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Fourth Amendment--Of Cars, Containers and Confusion

Jeffrey A. Carter

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FOURTH AMENDMENT—OF CARS, CONTAINERS AND CONFUSION

California v. Robbins, 101 S. Ct. 2841 (1981).
New York v. Belton, 101 S. Ct. 2860 (1981).

I. PRELUDE

"[I]n [analyzing fourth amendment issues] we do not write on a clean slate."¹ Last term, the Supreme Court reviewed the slate upon which it had written the automobile exception,² the search incident to

¹ Chadwick v. Sanders, 433 U.S. 1, 9 (1977).

² The automobile exception, an exception to the warrant requirement, justifies the warrantless search of an automobile when an officer has probable cause to believe that an automobile contains contraband or evidence of a crime and an exigent circumstance exists. An exigency exists when the automobile is stopped on the roadway, the occupants have reason to believe they are under suspicion, and any evidence could disappear prior to obtaining a warrant. See *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). See also C. WHITEBREAD, *CRIMINAL PROCEDURE* 141-52 (1980); Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1060 (1976); Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974) (hereinafter cited as *Warrantless Searches*). For a discussion of *Carroll*, *Chambers* and the automobile exception, see notes 95-109 & accompanying text *infra*.

One commentator has argued that the requirements of the automobile exception are clear. Confusion arises when cases involving automobiles are treated as if they are within the exception irrespective of whether they meet the requirements of the exception. See Moylan, *supra*, at 1012-13. It does not follow a fortiori that because the police search an automobile or an automobile is at the scene of a search that the automobile exception applies. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The Court has not included the warrantless search within the automobile exception if the officer did not have probable cause to search, *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-70 (1973), or the situation did not present an exigent circumstance, *Coolidge v. New Hampshire*, 403 U.S. at 459-62.

LaFave postulated that the automobile exception allows the warrantless search if probable cause developed when there was an immediate need to search or seize the car. 2 W. LAFAVE, *SEARCH AND SEIZURE*, 514-15 (1980).

A number of cases have involved the search of an automobile, but not the automobile exception: searches incident to an arrest, see, e.g., *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220-22 (1968); *Preston v. United States*, 376 U.S. 364, 367-68 (1964); inventory searches, see, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 369-76 (1976); *Cady v. Dombrowski*, 413 U.S. 433, 446-48 (1973); *Harris v. United States*, 390 U.S. 234, 235-36 (1968); *Cooper v. California*, 386 U.S. 58, 61-62 (1967); and searches of the exterior of an automobile, see, e.g., *Caldwell v. Lewis*, 417 U.S. 583, 588-92 (1974) (plurality opinion).

arrest exception,³ and the container case law⁴ in an attempt to bring some consistency to the chaos of fourth amendment analysis. The Court sought to clarify the scope of warrantless searches of containers found within automobiles by announcing two bright line rules.

The plurality held in *Robbins v. California*⁵ that, as a general rule, an officer cannot open without a warrant a closed opaque container which, by its appearance, does not convey its contents. Applying this rule, the *Robbins* Court invalidated the warrantless search of an opaquely wrapped package found in the luggage compartment of a station wagon during a valid automobile exception search.

The general rule announced by the majority in *New York v. Belton*⁶ established the right of an officer making a valid custodial arrest of an automobile occupant to search the passenger compartment of the automobile and any containers found during the search. The Court upheld the search of the contents of the pockets of Belton's jacket found on the back seat of a lawfully stopped automobile in which Belton was riding as incidental to Belton's arrest.

This Note analyzes the *Robbins* decision in light of the automobile exception and the container cases. The decision expanded the warrant requirement of the container cases and narrowed the scope of a warrantless search under the automobile exception. The plurality, in requiring a warrant to search all closed, opaque containers, misapplied the reasoning of the container cases, and misread the rationale underlying the automobile exception.⁷ The facts of *Robbins* placed the case within the confines of the automobile exception, but the plurality ignored the exception, and looked instead to the container cases for guidance. Finally, the plurality, in opting for a bright line rule, failed to consider the reasonableness of Robbin's privacy expectation and of the warrantless search.⁸

³ This Note uses interchangeably the phrases "arrest search exception", "search incident exception", and "search incident to an arrest exception". In the last major Supreme Court decision delineating the scope of the arrest search exception, *Chimel v. California*, 395 U.S. 752 (1969), the Court narrowed the exception to allow only a search of the arrestee's person and the area within the arrestee's immediate control. *Id.* at 762-63. See C. WHITEBREAD, *supra* note 2, at 134-42.

⁴ See *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977). These cases required a search warrant to search personal luggage. For a discussion of *Sanders* and *Chadwick*, see notes 110-17 & accompanying text *infra*.

⁵ 101 S. Ct. 2841 (1981).

⁶ 101 S. Ct. 2860 (1981).

⁷ Much of the discussion of the *Robbins* analysis focuses on the proper inclusion of cases within or exclusion of cases from the automobile exception. This Note argues that beginning with dicta in *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Court has misconstrued the automobile exception which has led to its present narrow interpretation. See notes 90-145 & accompanying text *infra*.

⁸ See notes 146-78 & accompanying text *infra*.

The rule announced in *Belton* represented a further expansion of the arrest search exception and rejected any application of the warrant requirement of the container cases. Based upon the facts of *Belton*, the warrantless search of the automobile and of Belton's jacket was reasonable. The Court's analysis, however, did not support its extension of the scope of the arrest search exception to include the passenger compartment of an automobile whenever an occupant of the automobile is arrested. Once the Court determined, however, that the area of the warrantless search included the passenger compartment, case law supported further inclusion of containers found within the passenger compartment. Finally, the efficacy of the bright line rule, due to its factual limitations, is questionable.⁹

Robbins and *Belton* will not advance the Court's goal of reducing the confusion concerning fourth amendment requirements for automobile and container searches.¹⁰ The decisions will enhance rather than diminish the confusion. The contrary philosophical positions taken by the Court in the two cases and the questionable impact of each decision perpetuates the confusion. The philosophical direction of the Court is unclear because it analyzed similar fact settings¹¹ and reached contrary decisions as to the appropriateness of each warrantless search. It struck down a warrantless search based on probable cause in *Robbins* and upheld a warrantless search without probable cause in *Belton*. The decisions probably will have little precedential value in future fourth amendment cases. A majority of the Court could not agree on the proper rule in *Robbins*, and the application of the rule announced by the Court in *Belton* is limited. Finally, the Court left courts and law enforcement officials without clear guidance about how to analyze fourth amendment issues when it chose to abandon a factual case-by-case approach, and, instead, announced bright line rules. The Court did not indicate when it would abandon the individual case approach for a categorical case approach in the future.

⁹ See notes 221-38 & accompanying text *infra*.

¹⁰ See notes 242-49 & accompanying text *infra*.

¹¹ Both *Robbins* and *Belton* involved the valid stop of an automobile by a state law enforcement officer, the valid arrest of the occupant or occupants of the car, a valid warrantless search of a particular area of the automobile, and the subsequent search of a container found in the area of the automobile searched. See *Robbins v. California*, 101 S. Ct. at 2855 (Stevens, J., dissenting). The Court was willing to decide the factually similar cases differently because the states of California and New York argued different exceptions in support of the searches. See *id.* at 2847 ("[T]he respondent does not allege the presence of any circumstances that would constitute a valid exception. . . ."). The exceptions cited by the court were the search incident exception and a consent search. *Id.* at 2847 n.3. Compare *id.* at 2848 n.2 (Powell, J., concurring). Justice Powell maintained that different decisions were necessary because of the different circumstances of each case, yet he found only one significant factual difference—the search extended to the trunk area in *Robbins*.

II. ROBBINS V. CALIFORNIA

Jeffrey R. Robbins was driving his station wagon in the early morning¹² when the California Highway Patrol stopped him for driving erratically.¹³ After asking to see his driver's license¹⁴ and car registration,¹⁵ one officer noted that Robbins was speaking rapidly¹⁶ and that he had trouble removing his driver's license from his wallet. Following Robbins to his station wagon for the registration papers, the officer believed that he smelled "marijuana smoke" when Robbins opened the door,¹⁷ and he saw a pair of tweezers similar to those used to smoke marijuana lying on the front seat of the car.¹⁸ The officer then searched Robbins and discovered a vile of liquid.¹⁹ The second officer stood with Robbins while the first officer searched the passenger compartment of the station wagon,²⁰ where he found marijuana and assorted contraband parapher-

¹² 1:45 a.m., Petition for cert. at 2.

¹³ 101 S. Ct. at 2843. Although there was some basis for questioning the propriety of the stop, that issue was not before the Court. The patrolman stopped Robbins on a cold and foggy winter morning. Visibility was a quarter of a mile. Petition for cert. at 2-3. The officers first noticed Robbins because they believed he was traveling too slowly for the speed zone. The speed zone, however, was lower than the officers thought. At a distance of one-quarter to one-half mile they saw Robbins cross the center line twice. *Id.* at 3. The officers then stopped Robbins pursuant to CAL. VEH. CODE § 2804 (West 1971).

A member of the California Highway Patrol upon reasonable belief that any vehicle is being operated in violation of any provisions of this code or is in such unsafe condition as to endanger any person, may require the driver of the vehicle to stop and submit to an inspection of the vehicle, and its equipment, license plates, and registration card.

Based on the visibility and the officers' mistaken belief as to the speed zone, it is not clear that they had a reasonable belief to stop Robbins' station wagon. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (It is unreasonable for an officer to randomly stop an automobile without at least articulable and reasonable suspicion that the driver is unlicensed or the vehicle is unregistered or either an occupant or the car is otherwise subject to seizure for violating the law).

¹⁴ CAL. VEH. CODE § 12951 (West 1971).

(a) The licensee shall have the license issued to him in his immediate possession at all times when driving a motor vehicle upon a highway.

(b) The driver of a motor vehicle shall present his license for examination upon demand of a peace officer enforcing the provisions of this code.

¹⁵ CAL. VEH. CODE § 4454 (West 1971).

(a) Every owner upon receipt of a registration card shall maintain the same or a facsimile copy thereof with the vehicle for which issued.

¹⁶ People v. Robbins, 103 Cal. App. 3d 34, 38, 162 Cal. Rptr. 780, 782 (1st Dist. 1980).

¹⁷ 101 S. Ct. at 2844.

¹⁸ 103 Cal. App. 3d at 38, 162 Cal. Rptr. at 782.

¹⁹ The record did not disclose the contents of the vile.

²⁰ A series of events occurred at this point which the Supreme Court did not relate. After frisking Robbins, the officer entered the station wagon to seize the tweezers. 103 Cal. App. 3d at 38, 162 Cal. Rptr. at 782. Shortly thereafter, Robbins spread eagled over the automobile collapsed on to the roadway, and began to vomit. *Id.* The officer exited the car momentarily, then re-entered it and searched it thoroughly. *Id.*

Robbins claimed that exhaust fumes from his car had overcome him, causing his sickness. Petition for cert. at 4. He alleged implicitly that the officers forced his statement re-

nalía.²¹ Robbins then volunteered, "[w]hat you are looking for is in the back."²² One officer placed Robbins in the patrol car while the other opened the tailgate. The officer opened the luggage compartment, opened a tote bag and "two packages wrapped in green opaque plastic" within the compartment,²³ all of which contained marijuana.²⁴

Robbins was charged²⁵ with various drug offenses under California law.²⁶ His motion to suppress the evidence found in the search of the packages in the luggage compartment was denied,²⁷ and Robbins was convicted. The California Court of Appeals upheld the conviction.²⁸ The Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of its decision in *Arkansas v. Sanders*.²⁹ On remand, the California Court of Appeals³⁰ reaffirmed Robbins' conviction, finding that the search of the green packages was within one of the exceptions justifying a warrantless search

garding additional contraband by causing him to breathe exhaust fumes, and then by forcing him to remain in the cold after getting sick. *Id.*

²¹ 101 S. Ct. at 2844. The items seized included "a pair of tweezers holding a burned hand-rolled cigarette butt, an alligator clip, a hand-rolled cigarette, and a cookie tin which contained marijuana seeds, two packs of cigarette papers, and a plastic baggie containing marijuana." 103 Cal. App. 3d at 38, 162 Cal. Rptr. at 782 (The court took the facts from the hearing on the motion to suppress.)

The Attorney General of California conceded that *Arkansas v. Sanders* required the officer to obtain a warrant before opening the cookie tin. *Id.* at 39, 162 Cal. Rptr. at 782.

²² 101 S. Ct. at 2854 (Rehnquist, J. dissenting). *See* note 20 *supra*.

²³ 101 S. Ct. at 2844 (plurality opinion).

²⁴ 103 Cal. App. 3d at 38, 162 Cal. Rptr. at 782. The Attorney General of California agreed that opening the tote bag required a warrant after *Sanders*. *Id.* at 39, 162 Cal. Rptr. at 782.

Each green plastic bag contained fifteen pounds of marijuana. 101 S. Ct. at 2844. An inspector for the Solano County Drug Abuse Bureau estimated the street value of the confiscated marijuana to be \$8000. The amount seized would supply an individual user for seventeen years. Petition against cert. at 6-7.

²⁵ The exact point at which the officers placed Robbins under arrest is not clear from the record. The Court's rendition does not even mention his arrest. It appears that he was initially arrested for driving under the influence of marijuana. *See* Petition for cert. at 3. The exact time of the arrest or even the fact of an arrest is not relevant under the automobile exception. *See* Moylan, *supra* note 2, at 1013.

²⁶ Robbins was charged and convicted for violating CAL. HEALTH & SAFETY CODE § 11357 (West Supp. 1981) (unauthorized possession of marijuana); CAL. HEALTH & SAFETY CODE § 11359 (West Supp. 1981) (unauthorized possession of marijuana for sale); CAL. HEALTH & SAFETY CODE § 11360 (West Supp. 1981) (transportation of marijuana).

The appellate court stayed the sentences under §§ 11357 and 11359 because the former was based on inadmissible evidence and the latter was included within § 11360. 103 Cal. App. 3d at 42, 162 Cal. Rptr. at 784-85.

²⁷ CAL. PENAL CODE § 1538.5 (West Supp. 1981). The section allows a defendant to move to suppress evidence or for the return of property obtained during an unreasonable warrantless search or seizure.

²⁸ Unpublished opinion.

²⁹ 442 U.S. 753 (1979).

³⁰ 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (1st Dist. 1980).

of a container recognized by the Court in *Sanders*.³¹ The court held that Robbins did not have a reasonable expectation of privacy in the green plastic packages because the trial court could have reasonably determined that the officers inferred from the appearance of the packages that they contained marijuana.³² The Supreme Court granted certiorari and reversed the decision of the California court.³³

³¹ *Id.* at 39-40, 162 Cal. Rptr. at 783. For a discussion of the exceptions recognized by *Sanders*, see note 148 & accompanying text *infra*.

³² Before analyzing the search under *Sanders*, the court, per Judge Christain, found the stop of the automobile as well as the subsequent search of its interior to be lawful based on the officers' belief that Robbins had been smoking marijuana. *People v. Robbins*, 103 Cal. App. 3d at 38-39, 162 Cal. Rptr. at 782 (citing *People v. Boddie*, 274 Cal. App. 2d 408, 80 Cal. Rptr. 83 (1969)).

Robbins argued based upon *Remers v. Superior Court*, 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970) (warrantless search of a tinfoil package invalidated because tinfoil is commonly used to wrap lawful items as well as drugs), that any number of lawful items could have been wrapped like the marijuana bricks. The court rejected Robbins' argument and contended that although the packages could have contained a number of lawful items, "[a]ny experienced observer could have inferred [that] a bulky, fifteen pound, brick-shaped, plastic-wrapped package suggested that it contain[ed] a specific type of contraband (a brick of marijuana)." 103 Cal. App. 3d 40, 162 Cal. Rptr. at 783.

The dissent argued that *Sanders* brought most closed containers within the protection of the fourth amendment warrant requirement. *Id.* at 43, 162 Cal. Rptr. at 785 (Rattigan, J., dissenting). The dissent accepted Robbins' argument and pointed out that the packages could have contained a number of lawful items such as "books, stationary, canned goods, or any number of other wholly innocuous items. . . ." *Id.* The dissent concluded, therefore, that the packages did not fall within the exceptions recognized by *Sanders*. *Id.* at 44, 162 Cal. Rptr. at 785 (Rattigan, J., dissenting).

³³ The Court granted certiorari to resolve the "continuing uncertainty" of the reasonableness of warrantless searches of closed containers. 101 S. Ct. at 2844.

The container cases had generated considerable uncertainty. The Court granted certiorari in *Sanders* to clear up the misunderstanding concerning *Chadwick*. *Arkansas v. Sanders*, 442 U.S. 753, 754 (1979). In his dissent in *Sanders* Justice Blackmun argued that *Sanders* would only add to the confusion of the permissibility of warrantless searches of containers. In premonitory fashion, Justice Blackmun wrote: "Still hanging in limbo, and probably soon to be litigated, are the briefcase, the wallet, the package, the paper bag, and every other kind of container." *Id.* at 768. *Robbins* is the realization of Blackmun's premonition.

The confusion generated by *Chadwick* and *Sanders* is not surprising since, prior to *Chadwick*, the lower courts applied the automobile exception to searches of containers. See *Moylan*, *supra* note 2, at 1054. See, e.g., *United States v. Vento*, 533 F.2d 990, 993 (9th Cir. 1976) (only challenged search of car, and not the search of a paper bag within the car); *United States v. Canada*, 527 F.2d 1374, 1379-80 (9th Circuit 1975), *cert. denied*, 429 U.S. 867 (1976) (personal belongings bag); *United States v. Tramunti*, 513 F.2d 1087, 1100 (2d Cir. 1975) (suitcase); *United States v. Anderson*, 500 F.2d 1311, 1315 (5th Cir. 1974) (boxes); *United States v. Soriano*, 497 F.2d 147, 149 (5th Cir. 1974) (suitcase); *United States v. Bowman*, 487 F.2d 1129, 1131 (10th Cir. 1973) (no challenge of search of footlocker or suitcase found in car; challenged the search of the car); *United States v. Evans*, 481 F.2d 990, 993 (9th Cir. 1973) (footlocker); *United States v. Garner*, 451 F.2d 167, 169 (6th Cir. 1971) (*per curiam*) (briefcases).

This practice continued even after the *Chadwick* decision. See, e.g., *United States v. Milhoun*, 599 F.2d 518, 527 (3d Cir. 1979) (satchel); *United States v. Neuman*, 585 F.2d 355, 360-61 (8th Cir. 1978) (cardboard box); *United States v. Gaultney*, 581 F.2d 1137, 1143-44 (5th Cir. 1978) (box); *United States v. Finnegan*, 568 F.2d 637, 640-41 (9th Cir. 1977) (suit-

The Court in *Robbins* squarely faced the issue of whether the automobile exception to the warrant requirement or the warrant requirement of the container cases controlled the search of a container discovered during the valid warrantless search of an automobile.³⁴ A plurality³⁵ refused to extend the automobile exception to closed containers found within an automobile; instead, they required the officer to obtain a warrant before opening the container. Justice Powell concurred³⁶ only in the result because he disagreed with the majority's bright line rule. A bright line rule did not trouble the Justices who dissented.³⁷ They believed, however, that such a rule should allow the search of anything discovered during an automobile exception search.³⁸

Justice Stewart, writing for the plurality, rejected the two arguments pressed on the Court to justify the warrantless opening of the packages. After invoking the usual fourth amendment presumptions and niceties,³⁹ he immediately turned to *United States v. Chadwick*⁴⁰ and *Arkansas v. Sanders*⁴¹ to support his decision not to accept the first argument, which urged the Court to expand the automobile exception to the warrantless opening of closed containers found within an automobile.⁴² The plurality pointed out that in *Chadwick*⁴³ and in *Sanders*,⁴⁴ the federal government and the state of Arkansas, respectively, had urged the Court

case); but see *United States v. Stevie*, 582 F.2d 1175, 1178 (8th Cir. 1978), cert. denied, 443 U.S. 911 (1979) (officers could seize suitcases from stopped automobile, but could not search them without a warrant).

³⁴ Other potential threshold questions were not at issue. State law apparently justified the initial stop of the car. The automobile exception validated the search of the car and the seizure of the packages.

³⁵ The plurality consisted of Justices Stewart, Brennan, White, and Marshall.

³⁶ Chief Justice Burger concurred in the result, but failed to write an opinion expressing his disagreement with the analysis. It is odd that the Chief Justice would fail to express his disagreement with the reasoning of the plurality or provide his analysis on an issue within such a volatile area of the law. The Chief Justice's failure to express himself is one of the questions surrounding the subsequent application of *Robbins*.

³⁷ Justices Blackmun, Rehnquist, and Stevens all dissented in separate opinions.

³⁸ Justice Stevens was not willing to go as far as Justices Blackmun and Rehnquist. Stevens would, however, allow the warrantless search of containers that could reasonably contain contraband. 101 S. Ct. of 2855 (Stevens, J., dissenting).

³⁹ Justice Stewart set out the fundamental fourth amendment trilogy. First, the fourth amendment protects against unreasonable searches and seizures. Next, courts presume that a search is per se unreasonable if the officer has not obtained a warrant based on probable cause from a neutral magistrate. Finally, a few well-defined exceptions overcome the presumption that a warrantless search is unreasonable. *Id.* at 2844.

⁴⁰ 433 U.S. 1, 12-13 (1977).

⁴¹ 442 U.S. 753, 763-65.

⁴² The United States government, as amicus curiae, urged the Court to extend the automobile exception to include containers found during an automobile exception search. 101 S. Ct. at 2845.

⁴³ The government did not argue in *Chadwick* that luggage was within the automobile exception, but only that luggage was analogous to vehicles due to their mobile nature. It asserted that since officers could reasonably search an automobile without a warrant due to

to extend the automobile exception to validate the warrantless search of containers taken from automobiles in those cases. The Court refused to do so in each case. In *Chadwick*, the Court found that since luggage was more easily seized and controlled,⁴⁵ and had a greater expectation of privacy than did an automobile,⁴⁶ luggage required a warrant before an officer could search it. The majority in *Sanders* applied the same analysis to a suitcase.⁴⁷ Justice Stewart adopted this rationale without further analysis to reject the extension argument.⁴⁸

The Court then turned to the second argument: the fourth amend-

its mobility, officers should also be able to search luggage without a warrant. *United States v. Chadwick*, 433 U.S. at 11-13.

The government also contended, based on the abuse of the general writs of assistance, that the warrant clause was meant only to protect "interests traditionally identified with the home." *Id.* at 6 (footnote omitted). See note 78 *infra* for a discussion of the history of the fourth amendment.

Although historians support the government's interpretation of the purpose of the warrant clause of the fourth amendment, see generally T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969), the Court was quick to point to precedent that had applied the warrant clause to privacy infringements found outside "the four walls of the home." *United States v. Chadwick*, 433 U.S. at 11 (footnote omitted). The Court cited the following cases to support their rejection of the government's argument: *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (warrantless search of automobile in driveway not allowed because no exigent circumstance existed); *Katz v. United States*, 389 U.S. 347 (1967) (held inadmissible evidence obtained by a warrantless electronic monitoring of phone booth conversations); *Preston v. United States*, 376 U.S. 364 (1964) (search of automobile within police custody not upheld under arrest search exception); *United States v. Jeffers*, 342 U.S. 48 (1951) (warrant required for search of a hotel room).

⁴⁴ 442 U.S. at 761.

⁴⁵ The majority in *Chadwick* maintained that once the officers had seized the footlocker and transported it to their headquarters, there was no risk involved in waiting for a warrant before searching the footlocker. *United States v. Chadwick*, 433 U.S. at 13. The Court noted that it was easier to store an item like a footlocker than to store an automobile while waiting for a warrant. *Id.* at 13 n.7.

⁴⁶ The Court contended that, whereas automobiles were merely used for transportation, suitcases were repositories of personal effects; that whereas automobiles traveled the public thoroughfares in plain view, the contents of suitcases were hidden from public view; and that whereas automobiles were subject to pervasive regulation, suitcases were not regulated. *Id.* at 12-13.

⁴⁷ The Court in *Sanders* reiterated the analysis used in *Chadwick*. It noted that the automobile exception justified stopping the cab and seizing the suitcase from the trunk, *id.* at 761, but that the exception did not extend to the search of the suitcase, *id.* at 763. The Court maintained that the state had failed to show an exigency justifying the immediate search without a warrant. *Id.* at 763. Justice Powell concluded that since the expected privacy in a suitcase was not diminished by placing it in an automobile, and since suitcases are repositories of personal effects, the reasons for allowing the warrantless search of an automobile did not apply to a suitcase: "We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police." *Id.* at 764-65 (footnote omitted).

⁴⁸ "Those cases made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 101 S. Ct. at 2845.

ment does not protect all containers,⁴⁹ but protects only those which are commonly used to transport personal effects.⁵⁰ Justice Stewart first rejected a personal-impersonal dichotomy because it lacked a basis in the fourth amendment.⁵¹ He stated that objects are protected not because they are personal, but because of the expectation of privacy manifested by putting them in closed opaque containers.⁵² Second, he maintained

⁴⁹ The State of California argued that different expectations of privacy existed in different containers. 101 S. Ct. at 2845.

The State proposed a reasonableness test for determining which containers were protected by the warrant requirement.

If a reasonable person, in light of all the circumstances, has cause to believe that the container in question is a repository of personal effects, than a warrantless search is prohibited. If, however, there is no reason to believe that the container is a receptacle for such articles, then probable cause alone is sufficient to justify the search. In evaluating all of the circumstances, the searching police officer may consider the intended purpose of the container, its present use, how it is secured or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it may emit.

Brief for Respondent, *Robbins v. California*, 101 S. Ct. 2841 (1981), at 51-52. The State maintained that the rule proposed flowed from *Katz v. United States*, 389 U.S. 347 (1967) *Chadwick*, *Rakas v. Illinois*, 439 U.S. 128 (1978) (standing requirements to challenge validity of a search), and *Sanders*. The state argued that the rule it proposed was an outgrowth of the exception in *Sanders* that a warrant is not required to search a container if the officer can infer the container's contents from its appearance. Brief for Respondent, *Robbins v. California*, 101 S. Ct. 2841 (1981), at 57-58.

The State had abundant support for its position that all containers are not equal in the eyes of the fourth amendment. *See* *United States v. Benson*, 631 F.2d 1336, 1338 (8th Cir. 1980) (warrant needed to search luggage); *United States v. Rigales*, 630 F.2d 364, 368 (5th Cir. 1980) (warrant needed to search leather pouch); *United States v. McKay*, 606 F.2d 264, 265 (9th Cir. 1979) (warrant needed to search a suitcase); *United States v. Meier*, 602 F.2d 253, 255 (10th Cir. 1979) (warrant needed to search backpack). *Compare* *United States v. Mannino*, 635 F.2d 110, 114 (23d Cir. 1980) (upheld warrantless search of a box); *United States v. Goshorn*, 628 F.2d 697, 700 (1st Cir. 1980) (upheld warrantless search of paper and plastic bag); *United States v. Mackey*, 626 F.2d 684, 686 (9th Cir. 1980) (upheld warrantless search of brown paper bag).

The Supreme Court's development of an alternative rationale for the automobile exception bolsters the State's argument for the sliding expectation level. The Court has recognized "significant differences" between vehicles and dwellings, and on that basis has permitted warrantless searches of automobiles in circumstances that would not justify the warrantless search of a dwelling. *See* *United States v. Chadwick*, 433 U.S. 1, 12; *Carroll v. United States*, 267 U.S. 132, 153. Throughout the past decade the Court has maintained in dictum that the difference in warrant needs between automobiles and houses was due to the lesser expectation of privacy in the former. *See* notes 110-34 & accompanying text *infra*.

⁵⁰ By personal effects the [State] means property worn on or carried about the person or having some intimate relation to the person." 101 S. Ct. at 2845.

⁵¹ The fourth amendment protects people and their effects whether they are personal or impersonal. *Id.* at 2846. Almost fifteen years earlier, the Court pointed out that "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. at 351.

⁵² Once placed within a closed, opaque container, "a diary and a dishpan are equally protected by the fourth amendment." 101 S. Ct. at 2846. If there is no difference in the consideration of a container holding a diary and one holding a dishpan, then the Court should not have relied on personal effects as a factor in distinguishing between automobiles and luggage. *See* note 46 *supra*.

that a personal-impersonal distinction was patently unworkable.⁵³ Finally, although he recognized the plain view exceptions of *Sanders*,⁵⁴ Justice Stewart ruled that the state had not proven that the two green plastic packages fell within the exceptions.⁵⁵ The plurality concluded that the automobile exception did not justify the warrantless search of

⁵³ "[A]s the disparate results in the decided cases indicate, no court, no constable, no citizen can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffle bag, or box." 101 S. Ct. at 2846.

The Court cited *United States v. Ross*, No. 79-1624 (D.C. Cir. March 31, 1981). The Circuit court held, en banc, that the police could not search without a warrant a brown paper bag removed from the trunk of a parked car unless one of two circumstances existed. Either the officers had to reasonably believe that the bag's contents posed a danger to them if not opened immediately, or a risk of losing the evidence had to exist if the officers obtained a warrant first. *Id.* at 18. The court rejected a 'worthy container' rule. *Id.* at 3, 21. The court did uphold the initial stop of the automobile and the seizure of the package, based upon the informant's tip, under the automobile exception. *Id.* at 19-20.

The State of California argued that there was a workable way to distinguish between containers holding personal items and those holding impersonal items. See note 45 *supra*. The State pointed out that the test proposed would not allow warrantless searches of briefcases or suitcases. Brief for Respondent, *Robbins v. California*, 101 S. Ct. 2841 (1981), at 52. The en banc court in *Ross* maintained that one person's brown bag is another's suitcase. The respondent dealt with this social strata argument when it discussed the search of Robbins' two green garbage bags. The officers would have had to obtain a warrant to open the bags if from handling them they believed that the contents of the bags had the consistency and weight of clothing. If, however, the bags had the consistency and weight of marijuana and the packages smelled of marijuana, then the officers could search the packages "because there is probable cause to believe the packages contain contraband." Brief for Respondent, *Robbins v. California*, 101 S. Ct. 2841 (1981), at 53.

⁵⁴ The *Sanders* Court acknowledged exceptions to its holding that a warrant was required to search luggage irrespective of where it was seized. The exceptions delineated by the Court centered around the plain view exception to the warrant requirement:

[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant.

442 U.S. at 764-65 n.13. "[T]he negative implication of footnote 13 of the *Sanders* opinion is that, unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment." 101 S. Ct. at 2846.

⁵⁵ Justice Stewart maintained that the testimony of the officer—that he had heard that marijuana was packaged in green, plastic bags—was not sufficient to bring the packages within the *Sander's* exception:

This vague testimony certainly did not establish that marijuana is ordinarily 'packaged this way.' Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question [*Sanders* footnote thirteen] a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer.

Id. at 2847.

The record was silent as to whether any inferences were drawn by the officer from handling the packages or by smelling an odor emanating from the packages before he opened them. The record did indicate, however, that after the trooper had discovered marijuana and paraphernalia in the passenger compartment, Robbins told the troopers that what they were looking for was in the back. 103 Cal. App. 3d at 38, 162 Cal. Rptr. at 782.

the packages.⁵⁶

In a separate concurrence,⁵⁷ Justice Powell agreed with the plurality that Robbins had manifested a reasonable expectation of privacy in the packages,⁵⁸ but he refused to adopt the plurality's general rule that a warrant is required in order to search all closed opaque containers.⁵⁹ Justice Powell⁶⁰ preferred to limit the plurality's opinion. He asserted

⁵⁶ The plurality held that a closed opaque container "may not be opened without a warrant, even if it is found during the course of a lawful search of an automobile." 101 S. Ct. at 2847. The plurality did note, however, that the officers could have opened the containers pursuant to either an arrest search or a consent search exception to the warrant requirement. *Id.* at 2847, n.3.

⁵⁷ Before discussing Robbins, Justice Powell made two preliminary points. First he noted the general confusion surrounding the reasonableness of automobile exceptions. He attributed the confusion to two factors: "the necessity of applying the general command of the Fourth Amendment to ever-varying facts;" and to the "often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder." 101 S. Ct. at 2848 (Powell, J., concurring).

Next Justice Powell outlined the three issues presented by *Robbins* and *Belton* collectively:

(A) the scope of the search incident to arrest on the public highway; (B) whether officers must obtain a warrant when they have probable cause to search a particular container in which the suspect has a reasonable expectation of privacy; and (C) the scope of the 'automobile exception' to the warrant requirement, which potentially includes all areas of the car and containers found therein.

Id. at 2848 (Powell, J., concurring). He further pointed out the importance of delineating between the issues and discussing them separately to avoid confusion. *Id.* at 2848.

Similarly, a commentator has warned of intertwining the automobile exception of *Carroll* and the search incident to an arrest exception of *Chimel*:

All too frequently, however, search incident criteria and *Carroll* Doctrine [automobile exception] criteria are intertwined in one analytically inextricable mess. A sound rule of thumb for the common law reader would be to take any opinion in which reference to both *Carroll* and *Chimel* is made in a single paragraph, let alone in a single sentence, and to consign that opinion politely but expeditiously to the nearest trashcan.

Moylan, *supra* note 2, at 1013. For a good example of a decision which keeps the analysis separate, see *Coolidge v. New Hampshire*, 403 U.S. 443. The Court analyzed in distinct sections of the opinion the validity of the search of *Coolidge's* automobile under the automobile exception, *id.* at 458-64, the search incident to an arrest exception, *id.* at 455-57, and the plain view exception, *id.* at 464-73.

⁵⁸ Justice Powell contended that *Sanders* justified the result but did not compel it. 101 S. Ct. at 2847 (Powell, J., concurring). He concurred in the judgment "because the manner in which the package at issue was carefully wrapped and sealed evidenced petitioner's expectation of privacy in its contents." *Id.*

⁵⁹ Justice Powell gave several reasons for not adopting the plurality's bright line rule. Not only did the rule go beyond any precedent, including *Sanders*, but it also failed to address the nature of the container and whether one could reasonably have an expectation of privacy in the container. "The plurality's 'bright-line' rule would extend the warrant clause of the Fourth Amendment to every 'closed, opaque container,' without regard to size, shape or whether common experience would suggest that the owner was asserting a privacy interest in the contents." *Id.* at 2847 n.1. Finally, the plurality's rule failed to weigh the societal and individual interests. Justice Powell asserted that the decision, "impose[d] substantial burdens on law enforcement without vindicating any significant values of privacy." *Id.* at 2847.

⁶⁰ Justice Powell began his discussion by explaining his support for the bright line rule announced in *Belton*. After limiting the rationale of *Belton* to the search incident to arrest

that the plurality had analyzed *Robbins* strictly as a container case, and had not decided whether a warrant was necessary if a contemporaneous arrest had occurred or if the officers had had probable cause to search the automobile carrying the container.⁶¹ He argued that *Chadwick* and *Sanders* mandated a reasonableness approach⁶² in deciding when a warrant was required to search a container.⁶³ Certainly, he concluded, neither case supported the "mechanical" approach of the plurality,⁶⁴ which would not better protect the privacy interests of citizens nor aid the efforts of law enforcement personnel.⁶⁵

exception, he balanced the individual's "limited expectation of privacy in the interior of the automobile" that existed after a custodial arrest with the government's interest in protecting the officer and any evidence present. He concluded that "in the volatile and fluid situation of an encounter between an arresting officer and a suspect apprehended on the public highway" that it was reasonable and necessary to "allow an officer . . . to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself or the vulnerability of evidence. *Id.* at 2848.

⁶¹ "[T]he plurality's opinion in this case concerns itself primarily with the kinds of containers requiring a warrant for their search when police have probable cause to search them, and where there has been no arrest." *Id.* at 2849. He viewed the case solely as a container case and not as an automobile exception case. *Id.* In other words, the probable cause focused on the container rather than the automobile.

This approach misreads the facts. Unlike *Chadwick* or *Sanders*, the troopers in *Robbins* did not have probable cause to believe prior to stopping the automobile that a package within the automobile contained contraband. Probable cause to search the automobile arose prior to probable cause to search the packages. The Court's decision to uphold the seizure of the packages supports this inference. *Id.* at 2847 (plurality opinion). See notes 144-45 & accompanying text *infra*.

⁶² See *Rakas v. Illinois*, 439 U.S. 128, 152 (Powell, J., concurring) ("The ultimate question . . . is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances.").

⁶³ *Chadwick* only required a warrant to search sealed containers that generally hold personal items. *United States v. Chadwick*, 433 U.S. at 11. *Sanders* only required a warrant to search containers that are repositories of personal effects. *Arkansas v. Sanders*, 442 U.S. at 764-65.

⁶⁴ The majority in *Sanders* explained that they held only that personal luggage required a warrant to validate its search. The majority also mentioned other containers and noted that officers and the courts would find it difficult at times to determine which containers required a warrant. 442 U.S. at 764 n.13. This implicitly left the door open to continued warrantless searches of closed containers.

At least one commentator has interpreted the language of footnote thirteen to indicate that the list of exceptions provided by the *Sanders* Court were not meant to be exhaustive. 2 W. LAFAVE, *supra* note 2, at 76-77 (Supp. 1981).

For circuit court cases allowing the warrantless search of closed, opaque containers after *Sanders*, see note 49 *supra*. For two of the most recent cases allowing the warrantless search of closed, opaque containers see, e.g., *United States v. Stewart*, 650 F.2d 178, 181 (9th Cir. 1981) (briefcase); *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (the possibility of a fugitive at large provided an exigency to search a briefcase).

⁶⁵ Justice Powell's thesis is that an increased burden on a societal interest, manifested by requiring officers to spend more time and effort seeking warrants rather than performing their normal duties, is justified only when offset by an increase in the protection afforded individual rights. Here, requiring an officer to obtain a warrant to search a "cigar box or a Dixie cup" discovered during a valid automobile exception search would increase the burden on

Finally, Justice Powell considered the scope of the automobile exception. He maintained that extending the scope of the exception to the situation at bar, as advocated by the dissenters, was consistent with *Chadwick* and *Sanders* since neither case involved the automobile exception.⁶⁶ Furthermore, he favored the idea of extending the exception because this option presented an opportunity for a majority of the Court to establish specific guidelines for the police and the courts to follow.⁶⁷ He noted one drawback: the bright line rule might shift the focus of litigation to other questions, such as when probable cause ripened and whether the suspicion focused on the container or the automobile, and thereby lost some of its effectiveness.⁶⁸ Because he was able to dis-

society without "the advancement of important Fourth Amendment values." 101 S. Ct. at 2849 (Powell, J., concurring).

Justice Powell argued that the plurality had overstated the difficulty in determining a reasonable expectation of privacy. He argued that a warrant clearly was required to search personal luggage, whereas a warrantless search of a plastic cup or brown paper sack was reasonable. He urged courts to hold hearings to determine the level of expectation manifested by the defendant in items that fell between the two extremes. *Id.* at 2850 n.3.

Relevant to such an inquiry should be the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing or binding the container, that indicates a desire to prevent the contents from being displayed upon simple mischance.

Id.

⁶⁶ *Id.* at 2850. He perceived the dissenters' position to be that a warrantless search of a container was valid when the probable cause focused on the automobile and not a particular container. He believed that this position, which distinguished the need for a warrant based on the foci of the probable cause, was reconcilable with *Chadwick* and *Sanders*. The probable cause in *Chadwick* and *Sanders* focused on the footlocker and the suitcase, respectively, and not the automobiles. *Id.* See notes 139-40 & accompanying text *infra*.

Justice Powell did note without elaboration, however, that acceptance of the position of the dissenters would require the rejection of much of the reasoning in *Sanders*. 101 S. Ct. at 2850.

⁶⁷ *Id.* at 2850 (Powell, J., concurring).

⁶⁸ Justice Powell's question as to the ripening of probable cause is not unique to the plurality's bright line rule. The defendant can challenge the existence of probable cause whenever probable cause is required to justify a fourth amendment search. Even when a warrant is obtained, the sufficiency of its basis may later be challenged. *Franks v. Delaware*, 438 U.S. 155 (1978).

The fourth amendment does not require probable cause for governmental intrusions that do not reach the level of a search, seizure, or an arrest. The Court usually requires reasonable suspicion to support the lesser intrusions. See *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968). Compare *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (probable cause required for custodial interrogation seizure); *United State v. Martinez-Fuentes*, 428 U.S. 543, 560-62 (1976) (no level of individualized suspicion required for stops at border checkpoints). Also, probable cause is not required for a search incident to an arrest. See *Belton v. New York*, 101 S. Ct. 2860 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

Chadwick raised by implication the second issue, the focus of the probable cause. By

tinguish *Robbins* from the automobile exception and because it was late in the term, Justice Powell chose not to side with the dissenters.⁶⁹

Justice Blackmun dissented based upon his opinions in *Chadwick*⁷⁰ and *Sanders*.⁷¹ The only merit he found in the plurality's opinion was clarity.⁷² He, too, felt that the bright line rule would shift the focus of the inquiry. He thought future litigation would focus on whether a package's appearance bespoke its contents.⁷³ He did opt for a bright line rule, which would extend the warrantless search of the automobile exception to include personal property found within an automobile.⁷⁴

Justice Rehnquist, in dissent, levelled a general attack on fourth amendment jurisprudence,⁷⁵ reciting themes familiar in his opinions. He challenged the propriety of applying the exclusionary rule to the

precluding the warrantless search of any closed opaque container, *Robbins* eliminated this concern. The magnitude of Justice Powell's concern is questionable. The distinction as to the development of probable cause between *Robbins* on the one hand, and *Chadwick* and *Sanders* on the other, is clear. See notes 144-45 & accompanying text *infra*.

⁶⁹ Some future case affording an opportunity for more thorough consideration of the basic principles at risk may offer some better, if more radical, solution to the confusion that infects this benighted area of the law." 101 S. Ct. at 2851 (Powell, J., concurring) (footnote omitted).

⁷⁰ *Id.* at 2851 (Blackmun, J., dissenting); *United States v. Chadwick*, 433 U.S. at 17 (Blackmun, J., dissenting). Blackmun in *Chadwick* did not view *Chadwick* as an automobile exception case. Rather, he proposed that "a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place." *Id.* at 19. He maintained that the automobile exception would have applied if the agents had waited for the car to drive off and then pulled it over. *Id.* at 22-23.

Based on a three-pronged argument he maintained that a warrant was not required to search the footlocker even after the DEA agents had taken it to the federal building. First, it was unreasonable for the officers to leave the property on the street or to post a guard over it while they obtained a warrant. Second, the Court had previously allowed warrantless searches even when the officers could have obtained a warrant. See *Caldwell v. Lewis*, 417 U.S. 583, 591-92 (1974) (plurality opinion) (reasonable to obtain evidence from the exterior of an automobile without a warrant); *United States v. Edwards*, 415 U.S. 800, 804-05 (1974) (reasonable for the police to provide arrestee with new clothes the morning after his arrest and use the clothes he was arrested in as evidence). Third, requiring the officer to obtain a warrant would not increase fourth amendment protections since a warrant would be forthcoming in most instances. *Id.* at 19-20.

⁷¹ *Arkansas v. Sanders*, 442 U.S. at 768 (Blackmun, J., dissenting). He argued that luggage, like an automobile, was mobile and the expectation of privacy was not significantly different; therefore, officers could search luggage found within an automobile without a warrant. *Id.* at 769.

⁷² The rule "should serve to eliminate the opaqueness and to dissipate some of the confusion." 101 S. Ct. at 2851 (Blackmun, J., dissenting).

⁷³ The lower court's opinion in *Robbins* suggests that the potential exists for a shift in issues to whether the officers could have reasonably inferred the contents of a package from its appearance. 103 Cal. App. 3d at 40, 162 Cal. Rptr. at 783 ("Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana."); *Id.* at 44, 162 Cal. Rptr. at 785 (Rattigan, J., dissenting) ("[I]t could contain books, stationary, canned goods, or any number of other wholly innocuous items which might be heavy in weight.").

⁷⁴ 101 S. Ct. at 2851 (Blackmun, J., dissenting).

⁷⁵ *Id.* at 2851 (Rehnquist, J., dissenting). He accused Justice Stewart of "engrafting sub-

states,⁷⁶ and criticized the pre-eminence of the warrant requirement⁷⁷ as unjustified by the language or history of the fourth amendment.⁷⁸ He

tleties into the jurisprudence of the Fourth Amendment itself that are neither required nor desirable under our previous decisions."

Justice Rehnquist did not identify the subtleties of which he complained. Since Justice Stewart did not introduce any fine distinctions in *Robbins*, Justice Rehnquist's concern must stem from the fact that Justice Stewart wrote two contrary opinions based on similar factual settings.

⁷⁶ The "'exclusionary rule' . . . imposes a burden out of all proportion to the Fourth Amendment values which it seeks to advance by seriously impeding the efforts of the national, state, and local governments to apprehend and convict those who have violated their laws." *Id.* at 2851 (Rehnquist, J., dissenting).

Justice Rehnquist harkened back to Justice Harlan's concurring opinions in *Coolidge v. New Hampshire*, 403 U.S. at 490, in which Justice Harlan urged that the Court overrule *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (which had closed "the only courtroom door remaining open to evidence secured by official lawlessness . . .," in extending application of the exclusionary rule to evidence procured by state and local officials), and *Ker v. California*, 374 U.S. 23, 33-34 (1963) (extending the reasonableness standard to state searches and seizures). Justice Harlan believed that only then could the quite "intolerable" state of uncertainty surrounding fourth amendment requirements be solved. *Coolidge v. New Hampshire*, 403 U.S. at 490-91.

⁷⁷ He challenged the substance of the requirement on two grounds: that magistrates did not need legal training and that the sufficiency of the basis of the warrant could be challenged at trial. 101 S. Ct. at 2852.

In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court held that the clerks of the Tampa Bay Municipal Court were neutral and detached magistrates for the purpose of the fourth amendment. *Id.* on 345-46. The clerks were only authorized to issue arrest warrants for violations of city ordinances. *Id.* at 347. The Court pointed out, though, that irrespective of the court system, it had never held that only lawyers or judges could issue warrants. *Id.* at 348.

The Court in *Franks v. Delaware*, 438 U.S. 154 (1978), recognized the right of a defendant to challenge the truthfulness of statements made in an affidavit used to obtain a warrant. *Id.* at 155-56.

The Justice's challenge to the warrant requirement based on *Shadwick* and *Franks* is unsound. *Shadwick* did not break new ground. As the Court there pointed out, non-lawyers and non-judges had been used in the federal system as magistrates, 407 U.S. at 349. Moreover, the decision reached in *Franks* is consistent with the protection the warrant clause was designed to provide. The fourth amendment requires probable cause to obtain a warrant. This restriction would lose its meaning if the officer seeking the warrant did not have to stick to the facts known and inferences reasonably drawn. *See Franks v. Delaware*, 430 U.S. at 168.

⁷⁸ "[N]othing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants." 101 S. Ct. at 2852 (Rehnquist, J., dissenting).

Although the fourth amendment provides no indication as to which clause controls—the reasonableness clause or the warrant clause—the Court in this century began to favor the warrant clause to ensure the reasonableness of a search or seizure. As federal jurisdiction over criminal activity increased, the Court came to view the warrant as the safeguard of fourth amendment rights. T. TAYLOR, *supra* note 43, at 45-46. *See generally* N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 106 (reprint 1970).

Justices Frankfurter and Jackson advocated the dominance of the warrant clause. Justice Jackson penned the passage that has become synonymous with the mandate of a warrant:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be

argued that these two principles, along with the Court's tendency to decide cases solely with an urban police force in mind, unrealistically ignored the problems and needs peculiar to each locality.⁷⁹

drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. at 13-14 (footnote omitted). Justice Jackson emphasized that the key to safeguarding fourth amendment rights was the involvement of the neutral magistrate and not the level of evidence. Even if an officer had sufficient evidence to obtain a warrant, he was not to search unless he first obtained the warrant. Any other conclusion "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.* (footnote omitted). See *Brinegar v. United States*, 338 U.S. at 180-81 (Jackson, J., dissenting) (uncontrolled search and seizure is the most effective weapon of arbitrary governments). See also *Katz v. United States*, 389 U.S. at 356-57 (approval of search after the fact disallowed if a warrant was required).

The presumption in favor of the warranted search is now firmly embedded in our jurisprudence. Except for a few recognized exceptions, a search conducted without obtaining a warrant is "*per se* unreasonable under the Fourth Amendment." *Id.* at 357 (footnote omitted). See also *Coolidge v. New Hampshire*, 403 U.S. at 454-55. reasonableness is not a substitute for a warrant. *Arkansas v. Sanders*, 442 U.S. at 758.

One commentator has argued that deference to the warrant clause stands the fourth amendment on its head. T. TAYLOR, *supra* note 43, at 23-24. According to Taylor, the founding fathers intended the warrant clause to ensure against the re-emergence of the general writ of assistance. *Id.* at 35-44. See also C. PYLE, *PRIVACY: CASES, MATERIALS AND QUESTIONS* 3-16 to 3-18 (forthcoming). The writ had plagued the colonies prior to the revolution. A general writ, which was a writ of unfixed term, allowed the holder (usually the crown's tax agents) to search wherever he believed property was kept on which a custom or duty was owed. For a discussion of the writ of assistance and the important cases of that era, see S. PRESSER & J. ZAINALDIN, *LAW AND AMERICAN HISTORY* 61-90 (1980); C. PYLE, *supra*, at 3-12 to 3-14. John Adams once declared that James Otis' denouncement of the writs "breathed into this nation the breath of life." T. TAYLOR, *supra* note 43, at 27. See *Boyd v. United States*, 116 U.S. 616, 624-25 (1886) (recalling the history of the writs of assistance). "The 'constitutional fathers were not concerned about warrantless searches, but about over-reaching warrants. . . . Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution . . ." *Id.* at 41.

Justices in dissent still express the view that reasonableness is the controlling yardstick of search and seizure validity. See *Steagald v. United States*, 101 S. Ct. 1642, 1654 (Rehnquist, J., dissenting) ("Here as in all Fourth Amendment cases 'reasonableness is still the ultimate standard' " (quoting *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967))).

⁷⁹ 101 S. Ct. at 2852 (Rehnquist, J., dissenting). He strenuously maintained that the exclusionary rule, coupled with the presumption in favor of the warrant clause, had "substantially frustrated" the efforts of law enforcement officers to arrest or gather evidence when they had probable cause. He explained that the Court too often assumed that obtaining a warrant only required the officer to "make a quick half mile ride to the nearest precinct station in an urban area . . ." *Id.*

He argued that this urbanized view of law enforcement was unrealistic because in many western and southern states the nearest magistrate is twenty-five to fifty miles away, rather than merely one-half mile away. *Id.* Examples of the difficulties faced by some local law officials in obtaining warrants were presented to the Eighth Circuit in *United States v. Bozada*, 473 F.2d 389 (8th Cir.), *cert. denied*, 411 U.S. 969 (1973).

- *Arkansas: Chicot County*: Sheriff Max Brown polices 642 square miles with the help of two regular deputies. The highway patrol has two troopers assigned to the county. There are four part-time justices of the peace and no circuit judges in Chicot County. Two U.S. highways pass through the county.

Justice Rehnquist then turned to a discussion of the *Robbins* case. He rejected the plurality's interpretations of *Cady v. Dombrowski*⁸⁰ and *South Dakota v. Opperman*.⁸¹ To Justice Rehnquist, *Cady* and *Opperman* demonstrate that the inherent mobility of automobiles as a class, and not the mobility of a particular automobile, justifies the automobile exception.⁸² He agreed with Justice Blackmun that officers could search

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- *Iowa: Ringgold County*: Sheriff E.T. Strange patrols 538 square miles with the help of one deputy. The highway patrol has one trooper assigned to the county; there are three part-time judges in Ringgold County. However the sheriff advises that occasions arise in which they are out of town and it might be necessary to go to another county to procure a search warrant.
 - *Minnesota: Lake of the Woods County*: Sheriff Emmett Chilgren polices 1,311 square miles without the help of a regular deputy. The highway patrol has a single trooper assigned to the county. The county justice of the peace position was recently vacated, although Lake of the Woods County shares a county judge with two other counties. The county seat is Baudette, but the county judge may be holding court in Hallock, in Kittson County, a round-trip of 264 miles from Baudette. . . . Sheriff Chilgren stated to counsel that a search warrant could take as long as two days to obtain under adverse circumstances.
 - *Missouri: Barry County*: Sheriff Edwin Dummit polices 789 square miles with the help of four deputies. The highway patrol has two troopers assigned to the county. There is only one magistrate and one circuit judge in Barry County.
 - *Nebraska: Sioux County*: Sheriff Tom Broderick patrols 2,063 square miles with the help of one deputy. The highway patrol does not have a trooper regularly assigned to the county. There is only one county judge in Sioux County.
 - *North Dakota: Sheridan County*: Sheriff Leonard Hanson polices 989 square miles and has no regular deputies. The highway patrol does not station a trooper there. A single justice of the peace is the only judicial officer in Sheridan County. . . .
 - *South Dakota: Buffalo County*: Sheriff Francis E. Healey patrols 482 square miles with the help of one county deputy. The highway patrol does not have any troopers regularly assigned to the county. There are two part-time justices of the peace in Buffalo County.

Brief of Amicus Curiae, *Arkansas v. Sanders*, 442 U.S. 753 (1979), 10-11 (information updated as of 1978) (footnotes omitted).

Justice Rehnquist noted with favor *Wolf v. Colorado*, 338 U.S. 25 (1949), which recognized the need for diverse approaches which enable local officers to deal with their own localized problems. The Court in *Wolf* refused to extend the exclusionary rule to state courts trying state crimes. *Id.* at 33.

Mapp v. Ohio, 367 U.S. at 654-55, overruled *Wolf*. The Court in *Mapp* maintained that the facts supporting the decision in *Wolf* had changed: more states had shifted toward the exclusionary rule, *id.* at 651; other remedies for unlawful police activity had been found wanting, *id.* at 652; and federal law was now more consistent, *id.* at 653.

⁸⁰ 413 U.S. 433 (1973). For a discussion of the case, see notes 122-25 & accompanying text *infra*.

⁸¹ 428 U.S. 364 (1976). For a discussion of the case, see notes 126-34 & accompanying text *infra*.

⁸² The plurality had argued that since the Court had applied the automobile exception when the car was immobile, there must be another rationale underlying the exception. Writing for the majority, Justice Rehnquist maintained that the mobility rationale for the automobile exception was based on the inherent mobility of automobiles as a class rather than on the mobility of a particular automobile. *Cady v. Dombrowski*, 413 U.S. at 440-41.

His interpretation of the automobile exception rationale, however, is unfaithful to the exception as set out in *Carroll*. *Carroll* required probable cause to search the automobile and the existence of an exigency. *Id.* at 153. *Chambers* also required the presence of these factors, *Chambers v. Maroney*, 399 U.S. at 51, even though it allowed a later search of the automo-

personal property found within an automobile during a valid search of the automobile under the exception.⁸³ Justice Rehnquist stressed that even if the automobile exception did not apply and *Sanders* controlled, the officer lawfully searched the packages found within the luggage compartment of Robbins' station wagon because the packages fell within the exceptions recognized by *Sanders*.⁸⁴ Although he agreed with the plurality that the Court must simplify fourth amendment analysis, Justice Rehnquist maintained that the answer was not to expand *Chadwick* and *Sanders*, but to apply the automobile exception to cases such as *Robbins*.⁸⁵

Justice Stevens argued in dissent for the application of the automobile exception,⁸⁶ reminding the other justices that neither *Chadwick* nor *Sanders* dealt with a factual situation within the framework of the automobile exception.⁸⁷ He further stressed that a recognized exception to

bile for safety reasons, *id.* at 52 n.10. Justice Rehnquist's analysis would remove the exigent circumstance requirement.

A car's mobility in most circumstances provides the exigency, but it is based on the factual situation and not the car's inherent nature. Justice Rehnquist has made the mistake of attempting to place search and seizure cases involving automobiles within the exception merely because an automobile is involved. For example, he tried to justify the automobile inventory searches in *Cady v. Dombrowski*, 413 U.S. 433, and *South Dakota v. Opperman*, 428 U.S. 364, based on the inherent mobility of automobiles. In *Cady*, the car searched had been wrecked, 413 U.S. at 435-36, and in *Opperman*, the contents of the car were inventoried after officers towed it to an impoundment lot, 428 U.S. at 365-66. For a discussion of *Cady* and *Opperman*, see notes 119-34 & accompanying text *infra*.

⁸³ "If 'contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant,' . . . then, in my view, luggage and similar containers found in an automobile may be searched for contraband without a warrant." 101 S. Ct. at 2853 (Rehnquist, J., dissenting) (quoting *Arkansas v. Sanders*, 442 U.S. at 769 (Blackmun, J., dissenting) (quoting *Carroll v. United States*, 267 U.S. at 153)).

⁸⁴ Rather than looking solely to the appearance of the package to determine whether a warrant was required to open it as implied by *Sanders*, Justice Rehnquist looked to the totality of the circumstances. Based on the marijuana and paraphernalia already discovered, Robbins' statement, and the officer's recognition that marijuana is often packaged in the same way as the bags discovered, Robbins did not have an expectation of privacy in the bags warranting the officer to await the decision of a magistrate. *Id.* at 2854.

⁸⁵ *Chadwick*, *Sanders*, and *Robbins* do indicate a progression of increased protection afforded containers in the name of the fourth amendment. *Chadwick* disallowed the search of a double locked footlocker. *Sanders* disallowed the warrantless search of an unlocked suitcase. Not until *Robbins*, however, did the Court extend the warrant requirement to all closed containers. "Apparently, the plurality today decides that distinguishing between containers found in a car is too difficult a task . . ." *Id.* at 2854 (Rehnquist, J., dissenting).

⁸⁶ *Id.* at 2855 (Stevens, J., dissenting). "In my opinion, the 'automobile exception' to the warrant requirement therefore provided each officer the authority to make a thorough search of the vehicle including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain the contraband." Justice Stevens believed that the plurality had engaged in an "unprecedented and unnecessary narrowing of the automobile exception." *Id.* at 2857.

⁸⁷ Relying on Chief Justice Burger's concurring opinion in *Sanders*, Justice Stevens argued that since neither *Chadwick* nor *Sanders* were automobile exception cases, the pre-*Chadwick* law

the warrant requirement, like the automobile exception, justifies as broad a search as if a warrant had been issued.⁸⁸ Therefore, he reasoned that the search of the container found during a valid warrantless search was itself valid since, if the officer had had a warrant to search the automobile and found a suitcase in the process, the officer could have searched the suitcase without a warrant from a magistrate.⁸⁹

III. UNREASONABLE APPLICATION OF THE CONTAINER CASES

Robbins presented the Court with only one issue for determination: the propriety⁹⁰ of the officer's search of the green garbage bags found in Robbins' station wagon during a valid automobile exception search.⁹¹ The case provided a classic confrontation between the dichotomous perspectives of fourth amendment⁹² analysis. On the one hand, the Court could have adopted the reasonableness approach of the automobile exception to justify the warrantless search of the packages. On the other

allowing the warrantless search of containers discovered during the valid search of an automobile remained intact. *Id.* at 2855-56. He pointed out that in neither *Chadwick* nor *Sanders*, did the officers have probable cause to search the automobiles involved. "The issue . . . would have been exactly the same if the officers had apprehended the suspects before they placed the footlocker in the trunk of the car in *Chadwick* or before they hailed the taxi in *Sanders*." *Id.* at 2856 (footnote omitted). Justice Stevens maintained that although *Sanders* involved a moving vehicle, it was not within the automobile exception. He reasoned that to uphold the warrantless search of the suitcase merely because the officers waited to seize it after it was placed in a moving vehicle would allow officers to evade the mandate of *Chadwick*. *Id.* This rejected Justice Blackmun's view in *Chadwick* that if the officers had waited for *Chadwick* to drive away, the automobile exception would have applied. See note 73 *supra*.

⁸⁸ Justice Stevens did not provide any support for this contention. He might, however, look to *Terry* for support. *Terry* established that the scope of a reasonable search is determined by the initial justification for the intrusion. *Id.* at 19-20.

⁸⁹ 101 S. Ct. at 2857 (Stevens, J., dissenting). "Similarly, if a magistrate issues a warrant for the search of a house, police executing that warrant clearly need not obtain a separate warrant for the search of a suitcase found in the house, so long as the things to be seized could reasonably be found in such a suitcase." *Id.* at 2857, n.8.

Warden v. Hayden, 387 U.S. 294 (1967) supports Justice Steven's position. In *Hayden*, the Court upheld the warrantless search of a flush tank, the area underneath a mattress, a chest drawer, and a washing machine based on the exigency of hot pursuit. *Id.* at 297-98. The scope of the warrantless search in *Hayden* extended to anything or any place where the suspect could have hidden or where he could have hidden a weapon. Similarly, the automobile exception should extend to any container within the automobile where the occupant could have hidden contraband.

⁹⁰ The word properly is used because the Court did not look to the reasonableness of the warrantless search based on the facts and circumstances confronting the officer. See notes 146-55 & accompanying text *infra*.

⁹¹ It was the only issue before the court. All the justices accepted the validity of the initial stop. They also either accepted the search of the automobile as valid, or, as in Justice Powell's case, viewed it as irrelevant.

⁹² The fourth amendment establishes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no Warrants shall issue, but upon probable cause . . ." U.S. CONST. amend. IV.

hand, the Court could, and did, rely on the warrant requirement of the container cases to invalidate the search.

The lawfulness of a container search arising during a lawful warrantless search of an automobile was an issue of first impression for the Court. The automobile exception cases previously before the Court had not involved the opening of separate containers.⁹³ Similarly, the facts of the container cases had not fit the classic requirements of the automobile exception.⁹⁴ This Note argues that, in analyzing the interface of the automobile and the container doctrines, the Court misapplied the former and over-extended the latter.

The plurality, in adopting the diminished expectation of privacy rationale of *Chadwick* and *Sanders*, misconstrued the automobile exception. The automobile exception decisions never relied on a lesser expectation of privacy in an automobile to support a warrantless search.

The Supreme Court established the automobile exception in *Carroll v. United States*.⁹⁵ Chief Justice Taft, writing for the majority, upheld the warrantless search of an automobile stopped on a public highway by prohibition agents, because they had probable cause to believe the automobile was carrying contraband liquor.⁹⁶ Based upon a review of Congressional enactments authorizing government agents to search for and

⁹³ The automobile exception cases did not rule on whether an officer could open a container found within the automobile searched. In *Carroll* and the cases that followed, the contraband was not within a container that hid its identity. See *Brinegar v. United States*, 338 U.S. 160 (1949) (officers found cases of whiskey); *Scher v. United States*, 305 U.S. 251 (1938) (no discussion of how whiskey was found); *Husty v. United States*, 282 U.S. 694 (1931) (no indication that contraband whiskey was in a container that hid its identity); *United States v. Lee*, 274 U.S. 559 (1927) (Coast Guardsman saw cases of grain alcohol on deck). Justice Brandeis upheld the seizure under the plain view exception, *id.* at 563, the arrest search exception, *id.*, and *Carroll, id.* Nor does a container appear to have been involved in the more recent automobile cases. See *Texas v. White*, 423 U.S. 67 (1975) (*per curiam*) (no container was involved); *Chambers v. Maroney*, 399 U.S. 42 (1970) (Some coins were found in a glove, but it is not clear from the record that the coins were used as evidence, nor is it clear that a glove constitutes a container.).

⁹⁴ See notes 135-43 & accompanying text *infra*.

⁹⁵ 267 U.S. 132 (1925). The Court pointed out that the exception was distinct from the search incident to an arrest exception mentioned in *Weeks v. United States*, 232 U.S. 383 (1914). "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Id.* at 158-59. Justices McReynolds and Sutherland argued in dissent that the seizure was unlawful because it followed an unlawful arrest. *Id.* at 168 (McReynolds, J., dissenting).

Other federal courts had upheld the warrantless search of an automobile prior to *Carroll*. See, e.g., *Boyd v. United States*, 286 F. 930 (4th Cir. 1923); *Lambart v. United States*, 282 F. 413 (9th Cir. 1922).

⁹⁶ According to Chief Justice Taft, "[o]n reason and authority the true rule" was:

[i]f 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.

seize contraband, Chief Justice Taft concluded that for purposes of the warrant requirement, the fourth amendment recognized a difference between permanent structures⁹⁷ and mobile vehicles.⁹⁸ The statutes he reviewed required that federal agents obtain a warrant to search a dwelling, but allowed the agents to search vehicles, ships, animals, and other means of transportation without a warrant.⁹⁹ Applying this dis-

267 U.S. at 149.

In *Carroll*, three federal prohibition agents patrolling between Detroit and Grand Rapids recognized Carroll's automobile as it passed them, headed for Detroit. Earlier, two of the agents had attempted to buy liquor from Carroll and a companion, but the latter two never returned with the liquor. *Id.* at 134-36.

⁹⁷ A comparison of *Carroll* and *Agnello v. United States*, 269 U.S. 20 (1925), decided the same term, highlights the difference in treatment afforded buildings and moving vehicles by the Court. The Court in *Agnello* refused to allow the warrantless search of Agnello's home even though the officers had probable cause to search the house. *Id.* at 33. "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant." *Id.* at 32. In *Carroll*, the Court looked to a long history of Congressional legislation authorizing warrantless searches of vehicles by customs agents. *Carroll v. United States*, 267 U.S. at 150-54.

⁹⁸ *Carroll v. United States*, 267 U.S. at 153:

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

(Emphasis added).

⁹⁹ Most of the examples of legislation provided by the majority authorized customs officials to search without a warrant those vehicles suspected of concealing contraband or goods with unpaid duties. Temporally, the examples stretched from ones contemporaneous with the adoption of the fourth amendment, 1 Stat. 29, 43 (July 31, 1789), to the National Prohibition Act, Ch. 85, Tit. II § 25, 41 Stat. 305, 315 (October 28, 1919). See *Carroll v. United States*, 267 U.S. at 150-54 for the examples cited by Chief Justice Taft. For a criticism of Carroll's reliance on the statutes see F. BLACK, *ILL-STARRED PROHIBITION CASES* 21-27 (1931).

Customs officials continue to enjoy the right to search for contraband without a warrant. See 19 U.S.C. § 482 (1976) (authorized officers may "stop, search, and examine, . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is subject to duty, or shall have been introduced into the United States in any manner contrary to law . . ."); 19 U.S.C. § 1496 (1976) (customs officer can search "baggage of any person arriving in the United States . . .").

For recent Supreme Court decisions recognizing the border exception to the warrant requirement, and delineating the definition of border, the level of suspicion required to justify the intrusion, and the scope of the search, see *United States v. Martinez-Fuentes*, 428 U.S. at 562 (stops at border checkpoints do not require reasonable suspicion); *United States v. Brignoni-Ponce*, 422 U.S. at 884 (stops by border patrol require reasonable suspicion); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (twenty miles from border not within the border area).

At least one lower court case has allowed certain border searches on less than reasonable suspicion. See *United States v. Sandler*, 644 F.2d 1163, 1169 (5th Cir. 1981) (mere suspicion justifies a pat-down search and the removal of outer garments).

inction to the facts of *Carroll*, he concluded that, "a search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway [for contraband]; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained."¹⁰⁰

The *Carroll* decision established two requirements for a warrantless search under the automobile exception. The officer had to have probable cause¹⁰¹ to believe the automobile contained contraband,¹⁰² and an exigency¹⁰³ had to exist to necessitate the warrantless search. The mobile nature of the particular automobile and the fact that probable cause developed suddenly supplied the exigency.

The *Carroll* doctrine remained unchanged through a number of applications to factually similar cases.¹⁰⁴ Not until the Burger Court's reaffirmation of the exception in *Chambers v. Maroney*,¹⁰⁵ did the Court alter the doctrine. Justice White, for the Court, reaffirmed the difference between the search of a mobile vehicle and a permanent situs.¹⁰⁶ He reasserted the two requirements of the automobile exception, but further extended the exception to cover the warrantless search of an automobile after police had moved it to the station house.¹⁰⁷ Previously, the war-

¹⁰⁰ *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

¹⁰¹ After briefly surveying the definitions of probable cause, the *Carroll* Court formulated a rule upon which the Court still relies. The prohibition agents had probable cause to stop the automobile and search it for liquor because "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief . . ." that liquor was in the automobile. *Carroll v. United States*, 267 U.S. at 162.

¹⁰² The majority made clear that its decision did not sanction the stopping of an automobile at any time for any reason. Every citizen has a "right to free passage [on public highways] without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.* at 154. "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor . . ." *Id.* at 153-54.

¹⁰³ An "exigency exists only when the police do not have a reasonable period of time in which to obtain a warrant." C. WHITEBREAD, *supra* note 2, at 148.

¹⁰⁴ See, e.g., *Brinegar v. United States* 338 U.S. 160 (1949); *Scher v. United States*, 305 U.S. 251 (1938); *Husty v. United States*, 282 U.S. 694 (1931).

¹⁰⁵ 399 U.S. 42 (1970). The Court upheld the warrantless search of an automobile in which *Chambers* was a passenger. The Court found that probable cause existed to search the car because it matched the description of an automobile used an hour earlier in a robbery, the number of occupants matched the number seen in the get-away car, the clothing worn by one of the occupants matched the clothing worn by one of the robbers, and a trench coat in the car was similar to the trench coat worn by another of the robbers. *Id.* at 44-45.

¹⁰⁶ He recognized that *Carroll* had approved of the warrantless search of vehicles "in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize." *Id.* at 48.

¹⁰⁷ "The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial

warrantless search had occurred where the vehicle was stopped.¹⁰⁸

The Court in *Chambers* based the warrantless search solely on the exigent development of probable cause and the exigent circumstances posed by a mobile vehicle.¹⁰⁹ Dictum in later Supreme Court decisions, however, pointed to *Chambers* as indicating that mobility alone did not underlie the exception since the officers had seized and moved the car prior to searching it. *Chadwick* and *Sanders* based their requirement of a warrant to search personal luggage on this dictum. The Court in each case pointed out that potential mobility was not always present when a warrantless search of an automobile transpired and that an officer could search an automobile without a warrant in situations that would require a warrant to search a house. For these reasons, the Court presumed that a lesser expectation of privacy in automobiles also justified the automobile exception.

In *Chadwick*, Chief Justice Burger's majority opinion refused to uphold the warrantless search of a double-locked foot locker which was seized by officers from the open trunk of *Chadwick's* automobile, taken

of its use to anyone until a warrant is secured." *Id.* at 52. The majority believed it was impractical and potentially unsafe to require an officer to search the car in a dark parking lot in the middle of the night. Delaying the search until the officers brought the car to the station also increased the protection they could afford the car and the valuables within it. *Id.* at 51 n.10. The Court saw no constitutional difference between seizing the car and holding it until the officer obtained a warrant, and allowing the officer to search the car immediately without a warrant. *Id.*

¹⁰⁸ For an extension of *Chambers*, see *Texas v. White*, 423 U.S. 67, 67-68 (1975) (per curiam) (upheld mid-day warrantless search of a car officers had driven from a bank parking lot to their headquarters before searching). See also *United States v. Edwards*, 415 U.S. 800, 803 (1974) (applied reasoning similar to *Chambers'* in an examination of a search incident to an arrest).

Like *Chambers*, *White* involved the valid seizure of an automobile under the automobile exception and a subsequent warrantless search of the automobile after officers took it to police headquarters. 423 U.S. at 67-68. Unlike *Chambers*, the *White* Court did not determine whether the officers were reasonable in waiting to search the car at the station house. *Id.* at 68. The dissent maintained that since the officers seized the car in the afternoon and no safety or practicality problems were shown, it was neither impractical nor unsafe for the officers to search the car at the scene. *Id.* at 70 (Marshall, J., dissenting). The majority held that if the officers had probable cause to search the automobile at the scene, they could also wait and search the automobile at the station house without first obtaining a warrant. *Id.* at 68.

¹⁰⁹ Justice Blackmun took no part in the decision. Justice Harlan accepted the stop and seizure of the automobile under the automobile exception, but dissented because the Court upheld the later search of the car at the police station. *Id.* at 62-64 (Harlan, J., concurring in part and dissenting in part).

The eight justices who participated in the *Chambers* case accepted the automobile exception with its two requirements of probable cause and exigent circumstances. Harlan argued that the exigent circumstances did not justify searching the automobile at the station house in *Chambers*. *Id.* at 62-63. No member relied on a lesser expectation of privacy rationale to justify the search.

to their headquarters, and searched by them over an hour later.¹¹⁰ The Court ruled that Chadwick had manifested a reasonable expectation of privacy in the footlocker, thereby necessitating a warrant to search it.¹¹¹ The government asserted that luggage, due to its mobile nature, should be governed by a rule analogous to the automobile exception.¹¹² The Court stated that the similarities between an automobile and luggage were not great enough to merit the application of such a rule.¹¹³ The majority pointed out that mobility was not the sole rationale for the automobile exception. Another basis for the exception was the lesser expectation of privacy that existed in automobiles. Chief Justice Burger contended that this lesser expectation did not apply to luggage.¹¹⁴

Justice Powell's opinion for the Court in *Sanders* similarly held that the automobile exception did not justify the warrantless search of a closed suitcase believed to contain contraband which was seized from the trunk of a cab.¹¹⁵ As in *Chadwick*, he noted that the automobile exception indicated a lesser expectation of privacy in an automobile.¹¹⁶ He highlighted this expectation of privacy difference between automobiles and luggage to support his conclusion.¹¹⁷

¹¹⁰ *United States v. Chadwick*, 433 U.S. 1 (1977). Federal agents in San Diego informed agents stationed in Boston of their suspicion that a trunk due to arrive in Boston in two days contained contraband. The agents staked out the train station on the day the trunk was due to arrive. A dog trained to identify marijuana signaled that there was marijuana inside the trunk. The agents did not move in, however, until the two travelers with the footlocker joined up with Chadwick, and had placed the footlocker in the trunk of Chadwick's car. *Id.* at 3-5.

¹¹¹ *Id.* at 11. The Court maintained that locking one's personal effects within luggage manifested the same privacy interest as securing one's home. *Id.*

¹¹² *Id.* at 11-12.

¹¹³ *Id.* at 12-13. The Court compared the automobile and the suitcase as to purpose, public visibility, and government regulation. *See* note 46 *supra*.

¹¹⁴ *Id.* at 12-13. The majority contended that mobility alone did not justify the automobile exception because the Court had upheld the warrantless search of immobile vehicles. For support the Court cited *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); *Texas v. White*, 423 U.S. 67, 96 (1975); *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973); *Chambers v. Marone*, 399 U.S. 42 (1970); and *Cooper v. California*, 386 U.S. 58 (1967). The Court concluded that if mobility was not the sole rationale for the automobile exception, then it must be based on the "diminished expectation of privacy which surrounds the automobile." *United States v. Chadwick*, 433 U.S. at 12. Furthermore, "[t]he factors which diminish the privacy aspects of an automobile . . .," do not apply to luggage. *Id.* at 13. "In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.* Of the cases cited by the Court, however, only *White* and *Chambers* fall within the automobile exception.

¹¹⁵ *Arkansas v. Sanders*, 442 U.S. at 761-62. Little Rock police, acting on a tip which precisely indicated when Sanders would arrive in Little Rock, and accurately described the type of luggage containing contraband which he would be carrying, staked out the Little Rock airport. The officers stopped Sanders' cab as it left the airport, took Sanders' suitcase from the trunk, and searched it. *Id.* at 755-56.

¹¹⁶ *Id.* at 764-65.

¹¹⁷ The majority stated that the same level of expectation of privacy existed in the suitcase whether the officers removed it from an automobile or seized it from other locations. The

Chadwick and *Sanders* were not the first decisions to articulate an alternative rationale for the automobile exception. Several cases involving automobiles, but not within the automobile exception, have maintained that a lower expectation of privacy supports the exception.¹¹⁸ The plurality cited *Cady v. Dombrowski*¹¹⁹ and *South Dakota v. Opperman*¹²⁰ as indicating that mobility alone did not justify the automobile exception.¹²¹

Cady involved the inventory search of an automobile for public safety reasons. The Court ruled that the public safety concern made the warrantless search reasonable.¹²² This concern arguably provided the exigency necessary for an automobile exception search. At the time that the officer conducted the search, however, neither he nor anyone else knew that a crime had been committed or that the driver of the automobile might be involved.¹²³ In other words, the officer did not have probable cause to believe the car contained evidence of a crime.¹²⁴ Not only was *Cady* not within the automobile exception, but the Court in its dicta discussing the exception did not allude to a lesser expectation of privacy in automobiles as a rationale for the exception.¹²⁵

reasons justifying a warrantless search of an automobile did not apply to searches of personal luggage. *Id.* at 764-65.

¹¹⁸ The extension of the automobile exception in *Chambers* to allow the officers to search the automobile without a warrant after they had seized it and moved it does cast doubt on the exigency requirement of the exception. To maintain the exigent element the Court created a fiction: once the exigency developed, it attached itself to the situation even after the officers removed the car. *Chambers v. Maroney*, 339 U.S. at 51-52.

¹¹⁹ 413 U.S. 433 (1973).

¹²⁰ 428 U.S. 364 (1976).

¹²¹ 101 S. Ct. at 2845.

¹²² *Cady v. Dombrowski*, 413 U.S. at 447. The majority contended that the possibility that an intruder might obtain the revolver justified the "caretaking 'search'." *Id.* at 447. The police in the rural Wisconsin community had acted reasonably in removing the car from the scene of the accident, *id.* at 446, and in searching the automobile rather than posting a guard until they obtained a search warrant. *Id.* at 447.

¹²³ Local Indiana police took *Dombrowski*, who was involved in a wreck, to the hospital. He mentioned to the officers that he was a Chicago policeman. Because the officers did not find a gun on *Dombrowski* (they believed that Chicago policemen were required to carry their gun at all times), they were concerned that vandals might break into the wrecked automobile, find the gun, and steal it. During a search of the wrecked automobile for the gun, the officer discovered various blood-covered items in the trunk. These items linked *Dombrowski* to a murder, and led to his conviction. *Id.* at 435-38.

¹²⁴ The officer did not expect nor have reason to believe that he would discover evidence of a crime in the trunk of *Dombrowski's* car. The police were unaware of the murder at the time of the search. *Id.* at 447. Since the officer did not believe that the automobile was involved in criminal activity, the officer did not have probable cause, as recognized by *Carroll*, to search the automobile.

The dissent argued that the automobile exception did not justify the search, not because of a lack of probable cause, but because the automobile was immobile. No exigent circumstance existed. *Id.* at 451 (Brennan, J., dissenting).

¹²⁵ Justice Rehnquist, in his opinion for the *Cady* majority, mentioned the difference be-

Neither did *Opperman's* facts bring it within the automobile exception. The Court upheld the conviction of Opperman based on evidence found by an officer during an inventory search of Opperman's automobile, which had been towed from a "no parking" zone.¹²⁶ The officer searched the car pursuant to department regulations and not because he expected to find evidence of a crime within the automobile. In *Opperman*, there was no probable cause and no exigent circumstances.¹²⁷

Chief Justice Burger in *Opperman* advanced the alternate rationale of a lesser expectation of privacy in automobiles to justify the warrantless search.¹²⁸ The cases he cited for support, however, did not sustain his conclusion.¹²⁹ The Chief Justice compared the frequency of state

tween automobiles and dwellings twice, but not in connection with a lesser expectation of privacy. *Id.* at 442, 447-48. Justice Rehnquist attempted in dictum to extend the automobile exception to cover the warrantless search of any automobile because of the inherent mobility of automobiles as a class. *Id.* at 441. He believed the difference in treatment of vehicles and dwellings was due to both the "ambulatory character" of vehicles, and the opportunities they presented state and local officials for discovering evidence in plain view while performing their caretaking functions. *Id.* at 442.

This caretaking function brought the officer in *Cady* into a position to see the bloody items in the trunk. If the caretaking function is a valid basis for inventory searches, then the *Cady* decision falls within the plain view exception to the warrant requirement. The plain view exception allows an officer to seize items he can see from a location where he has a right to be. *Air Pollution Control Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974); *Coolidge v. New Hampshire*, 403 U.S. at 467-68.

¹²⁶ *South Dakota v. Opperman*, 428 U.S. at 365-67.

¹²⁷ *Id.* at 365-66. During the inventory search the officer found marijuana in the glove compartment. When Opperman came to claim his car, the police arrested him for possession of marijuana. The officer conducting the inventory testified that the inventory of the car's contents was taken to safeguard the articles in the automobile. The department had experienced problems with vandals breaking into impounded cars. *Id.* at 366 n.1.

Chief Justice Burger, in applying the reasonableness standard of the fourth amendment to the "protective inventory," noted that courts dealing with the issue had not determined whether probable cause justified the inventory. He believed the courts were correct in not reaching the issue because the inventory was not a criminal procedure. Probable cause applies only to criminal investigations. *Id.* at 370, n.5. See also *id.* at 383 (Powell, J., concurring). Since probable cause was not relevant to the majority, the automobile exception by definition would not apply to *Opperman*.

¹²⁸ *Id.* at 367. He asserted that the exigency required by the automobile exception was supplied by the inherent mobility of automobiles. He cited *Carroll* and *Coolidge* for support. Taken together those two cases show that inherent mobility does not always supply the exigent circumstance. *Carroll* approved the warrantless search of an automobile stopped on a public highway. *Coolidge* disapproved the warrantless search of an automobile seized in a driveway, taken to the police station, and then searched. The difference in the two cases was the lack of an exigency in *Coolidge*: the police had ample opportunity to obtain a warrant. 403 U.S. at 462 ("no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile").

¹²⁹ See, e.g., *Chambers v. Maroney*, 399 U.S. 42; see also notes 107, 114 *supra*; *Cooper v. California*, 386 U.S. 58 (1967). In *Cooper*, the Court upheld the warrantless search of an automobile which was seized and impounded for forfeiture proceedings under state law. The

and local police contact with automobiles,¹³⁰ and the warrant requirements for nonconsensual administrative searches mandated by *Camara v. Municipal Court of San Francisco*¹³¹ and *See v. City of Seattle*.¹³² He implied that since local police contact concerning traffic violations did not require a warrant, and administrative searches did require one, the automobile must have a lower expectation of privacy.¹³³ This reasoning ignores the rationale of the automobile exception cases.¹³⁴

Although the automobile exception decisions in *Carroll* and its progeny recognized that a difference existed between automobiles and houses for warrant purposes, none of the decisions asserted that the privacy expected in an automobile was less than the privacy expected in a dwelling. The Court continued to require that an officer must have probable cause to search a vehicle just as he is required to have probable cause to search a dwelling.¹³⁵ The Court dispensed with the warrant in the case of an automobile searched under the exception because of its mobility. The mobility made it unreasonable to require an officer to obtain a warrant prior to the search.

The plurality ignored the mobility rationale stated in the *Carroll* and *Chambers* line of automobile exception cases and, instead, adopted the underlying rationale of *Chadwick* and *Sanders*—that the expectation of privacy in an automobile is less than in a container. The plurality concluded that, although the warrantless search of the automobile was reasonable, a warrantless search of the container found within the auto-

Court held the search reasonable in light of the time the police would have to hold the car prior to its forfeiture. *Id.* at 61-62.

¹³⁰ *South Dakota v. Opperman*, 428 U.S. at 367-68. See also note 125 *supra*.

¹³¹ 387 U.S. 523.

¹³² 387 U.S. 541 (1967).

¹³³ *South Dakota v. Opperman*, 428 U.S. at 367, n.2.

¹³⁴ There is some merit in Chief Justice Burger's analysis if the owner of an automobile is similar to the owner of a pervasively regulated business. See *Donovan v. Dewey*, 101 S. Ct. 2534 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972); *Colonade Corp. v. United States*, 397 U.S. 72, 77 (1970).

There are, however, differences between these cases and the individual driver or occupant of an automobile. First, the above three cases involved a federal interest prompting the warrantless search, *Donovan v. Dewey*, 101 S. Ct. at 2538-39, whereas automobile regulation is a state and local function, *Cady v. Dombrowski*, 413 U.S. at 440-41. Second, the warrantless search was established by statute in *Dewey*, *Biswell*, and *Colonade*. *Dewey v. Donovan*, 101 S. Ct. at 2539.

¹³⁵ "[O]ur cases have consistently recognized that the nature and substantiality of interest required to justify a search of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office." *South Dakota v. Opperman*, 428 U.S. at 388 (Marshall, J., dissenting). Justices Brennan and Stewart, who joined with Marshall's *Opperman* dissent, advocated the lesser expectation of privacy rational for the automobile exception in *Robbins*. Their position in *Robbins* is contrary to the Marshall position in *Opperman* and another reason why the automobile search cases are so confusing.

mobile was unreasonable.¹³⁶ The plurality was incorrect in accepting the *Chadwick-Sanders* interpretation of the rationale underlying the automobile exception because neither *Chadwick* nor *Sanders* fit within the exception.

The Court in *Chadwick* made clear that it was not considering the need for a warrant to search a container found during a valid warrantless search of an automobile.¹³⁷ Several Justices in *Sanders*, however, indicated that they considered the case within the exception.¹³⁸ The facts of both *Chadwick* and *Sanders* failed to indicate the prerequisites of a warrantless search under the automobile exception—probable cause and exigent circumstances.

The officers in both *Chadwick* and *Sanders* had probable cause to believe that the footlocker and the suitcase, respectively, contained contraband.¹³⁹ Unlike *Carroll* and *Chambers*, where the officers had probable cause to believe the automobiles contained contraband or evidence of a crime, the officers in *Chadwick* and *Sanders* did not have probable cause to search the automobiles. Probable cause to search the containers had developed prior to the introduction of the automobiles into the factual pattern. If *Chadwick* and *Sanders* had not placed their containers within the automobiles, the investigation would not have focused on the automobiles at all. "The relationship between the automobile and the contraband was purely incidental"¹⁴⁰ in these cases.

¹³⁶ 101 S. Ct. at 2847.

¹³⁷ The question for which certiorari was granted did not even mention automobiles: "[w]hether a search warrant is required before federal agents may open a locked footlocker which they have lawfully seized at the time of the arrest of its owners, when there is probable cause to believe the footlocker contains contraband." *United States v. Chadwick*, 433 U.S. at 3. The government did not contend that the automobile exception applied; it merely attempted to analogize from it. *Id.* at 11-12. Justice Blackmun implied that the case was not within the automobile exception by pointing out changes in the facts that would have made the exception applicable. *Id.* at 22-23 (Blackmun, J., dissenting). See note 145 *infra*. See 2 W. LAFAYE, *supra* note 2, at 538-39.

¹³⁸ *Arkansas v. Sanders*, 442 U.S. at 764-65; *Id.* at 768 (Blackmun, J., dissenting). Only Chief Justice Burger and Justice Stevens actually maintained that *Sanders* was not within the automobile exception. *Id.* at 766-67 (Burger, C.J., concurring).

¹³⁹ See notes 110, 115 *supra* respectively.

¹⁴⁰ Chief Justice Burger reminded the majority in *Sanders* that the automobile exception did not apply to *Chadwick*. The automobile in *Chadwick* was an incidental aspect of the factual situation. The focus in both cases was on containers rather than automobiles. *Arkansas v. Sanders*, 442 U.S. at 766-67 (Burger, C.J., concurring). He stressed that the *Chadwick* decision only held that a person's expectation of privacy in personal luggage did not decrease simply because it was in his possession when he was arrested in a public place. *Id.*

He further urged the Court to apply the same analysis to *Sanders*: "[I]t was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*." *Id.* at 767 (Burger, C.J., concurring).

Similarly, no exigent circumstance existed in either *Chadwick* or *Sanders*. In each of the automobile exception cases, the officer had unexpectedly come upon a car traveling on a public roadway which he had probable cause to search.¹⁴¹ In *Chadwick* and in *Sanders*, however, the officers were tipped as to the approximate time and place of arrival of the suspects and their identity. The officers also expected to find the footlocker and the suitcase with the suspects. In each situation, the officers had enough time and information to obtain a warrant to search the luggage,¹⁴² but failed to do so. Since neither case was within the automobile exception, it is not surprising that both *Chadwick* and *Sanders* required warrants to search the containers. If a search does not fall within a recognized exception to the warrant clause, a warrant is required.¹⁴³

The determination that *Chadwick* and *Sanders* are not within the automobile exception still leaves unanswered the question whether the automobile exception or *Chadwick-Sanders* should control *Robbins*. The facts of *Robbins* support a finding of exigent circumstances as did the facts in *Carroll* and *Chambers*. The highway patrolmen did not expect to find Robbins on that early morning, and when they did, they could not have fulfilled both of their responsibilities: stopping Robbins and also obtaining a warrant. The officers in *Chadwick* and in *Sanders*, on the other hand, had prior knowledge of the suspects' arrival and could have obtained a warrant.

The development of probable cause in *Robbins* is also more similar to the pattern seen in the automobile exception cases. Although in *Carroll* probable cause existed from the moment the officers saw the suspect's automobile pass them,¹⁴⁴ in *Chambers*, probable cause did not develop until after the officer had stopped the automobile and had seen the occupants.¹⁴⁵ Similarly, in *Robbins* probable cause developed after the officer had stopped the car and noticed Robbins' rapid speech and lack of coordination, the marijuana odor, and the tweezers on the front seat. Unlike the police in *Chadwick* or *Sanders*, the California troopers did not have advance notice that Robbins was headed their way or that he was carrying contraband.

The plurality, by adopting the dicta of the container cases and extending them to a warrantless search under the automobile exception,

¹⁴¹ This is the way the automobile exception exigency normally develops. *Moylan*, *supra* note 2, at 1006.

¹⁴² *Arkansas v. Sanders*, 442 U.S. at 755-56; *United States v. Chadwick*, 433 U.S. at 3.

¹⁴³ *Coolidge v. New Hampshire*, 403 U.S. at 454-55; *Katz v. United States*, 389 U.S. at 357.

¹⁴⁴ See note 97 & accompanying text *supra*.

¹⁴⁵ See note 105 & accompanying text *supra*.

further confused this area of fourth amendment law. The plurality could have better attained its goal of clarity if it had reaffirmed the two requirements of the automobile exception, dismissed the lesser expectation of privacy rationale as confusing dicta, and rejected the container cases as inapplicable to the facts of *Robbins*.

IV. REASONABLE APPLICATION OF THE AUTOMOBILE EXCEPTION

In extending the warrant requirement of the container cases to the garbage bags found in the station wagon, the *Robbins* plurality misanalyzed *Robbins*' expectation of privacy. Furthermore, the plurality cut short its analysis. Even if *Robbins* had a reasonable expectation of privacy in the garbage bags, the plurality should have continued its analysis to determine the reasonableness of extending the automobile exception to the bags.

The fourth amendment protects only reasonable expectations of privacy.¹⁴⁶ The facts and circumstances of the situation determine the reasonableness of an expectation of privacy.¹⁴⁷ *Chadwick* and *Sanders* seemed to indicate that an individual manifests a reasonable expectation of privacy in personal luggage by closing it.¹⁴⁸ In extending the warrant requirement to all closed opaque containers,¹⁴⁹ the *Robbins* plurality focused solely on whether the package was closed¹⁵⁰ and ignored

¹⁴⁶ *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). The Court has accepted Justice Harlan's analysis of subjective and objective expectations of privacy to determine the reasonableness of the expectation. See *Terry v. Ohio*, 392 U.S. at 9.

¹⁴⁷ See *Chimel v. California*, 395 U.S. 752, 765 (1969); *Terry v. Ohio*, 392 U.S. at 9; *Cooper v. California*, 386 U.S. at 59; *Ker v. California*, 374 U.S. 23, 33 (1963).

¹⁴⁸ *Arkansas v. Sanders*, 442 U.S. at 764 n.13; *United States v. Chadwick*, 433 U.S. at 13.

¹⁴⁹ The *Sanders* Court explicitly recognized exceptions to the need for a warrant when the "contents can be inferred from [the package's] outward appearance" or when the contents are in plain view. *Arkansas v. Sanders*, 442 U.S. at 764 n.13. Taken alone the footnote might indicate that the Court would not recognize any other exceptions. *Sanders*, however, stressed the inherently personal nature of the contents of suitcases, *id.* at 764-65, which implies that containers that generally do not contain personal effects are not protected by the fourth amendment warrant requirement. Also, the Court noted that it would be difficult to know which packages required a warrant. *Id.* at 764-65 n.13. This led one commentator to conclude that the list of examples was not exhaustive. 2 W. LAFAVE, *supra* note 2, at 76-77 (Supp. 1981).

Chadwick dealt solely with personal items put into a locked container. *United States v. Chadwick*, 433 U.S. at 11. LaFave argues that *Chadwick* only required a warrant to search a container when no exigent circumstance existed to justify the warrantless search. 2 W. LAFAVE, *supra* note 2, at 542-43.

¹⁵⁰ 101 S. Ct. at 2845. The plurality applied a quasi plain view test to determine the reasonableness of opening a container without a warrant. *Sanders* first alluded to this test when it outlined some possible exceptions to the warrant requirement. *Arkansas v. Sanders*, 442 U.S. at 764-65, n.13. Since the Court in *Sanders* and the plurality in *Robbins* allowed the officers to seize the suitcase and the packages it seems unreasonable to allow the officers to open the packages without a warrant only if the officers could see the contents of the packages. If the officers could smell marijuana in the package or the package's weight and consis-

the personal luggage aspect of the *Chadwick* and *Sanders* holdings.¹⁵¹ The plurality confused the determination of whether the individual had manifested an expectation of privacy with whether the privacy expectation was reasonable. Whether a package is transparent or opaque, open or closed, is relevant in determining whether the person manifested an expectation of privacy. These same considerations, however, do not indicate whether the expectation was reasonable.

The facts and circumstances of *Robbins* do not indicate a reasonable expectation of privacy in the garbage bags. First, reasonableness is an objective determination based on societal norms.¹⁵² Society's finding that an expectation of privacy in the contents of a closed suitcase or closed footlocker was reasonable does not mean that society would view a similar expectation of privacy in a closed dixie cup, brown paper sack, or garbage bag as reasonable.¹⁵³ Yet, the plurality extended societal approval to an expectation of privacy in these latter containers merely because the containers were closed. Second, the officer inferred from the appearance of the bags that they contained marijuana.¹⁵⁴ The plurality discounted this inference because the officer had never seen marijuana packaged in garbage bags.¹⁵⁵ The officer's testimony that he had knowledge of this practice, coupled with *Robbins'* statement indicating that more marijuana was secreted in the luggage compartment, indicated that no reasonable expectation of privacy existed in the garbage bags at the time of the search.

Even if the plurality correctly determined that there was a reasonable expectation of privacy in the garbage bags, it does not automatically follow that a warrant was required to search the bags. A finding of a reasonable expectation of privacy only ensures that the Court will not sanction an unreasonable intrusion of the privacy interest by the government. When a recognized exception¹⁵⁶ to the warrant requirement is

tency indicated that marijuana was inside then the courts should allow the warrantless search of the package. This result is consistent with a totality of the circumstances approach to determining the reasonableness of a search.

¹⁵¹ 101 S. Ct. at 2845. Justice Stewart explicitly rejected the proposition that the fourth amendment only protected personal effects. See also *Arkansas v. Sanders*, 442 U.S. at 764-65; *United States v. Chadwick*, 433 U.S. at 11.

¹⁵² 101 S. Ct. at 2847; *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring).

¹⁵³ "[W]hen the effects are such things as coats and paper bags, the possessory interest and privacy interest are much less distinct, and it is thus far easier to conclude that the latter interest is not protected by the Warrant Clause whenever exigent circumstances allow a warrantless intrusion upon the former interest." 2 W. LAFAVE, *supra* note 2, at 365 (footnote omitted).

¹⁵⁴ 103 Cal. App. 3d at 40, 162 Cal. Rptr. at 783.

¹⁵⁵ 101 S. Ct. at 2847.

¹⁵⁶ When the Court mentions the exceptions to the fourth amendment it inevitably cites *Katz* for the proposition that "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—

present, no warrant is necessary for the intrusion. The automobile exception was present in *Robbins*.¹⁵⁷

The underlying justifications of an exception are balanced against the privacy interest invaded to determine whether the application of the exception to the situation is reasonable.¹⁵⁸ Since *Carroll*, the Court has given great weight to the need of law enforcers with probable cause to stop and search automobiles without a warrant in order to seize evidence that could disappear if the officers obtained a warrant. The Supreme Court viewed the need to preserve evidence as outweighing the invasion of the privacy expected in an automobile.

The plurality in *Robbins* gave greater weight to the privacy interests in containers and found that this higher level of expected privacy out-

subject only to a few specifically established and well-delineated exceptions." *Id.* at 357 (footnotes omitted). If the exceptions are so well delineated, why does the Court face yet another case requiring it to clarify the application or non-application of an exception?

The number of exceptions to the warrant requirement depends on how an exception is defined and how the exceptions are labeled. The recognized exceptions include: the search incident to an arrest, *see, e.g.*, *Chimel v. California*, 395 U.S. 752, 768 (dwelling); *Preston v. United States*, 376 U.S. 364, 367 (1964) (automobile); plain view, *see, e.g.*, *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 467-68; *Ker v. California*, 374 U.S. 23, 43; hot pursuit, *see, e.g.*, *Warden v. Hayden*, 387 U.S. 294, 298-99; searches by customs officials, *see, e.g.*, *United States v. Ramsey*, 413 U.S. 606, 616 (1977); administrative searches, *see, e.g.*, *Donovan v. Dewey*, 101 S. Ct. 2534 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77; automobile inventory searches, *see, e.g.*, *South Dakota v. Opperman*, 428 U.S. 364, 372; *Harris v. United States*, 390 U.S. 234, 236 (1968); *Cooper v. California*, 386 U.S. 58, 61-62 (1967); automobile exception, *see, e.g.*, *Texas v. White*, 423 U.S. 67, 68; *Chambers v. Maroney*, 399 U.S. 42, 51-52; *Carroll v. United States*, 267 U.S. 132, 158-59.

Some commentators include *Terry v. Ohio* and its progeny in a listing of warrant exceptions. Moylan, *supra* note 2, at 1032. *Terry* allowed an officer to stop and frisk a person when the officer has a reasonable suspicion that the person is armed and dangerous. 392 U.S. at 28-30. For a discussion of *Terry* and its progeny and the development of the "stop and frisk" concept, *see* Note, *Fourth Amendment: Airport Searches and Seizures: Where Will the Court Land?*, 71 J. CRIM. L. & C. 499 (1980). *Terry* is not an exception to the warrant requirement; it is an exception to the need for probable cause.

Similarly, consent searches are treated as exceptions to the fourth amendment warrant requirement, but with consent to search the question of probable cause never arises. *See* Moylan, *supra* note 2, at 988 n.8. For a discussion of consent searches, *see* *Schneekloth v. Bustamonte: The Question of Noncustodial and Custodial Searches*, 66 J. CRIM. L. & C. 286 (1975). *See also* *Schneekloth v. Bustamonte*, 412 U.S. 218; *Bumper v. North Carolina*, 391 U.S. 543 (1968).

For an exception the Court refused to recognize, *see* *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (seriousness of the offense does not eliminate the need for a warrant).

The party seeking an exception to the warrant requirement has the burden of justifying the exception. *Arkansas v. Sanders*, 442 U.S. at 759-60, *Chambers v. Maroney*, 399 U.S. at 61 (Harlan, J., concurring in part and dissenting in part).

¹⁵⁷ 101 S. Ct. at 2847. The Court ruled that the search of the container occurred during the lawful warrantless search of Robbins' automobile.

¹⁵⁸ *Terry v. Ohio*, 392 U.S. at 21; *Camara v. Municipal Court*, 387 U.S. at 534-35.

weighed the government's need for an immediate search.¹⁵⁹ In requiring a warrant to search closed opaque containers, the plurality relied on the comparison of privacy interests in automobiles and in luggage made by the Court in *Chadwick*.¹⁶⁰ The *Chadwick* Court cited three factors¹⁶¹ that caused it to conclude that the level of privacy expected in an automobile was less than the expectation of privacy in a suitcase: whether the object serves as a repository for personal effects, whether the contents are in plain view, and whether the state regulates the object.¹⁶² Upon close inspection, the factors do not indicate a significant difference between the privacy expected in a suitcase and in an automobile.

Chadwick first found that an automobile, unlike a suitcase, was not a repository of personal effects. The basis for this conclusion is not clear. The automobile does transport personal effects. In fact, the automobile, like the suitcase, is a temporary container used to move personal effects from one permanent repository to another. Only in unusual situations is either the automobile or the suitcase more than a temporary storage place for personal effects.¹⁶³ If a functional difference does exist between an automobile and a suitcase it is no longer relevant in determining the level of privacy expected. Justice Stewart in *Robbins* implicitly rejected this factor when he rejected the State of California's argument that the fourth amendment distinguishes between personal and impersonal property.¹⁶⁴ If the fourth amendment protects personal and impersonal

¹⁵⁹ The plurality adopted the view of the Court in *Chadwick*, 433 U.S. at 12-13, and *Sanders*, 443 U.S. at 763-64, that an officer could more easily seize a container and safely store it until he obtained a warrant than he could seize and store an automobile. 101 S. Ct. at 2845. This view helped justify the Court's insistence that the officer obtain a warrant. The Court in *Chambers* had earlier ruled that no constitutional difference existed between seizing the car and holding it for a warrant or searching it immediately, *Chambers v. Maroney*, 399 U.S. at 52.

¹⁶⁰ The difference afforded automobiles and homes by the fourth amendment underlies the plurality's conclusion. Prior cases had interpreted this different treatment to indicate that a lesser expectation of privacy existed in an automobile. See notes 119-34 & accompanying text *supra*, for a discussion of *Cady* and *Opperman*. *Chadwick* and *Sanders* took the interpretation a step further and found that automobiles had a lesser expectation of privacy than did luggage.

This Note has not contended that a lesser expectation of privacy existed in automobiles as compared to homes. It has contended, however, that this lesser expectation did not underlie the automobile exception. If a lesser expectation of privacy did justify the automobile exception, however, it does not logically follow that items as transient as footlockers or suitcases have any greater expectation of privacy than an automobile. See *Arkansas v. Sanders*, 442 U.S. at 769 (Blackmun, J., dissenting).

¹⁶¹ *Sanders* did not introduce any new factors. The Court stressed the personal nature of luggage and emphasized that the expected level of privacy does not decline when luggage is put inside an automobile. *Id.* at 764-65.

¹⁶² 101 S. Ct. at 2845; *United States v. Chadwick*, 433 U.S. at 12-13.

¹⁶³ Traveling salesmen and the mobile vacation home are exceptions to each, respectively.

¹⁶⁴ See notes 51-53 & accompanying text *supra*. This refusal to recognize any distinction between impersonal and personal effects renders the repository of personal effects factor meaningless. If the fourth amendment equally protects the dishpan and the diary, then the

property alike, then the contents of a container or of an automobile would not affect the level of privacy expected in the container or automobile.

The plain view factor of *Chadwick* also does not distinguish automobiles from luggage. Admittedly, the contents of the passenger compartment are visible to the public as the automobile travels over the public thoroughfares,¹⁶⁵ while the contents of luggage are seldom exposed to public scrutiny.¹⁶⁶ Any expectation of privacy existing in the contents of luggage because of its hidden nature is, however, not different from the expectation of privacy in the contents of a glove compartment or a trunk.¹⁶⁷ Drivers and occupants of automobiles often put items in the glove compartment or trunk to secret them from public view.¹⁶⁸ The Court, however, has not recognized a plain view limit to warrantless searches under the automobile exception. The Court, pursuant to the exception, has upheld the search of the area behind the back seat cushion,¹⁶⁹ the glove compartment, a hidden recess,¹⁷⁰ the area behind the front seat cushion¹⁷¹ and, in *Robbins*, the luggage compartment of a station wagon.¹⁷² If the Court recognized plain view as a rationale for the automobile exception, the Court would logically limit the exception to the passenger compartment of the automobile. The officer could only search and seize those items that he could see from outside of the automobile looking in.¹⁷³ In summary, whether the public can see the item is irrelevant to the automobile exception. Consistency requires that courts allow officers to open containers found within the car just as they are allowed to open the glove compartment and the trunk. The level of privacy expected does not differ.

The final *Chadwick* factor, which compared state and local regulation of automobiles and luggage, does not reach the expected level of privacy issue. Simply because states and localities regulate automobile use and safety conditions, but do not impose similar regulations on lug-

same expectation of privacy can exist in the contents of a suitcase or the trunk of an automobile. For consistency's sake, the Court must either remove the trunk area from the automobile exception or allow the search of containers within the exception.

¹⁶⁵ *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). See *United States v. Chadwick*, 433 U.S. at 13; *South Dakota v. Opperman*, 428 U.S. at 368.

¹⁶⁶ 433 U.S. at 13.

¹⁶⁷ See *Katz v. United States*, 389 U.S. at 351-52.

¹⁶⁸ See Note, *Warrantless Searches*, *supra* note 2, at 840-41.

¹⁶⁹ *Carroll v. United States*, 267 U.S. 132.

¹⁷⁰ *Chambers v. Maroney*, 399 U.S. 42.

¹⁷¹ *Texas v. White*, 423 U.S. 67.

¹⁷² 101 S. Ct. at 2844.

¹⁷³ For use of the plain view exception to uphold the admissibility of evidence seized from an automobile, see *Harris v. United States*, 390 U.S. 234 (1968) (officer discovered evidence during a routine lock-up of an impounded automobile).

gage, does not indicate that luggage has a higher expected level of privacy. Traffic ordinances and maintenance requirements do not infringe on the privacy interest in items within the automobile. Stopping an automobile for a traffic violation does not trigger a warrantless search of the automobile under the automobile exception. Neither stopping an automobile nor arresting the occupants determines whether the automobile exception applies.¹⁷⁴ The exception requires probable cause to believe the automobile contains contraband or evidence of a crime, and an exigent circumstance.

Based on the factors enunciated in *Chadwick* and adopted by the plurality, the expected level of privacy in an automobile is no less than the privacy expected in a suitcase. By giving the privacy interest in containers too great a weight, the plurality in *Robbins* improperly balanced the privacy interest and the government interest when it concluded that a warrantless search of the garbage bags was unreasonable.

Furthermore, the justifications underlying an exception not only determine its reasonableness, but also determine the scope of the permissible intrusion.¹⁷⁵ The ultimate question in *Robbins* is whether the justifications underlying the automobile exception made it reasonable to open the closed opaque containers without a search warrant.

The need to seize contraband or evidence that might disappear if an officer first had to obtain a warrant justifies the warrantless search of the automobile exception. The officer may search the entire automobile until the suspected item is found.¹⁷⁶ A rule that does not allow officers to look within containers found during the search will hamper law enforcement efforts and increase the intrusion on individual privacy. Not knowing the contents of any containers found in the car, the officer will have to make a more thorough search of the car and seize all of the containers found. Every time an officer stops and searches an automobile under the automobile exception and finds a container that he believes contains contraband or evidence, he will have to take the container to a magistrate before opening it. Furthermore, for the seizure of the containers to be effective, the officer will also have to seize the occupants of the automobile to ensure that they do not escape while he obtains a warrant. The safety of the occupants and the need to ensure against their escape will prevent the officer from performing his other duties, and will diminish the protection afforded individuals of the area until he has presented his beliefs to a magistrate. If the magistrate denies the warrant request, the officer would then have to transport the

¹⁷⁴ See *New York v. Belton*, 101 S. Ct. at 2861-62.

¹⁷⁵ *Terry v. Ohio*, 392 U.S. at 19.

¹⁷⁶ See 101 S. Ct. at 2857 (Stevens, J., dissenting). See also *Warden v. Hayden*, 387 U.S. at 298-99 (search of entire house).

occupants back to their car, which would also take him away from his duties. In an urban area, the trip to the magistrate may be a minor inconvenience, but in rural areas, the magistrate may preside a considerable distance away.¹⁷⁷

Requiring a warrant to search all closed opaque containers does not offset the negative impact on law enforcement activities by improving the protection afforded individual privacy. First, safeguards already exist to protect the individual: automobile stops cannot be random,¹⁷⁸ and probable cause and exigency are required to justify the automobile exception. Second, the rule will prove more intrusive because the officer will have to seize the occupants of the car as well as the container. In a rural area, this seizure could last for several hours or even days. Finally, the occupants will have to leave their car unprotected from intruders or have the car towed at considerable cost to a location close to the nearest magistrate. Since the warrant requirement does not diminish the intrusive nature of the government's action, the Court should have extended the warrantless search of the automobile exception to aid the officer in the field and the effectiveness of law enforcement in general.

V. NEW YORK V. BELTON

Roger Belton began his odyssey to the Supreme Court when a New York state trooper pulled over the automobile in which he was riding for traveling at excessive speeds. All four occupants remained inside the automobile as the trooper came to the driver's window and asked to see the driver's operating license and the car registration.¹⁷⁹ While standing at the driver's window, the officer thought that he smelled marijuana smoke and he saw an envelope bearing the inscription "Supergold" on the floor of the car.¹⁸⁰ The trooper then ordered the four occupants out of the car, arrested them for possession of marijuana, and placed each in a separate area so that they could not touch.¹⁸¹ The trooper checked and found marijuana in the envelope on the automobile's floor, searched each of the occupants, then searched the interior of the automobile where he discovered cocaine within a zipped pocket of Belton's jacket lying on the back seat of the automobile. The trooper took the jacket and the arrestees to a local police station.

¹⁷⁷ See note 79 & accompanying text *supra*.

¹⁷⁸ *Delaware v. Prouse*, 440 U.S. 650 (1979).

¹⁷⁹ 101 S. Ct. at 2861. For New York law authorizing the officer to ask for the licence and registration, see N.Y. VEH. & TRAF. LAW §§ 401.4 (McKinney Supp. 1980-81) (registration); N.Y. VEH. & TRAF. LAW § 501 (McKinney 1970) (driver's license).

¹⁸⁰ The trooper believed the marking on the envelope indicated a connection with drugs. 101 S. Ct. at 2862.

¹⁸¹ The four were placed apart because the trooper, having only one pair of handcuffs, decided against restraining only one of the four.

Belton, who was indicted for the "criminal possession of a controlled substance",¹⁸² moved to suppress the introduction of the cocaine into evidence, but the trial court denied the motion.¹⁸³ The appellate court upheld the search and seizure as incident to an arrest, and refused to find *Chadwick* controlling.¹⁸⁴

The New York Court of Appeals reversed.¹⁸⁵ The majority failed to understand how the search of the jacket without a warrant was justified as incident to an arrest when the jacket was not accessible to the arrestee at the time of the search.¹⁸⁶ The dissent challenged the majority's conclusion that the jacket was in the exclusive control of the officer at the time of search; the dissenters viewed the situation as fluid, and the search justified.¹⁸⁷

Justice Stewart's majority opinion¹⁸⁸ reversed the New York Court of Appeals.¹⁸⁹ The Court held that the search of Belton's jacket was

¹⁸² The record does not indicate the basis for Belton's indictment or conviction. For New York's law on possession of a controlled substance, see N.Y. PUB. HEALTH § 220.03-220.21 (McKinney 1970).

¹⁸³ After his motion to suppress was denied, Belton pleaded guilty to a lesser offense while maintaining his right to appeal the seizure of the cocaine.

¹⁸⁴ *People v. Belton*, 68 A.D.2d 198, 416 N.Y.S.2d 922 (1979). The court refused to find *Chadwick* controlling. Instead, it relied on three New York state court cases. In *People v. DeSantis*, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), the court upheld the search of a suitcase in the possession of the arrestee when arrested. It concluded that the search following the arrest was a de minimis intrusion. *Id.* at 87, 385 N.E.2d at 579, 412 N.Y.S.2d at 840. In *People v. Cofield*, 55 A.D.2d 113, 389 N.Y.S.2d 602 (1976), *aff'd* 43 N.Y.2d 654, 371 N.E.2d 535, 400 N.Y.S.2d 815 (1977), the court upheld the search of a paper bag found in a satchel resting on the back seat of an automobile as incident to an arrest. *Id.* at 115, 389 N.Y.S.2d at 603. Finally, *People v. Abramovitz*, 58 A.D.2d 921, 396 N.Y.S.2d 729 (1977) upheld as incident to an arrest the search of a leather bag behind the driver's seat. *Id.* at 922, 396 N.Y.S.2d at 731.

¹⁸⁵ 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980).

¹⁸⁶ The majority, per Chief Justice Cooke, dismissed the arrest search exception as justification for the search because the exception stops short of justifying searches of items or areas not accessible to the arrestee. *Id.* at 449, 407 N.E.2d at 422, 429 N.Y.S.2d at 576. If the arrestee "is effectively neutralized or the object is with the exclusive control of the police," the search incident to an arrest exception does not validate the search. *Id.* at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576.

¹⁸⁷ Justice Gabrielli, in dissent, agreed with the majority that the test was whether the object searched was within the exclusive control of the officer. He maintained that at the time the patrolman searched the automobile the situation was still fluid and potentially dangerous: four suspects stood beside the car while the officer ascertained the amount of contraband within the automobile. *Id.* at 454, 407 N.E.2d at 424, 429 N.Y.S.2d at 578. Justice Gabrielli chided the majority for its conclusion that the patrolman was in exclusive control of the situation simply because the occupants were outside the automobile and the patrolman had told them they were under arrest. *Id.* at 454-55, 407 N.E.2d at 425, 429 N.Y.S.2d at 579.

¹⁸⁸ Justice Stewart wrote for Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.

¹⁸⁹ The Court granted certiorari to determine the proper scope of a search incident to an arrest when the arrestee was a recent occupant of the automobile. 101 S. Ct. at 2862.

valid under the arrest search exception of *Chimel*.¹⁹⁰ Justice Stevens concurred, finding the search of the container justified under the automobile exception. The dissenters believed that the majority rule was an unprecedented extension of *Chimel*.¹⁹¹

Justice Stewart, writing for the majority, began his examination of the issues by referring to *Chimel v. California*.¹⁹² He acknowledged that *Chimel* limited the scope of a warrantless search contemporaneous with a valid arrest to the person of the arrestee and the area within the arrestee's immediate control.¹⁹³ He noted that although the *Chimel* rule appeared clear, it was difficult to apply to specific factual situations. This disturbed him because he believed that, in the realm of fourth amendment analysis, courts should establish clear cut rules. The majority position was based on the belief that clear cut rules serve a dual function: they aid the police in their duties while simultaneously enhancing the protection of fourth amendment rights.¹⁹⁴ Justice Stewart pointed out that in *United States v. Robinson*¹⁹⁵ the Court had established a bright line rule for the search of the person of the arrestee incident to an arrest in order to clarify any confusion surrounding the scope of the personal search.¹⁹⁶ He noted, however, that the Court had not established such a clarifying rule defining the scope of the area an officer could search

¹⁹⁰ *Id.* at 2865. Justice Stewart noted that since the search of the jacket was permissible under the arrest search exception, there was no need to consider the automobile exception. *Id.* at 2865 n.6.

Based on *Robbins*, if the State of New York had only argued the automobile exception, the Court probably would have ruled the warrantless search unreasonable.

¹⁹¹ The roots of the dissenters' view can be traced to the dissent in *United States v. Robinson*, 414 U.S. 218 (1973). The dissent there argued that the officer acted unreasonably in opening the cigarette package rather than seizing it and seeking a warrant. *Id.* at 250-59 (Marshall, J., dissenting).

¹⁹² 395 U.S. 752 (1969).

¹⁹³ 101 S. Ct. at 2862; *Chimel v. California*, 395 U.S. at 762-63.

¹⁹⁴ 101 S. Ct. at 2863-64. Justice Stewart cited Professor LaFave's conclusion that bright lines not only aid the police, but they also better protect fourth amendment rights. See LaFave, "Case by Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127. "[S]ecurity [as guaranteed by the fourth amendment] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 142. See also *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (cited by Justice Stewart).

¹⁹⁵ 414 U.S. 218. An officer suspected Robinson was driving without a license; he stopped and arrested Robinson after confirming his suspicion. During the pat down search, the officer seized and opened a crumpled cigarette package. He found contraband inside. *id.* at 220-23.

See *Gustafson v. Florida*, 414 U.S. 260 (1973) (companion case to *Robinson*); *Draper v. United States*, 358 U.S. 307 (1959) (police acted reasonably in searching a bag Draper was carrying when arrested, based on probable cause to believe he was carrying heroin.).

¹⁹⁶ 414 U.S. at 235. Prior to *Robinson*, none of the search incident to arrest cases had actually decided the scope of the search of an arrestee and admissibility of evidence seized, even though *Chimel* had recognized the validity of a search of the arrestee contemporaneous with the arrest. LaFave, *supra* note 194, at 134.

when the arrestee was an occupant of an automobile. Because *Robinson* had left this question unanswered, and because of the confusion in the lower courts, Justice Stewart concluded that a bright line rule was needed.¹⁹⁷ Based on his reading of the lower court decisions, and in light of the mandate of *Chimel*, Justice Stewart held that an officer may search the passenger compartment of an automobile without a warrant when the officer has contemporaneously arrested a recent occupant of the automobile.¹⁹⁸

The majority was not content merely to authorize the search of the interior of the automobile. Instead, they chose to extend the exception to include any containers found during the search, regardless of the probability that the container would hold a weapon or evidence.¹⁹⁹ The Court justified its extension in three steps. First, if the arrestee could reach the passenger compartment, he could also reach any containers within the compartment.²⁰⁰ Second, the Court reasoned that the prior arrest justified the further intrusion on the arrestee's privacy interests in the containers. Finally, based on *Robinson*'s allowance of the search of an arrestee's person regardless of whether the officer had probable cause to believe the arrestee possessed a weapon or contraband, the Court decided that the officer did not have to determine the probability that a certain container could hold a weapon or destructible evidence to justify a warrantless search of it.²⁰¹ The New York Court of Appeals relied on *Chadwick* and *Sanders* to require a warrant for the search of Belton's jacket. Justice Stewart rejected the reliance and pointed out that neither case involved a search incident to an arrest.²⁰²

Justice Stevens believed that the Court should have decided *Belton*

¹⁹⁷ "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person can not know the scope of his constitutional protection, nor can a policeman know the scope of his authority." 101 S. Ct. at 2864.

¹⁹⁸ Finding that the lower courts had been unable to establish a workable interpretation of "the area within the immediate control of the arrestee," and concluding that when the occupant of an automobile is arrested the passenger compartment is within the area of immediate control, the Court held "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of the arrest, search the passenger compartment of that automobile." *Id.* at 2864 (footnotes omitted).

¹⁹⁹ The majority defined container as "any object capable of holding another object." This definition included glove compartments and clothing as well as traditional containers. *Id.* at 2864 n.4.

²⁰⁰ Appellate courts interpret broadly the area within an arrestee's immediate control and the arrestee's ability to gain access to and open containers within the area. *See* 2 W. LAFAVE, *supra* note 2, at 349.

²⁰¹ 101 S. Ct. at 2864. *See also* *Chimel v. California*, 395 U.S. at 763.

²⁰² 101 S. Ct. at 2864-65. Justice Stewart took exception with the "fallacious theory" of the New York court that the trooper, by searching and seizing the jacket, had gained exclusive control of it. He maintained that the lower court's theory would eliminate the exception. He reasoned that every time an officer searched an item within an arrestee's immediate area of

and *Robbins* the same way²⁰³ and, therefore, also concurred²⁰⁴ in reversing the judgment in *Belton*. He refused to join the majority, however, because he believed that it established an overbroad constitutional principle.²⁰⁵ Justice Stevens maintained that the Court could have reached the same conclusion if it had applied the automobile exception to the case and, at the same time, could have avoided subjecting motorists to a potential additional infringement of their privacy interests.²⁰⁶ He pointed out that the automobile exception requires probable cause before a search may commence. The majority would allow an officer to search the interior of the automobile whenever he first arrests an occupant, irrespective of the charge and irrespective of whether the officer had probable cause to search the automobile. He worried that officers would tend to take a traffic regulation violator into custody in order to justify the search of the car's passenger area.²⁰⁷ Had the court applied the automobile exception, he concluded, the custodial-noncustodial arrest distinction would be irrelevant.²⁰⁸

Justice Brennan²⁰⁹ wrote a scathing dissent. He feared that the majority's opinion heralded a retreat from the principles promulgated in

control, the act of searching it would remove it from the arrestee's sphere of influence, thereby eliminating the exigency justifying the warrantless search. *Id.* at 2865 n.5.

The majority in *Chadwick* recognized that *Chimel* did not extend to a search that was temporally or geographically remote from the arrest. *United States v. Chadwick*, 433 U.S. at 14-15. The officers arrested Chadwick over an hour before they searched his footlocker. Furthermore, the arrest occurred at a train station, but the officers searched the footlocker at their offices. *Id.* at 4. See also *Arkansas v. Sanders*, 442 U.S. at 763 n.11.

²⁰³ 101 S. Ct. at 2865 (Stevens, J., concurring).

²⁰⁴ *Id.* at 2865. Justice Rehnquist also concurred because the Court would not overrule *Mapp* and because the Court did not rule on the automobile exception. *Id.* at 2865 (Rehnquist, J., concurring).

²⁰⁵ He contended that the Court's reasoning in *Belton* would significantly and unnecessarily extend the automobile exception. He believed that the Court did not have to allow the warrantless searches without probable cause to reach the proper result. 101 S. Ct. at 2859 (Stevens, J., dissenting).

Justice Stevens' meaning is not clear. The majority in *Belton* pointed out that they did not reach the automobile exception issue. 101 S. Ct. at 2865, n.6. Possibly the text is incorrect and Justice Stevens actually meant to say that *Belton* overextended the search incident to an arrest.

²⁰⁶ He maintained that the officer had probable cause to search the automobile for contraband because he smelled marijuana. 101 S. Ct. at 2859. He based his conclusion on the *Robbins* opinion. *Id.* at 2859 n.13. In *Robbins* the plurality accepted the warrantless search of the automobile under the automobile exception based on a similar fact pattern.

²⁰⁷ The distinction made by the majority between custodial and noncustodial arrests bothered Justice Stevens. He feared that officers would begin to make custodial arrests for traffic regulation violations to obtain the right to search packages within the automobile. *Id.* at 2859. He feared that no constitutional limits existed to control such police behavior. *Id.* at 2858 n.11.

²⁰⁸ Under the automobile exception, the type of arrest or whether there was an arrest is not relevant. See *Carroll v. United States*, 267 U.S. at 158-59.

²⁰⁹ He was joined by Justice Marshall.

Chimel.²¹⁰ He maintained that it was a fiction to assert that an arrestee could always gain access to the interior of the automobile and, therefore, the Court inappropriately extended *Chimel* to justify the warrantless search of the area.²¹¹ He also argued that the majority's rule was contrary to fundamental fourth amendment principles dealing with exceptions to the warrant requirement.²¹² He accused the majority of refusing to limit the scope of the search to its initial justification²¹³ and failing to look to the facts to determine whether to grant the exception.²¹⁴ He asserted that the majority's approach had no rational stopping point.²¹⁵

Justice Brennan castigated the majority for departing from *Chimel* and fourth amendment principles merely for the sake of convenience and clarity. He vigorously asserted that the rule proclaimed would not

²¹⁰ 101 S. Ct. at 2866 (Brennan, J., dissenting). "The Court today turns its back on the product of that analysis, formulating an arbitrary 'bright line' rule applicable to 'recent' occupants of automobiles that fails to reflect *Chimel's* underlying policy justifications." *Id.*

²¹¹ Relying extensively on the New York Court of Appeals' rendition of the situation, he accepted the court's view that because the occupants were standing outside the automobile and were under arrest, the contents of the interior of the car were not within the arrestees' immediate area of control. Since he concluded that *Chimel's* rationale did not apply, he argued that the majority had carved out a dangerous precedent in approving the warrantless search. *Id.* at 2868 (Brennan, J., dissenting).

²¹² Specifically, he believed that the Court ignored "a fundamental principal of Fourth Amendment analysis that exceptions to the warrant requirement are to be narrowly construed." *Id.* at 2866. He cited *Arkansas v. Sanders*, 442 U.S. at 759-60; *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978); *Coolidge v. New Hampshire*, 403 U.S. at 454-55; *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Katz v. United States*, 389 U.S. at 357; *Jones v. United States*, 357 U.S. 493, 499 (1958).

²¹³ "[F]or a search to be valid under the Fourth Amendment, it must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 101 S. Ct. at 2866 (quoting *Terry v. Ohio*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. at 310)).

²¹⁴ "[C]ourts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright line rule of general application." 101 S. Ct. at 1866 (Brennan, J., dissenting).

²¹⁵ He argued that under the Court's rationale the police could search an automobile interior even if the arrestee were handcuffed and in the police car. *Id.* at 2868. He maintained that this outcome was "analytically unsound and inconsistent with every significant search incident to arrest case" decided by the Court. *Id.*

Only in *Vale v. Louisiana*, 399 U.S. at 35, was the search contemporaneous with the arrest. The Court held the warrantless search of *Vale's* home impermissible after officers arrested him on its porch steps. *See Shipley v. California*, 395 U.S. 818 (1969) (per curiam).

In all the other cases cited by Justice Brennan, the search was not contemporaneous with the arrest. *United States v. Chadwick*, 433 U.S. at 14 (one-and-one-half hours later); *Coolidge v. New Hampshire*, 403 U.S. at 456-57 (two days later); *Chambers v. Maroney*, 399 U.S. at 47 (after towed to station house and arrestees in custody); *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 220 (1968) (after car towed to station house); *Preston v. United States*, 376 U.S. 364, 368 (1964) (after automobile towed to a garage).

The Court in *Chimel* made the same point. "No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." *Chimel v. California*, 395 U.S. at 766 (footnote omitted).

be any more convenient or clear because it left many questions unanswered.²¹⁶ Justice Brennan predicted that law enforcement officers and the courts would find it more difficult to answer the questions because the Court failed to provide any guiding rationale to replace the abandoned rationale of *Chimel*.²¹⁷ He concluded that the rule announced would hamper rather than aid effective law enforcement. Although he recognized that *Chimel* was sometimes difficult to apply, he urged the Court not to abandon it because certain guidelines did exist to aid in its application²¹⁸ and because it was faithful to the fourth amendment.

In a short dissent, Justice White²¹⁹ argued that the Court had acted rashly in establishing a rule that would allow officers to search containers in the absence of probable cause. He believed that this was a radical extension of *Chimel*, and noted that even if *Robbins* had upheld the search of the packages, the officers still would have needed probable cause to validate the search.²²⁰

VI. THE CHIMEL DOCTRINE

Belton presented the Court with two issues, both involving the scope of a search incident to an arrest. The Court extended the exception to include the passenger compartment of an automobile, and further ex-

²¹⁶ 101 S. Ct. at 2869 (Brennan, J., dissenting). The questions relating to the search of the automobile include: how soon must the arrest occur after the person has left the automobile; how close to the car must the arrestee be when the car is searched; when did the police have to develop probable cause; and what is included within the interior of the car. *Id.*

²¹⁷ Although he agreed with the majority that in routine cases the trunk-interior demarcation would work, he believed that the rule espoused would only serve to create additional problems in the more difficult cases. He argued that the Court had abandoned the principles of *Chimel* and therefore had given the police and lower courts a rule without an underlying rationale. *Id.*

²¹⁸ In determining the relevant scope of a search incident to an arrest, Justice Brennan urged courts to consider the number of arrestees and officers involved, whether the arrestees were restrained and in what manner, and "the ability of the arrestee to gain access to a particular area or container." *Id.* at 2870.

The last factor cited by Justice Brennan is conclusory and adds nothing to the analysis. For a discussion of factors to determine whether a search is valid as incidental to an arrest, see 2 W. LAFAVE, *supra* note 2, at 502-06.

Justice Brennan also lashed out at the majority for creating a straw man based on its interpretation of the New York Court of Appeals' "exclusive control" theory. He reminded the Court that *Chadwick* decided that exclusive control meant more than merely holding an item in one's hand. It meant that there was not a "significant risk" that the arrestee could gain access to the item. 101 S. Ct. at 2870 n.5.

He broadened the language of *Chadwick*. The majority in *Chadwick* recognized exclusive control when no danger existed that the arrestee would gain access to the object or area, *United States v. Chadwick*, 433 U.S. at 14-15. They did not, contrary to Justice Brennan's indication, recognize it when an insignificant risk still remained.

²¹⁹ He was joined by Justice Marshall.

²²⁰ 101 S. Ct. at 2870 (White, J., dissenting). He maintained that the Court should have exercised more caution in extending warrantless searches not based on probable cause.

tended it to any containers found within the passenger areas whenever an officer contemporaneously arrests a recent occupant of the automobile. Although the majority was correct in concluding that the warrantless search was reasonable in this case, no precedent required the majority to find all such searches reasonable.

The scope of a search incident to an arrest has had a volatile history.²²¹ The Court changed direction for the last time in *Chimel*, which overruled²²² *United States v. Rabinowitz*²²³ and *Harris v. United States*.²²⁴ The Court in *Chimel* chose to narrow the search justified by a prior, contemporaneous arrest. Rather than continuing to uphold searches of areas over which the arrestee had possessory control, such as an entire apartment²²⁵ or an entire room,²²⁶ the Court chose to limit the search to the area within the arrestee's immediate control.²²⁷

²²¹ The Court first recognized the search incident to an arrest exception in dictum in *Weeks v. United States*, 232 U.S. 383, 392 (1914). A little over ten years later, the Court extended the right to include a search of the place where the arrest occurred. *Agnello v. United States*, 269 U.S. 20, 30 (1925) (dictum); *Marron v. United States*, 275 U.S. 192, 198-99 (1927). The Court then limited the exception by requiring officers to obtain warrants when they had the opportunity and the necessary information to do so. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-58 (1931); *United States v. Lefkowitz*, 285 U.S. 452, 464-66 (1932). *Harris* reversed the limiting trend: it reiterated the *Agnello* dictum and *Marron* holding. *Harris v. United States*, 331 U.S. 145, 150-51 (1947). A year later, however, the Court jumped back to *Go-Bart* and *Lefkowitz* in *Trupiano v. United States*, 334 U.S. 699 (1948), in which the Court invalidated a warrantless search because the officers could have obtained a warrant. *Id.* at 705, 708. Within two years the Court had returned to *Harris*. *United States v. Rabinowitz*, 339 U.S. 56, 63-66 (1950). *Harris* and *Rabinowitz* were the law until *Chimel v. California*, 395 U.S. 752.

In the first thirty-five years of the exception the Court narrowed or expanded it four times. *Chimel* was the fifth change in doctrine by the Court. 395 U.S. at 770 (White, J., dissenting). For a synopsis of the history of the arrest search exception, see *id.* at 755-60.

The *Chimel* change should not have come as a total surprise. Five years before the *Chimel* decision the Court analyzed another search incident to an arrest situation and elucidated the very principles that would make *Chimel* famous. See *Preston v. United States*, 376 U.S. 364 (1964). Police, upon making an arrest, could "make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime." They could search "things under the accused's immediate control, [and] depending on the circumstances, . . . the place where he is arrested." *Id.* at 367.

²²² 395 U.S. at 768. The police, with an arrest warrant for *Chimel*, went to his home and waited for him to return from work. When *Chimel* arrived the officers arrested him and searched his entire home. *Id.* at 753-54.

²²³ 339 U.S. 56 (1950).

²²⁴ 331 U.S. 145 (1947).

²²⁵ 331 U.S. at 148-49. Officers arrested *Harris* pursuant to an arrest warrant as he sat in his living room. Documents used to convict him were found within a sealed envelope in a desk drawer.

²²⁶ 339 U.S. at 58-59. Officers arrested *Rabinowitz* pursuant to an arrest warrant in his one-room office. Officers seized forged documents during a ninety minute search of his desk, file cabinets and safe.

²²⁷ 395 U.S. 752, 763. The Court construed "that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The Court

As the majority in *Belton* indicated, the courts often have had difficulty determining the permissible area of the search.²²⁸ Police officers also have had difficulty ascertaining the proper scope of a search incident to an arrest when faced with split-second judgments based on the facts of a particular situation.²²⁹ To clarify the confusion, the Court handed down its bright line rule as an extension of *Chimel*. The officer would no longer have to decide whether the arrestee could reach into the automobile to grab a weapon or evidence before searching the automobile. After *Belton*, if the arrestee was a recent occupant, the officer could search the passenger compartment of the automobile without a warrant.

The dissent correctly accused the majority of ignoring the *Chimel* rationale. *Chimel* required an analysis of the facts and circumstances facing the officer to determine the permissible scope of the search incident to the arrest.²³⁰ *Chimel* refused to allow the search of the home of the arrestee or even the room in which the arrestee was arrested. The majority in *Belton* failed to analyze the total situation and, instead, focused solely on the fact that Belton had just recently departed from the automobile prior to his arrest. As Justice Brennan indicated, the majority's analysis failed to include the *Chimel* tests of whether the area was still accessible to Belton or whether the officer had exclusive control of the area searched. If the officer had exclusive control of the area, or Belton did not have access to the area, the officer would need a warrant to search the area.

The Court cited *United States v. Robinson* as precedent for its bright line rule. Reliance on *Robinson*, however, was also misplaced. The Court in *Robinson* upheld the right to search the person of the arrestee regardless of whether the officer had reason to believe that a weapon or evidence would be found.²³¹ The corollary to the rule espoused in *Robinson*

has not ruled on whether the destructibility of the evidence is crucial to the immediate warrantless seizure.

²²⁸ See text accompanying note 196 *supra*.

²²⁹ Although the Court has presumed that the officer will seek a warrant when he is not sure whether the scope of the intended search is permissible, human nature indicates an opposite result. In a tension-filled arrest situation, it is more realistic to conclude that the officer will attempt to stretch the boundaries of the exception to their limits. The sense of self preservation surely preempts the vague nuances of the fourth amendment. See *Brinegar v. United States*, 338 U.S. at 182 (Jackson, J., dissenting).

Traffic stops are particularly dangerous for the police. In 1979, 6,329 officers were assaulted during routine traffic stops. Brief for Petitioner, *New York v. Belton*, 101 S. Ct. 2860 (1981), at 14 n.16 (citing CRIME IN THE UNITED STATES, 1975-79). From 1975 through 1979, eighty-two officers were murdered during traffic stops. *Id.* at 14 n.6 (citing 1975-80, UNIFORM CRIME REPORTS OF THE UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED 1975-1980).

²³⁰ *Chimel v. California*, 395 U.S. at 765; *United States v. Rabinowitz*, 339 U.S. at 63.

²³¹ See note 195 & accompanying text *supra*.

is that the police may search the area within the arrestee's control irrespective of whether the police have probable cause to believe a weapon or evidence is located within the area. *Robinson* does not support a rule that defines, for a general category of cases, the area of a permissible search incident to an arrest. *Belton*, without precedent, decided that whenever an officer arrests a recent occupant of an automobile, the passenger compartment is included within the area the officer may search without a warrant.

The *Belton* Court maintained that a clear cut rule would aid law enforcement efforts because officers would not have to consider the specific facts of each situation in determining whether they could search the interior of the automobile. The rule announced in *Belton*, however, is limited to the facts of the *Belton* case because the court failed to provide any useful rationale²³² for applying it to cases whose facts vary from *Belton*. The location of the arrestee when arrested is the crucial issue in determining whether the area searched incident to an arrest was reasonable.²³³ The *Belton* rule only provides guidance on this issue when the officer removes an occupant from his automobile and arrests him. If the occupant is already outside of his vehicle when the officer approaches him and an arrest occurs, *Belton*'s bright line rule does not provide any guidance. The officer must evaluate the particular facts of the situation to determine whether he can search the automobile without a warrant. Courts must guard against officers directing occupants to return to their automobiles as a pretext for justifying a warrantless search of the automobile under *Belton*.

Although the Court did establish a bright line rule which was contrary to *Chimel* and unsupported by *Robinson*, the Court was correct in finding the warrantless search of *Belton*'s jacket reasonable. An officer may search without a warrant an area incident to an arrest if the area was within the arrestee's immediate control and if the officer does not have exclusive control of the area prior to the search.²³⁴ Justice Brennan argued, and the New York Court of Appeals held, that the trooper in *Belton* had the situation under control and had secured the interior of the automobile from intrusion by one or more of the arrestees. They reached this conclusion because the trooper, before searching the interior of the automobile, had ordered the occupants from the car and told them they were under arrest. They believed that this showed that the

²³² 101 S. Ct. at 2869 (Brennan, J., dissenting).

²³³ *Chimel v. California*, 395 U.S. at 763.

²³⁴ The search incident to an arrest exception does not cover searches that are remote in time or place from the arrest nor in circumstances where the officers have exclusive control of the area or object searched. See *United States v. Chadwick*, 433 U.S. at 15; *Coolidge v. New Hampshire*, 403 U.S. at 456-57; *Preston v. United States*, 376 U.S. 364, 367 (1964).

trooper had control of the situation and, therefore, he had to obtain a warrant before searching the car. The facts of *Belton* do not support this conclusion. A lone trooper stopped a speeding automobile which none of the occupants owned. He eventually ordered the occupants out of the car and placed them under arrest for a drug offense. Having only one pair of handcuffs, the officer could not restrain all four of the occupants, so he placed them around the automobile. Considering the proximity of the arrestees to the car, the fact that none were restrained, and that the occupants outnumbered the officer four to one, the officer's verbal commands do not indicate that he had total control of the situation. The search incident to an arrest exception was recognized in order to protect the safety of the officer and to guard against the destruction of evidence.²³⁵ It is unreasonable to require an officer confronted by several unrestrained arrestees to assume their willingness to obey his commands until they act in a contrary manner.²³⁶

Once the threshold issue of the scope of the search is determined in favor of allowing the search of the interior of the automobile, the further warrantless search of the containers found there follows. *Chimel* allowed the opening of "desk drawers or other closed or concealed areas" within the area of the arrestee's reach.²³⁷ The Court gave no indication that containers are not included within the definition of closed or concealed areas. Similarly, *Robinson* allowed the officer to open a crumpled cigarette package found on the arrestee.²³⁸ Once the arrest has occurred, the officer may contemporaneously search the arrestee and the area within his immediate control, opening anything found in the course of the search. The officer, therefore, acted properly in searching the pockets of the jacket since the jacket was within *Belton's* immediate area of control.

VII. CONCLUSION

Fourth amendment litigation consumes a disproportionate share of the Supreme Court's time.²³⁹ This incessant litigation has confused law

²³⁵ If the officer cannot search for weapons, the arrestee might use any available weapons "to resist arrest or effect his escape. . . . [T]he officer's safety might well be endangered, and the arrest itself frustrated." Similarly, the officer can search and seize evidence "to prevent its concealment or destruction." 395 U.S. at 763.

²³⁶ The officer had already arrested them because he had probable cause to believe they had broken a law. A pat down is a seizure under *Terry* analysis. See *Terry v. Ohio*, 392 U.S. at 16.

²³⁷ 395 U.S. at 763.

²³⁸ See note 194 & accompanying text *supra*.

²³⁹ "The Amendment . . . continues to spawn a seemingly endless stream of litigation; as some issues are finally put to rest, still others surface and cry out for resolution." LaFave, *supra* note 192, at 127.

officers and the courts, and has led commentators to call for clear cut rules.²⁴⁰ The Court in *Robbins* and in *Belton* apparently listened to this call and strove to obtain clarity and consistency in the analysis of automobile search and container search issues. Both decisions announced bright line rules that their adherents on the Court believed would provide form to fourth amendment analysis. It is unlikely that they succeeded; the dissenters in both cases foretold of new issues to which the focus of fourth amendment litigation would shift.²⁴¹

The decisions in *Robbins* and *Belton* did clarify some fourth amendment issues. Even though the plurality mistakenly considered *Robbins* as a container case instead of an automobile exception case, it did clarify when an officer had to obtain a warrant to search a container. Similarly, in *Belton* the Court clarified the scope of an arrest-incident search on the facts presented. Furthermore, the decision made clear that whenever the Court in the future finds that a container was within the immediate area of control of the arrestee, regardless of the nature of the container, an officer may search it without a warrant. These questions were unsettled prior to this term.

Although the Court indicated that it desired to write on a clean slate of fourth amendment jurisprudence, the decisions are, on close inspection, disappointing. The philosophical direction of the Court and the precedential value of these cases are unclear. Two facts contribute to this philosophical confusion and precedential uncertainty.

²⁴⁰ Professor LaFave has reiterated many times his call for clear guidelines for the police. "Even if the result ultimately reached would not be satisfying to a logician, one would hope . . . that the Court would 'adopt a clearcut rule' so that the police would know how to proceed as to a situation with which they are regularly confronted." 2 W. LAFAVE, *supra* note 2, at 541 (footnote omitted). In one of the most commonly cited statements by Professor LaFave on the need for clear cut rules, he said:

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

LaFave, *supra* note 194, at 141 (footnotes omitted).

Three of the four parties in *Robbins* and *Belton* urged the Court to clarify the law or establish bright line rules. *Robbins* argued that the warrant requirement absent exigent circumstances was sufficient. Brief for Petitioner, *Robbins v. California*, 101 S. Ct. 2841 (1981), at 41-42. The State of California urged the Court to make clear what containers came within the protection of the fourth amendment. Brief for Respondent, *Robbins v. California*, 101 S. Ct. 2841 (1981), at 47-48. Similarly, the State of New York asked the Court to establish factors to consider in determining the appropriate scope of a search incident to an arrest. Brief for Petitioner, *New York v. Belton*, 101 S. Ct. 2860 (1981), at 18.

²⁴¹ 101 S. Ct. at 2850 (Powell, J., concurring); *id.* at 2850 (Blackmun, J., dissenting); 101 S. Ct. at 2869 (Brennan, J., dissenting).

First, the cases were factually similar. Both *Robbins* and *Belton* first came under police scrutiny when the automobiles in which they rode were validly stopped for a traffic infraction. The officers in each situation developed probable cause during the stop to arrest *Robbins* and *Belton* for drug related offenses. After the arrest, the officers searched an area of each automobile and found contraband. The only factual difference²⁴² was that the evidence seized in *Robbins* was found in the luggage area, whereas the evidence seized in *Belton* was found in the passenger compartment; the court did not rule on the basis of this distinction.

Second, a majority of the Court could not agree on a uniform approach to the cases. A majority of the justices, however, were consistent in their approach to the cases. Three justices consistently began their analysis with a presumption in favor of the warrant clause and required a warrant in each case.²⁴³ Three other justices took a reasonableness approach in analyzing the warrantless searches and found them valid in each case.²⁴⁴

The trilateral split on the Court resulted in it deciding two factually similar cases differently because it emphasized a different fourth amendment clause in analyzing the automobile exception in *Robbins* and the search incident to an arrest exception in *Belton*. This inconsistency does not indicate to lower courts or to police officers the philosophical direction of the Court. *Robbins* and *Belton* leave open the question whether the Court will continue to adhere to the warrant requirement or whether it will look to the reasonableness of the search in the future.

The fourth amendment was designed to safeguard individual privacy rights from unreasonable searches and seizures. The *Robbins* and *Belton* decisions placed the court in the awkward position of having narrowed the warrant exception that requires the most justification for an intrusion of one's privacy interests, and having extended the warrant exception that does not require probable cause for an intrusion. Because the Court's prior decisions did not mandate the narrowing of the

²⁴² Both Justice Powell, 101 S. Ct. at 2848 n.2, and Justice Stevens, *id.* at 2855, mentioned the similarity. Justice Powell, however, did not view the factual similarity as bearing on the results of the cases. Justice Stevens, on the other hand, viewed the similarity as an indication that the Court should have reached the same result in each case.

²⁴³ Justices Brennan, Marshall, and White. The position taken by the three justices is consistent with contemporary fourth amendment analysis: a search pursuant to a valid warrant is reasonable per se while a warrantless search's reasonableness must be determined by the facts and circumstances of the situation. When they found that the warrant requirement applied to the search in *Robbins*, albeit incorrectly, they did not have to look to the facts. The warrantless search was per se unreasonable. Consistent with contemporary fourth amendment analysis, the justices attacked the majority in *Belton* for failing to consider the facts and circumstances in extending the search incident to an arrest exception.

²⁴⁴ Justices Blackmun, Rehnquist, and Stevens.

automobile exception or the extension of the search incident exception, law enforcement personnel must wonder whether the decisions represent anything more than form over substance.

There is one explanation for why the Court was more willing to expand the search incident to an arrest exception than the automobile exception. Theoretically, the Court determines the reasonableness of any search or seizure by balancing the societal interest in the intrusion against the individual's privacy interest.²⁴⁵ Fourth amendment analysis currently presumes reasonableness when an officer obtains a warrant, and unreasonableness when he fails to obtain a warrant.²⁴⁶ The presumptions are cast aside, however, when a recognized exception to the warrant clause is present. The Court finds an exception reasonable based upon its underlying rationale. The rationale justifies the search and also limits the scope of the search.²⁴⁷ Both the automobile exception and the search incident to an arrest exception promote the societal concern of preserving evidence. The arrest search exception, however, is also concerned with the safety of the officer. Since the underlying rationale of the search incident to an arrest exception is broader than the automobile exception rationale, the former justifies a broader search.

Just as the philosophical direction of the court is unclear, the precedential value of *Robbins* is uncertain because, after Justice Stewart's retirement, only three members of the plurality who supported the bright line rule remain on the Court. Justice Powell, who voted with the plu-

²⁴⁵ The exceptions evolve from the belief that in certain instances it is more reasonable for an officer to conduct a search without a warrant than to require the officer to first obtain a warrant from a neutral magistrate. The reasonableness of any particular search or seizure is determined by balancing the conflicting interests: "[T]here can be 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Camara v. Municipal Court*, 387 U.S. at 536-37 (brackets in original).

Although *Camara* is often cited as initiating the balancing approach to fourth amendment rights, Justice Jackson discussed balancing as early as in the *Johnson* case. "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." *Johnson v. United States*, 333 U.S. at 14-15. See also *Carroll v. United States*, 267 U.S. at 149.

More recently, the Court reaffirmed the balancing approach in dictum in *Sanders*. "[T]he societal costs of obtaining a warrant, such as danger to officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas v. Sanders*, 442 U.S. at 759 (footnotes omitted). See W. LAFAVE, *supra* note 2, at 836.

Some decisions have mentioned a third factor in the balancing scheme: the efficacy of the intrusion. See *Brown v. Texas*, 443 U.S. at 50-51; *Delaware v. Prouse*, 440 U.S. at 654; *United States v. Brignoni-Ponce*, 422 U.S. at 878-81.

²⁴⁶ *Coolidge v. New Hampshire*, 403 U.S. at 454-55; *Katz v. United States*, 389 U.S. at 357.

²⁴⁷ *Chambers v. Maroney*, 399 U.S. at 61 (Harlan, J., concurring in part and dissenting in part); *Terry v. Ohio*, 392 U.S. at 19.

rality, indicated in his concurrence that the *Robbins* decision had not settled the issue of the scope of the automobile exception. He indicated his willingness to accept the bright line rule advocated by the dissenters and to extend the automobile exception search to include all containers found during the search.²⁴⁸ After *Robbins* it remains for the Court to create a consensus concerning the scope of the automobile exception.

The precedential value of the rule announced in *Belton* is also of questionable status. Of the six justices who voted to uphold the warrantless search of *Belton's* jacket, Justice Stewart has retired, Justice Rehnquist voted based on what the majority did not do, and Justice Stevens upheld the warrantless search on other grounds. Furthermore, upon close inspection, the rule announced appears limited to the factual context of the case. If the arrestee is not a recent occupant of an automobile stopped on a public thoroughfare, the Court must revert back to the principles of *Chimel* to decide the reasonableness of each search or announce additional bright line rules.

The philosophical divergence and the questionable guidance provided by the Court are not new in this area of the law.²⁴⁹ The Court's willingness to abandon the customary case-by-case approach to analyzing fourth amendment issues is unprecedented. The decision in both cases established general categories of rights or authority under the fourth amendment and chose to ignore the facts and circumstances of future cases. *Robbins* established that an expectation of privacy exists in all closed opaque containers and mandated that a warrant be obtained before searching them. *Belton* defined the area of a search incident to an arrest to always include the passenger compartment of an automobile upon the arrest of a recent occupant.

Between the two opinions, all nine justices favored a bright line rule that would deal with a general category of case types rather than look to the facts of each individual case. Since a bright line rule was adopted

²⁴⁸ "Some future case affording an opportunity for more thorough consideration of the basic principles at risk may offer some better, if more radical solution to the confusion that infects this behighted area of the law." 101 S. Ct. at 2851 (Powell, J., concurring).

²⁴⁹ Confusion existed in this area of the law even before the container cases of *Chadwick* and *Sanders*. The Court has, from time to time, noted its own inconsistency within the fourth amendment realm. "The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent." *Coolidge v. New Hampshire*, 403 U.S. at 483. The Court has also noted that the law concerning the warrantless search of vehicles is "less than a seamless web." *Cady v. Dombrowski*, 413 U.S. at 440; *Coolidge v. New Hampshire*, 403 U.S. at 490 (Harlan, J., concurring).

Commentators, too, have commented on the confused state of the law pertaining to vehicles and searches. "The several decisions of the Court on this subject can not be reconciled, and in recent years the Court had often been unable to muster a majority position on the issue. It is no exaggeration, therefore, to say that these decisions constitute a 'labyrinth of judicial uncertainty'" 2 W. LAFAYE, *supra* note 2, at 111.

that increased the warrant requirement and another was adopted that extended a warrant exception, it is impossible to know what trend, if any, these cases indicate. It is obvious that the justices are willing to experiment with this general factual approach when it furthers their fourth amendment analysis.

The legacy of these cases is confusion. Rather than erasing the slate to provide clear guidelines to law officers and the courts, the Court chose to smudge the writing already on the slate and then to write over it with bright line rules that provide no clarity.

JEFFREY A. CARTER