrant to stop an automobile. Before a warrant could be secured, the automobile would be beyond the reach of the officer . . . ."  

After finding support for the statutory distinction between an automobile and a dwelling, the Court held the distinction to be constitutionally valid. The Court noted that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . . ." It pointed out that the legislation passed by the Congress which approved the fourth amendment had drawn a distinction between the necessity for a warrant in the search and seizure of contraband found on a ship or vessel and contraband found in dwellings, stores, or buildings. Therefore, the Court held, a warrant was not required to conduct the search of the automobile because it was not practicable to secure one.

Although the Court in *Carroll* did not expressly limit its holding to immediate, on-the-scene searches, such a limitation

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20 *Id.* at 134.
21 *Id.* at 143–47.
22 *Id.* at 146.
23 *Id.*
24 *Id.* at 149.
25 *Id.* at 151. This same distinction was drawn in later legislation relating to the introduction of liquor into Indian country and included automobiles in the category of areas that could be searched without a warrant. *Id.* at 152.
26 *Id.* at 154.
was implicit in the decision. The legislative history relied on by the Court justified the special automobile rule as based on the need to prevent the mobile vehicle from disappearing before a warrant could be secured. 27 Moreover, the Court clearly intended the exception to be a narrow one, carefully limited to the scope required by the exigencies of time and mobility: “In cases where the securing of a warrant is reasonably practicable, it must be used . . . . In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.” 28

Thus the Court in Carroll suggested that when the exigencies of time and mobility were not involved—that is, when, for some reason, the car was immobilized and there was no danger of its leaving the jurisdiction—a warrant would be required. 29 If the exception created in Carroll is interpreted in this narrow fashion, mere mobility or inherent mobility does not justify a warrantless search of an automobile. Rather, a warrantless search is justified only when mobility creates exigent circumstances which make securing a warrant impracticable. This does not occur every time an automobile is stopped on probable cause. Whenever police stop an automobile, they obviously could seize it, immobilize it while they seek a warrant, and thereby eliminate the possibility of its leaving the jurisdiction. Arguably, then, the mobility of the automobile would rarely justify the search. However, the “seizure option” leaves the police “with the difficult task of deciding what to do with the occupants while a warrant is obtained.” 30 The police could detain the occupants on the spot or leave them stranded and seize

27 Id. at 146.
28 Id. at 156 (emphasis added).
29 See Ramon v. Cupp, 423 F.2d at 249:

[If the officers had probable cause to believe that the automobile was being used at that time to transport contraband and if procuring a search warrant might afford opportunity for quick removal of the vehicle from the jurisdiction, then such exigent circumstances will justify a warrantless search. Carroll v. United States. Exigencies do not exist when the vehicle and the suspect are both in police custody.

See also United States ex rel. Dabey v. Mazurkiewicz, 431 F.2d at 842 (exception exists where vehicle is “readily removable”).

the automobile and take it to the station until a warrant is obtained. Each of these alternatives represents a serious intrusion upon the suspect’s possessory interest in the car, because each prevents the suspect from continuing on her way.\textsuperscript{31} The only truly nonintrusive alternative to an immediate search is to release the automobile to the suspect until police obtain a warrant. Yet this alternative “creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court’s automobile exception.”\textsuperscript{32} Thus, the automobile’s mobility justifies an immediate search because such a search does not represent a significantly greater intrusion than that which would result from imposing a warrant requirement and allowing interim detention of the automobile and, possibly, the driver.

However, in most cases, where probable cause of criminal activity justifies the stop of an automobile, the police also have probable cause to arrest the occupants, and in fact do arrest them, before searching the car.\textsuperscript{33} Once arrested, the suspects may be taken to the station for booking. In these cases, seizing the automobile by securing it on the spot or by taking it to the station would not represent a serious intrusion upon the occupant’s possessory interest; the occupant under arrest is unable to use the car anyway. Similarly, because no search has occurred, the occupant’s privacy interest in the car has not been infringed. This limited seizure allows the police to secure a warrant without fear of the automobile leaving the jurisdiction. Thus, the mobility rationale fails to justify an immediate, warrantless search when the occupants are in custody.\textsuperscript{34}

This reasoning suggests that \textit{Carroll} permits a warrantless automobile search only when the police have no right to arrest the occupants before the search. That was precisely the situation in \textit{Carroll}, where the agents suspected Carroll of committing only a misdemeanor and apparently had no right to arrest him until after they had conducted the search and had found the

\textsuperscript{31} \textit{Id.} at 807 n.9. \textit{See also} United States v. Place, 462 U.S. at 708 (recognizing a “liberty interest” in proceeding with one’s itinerary).

\textsuperscript{32} \textit{Ross}, 456 U.S. at 830 (Marshall, J., dissenting).


\textsuperscript{34} \textit{See Ross}, 456 U.S. at 830 (Marshall, J., dissenting).
alcohol. The “mobility” rationale of *Carroll* has never been interpreted to require police officers arresting automobile occupants to seize the automobile rather than search it. However, *Preston v. United States*, the first case to address the issue of a delayed search of an automobile that police had seized and impounded, read *Carroll* to require officers to seek a warrant prior to searching the car.

In *Preston*, police received a complaint that “three suspicious men acting suspiciously” had been in an automobile in a business district all night. After questioning the men and receiving “unsatisfactory and evasive” answers, the officers arrested the trio for vagrancy. They searched them and took them to police headquarters. The police did not search the car at the time of the arrest, but instead drove it to the station. Later, without obtaining a warrant they searched the car on two separate occasions, finding two loaded revolvers and various items for which the most obvious use was to rob a bank. Based almost entirely on this evidence, the three men were convicted of conspiracy to rob a federally insured bank. On appeal, the defendants challenged the constitutionality of the searches.

The Court accepted the *Carroll* reasoning that the analysis of automobile searches differs from that of searches of fixed objects. In deciding the case, the Court explained that:

> [e]ven in the case of motorcars, the test still is, was the search unreasonable. Therefore, we must inquire whether the facts of this case are such as to fall within *any of the exceptions* to the constitutional rule that a search warrant must be had before a search may be made.

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35 Id. at 807 n.9; Chambers v. Maroney, 399 U.S. 42.
36 376 U.S. 364 (1964). Although *Preston* was decided almost forty years after *Carroll*, very little affecting the automobile exception occurred during the intervening years. See Moylan, *supra* note 15, at 1000.
37 376 U.S. at 365.
38 Id.
39 Id.
40 Id. at 365–66.
41 Id. at 366.
42 Id. at 364.
43 Id. at 366–67 (emphasis added).
The Court rejected the government's argument that the search was justified as incidental to an arrest, holding that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."\(^{44}\)

The opinion suggests that the delay in executing the search decided both the question of whether the search was incident to arrest and the question of whether it could be justified under the automobile exception:

Here, we may assume ... that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place.\(^{45}\)

The Court noted that upholding the delayed search would not comport with the justifications for the automobile exception: "[S]ince the men were under arrest at the police station and the car was in police custody at a garage," there was no "danger that the car would be moved out of the locality or jurisdiction."\(^{46}\)

Thus, the \textit{Preston} Court seemed to invoke a contemporaneity requirement to hold invalid the delayed search under the automobile exception. However, in declaring the search invalid, the Court in its concluding sentence failed to mention specifically that the automobile exception could not save the search: "We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment."\(^{47}\) This failure led to the decision being relegated to the "search inci-

\(^{44}\) \textit{Id.} (emphasis added).
\(^{45}\) \textit{See id.} at 367-68.
\(^{46}\) \textit{Id.} at 368 (citing \textit{Carroll v. United States}).
\(^{47}\) \textit{Id.}
dent" category and virtually ignored when the identical issue of a delayed car search was again raised in the automobile exception context. That happened just five years later in Chambers v. Maroney, when the Court set forth a much broader reading of the automobile exception.

Chambers involved the search of an automobile following the stop and arrest of the occupants. Like Preston, and unlike Carroll, the search of the car did not take place immediately, but occurred a short time later at the station house. The police had probable cause to arrest the defendants and to search the car; the only question was whether the delay in searching the car was lawful absent a warrant. As in Preston, the Court held that the delayed search could not be justified as incident to arrest. The Court, however, apparently did not believe that the delay prevented the search from qualifying under the automobile exception. The Court explained Preston, which seemed to reach the opposite result in a nearly identical situation, as dealing "primarily with a search incident to arrest." As discussed above, Preston did primarily deal with the search incident to arrest exception, but it also decided whether the search was valid under the automobile exception. Nevertheless, with Preston lightly brushed aside, the Court in Chambers turned to the case before it.

The Court noted that, in many cases, probable cause to search a car arises unexpectedly. In those cases, "if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be

48 See Cady v. Dombrowski, 413 U.S. 433, 444 (1973) ("It would be possible to interpret Preston broadly . . . but we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest."); Cooper v. California, 386 U.S. 58, 59–60 (1967) ("In Preston the search was sought to be justified primarily on the ground that it was incidental to and part of a lawful arrest . . . [T]he police arrested Preston for vagrancy . . . and no claim was made that the police had authority to hold his car on that charge.").

50 Id. at 44.
51 Id. at 46.
52 Id. at 47.
53 Id. at 50. The Court noted that Cooper v. California, 386 U.S. 58, had read Preston in this manner.
54 The Chambers Court did not rely on Cooper to uphold the delayed search because the auto in this case, unlike in Cooper, was not being held pursuant to a forfeiture statute. See Cooper, 386 U.S. at 60.
seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.” The Court explained that “[a]rguably, because of the preference for a magistrate’s judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the ‘lesser’ intrusion is permissible until the magistrate authorizes the greater.” Despite its suggestion of an implicit hierarchy, the Court refused to rank the various intrusions and concluded, without explanation, that it was debatable whether an immediate search or prolonged seizure was the lesser intrusion, and that either course was constitutionally acceptable.

If the Court was relying on the assertion in Carroll that an immediate search was permissible despite the apparent availability of the seizure alternative, it overlooked the fact that the suspects in Carroll could not properly be arrested until after the discovery of contraband during the search. Thus, seizing the car in Carroll would have constituted a serious intrusion because it would have prevented the suspects from continuing on their way. In contrast, the police in Chambers had probable cause to arrest, and did arrest, the suspects prior to the search. In this type of case, seizing the car is a minimal intrusion upon the suspect’s possessory interest, because he can no longer use the car anyway. The seizure also protects the suspect’s privacy interest in the car. Nevertheless, the Court found:

For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Even accepting the Court’s conclusion that there is no difference between a prolonged seizure and an immediate search,

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55 399 U.S. at 51.
56 Id.
57 Id. Justice Harlan discussed the questionable analysis that led to this conclusion in his partial dissent. Id. at 63–65.
58 Id. at 52 (emphasis added).
the question remains whether a delayed warrantless search is permissible. The Court seemed to be addressing that issue when it explained:

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.59

This passage is truly baffling. The Court again nominally justified only an immediate, not a delayed, search. However, since this passage decided the case, the Court must have intended "immediate" to embrace any search conducted during the prolonged seizure that it ruled was permissible in order to preserve the car and its contents.60

By defining "immediate search" to include delayed searches following a seizure, the Court permitted the infringement of both privacy and possessor interests.61 Although it is conceivable, as the Court concluded in justifying an immediate search, that a suspect would accept an infringement of his privacy interest in order to prevent a significant infringement of his possessor interest, a suspect suffers doubly when first his possessor interest is infringed and then his privacy interest is also infringed.

59 Id. (footnote omitted).
60 The Court's reasoning is very circular. First it concluded that an "immediate" search and a seizure were "equivalent" intrusions. Then it argued that a seizure at the station was permissible due to the mobility of the car (it could be removed by friends or relatives if it were not seized) and the need to preserve it for a later search. Finally, the Court concluded that if a seizure was permissible, the "equivalent" intrusion, an immediate search, must be permissible. However, the "immediate" search was really a delayed search, a factor which the Court seemed to ignore. See Moylan, supra note 15, at 1062–63.
61 399 U.S. at 63 n.8 (Harlan, J., dissenting in part).
The apparent rationale of the Court simply does not justify a delayed search following a prolonged seizure.

The only reading of Chambers that would justify a delayed search following a prolonged seizure argues that a delayed search is permissible only when exigent circumstances make the delay reasonable. In fact, in a footnote, the Court focused on the exigent circumstances:

It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner’s convenience and the safety of his car to have the vehicle and the keys together at the station house.\(^{62}\)

This reading of Chambers allows the contemporaneity requirement to retain some life. The Court, however, in later cases refused to adopt this interpretation.

Five years after Chambers, the Court heard Texas v. White,\(^{63}\) in which police arrested the defendant while he was attempting to pass fraudulent checks at a drive-in bank window.\(^{64}\) The police brought White and his car to the station,\(^{65}\) questioned White briefly and, pursuant to their normal procedure, requested consent to search the car. White refused to consent; nonetheless the police searched the car without obtaining a warrant.\(^{66}\) The search revealed checks corresponding to those that White had allegedly attempted to pass at a different bank. At trial, White’s objection to the introduction of the checks was overruled because, according to the judge, probable cause existed for an arrest and a search, at either the scene or at the station house.\(^{67}\) White was convicted.\(^{68}\)

The Texas Court of Criminal Appeals reversed White’s conviction on the grounds that the delayed, warrantless search

\(^{62}\) Id. at 52 n.10.
\(^{63}\) 423 U.S. 67 (1975).
\(^{64}\) Id. at 67.
\(^{65}\) Id.
\(^{66}\) Id. at 68.
\(^{67}\) Id.
\(^{68}\) Id.
of the car violated White’s fourth amendment rights. The Texas court read Chambers narrowly, permitting delayed searches only where exigent circumstances prevented an immediate, on-the-scene search. The court noted that there were no such exigent circumstances in the present case.

The Supreme Court did not agree with this analysis of Chambers. The crux of the short, per curiam opinion, which reinstated White’s conviction, lay in one sentence: Chambers governed the case because “[t]here, as here, ‘[t]he probable cause factor’ that developed at the scene still obtained at the station house.” In quoting Chambers, the White opinion omitted the portion of the sentence that stated that the mobility of the car still obtained at the station. More importantly, the White court eliminated the need to justify delaying the search. Justice Marshall’s dissent, joined by Justice Brennan, noted this metamorphosis:

Only by misstating the holding of Chambers . . . can the Court make that case appear dispositive of this one . . . . Chambers did not hold, as the Court suggests, that “police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant.” Chambers simply held that to be the rule when it is reasonable to take the car to the station house in the first place.

Marshall’s reading was compelling but unavailing. The Court had expanded the automobile exception by eliminating the requirement of contemporaneity with virtually no analysis and by misstating the holding of Chambers.

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70 Id. at 257.
71 “The arrest was not made out on a lonely country road around midnight, where the search might have been dangerous to the officers, as the Supreme Court noted was the case in Chambers v. Maroney . . . .” Id.
72 Texas v. White, 423 U.S. at 68 (citation omitted).
73 Id. at 69 (Marshall, J., dissenting) (citation omitted).
Moreover, the Court has steadfastly held to this broad reading of *Chambers*,\(^{74}\) going out of its way to criticize lower courts that have retained exigency as a factor.\(^{75}\) In *Michigan v. Thomas*,\(^{76}\) for example, the Court explained:

In *Chambers v. Maroney* we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas v. White*. It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court’s assessment of the likelihood in each particular case 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.\(^{77}\)

This criticism is unfounded. Contrary to the Court’s statement, it is not clear why the justification for the search is still present even when the car is not mobile.

The Burger Court expanded the automobile exception by invoking a search and seizure analysis substantially different from that used by the Courts that created the exception. The new analysis, in effect, does away with the rule that searches and seizures are per se unreasonable unless supported by a warrant. It also vitiates the rule that exceptions to the warrant requirement must be narrowly tailored to meet the circumstances that justify the exception. The warrant requirement is no longer the cornerstone of the reasonableness determination; searches are now evaluated under a more flexible notion of


\(^{75}\) In *Florida v. Meyers*, 466 U.S. at 382, the Court granted certiorari from the Florida Court of Appeals, despite the Florida Supreme Court’s decision not to review the case, and summarily reversed.

\(^{76}\) 458 U.S. 259.

\(^{77}\) *Id.* at 261 (citations omitted).
reasonableness. The new reasonableness standard does not require the presence of the exigent circumstances which initially permitted, and presumably limited, the exception. Instead, it evaluates the activity to determine whether it departs significantly from the conduct permitted in situations clearly within the exception. If, in the Court's view, the conduct does not so depart, it is upheld as reasonable. In Justice Frankfurter's words, the exceptions have become "enthroned into the rule," despite the fact that the expansions cannot be justified under the original formulation of the exceptions. Thus, serious infringements of citizens' rights are upheld without reference to whether it is necessary to permit the specific police conduct without a warrant. When this analysis is utilized, the character of the exception as carefully delineated and jealously drawn is lost, and eventually, so is the protection of the fourth amendment.

In a more recent automobile exception case, United States v. Ross, the Court attempted to explain the permissibility of delayed searches using a "now or earlier" rationale that did not appear in Chambers. Since the police could search a car at the time of arrest, passage of time is the only argument which the defendant can advance to invalidate the subsequent search. According to the Court, prohibiting delayed searches would provide little protection to car occupants because it would simply result in the police searching at the scene in every case.

This now or earlier rationale is difficult to counter. The only additional intrusion that occupants suffer in a delayed search is the denial of the possession or use of the automobile during the delay. As discussed above, in most cases the occupant will be

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79 The Court attempted to provide a rationale for the expansion only after the fact. See United States v. Ross, 456 U.S. 798, 807 n.9 (1982).
80 456 U.S. 798. In Ross, police with probable cause stopped a car and arrested the driver. They conducted a search of the car at the scene and discovered a closed brown paper bag which they opened. Later at the station, they also searched a leather pouch discovered in the trunk. The bag and pouch contained narcotics. The Court held that the warrantless searches of the containers were justified.
81 Exigent circumstances may prevent this option, of course, but they alone would justify the delay. See supra text accompanying notes 58-62.
under arrest and unable to use the car anyway. Thus, the intrusion is truly minimal.

However, the now or earlier rational represents a radical shift of the burden in fourth amendment jurisprudence. The starting point for the creation of an exception to the warrant requirement is that the burden is on those who seek an exception to show that the exigencies of the situation made that course imperative. The now or earlier rationale, however, places the burden on citizens to demonstrate that a delay in executing the search was unreasonable because it adversely and significantly affected a privacy or possessory interest. Such a showing is unlikely.

The Court seems to recognize that the mobility of automobiles provides a tenuous basis for delayed searches when the car is impounded and the occupants under arrest. It has explained in a post hoc manner that the automobile exception was based not only on the exigency of mobility, but also on the diminished expectation of privacy inherent in an automobile. Thus, it is somewhat futile to point out that Chambers and its progeny are not supported by Carroll's original justification for the exception, since mobility is no longer the sole basis for permitting the search. However, it is important to note that the Court expanded the exception before introduction of the notion of a lesser expectation of privacy in automobiles.

Recognizing that the expansion of the automobile exception resulted from a shift in fourth amendment analysis rather than

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82 In United States v. Johns, 105 S. Ct. 881, 887 (1985), the Court stated:

We do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest. . . . Respondents have not even alleged, much less proved, that the delay in the search of packages adversely affected legitimate interests protected by the Fourth Amendment. Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles.

84 Ross, 456 U.S. at 830–33 (Marshall, J., dissenting).
from a new judicial attitude toward automobile searches suggests that other exceptions will be similarly expanded. Although the end result in the automobile cases may not be a serious additional infringement of privacy interests, particularly if one accepts the now or earlier rationale, this is not the case for expansions in the search incident to arrest and the investigative detention contexts.

II. The Search Incident to Arrest Exception

The search incident to arrest exception to the warrant requirement allows police to search an arrestee, and the area within his immediate control, in order to protect against the use of a weapon and to prevent the possible destruction of evidence.85 Originally, the exception required that the search take place at the time of arrest.86 The Burger Court, however, has, for all practical purposes, read this element of contemporaneity out of the exception, first by expanding the exception to permit delayed searches in cases where special circumstances exist,87 and then by eliminating the special circumstances requirement altogether.88 Thus, the Court deems lawful many searches which seriously and unnecessarily infringe on the individual’s right to privacy.

Search incident to arrest is the oldest warrant exception.89 The Court first created the exception in dictum in Weeks v. United States,90 and attempted to develop an acceptable scope for the exception throughout the ensuing fifty years.91 Until 1969, the Court was unable to articulate a standard by which to

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85 See Chimel v. California, 395 U.S. at 762.
86 See infra note 104.
89 C. Whitebread, Criminal Procedure 133 (1980).
90 232 U.S. 383 (1914).
91 See Aaronson & Wallace, A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest, 64 Geo. L.J. 53, 58 (1975). In United States v. Rabinowitz, 339 U.S. 56 (1950), the Court upheld the search of an entire office where the defendant was arrested despite the fact that the police knew what they were looking for in advance and could have obtained a search warrant. Rabinowitz was the law on the subject until Chimel.
measure the appropriateness of official conduct in the search incident to arrest context. *Chimel v. California*, 92 decided that year, is uniformly cited as the origin of the present search incident to arrest exception. 93

In *Chimel*, police officers went to the defendant’s home with a warrant authorizing his arrest for a coin shop burglary. The officers handed Chimel the arrest warrant and requested permission to look around. Although the defendant denied permission and no search warrant had been issued, the officers informed the defendant that, “on the basis of the lawful arrest,” they would conduct a search. 94 The police searched the entire house, including the drawers in the master bedroom and the sewing room. The search, which lasted between forty-five minutes and one hour, resulted in the seizure of numerous items, primarily coins. 95 At trial, the items were admitted over the defendant’s objection, and the California appellate courts affirmed the conviction.

The Supreme Court, in addressing defendant’s challenge to the admission of the seized items, 96 reaffirmed the principle that “the presence of a search warrant serves a high function” and that “[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.” 97 Thus, whenever practicable, police are required to obtain a warrant, and the Court should not “excuse the absence of a search warrant without a showing by those who seek [the] exemption . . . that the exigencies of the situation made that course imperative.” 98

93 See United States v. Satterfield, 743 F.2d 827, 845 (11th Cir. 1984); United States v. Litman, 739 F.2d 137, 139 (4th Cir. 1984); United States v. McConney, 728 F.2d 1195, 1207 (9th Cir. 1984); Florida v. Royer, 460 U.S. 491, 500 (1983); New York v. Belton, 453 U.S. 454, 457 (1981) ("[T]he Court held in *Chimel* . . . that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area.").
94 *Chimel*, 395 U.S. at 754.
95 Id.
96 The defendant also challenged the validity of the arrest warrant. The Court assumed that the arrest was valid in order to address directly the warrantless search issue. Id. at 755.
97 Id. at 761 (citing McDonald v. United States, 335 U.S. 451 (1948)).
98 Id. at 761.
The Court rejected the government’s argument that the warrantless search should be evaluated in terms of whether it was merely “reasonable.”\textsuperscript{99} The Court explained:

[T]hat argument is founded on little more than a subjective view regarding acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point.\textsuperscript{100}

The Court then suggested that whether the search was permissible—and whether it was reasonable—depended upon whether the circumstances permitting the search incident exception justified its scope. Those circumstances were the possibility that the suspect might use a concealed weapon against the arresting officer and the possibility that the suspect might destroy evidence: “There is ample justification, . . . for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”\textsuperscript{101} The Court did not believe that the circumstances in \textit{Chimel} justified the search of the entire house. There was little chance that the defendant would either secure a weapon from, or destroy evidence in, closed or sealed areas in the room where the arrest was made or in other rooms in the house.\textsuperscript{102}

While \textit{Chimel} is most noteworthy for settling the controversy concerning the geographic scope of searches incident to arrest, it is clear that the Court considered its analysis equally applicable to the temporal scope of such searches. The Court applied the “straightforward” reasoning it had used in \textit{Preston v. United States} to hold the delayed search unconstitutional.\textsuperscript{103} The \textit{Preston} Court, after noting the justifications for the search incident exception, held that a delayed search of an impounded

\textsuperscript{99} \textit{Id.} at 764.
\textsuperscript{100} \textit{Id.} at 764–65.
\textsuperscript{101} \textit{Id.} at 762–63.
\textsuperscript{102} The Court did not, however, consider the presence of third persons. \textit{See} Aaronson \& Wallace, \textit{supra} note 91.
\textsuperscript{103} \textit{Chimel}, 395 U.S. at 764.
auto fell outside the scope of that exception because "these justifications are absent where a search is remote in time or place from the arrest."\textsuperscript{104} Because a delayed search was not at issue in Chimel, the Court did not directly address the temporal restrictions on searches incident to arrest. Yet the Court considered contemporaneity as well as geography to be crucial factors in determining the validity of searches incident to arrest. In virtually all of the geography cases, the Court included a temporal restriction as part of its rule.\textsuperscript{105} However, the first case to directly address the issue of a delayed search, \textit{United States v. Edwards},\textsuperscript{106} did not clearly impose a contemporaneity requirement.

\textit{Edwards} involved the warrantless seizure and search of a suspect's clothing more than ten hours after his arrest. Police arrested the suspect shortly after eleven p.m. on May 31, 1970, charging him with attempting to break into a post office. They took him to the local jail.\textsuperscript{107} Contemporaneously or shortly thereafter, police discovered that the attempted entry had been made through a wooden window, which had apparently been pried open. The prying left paint chips on the window sill and screen and the police believed that similar paint chips would be found on the suspect's clothing.\textsuperscript{108} The next morning, the police took the defendant's clothing and examined it. They discovered paint chips matching the samples taken from the window. Over the defendant's objection, the government introduced this evidence, and the defendant was convicted.\textsuperscript{109} The Sixth Circuit reversed the conviction, holding that, although the arrest was lawful and probable cause existed to believe that paint chips would be discovered on defendant's clothing, the absence of a warrant

\textsuperscript{104} Preston, 376 U.S. at 367.
\textsuperscript{105} See Vale v. Louisiana, 399 U.S. 30, 33 (1969) ("A search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.") (citations omitted); Stoner v. California, 376 U.S. 483, 486 (1963); Preston, 376 U.S. at 367; Marron v. United States, 275 U.S. 192, 199 (1927).
\textsuperscript{106} 415 U.S. 800 (1974). Although Preston and Stoner involved delayed searches, other factors were present. See Preston, 376 U.S. 364 (search of an automobile); Stoner, 376 U.S. 483 (decided primarily on the ground that the search was geographically attenuated).
\textsuperscript{107} 415 U.S. at 801.
\textsuperscript{108} Id. at 801–02.
\textsuperscript{109} Id. at 802.
made the search and seizure invalid under the fourth amendment.\textsuperscript{110}

The Supreme Court noted that the court of appeals had conceded that searches permitted on the spot at the time of arrest could lawfully be conducted upon arrival at the place of detention.\textsuperscript{111} The court of appeals nevertheless had held that a warrant was required when the search occurred after the administrative mechanics were complete and the prisoner was incarcerated.\textsuperscript{112} The Supreme Court rejected the claim that the administrative mechanics of arrest had, in this case, been completed. The Court stated:

[I]t seems to us that the normal processes incident to arrest and custody had not been completed when [defendant] was placed in his cell on the night of May 31. With or without probable cause, the authorities were entitled at that point not only to search [his] clothing but also to take it from him and keep it in official custody. There was testimony that this was the standard practice in this city. The police were also entitled to take from [him] any evidence of the crime in his immediate possession, including his clothing.\textsuperscript{113}

But a search on the night of May 31 was not at issue; the search took place the next morning. Recognizing this, the Court explained that "it was late at night; no substitute clothing was then available for Edwards to wear, and it would certainly have been unreasonable for the police to have stripped respondent of his clothing and left him exposed in his cell throughout the night."\textsuperscript{114}

This rationale is reminiscent of that used to uphold the delayed car search in \textit{Chambers}. There the Court first explained that an on-the-scene search would have been permissible, and then concluded that the delay in executing the search was reasonable because of exigent circumstances.

\textsuperscript{110} Id.
\textsuperscript{111} Id. at 803.
\textsuperscript{112} Id. at 804.
\textsuperscript{113} Id. at 804–05.
\textsuperscript{114} Id. at 805.
However, an additional justification provided by the Court is particularly troubling. Referring to the seizure and analysis of the clothing, the Court stated:

This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of . . . detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration.\textsuperscript{115}

However, this was not the defendant's claim. Rather, Edwards contended that what would have been permissible on May 31 was not done at that time and thus that the search on June 1 was unconstitutional.\textsuperscript{116} The Court's reliance on the fact that the police did no more than would have been permissible at the time of arrest is similar to the now or earlier rationale that led to the elimination of the contemporaneity requirement in the automobile cases.\textsuperscript{117} Moreover, the Court implied that it was unnecessary for the police to demonstrate exigent circumstances to justify not obtaining a warrant during the delay: "It [is] no answer to say that the police could have obtained a search warrant, for the Court [has] held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was."\textsuperscript{118}

This approach entails a radical shift in the standard for determining whether a search is permissible under the fourth amendment. In \textit{Chimel}, the Court rejected a general reasonableness standard and expressly required a warrant whenever practicable. The \textit{Edwards} analysis represents another example of enthroning the exception into the rule. Rather than examining the conduct to see whether the particular requirements of the exception have been met, the Court takes the exception as given and evaluates the conduct in question in terms of its reasonableness in light of the exception.

\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 802.
\textsuperscript{117} \textit{See supra} text accompanying notes 80–82.
\textsuperscript{118} 415 U.S. at 807.
The vitality of the contemporaneity requirement after Edwards was uncertain. It is possible to read Edwards narrowly as retaining the requirement of contemporaneity and permitting delayed searches only when exigent circumstances make the delay reasonable; it can also be read broadly as eliminating the contemporaneity requirement in the search incident to arrest context.\textsuperscript{119} The Court's subsequent decision in United States v. Chadwick\textsuperscript{120} supports a narrow reading of Edwards.

In Chadwick narcotics agents arrested suspects immediately after they had placed a 200-pound, locked footlocker into the trunk of a car. The agents had probable cause to believe the footlocker contained marijuana.\textsuperscript{121} At the time of the arrest, two of the suspects were standing next to the open trunk containing the footlocker; the other was in the car. Incident to the arrest, the agents searched the suspects and seized the footlocker. They took the suspects, the footlocker, and the car to the station. An hour and a half after the arrest, the agents, with neither the suspects' consent nor a warrant,\textsuperscript{122} opened the footlocker and discovered large quantities of marijuana.

The government argued that "the Constitution permits the warrantless search of any property in the possession of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime."\textsuperscript{123} With this argument, the government apparently was not contending that the search was lawful as a search incident to arrest under Chimel, because the search incident exception requires neither that the arrest take place in public nor that there be probable cause to believe the property searched contains contraband or evidence of crime. Presumably, the government

\textsuperscript{119} The opinion's citation with apparent approval to United States v. Caruso, 358 F.2d 184 (2d Cir. 1966), cert. denied, 385 U.S. 862 (1966), a case which did not involve any special circumstances, suggests that a broad reading is appropriate. The sparse commentary on Edwards generally cautions against a broad reading and suggests that the case applies only in certain situations, such as those involving prisoners' clothing or in which exigent circumstances justify the delay. See W. LaFave, Criminal Procedure 147 (1985); C. Whitebread, Criminal Procedure 189 (1980); Project, supra note 4, at 311. But see Note, supra note 78, at 238 ("The Edwards decision renders the Chimel requirement of contemporaneity ... virtually impotent ... ").

\textsuperscript{120} 433 U.S. 1 (1977).

\textsuperscript{121} Id. at 5.

\textsuperscript{122} Id. at 4.

\textsuperscript{123} Id. at 14.
could have argued simply that the search of the footlocker was valid as a search incident to arrest, because prior to Chadwick courts\textsuperscript{124} did not pay close attention to whether in the particular case there was no realistic opportunity for the arrestee to gain access to the interior of the container. However, perhaps because it is obvious that the interior of a 200-pound, double-locked footlocker is not an area “from within which [a suspect] might gain possession of a weapon or destructible evidence,” both lower courts had held the footlocker was not within the immediate control of the arrestees,\textsuperscript{125} and the government conceded that fact in the Supreme Court.\textsuperscript{126} Thus, the government seemed to be asking the Court to expand the search incident to arrest exception to include containers not within the suspect’s immediate control, yet within the suspect’s possession, when probable cause exists to believe they contain contraband or evidence of crime.

The Court treated the government’s argument as if it were contending that the search, although delayed, was valid as a search incident to arrest. The Court explained that warrantless luggage searches “cannot be justified as incident to . . . an arrest either if the ‘search is remote in time or place from the arrest or no exigency exists.’”\textsuperscript{127} Thus, in this case, where “the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody,” the search could not “be viewed as incidental to the arrest”\textsuperscript{128} and was unconstitutional.

The precise meaning of Chadwick is unclear. The Court’s language suggests that contemporaneity was still important in the search incident to arrest context; the delay in executing the search may have led the Court to decide that it could not be viewed as incidental to the arrest.\textsuperscript{129} This reading implies that Edwards should be read narrowly, permitting delayed searches

\textsuperscript{124} LaFave and Israel, supra note 8, at 150.
\textsuperscript{126} Chadwick, 433 U.S. at 14.
\textsuperscript{127} Id. at 15.
\textsuperscript{128} Id.
\textsuperscript{129} Id.; see also 2 W. LaFave, Search and Seizure at 353 (Supp. 1986) (Court in Chadwick “latched on to Preston rule”).
only in limited circumstances. On the other hand, the Court in Chadwick may only have been accepting the government’s concession that the footlocker was not within the immediate control of the suspects, a concession that disqualified the search as one incident to arrest, under Chimel. Under this rationale, the search would have been impermissible even if it had taken place at the time of the arrest.\textsuperscript{130} If the basis for the opinion was a strict reading of the “within the immediate control” standard of Chimel, Chadwick says little about the permissibility of delaying otherwise valid searches. This leaves the door open for a broad reading of Edwards, which would permit delayed searches of any items that could have been searched lawfully at the time of arrest.

Even the members of the Court were unable to agree on the meaning of Chadwick. Justice Brennan, in his concurrence, claimed that the search would not have been lawful if it had taken place at the time of the arrest.\textsuperscript{131} Justice Blackmun’s dissent, however, argued that the delay in undertaking the search was the crucial factor in the majority’s decision to find the search unconstitutional.\textsuperscript{132}

In Blackmun’s view, the Court was simply holding that containers seized at the time of arrest, pursuant to the search incident to arrest exception, could not be searched at a later time. This holding concerned Blackmun because, as he understood it, the Court had already rejected a contemporaneity requirement under both the search incident exception and the automobile exception.\textsuperscript{133} In his view, the Court had missed an opportunity “to apply the rationale of recent decisions and develop a clear doctrine concerning the proper consequences of custodial arrest.”\textsuperscript{134} Justice Blackmun favored a rule permitting a delayed, warrantless search of any movable property in pos-

\textsuperscript{130} Such a reading of Chimel was probably a more limited one than lower courts had given the case. It certainly was not an illogical reading. See 2 W. LaFave, Search and Seizure at 353.

\textsuperscript{131} 433 U.S. at 17 n.2 (Brennan, J., concurring) (“[T]he footlocker in this case hardly was ‘within [respondents’] immediate control’—construing that phrase to mean the area from within which [they] might gain possession of a weapon or destructible evidence.”) (quoting Chimel, 395 U.S. at 763).

\textsuperscript{132} Id. at 22–23 (Blackmun, J., dissenting).

\textsuperscript{133} Id. at 18–19.

\textsuperscript{134} Id. at 17–18.
session of a suspect properly arrested in a public place. According to Blackmun, the additional infringement of the suspect's privacy under these circumstances—when compared with the deprivation already imposed by the arrest—could "be fairly regarded as incidental."\textsuperscript{135} Such a rule would avoid the dilemma that the lower courts might otherwise face in deciding which cases were more like Edwards and which were more like Chadwick.\textsuperscript{136}

The imprecision of the Court's opinion in Chadwick predictably led to confusion among the lower courts. Although some interpreted Chadwick as limiting Chimel and the permissibility of contemporaneous searches of containers,\textsuperscript{137} more often Chadwick was read as a limit on Edwards and on delayed searches.\textsuperscript{138} Justice Blackmun's prediction proved correct; when a delayed search was at issue, the lower courts struggled to decide whether the case was more like Edwards or Chadwick.

\textit{United States v. Schleis}\textsuperscript{139} exemplifies the confusion. The police in this case performed a pat down of the suspect which

\begin{footnotesize}
\textsuperscript{135} \textit{Id.} at 20. Note that Justice Blackmun seems to be changing the emphasis to whether the conduct is "incidental" in the sense of marginally more intrusive rather than "incident" in the sense of following closely in time.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} United States v. Calandrella, 605 F.2d 236, 249 (6th Cir. 1979), \textit{cert. denied}, 444 U.S. 991 (1979):

Although the briefcase was apparently within the immediate area around the defendant at the time he was arrested, \textit{see Chimel} . . . we believe that once the agents had seized the item and reduced it to their exclusive control there was no further danger that the defendant would secure therefrom either a weapon or an instrumentality of escape, or would destroy evidence contained in the briefcase. \textit{United States v. Chadwick} . . . .

\textit{See also} People v. Dalton, 24 Cal. 3d 850, 857, 598 F.2d 467, 471, 157 Cal. Rptr. 497, 501 (1979) ("The boxes were not accessible to appellant or his passenger. At all times after the discovery of the closed boxes, they were under the exclusive control of the officers. Therefore, under Chadwick the search cannot be characterized as incident to the arrest. . . . ").

\textsuperscript{138} \textit{See}, e.g., United States v. Neumann, 585 F.2d 355, 359 (8th Cir. 1978) ("[W]e did not read Chadwick as representing a departure from such a longstanding approach . . . . But we found the Chadwick warrant requirement had been triggered in Schleis, and in the circumstances of that case the search . . . could not be justified as incident to a valid arrest, nor was it permissible under United States v. Edwards . . . ") (citations omitted); \textit{see also} United States v. Ziller, 623 F.2d 562 (9th Cir. 1980); United States v. Sonntag, 684 F.2d 781 (11th Cir. 1982); United States v. Baldwin, 644 F.2d 381 (5th Cir. 1981); United States v. Pasaro, 624 F.2d 938 (9th Cir. 1980).

\textsuperscript{139} 543 F.2d 59 (8th Cir. 1976), \textit{vacated and remanded for further consideration in light of} United States v. Chadwick, 433 U.S. 903 (1977).
\end{footnotesize}
revealed marijuana and led to his arrest. The police took the suspect to the station before completing the search because a crowd was gathering at the scene. At the station, a search of the suspect’s clothing uncovered a medicine bottle containing cocaine. The police then forced open defendant’s briefcase and discovered a large quantity of cocaine. The trial court denied defendant’s motion to suppress, and on appeal, the Eighth Circuit affirmed the trial court’s ruling. The court cited Edwards for the proposition that

for a reasonable time (over ten hours in Edwards) and to a reasonable extent the effects in the possession of the accused at the time of arrest which were subject to search and seizure at such time and place [can] lawfully be searched and seized without a warrant at the stationhouse.

Noting that “[t]he police in the instant case were faced with a gathering crowd,” the court decided that the delayed search met the “reasonable time and reasonable extent tests approved in Edwards.”

After the Chadwick decision, the Supreme Court granted certiorari in Schleis, vacated the Eighth Circuit decision, and remanded “for further consideration in light of United States v. Chadwick.” On remand, the court of appeals struggled to decide whether the delayed search of a briefcase was more like the delayed search of clothing upheld in Edwards or more like the delayed footlocker search held unconstitutional in Chadwick. The Eighth Circuit recognized that some language in Edwards suggested that any items that could be searched at the

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140 Id. at 60–61.
141 Id. at 61.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id. at 62.
147 Id.
time of arrest could be searched at a later time. The court nevertheless concluded that Chadwick "clearly refrained from extending Edwards beyond searches of an arrestee's clothing" and limited delayed searches to the "effects still in the defendant's possession at the place of detention, such as the defendant's clothing." The search, the court held, was unconstitutional. Thus, in the Eighth Circuit's view, Chadwick laid to rest any suggestion that Edwards eliminated the requirement of contemporaneity in the search incident to arrest context. Although the Eighth Circuit was not alone in its reading of Chadwick and Edwards, the Supreme Court's citation to Edwards in a recent case upholding the delayed search of a container casts doubt on whether Chadwick in fact limited Edwards.

In United States v. Johns, the Court considered the validity of a delayed search of several containers seized from the back of a pickup truck. A search of the containers on the scene, contemporaneous to the arrest, or even shortly thereafter at the station, clearly would have been permissible under the Court's recent decision in United States v. Ross. Ross had extended the automobile exception by allowing searches of containers found in automobiles. However, in Johns, the Court upheld a search that took place a full three days after the seizure, explaining that "there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure," and that it was unwilling to fashion a separate rule for containers. The Court observed that "the practical effect" of holding the delayed search unreasonable would be "to direct police officers to search immediately all containers that they discover in the course of a vehicle search." Such a require-

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150 Id.
151 See United States v. Fleming, 677 F.2d 602, 607 (7th Cir. 1982) (upholding search but noting that "[i]t is surely possible for a Chimel search to be undertaken too long after the arrest and too far from the arrestee's person. That is the lesson of Chadwick."); United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981).
153 Id.
155 Id. at 817-824.
156 105 S. Ct. at 884.
157 Id. at 885 (citing Texas v. White, 423 U.S. 67, 68 (1975); Chambers v. Maroney, 399 U.S. at 52).
158 105 S. Ct. at 887.
ment, the Court concluded, "would be of little benefit to the person whose property is searched."\(^{159}\)

This holding alone is not problematic.\(^{160}\) Although it invokes the now or earlier rationale and applies a general standard of reasonableness, it seems the inevitable result after Ross included containers within the automobile exception, which already permitted delayed searches. The Court's approach, however, is troubling because it appears to rely on United States v. Edwards for support.\(^{161}\) In Edwards the Court allowed the delayed search because exigent circumstances justified the delay; however, there were no such circumstances in Johns, and the government made no attempt to justify the delay.\(^{162}\) If Edwards could be used to justify a search on a now or earlier rationale in a case without exigent circumstances, the Court could use it to justify any delayed search that follows an opportunity for a lawful on-the-scene search.\(^{163}\) Thus, one has to question the accuracy of the limited interpretation of Edwards that several circuit courts believe is suggested by Chadwick.

The Johns Court ruled that, since the case involved an automobile search, Chadwick was "simply inapposite."\(^{164}\) It is true that Chadwick was inapposite to justify an immediate on-the-scene search of packages.\(^{165}\) Yet Chadwick should have been considered when deciding whether a search that would have been lawful at the scene is valid if it occurs after a delay.\(^{166}\) Perhaps the Court believed that, in light of Ross, the validity of a delayed search of a container taken from a vehicle was purely an automobile exception issue and that there was no need to consider non-automobile cases. However, the Court did cite Edwards. Evidently the Court accepted the limited reading of Chadwick, that an immediate, on-the-scene search was not justified because the footlocker, not within the immediate control

\(^{159}\) Id.

\(^{160}\) See Texas v. White, 423 U.S. 67 (1975); supra text accompanying notes 73–76.

\(^{161}\) Johns, 105 S. Ct. at 887.

\(^{162}\) Id. at 885–87.

\(^{163}\) For example, Edwards could be used to justify the delayed search in Schleis, 582 F.2d 1166.

\(^{164}\) Johns, 105 S. Ct. at 885.

\(^{165}\) Ross controlled this issue.

\(^{166}\) Arguably, that was precisely the situation in Chadwick. See supra text accompanying notes 128–31.
of the suspect, was not within the scope of the search incident to arrest exception. If that is the case, *Chadwick* means much less than subsequent decisions have suggested, and is not a limit on *Edwards*.

In light of the Court’s view of fourth amendment reasonableness, it is likely that *Johns* signals the death of the contemporaneity requirement in the search incident to arrest context. Although *Edwards* and *Chadwick* taken together appear to justify a case-by-case analysis of delayed container searches, the Court is unlikely to follow such a course of action.\(^{167}\) The Court is more apt to follow a bright-line approach, using a now or earlier rationale to permit all delayed searches that follow an opportunity for a valid on-the-scene search.\(^{168}\)

While the now or earlier rationale is difficult to counter in the automobile exception context, delayed searches incident to arrest should be distinguished from delayed auto searches because the former result in more serious intrusions upon the suspect’s right to privacy. Unlike a delayed auto search, a delayed search of the suspect’s person does not simply substitute for an earlier, on-the-scene search. Owing to safety concerns, a suspect will almost invariably be searched at the time of arrest, and probably again at the station as part of the booking process.\(^{169}\) Thus, a delayed search of the suspect will be at least the second and often the third time the suspect has been subjected to such a search.\(^{170}\) The delayed search of a suspect’s person does not replace an earlier intrusion, but is an additional search and an additional infringement of the suspect’s privacy. The now or earlier rationale, based on the perception that in a delayed search context the suspect has simply been subjected to the same infringement of his privacy to which he would have been subjected had the police searched earlier, cannot justify a delayed search of the suspect himself who has already been

\(^{167}\) The Court has eschewed this approach in other contexts. For example, in *New York v. Belton*, the Court held that the entire interior of an automobile could be searched upon the arrest of the occupant. 433 U.S. 454 (1981).

\(^{168}\) There is language in *Edwards* to support such a rationale. *Cf. Schleis*, 582 F.2d at 1171 ("[t]he . . . language in *Edwards* suggests than any item that could be searched at the time of the arrest could be searched at any time after the arrest.") (emphasis in original).

\(^{169}\) See, *e.g.*, *Edwards*, 415 U.S. at 804 (suspect was searched twice).

\(^{170}\) See, *e.g.*, *id.* at 802–4.
searched at the scene. Moreover, in the case of automobiles, once the car has been searched there no longer remains any substantial expectation of privacy in the vehicle. Thus, additional searches of the car do not entail significant additional infringements of the suspect’s privacy interest.

The Court in *Edwards* recognized this possible assault on the suspect’s dignity by explaining that:

> Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints. This type of conduct “must still be tested by the Fourth Amendment prescription against unreasonable searches and seizures.” We thus have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which might “violate the dictates of reason either because of their number or their manner of perpetration.” 171

The difficulty with judging delayed searches by such a standard, however, is that while a single delayed search following an on-the-scene search represents an additional privacy infringement, it probably will not “violate the dictates of reason either because of [its] number or [its] manner of perpetration.” However, the fact that the delayed search is an additional infringement does eliminate the underlying basis of the now or earlier rationale. Nevertheless, the Court has shifted the burden to the suspect to show not merely that a delayed search results in an additional infringement of his privacy interest, but also that it “violates the dictates of reason.”

The Court’s decision to free the police from the narrow constraints of the warrant clause, imposing instead the less confining reins of a reasonableness standard, deprives citizens of fourth amendment protections and subjects them to serious infringements of privacy. Similar and perhaps more serious results are evident in the investigative detention context.

171 *Id.* at 808 n.9 (citing Charles v. United States, 278 F.2d 386, 389 (9th Cir. 1960), *cert. denied*, 344 U.S. 831 (1960)).
III. Investigative Detentions

The investigative detention exception to the warrant requirement, unlike the other exceptions, does not require exigent circumstances in order to justify actions that would normally require a warrant. Instead, it exempts an entire class of police conduct from the warrant clause and dispenses with the probable cause requirement as well.\textsuperscript{172} Nevertheless, as the Court held in \textit{Terry v. Ohio}, because the scope of the intrusion must be "strictly tied to and justified by" the circumstances that warranted its initiation,\textsuperscript{173} the intrusion must be confined to a brief seizure and a limited pat-down search of the suspect's outer clothing for weapons.\textsuperscript{174} The Burger Court, however, is expanding the exception to include a wide range of police conduct far more intrusive than a brief seizure and limited search of outer clothing.\textsuperscript{175}

The first Supreme Court treatment of the constitutionality of investigative detentions focused on the conduct of the officer performing the investigation. In \textit{Terry v. Ohio}, the Court reviewed the actions of an experienced detective in apprehending suspects he believed were about to engage in an armed robbery.\textsuperscript{176} The officer testified that, after observing the suspects' "elaborately casual and oft-repeated reconnaissance of [a particular] store window," he suspected the two men of "casing a job, a stick-up," and he feared that they might have had a gun.\textsuperscript{177} The officer approached them, identified himself, and asked their names. When the suspects "mumbled something" in response, the officer grabbed Terry, one of the men, and patted down the outside of his clothing.\textsuperscript{178} The officer felt a pistol in the pocket of Terry's overcoat, and recovered the gun by removing the overcoat. Terry was arrested and charged with carrying a concealed weapon.\textsuperscript{179} The government introduced the gun at trial.

\textsuperscript{172} \textit{See} Terry v. Ohio, 392 U.S. 1, 24–27 (1969).
\textsuperscript{173} \textit{Id.} at 19, 20–22; \textit{see} Florida v. Royer, 460 U.S. 491, 500 (1983).
\textsuperscript{174} Terry, 392 U.S. at 23–27.
\textsuperscript{175} \textit{See} United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985).
\textsuperscript{176} 392 U.S. at 6.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 7.
\textsuperscript{179} Id.
On review of Terry’s conviction, the Supreme Court held that a “stop and frisk” is subject to fourth amendment scrutiny.\textsuperscript{180} Although recognizing that the conduct in question differs in degree from what typically constitutes a search and seizure, the Court ruled that “there can be no question . . . that [the officer] ‘seized’ petitioner and subjected him to a ‘search’ when he took hold of him and patted down the outer surfaces of his clothing.”\textsuperscript{181} Nevertheless, the Court had little difficulty deciding that the warrant clause, requiring probable cause and prior judicial approval, did not apply.\textsuperscript{182} Instead, the officer’s conduct was tested under the fourth amendment’s general proscription against unreasonable searches and seizures.\textsuperscript{183} In reaching this conclusion, however, the Court emphasized that it was not “re-treat[ing] from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.”\textsuperscript{184} Moreover, the Court had already noted that the scope of any search “must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”\textsuperscript{185}

In assessing the reasonableness of the stop and frisk, the Court applied the test of \textit{Camara v. Municipal Court},\textsuperscript{186} and balanced the governmental interest allegedly justifying the intrusion against the privacy interest infringed by the search.\textsuperscript{187} In \textit{Terry} the governmental interest was effective crime prevention and detection. Protecting this interest requires that, in appropriate circumstances, a police officer be permitted to approach a citizen for the purpose of investigating possible criminal behavior without probable cause to make an arrest.\textsuperscript{188} The major issue, in the Court’s view, was the propriety of the officer’s invasion of Terry’s personal privacy by searching him for weap-

\textsuperscript{180} \textit{Id.} at 19.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 20.
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 19.
\textsuperscript{186} 387 U.S. 523 (1967).
\textsuperscript{187} \textit{Id.} at 534–35, 536–37.
\textsuperscript{188} \textit{Terry}, 392 U.S. at 22.
The additional governmental interest of a police officer taking steps to protect himself against the possibility that the person with whom he is dealing is armed with a weapon supported this action. The Court, although recognizing that even a limited search of outer clothing is a severe intrusion of an individual's privacy, explained that it was much less intrusive than the search permitted when probable cause exists. The Court found such a search reasonable as long as it is narrowly drawn to serve the government's valid interest in protection of the officer.

The Court, focusing almost exclusively on the search issue in *Terry*, did not place an express time limit on the duration of a permissible seizure under this new exception. Nevertheless, a requirement that the seizure be brief was certainly implicit in the holding; the limited nature of the seizure was the basis for distinguishing it from an arrest and thus requiring less than probable cause. The Court stressed that "[t]he Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." Several times the Court emphasized that the scope of the search and seizure was strictly confined by the special circumstances that justified the intrusion upon individual freedom. Even the government argued only that "the police should be allowed to 'stop' a person and detain him briefly for questioning." In short, the entire basis for exempting the "stop" from the warrant requirement was that it was "a wholly different kind of intrusion" from an arrest, which is "inevitably accompanied by future interference with the individual's freedom of movement." Thus, a detention based upon less than probable cause, and lengthy enough to resemble an arrest, simply could not be justified under the Court's decision in *Terry*.

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189 *Id.* at 23.
190 *Id.* at 27.
191 *Id.* at 19 n.16 & 32–33 (Harlan, J., concurring); LaFave, "Street Encounters and the Constitution: *Terry*, Sibron, Peters, and Beyond", 67 Mich. L. Rev. 40, 63–64 (1968).
192 *Terry*, 392 U.S. at 20.
193 *Id.* at 28–29.
194 *Id.* at 10 (emphasis added).
195 *Id.* at 26.
196 *Id.* at 26–27; see also Dunaway v. New York, 442 U.S. 200, 212–13 (1979); W. LaFave, Criminal Procedure 177 (1985).
The Supreme Court made this brevity requirement explicit in *United States v. Place*,\(^1\) holding unlawful due to its length a ninety-minute detention of an air traveler’s luggage. Place aroused the suspicions of law enforcement officials in Miami, where officials had questioned him briefly at the airport. Although Place consented to a search of his luggage,\(^2\) the agents in Miami did not undertake the search because the bags had been checked and the plane was departing. The officials notified DEA agents in New York of their suspicions.\(^3\) Upon his arrival at LaGuardia Airport, the New York agents questioned Place and asked for consent to search his bags. This time he refused. Nevertheless, the agents took Place’s bags, provided Place with a number were he could contact them, and transported the luggage to Kennedy Airport for a sniff test by a trained narcotics dog.\(^4\) The dog reacted positively to one bag.\(^5\) Ninety minutes had elapsed since the seizure of the bags at LaGuardia.\(^6\) Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they obtained a warrant, opened the bags, and discovered cocaine. Place was indicted for possession with intent to distribute. At trial, he challenged the seizure and subsequent search of his luggage.

The government, recognizing that probable cause did not exist prior to the positive reaction by the narcotics dog, asked the Supreme Court to apply the reasoning of *Terry*.\(^7\) The Court agreed that *Terry* was applicable and concluded that *Terry* authorized brief seizures of travelers’ luggage even when such seizures were not supported by probable cause, but only by a reasonable suspicion, based on articulable and objective facts, that the luggage contains contraband or evidence of a crime.\(^8\) The Court felt that, “[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspi-

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2. *Id.* at 698.
3. *Id.*
4. *Id.* at 699.
5. *Id.*
6. *Id.*
7. *Id.* at 702.
8. *Id.* at 703.
cion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels.

Thus, the issue before the Court was whether the seizure of Place’s luggage was sufficiently brief to bring it within the rule. The government argued that, because any dispossession of personality was a complete dispossession, the ninety minute detention was permissible if the initial seizure was justified. The Court rejected this contention, pointing out that a brief, on-the-spot inquiry, even if it involved complete police control of the luggage while it was exposed to a trained narcotics dog, differed from a seizure of the luggage for purposes of transporting it to another location. Holding that “the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause,” the Court found that “[t]he length of the detention of respondent’s luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.” The Court emphasized that although seizures longer than momentary ones had been recognized as reasonable, brevity was an important factor in determining the legality of the seizure.

The Court did not identify an outside time limit for such seizures, but it did explain that one factor to consider is whether the police diligently pursued their investigation. The Court found that, in this case, police should have been better prepared to make a brief seizure since they had known when Place would arrive and anticipated stopping him.

Place thus involved a careful application of the brevity requirement of Terry, as mandated by the rule that the scope of any intrusion exempted from the warrant requirement be strictly tied to, and justified by, the circumstances that render its initia-

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205 Id. at 704 (emphasis added) (footnote omitted).
206 Id. at 705.
207 Id. at 706.
208 Id. at 709.
209 Id.
211 Place, 462 U.S. at 709.
212 Id.
tion permissible. In *Place* there simply were no exigent circumstances to justify a prolonged seizure. *Place* may represent the high-water mark of the brevity requirement for investigative detentions. Less than two years later, the Court sanctioned a longer than momentary detention of a suspect on the basis of the holding in *Terry*.\(^{213}\) Nevertheless, the Court did not abandon *Place*'s approach of carefully applying *Terry*'s brevity requirement—exigent circumstances justified the extended scope.

The seizure in *United States v. Sharpe* occurred when a federal agent and a patrolman, in separate cars, attempted to make an "investigative stop" of a suspicious pickup truck travelling in tandem with a car.\(^{214}\) The patrolman pulled alongside the car and signalled for the driver to stop. As the cars were pulling over, the pickup pulled between them and continued down the highway. While the agent stayed with the car, the patrolman chased the truck and stopped it approximately one-half mile down the highway. He performed a pat down search of the driver, asked for identification, and waited for the agent to arrive.\(^{215}\) The agent, after obtaining additional assistance from the local police, arrived at the scene approximately fifteen minutes later.\(^{216}\) He examined the suspect's identification papers, informed the suspect that he thought the truck was loaded with marijuana, and twice sought permission to search the truck.\(^{217}\) After the suspect refused permission, the agent stepped on the rear of the truck to determine if it was overloaded, and, putting his nose to the rear window of the camper shell, smelled marijuana.\(^{218}\) At this point, without again seeking permission, the agent opened the camper shell of the truck and discovered a large quantity of marijuana.\(^{219}\)

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\(^{214}\) *Id.* at 1570–72. Agents had observed that the truck was riding low in the rear and was not bouncing over bumps, indicating that it was heavily loaded. Further, a quilted material covered the windows of the camper. When the marked police car began following the vehicles, they took evasive actions and started speeding. The Court noted that these facts gave rise to a reasonable suspicion, allowing the agents to stop the Pontiac and the truck.
\(^{215}\) *Id.* at 1571.
\(^{216}\) *Id.*
\(^{217}\) *Id.*
\(^{218}\) *Id.* at 1572.
\(^{219}\) *Id.*
The Fourth Circuit reversed the trial court conviction; although the agent had sufficient basis for stopping the defendants, the investigative stops were deemed unlawful because they "failed to meet the requirement of brevity."\textsuperscript{220} The Supreme Court, reviewing the case in light of \textit{Terry}, criticized the appellate court for holding the search unlawful due to its length without examining the reasonableness of the police conduct.\textsuperscript{221} The Court viewed the Fourth Circuit's decision as imposing a per se rule against detentions lasting twenty minutes, a result which the Court described as "clearly and fundamentally at odds with our approach in this area."\textsuperscript{222} The Court explained that in order to test the legality of a \textit{Terry} stop, a court must examine whether the police acted diligently or whether they unnecessarily prolonged the detention. The Court admitted that this approach might cause some difficult line-drawing problems and conceded that "if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop,"\textsuperscript{223} but refused to impose rigid time limitations on \textit{Terry} stops.\textsuperscript{224}

The Court had little difficulty finding that the agent in the case before it had pursued his investigation in a diligent and reasonable manner. The fact that the agent had to stay with the driver of the car until local police arrived caused most of the delay in executing the seizure.\textsuperscript{225} Once the agent arrived at the location of the truck, he proceeded expeditiously.\textsuperscript{226} Moreover, the Court noted,

\begin{quote}
[t]he delay in this case was attributable almost entirely to the evasive actions of [the truck driver], who sought to elude the police as [the other defendant] moved his
\end{quote}

\begin{footnotes}
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 1574, 1576.
\textsuperscript{222} Id. at 1575. The Court pointed out that in \textit{Place} it had expressly declined to adopt a "hard and fast time limit for permissible \textit{Terry} stops." Similarly, in \textit{Florida v. Royer}, a plurality of the Court opined that "an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop." 460 U.S. at 500.
\textsuperscript{223} 105 S. Ct. at 1575.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 1576.
\textsuperscript{226} Id.
\end{footnotes}
Pontiac to the side of the road. Except for [those] maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place.\textsuperscript{227}

Although \textit{Sharpe} may be troubling because it was the first time a prolonged detention was upheld under the \textit{Terry} doctrine, the result was not a significant departure from the requirement of brevity.\textsuperscript{228} However, less than four months later, the Court applied the rationale without careful attention to \textit{Sharpe}'s unique circumstances and upheld a sixteen hour detention on less than probable cause and without exigent circumstances justifying the delay.

In \textit{United States v. Montoya de Hernandez},\textsuperscript{229} customs inspectors detained the defendant upon her arrival in Los Angeles on a flight originating in Bogota, Colombia, because they suspected her of attempting to smuggle narcotics hidden in her alimentary canal.\textsuperscript{230} A female inspector conducted a patdown and a strip search of the defendant. While the search revealed no drugs, it increased the inspectors' suspicion.\textsuperscript{231} The inspector in charge gave her the options of returning to Bogota on the next flight, agreeing to an x-ray, or remaining in detention until she produced a monitored bowel movement. The defendant chose the first option. While arrangements for a return flight were being made, officials placed the defendant under observation in a customs office. They told her that, if she had a bowel

\textsuperscript{227} \textit{Id.}

\textsuperscript{228} Justice Marshall, although concurring in the result in \textit{Sharpe}, found fault with the majority opinion's potential for prompting a significant departure from the brevity requirement. Justice Marshall agreed that because the prolongation of the detention resulted from the suspect's own actions, the detention was valid despite its length. However, Marshall felt that the majority's decision was not closely enough tied to that fact. In Marshall's view, the majority opinion would sanction a prolonged search as long as a majority of the Court perceived the governmental interest to be sufficiently important and the conduct of the police to be reasonable. Marshall believed that \textit{Terry} could not justify more than a brief detention (defined as a few minutes in length) no matter how important the government interest or how reasonable the police conduct if there was no probable cause. For Marshall, brevity was the threshold question in \textit{Terry} and not simply a factor to be considered; it could not be outweighed by reasonable police conduct. \textit{Id.} at 1577–84 (Marshall, J., concurring).

\textsuperscript{229} 105 S. Ct. 3304 (1985).

\textsuperscript{230} \textit{Id.} at 3307.

\textsuperscript{231} \textit{Id.} ("The search revealed no contraband but the inspector noticed that respondent was wearing two pair of elastic underpants with a paper towel lining the crotch area.").
movement, she would have to use a wastebasket so that officials could inspect her stool for balloons or capsules containing narcotics.\textsuperscript{232} Officials were unsuccessful in their attempts to place the defendant on a return flight.\textsuperscript{233} They then informed the defendant that she would be detained until she either consented to an x-ray or produced a bowel movement.\textsuperscript{234} The next day, after sixteen hours during which the defendant had complied with neither of these conditions, customs officials finally sought a court order authorizing an x-ray and a rectal examination.\textsuperscript{235} Eight hours later, a magistrate issued the order authorizing these procedures. When the rectal examination was performed, the physician found a balloon containing a foreign substance. The defendant was arrested.\textsuperscript{236}

In \textit{Montoya} the defendant challenged the constitutionality of the detention and the subsequent search.\textsuperscript{237} The Supreme Court first addressed the issue of the level of suspicion that is required to justify a seizure of an incoming traveler for purposes other than a routine border search.\textsuperscript{238} The majority opinion, written by Justice Rehnquist, adopted the “reasonable suspicion” standard that it had applied in other contexts.\textsuperscript{239} The Court justified this standard on two grounds. First, the seizure occurred at the international border, where the expectation of privacy is lessened and where the balance between the interests of the government and the privacy right of the individual is struck more favorably to the government.\textsuperscript{240} Second, the case involved smuggling of illicit narcotics, a “veritable national crisis in law enforcement.”\textsuperscript{241} Nonetheless, the fact that the search was supported by a reasonable suspicion,\textsuperscript{242} and thus justified at its inception, did not necessarily validate the entire detention. The Court thus inquired whether the detention of the respondent...
was reasonably related in scope to the circumstances which justified it.

Citing Sharpe and Place to support the proposition that the Court had "consistently rejected hard and fast time limits" on Terry-type stops, the majority found that in the case of an alimentary canal drug smuggler, a sixteen hour detention is not unreasonable:

The rudimentary knowledge of the human body which judges possess in common with the rest of mankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief Terry-type stops. It presents few, if any external signs; a quick frisk will not do, nor will even a strip search.244

In the majority’s view, the customs inspectors had only two alternatives: subject the suspect to an x-ray or wait for a bowel movement. Once the suspect declined consent to an x-ray, the inspectors were faced with the choice of either awaiting a bowel movement or turning the suspect loose. The choice of the former procedure, the Court found, was permissible. Although this choice resulted in a substantial delay, due in part to the "heroic" efforts of the suspect not to produce a bowel movement, the delay did not render the detention unreasonable: "Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect’s evasive actions . . . and that principle applies here as well."248

Justifying the prolonged detention in Montoya as "attributable to the suspect’s evasive actions" is ludicrous, and cannot be supported by the decision in United States v. Sharpe. In employing this rationale, Justice Rehnquist failed to recognize, or chose to ignore, a fundamental distinction between the character of the suspect’s actions in each case. In Sharpe, the sus-

243 Id. at 3312.
244 Id.
245 Id.
246 Id.
247 Id. at 3308.
248 Id. at 3312.
pect attempted to flee as the stop occurred. The suspect had no right to take this action, and it removed him from the only person who could diligently pursue the investigation with sufficient expertise.\textsuperscript{249} In effect, the suspect delayed the start of the investigation that was the permissible object of the stop. Once the investigation began, it concluded quickly.\textsuperscript{250} In contrast, in \textit{Montoya} the defendant’s refusal to consent to an x-ray or to produce a monitored bowel movement were actions that she had every right to take.\textsuperscript{251} These actions did not delay the start of the investigation, but merely frustrated the purposes of it. The officials, after taking every investigative step that was available without judicial approval, still did not have probable cause to arrest the defendant. At that point, the suspect should have been released or a warrant should have been sought.

The majority in \textit{Montoya} completely ignored the “diligence of police” prong of \textit{Sharpe}. It did so in favor of a general standard of reasonableness that did not require the police to utilize the least intrusive means to accomplish their purpose. Justice Rehnquist, analyzing the scope of the detention,\textsuperscript{252} ignored the eminently practical alternative of detaining the suspect briefly while seeking a warrant. This alternative would seem to be the required course if \textit{Sharpe} is to be taken seriously.\textsuperscript{253} Suggesting such an alternative does leave one open to the charge of “unrealistic second-guessing,”\textsuperscript{254} but perhaps no more so than Justice Rehnquist’s “guess” that the inspectors “no doubt expected that respondent, having recently disembarked from a 10-hour direct flight with a full and stiff abdomen, would produce a bowel movement without extended delay.”\textsuperscript{255}

Nevertheless, the Court dismissed the possibility that the existence of such an alternative made the search unlawful: “The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to

\begin{footnotesize}
\begin{enumerate}
\item \textit{Sharpe}, 105 S. Ct. at 1576.
\item \textit{Id}.
\item The majority expressly declined to decide whether an involuntary x-ray could be administered on mere reasonable suspicion. 105 S. Ct. at 3311 n.4.
\item \textit{Id} at 3311.
\item “In assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.” \textit{Sharpe}, 105 S. Ct. at 1575.
\item \textit{Id} at 1576.
\item \textit{Montoya}, 105 S. Ct. at 3312.
\end{enumerate}
\end{footnotesize}
recognize or to pursue it." The Court once again favored a
general standard of reasonableness, and ignored the requirement
that the scope of any intrusion permitted by a warrant exception
be strictly tied to, and justified by, the circumstances which
warrant creation of the exception. Yet even accepting this gen-
eral standard, it seems unreasonable for the inspectors not to
have recognized and pursued the option of obtaining a warrant;
although it was about midnight when the detention began, this
was precisely the time that the warrant was procured the fol-
lowing day. The outcome of this case demonstrates the pre-
science of the Chimel Court's warning that evaluating a search
simply in terms of whether it is subjectively reasonable will
bring fourth amendment protections to the evaporation point.

This single case, of course, does not mean that the brevity
requirement has been eliminated entirely from the investiga-
tive detention exception. Nevertheless, there certainly is cause for
concern when a doctrine that previously had been used to sup-
port only momentary stops is suddenly invoked to uphold the
seizure and incommunicado detention of a person for more than
sixteen hours.

While the special border location may distinguish Montoya,
several aspects of the case do suggest that the Court is elimi-
nating the brevity requirement. First, although the case involved
an international border, the fourth amendment was held to gov-
ern the official conduct involved, leading the Court to invoke
a balancing test similar to that applied in Terry. The border
location simply tipped the scales heavily in favor of the govern-
ment. Second, in reaching the conclusion that the govern-
mental interests outweighed the intrusion on personal security,
the Court relied heavily on the Sharpe reasoning that when

256 Id. at 3311.
257 Id. at 3308.
259 Justice Brennan noted in his dissent that "[i]t is simply staggering that the Court
suggests that Terry would even begin to sanction a 27-hour criminal-investigative de-
tention, even one occurring at the border." Montoya, 105 S. Ct. at 3320. Officials sought
a court order 16 hours after they detained the suspect. The magistrate issued the order
eight hours later, and presumably the examination of the suspect took three more hours;
this would explain Justice Brennan's 27 hour figure.
260 105 S. Ct. at at 3308-09.
261 Id. at 3311-12.
262 Id. at 3310.
delays are attributable to the suspect’s evasive actions, longer delays satisfy the reasonableness requirement of the fourth amendment. If the Court continues to apply this rationale to other situations which involve warrantless searches prior to arrest in the manner it did in Montoya, the brevity requirement will likely disappear.

The consequences of eliminating the brevity requirement for investigative detentions are far more serious than the consequences of eliminating the contemporaneity requirement for automobile searches and searches incident to arrest. In the investigative detention context, unlike the others, eliminating the brevity requirement does not merely change the timing of police conduct; instead, it converts the right to make a brief, investigative stop into the power to make a de facto arrest on less than probable cause. Police will stop citizens where reasonable suspicion justifies the stop at its initiation. If a citizen does not “cooperate,” or if the police have difficulty detecting criminal activity, they will detain that citizen longer on the theory that he, and not the government, is responsible for the delay in the investigation. The result is a de facto arrest on less than probable cause and a serious infringement of the “inestimable right of personal security.” The Supreme Court in Terry recognized that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”

This scenario of investigative detentions lasting to the point of becoming de facto arrests is contrary to the holding of Terry. Although it is possible that the Court will restrict Mont-

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263 Id. at 3312.
264 See supra text accompanying notes 118–120, 167–171.
265 Moreover, the Court seems willing to lower the standard of reasonable suspicion, which will result in even more frequent “stops” of citizens. See Sharpe, 105 S. Ct. at 1588 n.9 (Brennan, J., dissenting).
266 Of course, detection of criminal activity may prove difficult because no criminal activity is taking place. Nevertheless, the Court’s decision in Montoya seems to justify prolonging the detention unless the citizen is willing to subject himself to a more intrusive search that proves the police wrong. See Montoya, 105 S. Ct. 3304.
267 Terry, 392 U.S. at 8–9.
268 Id. at 9 (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).
269 Florida v. Royer, 460 U.S. at 500.
toya to border-related cases, this seems unlikely in light of the Court’s extension of the “special circumstances cases” rule in the areas of automobile searches and searches incident to arrest.

Justice Brennan has warned that the scope of a Terry-type investigative stop, and any attendant search, must be extremely limited or the Terry exception “would threaten to swallow the general rule that fourth amendment seizures are ‘reasonable’ only if based on probable cause.”270 Justice Brennan has also made clear that he does not believe the Court has diligently adhered to such limits.271 Similarly, Justice Blackmun has expressed concern over “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.”272 This conversion seems virtually complete in Mon-toya.273 Moreover, it is not difficult to imagine a majority of the Burger Court routinely finding prolonged detention of suspected criminals, particularly those suspected of transporting narcotics, to be “reasonable” in light of the perceived national crisis of narcotics smuggling.274 In this regard, Justice McReynolds’ dissent in Carroll v. United States, a case in which an earlier crisis in national law enforcement—smuggling of bootleg alcohol—was used to justify the creation of the automobile exception, provides a stern warning:

The damnable character of the “bootlegger’s” business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. “To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . .

270 Sharpe, 105 S. Ct. at 1592 (Brennan, J., dissenting) (citing Dunaway, 442 U.S. at 212–13).
271 Montoya, 105 S. Ct. at 3319–20 (Brennan, J., dissenting); Sharpe, 105 S. Ct. at 1593 (Brennan, J., dissenting).
272 Place, 462 U.S. at 721 (Blackmun, J., concurring).
273 Justice Brennan noted in his dissent that the case represented “the most extraordinary example to date of the Court’s studied effort to employ the Terry decision as a means of converting the Fourth Amendment into a general ‘reasonableness’ balancing process—a process ‘in which the judicial thumb apparently will be planted firmly on the law-enforcement side of the scales.’” Montoya, 105 S. Ct. at 3320 (citing Sharpe, 105 S. Ct. at 1593 (Brennan, J., dissenting)).
274 Montoya, 105 S. Ct. at 3309.
in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.” 275

IV. Conclusion

It is no secret that the Burger Court has substantially weakened fourth amendment protections by creating new exceptions to the amendment’s prohibitions against certain governmental conduct. However, the Court also has weakened, perhaps to an even greater extent, the protections of the fourth amendment in more subtle ways. One such subtle weakening is the elimination of the contemporaneity and brevity requirements in the automobile search, the search incident to arrest, and the investigative detention exceptions to the warrant requirement. The elimination of these requirements results from a shift in the Court’s approach to evaluating warrantless searches and seizures.

The Court no longer adheres to the maxim that a search or seizure is per se unreasonable unless it is supported by a warrant or falls within a jealously and carefully drawn exception to the warrant requirement. Instead, the Court simply evaluates police conduct under a general notion of reasonableness. Through this approach, the Court has broadened the scope of the exceptions to such an extent that they are no longer limited to the exigent circumstances that justified their creation. Police conduct need only be considered “reasonable” for it to be upheld, even if that conduct bears little relation to the rationale that justified the exception.

Although it may seem surprising that the Burger Court has retained the exclusionary rule despite some Justices’ open hostility to it, perhaps the Court has simply chosen a different approach to accomplish its ultimate object. Rather than eliminating the exclusionary rule, the Burger Court has simply diluted the protections of the fourth amendment to such an extent that very little remains to be excluded. The Court is allowing warrantless searches and seizures based not on exigent circum-

stances but rather on the majority’s increasingly permissive view of “reasonableness.” The protections of the fourth amendment should not vary with the changing, subjective notions of a majority of the Justices. The better approach, previously followed by the Court, requires the presence of a warrant to meet the standard of reasonableness. Such an approach is mandated by the warrant clause of the fourth amendment.\textsuperscript{276} Moreover, this approach prevents the definition of reasonableness from shifting radically with the membership of the Court. Admittedly, even under such a standard, fourth amendment protections will vary according to the Court’s determination of what constitutes exigent circumstances, but at least circumstances displaying some necessity for dispensing with the warrant requirement must be demonstrated. At present, the government need not and does not even attempt to justify its actions as necessary;\textsuperscript{277} it simply relies on the Court to view the conduct as reasonable.

Unless the Supreme Court returns to the warrant as the standard of reasonableness and undertakes a careful analysis of whether warrantless conduct is justified due to exigent circumstances, the rights of citizens will remain subject to a standardless notion of reasonableness held by a majority of the Court.

\textsuperscript{277} See \textit{Johns}, 105 S. Ct. 881.