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## Search and Seizure of Containers Found in Automobiles: The Supreme Court Struggles for a "Bright Line" Rule

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# COMMENTS

## SEARCH AND SEIZURE OF CONTAINERS FOUND IN AUTOMOBILES: THE SUPREME COURT STRUGGLES FOR A "BRIGHT LINE" RULE

### I. INTRODUCTION

Two recent decisions by the United States Supreme Court have added a new dimension to the law of search and seizure of automobiles and containers found within motor vehicles.\* The plurality opinion in *Robbins v. California*<sup>1</sup> held that a closed opaque container found in the luggage compartment<sup>2</sup> of a station wagon during the course of a lawful vehicle search could not be seized without a warrant.<sup>3</sup> However, in *New York v. Belton*,<sup>4</sup> a majority held that a police officer, incident to a lawful custodial arrest of an occupant of an automobile, may search the passenger compartment of that automobile and examine contents of any containers,<sup>5</sup> open or closed, found therein.

The law governing search and seizure of automobiles and the containers found within them is extremely confusing,<sup>6</sup> and several Justices have expressed great dissatisfaction with the lack of clarity in the Court's deci-

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\* The Supreme Court's most recent decision in *United States v. Ross* is discussed in the Addendum to this article.

1. 101 S. Ct. 2841 (1981). Justice Stewart wrote the plurality opinion, joined by Justices Brennan, White and Marshall. The Chief Justice and Justice Powell concurred in the judgment. Justices Blackmun, Rehnquist and Stevens dissented, each writing separate opinions.

2. While the evidence in *Robbins* was seized from the luggage compartment, the holding appears sufficiently broad to apply to any opaque closed container, regardless of its location in the vehicle. *Id.* at 2847.

3. *Id.*

4. 101 S. Ct. 2860 (1981). Justice Stewart also delivered the opinion of the Court in this companion case to *Robbins* and was joined by the Chief Justice and Justices Blackmun, Powell and Rehnquist. Justice Rehnquist also filed a concurring statement. Justice Stevens wrote a separate opinion, concurring in the judgment. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justice White also wrote a dissenting opinion in which Justice Marshall joined.

5. *Id.* at 2864. The *Belton* decision applies to containers as well as to any other container-like object located within the passenger compartment. A container is any object capable of holding another object and includes glove compartments, consoles, luggage, boxes, bags, clothing, etc. The court's holding applies only to the interior of the passenger compartment and does not extend to the trunk. *Id.* at 2864 n.4.

6. One commentator notes that "[f]ew areas of search and seizure law are more confused than automobile stops and searches." 1 W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 11.1 (2d ed. 1981).

sions in this area.<sup>7</sup> While the search and seizure of containers found inside automobiles involves considerations separate from the doctrines governing general automobile searches and seizures,<sup>8</sup> it would be impossible to discuss adequately the "container" cases without examining the requirements for warrantless searches of vehicles in general. Consequently, this comment will begin by briefly examining the extent to which automobiles are protected from unreasonable searches and seizures under the fourth amendment.<sup>9</sup>

The Supreme Court has held that automobiles are protected under the fourth amendment as "effects."<sup>10</sup> This statement is somewhat misleading, however, since the Court's decisions have also stated that it is not the place or thing being searched that produces fourth amendment protection. Rather, the test is whether the challenger to a search has a "reasonable expectation of privacy" in the area or item being searched.<sup>11</sup> The Supreme Court has concluded that there is a lesser, or diminished, expectation of privacy in an automobile as compared with one's home or office.<sup>12</sup>

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7. Justice Rehnquist, in addressing the issue of warrantless searches and seizures of automobiles, stated: "This branch of the law is something less than a seamless web." *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973). Compare *Cardwell v. Lewis*, 417 U.S. 583 (1974) (plurality opinion) with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion). See also *Arkansas v. Sanders*, 442 U.S. 753, 768 (1979) (Blackmun, J., dissenting). All cases in this area reflect a deeply divided Court.

8. The Supreme Court has distinguished searches and seizures of closed containers found in lawfully stopped automobiles from the general search of a vehicle's interior. See, e.g., *Robbins v. California*, 101 S. Ct. 2841 (1981) (closed opaque container found by police during lawful search of vehicle may not be searched without warrant); *Arkansas v. Sanders*, 442 U.S. 753 (1979) (warrantless search of personal luggage in lawfully stopped vehicle not valid under automobile exception); *United States v. Chadwick*, 433 U.S. 1 (1977) (footlocker search not justified under either automobile exception or search incident to arrest exception).

9. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

10. *United States v. Chadwick*, 433 U.S. 1, 12 (1977); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971).

11. *Katz v. United States*, 389 U.S. 347, 351-53 (1967). In *Katz* the Supreme Court abandoned the "protected places" approach, which almost always limited fourth amendment protection to private property owned by the individual who was the subject of the search. Instead, the Court emphasized a subjective concept of privacy expressed in the now famous phrase "the Fourth Amendment protects people, not places." *Id.* at 351. Thus, determining whether an individual is entitled to fourth amendment protection in a particular situation now depends upon whether he is entitled to a reasonable expectation of privacy in the area searched.

12. *Robbins v. California*, 101 S. Ct. 2841, 2845 (1981); *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); *Cady v. Dombrowski*, 413 U.S. 433, 439-40 (1973); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970); *Cooper v. California*, 386 U.S. 58, 59 (1967); *Carroll v. United*

In *Katz v. United States*,<sup>13</sup> the Court read into the fourth amendment the so-called "warrant requirement," stating that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."<sup>14</sup> Evidence seized by law enforcement officers without a warrant and not within an exception to the warrant requirement is, therefore, illegally obtained and, as such, is inadmissible at trial.<sup>15</sup>

Some commentators view the Supreme Court's relaxation of fourth amendment protection in automobile search cases as a response to the stringency of the warrant requirement and the exclusionary rule in criminal prosecutions.<sup>16</sup> Whether this is the case or not, the Court appears to be searching for a "bright line" rule—pragmatic guidelines that law enforcement officers and courts can apply in determining the need for a warrant.<sup>17</sup> This comment discusses the Supreme Court's search for a

States, 267 U.S. 132, 153-54 (1925).

13. 389 U.S. 347 (1967).

14. *Id.* at 357. Whether the exceptions to the warrant requirement are "few" is debatable. One author has catalogued more than 15 established exceptions to the warrant requirement. See Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L.C. & P.S. 198, 199 (1977).

The generally recognized exceptions to the fourth amendment's warrant requirement are:

- (1) search incident to lawful arrest, *Chimel v. California*, 395 U.S. 752 (1969);
- (2) hot pursuit; *Warden v. Hayden*, 387 U.S. 294 (1967);
- (3) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968);
- (4) plain view, *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971);
- (5) consent searches, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); and
- (6) automobile searches, *Carroll v. United States*, 267 U.S. 132 (1925) (mobility plus probable cause); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory).

15. *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

16. The debate over construction of the fourth amendment continues. Prior to *Katz*, the Supreme Court held that a search reasonable under the "totality of circumstances" was constitutional, regardless of whether a warrant was first obtained. *United States v. Rabino-witz*, 339 U.S. 56, 63-66 (1950), *overruled*, *Chimel v. California*, 395 U.S. 752, 768 (1969). Justice Rehnquist has criticized the Court's emphasis of the "warrant requirement" over the "reasonableness" of the search, claiming that the Court has "'stood the fourth amendment on its head' from a historical viewpoint." *Robbins v. California*, 101 S. Ct. 2841, 2852 (1981) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971)) (Rehnquist, J., dissenting).

In *Robbins*, Rehnquist also revived Justice Harlan's attack on the exclusionary rule. Citing Harlan's criticism in *Coolidge v. New Hampshire*, 403 U.S. 443, 490-91 (1971), Rehnquist urged an end to the rule. 101 S. Ct. at 2851-52. One author's explanation for the broadening of the automobile exception is the Court's desire to mitigate the "devastating social effect of the exclusionary rule." Note, *The Automobile Exception to the Warrant Requirement: Speeding Away From the Fourth Amendment*, 82 W. VA. L. REV. 637, 638 (1980).

17. Both the *Robbins* and *Belton* opinions refer to a "bright line" rule in automobile search cases. See, e.g., *Robbins v. California*, 101 S. Ct. 2841, 2847 n.1, 2848 (1981) (Powell, J., concurring); *New York v. Belton*, 101 S. Ct. 2860, 2866 (1981) (Brennan, J., dissenting). Justice Stewart revealed the need for a "bright line" rule when he observed:

"bright line" rule by briefly examining the law governing automobile searches and the various exceptions to the warrant requirement which permit warrantless vehicle searches. The remainder of the comment will focus on searches of containers found in automobiles during the course of a lawful search.

## II. THE LAW GOVERNING SEARCHES AND SEIZURES OF AUTOMOBILES

The United States Supreme Court first considered the issues surrounding a warrantless automobile search in the prohibition-era case of *Carroll v. United States*.<sup>18</sup> The Court upheld the validity of a warrantless vehicle search conducted by federal prohibition agents, who suspected the occupants of transporting illegal liquor in violation of the National Prohibition Act.<sup>19</sup> Chief Justice Taft, writing for the majority,<sup>20</sup> noted the time-honored distinction<sup>21</sup> between searches of dwellings and searches of mobile vehicles:

[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.<sup>22</sup>

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Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

*New York v. Belton*, 101 S. Ct. at 2863 (quoting LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141).

18. 267 U.S. 132 (1925).

19. National Prohibition Act, ch. 85, § 26, 41 Stat. 315 (1919) (repealed in 1933 by U.S. CONST. amend. XXI). The defendants were apparently caught while making a liquor run between Detroit and Grand Rapids. Detroit, not far from the Canadian border, was a well known center for illegal liquor traffic. The liquor was hidden behind the upholstery of the seats. 267 U.S. at 134-36.

20. Justice McReynolds, joined by Justice Sutherland, dissented, arguing that the defendants should have been arrested prior to the warrantless vehicle search. 267 U.S. at 163-75.

21. The distinction between searches of dwellings and searches of automobiles has found its way into many of the Court's post-*Carroll* decisions. See, e.g., *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979); *Cardwell v. Lewis*, 417 U.S. 583, 589-91 (1974); *Cady v. Dombrowski*, 413 U.S. 433, 439-40 (1973); *Chambers v. Maroney*, 399 U.S. 42, 48-51 (1970); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968); *Cooper v. California*, 386 U.S. 58, 59 (1967).

22. 267 U.S. at 153.

The distinction appeared to be based upon the vehicle's mobility, an exigent circumstance not associated with searches of dwellings.

Thus, the "automobile exception" to the warrant requirement was established. The Court held that a warrantless vehicle search was permissible where the government could show: (1) that probable cause for the search existed;<sup>23</sup> (2) that the vehicle was actually mobile and could have been "quickly moved out of the locality or jurisdiction in which the warrant must be sought;"<sup>24</sup> and (3) that it was not "reasonably practicable" to obtain a warrant under the circumstances.<sup>25</sup> A plain reading of the *Carroll* opinion suggests that the "automobile exception" to the warrant requirement was a narrow one.

No modification of the *Carroll* doctrine occurred until 1970, when the Court decided *Chambers v. Maroney*.<sup>26</sup> In *Chambers*, the Court upheld the validity of a warrantless vehicle search and took the "automobile exception" on a detour from the route charted in *Carroll*. Justice White, writing for the majority,<sup>27</sup> departed substantially from the three-fold test enunciated in *Carroll* by eliminating the requirement that procurement of a warrant be impracticable.<sup>28</sup> In *Chambers*, the vehicle and its occu-

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23. *Id.* at 149.

24. *Id.* at 153.

25. "In cases where the securing of a warrant is reasonably practicable, it must be used . . ." *Id.* at 156.

26. 399 U.S. 42 (1970). Prior to *Chambers*, the Supreme Court affirmed the holding in *Carroll* without modification three times. See *Brinegar v. United States*, 338 U.S. 160 (1949); *Scher v. United States*, 305 U.S. 251 (1938); and *Husty v. United States*, 282 U.S. 694 (1931). However, prior to the Court's ruling in *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest limited to area within immediate control of arrestee), it seemed possible for an officer to search a car incident to an arrest of its occupant because he was authorized to search the area where the arrest was made. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947). But see *Preston v. United States*, 376 U.S. 364 (1964) (search of vehicle at place and time other than at arrest too remote and not incident to arrest). Notwithstanding *Chimel's* limitations on the scope of a vehicle search incident to the arrest of its occupants, an officer can now search the passenger compartment of an automobile as incident to the custodial arrest of its occupants, even though the occupants are removed from the vehicle when the search is conducted. See *New York v. Belton*, 101 S. Ct. 2860 (1981). See also notes 133-51 *infra* and accompanying text.

27. Justice Blackmun did not participate in the decision; Justice Harlan dissented in part and concurred in part. Justice Stewart wrote a brief concurring opinion. 399 U.S. at 54-55.

28. Writing for the majority, Justice White declared:

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

pants were in police custody prior to the warrantless search of the automobile,<sup>29</sup> and there were no mobility problems or exigent circumstances to make obtaining a warrant impracticable. The holding in *Chambers* seems merely to require probable cause to justify a warrantless vehicle search. The Court found that the vehicle's attribute of "mobility" persists, even when the vehicle is taken into custody at the police station.<sup>30</sup> This "inherent mobility"<sup>31</sup> of the vehicle, coupled with the probable cause to believe it contained contraband or fruits of crime, was deemed sufficient to eliminate the warrant requirement.

During the Term after *Chambers* was decided, the Supreme Court once again considered the requirements for a lawful vehicle search. In *Coolidge v. New Hampshire*<sup>32</sup> the Court invalidated a post-arrest search of an automobile parked in a private driveway where the police had probable cause to search it for weeks prior to the actual search.<sup>33</sup> Following the defendant's arrest, police towed the car from the accused's private driveway to the police station where it was searched two days later.<sup>34</sup> In a plurality opinion written by Justice Stewart,<sup>35</sup> the Court seemed to reaffirm the *Carroll* requirement of "actual mobility," emphasizing that a particularized showing of exigent circumstances was necessary to justify the warrantless vehicle search. The majority concluded that there were no such

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*Id.* at 51-52.

29. The occupants were arrested and their vehicle was taken to the police station, where it was searched without a warrant. Evidence of a recent robbery was recovered. *Id.* at 44.

30. Since the police had probable cause to search the vehicle at the time it was stopped and the occupants arrested, and because the vehicle was "mobile" at the time of the stop, both the probable cause and mobility factors were still present when the vehicle and occupants were in custody at the police station. *Id.* at 52.

31. "Inherent mobility," as the Court in *Chambers* applied the concept, meant the vehicle's capability of being moved, even though the vehicle was in police custody and not actually mobile. *See* note 30 *supra*.

32. 403 U.S. 443 (1971) (plurality opinion).

33. In *Coolidge*, the police had obtained both an arrest warrant and a search warrant for the vehicle, but these were subsequently declared invalid because they had been issued by the State Attorney General, rather than by a neutral and detached magistrate. *Id.* at 449. As a result, the government was forced to argue the case as an exception to the warrant requirement.

34. *Id.* at 447-48.

35. Justices Brennan, Douglas, Marshall and Harlan joined Justice Stewart in Part I of the opinion, declaring the warrants invalid because they were not issued by a neutral and detached magistrate. The same Justices also agreed in Part IIA that the search could not be justified as incident to arrest. Justices Stewart, Douglas, Brennan and Marshall agreed in part IIB that the search was not valid under the "automobile exception" because the mobility factor was missing and it was practicable for the police to obtain a warrant prior to the search. In Part IIC, the same four Justices held that the "plain view" doctrine did not apply. Justice Harlan joined them once again in Part IID, holding that no exigent circumstances exist where the police planned the vehicle search well in advance. Chief Justice Burger and Justices Black, Blackmun and White all filed separate dissenting opinions in this fragmented decision.

exigent circumstances present in *Coolidge*.<sup>36</sup> Thus, it appeared that the Court would insist on "actual mobility" pursuant to *Carroll* rather than the "inherent mobility" standard announced in *Chambers* when determining the validity of warrantless vehicle searches.<sup>37</sup> Also, *Coolidge* seemed to reemphasize the *Carroll* mandate that a warrant should be obtained where reasonably practicable.<sup>38</sup>

The revival of the *Carroll* automobile exception was ephemeral, however, in light of the Court's decision in *Cardwell v. Lewis*<sup>39</sup> three years later. In *Cardwell*, the Court held that no violation of the defendant's fourth amendment rights resulted from a warrantless seizure of his automobile and the examination of its exterior at a police impoundment lot following the vehicle's removal from a public parking lot.<sup>40</sup> The plurality opinion, written by Justice Blackmun,<sup>41</sup> noted the lower degree of fourth amendment protection afforded automobiles as compared to dwellings due to the exigent circumstances associated with mobile vehicles,<sup>42</sup> adding that the lesser expectation of privacy in motor vehicles as opposed to dwellings permits less stringent warrant requirements in an automobile search case.<sup>43</sup> The search of the exterior of the car, according to the Court, was never actually a search at all within the meaning of the fourth amendment. Even if it had been such a search, there was no infringement of defendant's expectation of privacy because the exterior of a vehicle was exposed to public view.<sup>44</sup> The seizure of the car was also valid and no warrant was necessary because the defendant's family might have been able to remove the vehicle before a warrant could have been obtained.<sup>45</sup>

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36. 403 U.S. at 462.

37. Justice Stewart's concurring opinion rejected the concept of "inherent mobility" as a justification for a warrantless search based on probable cause:

In this case, it is, of course, true that even though *Coolidge* was in jail, his wife was miles away in the company of two plainclothesmen, and the *Coolidge* property was under the guard of two other officers, the automobile was in a literal sense "mobile."

A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.

*Id.* at 461 n.18.

38. *Id.* at 462.

39. 417 U.S. 583 (1974) (plurality opinion).

40. *Id.* at 585.

41. Justice Blackmun was joined by the Chief Justice and Justices White and Rehnquist.

*Id.*

42. *Id.* at 589-90.

43. The Court stated:

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

*Id.* at 590.

44. *Id.* at 591-92.

45. The Court referred to evidence presented in the lower court that *Lewis* had asked one of his attorneys to see that a family member retrieved the car. The threat to police custody



Whether "actual mobility" was present in *Cardwell* is debatable.<sup>46</sup> The case could have been easily decided solely on the basis of the "plain view" doctrine<sup>47</sup> but the plurality in *Cardwell* chose to treat it as an "automobile exception" case, broadening the exception by reviving the *Chambers* standards.<sup>48</sup>

The *Chambers-Cardwell* position marks the Supreme Court's shift from a probable cause plus exigent circumstances test (mobility plus impracticability of obtaining a warrant) to a probable cause plus a "lesser expectation of privacy" test.<sup>49</sup> Under the latter test, the concept of "mobility" is nothing more than a permanent attribute of the vehicle, regardless of the factual circumstances under which the car is searched. Not only is this shift a major distortion of the *Carroll* doctrine, but it is also inconsistent with the Court's well settled principle that an exigency must be present at the time of the search in order to justify an exception to the warrant requirement.<sup>50</sup>

The Court has also enlarged law enforcement powers by validating benign purpose or non-investigatory warrantless searches of automobiles where probable cause to search the vehicle is absent. In *Cady v. Dombrowski*,<sup>51</sup> in a five-to-four decision<sup>52</sup> the Court upheld a non-investigatory warrantless search of a vehicle in police custody. The defendant in that case was arrested for drunk driving after having a single car accident

of the vehicle was fleeting, however, since the attorney gave the car keys to the police in order to avoid a physical confrontation. *Id.* at 595.

46. Justice Stewart, joined by Justices Douglas, Brennan and Marshall, dissenting, argued that the *Carroll* doctrine required a *moving* vehicle to justify a warrantless search, and that the "automobile exception" did not apply to the search and seizure of a vehicle securely within police custody. The dissent indicated that both the defendant, Lewis, and the keys to his car were secured by the police well before the car was seized from the public lot and there was no likelihood that Lewis or anyone else could have meddled with the vehicle during the time necessary to obtain a warrant. *Id.* at 598 (Stewart, J., dissenting).

47. The *Cardwell* vehicle was parked on a public lot where seizure would not require an entry onto private property as was required in *Coolidge*. *Id.* at 593. In contrast to the extensive search of the interior involved in *Coolidge*, the search of the *Cardwell* vehicle was limited to an exterior examination of a tire tread and the taking of paint samples. *Id.* at 593 n.9.

48. The plurality opinion relied on the principle enunciated in *Chambers* that there was no difference between temporary seizure of a vehicle for the time necessary to obtain a warrant and an immediate warrantless search on the spot because the "mobility" of the vehicle remained, even when the vehicle and its occupant were under police custody. *Id.* at 593-94.

49. *Accord*, Note, *supra* note 16, at 649; Comment, *The Automobile Exception: A Contradiction in Fourth Amendment Principles*, 17 SAN DIEGO L. REV. 933, 944-45 (1980).

50. *Coolidge v. New Hampshire*, 403 U.S. at 461 n.18; *Chambers v. Maroney*, 399 U.S. at 61-63 (Harlan, J., concurring in part, dissenting in part).

51. 413 U.S. 433 (1973).

52. Justice Rehnquist wrote the opinion, joined by the Chief Justice and Justices White, Blackmun and Powell. Justice Brennan dissented, joined by Justices Douglas, Stewart and Marshall. *Id.* at 434.

in his vehicle. The police learned that the defendant was an off-duty Chicago policeman who was required to keep a service revolver with him at all times. After a cursory search of the defendant's person and the car, the pistol could not be found. The defendant's disabled vehicle was subsequently towed to a private garage where an officer searched the locked trunk in an attempt to find the missing revolver. Instead, he discovered evidence linking the defendant to a murder. The Court held the warrantless search lawful on the grounds that the police were simply exercising a "community caretaking function" by removing the disabled vehicle from the accident scene,<sup>53</sup> and that the search of the trunk to remove the revolver was standard police procedure "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands."<sup>54</sup> The majority in *Dombrowski* rejected the possibility that the "general public safety" concern was a pretext for a full scale investigative search<sup>55</sup> and characterized the search as non-criminal in nature.<sup>56</sup>

Benign purpose searches, which are characterized by an absence of probable cause and are purportedly non-investigatory, also include automobile inventory searches. Police typically inventory the contents of an automobile once it has been impounded.<sup>57</sup> In *South Dakota v. Oppen-*

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53. The majority determined that automobiles are less protected than dwellings or homes under the fourth amendment because of the substantial non-criminal contacts that police have with automobiles:

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

*Id.* at 441. In addition, the opinion stated that police activities such as accident investigations are usually non-criminal in nature so that the police are normally executing "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* In this instance the defendant, *Dombrowski*, because of his intoxicated state, was not able to make arrangements to have the vehicle towed. *Id.* at 443.

54. *Id.*

55. The investigating officer had no knowledge that a crime had been committed at the time the search was conducted. *Id.* at 447.

56. The search was purportedly occasioned by the officers' concern that the defendant's service revolver could have been stolen from the vehicle while it was at the private garage. See notes 53-54 *supra* and accompanying text.

57. Police take vehicles into custody for various reasons. *E.g.*, *Cooper v. California*, 386 U.S. 58 (1967) (warrantless search of a vehicle legitimately seized pursuant to forfeiture statute upheld). State statutes authorize vehicle forfeiture under numerous circumstances. See, *e.g.*, VA. CODE ANN. §§ 4-53 to -56 (Repl. Vol. 1979) (transportation of illicit alcoholic beverages); §§ 46.1-191.2, -351.1 (Repl. Vol. 1980 & Cum. Supp. 1981) (racing on the highway); § 18.2-249 (Repl. Vol. 1975) (narcotics); and § 18.2-110 (Repl. Vol. 1975) (transportation of stolen goods). Other statutes may authorize temporary impoundment in a number of situations. See, *e.g.*, VA. CODE ANN. §§ 46.1-2 (unattended, abandoned or immobile vehicles), -2.1 (vehicles obstructing traffic), -3.02 (outstanding parking violations), -3.1 (vehicles involved in accidents), -248 (vehicle stopped on the highway) (Repl. Vol. 1980). However, VA. CODE ANN. § 46.1-3 (Repl. Vol. 1980) permits local authorities to regulate impoundment

man,<sup>58</sup> the Supreme Court upheld a warrantless inventory search of an impounded vehicle conducted pursuant to a standard police department policy. Chief Justice Burger, writing for the majority,<sup>59</sup> based the decision on the inherent mobility of automobiles and the lower expectation of privacy recognized with regard to the contents of an automobile.<sup>60</sup> The Court explained that police and citizens are constantly engaged in non-criminal contacts with respect to their automobiles and, as in *Dombrowski*, the police exercise "community caretaking functions" over automobiles by taking them into custody.<sup>61</sup> The inventory search, according to the majority, serves three important purposes: 1) the protection of the vehicle owner's property while the vehicle remains in police custody; 2) the protection of police from liability arising out of claims of lost or stolen property; and 3) the protection of police from potential danger.<sup>62</sup>

The *Opperman* decision leaves unsettled two important issues regarding inventory searches. First, the decision does not specify under what conditions an automobile may be legitimately impounded. While the source of a police officer's authority may be found in state laws and local ordinances,<sup>63</sup> it is not clear whether the policeman can or should impound a vehicle for minor traffic violations when the driver is present, does not consent to the impounding of his vehicle, and is capable of providing for alternative disposition of the vehicle. Second, *Opperman* does not define the permissible scope of the inventory search. While the Court approved state court decisions holding that inventories may include a search of the glove compartment,<sup>64</sup> it did not indicate whether a distinction would be made between locked and unlocked glove compartments.<sup>65</sup> Nor did the Court deal with the problem of closed and locked containers found within the vehicle which could be removed and secured without further examination by the police.<sup>66</sup> The lower courts predictably are at variance on all

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under local ordinances and standard police procedures. *See also* Annot., 48 A.L.R.3d 537 (1973).

58. 428 U.S. 364 (1976).

59. Justices Blackmun, Powell, Rehnquist and Stevens joined in the opinion of Chief Justice Burger. Justice Powell also filed a concurring opinion. Justice Marshall wrote the dissent, joined by Justices Brennan and Stewart. Justice White filed a brief separate dissent.

60. 428 U.S. at 367.

61. *Id.* at 368 (citing *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973)). *See* note 53 *supra* and accompanying text.

62. 428 U.S. at 369.

63. *See* note 57 *supra*.

64. 428 U.S. at 372.

65. Arguably, when the vehicle's glove compartment is locked, the owner is exhibiting a greater expectation of privacy with respect to its contents than if he had left the compartment unlocked.

66. Justice Marshall believed that the majority opinion in *Opperman* did not authorize the further examination of closed containers which could be safely removed and secured. 428 U.S. at 388 n.6 (Marshall, J., dissenting).

three issues.<sup>67</sup> The better and more flexible approach to resolving these problems is to balance the interests served by the inventory search against the citizen's expectancy of privacy in the contents of his automobile.<sup>68</sup>

### III. SEARCHES OF CONTAINERS FOUND WITHIN AUTOMOBILES

The Supreme Court confronted the issue of the police officer's authority to open and search closed containers lawfully seized from an automobile in *United States v. Chadwick*.<sup>69</sup> In a seven-to-two decision,<sup>70</sup> the Court invalidated a warrantless footlocker search which produced large quantities of marijuana.

In *Chadwick*, federal narcotics agents had advance notice that two train passengers would arrive in Boston with a footlocker suspected to contain marijuana.<sup>71</sup> The Boston agents set up surveillance at the train station and ultimately confronted the drug couriers after the footlocker was loaded into the trunk of Chadwick's car outside the train station. While the trunk was still open but before the car's engine was started, the agents arrested Chadwick and the two drug couriers. All three men, the automobile, and the footlocker were taken into custody. An hour and a half later, agents broke open the padlocked footlocker revealing a substantial quantity of marijuana. The Court held that the warrantless search of the footlocker's contents was invalid, stating unequivocally: "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination . . . . There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides."<sup>72</sup>

The government had contended that the "automobile exception" for warrantless vehicle searches should apply to luggage seized from the auto-

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67. For a survey of the divergent lower court decisions concerning the police's authority to impound and inventory vehicles and the scope of the inventory search, see 1 W. RINGEL, *supra* note 6, at § 11.4.

68. Justice Powell, in his concurring opinion in *Opperman*, stated that an inventory search cannot be an unrestrained search authorizing the police to scrutinize the entire contents of an automobile. Such a search "would constitute a serious intrusion upon the privacy of the individual in many circumstances." 428 U.S. at 379-80.

69. 433 U.S. 1 (1977).

70. Chief Justice Burger delivered the majority opinion, joined by Justices Brennan, Stewart, White, Marshall, Powell and Stevens. Justice Blackmun wrote the dissent, joined by Justice Rehnquist. *Id.* at 2.

71. Railroad officials in San Diego, the departure point, discovered talcum powder leaking from an unusually heavy trunk, and one suspect matched a drug courier profile. This information was forwarded to Boston. *Id.* at 3.

72. *Id.* at 11.

mobile, since luggage, like the vehicle transporting it, was "mobile."<sup>73</sup> The Court rejected this argument, and distinguished the expectation of privacy in luggage from that in automobiles.

Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.<sup>74</sup>

The Court did not agree with the government's assertion that the footlocker was "mobile" simply because it had been seized from the trunk of Chadwick's car. To the contrary, the Court found that the footlocker was "immobilized" because the federal agents had it under their exclusive control without the "slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained."<sup>75</sup>

The government also had argued that the search of the footlocker was incident to the arrest of the three men because it was seized contemporaneously with their arrest and searched relatively soon thereafter.<sup>76</sup> The defect in this argument was two-fold. First, the contents of the double-locked footlocker were not within the arrestees' immediate control where they could have gained possession of the marijuana or destroyed it.<sup>77</sup> Second, while the footlocker was *seized* contemporaneously with the arrest of the three men, it was not *searched* until an hour and a half after the arrest, so that the search was "'remote in time [and] place from the arrest.'"<sup>78</sup>

The dissenting opinion, written by Justice Blackmun, questioned the majority's distinction between general searches of automobiles and searches of containers found within the vehicle.<sup>79</sup> The dissent pointed out that, under the rule announced in *United States v. Robinson*,<sup>80</sup> no warrant was required for an arresting officer's search of the clothing and per-

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73. *Id.* at 11-12.

74. *Id.* at 13.

75. *Id.*

76. *Id.* at 14.

77. *Id.* (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). The Court stated:

Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

433 U.S. at 15.

78. *Id.* at 15 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

79. 433 U.S. at 17 n.1 (Blackmun, J., dissenting).

80. 414 U.S. 218 (1973).

sonal effects of an individual lawfully under custodial arrest. The authority for the warrantless search, according to *Robinson*, was the custodial arrest itself. If the arrest were lawful, so was the search, regardless of whether evidence or weapons were within the immediate control of the arrestee so that they could be reached or destroyed.<sup>81</sup> The dissent noted that one year after *Robinson* was decided, the Court did away with the "contemporaneous" requirement for the search incident to arrest in *United States v. Edwards*<sup>82</sup> by holding that a warrantless search of an arrestee's personal effects may be delayed several hours following the arrest where the arrestee remains in lawful custody.<sup>83</sup>

The dissent argued that the *Robinson-Edwards* rationales, coupled with the *Chambers* "automobile exception," would permit the police to impound a vehicle upon probable cause and examine its contents without a warrant and that the police could seize and search "any movable property in the possession of a person properly arrested in a public place."<sup>84</sup> Justice Blackmun thus criticized the majority's refusal to include the footlocker among those personal articles that may be searched incident to lawful custodial arrest. The fact that a warrant could have been readily obtained after the federal agents seized the footlocker did not make the warrantless search of its contents unreasonable according to his view.<sup>85</sup>

The Supreme Court subsequently refused to extend the "automobile exception" to a warrantless search of personal luggage seized from a lawfully stopped vehicle in *Arkansas v. Sanders*.<sup>86</sup> In *Sanders*, the police, acting on an informant's "tip," set up surveillance at an airport, awaiting the arrival of a person suspected of carrying a green suitcase loaded with marijuana. The police watched the respondent claim a green suitcase from the airline baggage point and hand it to a companion who placed it in the trunk of a taxi waiting outside the airport. When the taxi drove away, the police gave pursuit, stopped the taxi and instructed the driver to open the trunk of the vehicle. Without the respondent's consent, the police seized and searched the green suitcase, discovering a significant quantity of marijuana.

In *Sanders* the Court confronted "the task of determining whether the warrantless search of respondent's suitcase [fell] on the *Chadwick* or the

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81. 433 U.S. at 18. The dissent stated that the arresting officer's right to search the custodial arrestee's person was automatic and need not be based on a court's *ad hoc* determination of the probability of the officer discovering evidence or weapons on the arrestee's person. See *Robinson v. United States*, 414 U.S. 218, 235 (1973).

82. 415 U.S. 800 (1974).

83. *Id.* at 807-08.

84. 433 U.S. at 19.

85. *Id.* at 19.

86. 442 U.S. 753 (1979).

*Chambers-Carroll* side of the Fourth Amendment line.<sup>87</sup> In a five-man majority opinion written by Justice Powell<sup>88</sup> the Court recognized that "a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations."<sup>89</sup> The mobility of the vehicle does not attach to the luggage found inside once the police have removed the luggage and have it safely within their control.<sup>90</sup> Therefore, as stated in *Chadwick*, "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control."<sup>91</sup>

The majority opinion in *Sanders* viewed suitcases as repositories for personal effects giving rise to a greater expectation of privacy than the privacy interests attending automobiles.<sup>92</sup> The majority emphasized that not all containers found within an automobile will warrant full protection under the fourth amendment. Some containers do not manifest an expectation of privacy "because their contents can be inferred from their [the container's] outward appearance."<sup>93</sup> Finally, the opinion noted that the administrative burdens accompanying a temporary seizure of an automobile while a warrant is being obtained do not apply to luggage seized from an automobile.<sup>94</sup>

The dissent insisted, however, that the "automobile exception" applied to the suitcase search in *Sanders* because *Carroll* authorized warrantless searches of vehicles for "contraband goods concealed and illegally transported in an automobile."<sup>95</sup> According to this view, the majority's distinction between luggage and various types of containers would lead to mass confusion.

Suppose a portable luggage-container rack is affixed to the top of the vehicle. Is the arresting officer constitutionally able to open this on the spot, on the theory that it is like the car's trunk, or must he remove it and take it to the station for a warrant, on the theory that it is like the 200-pound footlocker in *Chadwick*? Or suppose there is probable cause to arrest persons seated in the front seat of the automobile, and a suitcase rests on the back seat. Is that suitcase within the area of immediate control, such that *Chad-*

87. *Id.* at 757.

88. Justice Powell wrote for the majority, joined by Justices Brennan, Stewart, White and Marshall. Chief Justice Burger wrote a concurring opinion, in which Justice Stevens joined. Justice Blackmun dissented, joined by Justice Rehnquist.

89. *Id.* at 764.

90. *Id.* at 763.

91. *Id.* (quoting *United States v. Chadwick*, 433 U.S. at 13).

92. 442 U.S. at 764.

93. *Id.* at 764-65 n.13. Examples given by Justice Powell include a kit of burglar tools, a gun case or a transparent package.

94. *Id.* at 765 n.14.

95. *Id.* at 768 (Blackmun, J., dissenting).

*wick-Sanders* rules do not apply? Or suppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, a dufflebag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so “personal” that they must be impounded for future search only pursuant to a warrant?<sup>96</sup>

The dissent emphasized that little fourth amendment protection would be afforded by the *Chadwick-Sanders* rules in exchange for the difficulty of their application.<sup>97</sup> Since there was ample probable cause to believe the *Sanders* vehicle was transporting contraband and it was “mobile,” the “bright line” rule would be to authorize an immediate warrantless search of the luggage believed to contain contraband.<sup>98</sup>

After *Chadwick* and *Sanders*, it appeared that the presumptive warrant requirement was strengthened and that the Court was limiting the expanding “automobile exception,” at least as it applied to searches of luggage and “personal” containers found in automobiles subject to search and seizure. Support for the *Chadwick-Sanders* approach to the “container” cases appears to be weakening, however, in light of the Court's recent decision in *Robbins v. California*.<sup>99</sup>

*Robbins* invalidated a search of two opaque brick-shaped plastic packages of marijuana found in the luggage compartment of a station wagon lawfully stopped on the highway. At the time the vehicle was stopped, the California Highway Patrolmen did not suspect that it was transporting marijuana. The petitioner, who had been driving the vehicle, stepped out and approached the patrol car, whereupon the officers asked for his driver's license and vehicle registration. When the petitioner went back to the station wagon to get the registration, he opened the car door and the officers detected marijuana smoke. Suspicions aroused, the patrolmen did a “pat down” search of petitioner and discovered a vial of liquid on his person. They subsequently searched the passenger compartment of the station wagon and recovered marijuana and drug paraphernalia. After the petitioner was placed in the patrol car, the officers opened the tailgate of the station wagon and opened a recessed luggage compartment. Inside the luggage compartment were two box-shaped packages wrapped in green

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96. *Id.* at 771-72.

97. *Id.* at 772. The Chief Justice's concurring opinion in *Sanders* meets the dissent's argument:

The dissent complains that the Court does not adopt a “clear” rule, presumably one capable of resolving future Fourth Amendment litigation. This is not cause for lament, however desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise. We are construing the Constitution, not writing a statute or a manual for law enforcement officers.

*Id.* at 768 (Burger, C.J., concurring).

98. *Id.* at 769 (citing *Carroll v. United States*, 267 U.S. 132, 153 (1925)).

99. 101 S. Ct. 2841 (1981).



opaque plastic. Unwrapping both packages, the police found that each contained fifteen pounds of marijuana. Based on the evidence thus obtained, the petitioner was charged with various drug offenses.<sup>100</sup>

After an unsuccessful motion to suppress the evidence, the petitioner was convicted for various narcotics offenses by a jury. The California Court of Appeals affirmed. However, on a writ of certiorari, the United States Supreme Court remanded the case for further consideration in light of *Arkansas v. Sanders*.<sup>101</sup> On remand, the California Court of Appeals again affirmed the conviction, holding that the trial court "could reasonably [have] conclude[d] that the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents."<sup>102</sup>

Justice Stewart, writing the plurality opinion,<sup>103</sup> held that the search was invalid, citing the Court's refusal in *Chadwick* and *Sanders* to uphold warrantless searches of closed containers found inside an automobile.<sup>104</sup> The State of California had contended that the packages searched in the *Robbins* case were, by their very nature, not the type of containers likely to hold "personal" effects intended by the owner to remain free from public scrutiny. Its position was that *Chadwick* and *Sanders* did not prohibit the warrantless search of "fimsier" containers like the packages opened in *Robbins*.<sup>105</sup>

The plurality opinion rejected the government's "sturdy-fimsy" dichotomy. First, it stated, the fourth amendment warrant requirement does not depend upon whether the container may be characterized as holding "personal" effects as opposed to "impersonal" effects.<sup>106</sup> "The contents of Chadwick's footlocker and Sander's suitcase were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably 'manifested an expectation that the contents would remain free from public examination.'<sup>107</sup> In addition, even if the Court were to adopt the government's position that fourth amendment protection depends upon the nature of the container and the likelihood of its contents being "personal" as opposed to "impersonal" effects, such a position could not offer

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100. *Id.* at 2842-44.

101. 442 U.S. 753 (1979). For a discussion of the *Sanders* case, see notes 86-98 *supra* and accompanying text.

102. 101 S. Ct. at 2844 (quoting *People v. Robbins*, 103 Cal. App.3d 34, 40, 162 Cal. Rptr. 780, 783 (1980)).

103. See note 1 *supra*.

104. 101 S. Ct. at 2845.

105. *Id.* at 2845-46.

106. *Id.* at 2846.

107. *Id.* (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977)).

any workable guideline to determine what types of containers would more likely serve as repositories for personal effects.<sup>108</sup>

The plurality opinion admitted that *Sanders* did not apply to all containers found by the police during the course of an automobile search,<sup>109</sup> but asserted that the holding in that case extended protection to closed containers other than luggage. Exceptions to the rule were noted where containers, by their nature, betray their contents, so that no reasonable person could expect the contents to remain private; or where the package or container leaves its contents open to plain view.<sup>110</sup> The Justices joining in the plurality opinion rejected the California appellate court's conclusion that "[a]ny experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana."<sup>111</sup> Since the bricks of marijuana were wrapped inside a closed, opaque container, they could not be unwrapped without a warrant, even though found during the course of a lawful vehicle search based upon probable cause.<sup>112</sup>

Justice Powell, while concurring in the judgment, criticized the plurality for formulating an overbroad, mechanical "bright line" rule.<sup>113</sup> The test adopted by the plurality, he argued, would impose a warrant requirement on all searches of closed, opaque containers regardless of the owner's reasonable expectation of privacy.<sup>114</sup> Any difficulty in determining the owner of a container has a reasonable expectation of privacy with respect to the contents did not justify an automatic warrant requirement simply because the container was closed and opaque.<sup>115</sup>

Justice Blackmun, in a brief dissent, reiterated his position that the "automatic exception" to the warrant requirement should be extended to "container" searches.<sup>116</sup> Justice Rehnquist's dissent called for the overrul-

108. *Id.* at 2846. Justice Stewart noted that "[w]hat one person put into a suitcase, another may put into a paper bag." *Id.* (citation omitted).

109. *Id.* (citing *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979)). See note 93 *supra* and accompanying text.

110. 101 S. Ct. at 2846.

111. *Id.* (quoting *People v. Robbins*, 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (1980)). The California Court of Appeals concluded that the contents of the packages could be inferred by the nature of the packaging, based on the arresting officer's testimony that he had heard that marijuana was often packaged in a way similar to that of the petitioner's packages. The *Robbins* plurality found this evidence insufficient to support the appellate court's conclusion. 101 S. Ct. at 2846-47.

112. 101 S. Ct. at 2847.

113. *Id.* (Powell, J., concurring).

114. *Id.* at 2849.

115. *Id.* Justice Powell suggested that the ultimate inquiry in each case "is whether one's claim to privacy from government intrusion is reasonable in light of the surrounding circumstances." *Id.* (citations omitted).

116. *Id.* at 2851 (Blackmun, J., dissenting). Justice Blackmun agreed, however, with a great portion of Justice Rehnquist's dissent.

ing of *Mapp v. Ohio*,<sup>117</sup> suggesting that the confusion surrounding search and seizure questions could never be eliminated until *Mapp v. Ohio* was no longer a part of American jurisprudence.<sup>118</sup> In his opinion, also fettering the Court's ability to formulate "bright line" rules regarding search and seizure problems was the "presumptive warrant requirement" mandated in *Coolidge v. New Hampshire*.<sup>119</sup> Justice Rehnquist believed the reasonableness of a search should not depend upon whether a warrant was first obtained, but upon a standard of "reasonableness" considering all the facts surrounding the search.<sup>120</sup>

Since the Court was not prepared to act on Justice Rehnquist's suggestion that the "exclusionary rule" and the "presumptive warrant requirement" be abolished, Justice Rehnquist stated he would uphold the *Robbins* search under the "automobile exception." Justice Rehnquist adopted Justice Blackmun's position in *Arkansas v. Sanders* that "[t]he luggage, like the vehicle transporting it, is mobile."<sup>121</sup> Moreover, Justice Rehnquist stated that "automobiles as a class are inherently mobile" and that "one need not demonstrate that a particular automobile was capable of being moved . . . ."<sup>122</sup>

The fact that the police have custody of the automobile and containers found inside before the search is contemplated would be irrelevant under this view. Rehnquist also noted that the searching officer in *Robbins* could have inferred from the packaging that he had discovered two bricks of marijuana, so that the *Sanders* rule did not apply.<sup>123</sup> *Sanders*, he argued, did not require a warrant to search containers whose "contents can be inferred from their outward appearance."<sup>124</sup> He pointed to evidence in the record that during the course of the officer's search of the passenger compartment of the station wagon, the petitioner stated: "What you are looking for is in the back."<sup>125</sup> According to Rehnquist, this statement, coupled with the officer's knowledge that marijuana was packaged in that particular fashion, provided the officer with a reasonable inference of the packages' contents.<sup>126</sup>

In a separate dissenting opinion, Justice Stevens likewise favored ex-

117. 367 U.S. 643 (1961).

118. 101 S. Ct. at 2851-52 (Rehnquist, J., dissenting).

119. *Id.* (citing 403 U.S. 443 (1971) (warrantless searches per se unreasonable, subject to a few well-established and clearly delineated exceptions)).

120. 101 S. Ct. at 2851-52. *See also* note 16 *supra*.

121. 101 S. Ct. at 2853 (citing *Arkansas v. Sanders*, 442 U.S. 753, 769 (1979) (Blackmun, J., dissenting)).

122. 101 S. Ct. at 2853 (emphasis in original).

123. *Id.* at 2854.

124. *Id.* (citing *Arkansas v. Sanders*, 442 U.S. at 764-65 n.13).

125. 101 S. Ct. at 2854. Justice Rehnquist noted that petitioner's statement was "conspicuously absent from the recitation of the facts in the plurality opinion." *Id.*

126. *Id.*

tending the "automobile exception" to permit warrantless searches of containers found in cars, where the police have probable cause to search the vehicle.<sup>127</sup> In both *Robbins* and its companion case, *New York v. Belton*,<sup>128</sup> the automobiles were lawfully stopped, the occupants were lawfully arrested prior to the vehicle search, and the officers had probable cause to believe that the vehicles were transporting marijuana.<sup>129</sup> Therefore, according to Stevens, a consistent application of the "automobile exception" was required to avoid the unnecessary problem, created by *Chadwick* and *Sanders*, of drawing distinctions between various types of containers.<sup>130</sup> Stevens asserted that the whole purpose of the "automobile exception" was to relieve the police of the burden of obtaining a warrant prior to a probable cause search of a vehicle on the highway.<sup>131</sup> Since the "automobile exception" was, in effect, a substitute for a judicial warrant, the scope of the search under the exception should not be more restricted than a search conducted pursuant to a warrant.<sup>132</sup>

In the companion case of *New York v. Belton*,<sup>133</sup> a five-man majority

127. *Id.* at 2856 (Stevens, J., dissenting).

128. 101 S. Ct. 2860 (1981). See note 4 *supra*.

129. 101 S. Ct. at 2855. The initial stops in both *Robbins* and *Belton* were for traffic violations. *Robbins v. California*, 101 S. Ct. at 2843; *New York v. Belton*, 101 S. Ct. at 2861. In both cases, however, the police detected marijuana smoke during the traffic stop, and recovered marijuana from the passenger compartments of both vehicles during a lawful vehicle search. *Robbins v. California*, 101 S. Ct. at 2844; *New York v. Belton*, 101 S. Ct. at 2861-62.

130. 101 S. Ct. at 2856 (Stevens, J., dissenting). Justice Stevens agreed with Justice Blackmun's criticism of *Sanders* to the extent that *Sanders* required courts to differentiate between numerous types of containers. See text accompanying note 96 *supra*.

131. 101 S. Ct. at 2857 (Stevens, J., dissenting). Justice Stevens distinguished *Robbins* and *Belton* from *Chadwick* and *Sanders*. In the former cases, police had probable cause to search the vehicles entirely; but in the latter cases, police had probable cause to search only the footlocker and suitcase, not the vehicles. *Id.* at 2857 n.9. Therefore, according to Justice Stevens, *Chadwick* and *Sanders* were not "automobile exception" cases but instead were true "container" cases. *Robbins* and *Belton*, though, fell within the "automobile exception."

132. *Id.* at 2857. Justice Stevens explained:

The scope of any search that is within the exception should be just as broad as a magistrate could authorize by warrant if he were on the scene; the automobile exception to the warrant requirement therefore justifies neither more nor less than could a magistrate's warrant. If a magistrate issued a search warrant for an automobile, and officers conducting the search authorized by the warrant discovered a suitcase in the car, they surely would not need to return to the magistrate for another warrant before searching the suitcase.

*Id.* Justice Stevens applied the same reasoning to searches of containers discovered during the lawful search of a house pursuant to a warrant:

Similarly, if a magistrate issues a warrant for the search of a house, police executing that warrant clearly need not obtain a separate warrant for the search of a suitcase found in the house, so long as the things to be seized could reasonably be found in such a suitcase.

*Id.* at 2857 n.8.

133. 101 S. Ct. 2860 (1981).

opinion<sup>134</sup> authored by Justice Stewart upheld a container search during the course of a lawful search of the vehicle's passenger compartment after the occupants were placed under custodial arrest. The factual situation was strikingly similar to that in *Robbins*. In *Belton*, a New York state trooper stopped a vehicle for speeding. After a request to see the driver's license and the vehicle's registration, the officer discovered that none of the four occupants was the owner or related to the registered owner of the vehicle. During this time the officer smelled burnt marijuana and observed in plain view on the car floor an envelope marked "Supergold" which he associated with marijuana. The officer ordered all four men out of the car and placed them all under arrest for possession of marijuana. After a "pat down" search of each occupant, he separated them along the highway so they could not touch each other or the vehicle. After giving *Miranda* warnings to each of the four,<sup>135</sup> he searched them and the passenger compartment of the car. The officer seized and opened the envelope marked "Supergold" and found it to contain marijuana. During the course of his search of the passenger compartment, the officer also seized Belton's black leather jacket from the backseat, unzipped one of the pockets, and discovered a quantity of cocaine.<sup>136</sup>

Belton was indicted for unlawful possession of a controlled substance, and after an unsuccessful motion to suppress the cocaine, he pleaded guilty to a lesser included offense while preserving his fourth amendment claim that the cocaine was unlawfully seized. The Appellate Division of the New York Supreme Court affirmed Belton's conviction, holding that "[o]nce defendant was validly arrested for possession of marijuana, the officer was justified in searching the immediate area for other contraband."<sup>137</sup> The New York Court of Appeals reversed, reasoning that "[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article."<sup>138</sup>

On appeal, the United States Supreme Court, in an opinion written by Justice Stewart, recognized that *Chimel v. California*<sup>139</sup> established that a lawful custodial arrest justifies the warrantless, contemporaneous search of the arrestee's person and of the immediately surrounding area where the arrestee might reach for weapons or conceal or destroy evidence.<sup>140</sup> The *Belton* majority similarly recognized that *United States v. Robin-*

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134. See note 4 *supra*.

135. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

136. 101 S. Ct. at 2861-64.

137. *People v. Belton*, 68 A.D.2d 198, 201, 416 N.Y.S.2d 922, 925 (1979).

138. *People v. Belton*, 50 N.Y.2d 447, 449, 407 N.E.2d 420, 421, 429 N.Y.S.2d 574, 575 (1980).

139. 395 U.S. 752 (1969).

140. 101 S. Ct. at 2862 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)).

son<sup>141</sup> authorized searches incident to lawful custodial arrest without inquiries into the exigencies supporting the search.<sup>142</sup> For the first time, however, the Supreme Court was faced with the issue of "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it."<sup>143</sup>

The *Belton* majority determined that a vehicle's passenger compartment fell within the *Chimel* definition of "the area into which an arrestee might reach in order to grab a weapon or evidentiary item."<sup>144</sup> Therefore, the police could, "as a contemporaneous incident to arresting the vehicle's occupants, search the passenger compartment of that automobile."<sup>145</sup>

As a corollary to that finding, the *Belton* majority declared that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."<sup>146</sup> The Court was still faced with the problem that the arrestees in *Belton* were outside the vehicle at the time of the search and, therefore, did not have access to any of the evidence seized from the passenger compartment. By extending *Robinson* to the situation in *Belton*, the Court implied that no *ad hoc* judgment was to be made regarding the searching officer's assessment of the probability that the containers were concealing destructible evidence or weapons and the likelihood of the arrestees gaining possession or control of the containers.<sup>147</sup> The authority of the police to search the immediate area where the arrestees had been before the search stemmed solely from the custodial arrest of the vehicle's occupants.<sup>148</sup>

The Court distinguished *Chadwick* and *Sanders* based on the facts in *Belton*. The search of the footlocker in *Chadwick* was not contemporaneous with Chadwick's arrest, having been conducted an hour and a half later.<sup>149</sup> In *Sanders*, the Court had not considered the "search incident to arrest" rationale, since the government had not argued it and because the suitcase, located in the trunk of the vehicle, was not within the immediate

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141. 414 U.S. 218 (1973).

142. 101 S. Ct. at 2863. See note 81 *supra* and accompanying text.

143. 101 S. Ct. at 2863.

144. *Id.* at 2864 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

145. 101 S. Ct. at 2864.

146. *Id.* Even more expansive, however, is the *Belton* majority's definition of "container." See note 5 *supra*.

147. *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)). See note 81 *supra* and accompanying text.

148. 101 S. Ct. at 2864.

149. *Id.* at 2865 (citing *United States v. Chadwick*, 433 U.S. 1, 15 (1977)). Further, the federal agents in *Chadwick* had obtained secure, exclusive control over the footlocker as compared to the tentative custody of the black leather jacket in *Belton*.

control of the arrestee.<sup>150</sup> In *Belton*, however, the jacket was in the passenger compartment of the vehicle, which the arrestees had occupied just before being taken into custody, and, therefore, was within their immediate control.<sup>151</sup>

Justice Rehnquist concurred and joined in the majority opinion, but, as in *Robbins* only because of the Court's unwillingness to overrule *Mapp* and *Coolidge*, and because the Court would not uphold the *Belton* search under the "automobile exception."<sup>152</sup> However, Justice Stevens, in his dissenting opinion in *Robbins*, took issue with the broad "search incident to arrest" rule fashioned by the Court in *Belton*.<sup>153</sup> The Court's new rule in *Belton*, he said, would apply to every custodial arrest of a vehicle's occupant, permitting the police to search luggage and other closed containers, without a warrant and without probable cause.<sup>154</sup> He criticized *Belton's* new "bright line" rule for giving the police wide discretion because an officer "may find reason to follow that procedure whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation."<sup>155</sup> The Court's ruling in *Belton*, he added, authorized "broader vehicle searches than any neutral magistrate could authorize by issuing a warrant."<sup>156</sup>

Justices Brennan and Marshall sharply attacked the majority's "arbitrary 'bright line' rule" because it ignored the "underlying policy justifications" supporting the *Chimel* doctrine.<sup>157</sup> Justice Brennan reminded the Court of the well settled rule that exceptions to the fourth amendment warrant requirement are narrowly construed, so that warrantless intru-

150. 101 S. Ct. at 2865 (citing *Arkansas v. Saunders*, 442 U.S. 753, 764 n.11 (1979)).

151. 101 S. Ct. at 2865.

152. *Id.* at 2865 (Rehnquist, J., concurring). See also *Robbins v. California*, 101 S. Ct. at 2851 (Rehnquist, J., dissenting).

153. Justice Stevens concurred in the judgment in *Belton*, 101 S. Ct. at 2865, but sharply criticized the *Belton* majority's expansion of the search incident to arrest exception. See *Robbins v. California*, 101 S. Ct. at 2858-59 (Stevens, J., dissenting).

154. 101 S. Ct. at 2858. Justice Stevens feared that the police might use the *Belton* rule to search vehicles incident to a mere traffic offense:

It is, of course, true that persons apprehended for traffic violations are frequently not required to accompany the arresting officer to the police station before they are permitted to leave on their own recognizance or by using their driver's licenses as a form of bond. It is also possible that state law or local regulations may in some cases forbid police officers from taking persons into custody for violation of minor traffic laws. As a matter of constitutional law, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody.

*Id.* As a practical matter, Justice Stevens noted that in some states the police officer can make custodial arrests for violations of any motor vehicle law and that the traffic offender's failure to produce bond will often result in custodial detention. *Id.* at 2858 n.12 (citations omitted).

155. *Id.* at 2859.

156. *Id.*

157. *Id.* at 2865 (Brennan, J., dissenting).

sion is restricted in its scope by the exigent circumstances which justify its inception.<sup>158</sup> In *Chimel*, the exigent circumstances which compelled the Court to carve out an exception to the warrant requirement were "the safety of the arresting officer and the preservation of easily concealed or destructible evidence."<sup>159</sup> But the *Chimel* exception, Justice Brennan declared, "was narrowly tailored to address these concerns"<sup>160</sup> and consequently restricted the scope of the search incident to arrest to the arrestee's person and the area within his immediate control.<sup>161</sup> Citing a litany of prior decisions, Justice Brennan stated that the phrase "within his immediate control" has always been construed "to mean the area from within which he might gain possession of a weapon or destructible evidence."<sup>162</sup> Such was not the case in *Belton* where the possibility of the arrestees gaining possession of destructible evidence was non-existent.<sup>163</sup> Once the arrestee is safely in custody, so that weapons or evidence cannot be reached, the justifications underlying the *Chimel* exception cease to exist.<sup>164</sup> *Belton* and the three other occupants were removed from the car and placed under arrest *before* the search was begun. But for the legal fiction adopted by the *Belton* majority—"that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car"<sup>165</sup>—there would have been no grounds for arguing that any of these men could have reached Belton's jacket on the car's backseat. Justice Brennan urged "that the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it at the time of arrest and search."<sup>166</sup>

In response to the *Belton* Court's desire to fashion a "bright line" rule for law enforcement officers, Justice Brennan warned that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."<sup>167</sup> Even so, the *Belton* majority's "bright line" rule, according to Brennan, failed to provide a more efficient and workable solution. *Belton* did not indicate how much time may elapse after the occupant has been removed from the car and ar-

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158. *Id.* at 2866 (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

159. *Id.* at 2866 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). *But see* *Robinson v. United States*, 414 U.S. 218, 235 (1973) (police officer's authority to search stems from lawful custodial arrest and not from probability of discovering weapons or destructible evidence).

160. 101 S. Ct. at 2866.

161. *Id.* at 2866-67.

162. *Id.* (quoting *Chimel v. California*, 395 U.S. at 762-63).

163. 101 S. Ct. at 2867.

164. *Id.* (citing *Chambers v. Maroney*, 399 U.S. 42, 47 (1970); *Chimel v. California*, 395 U.S. 752, 764 (1969); *Preston v. United States*, 376 U.S. 364, 367 (1964)).

165. 101 S. Ct. at 2867.

166. *Id.* at 2868 (Brennan, J., dissenting).

167. *Id.* at 2869 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).



rested before a search of the passenger compartment becomes illegal.<sup>168</sup> Would it matter whether the police had probable cause to arrest the occupant before or after the driver was removed from the car?<sup>169</sup> Also, was there any reason why *Belton's* new search incident to arrest rule should apply solely to automobile searches?<sup>170</sup> Questions may also arise as to what constitutes the interior passenger compartment, which is subject to warrantless intrusion, as compared to exterior or trunk compartments to which *Belton* does not apply.<sup>171</sup>

Justice White's brief dissent, joined by Justice Marshall, criticized the *Belton* majority for its "extreme extension of *Chimel*."<sup>172</sup> Also, Justice White emphasized that *Belton* could not be squared with *Chadwick* and *Sanders* since the latter two cases held that closed containers, such as suitcases and footlockers, are repositories for personal effects, manifesting an expectation of privacy regardless of their location.<sup>173</sup> In the wake of *Belton*, however, suitcases and other locked containers are vulnerable to warrantless intrusion by virtue of their location in the passenger compartment of a vehicle whose occupants are under custodial arrest.<sup>174</sup>

#### IV. CONCLUSION

*Chadwick* rejected the use of the search incident to arrest exception as a justification for a warrantless container search. The *Chadwick* Court could have done so solely on the basis that the footlocker search was not "contemporaneous" with the drug couriers' arrests. Yet *Chadwick* furnished another reason why the search incident to arrest exception did not apply by reaffirming *Chimel's* limitation on the scope of such searches.

The determination of whether a container is "within the arrestee's immediate control" depends upon a realistic assessment of the arrestee's ability, at the time of the search, to obtain weapons or evidence from the container. Once the container is secured by the police and the arrestee is separated from the container so as to deny him access to its contents, the

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168. 101 S. Ct. at 2869.

169. *Id.*

170. *Id.* A policeman engaged in surveillance of a house could have probable cause to believe a crime was committed within. Why is the policeman prevented from arresting the occupant outside his house and escorting him back into the house and searching the house incident to the occupant's arrest?

171. Station wagons and hatchbacks have luggage compartments, which, although functioning as trunks, may be reached from the interior passenger compartment. What would have been the result in *Robbins* if the state had argued the search incident to arrest exception? Would the station wagon's luggage compartment be a "trunk" so that the *Belton* rule does not apply? Or would it be part of the interior passenger compartment which may be searched incident to the custodial arrest of the vehicle's occupants?

172. 101 S. Ct. at 2870 (White, J., dissenting).

173. *Id.*

174. See note 5 *supra*.

container is no longer within the arrestee's immediate control according to the decisions in *Chimel* and *Chadwick*.

The Court's holding in *Belton* cannot be reconciled with *Chadwick* or *Chimel*, and it represents a gross distortion of the search incident to arrest exception. With the vehicle's occupants removed from the car prior to the vehicle search, there was no possibility that the cocaine could have been removed from Belton's black leather jacket. The decision fashions a new rule: if, just before the arrest, a container sits in the passenger compartment of a vehicle, the container remains within the immediate control of the vehicle's occupants, who, having been placed under custodial arrest, are outside the vehicle when it is searched. According to this rule, the location of the container in relation to the arrestee at the time of the search is unimportant. So long as the container may be found in the passenger compartment, it may be searched without a warrant.

*Belton's* reliance on *Robinson* for its summary disregard of the *Chimel* limitation on the scope of the search incident to arrest was misplaced. In *Robinson* the Court was not faced with the problem of determining what constituted the area within the arrestee's immediate control. Rather, the issue was whether a policeman, incident to a lawful custodial traffic arrest, could search the arrestee's *person*, when it was unlikely that the arrestee was carrying weapons or criminal evidence. *Robinson* stated that courts should not second guess the arresting officer's decision to search and that the officer's authority to search stems from the lawful custodial arrest, and does not depend upon the likelihood of the arrestee having weapons or evidence in his possession.

However, *Robinson* did not change *Chimel's* limitation that the arresting officer can only search the arrestee's person and the area within the arrestee's immediate control. *Robinson* did not dispense with a reasoned judgment by courts and law enforcement officers regarding the lawful scope of a search incident to arrest. *Robinson* was no obstacle to *Chadwick's* rejection of a search incident to arrest once the container and vehicle's occupants are separated and under the exclusive control of the police. Thus, the *Belton* majority seemed more concerned about developing a "bright line" rule for a police manual, than it was in protecting privacy rights or following established precedent.

*Sanders* ruled out the possibility of applying the automobile exception to containers inside automobiles by distinguishing the legitimate expectation of privacy in luggage as repositories for personal effects from the "diminished expectation of privacy" in automobiles. The Court's emphasis on the special nature of luggage in both *Chadwick* and *Sanders* suggests that different types of containers are entitled to varying degrees of protection under the fourth amendment. *Robbins'* "closed, opaque container" rule seems inconsistent in this respect. However, the *Sanders* footnote, which states that not all containers deserve full fourth amend-

ment protection (since some containers betray their contents) suggests that the Court contemplated application of the *Sanders* warrant requirement to searches of other containers in addition to luggage.

The *Robbins* decision did not deviate significantly from *Sanders*. It was simply a logical extension of the *Sanders* reasoning that by placing effects in a closed, opaque container, one manifests a reasonable expectation of privacy in the container's contents, unless, because of the nature of the container, the contents may be inferred from their outward appearance.

The Supreme Court apparently is making an effort to clarify the confusing law of automobile searches. While this effort is to be commended, it seems questionable that the law of automobile searches can be reduced to simpler formulae and "bright line" rules. A far greater concern is the price, in terms of fourth amendment protection, that must be paid in exchange for greater police efficiency.

*James M. McCauley*

#### ADDENDUM

After this comment was written and as it was going to print, the Supreme Court of the United States announced its decision in *United States v. Ross*<sup>1</sup> in which a majority composed of five Justices<sup>2</sup> upheld warrantless searches of containers found in the trunk of a suspected drug dealer's automobile.

There was no question that the police had probable cause to believe that a search of the suspect's vehicle would produce narcotics. A proven reliable informant had told the police that an individual known as "Bandit" was dealing heroin out of his automobile trunk and had just completed a sale. The informant gave the police a description of the automobile, its owner, and its location, which proved accurate.<sup>3</sup> At an opportune moment, two detectives arrested the dealer/owner, searched the trunk of his automobile, and found a closed paper "lunch type" bag containing glassine envelopes of a white powdered substance which was later found to be heroin.<sup>4</sup> At the police station, a second warrantless search of the trunk produced a zippered leather pouch which contained \$3,200 in cash.

At the trial of Ross for possession of heroin with intent to distribute,

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1. 50 U.S.L.W. 4580 (June 1, 1982).

2. Justice Stevens authored the majority opinion, in which Chief Justice Burger and Justices Blackmun, Powell, Rehnquist and O'Connor joined.

3. 50 U.S.L.W. at 4581.

4. *Id.*

the district court denied a motion to suppress the evidence produced by these searches.<sup>5</sup> The Court of Appeals for the District of Columbia reversed, relying on *Sanders* and finding that Ross had exhibited a reasonable expectation of privacy in the contents of both containers. The court of appeals refused to consider the paper bag a container unworthy of fourth amendment protection as against the leather pouch, and concluded that the contents of both containers could not be searched without a warrant.<sup>6</sup> With Justice Stevens writing for the majority, the United States Supreme Court reversed, holding that when the police have probable cause to believe an automobile on the highway is carrying contraband, the police may stop the vehicle and search its contents, including all closed containers, locked or unlocked, without first procuring a warrant.<sup>7</sup>

The majority distinguished this case from *Robbins*, *Sanders*, and *Chadwick* factually in that the police did not have probable cause to believe that the *automobiles* in those earlier decisions were carrying narcotics. The focus was on the *containers* found within the vehicle and not the vehicle itself. Unlike the earlier decisions, *Ross* gave the Court a factual setting where the police suspected contraband was in the vehicle prior to stopping it and, because of this, the *Ross* search fit squarely within the *Carroll* automobile exception.<sup>8</sup>

The *Ross* majority then rejected the *Robbins* plurality's reasoning that a closed, opaque container could be indicative of a reasonable expectation of privacy in the container's contents.<sup>9</sup> The *Ross* majority stated that the type of container should not determine the scope of the search; rather, the scope of the search should be based upon the reasonable likelihood that the area or place searched will contain the items for which the police are searching.<sup>10</sup> Thus, while a brown paper bag is not a likely repository for a 12-gauge shotgun, it is a reasonable place to search for narcotics, and if the police have probable cause to suspect that the automobile is carrying narcotics, the paper bag located in the car's trunk is subject to search without a warrant.

The majority concluded that a valid vehicle search under the automobile exception can be as broad in scope as a full-blown search conducted

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5. *Id.*

6. A three-judge panel of the court of appeals concluded initially that the warrantless search of the paper bag was valid, but the warrantless search of the leather pouch was not, relying on *Arkansas v. Sanders*. Then the entire court of appeals decided to rehear the case en banc and struck down both searches finding no distinction of constitutional significance between the paper bag and the leather pouch. *Ross v. United States*, 655 F.2d 1159, 1161 (D.C. Cir. 1981).

7. 50 U.S.L.W. 4588.

8. *Id.* at 4586.

9. *Id.* at 4587-88.

10. *Id.* at 4587.

pursuant to a magistrate's warrant.<sup>11</sup> The substitution of a police officer's judgment for that of a neutral and detached magistrate's in the factual setting presented in *Ross* was a disturbing prospect to Justice Marshall who wrote a lengthy and vigorous dissent.<sup>12</sup> Praising the long established judicial preference for a magistrate's determination of probable cause, Justice Marshall criticized the *Ross* majority for failing to limit the scope of the automobile exception to the exigencies that justified its inception—where the vehicle's actual mobility made it impractical to obtain a warrant.

The beauty of the *Ross* decision is that it should do away with the senseless distinctions drawn between various sorts of containers, some of which warranted fourth amendment protection under the *Sanders-Robbins* approach, and others which did not. In announcing its new rule, however, the Court seems to be moving away from what was once regarded as an inviolate principle of fourth amendment law—that exceptions to the warrant requirement are to be narrowly construed.

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11. *Id.* at 4588.

12. *Id.* (Marshall, J., joined by Brennan, J., dissenting.).