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Robbins, Belton and Ross: Reconsideration of Bright Line Rules for Warrantless Container Searches

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Robbins, Belton AND *Ross:* RECONSIDERATION OF "BRIGHT LINE" RULES FOR WARRANTLESS CONTAINER SEARCHES*

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I. INTRODUCTION

THE LAW OF SEARCH AND SEIZURE, particularly the warrant requirement, has been adapted to an increasing array of legal and practical difficulties created by the proliferation of motor vehicles in American society. The dire need for effective law enforcement procedures, on the one hand, has been pitted against the obligation to safeguard valuable fourth amendment liberties on the other. The tension between these competing interests is reflected in the diverse viewpoints expressed in countless court decisions of the past half century. The United States Supreme Court has been sharply divided on the many troublesome issues regarding the warrantless search and seizure of a motor vehicle and its contents, particularly containers.

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Most of the initial controversy concerned the constitutionality of warrantless searches and seizures of the automobile[1] itself. In 1925, the Court created the "automobile exception" to the warrant requirement under which warrantless searches and seizures were permitted where police had probable cause to believe that contraband was contained somewhere in the vehicle.[2] In addition to the automobile exception, the Court also validated a warrantless vehicular search under the "search incident to a lawful arrest exception" where probable cause to search need not exist.[3] The Court also announced a third exception, the "inventory search exception," which permits police to conduct warrantless searches and seizures of legally impounded vehicles for the sole purpose of inventorying personal belongings located inside the vehicle.[4]

The scope of these exceptions has been litigated since 1925. Three recent Supreme Court cases have brought two of these exceptions full circle, however, by validating warrantless searches of closed opaque containers located in automobiles. In a 1981 case, *New York v. Belton*,[5] the Court created a "bright line" rule upholding the warrantless search of containers taken from a vehicle pursuant to the search incident to arrest exception. In a companion case, *Robbins v. California*,[6] a plurality of the Court invalidated the warrantless search of closed opaque containers discovered during a lawful automobile exception search. The following year in *United States v. Ross*,[7] however, a majority of the Court abandoned the *Robbins* rationale and held that such warrantless container searches are valid under the automobile exception if based on probable cause.[8] The Court has not yet addressed the warrantless container search issue under the inventory search exception.[9]

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[1] The words automobile and motor vehicle are used interchangeably throughout this Note and include all types and varieties of motor vehicles because the operative rules of law are generally not affected by the use of the vehicle. However, distinctive characteristics of the particular vehicle may help resolve such legal questions as the person's expectation of privacy in a particular compartment of the vehicle or the degree of ready access to its contents.

[2] Carroll v. United States, 267 U.S. 132 (1925).

[3] New York v. Belton, 453 U.S. 454 (1981).

[4] South Dakota v. Opperman, 428 U.S. 364 (1976) (plurality opinion).

[5] 453 U.S. 454 (1981).

[6] 453 U.S. 420 (1981) (plurality opinion).

[7] 456 U.S. 798, 102 S. Ct. 2157 (1982). The retirement of Justice Stewart (announced in 453 U.S. V (July 2, 1981)), who authored the *Belton* and *Robbins* opinions, and the appointment of Justice O'Connor (ordered in 453 U.S. IX (Sept. 25, 1981)), who joined the majority in *Ross*, may solidify the conservative posture of the Burger Court.

[8] *Cf.* United States v. Chadwick, 443 U.S. 1 (1977) (a search warrant is required where police have specific information that a particular container located in a car contains contraband); *and infra* Section III.

[9] The resolution of this issue is important because it could give police an opportunity to search containers without a warrant where they could not do so under the other automobile-related warrant exceptions. If police were permitted to routinely search containers pursuant to a standard inventory search, anything gained by limiting a search under the other exceptions would be lost. This Note,

This Note analyzes the development of these warrant exceptions to furnish a comprehensive review of their justifications. The major focus is on the underlying rationale of *Belton* and *Ross* and the possible ramifications of such far-reaching warrant exceptions. The Note recommends that state courts interpret their state constitutions to allow the less drastic alternative of warrantless *seizures* of certain containers rather than warrantless searches as permitted by *Belton* and *Ross* under the federal Constitution. In addition, an analytic methodology for isolating interrelated yet distinct search and seizure questions is proposed. Initially, a general background of fourth amendment jurisprudence is set forth to illustrate the Court's continuous struggle with search and seizure problems.

II. FOURTH AMENDMENT JURISPRUDENCE

A. *Traditional Fourth Amendment Analysis*

The basic tenet of search and seizure decisional law is that the "Fourth Amendment protects people, not places" from unwarranted governmental intrusions.[10] This guarantee protects the right of the people to be secure in their persons, places and things from unreasonable search and seizure by the government,[11] but does not protect any general right to be let alone by other people.[12] The Supreme Court declared long ago that the

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however, only contains a limited discussion of this question. *See infra* notes 137-52 and accompanying text. *See also* 2 W. LAFAVE, SEARCH AND SEIZURE § 7.4 (1978) [hereinafter cited as LAFAVE].

[10] Katz v. United States, 389 U.S. 347, 351 (1967).

[11] U.S. CONST. amend. IV provides:

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

The fourth amendment was made applicable to the states through the due process clause of the fourteenth amendment in Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). Several years later, the judicially created "exclusionary rule" was also imposed on the states to prohibit the use at trial of illegally obtained evidence to support the prosecution's case-in-chief. Mapp v. Ohio, 367 U.S. 643 (1961). *But see* United States v. Havens, 446 U.S. 620 (1980) (suppressed evidence may be used for impeachment purposes where the defendant's direct examination reasonably suggests this mode of cross-examination).

Most state constitutions contain provisions that parallel the fourth amendment. *See, e.g.*, OHIO CONST. art. 1, § 14. State courts, however, are free to interpret their state constitutions liberally to provide greater protection, in certain instances, than has been provided by fourth amendment interpretations of the Supreme Court. Furthermore, state interpretation of state constitutions is not subject to federal judicial review. *See* 28 U.S.C. § 1257 (1976). Accordingly, the challenges to the admissibility of evidence should be made under both the federal and state constitutions. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[12] *Katz*, 389 U.S. at 350-51.

"sanctity of a man's home and the privacies of his life" constitute the "essence of constitutional liberty and security," but that the nature of the intrusion "is not the breaking of his doors, and the rummaging of his drawers, . . . [rather] it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[13]

Three fundamental issues must be resolved when confronting a given fact situation involving a search and seizure: 1) whether the evidence was obtained by a government sponsored activity; 2) whether that activity constituted a search and/or seizure; and 3) whether the search and/or seizure required a warrant or was otherwise reasonable. Under the threshold question, whether evidence was obtained by a government sponsored activity, the answer is obvious in most instances because law enforcement officials will be directly involved. Yet the answer will be less clear in other situations, for example, police may encourage a person surreptitiously to acquire incriminating information or material for their use.[14] Absent a showing that that person was in effect acting as a government agent, fourth amendment protections will not be invoked since only governmental intrusions are governed thereby.

If there was governmental action, then the second level of analysis is needed to determine whether that activity constituted a search and/or seizure within the meaning of the fourth amendment.[15] A "search" only occurs when the government violates a person's legitimate expectation of privacy, which is protected by the fourth amendment.[16] The applicable inquiry, the *Katz* test,[17] has two requirements. First, a person must "have

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[13] Boyd v. United States, 116 U.S. 616, 630 (1886).

[14] *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980) (a paid informant generally acts as a government agent).

[15] The importance of this step is critical to proper fourth amendment analysis because the third level of inquiry is irrelevant if a search or seizure did not occur. Moreover, the failure to address each level in sequence, whether as a tactical manuever or as an oversight, has contributed to decisional confusion. Indeed, the greatest shortcoming of judicial search and seizure analysis thus far has been the failure to approach the problem with a disciplined step-by-step process. Haphazard legal analysis has compounded confusion in a complex area of the law.

As an end result, critical fourth amendment doctrines have been adopted without a full discussion on the merits. For example, in the landmark case of Terry v. Ohio, 392 U.S. 1 (1968), the Court expressly declined to decide the "constitutional propriety" of an investigatory stop of three suspicious men observed "casing" a store. *Id.* at 19 n.16. Nonetheless, *Terry* upheld the subsequent "frisk" of the suspects and the seizure of a weapon without first deciding whether the initial *stop* on less than probable cause was a "seizure" and if so whether it was constitutionally permissible. *Id.* at 6-7. The implication of *Terry* is that such stops are valid; otherwise, the seizure of the gun would have been tainted by the initial illegal seizure of the suspects and would have been suppressed under the "fruit of the poisonous tree" doctrine. *See* Wong Sun v. United States, 371 U.S. 471 (1963). Moreover, while the stop may in fact have been reasonable under the fourth amendment, the method used to approve it was significantly lacking.

[16] Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

[17] The *Katz* test was formulated by Justice Harlan in his concurring opinion in Katz v. United States, 389 U.S. 347, 360 (1967). A majority of the Court adopted

exhibited an actual (subjective) expectation of privacy, and, second that the expectation be one that society is prepared to recognize as 'reasonable' " (objective).[18] Thus, a fourth amendment search does not occur at all unless there is a legitimate expectation of privacy.[19] For example, the Court has found both a subjective and objective expectation of privacy in one's dwelling,[20] but has found only a subjective expectation in motor vehicles.[21]

A "seizure," on the other hand, occurs where the government detains an individual without his consent or exercises exclusive control over an object. Formal arrests clearly constitute "seizures" but other police-citizen confrontations short of arrest are not always "seizures." The Supreme Court has indicated that a person is "seized" only when an officer has in some way restrained the liberty of a citizen by the show of authority or use of physical force.[22] Other problems may arise as to whether certain communications, physical characteristics or evidentiary items can be seized at all within the meaning of the fourth amendment; *e.g.*, overheard conversations, fingerprints, voiceprints, bloodtype, etc. Such seizures are generally governed by the maxim: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[23]

Once it has been determined that a government sponsored search or seizure has occurred, then the third level of inquiry must be resolved, *i.e.*, whether the search and/or seizure was "reasonable." Here the government practice must either pass constitutional muster under the general reasonableness provision of the fourth amendment or under the warrant clause. This third level of inquiry has been a source of endless conflict

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the test in several later cases to the extent that it now subsumes a major portion of fourth amendment analysis. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

[18] 389 U.S. at 361 (Harlan, J., concurring).

[19] Similarly, a person waives his expectation of privacy when he freely and voluntarily consents to the search or seizure. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[20] *See* Payton v. New York, 445 U.S. 573 (1980).

[21] *See* Cady v. Dombrowski, 413 U.S. 433 (1973).

[22] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). *But see* United States v. Mendenhall, 446 U.S. 544, 551 n.5 (1980) (dicta), in which Justices Stewart and Rehnquist opined that the questioning of a suspect fitting a "drug courier profile" did not amount to a "seizure." They indicated further that a person is seized "only, if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554. Arguably, the test was misapplied in *Mendenhall* since cooperation is more often motivated by societally endorsed respect for authority figures, rather than by an independent desire to cooperate voluntarily. *See also* State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981) (paraphrasing the *Mendenhall* dicta, the court held that an investigatory stop of suspects resembling the drug courier profile did not amount to a "seizure"). *See generally Voluntary Consent Incident to Investigatory Stop*, 4 AM. J. TRIAL ADVOC. 739 (1981).

[23] *Katz*, 389 U.S. at 351. This maxim is commonly referred to as the "plain view" doctrine.

within the Court because of the debatable connection between the two clauses.[24] The fourth amendment unquestionably prohibits unreasonable searches and seizures and clearly sets forth that probable cause is required before a warrant will be issued, but the nexus between the clauses is unclear. That is, did the Framers equate the warrant requirement with reasonableness so that no search or seizure is reasonable without the authority of a properly drawn and executed warrant? In the late 1960's the Court responded to this issue by declaring succinctly that "searches conducted outside the judicial process, without prior judicial approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."[25] Despite this seemingly strict constructionist rhetoric, the Court added the caveat that this rule is "subject only to a few specifically established and well-delineated exceptions."[26]

Instead of pronouncing a rule of *per se* unreasonableness then, the Court has actually created rules of *per se* reasonableness favoring the prosecution.[27] While the prosecution does carry the burden of proving that a particular fact situation is covered by a warrant exception,[28] the warrantless search and/or seizure is automatically deemed reasonable if it fits into an established exception. This task becomes less difficult as the list of warrant exceptions continues to expand.[29] In any event, absent exigent

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[24] In the first major interpretation of the fourth amendment, the Court liberally construed the amendment and implicitly recognized that the two clauses operate independently. Boyd v. United States, 116 U.S. 616, 623-26, 635 (1886). *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 58 (1966). After analyzing the amendment's history, Landynski rejected the position that the reasonableness clause provided an additional search power beyond the warrant requirement. *Id.* at 42-44.

Since *Boyd*, the Court has expressed contrasting viewpoints on the amendment's meaning. *Compare* United States v. Rabinowitz, 339 U.S. 56 (1950) (reasonableness is not measured by the existence of a warrant), and Chimel v. California, 395 U.S. 752, 772-73 (1969) (White, J., dissenting); *with* Coolidge v. New Hampshire, 403 U.S. 443, 474-84 (1971) (Stewart, J., plurality opinion), and Harris v. United States, 331 U.S. 145 (1947) (reasonableness is determined by the warrant requirement).

[25] *Katz*, 389 U.S. at 357. *See also* Harris v. United States, 331 U.S. 145, 161 (1947) (Justice Frankfurter stated in dissent that "searches are 'unreasonable' unless authorized by a warrant").

[26] 389 U.S. at 357. *See generally* LAFAVE, *supra* note 9, at 6 for an argument in support of the present warrant system. LaFave suggests that an expansive warrant requirement would lead to a mechanical routine that would not serve the desired purposes. Instead, LaFave submits that: "[A]s a practical matter, the warrant process [serves] as a meaningful device for the protection of the Fourth Amendment rights only if used selectively to prevent those police practices which would be most destructive of Fourth Amendment values." *Id.*

[27] *See* Haddad, *Well-Defined Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. CRIMINOLOGY 198, 203 (1977).

[28] United States v. Jeffers, 342 U.S. 48, 51 (1951).

[29] The most common warrant exceptions include:

1. *Automobile exception,*
   Carroll v. United States, 267 U.S. 132 (1925);

circumstances, the Court requires an arrest warrant for the arrest of a person in his home,[30] a search warrant for the search of his home[31] and both if an individual is to be arrested in the home of a third person.[32] However, a warrant is not required for the arrest of a person in a public place[33] nor for a search of an automobile made within the parameters of the automobile exception,[34] but these intrusions must be supported by probable cause.

Probable cause[35] to *arrest* is established by information sufficient to support a reasonable belief that an offense has been committed and that the person sought committed that offense.[36] Whereas, probable cause to *search* must establish the probability that the items sought are connected with criminal activity and will be found in the place to be searched.[37] The Court has further indicated that probable cause encompasses non-technical probabilities that amount to "more than bare suspicion."[38] These probabilities should be based upon "factual and practical considerations of every-

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2. *Searches incident to lawful arrests,*
   Chimel v. California, 395 U.S. 752 (1969);
3. *Inventory Searches of automobiles,*
   South Dakota v. Opperman, 428 U.S. 364 (1976);
4. *Stop and Frisk,*
   Terry v. Ohio, 392 U.S. 1 (1968);
5. *Emergency searches under exigent circumstances,*
   Schmerber v. California, 384 U.S. 757 (1966);
6. *Investigatory vehicular stops,*
   State v. Freeman, 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980), *cert. denied*, 454 U.S. 822 (1981) (court applied balancing test from *Terry*); and
7. *Roving border patrol searches,*
   United States v. Ortiz, 422 U.S. 891 (1975).

For a listing of over twenty-five exceptions, see Haddad, *supra* note 27, at 199-201.

[30] Payton v. New York, 445 U.S. 573 (1980).

[31] *See* Chimel v. California, 395 U.S. 752 (1969) (search warrant is required to search that area of a person's home that is not within his immediate control at the time of a lawful arrest); Agnello v. United States, 269 U.S. 20, 32-33 (1925).

[32] Steagald v. United States, 451 U.S. 204 (1981).

[33] United States v. Watson, 423 U.S. 411 (1976).

[34] United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157 (1982); Carroll v. United States, 267 U.S. 132 (1925).

[35] *See* Haddad, *supra* note 27, at 214-15. Haddad suggests that probable cause should be broken down into four categories:

1. *Crime* probable cause in support of the belief that an offense has been committed;
2. *Offender* probable cause in support of the probability that a particular person did it;
3. *Search* probable cause in support of the probability that a search will prove fruitful; and
4. *Seizure* probable cause in support of the probability that the item is contraband or evidence.

[36] Wong Sun v. United States, 371 U.S. 471, 479 (1963).

[37] Spinelli v. United States, 393 U.S. 410, 417-19 (1969).

[38] Brinegar v. United States, 338 U.S. 160, 175 (1949).

day life on which reasonable and prudent men, not legal technicians, act."[39]

Where a warrant is required, a warrant application must be submitted to a magistrate who is "neutral and detached"[40] as well as "capable of determining [whether] probable cause exists."[41] Probable cause can be based upon hearsay,[42] such as information obtained from a reliable informant.[43] Not surprisingly, the Court has expressed a strong preference for arrest warrants[44] and search warrants[45] even where not required. Accordingly, on a close question of fact regarding probable cause the scales will tip in favor of upholding the search or seizure where a warrant was issued.[46]

Where neither a warrant nor probable cause to support a warrant exception is required, the general reasonableness clause has been used to justify the intrusion. In *Terry v. Ohio*,[47] the Court set forth a balancing test where the right to be free from unwarranted intrusions is weighed against such government interests as police safety, preservation of evidence, prevention of escape and effective crime prevention or detection. However, the Court has implied that the overall test for reasonableness is less stringent than the test for probable cause.[48] In recent years, the Supreme Court has been sensitive to law enforcement's need for an "escalating set of flexible responses, graduated in relation to the amount of information they possess"[49] to allow them to deal more effectively with "rapidly unfolding and often dangerous situations on city streets."[50] Ac-

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[39] *Id. Accord* Carroll v. United States, 267 U.S. 132, 162 (1925).

[40] Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion) (state attorney general who doubled as a justice of the peace was not a "neutral and detached magistrate" who could issue a valid search warrant in an investigation for which he was chief prosecutor). *See also* Connally v. Georgia, 429 U.S. 245 (1977) (an unsalaried justice of the peace who was paid a fee when he issued a warrant but nothing if he denied the application was not neutral and detached).

[41] Shadwick v. Tampa, 407 U.S. 345, 350 (1972) (upholding city provision that authorized municipal court clerks to issue arrest warrants for violations of municipal ordinances).

[42] Police routinely swear out affidavits based on information obtained by witnesses, informants or the victim.

[43] Information supplied by informers presents special problems that can be overcome under the *Aguilar-Spinelli* test. *See* Aguilar v. Texas, 378 U.S. 108 (1964) (an informer's previous credibility coupled with the underlying circumstances forming the basis for his information can demonstrate reliability); Spinelli v. United States, 393 U.S. 410 (1969) (where an informer's source of information is not disclosed, the defect can be cured if the amount of detail permits a reasonable inference that the information was gained in a reliable manner).

[44] Beck v. Ohio, 379 U.S. 89 (1964).

[45] United States v. Ventresca, 380 U.S. 102 (1965).

[46] *Id.* at 109.

[47] 392 U.S. 1 (1968). The government practice will be upheld if it is only a "minimal intrusion" on civil liberties and is reasonable in light of the totality of circumstances. *Id.* at 21.

[48] Delaware v. Prouse, 440 U.S. 648, 654 (1979).

[49] Terry v. Ohio, 392 U.S. 1, 10 (1968).

[50] *Id. Accord* Adams v. Williams, 407 U.S. 143, 145-46 (1972).

cordingly, several warrantless government practices not supported by probable cause have been upheld[51] under the reasonableness clause while only a few have been invalidated.[52]

B. *The Search Incident to a Lawful Arrest Exception*

1. Searching the Arrestee

One of the most pervasive police practices is the search of a person's body as soon as he or she is formally arrested. Such warrantless searches had been approved by the Court in dicta[53] for several decades. In 1973, this police practice survived a strong fourth amendment challenge in the companion cases of *United States v. Robinson*[54] and *Gustafson v. Florida*.[55]

The *Robinson* Court flatly rejected the argument that only a limited *Terry*-type "frisk" for weapons should be permitted on the grounds that a search incident to an arrest is supported by arrest probable cause,[56] while a frisk is a limited weapons search based on less than probable cause.[57] The Court reasoned that since a lawful arrest is reasonable under the fourth amendment, then a subsequent search of the arrestee is likewise

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[51] *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 705 (1981) (search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted"); United States v. Mendenhall, 446 U.S. 544 (1980) (investigatory stop of a woman in an airport concourse based on characteristics consistent with a "drug courier profile"); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (police practice of ordering driver out of car pursuant to a valid traffic violation stop and the subsequent frisk when the officer noticed a bulge in the driver's coat were upheld under *Terry*); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving border patrols can stop motorists near a border for a brief inquiry into their residence status); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk on less than probable cause was upheld); State v. Freeman, 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980), *cert. denied*, 454 U.S. 822 (1981) (investigatory vehicular stop upheld).

[52] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (random stops of motor vehicles merely to check the driver's license and car registration constitute unreasonable seizures); Dunaway v. New York, 442 U.S. 200 (1979) (*Terry*'s balancing test held not applicable to the custodial questioning of a suspect where police lack probable cause to arrest). *See also* Miles, *From Terry to Mimms: The Unacknowledged Erosion of Fourth Amendment Protections Surrounding Police-Citizen Confrontations*, 16 AM. CRIM. L. REV. 127 (1979).

[53] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 392 (1914) (dictum); Carroll v. United States, 267 U.S. 132, 158 (1925) (dictum).

[54] 414 U.S. 218 (1973).

[55] 414 U.S. 260 (1973).

[56] *See* Haddad, *supra* note 27, at 214-15. Arrest probable cause consists of *crime* probable cause (belief that an offense has been committed) and *offender* probable cause (probability that a particular person did it).

[57] 414 U.S. at 227. The suspect in *Robinson* was searched as required by police department regulations and was arrested for a traffic violation which carried a mandatory jail term. *Id.* at 220. Furthermore, the search was not motivated by the fear of imminent danger, nor need it be according to the *Robinson* Court. *Id.* at 235.

reasonable and "requires no additional justification."[58] Furthermore, the search is justified both by the greater need to protect police from extended exposure to suspects taken into custody and transported to a police station, and by the need to preserve evidence.[59] In *Gustafson*, the Court added that the authority to search a person pursuant to a lawful arrest is *per se* reasonable under the fourth amendment regardless of the degree of the offense.[60]

The following year, in *United States v. Edwards*,[61] the Court upheld the delayed warrantless search of a burglary suspect who had been in jail overnight.[62] The Court stated that a search that could have been made at the "time of arrest may legally be conducted later when the accused arrives at the place of detention."[63] Thus, *Edwards* did away with the requirement that the search of the arrestee be conducted contemporaneously with the arrest. *Edwards* is in direct conflict however, with other cases that prohibit delayed searches under the search incident exception regarding containers,[64] automobiles[65] and the area within the arrestee's immediate control.[66]

2. Containers Carried by the Arrestee

The Court has yet to address directly the question of whether a warrant is required to search or even seize containers being carried by an arrestee. In *United States v. Robinson*, the Court upheld the search and seizure of a container, a cigarette package taken from an inside coat

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[58] *Id.* at 235. "It is the fact of the lawful arrest which establishes the authority to search." *Id.* Furthermore, in *Katz* terms, a person subject to a lawful custodial arrest loses his legitimate expectation of privacy of his person; therefore, the lawful arrest is a "legitimate and overriding governmental concern" that usurps the fourth amendment privacy interest. *Id.* at 237 (Powell, J., concurring).

[59] *Id.* at 234-35.

[60] 414 U.S. at 264. Like Robinson, Gustafson was arrested for a minor traffic violation. *Gustafson* is factually distinguishable from *Robinson* in that the search conducted by the police was not pursuant to departmental policy, and there was no mandatory jail term for the offense. *Id.* at 263.

[61] 415 U.S. 800 (1974).

[62] *Id.* at 801. The arrestee's clothes were taken from him the morning after the arrest and were inspected for paint chips from the scene of the burglary. *Id.* at 802. The delay was also held reasonable because the arrest was made late at night and no other clothes were available until morning. *Id.* at 805.

[63] *Id.* at 803.

[64] United States v. Chadwick, 433 U.S. 1 (1977); *see infra* notes 159-76 and accompanying text.

[65] Preston v. United States, 376 U.S. 364, 367 (1964). *But see* Chambers v. Maroney, 399 U.S. 42 (1970) (the delayed search of an automobile is valid under the automobile exception), and *infra* notes 102-20 and accompanying text.

[66] Chimel v. California, 395 U.S. 752 (1969). Arguably, the result in *Edwards* can be distinguished from the delayed search prohibition of *Chimel, Chadwick* and *Preston*, because the arrestee in *Edwards* still had access to the evidence (paint chips) since he continued to wear the clothing worn at the time of the arrest.

pocket, without analyzing each phase of the intrusion.[67] Arguably, containers found *on* arrestees are so closely associated with the person that upholding the search *per se* is a pragmatic solution to the volatile confrontation of a custodial arrest. However, it is less clear whether a *per se* warrantless search rule for containers being *carried* by an arrestee is necessary to neutralize the confrontation. Instead, the government interests of police safety and preservation of evidence only justify the immediate *seizure* of the package, since a container once reduced to exclusive police control no longer poses a serious danger.[68] Thus, in *Katz* terms, a person does have a legitimate expectation of privacy as to any subsequent warrantless *search* of the container's contents.[69] Moreover, this rationale strikes a balance which maintains the status quo with the least possible intrusion. Indeed, many courts have followed this line of reasoning and have invalidated warrantless searches of containers under the search incident to arrest exception.[70]

3. Searching the Area Within Arrestee's Immediate Control

While the practice of searching the arrestee's person pursuant to a lawful arrest has long been regarded as legally permissible,[71] the scope of a warrantless search of the area surrounding the arrestee at the time of arrest was in a constant state of flux until *Chimel v. California.*[72] In *Chimel*, three policemen waited for a burglary suspect to enter his home before executing an arrest warrant.[73] Pursuant to the arrest, but without

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[67] 414 U.S. 218, 223 (1973). As the dissent pointed out, there were three distinct phases: the frisk, the removal of an unknown object and the opening of the package. *Id.* at 249 (dissenting opinion).

[68] If the police had reason to believe the container presented any imminent danger to life or limb, then the additional step of a warrantless search would be justifiable under the exigent circumstances exception to the warrant requirement. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966).

[69] *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753, 765 n.14 (1979) (upholding the warrantless seizure of a suitcase taken from an automobile but not the subsequent warrantless search); United States v. Chadwick, 433 U.S. 1, 15 (1977) (privacy interest in the contents of a footlocker was not diminished by the lawful arrest).

[70] *See, e.g.*, United States v. Benson, 631 F.2d 1336 (8th Cir. 1980), *vacated and remanded*, 453 U.S. 918 (1981) (remanded for reconsideration in light of New York v. Belton, 453 U.S. 454 (1981)); United States v. Calandrella, 605 F.2d 236 (6th Cir. 1979), *cert. denied*, 444 U.S. 991 (1980). For additional cases, see LAFAVE, *supra* note 9, at 77-78 nn.23.1-.2 (Supp. 1982).

[71] United States v. Robinson, 414 U.S. 218, 225 (1973).

[72] 395 U.S. 752, 755-60 (1969). The *Chimel* majority opinion accurately chronicles the embattled history of the rule. *Id.* It is sufficient to say here that *Chimel* overrules such cases as Rabinowitz v. United States, 339 U.S. 56 (1950), which had upheld a one-and-a-half hour warrantless search of the drawers, files and safe in a one room office, and Harris v. United States, 331 U.S. 145 (1947), which had upheld the warrantless search of a room separate from the one where the arrest occurred. 395 U.S. at 768.

[73] 395 U.S. at 753.

a search warrant or consent, the police searched the entire house for forty-five minutes until the stolen coins were found.[74]

The *Chimel* Court invalidated the search of the house, thus preventing police from undercutting the search warrant requirement which was designed to protect the sanctity of the home. As a consequence, the Court held that the "scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[75] Accordingly, *Chimel* limited the space in which a warrantless search incident to a lawful arrest can occur to that area within the arrestee's immediate control, *i.e.*, "the area within which he might gain possession of a weapon or destructible evidence."[76] Furthermore, *Chimel* prohibits the routine search of "any room other than that in which an arrest occurs . . . [or a broad search of] all the desk drawers or other closed or concealed areas in that room itself" that are not within the arrestee's immediate control.[77] Moreover, the limited search is justified both by the need for police safety and for the preservation of evidence.[78]

Chimel's effect on the practice of searching containers located within the arrestee's immediate control is an open question. This issue should be analyzed by a two tier approach. The first question is whether the container itself is within the area of arrestee's immediate control. If it is, then police should clearly be permitted to seize it. The second issue is whether the *inside* of the container is also within easy reach of the arrestee, *i.e.*, within his immediate control.[79] The answer to this second question will depend on such relevant factors as the nature of the container, whether it is locked or otherwise sealed, or whether the arrestee is physically restrained in any way. Thus, if it can be reasonably said that the contents were not easily accessible, then the additional intrusion of a warrantless search in an area outside of the arrestee's immediate control would be invalid.[80]

However, the Court's recent pronouncement of a *per se* rule in *New York v. Belton*[81] suggests a strong tendency for clear-cut rules in the custodial arrest setting. The *Belton* Court applied the *Chimel* "immediate control" doctrine in support of its holding that the warrantless search of the passenger compartment of an automobile is always reasonable when

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[74] *Id.* at 753-54.

[75] *Id.* at 762 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

[76] *Id.* at 763. The Court thereby preserved, to the most realistic degree, the traditional expectation of privacy in the security of one's home.

[77] *Id.* In addition, the search must be contemporaneous, *i.e.*, not "remote in time or place from the arrest." *Id.* at 764. Thus, a house cannot be searched as incident to an arrest which occurs on the front porch. Vale v. Louisiana, 399 U.S. 30 (1970).

[78] 395 U.S. at 763.

[79] *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 15 (1977).

[80] *See supra* note 70 and accompanying text.

[81] 453 U.S. 454 (1981).

made incident to the lawful arrest of the occupants.[82] Moreover, the *Belton* Court encompassed the warrantless search of containers found therein as also within the rule. Furthermore, the *Belton* rule might be extended to containers seized in the non-automobile context as evidenced by a recent Court order remanding a case for reconsideration in light of *Belton*.[83]

C. *The Automobile Exception*

1. Early Development

"The word 'automobile'[84] is not a talisman in whose presence the Fourth Amendment fades away and disappears."[85] Despite this proclamation, a search warrant is generally not required to search a motor vehicle or containers or compartments therein. In carving out the "automobile exception" however, the Court spun an endless web of confusing standards in an effort to guide conscientious law enforcement officials. This Section will isolate the major problems under this exception that have arisen over the years.

The Court first confronted the warrantless automobile search issue in *Carroll v. United States*.[86] Mr. Justice Taft, author of the majority opinion, upheld the warrantless intrusion by construing the fourth amendment in "light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will [allegedly] conserve public interests as well as the interests and rights of individual citizens."[87] The *Carroll* Court reasoned that since the Founding Fathers comprised the First, Second and Fourth Congresses, statutes passed by those Congresses were evidence of the Framers' intent.[88] After analyzing several statutes, the Court noted that the lawmakers had distinguished between the necessity for obtaining search warrants for goods subject to forfeiture when in a dwelling and those goods concealed and being transported in a movable vessel.[89] Consequently, the *Carroll* Court concluded that the

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[82] *Id.* at 460.

[83] United States v. Benson, 631 F.2d 1336 (8th Cir. 1980), *vacated and remanded*, 453 U.S. 918 (1981).

[84] For analytical purposes, the automobile should be thought of as both an object and a place. As an object, its exterior and certain portions of the interior are in plain view so that there is no reasonable expectation of privacy. As a place, it is a container in which a person has been deemed to have a diminished expectation of privacy. *See* Cardwell v. Lewis, 417 U.S. 583, 590-91 (1974) (plurality opinion).

[85] Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971) (plurality opinion).

[86] 267 U.S. 132 (1925). In *Carroll*, federal prohibition officers pulled over a car driven by a known prohibition violator believed to be making a "run." *Id.* at 134-35. They searched the car without a warrant and without probable cause to arrest and found sixty-eight quarts of whiskey and gin inside the back seat. *Id.* For an in-depth analysis of *Carroll*, see Knuckles, *Warrantless Automobile Searches: When Are They Constitutionally Permissible?*, 65 ILL. B.J. 532 (1977).

[87] 267 U.S. at 149.

[88] *Id.* at 151.

[89] *Id.*

Framers implicitly recognized the impracticability of obtaining a warrant to search or seize movable vessels.[90] The Court proceeded to hold the intrusion valid under the fourth amendment declaring:

> [T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.[91]

Carroll implicitly established a three part test for justifying the warrantless search and seizure of a vehicle: 1) there must be probable cause that contraband is inside the automobile,[92] 2) it must be impractical to obtain a warrant, and 3) the vehicle must be mobile.[93] In essense, mobility is the exigent circumstance that forms the underlying basis for the impracticability criterion. Since *Carroll* involved only the search of the automobile's passenger area, the permissible scope of the exception was undefined and most subsequent litigation challenged its limitations.

The next automobile case accepted by the Court was *Husty v. United States*,[94] in which *Carroll* was reaffirmed. In *Husty*, a *vacant* car was under surveillance pursuant to a reliable tip that it was loaded with bootleg alcohol. The police did nothing until the suspect entered the car and started the engine at which time the police seized and searched the car without a warrant.[95] The *Husty* search was upheld even though the automobile had not been moved, on the ground that it would be unreasonable to require the police to leave the scene to obtain a warrant.[96]

Similarly, in *Sher v. United States*[97] the Court upheld the warrantless search of a car parked in an open garage where the driver was walking toward his house.[98] The *Sher* Court extended *Carroll* to the search of the

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[90] *Id.* at 153.

[91] *Id.* at 149. *See also* United States v. Lee, 274 U.S. 559 (1927), in which the Court extended the *Carroll* rationale to warrantless searches of vessels on waterways where there is probable cause to believe the boats contain contraband. 274 U.S. 562. *But see* Trupiano v. United States, 334 U.S. 699 (1948), where the Court refused to extend *Carroll* to uphold the warrantless search of a building because it was reasonably practicable to obtain a warrant.

[92] Note that probable cause to arrest the driver is not relevant under this exception. *See* Haddad, *supra* note 27, at 222.

[93] The term "mobile" became a misnomer for the Court since, as later cases revealed, a vehicle is always mobile for constitutional purposes because the fourth amendment does not permit its seizure to the exclusion of the rest of the world. Chambers v. Maroney, 399 U.S. 42, 52 (1970). Nonetheless, the *Carroll* Court had created the distinct impression that mobility meant *actual* movement and that for this reason it was impracticable to obtain a search warrant.

[94] 282 U.S. 694 (1931) (reversed and remanded on other grounds).

[95] *Id.* at 700.

[96] *Id.* at 701.

[97] 305 U.S. 251 (1938).

[98] *Id.* at 253.

trunk and validated the intrusion because the car had been followed into the garage, the officer was there immediately after it was parked, the garage itself was not searched and the car could have been properly stopped earlier.[99] *Sher* and *Husty* are significant in that they firmly imbedded the probable cause[100] requirement into the exception. Furthermore, *Sher* and *Husty* suggest that mobility means potential movement regardless of the likelihood of actual movement. Thus, as illustrated by the facts in *Sher*, the mobility concept is a legal fiction used to justify a *per se* rule of reasonableness.[101]

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[99] *Id.* at 255.

[100] In the early automobile exception previously discussed, the issue of whether there was probable cause to search the vehicle was often a close question of fact and a point of disagreement within the Court. This was particularly evident in a later case, Brinegar v. United States, 338 U.S. 160 (1949), in which the bulk of the opinion focused on finding probable cause.

In *Brinegar*, two federal agents were parked near a state line overlooking a road frequently traveled by bootleggers. *Id.* at 162, 171. The agents saw a car pass that appeared to be "heavily loaded" and the driver of which they recognized as a man with a reputation for transporting liquor illegally. *Id.* at 162-63. A high speed chase ensued and the suspect's car was forced off the road. *Id.* The driver then admitted having illegal liquor in the car at which point he was arrested and the car was searched without a warrant. *Id.* The Court looked at the aggregate facts and found that probable cause to search did exist. *Id.* at 170.

By looking at the aggregate facts, the Court implicitly conceded that probable cause did not ripen until after the car was stopped. *Id.* at 178 (Burton, J., concurring). Such an approach glosses over the question of whether the initial stop, albeit on less than probable cause, was a valid *seizure* under the fourth amendment. The concurring opinion addressed the validity of the initial stop and concluded that the government agents had "ample grounds to justify the chase and official interrogation." *Id.* As such, a warrantless stop was viewed as reasonable since: "Nothing occurred that even tended to lessen the reasonableness of the original basis for the suspicion of the agents that a crime within their particular line of duty was being committed in their presence." *Id.* at 179. Notably, this language closely parallels the rationale adopted later by the Court in Terry v. Ohio, 392 U.S. 1 (1968), to uphold an investigatory "stop and frisk" of a pedestrian on less than probable cause. Moreover, some state courts have upheld investigatory vehicular stops on less than probable cause. *See, e.g.*, State v. Freeman, 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980), *cert. denied*, 454 U.S. 822 (1981).

[101] The most vehement attack on the early development of the automobile exception came from Justice Jackson in *Brinegar*, 338 U.S. at 180-88 (dissenting opinion). He charged that this exception to the warrant requirement tagged fourth amendment freedoms as "secondary rights" that are "relegated to a deferred position." *Id.* at 180. Instead, Justice Jackson argued that these rights are "indispensable freedoms" whose compromise would undermine the hallmark of American society.

> Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where

The automobile exception was developed further in the 1970 case of *Chambers v. Maroney*.[102] In *Chambers*, two armed men robbed a gas station forcing the attendant to fill his glove with change.[103] Two observant teenagers notified police that a station wagon with four occupants had sped away from a nearby parking lot.[104] Within the hour, police spotted the car on a public highway, stopped it and arrested all four occupants.[105] The car and the arrestees were transported to the police station where a thorough warrantless search disclosed two loaded .38 caliber revolvers and a right hand glove containing coins.[106] The *Chambers* Court held the search invalid under the search incident to arrest exception,[107] but approved the delayed search under the automobile exception.[108]

The *Chambers* Court upheld the initial warrantless seizure of the vehicle on *Carroll*-type practicability grounds since the procedure of following the car or tracing it hours or days later when a search warrant has been obtained would be an "impractical alternative" because contraband might be removed or the vehicle itself taken out of the jurisdiction.[109] The practicability argument though, is eviscerated by a subsequent delayed search of a container (the vehicle itself here) under exclusive police control at the station house.[110] The *Chambers* Court responded to this dilemma by analyzing the degree of intrusion accompanying both the seizure and the search in light of the mobility factor.

The majority reasoned that "since a car is readily movable" and the "opportunity to search is fleeting," the vehicle could either be searched immediately without a warrant or seized temporarily pending approval

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homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Id. at 180-81.

[102] 399 U.S. 42 (1970).

[103] *Id.* at 44.

[104] *Id.*

[105] *Id.*

[106] *Id.* These items were later admitted into evidence at trial and the occupants were convicted of armed robbery.

[107] The *Chambers* Court, *quoting* Preston v. United States, 376 U.S. 364, 367 (1964), stated: "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." 399 U.S. at 47.

[108] 399 U.S. at 47-48.

[109] *Id.* at 51 n.9.

[110] The *Chambers* Court clearly rejected the exclusive police control argument with regard to the vehicle as a container, but in Robbins v. California, 453 U.S. 420, 424-25 (1981) (plurality opinion), the Court accepted this argument for certain containers found in the vehicle pursuant to a valid automobile exception search. The reasoning behind this disparity rests in the Court's view in *Robbins* that people have a lesser expectation of privacy as to their vehicles but not as to certain containers. *See infra* notes 128-35 and accompanying text. In United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157 (1982), however, the Court voted 6-3 to reject the *Robbins* rationale.

of a search warrant application.[111] In cursory fashion, the Court concluded that:

> 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.[112]

The Court's position, however, clearly flies in the face of its long-standing warrant preference policy.[113]

In contrast, Justice Harlan's dissent expressed the belief that a "warrantless search involves the greater sacrifice of Fourth Amendment values."[114] So that the better procedure would be to permit the "simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant."[115] Such an approach would constitute a lesser intrusion. Justice Harlan reasoned further that the temporary immobilization of the vehicle would be a minimal additional inconvenience because *search* probable cause will also establish *arrest* probable cause and the vehicle's occupants would usually be in custody.[116] Justice Harlan also relied on the assumption that those not arrested would prefer temporary immobilization in exchange for having search probable cause determined by a neutral magistrate, or else they would consent to an immediate warrantless search.[117]

Despite Justice Harlan's viewpoint, the *Chambers*' majority found that

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[111] 399 U.S. at 51.

[112] *Id.* at 52.

[113] *See supra* notes 44-46 and accompanying text. It is important to note here, that the relative degree of one intrusion is simply irrelevant to the constitutional validity of the other. Instead, constitutional scrutiny of a warrantless *seizure* should be analyzed as an intrusion separate and distinct from the fourth amendment's prohibition against warrantless *searches*. Otherwise, precious fourth amendment values will be relegated to "secondary rights." *See generally supra* note 101.

[114] 399 U.S. at 63 (dissenting opinion).

[115] *Id.*

[116] *Id.* at 63-64.

[117] *Id.* at 64. The difficulty with permitting the temporary warrantless seizure of the vehicle is the potential for abusive police tactics. The police could use the threat of temporary seizure to coerce the occupant's consent to an on-the-spot warrantless search. However, such consent searches could be challenged as consents not freely and voluntarily given as required by Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Moreover, the policy underlying temporary seizure is that of preventing an additional intrusion, *i.e.*, a warrantless search, while maintaining a balance between the competing interests of prevention and detection of crime and unwarranted governmental intrusion. The choice is between coerced consent searches on the one hand and discretionary police power to determine probable cause on the other. The balance should be clearly struck with the least possible intrusion: temporary seizure pending a search warrant application.

probable cause as well as the car's mobility were still present at the police station.[118] This conclusion was expressly linked to the Court's unwillingness to preclude the use of a vehicle to anyone for a brief period of time under the fourth amendment while a search warrant is being obtained.[119] Thus, the Court created the legal fiction of everlasting mobility from the view that the Constitution does not exclude someone not in custody from removing an impounded vehicle. Ironically, the *Chambers* Court implicitly approved the temporary seizure of the Chambers vehicle from the time it was initially stopped until, and including, the time of the delayed warrantless search at police headquarters.[120]

In 1971, a divided Court limited the applicability of the automobile exception. In *Coolidge v. New Hampshire*,[121] two vehicles were towed from a private driveway after the owner was arrested in his nearby house. The *Coolidge* Court held that the delayed search was not justified under *Carroll* or *Chambers* because none of the exigencies of the automobile exception were present.[122] Consequently, the automobile exception only applies to vehicles impounded on public property.

In summary, the *Carroll-Chambers* line of cases permits government agents to search and seize vehicles either in the field or later at the police station. The only actual requirement is probable cause to believe the vehicle contains contraband. Moreover, the Court has authorized warrantless searches of the passenger area,[123] inside the seats,[124] concealed compartments under the dash,[125] under the front seat[126] and in the trunk.[127]

2. Diminished Expectation of Privacy

In post-*Chambers* cases, the Court began to view the automobile in expectation of privacy terms. In *Cady v. Dombrowski*,[128] the warrantless

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[118] 399 U.S. at 52.

[119] *Id.*

[120] Although not discussed in *Chambers*, the effect of permitting delayed searches of automobiles is to encourage more thorough searches under better conditions. While a hasty field search might still occur after *Chambers*, the more efficient search will occur at police headquarters. Effective law enforcement activities are certainly beneficial but such broad searches evoke memories of the detestable general warrants which subdued colonial America.

[121] 403 U.S. 443 (1971) (plurality opinion).

[122] *Id.* at 460-62.

[123] Texas v. White, 423 U.S. 67, 68 (1975).

[124] Carroll v. United States, 267 U.S. 132, 135 (1925).

[125] Chambers v. Maroney, 399 U.S. 42, 44 (1970).

[126] Brinegar v. United States, 338 U.S. 160, 163 (1949).

[127] Scher v. United States, 305 U.S. 251, 253 (1938).

[128] 413 U.S. 433 (1973). Here, an out-of-town policeman wrecked his rented car and was subsequently hospitalized. *Id.* at 436. Pursuant to departmental procedure, the police impounded the car and searched for the officer's weapon to protect the general public. The search of the trunk revealed bloody clothes and a nightstick and led to the search of other unrelated areas and the eventual murder conviction of the policeman. *Id.* at 436-38.

search and seizure of a disabled vehicle was upheld as reasonable in light of the government's caretaking function in a rural area.[129] *Cady* was not decided under the automobile exception but it nonetheless provides a significant interpretation of that exception. The *Cady* Court recognized that motor vehicles have a greater exposure to police confrontations than the inside of a home; consequently, automobiles have a lesser degree of constitutional protection.[130]

In *Caldwell v. Lewis*,[131] the Court expounded on this theme declaring that: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."[132] The privacy interest is further diminished by the fact that the vehicle and its occupants are continuously exposed to public view.[133] However, these comments were made with regard to the warrantless search of a car's exterior and the Court noted accordingly that "[t]his is not to say that no part of the interior of an automobile has Fourth Amendment protection."[134]

The lesser expectation of privacy is clearly emerging as the underlying rationale of the modern day automobile exception. This notion embraces both mobility and the practicability of obtaining a warrant as pertinent objective factors in determining the reasonableness of any expectation of privacy. Furthermore, the Court's list of factors that affect the objective aspect of the reasonableness test is continually growing: *e.g.*, extensive traffic regulations, vehicle equipment requirements and compulsory inspections.[135] These and other factors may support the conclusion that people do not have a reasonable expectation of privacy as to their freedom

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[129] The *Cady* Court stated that local officials have duties geared directly to the vehicle itself that are noncriminal in nature. Characterizing these duties as "community caretaking functions," the Court explained them as "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441. Moreover, the vehicle here was properly impounded because it was disabled and abandoned and as such was a "nuisance." *Id.* at 447. The search of the car was also reasonable since it was not motivated by a desire to find evidence; indeed, the local police did not even know at the time that a murder had been committed. *Id.* at 443.

[130] *Id.* at 439.

[131] 417 U.S. 583 (1974) (plurality opinion). Here, defendant was arrested after questioning at the police station and the police impounded his car which was parked in a nearby public parking lot. *Id.* at 587. The following day lab technicians removed paint scrapings from the car's exterior and cast impressions of the tires. *Id.* at 588. This evidence was used to convict defendant of vehicular homicide.

[132] *Id.* at 590. The *Cardwell* Court applied the *Chambers* rationale to uphold the seizure from a public place and the delayed warrantless search since police could have conducted the search on the spot. *Id.* at 593. However, the intrusion was not upheld under the automobile exception itself. *Id.* at 592 n.8.

[133] *Id.* at 590.

[134] *Id.* at 591.

[135] *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753, 761 (1979); South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (plurality opinion).

of mobility in an automobile, but the conclusion that they likewise have a diminished expectation of privacy in a car's interior compartments or containers is not as compelling.

Indeed, various compartments within a vehicle, notably the glove compartment and luggage area, manifest the intent to conceal its contents from public inspection. Unwarranted governmental intrusion into these and similar portions of vehicles should be regarded as abhorrent to a free society which depends so deeply upon its freedom of movement. While most automobiles may not serve as temporary residences, the fact that most vehicles are carefully selected, painstakingly maintained and often represent a major investment, lends support to the proposition that it is an extension of the individual and a reflection of one's personality.[136] The notion that there is a lesser expectation of privacy as to the car's interior clearly contradicts these realities.

D. *Inventory Searches*

Before discussing the warrantless search of containers found in an automobile, another automobile related warrant exception deserves mention: the "inventory search exception." In *South Dakota v. Opperman*,[137] the Court approved the warrantless search of an impounded vehicle made pursuant to a routine inventory of the personal effects located therein. The vehicle had been towed to a city lot because it was parked in a restricted zone.[138] Following departmental procedure, the personal items in the car were listed on standard inventory forms and taken to police headquarters for safekeeping.[139] The police also opened the unlocked glove compartment which as it turned out contained marihuana. Relying on *Cady* and the caretaking responsibilities recognized there, the *Opperman* plurality opted for the position that "less rigorous warrant requirements" are applicable to vehicle searches than are applicable to searches of homes and offices.[140]

The inventory procedure was viewed as a "routine administrative caretaking function"[141] that was not "unreasonable in scope"[142] nor a

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[136] *See generally* Delaware v. Prouse, 440 U.S. 649, 662-63 (1979). "Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile . . . ." *Id.* at 662.

[137] 428 U.S. 364 (1976).

[138] *Id.* at 365-66.

[139] *Id.* at 366.

[140] *Id.* at 367-68. The Court stated further that:

> Automobiles unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

Id. at 368.

[141] *Id.* at 370 n.5.

[142] *Id.* at 376 n.10.

"pretext concealing an investigatory police motive."[143] The search[144] was justified by the need to protect the owner's property while in custody, to protect the government from spurious lost or stolen property claims as well as to protect the public and police from potential danger.[145]

The permissible scope of the inventory search according to *Opperman* is limited to parts of the car customarily used to store valuables but it is uncertain whether the trunk is such an area.[146] The potential for abuse of the inventory search is obvious. If the government is permitted, during a routine inventory search, to search all areas of a vehicle as well as any containers located therein, the limited protection under *United States v. Ross*[147] and the automobile exception will be undercut. Police will simply conduct vehicle and container searches under the facade of the inventory exception. In response to these dangers, many state courts are restricting inventory searches by placing a duty on police to offer the owner, when known, an option of releasing the government from tort liability for lost or stolen items in lieu of an inventory search.[148] In addition, other states are requiring police to have the owner present during the search or to permit the owner to make other arrangements to protect his personal property.[149]

Opperman also leaves open the question of whether containers found during an inventory search can be opened and inventoried as well. The degradation of fourth amendment rights is particularly frightening here, especially in view of the various traffic code violations that could be used as a pretext to get the vehicle into the station in the first place. However, in *United States v. Chadwick*,[150] discussed in the next Section, the Court emitted a ray of hope by declaring that there is a greater expectation of privacy regarding closed containers than there is in the automobile itself. Since *Chadwick* does not deal with an inventory search with a non-investigatory motive, a few states have found it not applicable and have upheld the inventorying of the container's contents.[151] Fortunately, a clear majority of the lower courts are applying the *Chadwick* rationale to invalidate the opening of containers pursuant to an inventory search.[152]

III. SEARCHING CLOSED CONTAINERS LOCATED WITHIN A VEHICLE

In the 1977 case of *United States v. Chadwick*,[153] the Court had its first

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[143] *Id.* at 376.

[144] Notably, only Justice Powell had properly categorized the inventory procedure as a "search" since it intruded "upon an area in which the private citizen has a 'reasonable expectation of privacy.' " *Id.* at 377 n.1 (concurring opinion).

[145] *Id.* at 369.

[146] *Id.* at 376 n.10.

[147] 456 U.S. 798, 102 S. Ct. 2157 (1982).

[148] *See* LAFAVE, *supra* note 9, at 168 n.40 (Supp. 1982), for a list of state cases.

[149] *Id.*

[150] 433 U.S. 1 (1977).

[151] *See* LAFAVE, *supra* note 9, at 170 nn.70-71 (Supp. 1982).

[152] *Id.* at 170-71 n.72.

[153] 433 U.S. 1 (1977). *See also* Arkansas v. Sanders, 442 U.S. 753 (1979).

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opportunity to explore the legal implications of warrantless searches and seizures of closed containers fortuitously located within a motor vehicle. The *Carroll-Chambers* line of cases discussed above dealt only with the warrantless search of the vehicle itself where police had merely *general* knowledge that contraband was contained *somewhere* therein. *Chadwick*, on the other hand, deals with the situation where police have *specific* information that a particular container which happens to be located in a motor vehicle contains incriminating matter.[154] Thus, the focus of *Chadwick*-type searches is limited to the container, not the vehicle itself.

Post-*Chadwick* cases made this distinction important because of the different results in the application of the appropriate legal doctrine. As the law now stands, *Chadwick*-type searches cannot be made without a warrant, unless the container is within the "immediate control" of an arrestee in which case a warrantless search may be permissible, under *New York v. Belton*,[155] as a search incident to a lawful arrest. However, if the container is discovered during a lawful automobile exception search, based on probable cause of a *general* nature, and not conducted as a search incident to an arrest, then a warrantless search is permissible under *United States v. Ross*.[156]

Prior to *Ross*, the general/specific information distinction seemed to be a nullity since both *Chadwick* and *Robbins v. California*[157] required a search warrant before a container found in a vehicle could be searched. In *Ross*, however, the Court abandoned *Robbins* and extended the automobile exception to validate warrantless searches of containers found in a vehicle where there was reason to believe, based on general information, that there was contraband somewhere in the vehicle.[158] Thus, the general/specific information distinction remains viable and warrantless container searches are prohibited only in two seemingly anomalous situations: 1) where police have specific information that a particular container contains evidence, despite its location in a vehicle; and 2) where the police lack probable cause to search the vehicle in general and the search would not be incident to a valid arrest. This Section will analyze the rationale behind this distinction.

A. Chadwick *and* Sanders *Situations*

In *United States v. Chadwick*, federal narcotics agents received a tip from railroad officials that two individuals loaded a brown footlocker onto a Boston bound train.[159] The railroad officials suspected that illicit drugs were being transported because talcum powder, commonly used to cover-

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[154] 433 U.S. at 3-4.

[155] 453 U.S. 454 (1981).

[156] 456 U.S. 798, 102 S. Ct. 2157 (1982).

[157] 453 U.S. 420 (1981) (plurality opinion), *overruled*, United States v. Ross, 456 U.S. 798, ____, 102 S. Ct. 2157, 2172 (1982).

[158] 456 U.S. at ____, 102 S. Ct. at 2172.

[159] 433 U.S. 1, 3 (1977).

up marihuana odor, was seen leaking from the trunk and because the weight of the trunk was disproportionate to its size.[160] Two days later the train arrived in Boston and federal agents followed the suspects as they claimed the footlocker and were joined by Chadwick.[161] A trained police dog was discreetly released near the footlocker and the dog signalled that a controlled substance was in the container.[162] The three suspects then placed the footlocker in the trunk of Chadwick's waiting automobile, but before the car was even started, all three were arrested and the footlocker was seized.[163] A few hours later at the federal building, the agents opened the double-locked footlocker and discovered a large quantity of marihuana.[164] The arrests and search were made without warrants, the trunk was within the government's exclusive control at all times following the arrests and the agents did not contend that exigent circumstances justified the search.[165] The government asserted that the automobile exception rationale as applied in *Chambers*, as well as the search incident to arrest exception, justified their actions; however, the district and circuit courts disagreed and the evidence was suppressed.[166]

The Supreme Court affirmed the judgments below and rejected the government's broad propositions.[167] As to the search incident to arrest exception, the *Chadwick* Court held that a prompt warrantless search was limited by *Chimel* to the "arrestee's person and the area 'within his immediate control.' "[168] Such a search is justified only to prevent the destruction of evidence and to protect police from bodily harm.[169] The trunk here, according to the *Chadwick* majority, was not "immediately associated" with the arrestee's person and, once it was reduced to the agent's exclusive control, any threatened danger of access by the arrestees to it or its contents was dissipated.[170] Furthermore, the Court stated that such

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[160] *Id.*

[161] *Id.* at 3-4.

[162] *Id.* at 4.

[163] *Id.*

[164] *Id.* at 4-5.

[165] *Id.*

[166] *Id.* at 5-6.

[167] *Id.* at 6-7. In one such proposition, the government claimed that any property possessed by a person arrested in public could be searched without a warrant as incident to the arrest "so long as there is probable cause to believe that the property contains contraband or evidence of crime." *Id.* at 14. While the government conceded that the *Chimel* immediate control requirement was not present here, they reasoned instead that the delayed search was reasonable on practicability grounds. *Id.* The Court correctly determined that this argument was not pertinent to the search incident justifications. *Id.*

[168] *Id.* at 14 (citations omitted).

[169] *Id.* at 14-15.

[170] *Id.* at 15. *Compare* Justice Brennan's concurring opinion, *id.* at 16, that the police could not have made an immediate search of the footlocker no matter how much control defendants' had, because the double-lock prevented exercise of "immediate control" and access to the contents; *with* Justice Blackmun's dissenting

a delayed search is too " 'remote in time [and] place from the arrest,' " and is not justified as incident thereto.[171] Consequently, a search warrant is required whenever property of this type is "under the exclusive dominion of police authority."[172]

The *Chadwick* majority rejected the government's other contention that core fourth amendment interests were historically erected only to protect homes, offices and private communications through the warrant requirement, and that warrantless government intrusions of other areas, such as automobiles, would be reasonable if supported by probable cause.[173] Instead, *Chadwick* held that the fourth amendment safeguards "individuals from unreasonable government invasions of legitimate privacy interests" even outside of the home.[174] The *Chadwick* Court further maintained that: "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination."[175] In addition, the government's automobile analogy was distinguished on the grounds that a vehicle has a "diminished expectation of privacy" because it is not a home or a repository of personal effects where privacy is legitimately expected.[176]

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opinion, *id.* at 18-20, which contends that under *Robinson* the trunk could have been searched on the scene or delayed until later as in *Edwards*.

[171] *Id.* at 15 (citation omitted). The Court noted, however, that a delayed search may be valid if the exigency of the situation so dictates; for example, if the luggage contains explosives or other immediately dangerous instrumentalities. *Id.* at n.9. However, such a search should be upheld under the exigent circumstances exception, not the search incident exception. *See, e.g.*, Ker v. California, 374 U.S. 23, 39-40 (1962).

[172] 433 U.S. at 15. The validity of the initial seizure and detention of the trunk was not challenged here; nonetheless, this procedure was implicitly approved as "sufficient to guard against any risk that evidence might be lost." *Id.* at 13 (dictum). Further dicta indicated that the warrantless impoundment or immobilization of the container was a "substantial infringement" with the use and possession of the footlocker, and that the "seizure did not diminish" the expectation of privacy in the contents. *Id.* at 13 n.8.

Indeed, in Arkansas v. Sanders, 442 U.S. 753 (1979), the Court upheld the temporary seizure of a container while a magistrate determined the sufficiency of a search warrant application. *Id.* at 765 n.14. The *Sanders* Court distinguished the reluctance of the *Chambers* Court to grant such a procedure with regard to automobiles on the ground that temporary impoundment of containers does not impose severe burdens on the police department as does the temporary impoundment of vehicles. *Id.* In United States v. Ross, 456 U.S. 798, ____, 102 S. Ct. 2157, 2172 (1982), however, the Court further limited the *Sanders* temporary seizure rationale to non-automobile exception searches where the object of the search is the container, not the vehicle.

[173] 433 U.S. at 6-7, 11-13. This argument relied on the automobile exception by analogy. Yet, the government did not contend that the footlocker's brief contact with the vehicle invoked the automobile exception *per se*, thereby leaving the question open for another case.

[174] *Id.* at 11.

[175] *Id.*

[176] *Id.* at 12.

In 1979, in *Arkansas v. Sanders*,[177] the Court was confronted with the warrantless search and seizure of an unlocked suitcase belonging to a passenger in a taxi.[178] As was the case in *Chadwick*, the *Sanders* officers had probable cause to believe the suitcase, as opposed to the vehicle, contained contraband.[179] This specific information thus limited the scope of the search to a particular container, the suitcase, coincidentally located in a motor vehicle. *Sanders* differed from *Chadwick* in that the vehicle travelled two blocks before being stopped by police and the warrantless *Sanders* search occurred on the spot. The *Sanders* Court held that the location of the suitcase in a moving vehicle did not lessen Sanders' legitimate expectation of privacy in the contents of his luggage, and that the exigency of the suitcase's mobility, vis-a-vis its location, disappeared once securely within police control.[180] Consequently, the warrantless search of the suitcase was held invalid.

The difficulty with the *Sanders* holding was the disagreement among the Justices as to its scope. On the one hand, the broad interpretation stated above led to the conclusion that the warrantless search of a container could never be valid under the automobile exception.[181] Chief Justice Burger, in his concurring opinion which was joined by Justice Stevens, stated that the automobile exception is not operable here because police had specific knowledge that a particular container located in the vehicle contained contraband.[182] Thus, for Chief Justice Burger and Justice Stevens the specific versus general knowledge distinction remained meaningful and the question was still open whether a warrantless search of a container found during a lawful automobile exception search is reasonable. Moreover, two years later in *Robbins* Justice Powell, who authored the *Sanders* majority opinion, stated that neither *Chadwick* nor *Sanders* was an "automobile case" because of the specific nature of the probable cause.[183] Nonetheless, this dilemma was resolved in *United States v. Ross*,[184] where the Court upheld a warrantless container search under the automobile exception and rejected that portion of *Sanders* which could be construed

[177] 442 U.S. 753 (1979).

[178] *Id.* at 755.

[179] *Id.* Acting upon information from a reliable informant, local police observed the suspect arrive at the airport, carrying a suitcase believed to contain marihuana, and later enter a cab with an apparent co-conspirator. *Id.*

[180] *Id.* at 763. In dissent, Justices Blackmun and Rehnquist opined that once the container is seized the "additional intrusion of a search may well be regarded as incidental" and a search warrant would only add minimal protection. *Id.* at 770.

[181] *Id.* at 763.

[182] *Id.* at 767 (concurring opinion).

[183] 453 U.S. 420, 435 (1981) (concurring opinion). However, at least three federal circuit courts found that *Sanders* compelled the invalidation of an automobile exception/container search. *See, e.g.*, United States v. Ross, 655 F.2d 1159, 1168 (D.C. Cir. 1981) (en banc), *rev'd*, 456 U.S. 798, 102 S. Ct. 2157 (1982); United States v. Medina-Verduzo, 637 F.2d 649, 652-53 (9th Cir. 1980); United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 911 (1979).

[184] 456 U.S. 798, 102 S. Ct. 2157 (1982).

to invalidate such a warrantless search.[185] Thus, a warrantless container search is valid under *Ross* if based on general information, but is invalid under *Chadwick* and *Sanders* if based on specific information regarding a particular container.

Chadwick and *Sanders* left open two other issues. First, whether the search incident to arrest exception permits the warrantless search of containers seized from the car's passenger compartment following the occupant's arrest. In *Chadwick*, this exception was argued in an attempt to uphold the delayed search of the footlocker, but the Court flatly rejected it on grounds of remoteness in time from the arrest.[186] In *Sanders*, the argument was not asserted at all in support of the on-the-spot search of the suitcase taken from the trunk. Nonetheless, the *Sanders* Court stated that the luggage was not within the arrestee's "immediate control" at the time of the search.[187]

Chadwick and *Sanders* also left the question open as to which containers do not manifest a legitimate expectation of privacy. Footnote 13 of the *Sanders* opinion is the center of the controversy here.[188] The footnote indicates in general terms that two types of containers "cannot support any reasonable expectation of privacy"[189] and are thus not protected by the fourth amendment: 1) open containers with contents exposed to plain view; and 2) those containers with contents inferrable from the nature of the container. The *Ross* Court, however, rejected this rationale in the automobile exception context and held that the nature of the container does not define the scope of the warrantless search; instead, the object of the search and the place in which there is probable cause that contraband might be concealed therein are the relevant guideposts.[190]

B. *New York v. Belton*

1. A New "Bright Line" Rule

In *New York v. Belton*,[191] the Court applied the *Chimel* "immediate control" test and created a new "bright line" rule to *validate* warrantless automobile searches made contemporaneously with the lawful arrest of its occupants. In *Belton*, a lone state policeman pulled over an automobile for speeding on a thruway. While checking for identification he smelled burnt marihuana and saw an envelope on the car floor marked "Super-

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[185] *Id.* at ____, 102 S. Ct. at 2172. *See infra* text accompanying notes 284-87.

[186] *See generally supra* notes 167-68 and accompanying text.

[187] 442 U.S. 753, 763 n.11 (1979) (dictum). *But see* New York v. Belton, 453 U.S. 454 (1981) (upholding the warrantless search of a container taken from the passenger compartment where the container was deemed within the arrestee's immediate control).

[188] *Id.* at 764 n.13.

[189] *Id.* The Court cited a gun case and a kit of burglar tools as examples of this type of unprotected container.

[190] 456 U.S. at ____, 102 S. Ct. at 2172.

[191] 453 U.S. 454, 460 (1981).

gold."[192] The officer immediately associated the marked envelope with illicit drugs and ordered the four occupants out of the car, arrested them for unlawful possession of marihuana, frisked each of them and separated them into different areas on the highway.[193] The trooper then retrieved and opened the envelope discovering marihuana.[194] After reading the arrestees the Miranda warnings, he returned to the vehicle and searched the passenger compartment finding a jacket on the back seat.[195] He seized the jacket, unzipped one of the pockets and discovered cocaine.[196]

Writing for the majority,[197] Justice Stewart upheld the warrantless search of the zipped pocket as incident to a lawful arrest. Justice Stewart held that the *Chimel* standard, which authorizes the contemporaneous search of " 'the area within the immediate control of an arrestee,' " is applicable to situations where the arrestee was a recent occupant of an automobile.[198] Clearly the occupants here were placed under custodial arrest[199] before the search so that the next question was whether the jacket in the car's passenger compartment was an area within the arrestee's "immediate control."[200]

Justice Stewart acknowledged the need for a "workable rule"[201] because lower courts had reached inconsistent results in defining that area of an automobile within the arrestee's reach. Based upon his reading of the cases, Justice Stewart formulated the "generalization that articles inside the relatively narrow compass of the passenger compartment of an

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[192] *Id.* at 455-56.

[193] *Id.* at 456.

[194] *Id.*

[195] *Id.*

[196] *Id.* The jacket belonged to Belton who was subsequently indicted for possession of a controlled substance. His motion to suppress the cocaine was denied so Belton plead guilty to a lesser included offense but preserved his claim for appeal. *Id.* The New York Supreme Court, Appellate Division, upheld the warrantless intrusion on the grounds that the jacket was within Belton's "immediate area" and the search was therefore valid as incident to the arrest. *Id.* The New York Court of Appeals reversed, stating that the zipped pocket was unaccessible to the arrestee and the intrusion was therefore beyond the scope of the search incident exception. *Id.*

[197] The *Belton* opinion is characterized herein as a majority opinion only with great caution. Justices Brennan, Marshall and White clearly dissented while Chief Justice Burger and Justices Stewart, Blackmun and Powell agreed on the rationale. However, Justice Stevens concurred in the judgment only because of his belief that the automobile exception should be used to uphold such searches. *Id.* at 463 (concurring opinion). Like Justice Stevens, Justice Rehnquist was inclined to uphold the search under the automobile exception but reluctantly concurred in the Court's opinion. *Id.* Thus, a clear majority would uphold the search, however, a majority seemed to be emerging to validate it under the automobile exception rather than the search incident to arrest exception.

[198] *Id.* at 460. *See supra* notes 72-78 and accompanying text.

[199] The validity of the arrest was not challenged here. *Id.* at 462.

[200] *Id.* at 460.

[201] *Id.*

automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' "[202] Justice Stewart then read *Chimel*'s limits in light of this generalization and created the *per se* rule "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[203]

Justice Stewart further reasoned that "if the passenger compartment is within reach of the arrestee" then so are containers therein.[204] While this conclusion may follow as a general rule, Justice Stewart made the quantum leap, without any factual analysis, that the contents of containers are likewise an area within which an arrestee might reach.[205] Instead, he analyzed the access to the contents problem in terms of privacy interests which *Chimel* held to be outweighed by the significant government interests of police safety and preservation of evidence when the seized item was within the immediate control area.[206] Consequently, *Belton* held that the passenger compartment and any containers[207] located therein, as well as the container's contents, are *per se* within the spatial limits of *Chimel* and thereby subject to warrantless searches.

The majority suggested that this *per se* or "bright line" rule is necessary to provide straightforward guidelines for law enforcement officials.[208] Justice Powell's concurrence cogently pointed out the harsh realities and dangers of custodial arrests under *Belton*-type circumstances. For Justice Powell, the confrontation between the arresting officer and an arrestee apprehended on a public highway presents a "volatile and fluid situation," and the "practical necessities" of freeing police from having to make close and hasty calculations in such situations clearly outweigh the marginal cost to privacy interests.[209] Consequently, the broad scope of the *Belton*

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[202] *Id.* (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). Moreover, by analogy to the rationale in *Robinson*-type searches of the arrestee's person, Justice Stewart stated that it was irrelevant whether a container within that area "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Id.* at 460-61. Rather, the sole justification for the warrantless search is the fact of the lawful custodial arrest. *Id.* at 461. *See generally supra* notes 67-70 and accompanying text.

[203] 453 U.S. at 460 (footnotes omitted). Notably, Justice Stewart pointed out that the holding here "does not encompass the trunk" as an area within arrestee's "immediate control." *Id.* at 460-61 n.4. Furthermore, *Belton* adhered to the *Chimel* time limit: contemporaneousness.

[204] *Id.* at 460.

[205] *Id.*

[206] *Id.* at 461.

[207] *Id.* According to *Belton*, a "container" is "any object capable of holding another object . . . [including] closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *Id.* at 460-61 n.4.

[208] *Id.* at 459-60. See Robbins v. California, 453 U.S. 420, 430-31 (1981) (where Justice Powell explained his concurrence in *Belton*).

[209] *Robbins*, 453 U.S. at 431 (Powell, J., concurring).

search was dictated by the underlying justifications, as in *Robinson*, rather than by a careful application of the *Chimel* limits.

2. Potential Abuse

In dissent, Justice Brennan rightly pointed out that the rule established here is an unjustified and "dangerous precedent" that disregards the *Chimel* standards which were "narrowly tailored" to redress a similarly tenuous situation.[210] Justice Brennan commented that the fourth amendment cannot be discarded for the mere purpose of making law enforcement more efficient.[211] For Justice Brennan, the rule also "fails on its own terms" and does not provide workable guidelines for police to determine its limits.[212] Moreover, Justice Brennan refused to adopt the "fiction" established here "that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car."[213]

The *Belton per se* rule is highly susceptible to potential abuse. Under this rule, probable cause to search is not required, only probable cause to arrest is a prerequisite. However, probable cause to support an arrest is rarely determined by a neutral and detached magistrate pursuant to an arrest warrant application. An arrest warrant is not needed for arrests made pursuant to any crime committed in a policeman's presence nor for felonies not committed in his presence but where probable cause to arrest exists.[214] Applying these established principles to the occupants of a car, an arrest warrant will not be needed under most circumstances since vehicles inevitably appear on public thoroughfares.

Indeed, the patrolman in *Belton* could have arrested the driver without a warrant for the traffic violation which occurred in his presence and in public. Under *Belton*, the passenger compartment and any containers therein could have been searched on the sole justification of the lawful traffic arrest,[215] without regard to the existence of search probable cause.

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[210] 453 U.S. at 464-66, 468 (dissenting opinion). *See Robbins*, 453 U.S. at 449-50 (Stevens, J., dissenting) (the *Belton* approach, as opposed to the automobile exception approach, is an "extraordinary dangerous detour").

[211] 453 U.S. at 469 (dissenting opinion).

[212] *Id.* at 469-70. Justice Brennan pointed out that more problems are created than solved; for example, how long after the arrest may the search be validly conducted and is it relevant how close to the car the suspect is when the search is made. *Id. Cf.* People v. Riegler, 127 Cal. App. 3d 317, 323-24, 179 Cal. Rptr. 530, 533-34 (1981) (distinguished *Belton* since search was delayed five hours and container was in exclusive police control).

[213] 453 U.S. at 466.

[214] United States v. Watson, 423 U.S. 411 (1976). *See also* Gerstein v. Pugh, 420 U.S. 103 (1975), in which the Court required an ex parte hearing as soon as possible after a warrantless arrest to retain judicial determination of probable cause for extended incarceration.

[215] *Compare* Gustafson v. Florida, 414 U.S. 260, 264 (1973) (where the authority to search a person pursuant to a lawful arrest is *per se* reasonable regardless of the degree of the offense) and United States v. Robinson, 414 U.S. 218 (1973) (search of arrestee valid pursuant to arrest for traffic violation). In short, the reason for the search is unconnected to the nature of the offense and the search

In fact, many state statutes give police the discretion to arrest a driver without a warrant for certain minor traffic violations or vehicle equipment violations.[216] Furthermore, *Belton* offers no guidelines as to whether other occupants or their belongings may be searched where only a fellow occupant is formally under arrest. The combined effect of *Belton* and existing warrantless arrest rules shifts far-reaching discretionary powers from the magistrate to the policeman in the field.[217]

Traffic related violations might also be used by unscrupulous officers as a pretext for a general search pursuant to a lawful arrest.[218] Notably, the burden of proving the pretext would be on the citizen and would be a difficult hurdle to overcome. Even assuming that most law enforcement agents act in good faith and would not use traffic violations as a pretext for general searches, the mere fact that police officers are government agents "engaged in the often competitive enterprise of ferreting out crime" warrants caution.[219] Despite taking an oath to uphold the Constitution, police are in a position that is neither neutral or detached, and it is unrealistic to expect total objectivity from an adversarial party.[220]

Furthermore, the traffic violation pretense is not needed where police have a valid arrest warrant for criminal charges. *Belton* now enables police to gain an advantage over the arrestee by staking-out his vehicle, following him when he drives away and stopping him down the road to execute the warrant and conduct a contemporaneous search of the passenger compartment as incident to the lawful arrest. This is the precise evil the *Chimel* Court sought to overcome where police waited for the arrestee to arrive home in order to execute the arrest warrant and search the entire house without a warrant.[221] Evidently, the *Belton* Court chose to

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is valid even though no additional evidence relating to the charges could possibly be found on the arrestee.

[216] For a sampling of such state laws see Robbins v. California, 453 U.S. 420, 451 n.12 (1981) (dissenting opinion). *But see* Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests*, 48 U. CIN. L. REV. 321 (1979) (discusses validity of state statutes giving police such discretionary arrest powers).

[217] *See supra* notes 44-46 and accompanying text regarding the Court's heretofore cherished warrant preference. *See also* Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . ."); Johnson v. United States, 333 U.S. 10, 14 (1948) (the point of fourth amendment protection is that "inferences be drawn by a neutral and detached magistrate").

[218] Some courts have stated that searches incident to arrests for traffic violations will not be permitted where the arrest was but a pretext for the search. *See, e.g.*, United States v. Harris, 321 F.2d 739 (6th Cir. 1963); Taglavore v. United States, 291 F.2d 269 (9th Cir. 1961); Henderson v. United States, 12 F.2d 528 (4th Cir. 1926).

[219] Johnson v. United States, 333 U.S. 10, 14 (1948) (footnote omitted).

[220] *Id.* As Justice Jackson warned, uncontrolled searches and seizures are dangerous weapons that could be used in "cowing a population, crushing the spirit of the individual and putting terror in every heart." Brinegar v. United States, 338 U.S. 160, 180 (dissenting opinion). *See also supra* note 101.

[221] *See supra notes* 72-78 and accompanying text.

disregard these prior teachings simply because there is a lesser expectation of privacy in a motor vehicle than in a home.

3. A Recommendation

Belton's "bright line" rule was designed to maintain the status quo, in what is certainly a volatile police-citizen confrontation, by not requiring police to make on-the-spot expectation of privacy determinations. Such a goal is admirable and proper but not to the extent adopted in *Belton*. Notably, the *Belton* custodial arrest situation differs significantly from the custodial arrest encounter in *United States v. Robinson*.[222] In *Robinson*, the Court created a *per se* rule allowing the warrantless search of an arrestee's person and any containers closely associated with his person.[223] The underlying premise was that police safety justified an across the board rule because the arrestee would pose a continuing threat of danger while in transit to police headquarters. Out of deference to police safety, any subjective on the spot determination of actual danger would be too burdensome. In effect, *Belton* treated the passenger compartment and the contents of containers therein as items closely associated with the arrestee's person as in *Robinson*. This is true even though the *Belton* majority cloaked the rule in *Chimel* "immediate control" terminology. Such a leap seems wholly inconsistent with the varying degrees of exigency present in *Belton* and *Robinson*-type situations, respectively.

The critical difference between *Robinson* and *Belton* exigencies is that the passenger compartment did not pose a continuing threat to police safety, as the arrestee did in *Robinson*, because it is not transported to the station with the arrestee. Consequently, the exigency posed by access to the arrestee's vehicle is shorter in duration and does not compel the far-reaching rule posited in *Belton*. Instead, the facts of the *Belton* arrest suggest a less intrusive means of safeguarding fourth amendment rights while neutralizing such volatile encounters. Accordingly, the "bright line" in *Belton* should have been drawn at the warrantless *seizure* of the jacket.

The additional intrusion of a warrantless search of seized containers should not be determined by a *per se* rule; rather, exclusive police control over the object, as in *Sanders*, should be the determinative criterion upon which a subsequent warrantless intrusion should depend. Justice Stewart expressly rejected the exclusive control argument made in *Belton*, however, because in his view "under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid."[224] Although, as Justice Brennan pointed out, such a view erroneously assumes that an item once in police hands is always within their exclusive control.[225]

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[222] 414 U.S. 218 (1973).

[223] *Id.* at 235-36. *See also supra* notes 54-60 and accompanying text.

[224] 453 U.S. at 461-62 n.5.

[225] *Id.* at 471 n.5 (dissenting opinion). "[E]xclusive control means . . . sufficient control such that there is no significant risk that the arrestee or his confederates 'might gain possession of a weapon or destructible evidence.' " *Id.* (citation omitted).

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The exclusive control concept is simply another way of stating that something is no longer within the reach of an arrestee. The question then becomes whether there is a legitimate expectation of privacy in the container once removed from the unprotected *Chimel* zone. Such a question would turn on the same principle announced in *Sanders* and adopted by the plurality in *Robbins v. California* in the automobile exception context: the privacy expectation in closed containers taken from a vehicle is not less than the privacy expectation in closed containers found elsewhere.[226] Thus, the result would be the same under either warrant exception.

In short, the better rule would be to treat the passenger compartment and containers therein as always within the *Chimel* permissible search limits, as did the *Belton* Court, where the arrestee has not been removed from the area immediately surrounding the vehicle or otherwise significantly precluded access to the vehicle. Therefore, a search of the vehicle's interior that occurs after the arrestee is securely in custody in the patrol car or otherwise removed from the immediate vicinity would be invalid as not contemporaneous with the arrest. In addition, where the rule has been triggered by the arrestee's close proximity to the vehicle, the warrantless search of the passenger compartment and the warrantless *seizure* of containers therein would be *per se* reasonable by the Court's previously expressed view that there is a lesser expectation of privacy in motor vehicles.[227] Consequently, state courts should limit *Belton* to permit the warrantless *seizure* of a container taken from a vehicle under the search incident to arrest exception, unless the contents are within the arrestee's immediate control, by liberally construing their state constitutions. The rule recommended here would maintain the status quo on an intermediate level and prevent the removal of evidence as well as defuse a potentially dangerous situation while preserving the sacred fourth amendment prohibition against warrantless searches.

C. Robbins v. California

Curtails the Automobile Exception

While the Court did not reach the automobile exception issue in *New York v. Belton*,[228] it did address that question in *Robbins v. California*[229] where Justice Stewart, writing for a plurality,[230] invalidated the war-

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[226] 453 U.S. at 424-25. *See also supra* notes 177-89 and accompanying text, and *infra* notes 234-42 and accompanying text.

[227] *See also supra* notes 128-35 and accompanying text.

[228] 453 U.S. 454, 462-63 n.6 (1981).

[229] 453 U.S. 420 (1981) (plurality opinion).

[230] Justices Brennan, White and Marshall joined Stewart's plurality opinion, while Justices Stevens, Rehnquist and Blackmun dissented, *id.* at 421, and Chief Justice Burger and Justice Powell concurred in the judgment only, *id.* at 429. However, Justice Powell's concurrence does form a majority opinion to a limited extent; namely, he supports the plurality's "bright line" rule to the extent that

rantless search of a container lawfully seized from the luggage compartment of a station wagon pursuant to the automobile exception.[231] In *Robbins*, highway patrol officers pulled over an old station wagon being driven erratically.[232] The driver, Robbins, immediately exited the car and walked toward the police cruiser; when he reentered the vehicle to get his registration card, one patrolman smelled marihuana smoke coming from the car.[233] A subsequent frisk of Robbins uncovered a vial of liquid and a subsequent search of the passenger compartment revealed marihuana and drug paraphernalia.[234] After Robbins was put securely in the cruiser, the officers returned to the car and searched a recessed luggage compartment which contained a "totebag and two packages wrapped in green opaque plastic."[235] Police unwrapped the packages and seized thirty pounds of marihuana.[236]

In invalidating the warrantless search, Justice Stewart interpreted *United States v. Chadwick* and *Arkansas v. Sanders* broadly to uphold the expectation of privacy associated with certain containers located within an automobile, which does have a diminished expectation of privacy.[237]

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a search warrant is required for those containers which manifest a reasonable expectation of privacy, *i.e.*, worthy containers. *Id.* However, for Justice Powell, the plurality goes too far when "insubstantial containers" are included within the rule. *Id.*

[231] *Id.* at 428-29. The state did not argue that the search was valid as incident to a lawful arrest. *Id.* at 429 n.3. Under *Belton*, however, the warrantless search of a recessed luggage compartment would be invalid generally since it is an area not within the arrestee's immediate control. *Belton*, 453 U.S. at 460. In addition, once the arrestee was placed under custody in the police cruiser, as in *Robbins*, the return to the suspect's vehicle to conduct a search would arguably not be contemporaneous with the arrest. *Id.*

[232] 453 U.S. at 422.

[233] *Id.*

[234] *Id.*

[235] *Id.* (footnote omitted).

[236] *Id.* Defendant's pretrial motion to suppress the marihuana was denied and he was convicted of various drug offenses with this evidence. The judgment was affirmed by the California Court of Appeals but was later vacated and remanded by the Supreme Court for reconsideration in light of *Arkansas v. Sanders*, 442 U.S. 753 (1979). On remand, the warrantless search was upheld again since it was deemed that Robbins could not have a legitimate expectation of privacy in the packages because the contents could reasonably have been "inferred from their outward appearance." *Id.* at 423.

[237] 453 U.S. at 426-28. Thus, for the plurality the distinction of general versus specific probable cause was foreclosed by *Sanders*. Yet, for Justice Powell the result here is not necessarily compelled by *Sanders* since that was not an automobile search case. *Id.* at 432 (concurring opinion). Similarly, Chief Justice Burger's concurrence in the judgment only here signaled his apparent willingness to recognize this general/specific knowledge distinction. Furthermore, the dissenters, Justices Rehnquist, Blackmun and Stevens, would hold that *Sanders* is not applicable. *Id.* at 444-46 (dissenting opinion). Prior to Stewart's retirement then, four Justices (Brennan, Marshall, White and Stewart) would not uphold the distinction, while four others (Burger, Stevens, Rehnquist and Blackmun) would recognize it, leaving Justices Powell and O'Connor as possible swing votes. Thus,

Justice Stewart also noted that the problem of mobility is nonexistent once the container is controlled exclusively by police.[238] In addition, Justice Stewart rejected the state's "unworthy container" contention that "only containers commonly used to transport 'personal effects' " would be fully protected and that the "nature" of the container would control the degree of fourth amendment protection.[239] Instead, Justice Stewart counseled that "effects" are neither "personal" nor "impersonal" and are entitled to equal fourth amendment protection if the container in which "effects" are placed manifests a reasonable expectation of privacy.[240] As to the sealed opaque container in *Robbins*, the record did not establish that the green plastic wrapping is typically used to package marihuana to negate any legitimate expectation of privacy.[241]

Justice Powell agreed with Justice Stewart concerning Robbins' manifested expectation of privacy in this particular package, but parted with the plurality regarding the extension of the *Sanders* rationale to all containers.[242] Justice Powell would not require warrants to search "insubstantial containers in which no one had a reasonable expectation of privacy."[243] Moreover, Justice Powell viewed this case as a "container case" like *Chadwick* and *Sanders*, and he opined that the automobile exception is inapplicable because the "police had probable cause to search the container rather than the automobile generally."[244] Justice Powell also stated that the plurality's *per se* warrant requirement disregarded the principles of *Katz v. United States* and *Sanders* which require case-by-case adjudication on the question of reasonable expectation of privacy.[245]

In dissent, Justice Blackmun conceded that the plurality's rule does establish a "bright line," but the clearer approach would be to permit the warrantless search and seizure of "any personal property found in

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it is not surprising that, in United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157 (1982), the Court abandoned the plurality's rationale and expressly adopted the general/specific knowledge distinction with only Justices Brennan, Marshall and White dissenting. *See infra* notes 265-83 and accompanying text.

[238] 453 U.S. at 424-25. Notably, Justice Stewart rejected this argument in *Belton* in the search incident to arrest context. *Belton*, 453 U.S. at 461-62 n.5.

[239] *Id.* at 425-26. The state's argument was based on footnote 13 in *Sanders* which indicated that containers from which the contents could be inferred from its outward appearance "cannot support any reasonable expectation of privacy." *Id.* at 427. Justice Stewart recanted that footnote 13 merely explained how the "plain view" doctrine operates to obviate the need for a search warrant where a container is open to public view or where the "distinctive configuration" or "transparency" of the container "clearly announce its contents." *Id.*

[240] *Id.* at 426.

[241] *Id.* at 427-28.

[242] *Id.* at 432-33 (concurring opinion).

[243] *Id.* at 429. Furthermore, Justice Powell believes that "substantial burdens" would be imposed on "law enforcement without vindicating any significant values of privacy." *Id.*

[244] *Id.* at 432.

[245] *Id.* at 432-33.

an automobile" pursuant to the *Carroll-Chambers* automobile exception.[246] Justice Rehnquist also argued that such searches should be permissible under the automobile exception.[247] The plurality's rule, according to Justice Rehnquist, merely "compounds the evils of the 'exclusionary rule' by engrafting subtleties" into fourth amendment law.[248] Justice Stevens also favored use of the automobile exception to validate the warrantless searches in both *Belton* and *Robbins*.[249] Moreover, Justice Stevens stated that use of the automobile exception alone in *Belton* and *Robbins* situations would be a "shorter step" adhering to the "fundamental distinction" of validating a warrantless search based on probable cause, that a magistrate could have authorized, as opposed to the search incident to arrest exception which is not based on probable cause and could not have been authorized by a magistrate.[250]

The varying viewpoints expressed in *Robbins* clearly undercut Justice Stewart's attempt to establish a "bright line" rule for warrantless searches of containers seized under a valid automobile exception search. *Robbins* not only failed to put the general/specific information distinction to rest, but it inadvertently gave it new life. Indeed, Justice Powell invalidated the search in *Robbins* according to this *Chadwick-Sanders* distinction because he viewed *Robbins* as a container search case based on probable cause to believe that a particular container concealed illicit drugs.[251] The Louisiana Supreme Court drew on this disparity recently and distinguished *Robbins* as a container case that does not preclude the warrantless search of a container within a vehicle when only based upon general information.[252] Perhaps in recognition of this disparity, the United States Supreme Court ordered reconsideration of *Robbins* in *United States v. Ross*.[253]

IV. *United States v. Ross:* RECONSIDERATION OF *Robbins*

The rationale of the plurality in *Robbins v. California*[254] was abandoned by the United States Supreme Court in *United States v. Ross*.[255] The United States Court of Appeals for the District of Columbia had invalidated the warrantless search in *Ross* of a closed brown paper bag and a zippered leather pouch lawfully seized from a trunk under the automobile excep-

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[246] *Id.* at 436-37 (dissenting opinion).

[247] *Id.* at 439-41 (dissenting opinion).

[248] *Id.* at 437.

[249] *Id.* at 444 (dissenting opinion).

[250] *Id.* at 452-53.

[251] *Id.* at 432 (concurring opinion). In fact, Justice Powell indicated that the plurality decided this case based on the "assumption that the police had probable cause to search the container rather than the automobile generally." *Id.*

[252] State v. Hernandez, 408 So.2d 911, 916-17 (La.) (court believed that five out of the eight remaining *Robbins*' Justices would uphold this search under the automobile exception), *cert. denied*, ____ U.S. ____, 103 S. Ct. 90 (1982).

[253] 454 U.S. 891 (1981).

[254] 453 U.S. 420 (1981).

[255] 456 U.S. 798, 102 S. Ct. 2157 (1982).

tion.[256] However, the circuit court had relied on *Arkansas v. Sanders* to suppress the evidence since *Robbins* had not yet been decided.[257] The Supreme Court, recognizing the "importance of striving for clarification in this area of the law," granted the petition for certiorari.[258]

In *Ross*, a reliable informant telephoned police that a man nicknamed "Bandit" was selling narcotics from the trunk of his car.[259] Three police officers located the suspect and a radio check revealed that the owner, Ross, was also known as "Bandit."[260] The subsequent search of the trunk revealed an unsealed brown paper bag alongside a zippered leather pouch, but only the bag, which contained glassine envelopes full of white powder, was opened at this point.[261] The containers were returned to the trunk and the car was transported to the police station where a thorough search disclosed money in the pouch and heroin in the paper bag.[262]

The circuit court majority applied the *Sanders* reasonable expectation of privacy test and found the warrantless search of both the bag and pouch invalid. This result, according to the majority, was compelled by the *Sanders* mandate[263] that the focus of police suspicion was irrelevant.[264] Consequently, the fact that police may only have general information that contraband is *somewhere* in the vehicle as opposed to being located within a particular container is a distinction *Sanders* laid to rest.[265] Thus, the

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[256] 655 F.2d 1159, 1168 (D.C. Cir. 1981) (en banc). The search incident to arrest exception was also argued but was rejected since the seized containers were located out of defendant's "immediate control" in the trunk. *Id.* at 1169. The same result would have occurred under *Belton*'s "bright line" rule since only the passenger compartment was deemed *per se* within an arrestee's reach. New York v. Belton, 453 U.S. 454, 460 (1981).

[257] 655 F.2d at 1168.

[258] 456 U.S. 798, 102 S. Ct. 2157 (1982).

[259] *Id.* at ____, 102 S. Ct. at 2162. The informant did not specify any containers but he did give a detailed description of the car and Ross. *Id.* at ____, 102 S. Ct. at 2160. Consequently, the Court was squarely confronted with an automobile search based only upon general information that the vehicle contained contraband not any specific container.

[260] *Id.* at ____, 102 S. Ct. at 2160.

[261] *Id.*

[262] *Id.* A pretrial motion to suppress the heroin and the money was denied and Ross was convicted of possession of narcotics with the intent to distribute. *Id.*

[263] The circuit court interpreted *Sanders* as resolving two inconsistent post-*Chadwick* cases: United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977) (*Chadwick* was distinguished because the *vehicle* attracted police attention not a specific container, and the warrantless search of a suitcase was thereby held valid under *Chambers*); and United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 911 (1979) (held *Chadwick* controlled regardless of the focus of suspicion). 665 F.2d at 1166-67. Moreover, the circuit court in *Ross* believed that *Sanders* implicitly rejected the *Finnegan* approach and accepted the *Stevie* approach. *Id.* at 1167.

[264] 655 F.2d at 1167.

[265] *Id.* Furthermore, the circuit court stated that "the administrative feasibility of a distinction based on whether the object of suspicion is the car or the container" demands too much of police. *Id.* at 1168 n.21.

circuit court in *Ross* interpreted *Sanders* as eliminating the specific versus the general information distinction left open in *United States v. Chadwick*.[266]

The circuit court also refused to adopt an "unworthy container" rule in *Ross* to authorize warrantless searches of certain containers "less stable" than the luggage in *Chadwick* and *Sanders*.[267] The majority reasoned that such a rule would require police to make fine distinctions regarding the size and quality of material of countless varieties of containers.[268] The rule would also "snare those without the means or sophistication to use worthy containers."[269] Thus, the circuit court only needed to determine Ross' privacy interest in each container. After analyzing the facts, the circuit court concluded that the means of storage and the placement of the containers in a locked car trunk were actions "calculated to secure the privacy of his possessions against intrusions by members of the public"; therefore, the warrantless search was invalid.[270]

Justice Stevens, writing for the majority in *Ross*,[271] reversed the circuit court and drastically expanded the automobile search exception to validate the warrantless search, if based on probable cause of a general nature, of any container seized from an automobile.[272] The Court specifically held

> that the scope of the warrantless search authorized by [*Carroll v. United States*] is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search

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[266] 433 U.S. 1 (1977).

[267] 655 F.2d at 1169. *Accord* United States v. Hodge, 519 F. Supp. 654 (E.D. Tenn. 1981) (search of blanket wrapped around rifles held valid as not a container within purview of *Robbins* rule); United States v. Pillo, 522 F. Supp. 855 (M.D. Pa. 1981) (search of tupperware-type container invalid under Justice Stewart's analysis in *Robbins*).

[268] 655 F.2d at 1170.

[269] *Id.* (footnote omitted). The Supreme Court summarily dismissed the "unworthy container" argument as an improper constitutional distinction. *Ross*, 456 U.S. at ____, 102 S. Ct. at 2171.

[270] 655 F.2d at 1171 (footnote omitted). Notably, Judge Tamm argued in dissent that the automobile exception authorized the warrantless *seizure* of the containers, but the *Katz* test must be applied to justify the warrantless *search*. *Id.* at 1172-73 (dissenting opinion). As to the paper bag, Judge Tamm contended that the only privacy interest is possession and control, and that once the bag was lawfully seized under the automobile exception, there was no reasonable expectation of privacy. *Id.* at 1174. Moreover, paper bags only offer "minimal protection against accidental and deliberate intrusions" and are not as secure or permanent as luggage and therefore are "not *inevitably* associated with the expectation of privacy." *Id.* at 1177-78. Accordingly, Judge Tamm would invalidate the search of the pouch because of its similarity to luggage. *Id.* at 1179.

[271] In a solid 6-3 majority opinion, Justice Stevens was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist and O'Connor. Justices Brennan, White and Marshall dissented. 456 U.S. 798, ____, 102 S. Ct. 2157, 2157 (1982).

[272] *Id.* at ____, 102 S. Ct. at 2159.

> of every part of the vehicle and its contents that may conceal the object of the search.[273]

Therefore, "[o]nly the prior approval of the magistrate is waived . . . ."[274]

The Court reaffirmed the basic rule that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . .' "[275] The automobile exception, according to the *Ross* Court, is unquestionably a " 'specifically established and well-delineated' " exception to that rule.[276] Justice Stevens pointed out that, prior to *Chadwick* and *Sanders*, it was widely understood that the permissible scope of the automobile exception under *Carroll* extended to searches of containers found during a lawful search of an automobile.[277] Justice Stevens asserted further that the Court had implicitly sustained such warrantless container searches in prior cases.[278] The Court distinguished *Chadwick* and *Sanders* as container search cases in which suspicion was confined to a particular container rather than the entire vehicle as in *Ross*.[279] Thus, the *Ross* Court believed that warrantless searches of containers located during a lawful automobile exception search have always been valid, and that *Chadwick* and *Sanders* merely "qualified" this rule by requiring a search warrant only when police know the specific container in which contraband may be concealed.[280]

The *Ross* majority reasoned that the "practical consequences of the [automobile exception] would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle."[281] For the Court, the major practical consequence of its decision is "the prompt and efficient completion of the task at hand": the warrantless search for contraband.[282] The *Ross* Court maintained that the extent of a warrantless search under the automobile

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[273] *Id.* at ____, 102 S. Ct. at 2172. Offering consolation, Justice Stevens warned that police officers "lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional." *Id.* at ____ n.32, 102 S. Ct. at 2172 n.32.

[274] *Id.* at ____, 102 S. Ct. at 2172 (footnote omitted).

[275] *Id.*, *quoting* Katz v. United States, 389 U.S. 347, 357 (1967).

[276] *Id.*

[277] *Id.* at ____, 102 S. Ct. at 2169. *But see id.* at ____, 102 S. Ct. at 2178-79 (Marshall, J., dissenting).

[278] *Id.* at ____, 102 S. Ct. at 2169, *citing* Husty v. United States, 282 U.S. 694 (1931) (approving the warrantless search of whiskey bags seized during an automobile exception search); Scher v. United States, 305 U.S. 251 (1938) (warrantless search of packages of unstamped liquor). However, the contents of these packages may have been inferred from the nature of the container. If so, footnote 13 in *Sanders* would allow the warrantless search under the plain view doctrine and the automobile exception would simply not be applicable. *See supra* text accompanying notes 188-90.

[279] 456 U.S. at ____, 102 S. Ct. at 2168.

[280] *Id.* at ____ n.25, 102 S. Ct. at 2170 n.25.

[281] *Id.* at ____, 102 S. Ct. at 2170.

[282] *Id.* at ____, 102 S. Ct. at 2170-71 (footnote omitted).

exception should be the same as a search conducted pursuant to a valid search warrant. This result was supported by the Court's contention that

> [t]he practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained.[283]

The Court's rationale has several shortcomings. First, the practical considerations underlying the automobile exception only justify the warrantless seizure of containers. As the Court acknowledged in *Sanders*, the location of a container in a vehicle does not lessen the legitimate expectation of privacy in its contents and the exigency of the container's mobility, by virtue of its location in a vehicle, disappears once securely within police control.[284] The *Ross* Court circumvented this rationale in the automobile exception context by distinguishing *Sanders* as a non-automobile search case.[285] However, that does not overcome the fact that exclusive police control of a container eliminates the threat of its removal. Indeed, the Court engages in legal fiction when it holds in container search cases such as *Sanders* that the exigencies dissipate once the container is seized; but that in automobile search cases like *Ross*, the exigencies remain even after a container is in exclusive police control. The *Ross* Court rationalized this difference on the focus of the search: the entire vehicle versus a particular container. Yet, the more plausible explanation is the Court's explicit unwillingness to preclude anyone's use of a vehicle, and now its containers, for a brief period of time while a warrant is obtained pursuant to the fourth amendment.[286]

In addition, the specific/general information distinction creates an anomalous situation which thwarts the precise goal *Ross* was intended

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[283] *Id.* at ____ n.28, 102 S. Ct. at 2171 n.28.

[284] 442 U.S. 753, 763 (1979). *See supra* text accompanying notes 178-80.

[285] 456 U.S. at ____, 102 S. Ct. at 2168.

[286] Chambers v. Maroney, 399 U.S. 42, 52 (1970); *see supra* text accompanying notes 118-19. Yet, the *Chambers* Court authorized police to conduct a warrantless search of an automobile either in the field or later at the police station. Therefore, the Court implicitly authorized the temporary warrantless seizure of the vehicle. *See generally supra* notes 117, 120.

to promote: effective and efficient crime prevention and detection. Police are expected to conduct thorough investigations and gather all pertinent facts to prevent spurious and precipitous arrests, searches and accusations. The specific/general information distinction, however, discourages police from gathering and verifying detailed information. Instead, under *Ross*, police are rewarded by not having to obtain a warrant when they only have general information that contraband may be located somewhere in a vehicle.[287] Even more startling, police will also decide when they have enough general information to constitute probable cause. The only check on this unbridled discretion is *post hoc* review by a court presented with the fruits of the warrantless search. In addition, the details of the search will now be colored by hindsight.

Furthermore, the bright line rule established in *Ross* rests on the unrealistic assumption that police will discontinue an automobile search as soon as contraband is found in a container. This assumption presupposes that police, with only general information that contraband is somewhere in a vehicle, will suddenly know that a particular container was the object of their search all along and that no other contraband is in the vehicle.[288] Arguably, the discovery of contraband in a single container, depending on the item(s) sought, may lead police to believe that more contraband is concealed elsewhere and that the initial discovery may not establish, as asserted in *Ross*, that without the immediate search of a container "police could *never be certain* that the contraband was not secreted in a yet undiscovered portion of the vehicle."[289] Thus, broad vehicular searches may not be prevented by the warrantless search of its containers.

Indeed, the facts in *Ross* even negate the Court's rationale. The police in *Ross* opened a paper bag found in the trunk of a car and discovered glassine bags containing a white powder.[290] The bag was returned to the

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[287] In fact, the *Ross* Court indicated that in automobile search cases it would be too burdensome to require police to obtain a warrant. 456 U.S. at ____ n.21, 102 S. Ct. at 2168 n.21 (quoting *Robbins*, 453 U.S. at 433-34 (Powell, J., concurring)). Furthermore, the *Ross* majority claimed that the aggregate burden of obtaining a warrant to search a container, would unnecessarily remove " 'the officer from his normal police duties.' " *Id.* This suggests that applying for warrants is not a "normal police duty." If this is true, then perhaps there are too many warrant exceptions in that warrantless searches have become the rule and warrant applications have become the exception. *See supra* note 29.

[288] "This rule plainly has peculiar and unworkable consequences: the Government 'must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located.' " 456 U.S. at ____, 102 S. Ct. at 2180 (dissenting opinion) (citation omitted).

[289] *Id.* at ____ n.28, 102 S. Ct. at 2171 n.28 (emphasis added); *id.* at ____, 102 S. Ct. at 2179 (dissenting opinion). Indeed, police should conduct thorough searches where appropriate. The holding in *Ross*, however, does not necessarily encourage thorough police work.

[290] *Id.* at ____, 102 S. Ct. at 2160.

trunk and the car was driven to the police station and searched thoroughly.[291] This is a result the *Ross* Court assumed would not occur. Since the temporary seizure of the vehicle and its delayed search at police headquarters are implicitly valid under *Chambers*, only spurious reasoning can justify the additional intrusion of a warrantless container search on practicability grounds.[292] The rule in *Ross* is thus reduced to nothing more than a rule of convenience for law enforcement in contravention of traditional fourth amendment safeguards.

The most valuable fourth amendment safeguard compromised by *Ross* is the elimination of prior approval by a disinterested magistrate. As Justice Marshall cogently stated in dissent,

> [t]he warrant requirement is crucial to protecting Fourth Amendment rights because of the importance of having the probable cause determination made in the first instance by a neutral and detached magistrate. Time and again, we have emphasized that the warrant requirement provides a number of protections that a post-hoc judicial evaluation of a policeman's probable cause does not.[293]

Thus, the shift of the initial probable cause determination to law enforcement agents, who by the very nature of their jobs are not neutral and detached, effectively removes any public reassurance that privacy interests will be protected judicially.

V. CONCLUSION

The Supreme Court's holding in *United States v. Ross* brought the automobile search exception, established in *Carroll v. United States*, full circle. Police now may conduct warrantless searches of containers discovered in a vehicle pursuant to a lawful automobile exception search in addition to the warrantless search of the vehicle itself. The only requirement under *Ross* is that police have probable cause to believe that contraband is located *somewhere* in the vehicle. The automobile exception is qualified, however, by the distinction created in *United States v. Chadwick* and *Arkansas v. Sanders*. This qualification is that the automobile exception is inapplicable, and a warrant is therefore required, to a search of containers located in a vehicle when police have specific information that a particular container, rather than the vehicle in general, contains contraband. As previously noted, this anamolous distinction discourages thorough police work by permitting the warrantless search of a vehicle and its containers, when based on general information, that is broader

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[291] *Id.*

[292] "[T]he traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle." *Id.* at ____, 102 S. Ct. at 2176 (Marshall, J., dissenting).

[293] *Id.* at ____, 102 S. Ct. at 2174.

than a search authorized by a magistrate for the search of containers when police know which container to search.

Post *Ross* litigation will undoubtedly focus on this general/specific information distinction as well as whether police had search probable cause at all. Arguably, the application of the distinction will depend upon the nexus between the vehicle and the container because the degree of information standard is unworkable. Thus, where the nexus is substantial, as in *Ross*, courts will uphold the warrantless container search under the automobile exception despite specific information regarding a particular container. However, where the container is fortuitously located in a vehicle, as in *Sanders*, the nexus will be deemed insubstantial and a search warrant will therefore be required. The results are distinguishable as automobile searches and container searches, respectively, and the disparity only makes sense in light of the Court's apparent belief that there is a lesser expectation of privacy in one's vehicle.

Future litigation will also challenge container searches on grounds that police did not have sufficient information to constitute probable cause. However, post-hoc judicial review of probable cause will rarely be worthwhile since most courts, when presented with the fruits of the search, will be reluctant to suppress the evidence. As a consequence, *Ross* effectuated an unchecked, wholesale shift of the initial probable cause determination from magistrates to police. State courts must remedy this situation by interpreting their state constitutions as authorizing only the warrantless *seizure* of containers pursuant to the automobile exception to prevent the needless erosion of privacy interests.

In *New York v. Belton*, the Supreme Court has similarly used the diminished expectation of privacy in a motor vehicle and its contents as a springboard to expand unnecessarily the government's search and seizure powers. The *Belton* Court created a "bright line" rule by holding that a vehicle's passenger compartment and its containers are *per se* subject to warrantless searches under the search incident to a lawful arrest exception. The minimum requirement in *Belton* is that police have probable cause to arrest; search probable cause is not needed as in the automobile exception context. Consequently, the *Belton* rule is more susceptible to police abuse, than the rule in *Ross*, and poses a greater threat to the fourth amendment guarantee against unreasonable searches and seizures. Post *Belton* litigation will be focused primarily upon the spatial and contemporaneous limits of the rule. Once again, courts confronted with evidence of a crime will be reluctant to grant a motion to suppress the evidence.

The net effect of the far-reaching results in *Belton* and *Ross* is the diminished role of the magistrate and the shift of the balance of power under the fourth amendment to law enforcement agencies, at least in the motor vehicle context. The Court has seemingly abandoned its longstanding warrant preference policy in favor of alleged clearer rules to aid police in ferreting out crime. Proper fourth amendment analysis should seek

a balance between guarantees against needlessly broad search and seizure powers, on the one hand, and effective law enforcement on the other. Arguably, this balance was struck when the fourth amendment was drafted and the concomitant cost of protecting privacy interests was that some crimes would go undetected and some criminals would go unapprehended as a result of procedural safeguards. Meaningful checks and balances of broad governmental search powers are effectively removed, however, by the elimination of the initial probable cause determination made by neutral and detached magistrates.

The most effective way to uphold sacred fourth amendment values is to maintain the status quo by neutralizing each police-citizen confrontation without denegrating fourth amendment liberties to secondary rights. The least intrusive means should be sought at an intermediate level of intrusion to achieve the most reasonable result. In retrospect, *Belton* and *Ross* seem to represent more of an over-reaction to a steadily increasing crime rate in the United States than a careful analysis of the exigencies and circumstances of each confrontation. Indeed, the Court could have provided clear guidelines for the police in these cases by validating the warrantless seizure of containers under each exception and by requiring a search warrant once the container is reduced to exclusive police control. Moreover, state courts shoud preserve judicial integrity by curtailing the unnecessarily broad police powers established by *Belton* and *Ross* respectively.

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