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## Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-Ross World

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By Martin R. Gardner\*

# Searches And Seizures Of Automobiles And Their Contents: Fourth Amendment Considerations In A Post-*Ross* World

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## I. INTRODUCTION

In recent years the United States Supreme Court has had sev-

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eral occasions to speak to the so-called automobile exception to the warrant requirement of the fourth amendment to the United States Constitution.<sup>1</sup> The Court has attempted in these cases to clarify the scope of the exception, particularly as it relates to searches of containers found within automobiles.<sup>2</sup> Unfortunately, such efforts have failed to clearly define the scope of the authority to conduct warrantless searches of vehicles.<sup>3</sup> Moreover, the Court has seemed uncertain about the rationale supporting the automobile exception, vascillating between theories which focused on the impracticality of obtaining search warrants given the mobility of vehicles,<sup>4</sup> and those which excused warrantless vehicular searches because such intrusions supposedly offend only minimal privacy expectations.<sup>5</sup> So substantial was the doctrinal disarray, that a leading commentator noted:

[T]he boundaries of [the automobile exception] remain uncertain. The several decisions of the Court on this subject cannot be satisfactorily reconciled, and in recent years the Court has 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."<sup>6</sup>

Neither did the muddle go unnoticed by members of the Court, as attested by Justice Powell's recent lament: "The law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how . . . [instant] cases should be decided."<sup>7</sup>

All of this was, however, prior to *United States v. Ross*,<sup>8</sup> the Court's eagerly awaited 1982 decision which was heralded as "the opportunity for thorough consideration of . . . basic principles"<sup>9</sup> in hopes of "creat[ing] order out of the chaos . . . surrounding the

1. *See, e.g.*, *Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam) (warrantless at-the-scene searches of automobiles constitutionally permissible where police have probable cause which arises just prior to the search).

2. *See, e.g.*, *Robbins v. California*, 453 U.S. 420 (1981), which is discussed in detail in the text accompanying notes 108-23 *infra*; *Arkansas v. Sanders*, 442 U.S. 753 (1979), which is discussed in detail in the text accompanying notes 92-107 *infra*.

3. *See* 2 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 508-09 (1978) [hereinafter cited as LAFAVE].

4. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 459-62 (1971) (plurality opinion) (warrantless automobile searches justified where exigent circumstances make obtaining a warrant impractical). *Coolidge* is discussed in detail in the text accompanying notes 53-67 *infra*.

5. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977) (warrantless searches of automobiles permitted because of "the diminished expectation of privacy which surrounds the automobile") (dicta). *Chadwick* is discussed in detail in the text accompanying notes 74-91 *infra*.

6. 2 LAFAVE, *supra* note 3, at 509.

7. *Robbins v. California*, 453 U.S. 420, 430 (1980) (Powell, J., concurring).

8. 102 S. Ct. 2157 (1982).

9. *Id.* at 2168. *See also* text accompanying notes 152-240 *infra*.

fourth amendment's application to searches of automobiles and their contents."<sup>10</sup> *Ross* is now with us. The case commits a majority of the Court to the proposition that law enforcement officers may conduct warrantless searches of automobiles and containers carried therein if the search is supported by a probable cause belief that contraband is concealed somewhere within the vehicle.<sup>11</sup> The *Ross* holding, which precipitated dissents from three Justices,<sup>12</sup> is a sweeping innovation to the law of search and seizure which calls into question several recent Supreme Court opinions.<sup>13</sup> The major significance of *Ross* may rest, however, not so much in the fact that it breaks new ground in the controversial area of automobile searches—at the expense of prior case law no less—as in its implications bearing on the future vitality of the warrant process in fourth amendment jurisprudence generally.

This Article assesses the extent to which *Ross* indeed orders chaos and charts an unequivocal and desirable course for the law of vehicular searches under the fourth amendment. After focusing on *Ross* and its predecessor cases in the context of the automobile exception, the Article will assess the broader import of *Ross* as a possible harbinger of a retreat from the general requirement for warrants to search personal effects, whether or not associated with automobiles, and recommend ways to avoid such a retreat.

## II. THE AUTOMOBILE EXCEPTION: PRE-ROSS CASES

The fourth amendment, made applicable to the states through the due process clause of the fourteenth amendment<sup>14</sup> provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>15</sup>

The United States Supreme Court has stated on numerous occasions that governmental searches and seizures conducted without prior judicial warrant are presumptively unreasonable and

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10. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRM. L. REV. 557, 597 (1982).

11. 102 S. Ct. at 2159. Justice Stevens, joined by Chief Justice Burger and Justices Blackmun, O'Connor, Powell, and Rhenquist, delivered the opinion for the *Ross* Court.

12. Justices Marshall and Brennan joined in a dissenting opinion, 102 S. Ct. at 2173, and Justice White filed a separate dissent. *Id.*

13. See *infra* text accompanying notes 241-251.

14. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

15. U.S. CONST. amend. IV.

therefore violative of the constitution.<sup>16</sup> Under this interpretation of the fourth amendment, the warrant clause requires warrants as a precondition to valid searches and seizures.<sup>17</sup> The warrant requirement is based on several considerations. Since the decision whether or not a search or seizure is justified is made by a neutral judge or magistrate, it is theoretically more impartial than if made by law enforcement officers.<sup>18</sup> Thus, in situations where police mistakenly believe probable cause exists for a search or seizure, the warrant requirement may prevent unjustified invasions of privacy—which otherwise would occur in the absence of the warrant rule—from occurring because the magistrate will not authorize intrusions in the absence of probable cause. Similarly, since warrants issue prior to the search or seizure, there is some assurance that the information justifying the search did not initially come to light after, or as a consequence of, the search.<sup>19</sup> Finally, because the fourth amendment requires particularity in the description of the places to be searched and the persons or things to be seized, the scope of the intrusion is limited by the warrant.<sup>20</sup>

Warrants are not, however, constitutionally necessary in every search and seizure case. The Court has permitted warrantless in-

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16. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 7-11, 15-16 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 478-82 (1971); *Chimel v. California*, 395 U.S. 752, 762 (1969); *Katz v. United States*, 389 U.S. 347, 357 (1967).

17. Some members of the present Court would disagree with the statement in the text. Justice Rhenquist, for example, apparently rejects the view that warrants are constitutionally required. Rhenquist recently referred to the "judicially created preference" for warrants in arguing that "nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants." *Robbins v. California*, 453 U.S. 420, 438 (Rhenquist, J., dissenting). "The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause." *Id.* These views are at odds with the Court's traditional position. *See supra* note 16.

For a discussion supporting the Court's traditional view that warrants are required (not just preferred as a matter of policy) under the fourth amendment, see Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 613-21 (1982).

18. The police are often perceived as having vested interests in conducting searches. The magistrate thus acts as a buffer between the police officer, who is "engaged in the often competitive enterprise of ferreting out crime," and the suspect. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Whether or not magistrates are indeed more impartial than police is questionable. "In the few cases in which warrants are sought, they are usually issued prefactorily by magistrates who see their task as merely rubber-stamping the judgments of law enforcement officers. Indeed, in many cases the affidavits filed by police officers are not even read." Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335, 414 (1978).

19. *Adams v. Williams*, 407 U.S. 143, 152 (1972) (Brennan, J., dissenting) (quoting Judge Friendly's dissent at 436 F.2d 30, 38-39 (2d Cir. 1970)).

20. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion).

trusions under the fourth amendment "in a few specifically established and well-delineated exceptions"<sup>21</sup> which are supposedly "jealously and carefully drawn"<sup>22</sup> to accommodate only legitimate societal needs which outweigh the virtues of the rule that a valid warrant is a prerequisite for a search or seizure.<sup>23</sup> The automobile exception has long been recognized as one of the "carefully drawn" exclusions from the warrant rule.<sup>24</sup> As noted above, however, the drawing, at least prior to *Ross*, has hardly been careful.

Illustration of the confusion surrounding the automobile exception can best be grasped by distinguishing two kinds of cases: those in which police search vehicles and "integral parts" thereof ("automobile searches"), and those in which police search movable containers carried within vehicles ("container searches").<sup>25</sup> This distinction is necessary because the pre-*Ross* cases granted considerably more fourth amendment protection to defendants in container cases, or at least in certain container cases,<sup>26</sup> than to those whose cases arose in the context of true automobile searches.<sup>27</sup> Moreover, the automobile/container distinction permits a sequential discussion of the case law since the Court's articulation of the basic principles for automobile searches historically precedes its fashioning of the container search doctrine.

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21. *Katz v. United States*, 389 U.S. 347, 357 (1967).

22. *Jones v. United States*, 357 U.S. 493, 499 (1958).

23. *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979); see *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (warrantless search of homicide scene unconstitutional absent exigent circumstances); *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (search incident to arrest exception to warrant rule inapplicable to warrantless search of footlocker already in police control); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (search incident to arrest and automobile exceptions to warrant rule inapplicable to search of impounded car at police station).

24. The automobile exception originated with *Carroll v. United States*, 267 U.S. 132 (1925), which is discussed in detail in the text accompanying notes 28-40 *infra*. The automobile exception is the second oldest of the six or more exceptions to the warrant rule. 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, 988 (1976). Only the search incident to arrest exception predates the automobile exception. *Id.*

25. The Court in *Arkansas v. Sanders*, distinguished searches of "integral parts of automobiles"—such things as glove boxes, passenger compartments, and trunks—from searches of mobile containers carried in automobiles, such as luggage, which are not inherently fixed to automobiles. 442 U.S. at 763-66.

26. See *Robbins v. California*, 453 U.S. 420 ("Closed containers" whose contents are not in plain view are fully protected by the fourth amendment even though carried in automobiles.).

27. Compare, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (warrantless search of concealed compartment under automobile dashboard permitted) which is discussed in detail in the text accompanying notes 42-52 *infra*, with *Arkansas v. Sanders*, 442 U.S. 753 (warrantless search of luggage taken from trunk of automobile not permitted).

### A. The Automobile Search Doctrine

The Supreme Court first announced a special exception to the warrant rule for searches of automobiles in the prohibition era case of *Carroll v. United States*,<sup>28</sup> which held that governmental law enforcement agents operated within the confines of the fourth amendment when, acting without warrants but with probable cause to believe that an automobile contained illegal liquor, they stopped the car on the highway, uncovered and seized the liquor hidden in the automobile's upholstery, and arrested the occupants for illegally transporting intoxicating liquor.<sup>29</sup> The Court noted that while warrants were ordinarily required for searches of homes and other fixed structures,<sup>30</sup> requiring a similar rule for searches of vehicles would "not [be] practicable . . . because the vehicle can be quickly moved out of the locality."<sup>31</sup> The rights of automobile travelers to "free passage"<sup>32</sup> upon the public highways were not be taken lightly, however, and could be overridden only if the searching officer possessed "probable cause" to believe that vehicles were carrying "contraband or illegal merchandise."<sup>33</sup> But once such probable cause existed, vehicles could be stopped and searched even if the officer conducting the search lacked authority to make a warrantless arrest at the time of the stop.<sup>34</sup>

In focusing on the impracticality of obtaining warrants to search vehicles given their mobility, the *Carroll* Court adopted an "exigent circumstance" exception to the warrant requirement. Be-

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28. 267 U.S. 132 (1925).

29. For some time federal agents had suspected Carroll of engaging in bootlegging activities in a particular automobile. On several occasions the agents attempted, but failed, to stop Carroll. Finally, one evening while conducting a routine patrol of the highway, the agents unexpectedly encountered Carroll and a companion riding in the automobile in question. The agents stopped Carroll, searched his car, and found sixty-eight bottles of liquor.

Carroll was charged and convicted of "transporting . . . intoxicating liquors in . . . [an] automobile," a misdemeanor under federal law. 267 U.S. at 134-36, 144, 164.

30. *Id.* at 153.

31. *Id.* at 156.

32. *Id.* at 154.

33. *Id.*

34. Although the *Carroll* Court did not specifically address the issue, the occupants of the car in *Carroll* probably could not have been arrested prior to the discovery of the concealed liquor because warrantless arrests for misdemeanors are generally valid only if the crime is committed "in the presence of the arresting officer"—a situation non-existent in *Carroll* until the liquor was actually discovered. 2 LAFAYE, *supra* note 3, at 511. In any event the *Carroll* Court clearly indicated that "the right to search and the validity of the seizure are not dependent on the right to arrest." 267 U.S. at 158. Thus, the automobile exception is analytically distinct from the search incident to arrest exception to the warrant rule. See generally, Moylan, *supra* note 24.

cause the officers stopped the vehicle in *Carroll* while it was moving along the highway, without a realistic opportunity to obtain a warrant prior to the time of the stop,<sup>35</sup> the warrantless search and seizure was the only way to protect against loss of the evidence likely to occur through the automobile's mobility. Once stopped, the officers faced three alternatives: immediately search the car; seize the occupants in order to secure the car while seeking a search warrant; or impound the car in order to immobilize it while seeking a search warrant.<sup>36</sup> In permitting the first alternative the Court did not address the desirability of the other two, presumably because the second alternative would have been legally impossible given that the officers lacked authority to arrest the occupants prior to the search<sup>37</sup> and the third alternative might have resulted in more intrusive invasions of privacy and individual liberty than would an immediate search. Motorists not possessing contraband would be on the road again as soon as the immediate search failed to turn up evidence, instead of experiencing lengthy deprivations of the use of the car inherent in police attempts to obtain a warrant.<sup>38</sup>

Absent in *Carroll* is any discussion that warrantless searches of automobiles based on probable cause are *always* permissible. Indeed, there is reason to believe that had there been a reasonable opportunity to obtain a warrant prior to the time when the police encountered the car on the highway, the Court would have invalidated the search.<sup>39</sup> No exigent circumstance would then have existed. "In cases where the securing of a warrant is reasonably practicable, it must be used."<sup>40</sup>

The *Carroll* doctrine lay virtually untouched for forty-five years<sup>41</sup> until the Court again addressed the automobile exception

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35. See *supra* note 29; 2 LAFAYE, *supra* note 3, at 511; Moylan, *supra* note 24, at 993.

36. Grano, *supra* note 17, at 641.

37. See *supra* note 34.

38. Of course, the Court could have fashioned a rule which would have left the choice of an immediate search or a seizure of the car up to the occupants of the car themselves. Justice Harlan later argued for just such a rule. *Chambers v. Maroney*, 399 U.S. 42, 63-65 (1970) (Harlan, J., dissenting).

39. 2 LAFAYE, *supra* note 3, at 511.

40. 267 U.S. at 156.

41. The Court's inattention to the automobile exception for so many years is explained by the fact that many warrantless searches of vehicles were permitted under a liberal search incident to arrest doctrine which rendered the *Carroll* rule superfluous. 2 LAFAYE, *supra* note 3, at 511-12. When the Court imposed stricter requirements for the search incident to arrest rule in *Chimel v. California*, 395 U.S. 752 (1969), the automobile exception suddenly became viable again. 2 LAFAYE, *supra* note 3, at 512.



in *Chambers v. Maroney*.<sup>42</sup> In *Chambers*, witnesses to a robbery informed the police that four robbers were in the process of fleeing the scene of the crime in a car which the witnesses described in detail. The informants also provided descriptions of the robbers, as well as information regarding fruits of the crime carried inside the vehicle. Within an hour of the alert, police officers observed a car moving along the highway which answered the witnesses' description both as to the car itself and as to its four occupants. The police stopped the car, arrested the occupants, and drove the car to the police station. Sometime later, they conducted a warrantless search of the car at the station and uncovered evidence of the robbery, later used to convict the defendants, concealed under the dashboard. In rejecting claims that a fourth amendment violation had occurred, the *Chambers* Court looked to *Carroll* and held that the combination of probable cause to make the initial stop and exigent circumstances created through the mobility of the vehicle,<sup>43</sup> even after it was taken to the police station, justified the warrantless search and seizure.<sup>44</sup> The Court found unpersuasive the argument that the car had been effectively immobilized once it was secured at the station, thus removing the exigency.<sup>45</sup> As *Carroll* would permit a warrantless search at the time the car was stopped on the highway, the *Chambers* Court saw no different constitutional consequences in seizing the car and delaying the search.<sup>46</sup> "Given probable cause to search, either [the immediate or delayed search] . . . is reasonable under the Fourth Amendment."<sup>47</sup>

The *Chambers* Court sought to avoid the notion that probable

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42. 399 U.S. 42 (1970).

43. "[T]he Court has insisted upon probable cause as a minimum requirement for a reasonable search. . . . Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." 399 U.S. at 51.

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

399 U.S. at 52.

45. Justice Harlan, in his *Chambers* dissent, found merit in the claim that once the car had been seized, the police should have obtained a warrant prior to their search. 399 U.S. 63-65 (Harlan, J. dissenting). See also note 38 and accompanying text *supra*.

46. 399 U.S. at 51-52. See also note 44, *supra*.

47. *Id.* at 52.

cause alone was sufficient to justify warrantless automobile searches.

Neither *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant . . . .<sup>48</sup>

Notwithstanding such disclaimers, *Chambers*, with its refusal to require a warrant once the car had been secured at the station, severely emasculated the exigent circumstances requirement in automobile search cases. The exigencies excusing warrantless searches of vehicles simply do not exist once immobilization occurs.<sup>49</sup> Moreover, fourth amendment interests protected by the warrant requirement remain after justified warrantless seizures of vehicles occur. While possessory rights to impounded vehicles may be denied justifiably through a *Chambers* seizure, owners and occupants of such vehicles retain privacy interests, deserving the protection afforded by the warrant process, in personal effects carried within the vehicle.<sup>50</sup>

The incongruity of viewing *Chambers* as an exigent circumstances case has not escaped the Court. Indeed, in retrospect, the Court now sees *Chambers* as based, at least in part, on the theory that persons have only minimal expectations of privacy in their automobiles, thus rendering searches of automobiles less intrusive than those of homes or offices.<sup>51</sup> On such a view, warrantless invasions of cars, as such, are permissible even in the absence of exi-

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48. *Id.* at 50-51.

49. Many commentators have taken this view. See, e.g., Grano, *supra* note 17 at 607; Katz, *supra* note 10, at 565; Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127, 134 (1980); Note, *The Automobile Exception: A Contradiction in Fourth Amendment Principles*, 17 SAN DIEGO L. REV. 933, 940 (1980).

50. See Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 841-45 (1974) (Drivers have three interests at stake in warrantless stops and searches of their automobiles: an interest in moving on; an interest in control over their property; and an interest in the secrecy of the car's contents.).

Commentators have argued that police should be *required* to temporarily seize vehicles in *Chambers* situations while search warrants are sought. See, e.g., Note, *supra* note 49, at 954. Such a rule might, however, create administrative difficulties for some police forces which lack personnel or facilities to effectuate automobile seizures. Requiring a seizure rule in such circumstances might, therefore, be undesirable.

51. This view was first expressed in the plurality opinion of *Cardwell v. Lewis*,

gent circumstances if supported by probable cause.<sup>52</sup>

The requirement of exigency under the automobile exception did not die an easy death, however. Just one year after *Chambers*, the Court in *Coolidge v. New Hampshire*<sup>53</sup> again tackled an automobile search case. This time the Court, in a four Justice plurality,<sup>54</sup> invalidated a series of warrantless searches of an unoccupied car seized from the private driveway of a murder suspect's home. The police had known "for some time" prior to its seizure of the

417 U.S. 583 (1974). In upholding the warrantless examination of the exterior of defendant's automobile, the Court stated:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. . . . "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment Protection."

*Id.* at 590-91.

A majority of the Court later rationalized *Chambers* in terms of *Cardwell's* "lesser expectation of privacy" theory. *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977). The *Chadwick* Court did not explain how *Cardwell's* views about minimal privacy in the exterior of automobiles are equally applicable to the interior of automobiles as in *Chambers*. The Court's failure to explain is especially troubling in light of *Cardwell's* dicta: "This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable intrusion." 417 U.S. at 591.

52. This interpretation of the meaning of *Chambers* is bolstered by the Court's decision in *Texas v. White*, 423 U.S. 67 (1975) (per curiam), which upheld the warrantless station house search of a suspect's car seized with probable cause from a public street. Unlike the seizure in *Chambers*, which occurred at night in a dark area, 399 U.S. at 52 n.10, the seizure in *White* took place in broad daylight. The seven Justice majority in *White* rejected arguments of dissenting Justices Marshall and Brennan, 423 U.S. at 69, that the darkness in *Chambers* created an exigent circumstance which justified removing the car to the station where a thorough search could take place, while the daylight conditions in *White* made possible a thorough search of the car at the point of initial police encounter, thus eliminating the need to take the car to the police station. The majority discussed *Chambers* without mentioning the need for exigent circumstances: "*Chambers* . . . held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant." *Id.* at 68.

Commentators read *White* as eliminating any requirement of exigent circumstances in cases where police have probable cause to search a vehicle found in a public place. See, e.g., Katz, *supra* note 10, at 569; Yackle, *supra* note 18, at 407.

53. 403 U.S. 443 (1971).

54. Justice Stewart wrote the plurality opinion. Joining him were Justices Douglas, Brennan, and Marshall. Justice Harlan concurred separately. 403 U.S. at 445, 490. Justices Black, Blackmun, White, and Chief Justice Burger concurred in part and dissented in part. *Id.* at 492, 510.

probable role played by the car in the crime.<sup>55</sup> Indeed, the police had questioned the suspect almost a month prior to the seizure, thereby alerting him to the fact that he was the target of police investigation.<sup>56</sup> Notwithstanding his knowledge of police interest in him and his car, the suspect and the car were present at his home when the police finally arrived to make their arrest. Subsequent to the arrest of the suspect, the police seized the car and towed it to the station where it was searched two days later, again a year later, and, a third time, fourteen months after the seizure. Vacuum sweepings from the car's interior revealed evidence which was used to convict the suspect.

The plurality conceded that the police may have had probable cause to search the car,<sup>57</sup> but, nevertheless, invalidated the searches for want of exigency. Unlike *Carroll* and *Chambers* where probable cause arose at or near the moment the cars were stopped, the police in *Coolidge* had ample opportunity to obtain a warrant prior to seizing the car.<sup>58</sup> Moreover, the car in *Coolidge* was essentially immobilized at the time it was seized. The suspect was arrested inside the house without the likelihood that anyone else would remove the car once it was in police custody.<sup>59</sup> Thus, contrary to the situations in *Carroll* and *Chambers*, "the opportunity for search [in *Coolidge*] was . . . hardly 'fleeting.'"<sup>60</sup> In reaffirming the necessity of warrants in automobile cases where exigent circumstances are absent, the plurality said:

The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States*—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. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant . . . ."<sup>61</sup>

Not unexpectedly, dissenting Justices in *Coolidge* contended that *Chambers* controlled. Justices Black and Blackmun argued that probable cause alone was sufficient to justify the *Coolidge*

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55. 403 U.S. at 460. The Court does not specify exactly when probable cause arose.

56. *Id.* at 460.

57. *Id.* at 458.

58. *Id.* at 460-62.

59. *Id.* at 460. The police specifically informed the suspect's wife that she was not to use the family cars.

60. *Id.* at 460.

61. *Id.* at 461-62.

seizure and the subsequent searches.<sup>62</sup> The plurality's attempt to distinguish *Chambers* on the basis of the car's immobilization in *Coolidge* was unsatisfactory to the dissenters who read *Chambers* as validating delayed searches in the station house whenever immediate searches at the time of seizure would be permissible.<sup>63</sup>

While similar in many respects, *Chambers* and *Coolidge* differ in significant ways. In *Chambers* the police had no opportunity to obtain a warrant prior to their initial encounter with the robbers, while in *Coolidge* the police had probable cause "for some time" prior to their seizure of the car. Thus, *Chambers* manifests an exigent circumstance measured "backward in time" from the police officers' initial encounter with the suspect.<sup>64</sup> *Chambers*' backward exigency is further manifested by the fact that the car was being driven by the suspects at the time of the seizure. *Coolidge* exhibits no such exigency. There the car was parked in the place where it routinely could be found, and the suspect had prior knowledge of the police investigation but made no attempt to flee.

The Court's rethinking of the automobile exception, however, in terms of the "lesser expectations of privacy" theory<sup>65</sup> leaves the continued vitality of *Coolidge* in doubt.<sup>66</sup> Perhaps the Court would find that one still possesses sufficient privacy expectations in cars parked in private driveways to require search warrants even where police have probable cause to search. On the other hand, the discussion of *Ross* to follow gives reason to believe that *Coolidge* may have been overruled *sub silentio*.<sup>67</sup>

Whatever the status of *Coolidge*, the automobile search cases leave several unanswered questions. While *Chambers* makes clear that police may delay searches of vehicles which they have justifiably seized, the case is unclear about whether warrantless searches

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62. *Id.* at 504, 510 (Black and Blackmun, JJ., dissenting).

63. *Id.* at 504. Justice White and Chief Justice Burger would have found *Chambers* controlling in *Coolidge* had the detention of the car not been so lengthy. "*Chambers* did not authorize indefinite detention of automobiles [justifiably] seized; it contemplated some expedition in completing the searches so that automobiles could be released and returned to their owners." *Id.* at 523 (White, J., and Burger, C.J., dissenting in part and concurring in part). "It is only because of the long detention of the car that I find *Chambers* inapplicable." *Id.*

64. See C. WHITEBREAD, CRIMINAL PROCEDURE 148 (1980).

65. See *supra* text accompanying note 51.

66. See 1 W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 11-10.1-11-11 (2d ed. 1981); Note, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistency Through the Seamless Web*, 53 N.C.L. Rev. 722, 742-47 (1975).

67. See *infra* notes 186-192 and accompanying text.

of vehicles held for lengthy periods of time are permissible.<sup>68</sup> If such searches are prohibited,<sup>69</sup> the point at which a detention becomes unconstitutionally lengthy remains to be established.<sup>70</sup> Moreover, the Supreme Court has never clarified the extent to which the automobile exception applies to mobile homes and other similar vehicles in which people actually live part or all of their lives.<sup>71</sup> Finally, given its penchant to view automobile searches as involving minimal invasions of privacy, the Court has left unexplained why the fourth amendment governs these cases at all. Law enforcement practices are not required by the fourth amendment to be reasonable, much less to be based on probable cause, unless they infringe upon "justifiable reliance[s] on privacy."<sup>72</sup> If significant privacy interests do not attend automobiles, they would appear to be entirely beyond the protection of the fourth amendment.<sup>73</sup>

68. The dissenting Justices in *Coolidge* split on this issue. Compare the opinions of Justices Black and White. 403 U.S. at 504, 523. See *supra* note 63.

69. At least four members of the present Court would likely oppose searches after lengthy detention of justifiably seized cars. Justice White, joined by Chief Justice Burger, took that position in *Coolidge*. See *supra* note 63. In joining the *Coolidge* plurality, Justices Marshall and Brennan adopted the view that the seizure itself was unjustifiable, and, therefore, the length of the detention would be irrelevant. 403 U.S. at 463 n.20.

70. Where such a line would be drawn is difficult to imagine. *Chambers* seems to have rejected a rule that cars may be held only until exigencies excusing appeal to the warrant process no longer exist. See *supra* notes 45-47 and accompanying text.

71. The Court has recognized greater fourth amendment privacy interests in houses than in cars. See, e.g., *Vale v. Louisiana*, 399 U.S. 30, 33-34 (1970) (search warrant required to search home where probable cause to search arises immediately prior to warrantless search). Similarly, while warrantless arrests on probable cause are generally permissible outside the home, *United States v. Watson*, 423 U.S. 411 (1976), the Court has recently held that absent exigent circumstances, arrests in the home must be supported by warrants, *Payton v. New York*, 445 U.S. 573 (1980).

The lower courts have split in relating the automobile exception to "mobile homes." Compare, e.g., *State v. Francoeur*, 387 So. 2d 1063 (Fla. App. 1980) (automobile exception applies to camper van even if defendants were using it for living accommodations), with *United States v. Williams*, 630 F.2d 1322 (9th Cir. 1980), cert. denied, 449 U.S. 865 (1980) (automobile exception inapplicable to motor home).

72. *Katz v. United States*, 389 U.S. 347, 353 (1967). For general discussions of the problem of defining the scope of the fourth amendment, see LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 310-12 (1982); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377-409 (1974).

73. A plurality of the Court made just such a holding in *Cardwell v. Lewis*, 417 U.S. 583 (1974), when it found that police examination of the exterior of a car did not constitute a fourth amendment "search." "With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the car left in the public parking lot, we fail to compre-

## B. The Container Search Doctrine

The Court's difficulties in fashioning an adequate law of automobile searches were not exhausted with *Carroll*, *Chambers*, and *Coolidge*. Still to be faced was the problem of searches of mobile containers carried within vehicles. Assuming that circumstances justify a warrantless search of a vehicle under *Carroll* and *Chambers*, may this search extend to containers found within the car which might contain the objects sought?

The first container case considered in depth by the Court was *United States v. Chadwick*,<sup>74</sup> which held that federal officials violated the fourth amendment by failing to obtain a warrant to search a locked footlocker which they had lawfully seized from the open trunk of a parked car. The agents had been notified by officers from another city that the footlocker likely contained contraband.<sup>75</sup> The suspicions were borne out when a drug-sniffing dog signaled the presence of a controlled substance within the footlocker. Immediately after being alerted by the dog, the agents placed Chadwick and two colleagues under arrest as the three were about to drive away after having just lifted the footlocker

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hend what expectation of privacy was infringed." 417 U.S. at 591-92. Although the main thrust of *Cardwell* was that the fourth amendment simply did not apply, the plurality nevertheless elaborated on how "reasonable" the search was under the fourth amendment. "Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth Amendment." *Id.* at 592. Commentators have attacked *Cardwell*, calling it "probably the most doctrinally unsatisfying opinion ever written in the fourth amendment area." Moylan, *supra* note 24, at 1049.

Unsatisfying or not, the Court has extended *Cardwell*'s privacy analysis to searches of interiors of automobiles. *See supra* note 51. From such an extension it would seem to follow, at least until the Court tells us otherwise, that if examinations of automobile exteriors are not "searches," then neither are intrusions into interiors of vehicles.

Clearly the Court has yet to follow this logic. The automobile search cases described in the text of this Article, while deemphasizing the warrant requirement, do require fourth amendment probable cause. Moreover, the Court has insisted on at least a "reasonable suspicion" under the fourth amendment to support police stops to check automobile licensing and registration. *Delaware v. Prouse*, 440 U.S. 648 (1979). *See also* *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search of glove compartment of impounded van reasonable under fourth amendment); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (search of trunk of impounded car conducted to recover legally possessed revolver reasonable under fourth amendment).

74. 433 U.S. 1 (1977).

75. Federal agents in San Diego notified their counterparts in Boston that one, Machado, who matched a profile used to spot drug traffickers, would be arriving on the train in Boston with the footlocker. The footlocker was leaking talcum powder, a substance often used to mask the odor of marijuana or hashish. *Id.* at 3.

from the sidewalk into the trunk of their car. The agents drove the car and the still unopened footlocker to the federal building where it was opened and searched an hour and a half after the arrests. The search revealed large quantities of marijuana which the government sought to use as evidence against Chadwick and his associates. The Supreme Court concluded that although the agents possessed probable cause to believe that the footlocker contained contraband,<sup>76</sup> once the footlocker was secured at police headquarters and was in their "exclusive control,"<sup>77</sup> it could not be searched without a warrant.

The Court rejected the government's contention that the warrant requirement "protects only interests traditionally identified with the home."<sup>78</sup> The Court found "no evidence at all that [the framers of the Constitution] intended to exclude from protection of the [Warrant] Clause all searches occurring outside the home."<sup>79</sup> The fourth amendment is meant to "safeguard individuals from unreasonable government invasions of legitimate privacy interests,"<sup>80</sup> some of which, the Court found, existed in *Chadwick*.

In this case, important Fourth Amendment privacy interests were at

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76. Probable cause was established in the lower courts and was not contested in the Supreme Court. *Id.* at 5.

77. *Id.* at 15. "[W]hen no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." *Id.*

78. *Id.* at 6.

Recalling the colonial writs of assistance, which were often executed in searches of private dwellings, the Government claims that the Warrant Clause was adopted primarily, if not exclusively in response to unjustified intrusions into private homes on the authority of general warrants. The Government argues there is no evidence that the Framers of the Fourth Amendment intended to disturb the established practice of permitting warrantless searches outside the home, or to modify the initial clause of the Fourth Amendment by making warrantless searches supported by probable cause *per se* unreasonable.

Drawing on its reading of history, the Government argues that only homes, offices, and private communications implicate interests which lie at the core of the Fourth Amendment. Accordingly, it is only in these contexts that the determination whether a search or seizure is reasonable should turn on whether a warrant has been obtained. In all other situations, the Government contends, less significant privacy values are at stake, and the reasonableness of a government intrusion should depend solely on whether there is probable cause to believe evidence of criminal conduct is present. Where personal effects are lawfully seized outside the home on probable cause, the Government would thus regard searches without a warrant as not "unreasonable."

*Id.* at 6-7.

79. *Id.* at 8.

80. *Id.* at 11.



stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.<sup>81</sup>

The *Chadwick* Court also rejected the claim that because the footlocker was movable personalty, it, like automobiles, was mobile and should, therefore, be exempted from the warrant requirement.<sup>82</sup> Automobiles, said the Court, were different from other property. While the automobile exception was based "in part on [automobile] mobility which often makes obtaining a judicial warrant impractical," the *Chadwick* Court pointed out that prior decisions had sustained "warrantless searches of vehicles in cases in which the possibilities of the vehicles being removed or evidence in it destroyed were remote, if not nonexistent."<sup>83</sup> Therefore, the "answer" to the automobile exception doctrine "lies in the diminished expectation of privacy which surrounds the automobile."<sup>84</sup>

Factors noted by the *Chadwick* Court evidencing the diminished expectation of privacy include: automobiles are used for transportation, not for permanent residence; automobiles travel in public and expose occupants and contents to the view of others; automobiles are licensed and regulated in a variety of ways by the government; automobiles are often taken into police custody in the interests of public safety.<sup>85</sup> Footlockers and luggage, on the other hand, do not share these diminished privacy characteristics with cars. Luggage is intended as a repository of personal effects and its contents are generally closed to public view. "In sum," said the *Chadwick* Court, "a person's expectations of privacy in personal luggage are substantially greater than in an automobile."<sup>86</sup>

The Court's discussion of privacy expectations in automobiles is troubling. Surely it must come as a surprise to the first time reader of *Chadwick* that one relinquishes his/her legitimate privacy expectations the moment one enters his/her car.<sup>87</sup>

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81. *Id.*

82. *Id.* at 12.

83. *Id.* (quoting *Cady v. Dambrowski*, 413 U.S. 433, 441-42 (1973)).

84. *Id.*

85. *Id.*

86. *Id.* at 13.

87. Just how the . . . Court has arrived at the conclusion that automobiles are not private is anything but clear. . . . At best, the Justices merely describe what they perceive to be true of American life; they rely upon their sense of prevailing attitudes about automobiles. Less well-placed Americans are simply told what privacy they do or do not expect in their cars, that is, what expectations

[T]he Court's assertion that cars are not repositories of personal belongings defies common sense. Cars, like footlockers, are used to transport personal possessions. One's most private possessions, such as books, documents, diaries, photographs, and letters, and one's most valuable property, such as jewelry, invariably wind up in one's car at one point or another. Moreover, people frequently leave valuables in glove compartments and trunks while temporarily away from the car. One need only think of freeway service plazas to realize how much people depend upon the security of a locked car for the protection of valuable possessions. Indeed, an unattended, locked automobile undoubtedly provides more security for possessions than an unattended, locked suitcase or footlocker.<sup>88</sup>

Moreover, simply because automobiles are licensed and regulated by the government, it hardly follows that privacy expectations are justifiably relinquished. The government regulates housing through extensive health and safety regulations without reducing the home owner's privacy expectations in the entire house.<sup>89</sup>

The government did not argue in *Chadwick* that the footlocker's brief contact with the car brought the case within the doctrine of *Carroll/Chambers*.<sup>90</sup> Justice Blackmun's and Justice Rhenquist's dissent did, however, pose an interesting question: If the

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of privacy are *reasonable* or *legitimate*. Not only is the analysis suspicious insofar as it is grounded in changing public attitudes, but the Justices' ability to ascertain those attitudes at any point is open to serious question. What of the family that lives in a mobile home or, at least during the month of August, in a recreational vehicle? What of the traveling salesperson who leaves his or her sample case, dirty socks, and old love letters in the backseat of the company sedan parked outside the motel? What of the rest of us who live in overcrowded apartments where the television set is always blasting, the phone is always ringing, and the kids are always screaming? If we leave it all for a pleasant evening drive, who are the Justices to say that by doing so we leave our expectations of privacy behind? The truth is we often *seek* privacy on wheels.

Yackle, *supra* note 18, at 410-11. See also Katz, *supra* note 10, at 570.

88. Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 460 (1978).

89. [T]he Court has not proved its claim that expectations of privacy are lower in automobiles than in most other places. Automobiles are indeed regulated, but the fact that police may examine license plates, inspection stickers, headlights, exhaust systems, and other such things hardly proves that one has a reduced expectation of privacy in items held in the glove compartment, under the seat, or in the trunk. Similarly, the fact that an automobile travels public thoroughfares hardly proves that one has a reduced expectation of privacy against governmental prying into concealed areas. [Marshall v. Barlow's Inc., 436 U.S. 307 (1978)] seems to teach the very opposite: neither governmental regulation nor an individual's limited disclosures of some aspects of an activity give government a right of warrantless *carte blanche* access to all the rest. Expectations of privacy are not so easily diminished.

Grano, *supra* note 88, at 459-60.

90. 433 U.S. at 11.

agents had postponed the arrest just a few minutes longer until Chadwick and his colleagues had begun to drive away, could the car have been seized, taken to the agents' office, and had all of its contents, footlocker included, searched without a warrant?<sup>91</sup> While the dissenters answered the question in the affirmative, a majority of the court would take a different view three years later in *Arkansas v. Sanders*.<sup>92</sup>

*Sanders* dealt with facts similar to *Chadwick* except this time a piece of luggage, which the police had probable cause to believe contained marijuana, was carried in the trunk of a taxicab in which Sanders was a passenger.<sup>93</sup> After observing Sanders place the suitcase in the trunk of the cab and begin to drive away, the police stopped the taxicab and ordered the driver to open the trunk. The driver complied and the police immediately conducted a warrantless search of the unlocked suitcase which revealed a large quantity of marijuana which was later used as evidence against Sanders. No exigent circumstances justified the warrantless search once the police had placed the suitcase under their control.<sup>94</sup>

The issue facing the Supreme Court was whether the automobile exception covered the *Sanders* situation, thus excusing the warrantless search, or whether *Chadwick's* exclusive control doctrine invalidated the intrusion.<sup>95</sup> The Court saw *Sanders* falling on the *Chadwick* side of the line. Like the footlocker in *Chadwick*, the luggage in *Sanders* carried an "expectation of privacy" which could not be invaded without a warrant once police had the item within their "exclusive control."<sup>96</sup> Thus, the officers should have obtained a warrant after securing the suitcase.<sup>97</sup> While such a rule obtains for containers within cars, the *Sanders* Court sought to avoid a similar requirement where the vehicle itself is to be searched under the automobile exception. Requiring that vehicles be held until a search warrant could be obtained would burden "police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location . . . where they could be kept, with due regard to the safety of the vehicles and their con-

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91. 433 U.S. at 17, 22-23 (Blackmun, J., dissenting).

92. 442 U.S. 753 (1979).

93. The police were informed by a "reliable informant" that Sanders would arrive on an American Airlines flight at the Little Rock Airport. Sanders would be carrying a green suitcase containing marijuana. As predicted, Sanders arrived at the airport and claimed a green suitcase which he put in the trunk. *Id.* at 755-56, 761.

94. *Id.* at 756, 762.

95. *Id.* at 757.

96. *Id.* at 762.

97. *Id.* at 762, 763, 766.

tents until a magistrate ruled on the [warrant] application.”<sup>98</sup>

The *Sanders* Court found the automobile exception and its policies inapposite in the context of the search of the suitcase. Although the suitcase, like the taxicab, was mobile while it remained in the vehicle’s trunk, “the exigency of mobility must be assessed at the point immediately before the search,”<sup>99</sup> which in this case came after the police had seized the object and had it securely within their control. “Once police have seized a suitcase . . . the extent of its mobility is in no way affected by the place from which it was taken. . . . [A]s a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.”<sup>100</sup>

Moreover, while lesser expectations of privacy may attend cars and “integral parts” thereof,<sup>101</sup> the same is not true of luggage carried in automobiles.

One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles. 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.<sup>102</sup>

The *Sanders* Court attempted, however, to limit the scope of its holding by dropping the now famous footnote thirteen:<sup>103</sup>

Not all containers and packages found by police during the course of a

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98. *Id.* at 765-66 n.14. The view expressed in the text has been criticized by Judge Wilkey in his dissenting opinion in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc):

With all due respect, this explanation of impracticality is itself most impractical and theoretical. For surely we can assume that any police department, no matter how small or rural, can transport and impound vehicles illegally parked or abandoned in hazardous locations. Tow trucks are available everywhere and it is a common experience that police are prepared to resort to them. A “boot” on one wheel and one officer to watch over the car would be entirely sufficient to preserve immobile the auto and its contents. The Supreme Court apparently believes, however, that some small police departments may not be able to supply whatever additional resources are necessary to establish a chain of custody sufficient to secure not only a vehicle but evidence within against tampering while a warrant is sought.

*Id.* at 1200.

99. 442 U.S. at 763.

100. *Id.* at 763-64.

101. *Id.* at 761-763.

102. *Id.* at 764-65.

103. Professor LaFave describes footnote 13 as a “type of container exception to

search will deserve the full protection of the Fourth Amendment. Thus, some 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. . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.<sup>104</sup>

The last quoted sentence leaves open the question of whether such things as paper bags or cardboard cartons are covered by the *Sanders* rule even after such items come under the exclusive control of the police.<sup>105</sup> Not surprisingly, the lower courts encountered immediate problems relating *Sanders* to situations where non-luggage containers are legally seized from automobiles, secured by the police, and then subsequently searched.<sup>106</sup>

Another question unanswered by *Sanders* concerns the application of the warrant requirement to situations where police have probable cause to believe that evidence is concealed somewhere

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*Sanders*." 2 LAFAVE, *supra* note 3, at 153 (Supp. 1982). See generally, *id.*, at 148-159.

104. 442 U.S. at 764 n.13.

105. "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." 442 U.S. at 768 (Blackmun and Rhenquist, JJ., dissenting). Justices Blackmun and Rhenquist would have upheld the *Sanders* search under the automobile exception because "[t]he luggage, like the automobile transporting it, is mobile" and "the expectation of privacy in a suitcase found in the car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk." *Id.* at 769. "Given the significant encroachment on privacy interests entailed by a seizure of personal property, the additional protection provided by a search warrant may well be regarded as incidental." *Id.* at 770.

After detailing a series of hypothetical cases whose resolution is unclear under the majority opinion, the *Sanders* dissenters opted for a "clear-cut rule": Warrants should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* and *Chambers*. *Id.* at 772.

106. Compare, e.g., *State v. Jenkins*, 62 Hawaii 660, 619 P.2d 108 (1980) (*Sanders* applicable to knapsack with buckles, zipper, and flap), with *State v. Schrier*, 283 N.W.2d 338 (Iowa 1979) (*Sanders* not applicable to knapsack with a latch but whose flaps could be pushed aside revealing contents). See also the cases cited at 2 LAFAVE, *supra* note 3, at 149 n.102.3 (Supp. 1982); Comment, *Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U.L. REV. 291, 298 n.67 (1982), for cases illustrating the lower court confusion in applying the fourth amendment on a "container by container" basis; see generally, Note, *Warrantless Container Searches Under the Automobile and Search Incident Exceptions*, 9 FORDHAM URB. L.J. 185 (1980).

within a car, but, unlike the situation in *Sanders*, do not know whether it is concealed in a specific container or, for that matter, in any container at all.<sup>107</sup> In those circumstances, when police stop a car and find a container therein, may they search the container immediately under *Chambers* or must they secure the container while a warrant is obtained under *Sanders*? Should the answer to this question depend upon the kind of container discovered or should the automobile exception apply in all such cases thus avoiding the necessity of crating "downtown" all the containers within the vehicle which might possibly embody the evidence sought?

Some temporary answers to these questions came in the Court's short-lived opinion in *Robbins v. California*,<sup>108</sup> which held that the police violated the fourth amendment when, without a warrant, they searched two packages wrapped in green opaque plastic which had been discovered in the trunk of a car that had been stopped for a traffic offense. The initial stop of the car occurred because police observed the driver, Robbins, driving erratically. Once stopped, Robbins exited his car and walked towards the officers who asked to see his driver's license and the car's registration. After Robbins fumbled with his wallet, a police officer opened the car door to obtain the registration and immediately smelled marijuana smoke. An officer patted-down Robbins and discovered a vial of liquid. The officers then secured Robbins in the patrol car, opened the luggage compartment of the car, and dis-

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107. In their concurring opinion in *Sanders*, Chief Justice Burger and Justice Stevens specifically note that *Sanders* did not deal with the issue discussed in the text. They point out that the police had probable cause to believe that the suitcase contained marijuana *before* it was placed in the trunk of the taxicab. 442 U.S. at 766 (Burger, C.J., concurring).

Here, as in *Chadwick*, it 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*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an "automobile" exception case . . . .

This case simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle, but when they do *not* know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure. I am not sure whether that would be a stronger or weaker case for requiring a warrant to search the suitcase when a warrantless search of the automobile is otherwise permissible.

*Id.* at 767-68.

108. 453 U.S. 420 (1981). *Robbins* was overruled less than a year later in *United States v. Ross*, 102 S. Ct. 2157, 2172 (1982).

covered and immediately unwrapped the packages wrapped in opaque plastic. The packages contained marijuana which was later used to convict Robbins for violating drug laws. Robbins appealed and the Supreme Court ultimately granted certiorari to resolve the "continuing uncertainty as to whether closed containers found during a lawful warrantless search of an automobile may themselves be searched without a warrant."<sup>109</sup>

*Robbins* did not command a majority of the Court. A four Justice plurality opinion authored by Justice Stewart found that *Sanders* and *Chadwick* controlled the *Robbins* situation.<sup>110</sup> "Those cases made clear . . . 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."<sup>111</sup> The contents of Chadwick's footlocker and Sander's luggage were immune because they had been placed in a "closed, opaque container," which manifested a "reasonable expectation" that "the contents would remain free from public examination."<sup>112</sup> Likewise, Robbins and his packages received the protection of the warrant rule, footnote thirteen of *Sanders*<sup>113</sup> notwithstanding. "[T]he negative implication of footnote 13 . . . 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."<sup>114</sup>

The plurality's "opaque container" doctrine had the virtue of being a relatively clear rule avoiding the necessity of a container

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109. 453 U.S. at 423.

110. Justices Brennan, White, and Marshall joined Justice Stewart in the plurality. Chief Justice Burger and Justice Powell concurred separately. Justice Powell voiced specific reservations with the plurality opinion, see *infra* notes 117-119 and accompanying text; the Chief Justice concurred in the judgment in *Robbins* without stating his reasons for refusing to join the plurality opinion.

111. 453 U.S. at 425.

112. *Id.* at 426 (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1976)).

113. See *supra* text accompanying note 103.

114. 453 U.S. at 427. Prior to reaching the Supreme Court, the California Court of Appeals had found that the packages in *Robbins* fell directly under the rule prescribed in footnote 13 since "[a]ny experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana." *Id.* This conclusion was virtually unsupported by evidence and rejected by the Supreme Court plurality:

Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question 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. If indeed a green plastic wrapping reliably indicates that a package could only contain marihuana, that fact was not shown by the evidence of record in this case.

*Id.* at 428.

by container inquiry into respective privacy expectations.<sup>115</sup> Moreover, the rule respected subjective privacy expectations while paying homage to the traditional view that magistrates must decide when privacy rights give way to law enforcement interests.<sup>116</sup>

Despite these virtues, Justice Powell, while concurring in the *Robbins* result, objected to the plurality's bright line approach, favoring, instead, a rule which would distinguish constitutionally "insubstantial containers"<sup>117</sup> from containers which embody significant privacy interests.<sup>118</sup> Without such a distinction, Justice Powell believed heavy and unnecessary costs to law enforcement interests would be incurred.

While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigarbox or a Dixie cup in the course of a probable-cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values. The sole virtue of the plurality's rule is simplicity.<sup>119</sup>

Three separate dissenters filed opinions in *Robbins*.<sup>120</sup> The dissenters were in agreement, however, on the general solution to the *Robbins* problem: extend the automobile exception to cover all the contents of cars falling under the exception. "[A] warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* and *Chambers*."<sup>121</sup> As with the plurality rule, the dissenters' position would provide a bright line solution to the container search problem. Instead of subject-

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115. 453 U.S. at 429 n.1 (Powell, J., concurring). "[T]he plurality's rule provides a standard that is relatively simple to apply in a variety of situations." Comment, *supra* note 106, at 302. For a view on the reach of that bright line rule, see Justice Powell's concurring opinion in *Robbins*. 453 U.S. at 429 n.1.

116. 453 U.S. at 301-02.

117. *Id.* at 429 (Powell, J., concurring).

118. *Id.* at 429, 433-34.

119. *Id.* at 433-34.

120. See the dissenting opinions of Justices Blackmun, Rhenquist, and Stevens respectively, 453 U.S. at 436, 437, 444.

121. 453 U.S. at 436-37 (Blackmun, J., dissenting) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 772 (1979) (Blackmun, J., dissenting)). Justices Rhenquist and Stevens expressed similar views at 453 U.S. at 441 and 446-47 respectively.



ing virtually all closed containers to the rigors of the warrant requirement, as the plurality would have it, the dissenters would subject none.

Justice Stevens argued in his dissenting opinion that permitting the *Robbins* search under the automobile exception would not be inconsistent with either *Chadwick* or *Sanders* because neither of those cases involved the automobile exception.<sup>122</sup> In neither case did the police have probable cause to search an automobile. Probable cause existed to search the footlocker and suitcase respectively. In automobile exception cases, however, Justice Stevens contended:

The scope of any search that is within the exception should be just as broad as a magistrate could authorize by warrant if he were on the scene; the automobile exception to the warrant requirement therefore justifies neither more nor less than could a magistrate's warrant. If a magistrate issued a search warrant for an automobile, and officers in conducting the search authorized by the warrant discovered a suitcase in the car, they surely would not need to return to the magistrate for another warrant before searching the suitcase. The fact that the marijuana found in petitioner's car was wrapped in opaque green plastic does not take the search out of the automobile exception.<sup>123</sup>

Although only a plurality opinion, *Robbins* went a long way toward settling the container search doctrine. However, much of what *Robbins* settled was simultaneously unsettled by the Court's opinion in *New York v. Belton*,<sup>124</sup> delivered the same day as *Robbins*. *Belton* dealt with the problem of defining the scope of permissible warrantless searches incident to arrests made while the arrestee is in an automobile. The facts of *Belton* were similar to *Robbins*. A police officer stopped a speeding car, carrying Belton and three associates. The officer immediately detected the odor of burnt marijuana and observed an envelope marked "Supergold" which the officer associated with marijuana. He therefore ordered the four men out of the car and placed them under arrest for unlawful possession of marijuana. After separating the four men and patting them down, the officer collected the envelope, opened it and discovered marijuana inside. The officer then searched the passenger compartment of the car, found Belton's leather jacket on the back seat, unzipped one of the jacket pockets and discovered a quantity of cocaine. Belton conceded the legality of the initial stop and the search of the envelope,<sup>125</sup> but contended that his fourth amendment rights were violated when the jacket was searched without a warrant. The Supreme Court ultimately dis-

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122. 453 U.S. at 445 (Stevens, J., dissenting); see *supra* text accompanying note 107.

123. 453 U.S. at 448-49 (Stevens, J., dissenting).

124. 453 U.S. 454 (1981).

125. 453 U.S. at 462.

agreed, holding that warrantless searches of containers found within the "passenger area" of automobiles are permissible if the arrestee has been lawfully arrested while in the automobile.<sup>126</sup> The Court found that containers in such circumstances are necessarily "within the arrestee's immediate control."<sup>127</sup> Unless granted power to immediately secure areas within the arrestee's control, arresting officers would risk personal danger—the arrestee might seek to use a weapon to resist arrest or effect an escape—and face the possibility that the arrestee would conceal or destroy evidence.<sup>128</sup>

Because its rationale is premised on the search incident to arrest exception to the warrant rule, *Belton* is neither an automobile exception case nor a *Chadwick/Sanders* container case. Nevertheless, the *Belton* Court said that arrests in automobiles had historically posed special recurring problems for courts faced with the task of defining the scope of permissible searches incident to arrest.<sup>129</sup> As of the time of *Belton*, "no straightforward rule" had emerged in determining "whether, in the course of a search incident to a lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it."<sup>130</sup> While the Court had previously confined the incident to arrest exception to "the area within the immediate control of the arrestee,"<sup>131</sup> application of that standard was especially difficult in cases where that area arguably included the interior of an automobile and the arrestee was its recent occupant.<sup>132</sup> Therefore, the *Belton* Court found it necessary to fashion a workable rule to inform citizens of their constitutional rights and to clearly define the scope of police authority.<sup>133</sup> This rule must take into account the Court's finding that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact

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126. *Id.* at 460.

127. *Id.*

128. *Id.* at 457. In *Chimel v. California*, 395 U.S. 752 (1969), the Court had earlier held that lawful custodial arrests create a situation which justifies a contemporaneous warrantless search of the person arrested and of the immediately surrounding area. The underlying rationale of the incident to arrest exception is the need "to remove any weapons that the [arrestee] might use in order to resist arrest or effect his escape," and the need to prevent the concealment or destruction of evidence. *Id.* at 763.

129. 453 U.S. at 458-59. Apart from noting that lower courts often reached conflicting results, the Court did not explain why arrests in automobiles were so difficult to accommodate under the incident to arrest doctrine.

130. *Id.* at 459. The Court noted that some lower court cases had upheld warrantless searches of arrestees after they had abandoned their vehicles, while other cases had denied the validity of such searches.

131. *Id.* at 460.

132. *Id.*

133. *Id.* at 459-60.

generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item[.]'."<sup>134</sup> With these considerations in mind, the Court stated its rule: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," and examine the contents of any containers found therein, regardless of the likelihood that the container actually holds a weapon or evidence of criminal conduct.<sup>135</sup>

Justice Stevens concurred in the *Belton* result but argued that the search should have been upheld under the automobile exception rather than under the search incident theory.<sup>136</sup> Noting that the majority's rule would apparently apply to arrests for even the most petty offenses where the police had no reason to believe evidence was contained in the automobile, Stevens contended that *Belton* would grant a license to search far exceeding the scope permitted by the automobile exception.

Under the Court's new rule, the arresting officer may find reason to [take the driver into custody and thereby obtain justification for a search of the entire interior of the automobile] whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation.<sup>137</sup>

Of course such an extensive search would be precluded under the automobile exception unless the officer had probable cause to believe that the car contained contraband or other evidence.<sup>138</sup>

Justices Brennan and Marshall joined in a dissenting opinion in *Belton*, arguing that the majority had unnecessarily expanded the scope of the incident to arrest exception by adopting the fictions that "the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car,"<sup>139</sup> and that containers in the passenger compartment, whether locked or unlocked, are always within the reach of the arrestee.<sup>140</sup> The privacy interests so painstakingly preserved by the Court in cases like *Chadwick* and *Sanders* thus appeared to the dissenters to be at the mercy of *Belton*'s "dangerous precedent" which permitted warrantless searches of passenger compartments even where no threat of danger to the arresting officer or of loss of evidence existed.<sup>141</sup> Moreover, the dissenters found the majority's bright line

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134. *Id.* at 460 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

135. *Id.* at 460-61.

136. *Id.* at 444-53 (Stevens, J., dissenting in *Robbins* and concurring in *Belton*).

137. *Id.* at 452.

138. *Id.*

139. *Id.* at 466 (Brennan, J., dissenting).

140. *Id.* at 468.

141. *Id.* at 466-68. The dissenters found that *Belton* could not possibly have gained

rule far from radiant. What, for example, did the majority mean by its limitation of *Belton* to the "passenger compartment" of the vehicle? Did the limitation include locked glove compartments, the interior of door panels, or the area under the floorboards?<sup>142</sup> How should the requirement that the search be "contemporaneous" with the arrest be interpreted? Is a search five minutes after the arrestee has left the car "contemporaneous" enough?<sup>143</sup> Thirty minutes? Finally, the dissenters feared that *Belton* would signal the beginning of a general expansion of the incident to arrest exception beyond the concerns it was tailored to address. Why, asked the dissenters, is the *Belton* rule limited in principle to searches of cars?<sup>144</sup>

There is much to be said for the dissenters' concerns. The majority never explained exactly why it was necessary to pigeonhole vehicles into a special category for purposes of the incident to arrest exception. The distinction between automobile and nonautomobile contexts thus appears to be based more on judicial fiat than on sound principle.<sup>145</sup> Moreover, as noted by Justice Stevens and others,<sup>146</sup> *Belton's* search incident power is not premised on probable cause to search and is, thus, far broader than the power to search under the automobile exception.<sup>147</sup>

The tension between *Robbins* and *Belton* is clear. Although the Court granted protection to privacy interests associated with closed opaque containers in *Robbins*, it stripped away much of that protection in *Belton*.

To the extent that *Belton* permits warrantless searches of containers beyond the point justified by the rationales for the search incident to arrest exception, *Belton* also authorizes invasions of the same privacy interests for which *Robbins* requires fourth amendment protection. By allowing police to search closed opaque containers incident to an arrest, even in the

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access to his jacket at the time of his arrest. He was outside the car at the time the police officer entered the car and searched the jacket.

142. *Id.* at 469-70.

143. *Id.* at 470.

144. "[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.'" *Id.* at 464.

The dissenters' fears that *Belton* might be extended beyond the context of automobile arrests appear to be borne out by *United States v. Brown*, 671 F.2d 585 (D.C. Cir. 1982) which holds that the *Belton* rationale applies to any search incident to an arrest, regardless of whether a vehicle is involved. The *Brown* court holds that containers, there a small, zippered leather pouch, within the reach of a suspect when he is arrested may be searched, without a warrant, contemporaneous with the arrest.

145. Grano, *supra* note 17, at 611 n.48.

146. See *supra* notes 136-38 and accompanying text; see also Grano, *supra* note 17, at 613; Katz, *supra* note 10.

147. See *supra* notes 136-38 and accompanying text.

absence of probable cause to believe that the containers hold weapons or evidence, the Court, in *Belton*, ignores *Robbins*' recognitions of the legitimate privacy interest associated with such containers.<sup>148</sup>

Moreover, the practical application of *Robbins* and *Belton* yields unprincipled results. In most cases, when a police officer can conduct a search pursuant to the automobile exception, the probable cause supporting the search will also support an arrest of the occupant of the automobile, thereby creating an overlap of automobile and incident to arrest exceptions.<sup>149</sup> Under the automobile exception, police may search the interior of the car and, apparently, also such "integral parts" as the trunk.<sup>150</sup> *Robbins* precludes opening any opaque closed container found anywhere in the car. If the search is incident to an arrest, however, *Belton* authorizes the opening of containers found in the passenger compartment but not in the trunk.<sup>151</sup> Thus at least so far as container searches are concerned, the trunk of the car has been blessed by the Court as a special fourth amendment sanctuary. No apparent principle explains why a locked suitcase in the back seat of the car may be searched without a warrant but one placed in the trunk may not.

With such anomalies no doubt firmly in mind, as well as dissatisfaction with its earlier inability to generate a majority opinion, the Court decided to reconsider *Robbins*.<sup>152</sup> The stage was thus set for *United States v. Ross*.

### III. THE ROSS CASE

#### A. The Facts

*Ross* deals with a variation of the *Robbins* theme. A reliable informant notified police officers that an individual known as "Ban-

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148. Comment, *supra* note 106, at 313.

149. *Id.* at 314.

150. The Court has never explicitly held that trunks of cars may be opened under the automobile exception. *Cady v. Dombrowski*, 413 U.S. 433, 437 (1973), permitted the warrantless opening of a car trunk to search for a legally possessed revolver. The search in *Cady* was motivated by a caretaking concern by the police and not by a desire to obtain evidence. Moreover, "probable cause" to search the trunk was lacking in *Cady*. Moylan, *supra* note 24, at 1012. See also Note, *supra* note 66, at 758. *Sanders*, however, states that the automobile doctrine extends to "integral parts" of the vehicle. 442 U.S. at 761, 763. Seemingly, if the automobile exception permits tearing apart the interior of the car, as in *Carroll*, it also permits opening a closed or even locked trunk.

151. The *Belton* Court explicitly excluded the trunk from the scope of its passenger compartment rule. 453 U.S. at 460-61 n.4.

152. 102 S. Ct. 386 (1981). With a change in judicial personnel from the time *Robbins* was originally decided, the Court likely saw an increased prospect for a consensus of the Justices upon reconsideration of the case. Justice Stewart, the author of the *Robbins* plurality had retired and had been replaced by Justice O'Connor.

dit," who later turned out to be Albert Ross, was selling narcotics kept in the trunk of a car parked at a specified address. The informant provided the police with a detailed description of both "Bandit" and the car from which he was dealing. The basis for the informant's information was first hand observation of a drug sale and a direct assurance from "Bandit" that more drugs were in the car's trunk. Acting on this information, three police officers drove to the specified address, discovered a parked car matching the description provided by the informant, obtained a license check which disclosed that the car belonged to Ross, and received a computer check on Ross which revealed that he often assumed the alias, "Bandit." Finding no one matching the description given by the informant, the police briefly left the area where the car was parked in order to avoid alerting people on the street. Five minutes later, the three officers returned and observed that the car under suspicion was being driven down the street by a man matching the description given by the informant. The police stopped the car and ordered the driver, Ross, out of the vehicle. The police then searched Ross and the interior of the car. The latter search turned up a bullet on the car's front seat and a pistol in the glove compartment. The police arrested and handcuffed Ross, opened the trunk of his car, and found a closed brown paper bag which they immediately opened. The bag contained glassine bags of white powder, later determined to be heroin. The police replaced the bag, closed the trunk and drove the car to police headquarters where a subsequent search of the car revealed a zippered red pouch containing \$3200 in cash. No warrant was obtained.

Ross was charged with possession of heroin with intent to distribute. Over his objection, the heroin and the currency were introduced into evidence and Ross was convicted.

Ross appealed, contending that his fourth amendment rights had been violated by the warrantless search of the bag and pouch. After an en banc decision of the District of Columbia Court of Appeals had invalidated both the search of the paper bag and of the pouch,<sup>153</sup> the United States Supreme Court granted the government's petition for certiorari and invited "the parties to address the question whether the decision in *Robbins* should be reconsidered."<sup>154</sup> The Court's invitation to reconsider *Robbins* was motivated by a desire to achieve "clarification in this area of the law,"<sup>155</sup>

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153. *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc).

154. 102 S. Ct. 386 (1981).

155. 102 S. Ct. 2161-62. "Clarification" was necessary because the *Robbins* opinion commanded only a four Justice plurality of the Court and Chief Justice Burger's silent concurrence in *Robbins* left his position unclear. See Katz, *supra* note 10, at 577-80.

an area of vital importance to law enforcement and civil liberties interests alike. The Court stated that "it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement."<sup>156</sup>

## B. The Holding

Probable cause clearly existed in *Ross*.<sup>157</sup> Thus, the initial stop and search of the car's interior and the opening of the trunk and seizure of the bag and pouch were justified under the automobile exception.<sup>158</sup> The issue in *Ross* was whether the closed paper bag and zippered pouch could be opened and searched without a warrant given that the police had lawfully seized the items from the trunk with a probable cause belief that contraband was concealed somewhere therein. In upholding the search of the bag and pouch, and abandoning the recent opaque container rule of the *Robbins* plurality,<sup>159</sup> the Court adopted Justice Stevens' position in his *Robbins* dissent: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."<sup>160</sup>

## C. Rationale

The Court, with Justice Stevens writing the opinion joined by five other Justices,<sup>161</sup> began its analysis by extensive reference to *Carroll* which the Court read to stand for the proposition that war-

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156. 102 S. Ct. at 2161.

157. *Id.* at 2168 n.22. The finding of probable cause made by the Court of Appeals was not disputed in the Supreme Court.

The en banc Court of Appeals stated that "[b]ased on the tip the police received, Ross's car was properly stopped and searched, and the pouch and bag were properly seized." The court explained:

"[W]e believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." The court further noted that "[i]n this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified."

*Id.* (citations omitted).

158. *Id.*

159. *Id.* at 2172.

160. *Id.* See *supra* notes 122-23 and accompanying text.

161. Joining Justice Stevens in the majority opinion were Justices Blackmun, Powell, O'Connor, Rhenquist, and Chief Justice Burger.

warrantless searches of vehicles are constitutionally permissible if supported by probable cause.<sup>162</sup> The Court made no mention of an exigent circumstance requirement. While noting that automobile mobility provided the historical rationale for the automobile exception,<sup>163</sup> the Court failed to suggest that actual mobility is a necessary condition for application of the automobile exception.<sup>164</sup>

The Court next examined the *Chadwick* and *Sanders* cases pointing out that in neither "did the police have probable cause to search the vehicle or anything in it except the footlocker in [*Chadwick*] and the suitcase in [*Sanders*]." <sup>165</sup> These cases were distinguishable from *Robbins* and *Ross* in which suspicion was not directed at a specific container prior to the time of the container's search. Thus in *Robbins* and *Ross*, as in *Carroll* and *Chambers*, a magistrate could have issued a warrant to search the entire car, including secondary containers therein.<sup>166</sup> Therefore, "[t]he scope of the search[es] [in those cases] was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search."<sup>167</sup> The Court elaborated:

It would be illogical to assume that the outcome of *Chambers*—or the outcome of *Carroll* itself—would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision

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162. 102 S. Ct. at 2164. "[T]he exception to the warrant requirement established in *Carroll* . . . applies only to searches of vehicles that are supported by probable cause." *Id.*

163. [S]ince its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.

*Id.* at 2163 (footnotes omitted).

164. While *Carroll* may have originally been premised on an exigent circumstance theory, *see supra* note 163, the *Ross* Court apparently now sees it as supporting warrantless searches of automobiles on probable cause alone. "*Carroll* . . . applies . . . to searches of vehicles that are supported by probable cause. In this class of cases a search is not unreasonable if based on facts that would justify the issuance of a warrant." 102 S. Ct. at 2164.

165. 102 S. Ct. at 2167.

166. *Id.* at 2167, 2170. "A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search." *Id.* at 2170.

167. *Id.* at 2169.



in *Carroll* itself.<sup>168</sup>

The Court believed *Carroll* was based on "practical considerations . . . which would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle."<sup>169</sup> While the Court nowhere specifically explained what these "practical considerations" were, it did drop a footnote explaining how its new rule permitting warrantless searches of secondary containers would actually have the effect of restricting invasions of privacy.

The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* and *Chambers*.<sup>170</sup>

The Court alluded to another "practical consideration" which would be threatened by a warrant requirement in cases like *Ross*. Contraband carried in cars is generally enclosed in a secondary container of some kind.<sup>171</sup> Although the Court did not explain how this fact supposedly affected the practicality of applying the warrant rule,<sup>172</sup> perhaps it had in mind the administrative inconvenience entailed in seizing and securing all the car's containers while seeking a warrant.<sup>173</sup> If this was indeed the Court's concern, it never explained why and how administrative inconvenience was thought to override the privacy interests in the containers.

Regarding privacy interests in containers found within vehicles legally searchable under the automobile exception, the Court had little to say except to note that "the privacy interests in a car's trunk or glove compartment may be no less than those in a moveable container."<sup>174</sup> The Court thus suggested that a permissible

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168. *Id.*

169. *Id.* at 2170.

170. *Id.* at 2171 n.28.

171. *Id.* at 2170.

172. The Court did point out that "since its earliest days Congress had recognized the impracticality of securing a warrant in cases involving the transportation of contraband goods." *Id.* at 2163.

173. Justice Powell expressed this concern in his *Robbins* concurrence. See *supra* note 119 and accompanying text.

174. 102 S. Ct. at 2171-72.

search of "integral parts" of the automobile justified *a fortiori* a search of containers within the vehicle.<sup>175</sup>

#### D. The Dissent

Justice Marshall, joined by Justice Brennan, filed a vigorous dissent in *Ross*.<sup>176</sup> The dissenters favored granting to "any movable container found within an automobile . . . precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile."<sup>177</sup> They argued that the majority had "utterly disregard[ed] the value of a neutral and detached magistrate."<sup>178</sup> After listing the virtues of the warrant requirement,<sup>179</sup> Justice Marshall complained that the traditional rationales for the automobile exception—mobility and lesser expectations of privacy—do not support extending the exception to searches of containers found inside vehicles.<sup>180</sup> Containers are easily immobilized and are often imbued with significant privacy expectations.<sup>181</sup> "Ultimately," said Justice Marshall, "the majority, unable to rely on the justifications underlying the automobile exception, simply creates a new 'probable cause' exception to the warrant requirement for automobiles."<sup>182</sup> "The

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175. *Id.* at 2169.

176. *Id.* at 2173. Justice White also filed a brief dissenting opinion. *Id.* at 2173.

177. *Id.* at 2177.

178. *Id.*

179. *Id.* at 2174-75, 2177. See also notes 17-20 and accompanying text *supra*.

180. 102 S. Ct. at 2176.

181. *Id.*

182. *Id.* Justice Marshall explained:

The majority's sleight-of-hand ignores the obvious differences between the function served by a magistrate in making a determination of probable cause and the function of the automobile exception. It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant. A magistrate's only concern is whether there is probable cause to search them. Where suspicion has focused not on a particular item but only on a vehicle, home, or office, the magistrate might reasonably authorize a search of closed containers at the location as well. But an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies. After all, what justifies the warrantless search is not probable cause alone, but *probable cause coupled with the mobility of the automobile*. Because the scope of a warrantless search should depend on the scope of the justification for dispensing with a warrant, the entire premise of the majority's opinion fails to support its conclusion.

The majority's rule masks the startling assumption that a policeman's determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate. This assumption ignores a major premise of the warrant requirement—the

only convincing explanation . . . for the majority's broad rule is expediency; it assists police in conducting automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield."<sup>183</sup>

#### IV. *ROSS*: ANALYSIS AND CRITIQUE

The *Ross* dissenters described the case as "having profound implications for the privacy of citizens traveling in automobiles."<sup>184</sup> While this is no doubt true, the impact of *Ross* may ultimately extend beyond the automobile into the fourth amendment world in general. But before exploring these broader ramifications, the issues addressed in *Ross* will be more closely analyzed and critiqued.

##### A. *Ross*: Persuasiveness of the Rationale

A significant feature of the majority opinion in *Ross* is its apparent rejection of the exigent circumstance rationale for the automobile exception. While the Court had earlier spoken of "automobile mobility,"<sup>185</sup> there is no suggestion in *Ross* that a showing of actual exigency is a prerequisite for either the initial stop of an automobile or the subsequent seizure or search of its contents. Had the *Ross* Court seen fit, it could have utilized the exigent circumstance justification at least in support of the initial stop of *Ross*'s car. Probable cause to search arose while the car was mobile and in circumstances where, due to the mobility, obtaining a warrant prior to the initial encounter with the car would have been impractical. Therefore, as in *Carroll* and *Chambers*, but unlike *Coolidge*, "backward in time exigency"<sup>186</sup> did exist in *Ross*. The Court's failure to note this fact may be indicative of its having now dropped all pretenses of adherence to an exigent circumstance theory in automobile cases. If, indeed, *Carroll* now means that probable cause, alone, justifies the search of lawfully stopped vehicles and their

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importance of having a neutral and detached magistrate determine whether probable cause exists. The majority's explanation that the scope of the warrantless automobile search will be "limited" to what a magistrate could authorize is thus inconsistent with our cases, which firmly establish that an on-the-spot determination of probable cause is *never* the same as a decision by a neutral and detached magistrate.

*Id.* at 2177 (citation omitted).

183. *Id.* at 2181.

184. *Id.*

185. See *supra* text accompanying notes 35, 43 & 60.

186. See *supra* note 64 and accompanying text.

contents,<sup>187</sup> even where the police have had probable cause "for some time" prior to the seizure of the car as in *Coolidge*,<sup>188</sup> the *Ross* Court has apparently totally rejected *Carroll*'s dicta that warrants must be obtained where "reasonably practicable."<sup>189</sup> Also abandoned is *Chambers*'s admonition that warrantless searches may not be permissible "in every conceivable circumstance . . . even with probable cause."<sup>190</sup> If so, contrary to the teaching of *Coolidge*, the word "automobile" has indeed become a "talisman in whose presence the Fourth Amendment [warrant requirement] fades away and disappears."<sup>191</sup>

This interpretation of *Ross* is bolstered by the fact that there is little discussion in the opinion of "lesser privacy expectations" in automobiles. Instead, the *Ross* Court appears to read *Carroll* and *Chambers* as simply exempting automobiles as a class from the rigors of the warrant rule once probable cause to search exists. While automobile mobility or diminished privacy expectations might have provided the historical footing for the exemption,<sup>192</sup> the fact of the exemption itself, whatever its rationale, appears to be all that now interests the Court.

*Ross*, as the dissent suggests, appears to have created a new probable cause exemption to the warrant rule without providing satisfactory justification for abandoning the preference for warrants. To begin with, the Court suggests that warrantless searches of containers in *Ross*-type cases are permissible because similar searches with warrants would be permissible.<sup>193</sup> Surely the Court begs an important question by such reasoning. It assumes that the issue of whether or not a magistrate *would have in fact* issued a warrant is unimportant. Perhaps the question is less than crucial in cases like *Ross* where the police are correct in their assessments of probable cause.<sup>194</sup> But what of the cases, surely significant in number, of mistaken police belief of probable cause? In those situations, appeal to the warrant procedure may be profoundly crucial as a means of preventing unjustified intrusions into the container.

Similarly unconvincing is the Court's argument that "absurd results inconsistent with *Carroll*" would be generated if police were

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187. *Carroll* was so represented in *Ross*. See *supra* note 162 and accompanying text.

188. See *supra* notes 54-55 and accompanying text.

189. See *supra* text accompanying note 40.

190. See *supra* text accompanying note 48.

191. See *supra* text accompanying note 61.

192. See *supra* note 163.

193. See *supra* notes 166-67 and accompanying text.

194. But even in these cases the warrant process serves the symbolic function of "reassuring the public that the orderly process of law has been respected." 102 S. Ct. at 2175 (Marshall, J., dissenting).

required to obtain warrants prior to searching "burlap sacks and paper bags" legally seized under the automobile exception.<sup>195</sup> In such circumstances, the warrant requirement would indeed be absurd under *Carroll* if that decision was premised solely on the lesser expectation theory of automobile privacy and if "burlap sacks and paper bags" are imbued with minimal privacy expectations. To so read *Carroll*, however, is to strain the obvious thrust of the opinion.<sup>196</sup> Moreover, to justify the conclusion that burlap sacks and paper bags found in cars lack privacy protection because "the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container,"<sup>197</sup> overlooks the fact the privacy interests in such movable containers as locked diaries,<sup>198</sup> closed purses, and, of course, footlockers, and luggage, are often as substantial as such interests ever become. Furthermore, at one time or another, almost everyone carries these highly private containers in their automobiles. On the other hand, if *Carroll* is based on the exigent circumstance theory, as it in fact appears to be,<sup>199</sup> no obvious absurdity exists in requiring a warrant before searching the Court's burlap sacks and paper bags which have been seized by the police, since no exigency exists once the police immobilize such containers.<sup>200</sup> While a warrant requirement for searches of cars themselves may be unsound, given the practical problems of securing such large and valuable pieces of property while warrants are sought,<sup>201</sup> the same problems do not appear as significant when securing burlap sacks and paper bags.<sup>202</sup>

As for the Court's conclusion that the warrant requirement for containers would effectively increase the magnitude of privacy invasion since both cars and containers would end up being seized,<sup>203</sup> persons seeking to avoid the major privacy intrusion entailed in seizing the car while a warrant is sought could always consent to, indeed request, an immediate warrantless search of the car and its containers.<sup>204</sup>

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195. See *supra* note 168 and accompanying text.

196. See *supra* notes 34-40 and accompanying text.

197. See *supra* note 174 and accompanying text.

198. A locked diary may be a "container" for a variety of small items: love letters, tablets of drugs, photographs, marijuana, cigarettes, etc.

199. See *supra* notes 34-40 and accompanying text.

200. These points are made by the *Ross* dissenters. 102 S. Ct. at 2174, 2179.

201. See *supra* note 98 and accompanying text.

202. There might of course be cases where securing all the containers in a car would create administrative inconvenience. In such situations the police could simply seize the entire car. The occupants of the car could avoid the car's seizure if they so desired by consenting to an immediate warrantless search of the containers.

203. See *supra* note 70 and accompanying text.

204. 102 S. Ct. at 2179 (dissenting opinion): "[T]he defendant, not the police,

In general, the *Ross* opinion is unpersuasive. Without adequate reasoning, the Court carves out a new doctrine which limits the previous scope of the warrant requirement in an area touching important aspects of American life.

**B. *Ross*: Justified Bright Line or Untenable Departure From Constitutional Principle?**

Whatever the technical deficiencies of the Court's opinion in *Ross*, the case is less objectionable if it promotes sound policy. Therefore, although the dissent's indictment of *Ross* as a decision premised entirely on the majority's interest in promoting expediency in law enforcement appears well placed, the criticism is not necessarily decisive if law enforcement expediency is a sufficiently compelling interest. This Article's assessment of the justification for the *Ross* rule will be based on the answers to four questions:<sup>205</sup> (1) How genuine was the need to include secondary containers under the automobile exception? (2) Is the *Ross* rule the bright line standard it is meant to be? (3) Is the *Ross* rule subject to manipulation and abuse? (4) Apart from its articulated virtues, is the *Ross* rule likely to promote secondary values?

*1. The Necessity for the Ross Rule*

Surprisingly, the *Ross* Court offers little explanation for the need to abandon the opaque container rule of *Robbins* in favor of the *Ross* doctrine. The Court does allude to the need to achieve "clarity" in the law<sup>206</sup> but that interest is hardly compelling since the opaque container rule was itself relatively clear.<sup>207</sup> The Court's concern for clarity was thus more likely a function of the fact that a majority had not embraced the opaque container rule rather than a view that the rule itself was unclear. If, however, the Court felt that the absence of a majority opinion in *Robbins* rendered the law intolerably unclear, it made little effort to establish that fact.<sup>208</sup>

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should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant." It must be noted, however, that the "choice" may not occur to the defendant nor be suggested by the police. 2 LAFAVE, *supra* note 3, at 162 (Supp. 1982).

205. Professor LaFave employed a similar set of questions in his recent critique of *Belton*. See 2 LAFAVE, *supra* note 3, at 134 (Supp. 1982).

206. 102 S. Ct. at 2161.

207. See *supra* note 115 and accompanying text.

208. The Court did trace the checkered history of the *Ross* case in the lower courts prior to its arrival at the Supreme Court. Originally, a three-judge panel of the District of Columbia Court of Appeals had, under footnote 13 in *Sanders*, upheld the search of the paper bag, but not that of the pouch. *United States v. Ross*, No. 79-1624, slip op. at 9-18 (D.C. Cir. Apr. 17, 1980). The entire District

Another possible explanation for the necessity of the *Ross* rule can be extrapolated from the Court's citation to the fact that automobile searches are common occurrences.

[C]ountless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement.<sup>209</sup>

The high incidence of police contact with automobiles creates a special administrative problem: If warrants are required before any secondary container, *e.g.*, dixie cup, cigarette pack, etc., is searched, will not the warrant process be trivialized by its overuse? Professor LaFave states the problem this way:

Given the empirical evidence that the judiciary "does not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exist grounds for a search," this later principle [that the warrant process can best serve as a meaningful device for the protection of Fourth Amendment rights if used selectively to prevent those police practices which would be most destructive of Fourth Amendment values] would appear to have some substance to it. The underlying hypothesis [in the automobile search cases] is that if warrants are required for all searches and seizures but those occurring under truly exigent circumstances, then the warrant process becomes a mechanical routine with relatively little magisterial scrutiny, but that if on the other hand warrants are required for a comparatively small group of police activities which are highly intrusive in nature, then the tendency will be to give these warrant requests close examination.<sup>210</sup>

LaFave's points are well taken. But whether they justify *Ross*'s total abandonment of the warrant requirement is not clear. Before resorting to such a drastic move, perhaps some thought should have been directed toward ways of improving the warrant process.<sup>211</sup>

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of Columbia Circuit voted to reconsider the case en banc. This time the court, with four judges dissenting, adopted a rule tantamount to the opaque container doctrine of *Robbins* in invalidating the search of the paper bag as well as that of the pouch. *United States v. Ross*, 655 F.2d 1159, 1161 (1981). With the opaque container rule receiving the approval of the District of Columbia Circuit, it is not unlikely that other courts, federal and state, would have followed in adopting the *Robbins* doctrine. If so, it is unclear why the Supreme Court felt such an immediate need in *Ross* to clarify the law.

209. 102 S. Ct. at 2161-62.

210. 2 LAFAVE, *supra* note 3, at 518.

211. Professor Yackle makes the following points:

I frankly doubt that the Court has given judicial supervision a fair chance before finding fault and shelving the idea. I am persuaded that if the Court were to become serious about the warrant requirement and were to insist that the police and judges turn square corners in the warrant process, judicial supervision might yet become effective despite the shortcomings of the past. To date, however, the Court has not so much as demanded that issuing officers be demon-

## 2. *Ross* as a Bright Line

*Ross* establishes that warrantless searches of cars and containers within are permissible if police have probable cause to believe that contraband or other evidence is being carried *somewhere* within the vehicle. By distinguishing *Chadwick* and *Sanders*,<sup>212</sup> however, the *Ross* Court implies that warrants are still required in cases where police have probable cause to believe that the evidence they seek is enclosed within a specifically identified container.

A variety of unanswered questions remain. First, what if, as in *Coolidge*, the police have had probable cause to search a vehicle for a significant period of time, perhaps thirty days, prior to their first encounter with the car parked in a suspect's driveway? The *Ross* Court nowhere refers to *Coolidge* so assessments of the continued vitality of *Coolidge* are speculative. On the one hand, as discussed above, *Ross* may spell the demise of *Coolidge*.<sup>213</sup> On the other hand, the facts of *Ross* do not require the rejection of *Coolidge* because "backward exigency" *did* exist in *Ross*.<sup>214</sup> A totally bright line rule in *Ross* might have supplied dictum clarifying the present status of *Coolidge*.<sup>215</sup>

The *Ross* rule also creates uncertainty in light of *Chadwick* and *Sanders*. The *Ross* dicta implies that warrants must be obtained in *Chadwick* and *Sanders* situations where police have probable cause to search specific containers *before* they are ever placed in a car.<sup>216</sup> But what of cases where police obtain probable cause to search specifically identified containers *after* they are already in a car? Thus, assume that the informant in *Ross* had told the police that "Bandit" was selling drugs contained in a closed *brown paper bag* in the trunk of his car? Could the police open the bag without a warrant? *Ross* is ambivalent.

If, on the one hand, the *Ross* Court requires warrants in *Chadwick* and *Sanders* situations as a means of preventing the police

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strably qualified for their extraordinarily difficult and important work, and in fact has asked for no more than financial independence.

Yackle, *supra* note 18, at 415.

212. See *supra* notes 165-66 and accompanying text.

213. See *supra* notes 186-188 and accompanying text.

214. See *supra* text accompanying notes 184-87.

215. Clarification of the status of *Coolidge* in *Ross* would have been dicta since the *Ross* Court did not face the issue of whether warrantless searches of automobiles were permissible where no "backward exigency" exists.

216. See *supra* notes 165-66 and accompanying text. Although the *Ross* Court does not make specific mention of the fact, probable cause to search the containers in both *Chadwick* and *Sanders* existed prior to the time the container came into contact with an automobile. See *supra* notes 75-76 and 92-94 and accompanying text.



from escaping the warrant rule, by waiting to search containers until they are placed in cars, under the pretext of the automobile exception,<sup>217</sup> then there is no reason to require warrants where containers are already in automobiles at the time probable cause to search arises. From this reading of *Chadwick* and *Sanders*, the warrant requirement would hinge on the state of mind of the searching officer—warrants are necessary if the officer intends to avoid the warrant requirement. Far from introducing clarity, such emphasis on police intent creates new uncertainty. Must actual subjective intent to engage in a “pretext” search be shown before warrants are required, or would an objective measure of intent—what a reasonable officer under the circumstances would intend—be sufficient? If the latter, how will officers in the field ever be certain as to whether or not courts will later view their actions as pretext searches?

If, on the other hand, the reason for requiring warrants in *Chadwick/Sanders* situations is based not on an interest in preventing pretext searches, but rather in protecting the privacy interests inherent in containers such as footlockers and luggage, the police would seemingly be required to obtain warrants before searching such containers in cases where probable cause to search specific containers arises *after* the container has been placed in an automobile. The administrative inconvenience interest used to justify *Ross* appears less apposite where police know in advance of their search *which containers* likely house the sought after evidence. Although in cases like *Ross* it might indeed be inconvenient to secure every secondary container while search warrants are sought, especially where the containers are numerous and heavy in weight,<sup>218</sup> in general, little inconvenience would be encountered in securing only those containers the police have probable cause to believe contain evidence.<sup>219</sup> Thus, the *Ross* Court might have reached a different result had the informant told the police that the drugs were in a *paper bag* in the trunk of “Bandit’s” car. If so, the *Ross* Court’s talk of the equivalence of the privacy interest in secondary containers and integral parts of automobiles<sup>220</sup> would, inexplicably, be limited to cases, like *Ross*, where police have no

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217. The *Ross* dissenters suggest that the majority may be giving this interpretation to *Chadwick* and *Sanders*. 102 S. Ct. at 2180.

218. Consider, for example, the problems created for a single police officer in securing a two hundred-pound footlocker being carried in an automobile.

219. If, however, a single police officer is required to secure a heavyweight container, *see, e.g., supra* note 218, administrative inconvenience is a problem, even if the officer knows in advance that the particular container houses the evidence.

220. *See supra* note 174 and accompanying text.

reason in advance of their search to suspect any particular secondary container.

In comparison, *Ross* appears to provide fewer bright lines than did *Robbins*. Because *Robbins* was conceptualized as a container case and not as an automobile exception case,<sup>221</sup> the *Carroll*, *Chambers*, and *Coolidge* line of cases was unaffected by the opaque container rule of *Robbins*. Thus, unlike *Ross*, *Robbins* obviously left *Coolidge* untouched. Moreover, *Robbins* encountered none of *Ross*'s difficulties in relation to *Chadwick* and *Sanders*. *Robbins* merely clarified the meaning of *Sanders*'s footnote thirteen.<sup>222</sup>

Under *Robbins*, warrants were required to search all opaque containers whose contents were not in plain view,<sup>223</sup> regardless of whether or when such containers were placed in automobiles. The only genuine lack of certainty surrounding *Robbins* stemmed from the fact that a majority of the Court did not embrace the opaque container doctrine.

### 3. *Ross as Subject to Manipulation and Abuse*

In addition to its failure to establish a bright line, the *Ross* doctrine may also be a source of manipulation and abuse by the police. If the obligation to obtain a warrant in secondary container cases now hinges on whether or not the police have probable cause to search the container itself, as opposed to the car in general,<sup>224</sup> police officers now have an incentive to avoid discovering information regarding the exact container housing evidence within a car so long as they have probable cause to search the car itself. From the standpoint of the police officer who is not particularly enamored with the boring routine of traipsing downtown to obtain search warrants, the less she/he knows the better, since knowledge of the particular location of the evidence within the automobile may trigger the warrant requirement. Suppose that the *Ross* facts arise again but this time the informant knows not only that drugs are being dealt from the trunk of a car, but also that they are enclosed by a brown paper bag. When the informant begins to relate this information to the police, the informant may discover that the officer is not interested in hearing about brown paper bags, or of trunks, once the officer has obtained probable cause to believe that drugs are carried *somewhere* in a car. Armed with this information, the officer can conduct a warrantless search of the entire car and all its containers in hopes of finding not just the drugs de-

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221. See *supra* notes 110-113 and accompanying text.

222. See *supra* notes 113-114 and accompanying text.

223. *Id.*

224. See *supra* notes 216-20 and accompanying text.

scribed by the informant but other evidence as well. Therefore, *Ross* and its dicta might be manipulated to justify broad intrusions into entire vehicles when only limited invasions would have been permitted had the searching officer been interested in obtaining readily available information which would more narrowly focus the target of the search.

If, however, *Ross* may discourage discovery of the exact location of evidence, the opaque container rule of *Robbins* would appear to have the opposite effect. Under *Robbins*, officers would know that no closed opaque container could be searched without a warrant, unless, of course, the search was incident to an arrest.<sup>225</sup> Thus, rather than incurring the inconvenience of securing the car or all the various containers therein while a warrant is sought, police may well prefer to secure only the container thought to enclose the evidence. The police would seemingly be interested, whenever possible, in discovering the exact whereabouts of evidence within automobiles. Therefore, by choosing *Ross* over *Robbins* the Court may have opted for more extensive police intrusions into the confines of automobiles themselves, not to mention the containers within. While some law enforcement benefit might be gained, considerable protection of privacy would appear to have been lost.

#### 4. *Secondary Values of Ross*

The *Ross* Court articulated three basic values thought to be promoted by its decision: (1) a bright line standard rectifying previous uncertainty;<sup>226</sup> (2) a net decrease in invasions of privacy because quick warrantless searches of containers would eliminate the need for the extensive privacy invasions inherent in seizing cars and containers while warrants were sought;<sup>227</sup> and (3) an accommodation to the practicalities of law enforcement.<sup>228</sup> As noted above, it is unlikely that *Ross* adequately promotes the first value,<sup>229</sup> nor is the *Ross* doctrine necessary for the effectuation of the second.<sup>230</sup> On the other hand, *Ross* does appear to be a real boon to law enforcement officers by increasing their power to conduct warrantless searches. If this were the only value promoted by *Ross*, the decision would appear to be indefensible, especially in light of the potential for the rule's manipulation and abuse by the

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225. See *supra* text accompanying notes 124-47.

226. 102 S. Ct. at 2161-62.

227. *Id.* at 2171 n.28.

228. See *supra* notes 169-73 and accompanying text.

229. See *supra* notes 212-23 and accompanying text.

230. See *supra* notes 203-04 and accompanying text.

police.<sup>231</sup> Promoting effective law enforcement per se is an insufficient reason for sacrificing constitutionally protected interests.<sup>232</sup> Thus if *Ross* is to be justified, it must be because the decision promotes important interests in addition to those articulated by the Court.

One such interest, avoiding the trivialization of the warrant process, has already been discussed.<sup>233</sup> Two other possible secondary values of *Ross* require attention here.

First, the *Ross* rule might have the effect of preventing arrests which otherwise might have occurred. If, contrary to the teaching of *Ross*, police were required to obtain warrants whenever they encountered cars transporting containers believed to carry evidence, two things would likely occur: Either the police would quickly arrest the driver and occupants of the car and search all the containers in the passenger compartment under *Belton*, or, if an immediate *Belton* search was not possible, they would arrest all the parties and detain them while seeking a warrant. This latter alternative could result in significant and unjustified invasions of privacy if no evidence was in fact being carried in the vehicle. Again, Professor LaFave notes:

Probable cause requires a reasonable probability rather than certainty, and thus it will sometimes happen that a lawful search will not establish guilt but instead will exonerate. If the search occurs immediately and on the scene, this means the driver and occupants of the car will avoid arrest. But if a container found in a car is a possible location of the contraband sought and it can only be seized while a warrant is sought, the chances are that those then associated with the vehicle will also be seized at that time and will be held in custody until such time as a warrant for the container is obtained and executed.<sup>234</sup>

Avoiding such instances of unjustified arrest by permitting suspects to consent to immediate, on the spot, searches of cars and containers may not solve the problem since "[it is by no means clear] that [that] alternative will ordinarily occur to suspects or will routinely be suggested by police."<sup>235</sup>

The other possible secondary value of *Ross* also relates to arrest: *Ross* may have the effect of limiting the intrusiveness of *Belton*.<sup>236</sup> While *Ross* requires probable cause to search automobiles and containers therein, *Belton* permits searches of the passenger

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231. See *supra* text accompanying note 224.

232. "[Law enforcement] efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' government?" 102 S. Ct. at 2181 n.13 (dissenting opinion).

233. See *supra* notes 209-11 and accompanying text.

234. 2 LAFAVE, *supra* note 3, at 162 (Supp. 1982).

235. *Id.*

236. For a discussion of the far-ranging thrust of *Belton*, see *supra* notes 136-47 and accompanying text.

compartment and its containers incident to an automobile occupant's arrest, for whatever offense, even though the presence of a weapon is highly unlikely and evidence of crime is non-existent. *Belton* thus requires far less justification for invasions of automobile privacy than does *Ross*. If, as some suppose, the *Belton* doctrine resulted because of the Court's failure to reach a consensus in the companion *Robbins* case,<sup>237</sup> then there is reason to believe that the Court might reconsider *Belton* now that a majority has spoken in *Ross*. As the author of *Ross*, Justice Stevens for one would likely be attracted to abandoning *Belton* since *Ross* virtually restates the conclusions he reached in his *Belton* concurrence.<sup>238</sup> Perhaps Justice Stevens could now persuade a majority of his colleagues that *Belton* is unnecessary in light of *Ross*.<sup>239</sup>

These values notwithstanding, it is clear, given the decision's defects, that *Ross* is not one of the Court's finest efforts. Indeed, if as discussed immediately below, the case now jeopardizes the continued vitality of the warrant requirement for searches and seizures of all personal effects outside the home, *Ross* may well represent the Court's darkest fourth amendment hour.

## V. BEYOND *ROSS*: THE FUTURE OF THE WARRANT REQUIREMENT IN CONTAINER SEARCHES

Assessments of the future impact of *Ross* must begin with an examination of the extent the case departs from prior case law. In addition to its explicit rejection of *Robbins*, *Ross* appears to have seriously undercut *Coolidge*, *Chadwick*, and *Sanders*. If so, the fourth amendment warrant requirement may now be non-existent for personal effects searches and seizures occurring anywhere outside the home.<sup>240</sup>

### A. *Ross* and Prior Case Law

With its emphasis on "backward exigency" as a necessary condition for permissible warrantless searches and seizures of automobiles, *Coolidge* carved out an area, albeit small, of protection of automobile privacy through the warrant process. Subse-

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237. 2 LAFAVE, *supra* note 3, at 140 (Supp. 1982).

238. See *supra* notes 136-38 and accompanying text.

239. Abandoning *Belton* would not spell the demise of the search incident to arrest exception. Presumably, the doctrine of *Chimel v. California* would still govern searches incident to arrest, even those occurring in automobiles. See *supra* note 128.

240. The Court has given special blessing to searches and arrests occurring within the home. See *supra* note 71. See also *Steagald v. United States*, 451 U.S. 204 (1981) (search warrant required to enter and search home of A, in which police believed B, for whom they had an arrest warrant, was a guest).

quent cases culminating in *Ross* have seemingly rendered *Coolidge*, which was only a plurality opinion, virtually lifeless.<sup>241</sup> Probable cause, alone, appears now to be the only standard the Court requires for permissible searches of automobiles.

As for searches of secondary containers within automobiles, the situation is more complicated.<sup>242</sup> The *Ross* Court apparently sought to leave some vitality to the exclusive control rule of *Chadwick* and *Sanders*.<sup>243</sup> The problem is that there appears to be no principled reason why *Chadwick* and *Sanders* should remain good law after *Ross*.

*Ross* clearly establishes that the police may search without warrants all containers within cars which they have probable cause to believe carry evidence *somewhere* within. The Court's justification for such searches is not based on theories of exigency created through automobile mobility, or even on the view that significant privacy expectations do not attach to automobiles and their contents. Rather, the Court's rationale centers on the view that warrantless container searches in *Ross* situations are permissible because a magistrate could have authorized the searches.<sup>244</sup>

If, indeed, this is now the Court's view, it would appear that warrants are also unnecessary in cases where police obtain probable cause to believe that a specific container, already in a car, contains evidence.<sup>245</sup> In such circumstances, a search of the container would be no more intrusive than that which could be authorized by a magistrate. This same analysis would seem to permit warrantless searches in *Chadwick* and *Sanders* situations where police obtain probable cause to search specific containers *prior* to their being placed in automobiles, even though the police have the containers within their exclusive control at the time of the search.<sup>246</sup> After all, a magistrate could and would authorize such searches if probable cause exists.

Finally, if warrants are no longer required in *Chadwick* and *Sanders* situations, why should they be required for container searches having nothing whatsoever to do with automobiles?<sup>247</sup> If a magistrate could authorize the search of a container sitting on a street corner, why should the police be required to obtain a warrant once they have probable cause to believe the container con-

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241. See *supra* notes 65-67, 186-88 & 212-14 and accompanying text.

242. See *supra* text accompanying notes 215-20.

243. See *supra* text accompanying note 212. See also *supra* text accompanying notes 76-77 & 95-96.

244. See *supra* text accompanying note 193.

245. *Ross* does not necessarily permit warrantless searches in the situation described in the text. See *supra* text accompanying notes 216-20.

246. Again, *Ross* does not necessarily lead to this conclusion. See *id.*

247. See *Katz, supra* note 10, at 583.

ceals evidence? Because the *Ross* rationale is not tied to the traditional justifications for the automobile exception—mobility or lesser expectations of privacy—there appears no reason why the *Ross* rationale should not extend to container searches having nothing whatsoever to do with automobiles.

*Ross's* bootstrapping of container searches into the automobile exception may well sound the death knell to the view that warrantless searches are per se unreasonable unless falling within carefully defined exceptions.<sup>248</sup> If so, the Court will have accepted the position it supposedly rejected in *Chadwick*:<sup>249</sup> belongings, whether they are paper bags or photo albums, dixie cups or diaries, are exempt from the warrant requirement once they are removed from the home.<sup>250</sup>

## B. Recommendations

While the warrant process is far from totally effective,<sup>251</sup> it surely provides significant protection against unjustified invasions of privacy without placing undue costs on law enforcement interests. Therefore, it is hoped that the Court will rethink its current position, especially if *Ross* signals the course outlined immediately above.

Short of the unlikely possibility of overruling *Ross* and starting anew the process of structuring a doctrinally sound automobile exception,<sup>252</sup> the Court should at least limit *Ross* to its facts. War-

248. *See id.* at 601.

249. *See supra* text accompanying note 78.

250. *See Grano, supra* note 17, at 636.

251. *See, e.g.,* note 18 and text accompanying note 210, *supra*.

252. Should such a reexamination of the automobile exception occur, the Court should ground the exception firmly on the exigent circumstances rationale and reject the fiction that automobiles possess minimal expectations of privacy. *See supra* notes 87-89 and accompanying text.

The Court must reconsider *Chambers* and succeeding automobile exception cases, and abandon unsupported generalities. It should reintroduce traditional fourth amendment principles so that the automobile exception is compatible with established search and seizure rules, permitting waiver of the warrant requirement *only* when exigent circumstances or a genuine claim of impracticality exists.

Katz, *supra* note 10, at 572.

[U]nder a true exigent circumstances rationale, no persuasive argument can be made for the retention of *Chambers*. By failing to require "truly" exigent circumstances to justify a warrantless search, the Court in *Chambers* departed from the only rationale that gives appropriate respect to the fourth amendment warrant requirement. Moreover, *stare decisis* should not stand in the way of reconsidering *Chambers*, because *Chambers* is responsible for much of the confusion in present search warrant law. By granting certiorari in *Ross* to reconsider *Robbins*, the Supreme Court has acknowledged that *stare*

rants should be required in cases like *Coolidge* where no "backward exigency" justifies a warrantless intrusion. As for searches of secondary containers, warrants should be required whenever police have knowledge, prior to their actual encounter with an automobile, that a particular container within the vehicle likely houses incriminating evidence.<sup>253</sup> Warrants should be required for searches of all containers, not associated in any way with automobiles, which evidence privacy expectations.<sup>254</sup>

Moreover, the Court should reconsider *Belton* in light of *Ross*. Unless truly justified by exigent circumstances, searches and seizures of private effects within automobiles should not be permitted without a showing of probable cause.

While many of these recommendations may be inconsistent with the logic of *Ross*, that "logic" is itself wanting. Better to be illogical and maintain some integrity for the warrant process than to emasculate that process by following the sweeping implications of a tenuous opinion.

Finally, if the Supreme Court permits *Ross* to spell the demise of the warrant requirement for all container searches and seizures outside the home, state courts should provide increased protection against such warrantless intrusions under their state constitutions.<sup>255</sup> If vigorous protection of privacy is not to be forthcoming from the fourth amendment, similar state provisions must be utilized to guard against unjustified governmental intrusions into the lives of citizens.

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decisis should not prevent a necessary re-examination of the warrant issue.

Grano, *supra* note 17, at 645-46.

253. Police would of course be permitted to secure the containers while warrants are sought. Ordinarily, little time need be spent nor inconvenience incurred in securing the sought after container(s).

254. Identifying containers evidencing privacy expectations is, of course, sometimes difficult. The Court seemed willing to take on such a task, however, by its comments expressed in footnote 13 in *Sanders*. See *supra* text accompanying notes 103-04. For a view that the "type of container" inquiry is not inordinately difficult, see 2 LAFAYE, *supra* note 3, at 153-57 (Supp. 1982). Moreover, an "opaque container" analogue to *Robbins* could be utilized to avoid the necessity of resorting to a "type of container" analysis in container search situations not explicitly covered by *Ross*.

255. See Comment, *supra* note 106, at 316-17. "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

For an example of a state court affording greater constitutional protection of privacy interests associated with automobiles under state law than the Supreme Court recognizes under the fourth amendment, compare *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976) with *South Dakota v. Opperman*, 428 U.S. 364 (1976).



## VI. CONCLUSION

*United States v. Ross* marks a new era of fourth amendment jurisprudence. Potentially, *Ross* has totally eliminated the warrant requirement for searches and seizures of automobiles and has severely limited, if not abolished altogether, the situations in which police must obtain warrants prior to searching containers associated with automobiles. Furthermore, the sweep of the *Ross* opinion may forbode insufficient protection of privacy interests surrounding any and all containers and effects found outside the home.

Excessive crime is a constant threat to safety and security in modern American society. Indeed, the importance of effective law enforcement cannot be downplayed. Nor should the Supreme Court fail to take law enforcement considerations into account in structuring constitutional doctrine. Nevertheless, the Court must also vigilantly champion the cause of constitutionally protected values, not the least of which is the private enjoyment of one's personal effects. "Privacy is not a good that we hold at the pleasure of the government."<sup>256</sup> *Ross* comes dangerously close to suggesting the contrary.

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256. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 51 (1974).