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# UNITED STATES v. ROSS: EVOLVING STANDARDS FOR WARRANTLESS SEARCHES

Lewis R. Katz\*

## I. INTRODUCTION

Over the past twelve years, the Burger Court has eviscerated fourth amendment protection of individual privacy by continually expanding police authority to conduct warrantless searches of automobiles.<sup>1</sup> That process reflects the Court's changing attitudes toward the fourth amendment warrant requirement for police intrusions conducted outside the home.<sup>2</sup>

Most recently, in *United States v. Ross*,<sup>3</sup> the Supreme Court extended the automobile exception to the fourth amendment warrant requirement to closed containers found in lawfully stopped and searched vehicles. Under the exception, police may conduct a warrantless search of a

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<sup>1</sup> See generally 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 (1976); Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127 (1980); Note, *Drawing Lines Around the Fourth Amendment: Robbins v. California and New York v. Belton*, 10 HOFSTRA L. REV. 483 (1982); Note, *Search Incident to Arrest and the Automobile Exception*, 95 HARV. L. REV. 251 (1981); Note, *The Automobile Exception to the Warrant Requirement: Speeding Away From the Fourth Amendment*, 82 W. VA. L. REV. 637 (1980).

<sup>2</sup> The Court has recognized that a different set of fourth amendment values are affected when an intrusion takes place in a public place rather than in a home. In 1976, the Court reaffirmed that a warrant is not necessary to effect an arrest that occurs in a public place irrespective of the existence of exigent circumstances, whether it was practicable to get a warrant, or whether the suspect was about to flee. *United States v. Watson*, 423 U.S. 411 (1976). Moreover, an arrest that is attempted in public cannot be thwarted by a suspect who retreats into a house. In that instance, the exigent circumstances provided by "hot pursuit" permit the arresting officers to enter the house to complete the arrest. *United States v. Santana*, 427 U.S. 38 (1976). Absent exigent circumstances, however, an arrest warrant is needed to enter a dwelling to arrest an occupant, *Payton v. New York*, 445 U.S. 573 (1980), and, absent exigent circumstances, a search warrant is needed to enter a dwelling to arrest a non-resident. *Steagald v. United States*, 451 U.S. 204 (1981).

<sup>3</sup> *United States v. Ross*, 102 S. Ct. 2157 (1982).

vehicle when they have probable cause to believe that contraband or evidence of a crime may be found inside the car.<sup>4</sup> The Burger Court has thus transformed a narrow and tightly drawn exception into a virtually limitless general rule. In so doing, the Court has demonstrated a growing preference for warrantless searches in public places. In *Ross*, the Justices abandoned precedent, for which the ink was hardly dry, leaving little more of the judicial preference for a warrant than a shibboleth to be incanted periodically while the warrant clause is systematically ignored.

The *Ross* decision sought to clarify an ambiguous area of the law by restating and expanding the automobile exemption. In fact the Court went further, holding that the scope of a search under the automobile exception "is no broader and no narrower than a magistrate could legitimately authorize by warrant."<sup>5</sup> This statement provides the rationale underlying the Burger Court's repeated approval of broad warrantless searches even absent the conditions which gave rise to the exception. Moreover, despite its new bright-line rule, the decision leaves significant questions unanswered and may also signal the gradual creation of an entirely new and broader public place-probable cause exception to the warrant clause.<sup>6</sup>

The purpose of this Article is to examine the *Ross* decision and its implications for related fourth amendment areas. It will also discuss the automobile exception, the broad scope of warrantless searches, and the possible emergence of a public place-probable cause exception to the warrant requirement.

## II. *UNITED STATES V. ROSS*

The case arose when District of Columbia police received a telephone tip from a reliable informant that an individual known as "Bandit" was selling narcotics out of a parked vehicle.<sup>7</sup> The informant advised the officers that he had just observed Bandit complete a narcotics transaction and had been told by Bandit that additional narcotics

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<sup>4</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>5</sup> 102 S. Ct. at 2172.

<sup>6</sup> This approach was rejected by the Court as recently as 1977. "We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales." *United States v. Chadwick*, 433 U.S. 1, 7 (1976). "[A] fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home." *Id.* at 11 (footnotes and citations omitted). "I think it somewhat unfortunate that the Government sought a reversal in this case primarily to vindicate an extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy' areas." *Id.* at 17 (Blackmun, J., dissenting).

<sup>7</sup> 102 S. Ct. at 2160.

were in the car's trunk. The informant described Bandit and the automobile.<sup>8</sup> When the officers went to the scene, they observed a vehicle matching the informant's description. A computer check revealed that it was registered to Albert Ross, who fit the informant's description and was known to use the alias "Bandit." The officers saw the vehicle but no one matching Ross' description and they left the area to avoid alerting the suspect.<sup>9</sup> When they returned in five minutes, they saw the automobile being driven from its parking spot. The officers pulled alongside, confirmed that the driver matched the informant's description, stopped the car and ordered the driver from the vehicle. The officers searched Ross, discovered a bullet on the front seat of the automobile and then searched the interior compartment of the vehicle, finding a gun in the glove compartment. Ross was arrested and handcuffed.<sup>10</sup> The officers took Ross' car keys and opened the trunk. There, they discovered two containers: a closed, but unsealed, brown paper bag and a zippered red leather pouch. In the paper bag, the officers found several glassine envelopes containing white powder. The leather pouch was not disturbed. The paper bag was placed back in the trunk next to the zippered pouch and the vehicle was driven to police headquarters.<sup>11</sup> There, the car was subjected to a second search. The paper bag was removed and sent to the police laboratory, which later determined that the envelopes contained heroin. The zippered pouch was opened and found to contain \$3,200.<sup>12</sup>

The government charged Ross with possession of heroin with intent to distribute.<sup>13</sup> Having denied his suppression motion, the trial judge then admitted both the heroin and the money into evidence, and Ross was convicted.<sup>14</sup>

The Court of Appeals for the District of Columbia heard the case twice, once in panel and again en banc,<sup>15</sup> spotlighting the uncertainty surrounding the automobile container cases. On both occasions, the court attempted to fit the case into the framework the Supreme Court created in *Arkansas v. Sanders*,<sup>16</sup> where a majority held that the automobile exception is limited to the vehicle itself and does not extend to containers found in an automobile. The Court in *Sanders* approved a procedure by which a container discovered in a warrantless automobile

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 21 U.S.C. § 841(a) (1972).

<sup>14</sup> 102 S. Ct. at 2160.

<sup>15</sup> 655 F.2d 1159 (D.C. Cir. 1981) (en banc).

<sup>16</sup> 442 U.S. 753 (1979).

search could be seized for safekeeping by police, who would then petition the court for a search warrant.<sup>17</sup> The *Sanders* Court reaffirmed support for the automobile exception but reasoned that none of the proffered justifications for the exception applied to closed containers within a vehicle.

By the time *Sanders* was decided in 1979, application of the automobile exception had already outstripped its original justifications, forcing the Court to develop new rationales for the constant expansion of the warrant exemption.<sup>18</sup> None of those rationales, however, warranted expansion of the exception beyond the vehicle to its contents, and in *Sanders*, the Court drew that constitutional line. Unfortunately, even this line provided inadequate guidance for future cases. The majority had indicated that not all containers were entitled to fourth amendment protection and suggested exclusion where the package fails to demonstrate an owner's expectation of privacy.<sup>19</sup> Clearly within this category were containers which are not closed and where the contents are open to "plain view;" similarly unprotected were containers whose contents are inferable from the outward packaging of the container.<sup>20</sup> But Justice Powell, the author of the *Sanders* majority opinion, implied that other containers fell outside the protection.<sup>21</sup> He predicted that it would be difficult to distinguish between containers which were entitled to the full protection of the warrant clause and those which were not.<sup>22</sup> Many lower courts interpreted Powell's oblique comment as presaging the development of a "worthy container" rule,<sup>23</sup> which Justice Powell alone

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<sup>17</sup> This was the procedure already approved for containers found in a public place. See *United States v. Chadwick*, 433 U.S. 1, 11 (1977).

<sup>18</sup> See, e.g., *Texas v. White*, 423 U.S. 67 (1975) (after arrest of defendant and seizure of car, warrantless search of car upheld; *Chambers* used as authority for the decision without any reference to exigent circumstances, mobility, or the impracticability of obtaining a warrant); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (search of exterior of automobile parked in public lot allowed since defendant's attorney knew police were interested in automobile); *Chambers v. Maroney*, 399 U.S. 42 (1970) (warrantless search of automobile at police station reasonable since a warrantless search would have been reasonable at scene of arrest); see also *South Dakota v. Opperman*, 428 U.S. 364 (1976) (warrantless search of automobile towed after issuance of two parking violations upheld as related to standard police caretaking procedure); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (warrantless search of car two and one-half hours after defendant was hospitalized and car towed to private lot upheld as incident to caretaking function of police).

<sup>19</sup> *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Lower courts, in fact, did have difficulty distinguishing which containers were worthy of the full protection of the warrant clause. See *United States v. Ross*, 655 F.2d at 1174 n.3, 1175 n.4 (Tamm, J., dissenting), for a comprehensive list of containers and types of containers defined as worthy by state and federal courts and a corresponding list of unworthy containers. Most courts seemed to draw the line at containers that were "luggage-like." *Id.* at 1176; see

advocated in his later concurring opinion in *Robbins v. California*.<sup>24</sup>

A majority of the D.C. Circuit panel that first heard *Ross* followed Justice Powell's lead and applied a "worthy container" rule. The panel majority found a difference of constitutional magnitude between the leather pouch and paper bag uncovered in defendant's trunk and held that worthiness is to be determined by a container's likely contents.<sup>25</sup> Although the contents could not be examined in order to determine whether the container might be searched without a warrant, the court said the nature of the contents could be divined from the outward qualities of the container.<sup>26</sup> Judge Tamm, writing for the panel majority, reasoned that the protection of the rule is limited to containers which are likely repositories for intimate personal belongings; therefore the unsealed paper bag might be searched because it was not an appropriate repository for such possessions.<sup>27</sup> The panel ruled that the defendant had no reasonable expectation of privacy in the paper bag once it was lawfully in the hands of the police because a paper bag is quite insubstantial, affording minimal protection against accidental and deliberate intrusions by the curious and dishonest.<sup>28</sup> On the other hand, Judge Tamm distinguished the pouch as a form of luggage representing a "personal sanctuary"; the reasonable person would view it as an appropriate repository for intimate personal possessions, thereby manifesting a reasonable expectation of privacy and worthy of the full protection of the warrant clause.<sup>29</sup> Presumably, if the Supreme Court had adopted a "worthy container" rule, the line drawn at the paper bag by Judge Tamm, though attacked as "acute ethnocentric myopia,"<sup>30</sup> was as sound

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also *United States v. Martino*, 664 F.2d 860 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 3493 (1982); *Virgin Islands v. Rasool*, 657 F.2d 582 (3d Cir. 1981). Even after *Robbins*, however, courts exempted paper bags from the warrant requirement when discovered during search of a car; see *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982) (warrantless search of paper bag found in locked automobile trunk upheld under *Carroll* doctrine); *State v. Anderson*, 316 N.W.2d 105 (S.D. 1982) (search of small film canister upheld as an unworthy container, relying upon the absence of a clear majority in *Robbins*); see also Note, *Warrantless Container Searches Under the Automobile and Search Incident Exceptions*, 9 FORDHAM URB. L.J. 185, at 197-214 (1980); Note, *Drawing Lines Around the Fourth Amendment: Robbins v. California and New York v. Belton*, 10 HOFSTRA L.J. 483 (1982).

<sup>24</sup> 453 U.S. 420 at 429, 434 n.3 (1981) (Powell, J., concurring).

<sup>25</sup> *United States v. Ross*, No. 79-1624, slip op. (D.C. Cir. April 17, 1980), as amended May 6, 1980, *rev'd* 655 F.2d 1159 (D.C. Cir. 1981) (en banc). The panel majority's position is set forth by its author in Judge Tamm's dissent from the en banc decision. 655 F.2d at 1171.

<sup>26</sup> *Ross*, No. 79-1624, slip op.; see also 655 F.2d at 1171-80 (Tamm, J., dissenting).

<sup>27</sup> *Ross*, No. 79-1624, slip op.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *United States v. Ross*, No. 79-1624, slip op. at 13 (D.C. Cir. 1980) (dissent), quoting from *FCC v. Pacifica Foundation*, 438 U.S. 726, 775 (1979) (Brennan, J., dissenting). See also Justice Stewart's plurality opinion in *Robbins v. California*, 453 U.S. 420 (1981). "What one person may put into a suitcase, another may put into a paper bag." *Id.* at 426. Justice

as one could find. Judge Tamm did not find it easy to defend the "worthy container" rule but apparently inferred from Justice Powell's opinion in *Sanders* that the Supreme Court intended to subscribe to such a rule.<sup>31</sup>

A "worthy container" rule hardly provides a meaningful theoretical framework, let alone functional standards, for courts to distinguish that which is constitutionally protected from that which is not. Such a rule would significantly increase the unpredictability of fourth amendment litigation, where complaints of unpredictability already abound.

Moreover, the panel also was faced with the difficulty of determining in a vacuum the expectation of privacy in the container, without also considering the expectation of privacy in the place where the container is stored. While expectations of privacy are theoretically measured by the expectations of the reasonable person, that most fruitful avenue of inquiry was foreclosed from the panel's consideration.<sup>32</sup> A reasonable person would likely assume that a container placed in a locked automobile trunk, while by no means as secure as leaving it at home in a locked closet or for that matter in a bank safe, sufficiently manifests an expectation of privacy to be worthy of constitutional protection. But the structure of inquiry was governed by the automobile exception to the warrant clause. At least from 1970 until *Ross*, the exception rested largely on the theory that one who reveals his presence in public by riding in an automobile sacrifices a privacy interest in the *entire* vehicle, including separate locked compartments.<sup>33</sup> The Supreme Court in *Arkansas v. Sanders*<sup>34</sup> held that this loss of privacy did not carry beyond the vehicle itself, and that most closed containers were not subject to warrantless searches under the authority of the automobile excep-

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Stevens seems to take great satisfaction that *Ross* will not discriminate on the basis of wealth, 102 S. Ct. at 2171 & n.31. But Justice Marshall was not encouraged by such an equalizing result, since the distinction between the way rich and poor package their possessions is eliminated by the loss of protection to both. *Id.* at 2182 (Marshall, J., dissenting).

<sup>31</sup> Judge Tamm correctly inferred Justice Powell's intent about a worthy container rule generally and specifically with reference to a paper bag. *See Robbins v. California*, 453 U.S. at 434 n.3, where Justice Powell wrote, "[m]any others, varying from a plastic cup to the ubiquitous brown paper grocery sack, consistently lack [a reasonable expectation of privacy]." At the time, Judge Tamm had no way of knowing that no other Justice would subscribe to Justice Powell's worthy container doctrine.

<sup>32</sup> The Court in *Arkansas v. Sanders*, 442 U.S. 753, 763 (1979), clearly indicated that the entire car may be subject to a warrantless search, citing *South Dakota v. Opperman*, 428 U.S. 364, 366 (1978) (glove compartment); *Texas v. White*, 423 U.S. 67, 68 (1975) (passenger compartment); *Cady v. Dombrowski*, 413 U.S. 433, 437 (1973) (trunk); *Chambers v. Maroney*, 399 U.S. 42, 44 (1970) (concealed compartment under dashboard); *Carroll v. United States*, 267 U.S. 132, 136 (1925) (behind the upholstery of the seats).

<sup>33</sup> *See United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973).

<sup>34</sup> 442 U.S. 753 (1979).

tion. In reliance on Justice Powell's opinions in *Sanders* and *Robbins*, the panel majority in *Ross* drew constitutional distinctions based upon the size and substantiality of the containers' packaging.<sup>35</sup>

The D.C. Circuit, sitting en banc,<sup>36</sup> rejected its panel majority's reading of *Sanders* and the "worthy container" rule. Instead, the en banc majority adopted the analysis proposed by Judge Bazelon, who had dissented from the panel's conclusion.<sup>37</sup> Writing for the majority, Judge Ginsburg concluded that:

*Sanders* did not establish a "worthy container" rule encompassing bags of leather but not of paper. Rather, it appears to us that *Sanders* reaffirmed the Supreme Court's longstanding position regarding the centrality of the warrant requirement to Fourth Amendment administration: absent a "specifically established and well-delineated" exception, a warrantless search is *per se* impermissible. . . .

No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search "unworthy" containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decisionmakers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch.<sup>38</sup>

Three months later, a majority of the Supreme Court in *Robbins v. California* adhered to the position advanced in *Sanders*, and rejected extension of the automobile exception to a vehicle's contents.<sup>39</sup> Six members of the *Robbins* Court agreed that most closed containers found in a car are protected to the same extent as closed containers found elsewhere, ruling that the justifications which gave rise to the automobile exception—mobility and the diminished expectation of privacy in a vehicle—are inapplicable to the contents of the vehicle.<sup>40</sup> Therefore, the Court in *Robbins* held illegal the warrantless search of the bulky, taped,

<sup>35</sup> *United States v. Ross*, No. 79-1624, slip op. at 14; see also 655 F.2d at 1177 (Tamm, J., dissenting).

<sup>36</sup> 655 F.2d 1159 (1981) (en banc). Two of the three members of the panel did not sit on the en banc reconsideration of the panel decision in *Ross*. They were District Judge Harold Greene, who sat on the panel by designation and who concurred in Judge Tamm's panel opinion, and Senior Circuit Judge David Bazelon.

<sup>37</sup> Judge Bazelon's position was adopted in Justice Stewart's plurality opinion three months later in *Robbins v. California*, 453 U.S. 420, 426-27 (1981).

<sup>38</sup> 655 F.2d at 1161 (citations and footnotes omitted).

<sup>39</sup> 453 U.S. at 424-25, *relying upon* *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Chadwick*, 433 U.S. 1 (1977).

<sup>40</sup> 453 U.S. at 424-25.



opaque packages found in the luggage compartment of the defendant's station wagon.<sup>41</sup> But the majority could agree only on its refusal to extend the automobile exception; there was no other majority position in *Robbins*.<sup>42</sup>

A plurality of four, represented by Justice Stewart, rejected the proposition that the warrant clause only protected containers likely to hold personal effects and noted that the constitutional protection extends to people and their effects, "whether they are 'personal' or 'impersonal.'"<sup>43</sup> According to Justice Stewart, the fourth amendment guarantee attaches because items are placed in closed, opaque containers.<sup>44</sup> Justice Stewart also rejected the "worthy container" rule, thus proposing constitutional protection for all but the two categories specifically excluded by the *Sanders* Court—items that are in plain view or those whose packaging announces their contents.<sup>45</sup>

The other two votes for reversal in *Robbins* were cast by Justice Powell, who wrote a separate concurring opinion,<sup>46</sup> and Chief Justice Burger, who voted with the majority but concurred in neither of the written opinions.<sup>47</sup> Justice Powell confirmed that Judge Tamm had interpreted his *Sanders* opinion correctly by advocating a "worthy container" rule. He rejected both the plurality's bright-line rule extending fourth amendment protection to all but the specifically excluded containers<sup>48</sup> and the dissent's bright-line rule extending the automobile exception to all containers found in any lawfully stopped and searched vehicle.<sup>49</sup> At the same time, Justice Powell was attracted to the dissent's advocacy of an expanded automobile exception as a way of providing agreement for a majority of the Court on an issue that had provoked incessant litigation.<sup>50</sup> This attraction increased and ultimately led him to switch his position in *Ross*.<sup>51</sup>

In *Sanders*, Chief Justice Burger had concurred with the majority but did not think it necessary in that case to decide whether the automo-

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<sup>41</sup> *Id.* at 428-29.

<sup>42</sup> Justice Stewart announced the judgment of the Court and wrote an opinion in which Justices Brennan, White, and Marshall joined. Justice Powell wrote an opinion concurring in the judgment. Chief Justice Burger concurred in the judgment without a written opinion. Justices Rehnquist, Blackmun, and Stevens dissented.

<sup>43</sup> 453 U.S. at 426.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 427.

<sup>46</sup> *Id.* at 429.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 435.

<sup>50</sup> *Id.*

<sup>51</sup> 102 S. Ct. at 2173.

bile exception applied to the contents of a vehicle.<sup>52</sup> His silent vote in *Robbins* was evidence that he had resolved this question against expansion of the automobile exception.<sup>53</sup> His contradictory vote in *Ross* less than a year later was again unaccompanied by any separate statement explaining his reasoning or his apparent self-reversal. In *Ross*, the Chief Justice joined in the majority opinion, which was a restatement of the dissent against which he had voted in *Robbins*.<sup>54</sup>

The inability of the *Robbins* majority to present a unified theory in support of its decision set the stage for the reconsideration of the issue the following term in *United States v. Ross*.<sup>55</sup> The absence of a clear majority position was compounded by other factors. First, Justice Stewart, the author of the plurality position and one of the principal advocates of strict limitations upon exceptions to the warrant requirement, retired at the end of the term, days after delivering his opinions in *Robbins* and its companion case, *New York v. Belton*.<sup>56</sup> Second, Justice Powell's "worthiness" evaluation was clearly unacceptable to the rest of the Court. Moreover, Powell himself had expressed growing discomfort with the uncertainty in this area, which ultimately led him to approve the dissenters' bright-line rule.<sup>57</sup> Finally, Justice Stevens, who in seven years on the Court had rejected bright-line rules on fourth amendment issues in favor of strict limitations on exceptions to the warrant requirement,<sup>58</sup>

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<sup>52</sup> 442 U.S. at 766-67.

<sup>53</sup> *But see* State v. Hernandez, 408 So. 2d 911, 915-16 (La. 1981), where the Louisiana Supreme Court interpreted the Chief Justice's silent concurrence in *Robbins* as a reiteration of the point he raised in *Sanders*. Nothing in the *Robbins* facts, however, justified the Louisiana court's conclusion. In *Robbins*, probable cause focused on the entire car. The police were not aware of the defendant or his packages before the car was stopped on the highway.

<sup>54</sup> 102 S. Ct. at 2159-73.

<sup>55</sup> The Court granted certiorari as soon as it reconvened in October, 1981, and directed the parties to brief whether the decision in *Robbins* should be reconsidered. 102 S. Ct. 386 (1981).

<sup>56</sup> 453 U.S. 454 (1981). Justice Stewart's opinions in *Robbins* and *Belton* were not paradigms of consistency. Although he concurred in *Chambers v. Maroney*, 399 U.S. 42, 54-55 (1970), he would not have reached the issue of the search. In *Coolidge v. New Hampshire*, 403 U.S. 433 (1971), he argued for a much narrower automobile exception. In *Texas v. White*, 423 U.S. 67 (1975) (per curiam), he voted with the majority and seemed to accept the greatly expanded exception. *See generally* Lewis, *Justice Stewart and Fourth Amendment Probable Cause: "Swing Voter" or Participant in a "New Majority"?*, 22 LOY. L. REV. 713 (1976). In *Robbins*, Justice Stewart argued against expansion of the automobile exception, but in *Belton* he wrote the majority opinion allowing the broadest latitude for the exemption of incidental searches when the site of an arrest is an automobile.

<sup>57</sup> 453 U.S. at 430, 435. The role that the Chief Justice had carved out for himself in the resolution of this issue must have been known to the other Justices who participated in the *Robbins* conference discussion; only they were privy to his uncertainty or lack of commitment to the result in that case.

<sup>58</sup> *See, e.g.,* Pennsylvania v. Mimms, 434 U.S. 106, 115 (1977) (Stevens, J., dissenting); *see also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403-04 (1974) (fourth amendment should speak to police and speak to them intelligibly).

indicated in his *Robbins* dissent that these principles were inapplicable when considering automobiles.<sup>59</sup>

Facilitated by one retirement and two vote changes, six Justices were thus able to coalesce around the views of Justice Stevens to produce a majority opinion in "this troubled area."<sup>60</sup> The *Ross* Court held that a warrantless search under the automobile exception, where police have legitimately stopped an automobile and have probable cause to believe that contraband is concealed within it may be "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'"<sup>61</sup>

Justice Stevens reviewed the origins of the automobile exception to the warrant requirement. The exception was created in *Carroll v. United States*<sup>62</sup> as a response to the impracticability of securing a warrant in cases involving the transportation of contraband goods. The Court has repeatedly rejected an alternative Justice Harlan proposed after *Carroll* in *Chambers v. Maroney*,<sup>63</sup> that would have required police first to seize the vehicle and then obtain a warrant before conducting a search. In *Ross*, Justice Stevens restated in a footnote the Court's reasoning for rejecting the Harlan approach;<sup>64</sup> he also sought to explain why the Court had approved warrantless searches where automobiles have already been seized, are safely in police custody, and where the security of the evidence is no longer at risk. The decision to expand the exception, he contended, was based on the "practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests."<sup>65</sup> According to Justice Stevens, the Court has refused to require the posting of a guard or the towing of the vehicle because the privacy interest of the occupants has already been intruded upon by the stopping.<sup>66</sup> Moreover, he suggested that such a rule would often leave the car's occupants stranded on the highway while the car was seized.<sup>67</sup> Justice Stevens stressed that the exception is only available where objective facts would justify issuance of a warrant by a magistrate "and not merely on the subjective good faith of the police officers."<sup>68</sup>

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<sup>59</sup> 453 U.S. at 447 (Stevens, J., dissenting).

<sup>60</sup> 102 S. Ct. at 2168.

<sup>61</sup> *Id.* at 2159.

<sup>62</sup> 267 U.S. 132 (1925).

<sup>63</sup> *Chambers v. Maroney*, 399 U.S. 42, 61-65 (1970) (Harlan, J., dissenting).

<sup>64</sup> 102 S. Ct. at 2163 n.9.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Judge Wilkey originally offered this line of reasoning when the Court of Appeals for the District of Columbia heard the case. See 655 F.2d at 1196-99 (Wilkey, J., dissenting).

<sup>68</sup> 102 S. Ct. at 2164. This brief reference to the good faith exception to the exclusionary rule is not likely to be dispositive of the issue. See *United States v. Williams*, 622 F.2d 830 (5th

The automobile exception which the Burger Court inherited was limited and carefully drawn. It recognized that the mobility of a vehicle would create, in certain circumstances, an exigency which would allow police officers, who lawfully stopped a vehicle upon a highway, to conduct an immediate search without first obtaining judicial permission. The automobile exception to the warrant requirement, devised by Chief Justice Taft in *Carroll*,<sup>69</sup> recognized the existence of an emergency situation where police, having probable cause to believe that evidence would be found in a vehicle, would lose the opportunity to search for and seize the evidence if forced to delay the search while a warrant was sought and the automobile was driven away. The exception was limited only to those situations where the delay caused by recourse to a judge or magistrate created the potential of forever denying to police the opportunity to recover contraband or evidence of a crime. It was thus reasonable for police to enter and search the vehicle without prior judicial permission because the alternative actually would have frustrated legitimate law enforcement purposes.<sup>70</sup> There was no prior arrest in *Carroll* which would have immobilized the occupants of the vehicle and prevented them from removing the car.<sup>71</sup> The *actual* mobility of the particular automobile constituted the exceptional circumstance which provided the excuse for bypassing the warrant process.

The *Ross* Court claimed that Chief Justice Taft's failure to consider a temporary seizure of the vehicle serves as the basis for a broader reading of the *Carroll* rule.<sup>72</sup> In both cases, however, the police clearly could have temporarily seized the car while they petitioned for a warrant.<sup>73</sup> The occupants of the vehicle, not then under arrest, would have been displaced and inconvenienced, but their privacy interest in the vehicle,

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Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), where 13 out of 24 judges sitting en banc held that evidence is not to be suppressed under the exclusionary rule when officers discover it in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. *Id.* at 846-47; *see also* Mertens and Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365 (1981). The Supreme Court recently heard arguments in *Illinois v. Gates*, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980), *aff'd*, 85 Ill.2d 376, 423 N.E.2d 887 (1981), *cert. granted*, 102 S. Ct. 997 (1982), *restored to calendar for reargument*, 103 S. Ct. 436 (1983), in which the Court directed the parties to argue the issue of the good faith exception.

<sup>69</sup> 267 U.S. 132 (1925).

<sup>70</sup> *Id.* at 153; 102 S. Ct. at 2163.

<sup>71</sup> 267 U.S. 132 (1925). Justice Marshall raised this point in his dissent when he argued that it is not always impracticable to obtain a warrant before searching an automobile. 102 S. Ct. at 2178 n.6 and accompanying text, *citing* 2 W. LAFAVE, *SEARCH & SEIZURE* 511 (1978 & Supp. 1982). *But see also* 655 F.2d at 1196-1200 (Judge Wilkey analyzes and emphasizes this point).

<sup>72</sup> 102 S. Ct. at 2163 n.9; *see also id.* at 2178-79 (Marshall, J., dissenting).

<sup>73</sup> *Id.* at 2178; *see also* Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 567 (1982).

while interrupted, would not have been nullified by police acting without judicial authorization. The Court in *Carroll* never considered this possibility, and the Burger Court has rejected it.<sup>74</sup> The latter has been unwilling to categorize seizure of a vehicle as significantly less an intrusion upon the protected privacy interest, although the Court does consider temporary seizures in other contexts a preferable and lesser intrusion.<sup>75</sup> In *Ross*, Justice Stevens attributed great significance to the *Carroll* Court's failure to consider a temporary seizure as a substitute for the immediate search. That omission formed part of the basis for Justice Stevens's broader rule and allowed him to abandon the "actual mobility" rationale for the exception.

At the time of the *Carroll* decision, the privacy rationale was largely undeveloped as the basis of fourth amendment protection. The Court had not yet focused upon varying privacy interests, nor upon the need to minimize sanctioned intrusions. Justice Stevens suggested that a "seizure pending warrant" rule would often leave motorists stranded on the highway while their automobile was removed for safekeeping.<sup>76</sup> This solicitude for stranded motorists is incredible, particularly when offered as a revisionist basis for the *Carroll* decision by a Supreme Court which extended the exception to cases where motorists are arrested or otherwise incapacitated and where it is not necessary to conduct an immediate search.<sup>77</sup> In none of the cases in which the Burger Court has extended the automobile exception is such solicitude appropriate; in all of those cases, the occupants of the vehicles were already in police custody and thus were unlikely to be inconvenienced by removal of their car pending a search warrant.<sup>78</sup> As Justice Harlan suggested in 1970,<sup>79</sup> even if the case should arise where a motorist is terribly inconvenienced by recourse to the warrant procedure, he can waive a warrant and consent to a search.<sup>80</sup>

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<sup>74</sup> *United States v. Ross*, 102 S. Ct. at 2163 n.9; *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

<sup>75</sup> See *United States v. Van Leeuwen*, 397 U.S. 249 (1970), where the Court acknowledged the differences between a search and a seizure of a mailed package en route. The Court held the temporary seizure adequately protected the defendant's privacy interest, but that any further intrusion on that interest required a magistrate's approval.

<sup>76</sup> See *United States v. Ross*, 655 F.2d at 1196-1200 (Wilkey, J., dissenting), where this proposition was first advanced.

<sup>77</sup> The privacy rationale was not as sophisticated in 1925 and the concept of varying privacy interests had not been developed.

<sup>78</sup> E.g., *New York v. Belton*, 453 U.S. 454 (1981); *Colorado v. Bannister*, 449 U.S. 1 (1980); *Texas v. White*, 423 U.S. 67 (1975); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970). See W. LAFAVE, *supra* note 71, at 512-19.

<sup>79</sup> *Chambers v. Maroney*, 399 U.S. 42, 61-65 (1970) (Harlan, J., dissenting).

<sup>80</sup> Perhaps this type of consent would confront an occasional motorist with a Hobson's choice, but the Court has not deemed such choices unpalatable when involving other constitutional rights, provided that the individual retains control over the course of events. See, e.g.,

Having reaffirmed the unassailability of the automobile exception, the Court began the task of reversing the holding in *Robbins* by extending the exception to the contents of lawfully searched vehicles.<sup>81</sup> The *Robbins/Sanders* standard dictated that courts consider the vehicle and its contents separately when determining the necessity for a warrant. In both cases, the Court concluded that the reasoning which underlies the warrantless search of a vehicle was inapplicable to its contents, and that no independent justification for bypassing a warrant could be fashioned. However in *Ross*, the Court rejected this framework. It was sufficient, according to Justice Stevens, that the search which turned up the container was itself exempted from the warrant requirement; no separate justification need be made for a warrantless search of the container.<sup>82</sup> Consequently, the scope of a warrantless search authorized by the automobile exception, Justice Stevens wrote, is as broad as a search conducted with a warrant.<sup>83</sup> Under this approach, the exception that allows the warrantless intrusion is equated with a warrant. It secures entry for the police officer and does not circumscribe the scope of the subsequent search. The only limitation on a search under the automobile exception, like the limitation of a search conducted pursuant to a warrant, is defined by the object of the search. The authorization to search extends to the entire automobile, as well as to any container within the automobile which may house the object that is sought.<sup>84</sup>

### III. THE AUTOMOBILE EXCEPTION AFTER *ROSS*

The automobile exception stands now as a general exception to the warrant requirement.<sup>85</sup> During the years of the exception's uncontrolled growth, the high Court has failed to develop a rationale to justify the exception's current dimensions, nor has the Court explained its vast departure from established fourth amendment doctrine. As the scope of

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Oregon v. Kennedy, 102 S. Ct. 2083 (1982), where the Court, per Justice Rehnquist, held that "overreaching" is an overly expansive standard for application of the double jeopardy clause following a mistrial resulting from the defendant's own motion. Thus, where prosecutorial misconduct arises, counsel for the defense is faced with the choice between a possibly prejudiced jury or waiver of his client's right to a verdict from that jury.

<sup>81</sup> 102 S. Ct. at 2169.

<sup>82</sup> *Id.* at 2172.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *United States v. Ross*, 102 S. Ct. 2157 (1982). As Professor Kamisar has recently noted, the Court adopted the principle, if not the language, of the Government's argument that the automobile exception is the "functional equivalent of a warrant to search an automobile." See Kamisar, *United States v. Ross: The Court Takes Another Look at the Container-in-the-Car Situation*, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-82* (4th ed. 1983) (to be published in 1983).

the automobile exception has incrementally grown, fundamental fourth amendment principles have been cast aside in favor of transient rules.<sup>86</sup> In turn, these new rules have also given way with each new factual deviation. In the name of law enforcement expedience, the Court has endorsed each of these extensions, mocking basic fourth amendment jurisprudence to such a great degree that the current automobile exception, despite the Court's protests to the contrary, effectively undermines all applications of the warrant requirement.<sup>87</sup>

The Supreme Court has said consistently that the fourth amendment guarantee against unreasonable searches and seizures mandates "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable. . . ." <sup>88</sup> This statement reflects the view that a system that interposes a neutral judicial officer between citizens and police best protects the privacy interests of Americans. The Court's premise has been that in order to be effective, the fourth amendment must operate before the intrusion is complete, when the protection is prophylactic rather than corrective.<sup>89</sup> Reasonableness is to be determined in the first instance by compliance with the demands of the warrant clause.

This traditional analysis demands that the warrant requirement be excused only when the cost to society resulting from the delay is great and jeopardizes legitimate societal interests. For example, a warrantless search is permissible if the delay may seriously jeopardize society's opportunity to conduct the search at all or if it may in any way endanger the safety of law enforcement officers. The burden rests upon the government to demonstrate that the intrusion fits within "a few specifically established and well-delineated exceptions" to the warrant requirement.<sup>90</sup> In the past, the Supreme Court did not look upon the warrant requirement as a formality designed to be waived at the mere spectre of police inconvenience. In fact, in *McDonald v. United States*,<sup>91</sup> the Court indicated that the state must show "some grave emergency"<sup>92</sup> before it may bypass the shield which the fourth amendment erects between a citizen and the police. Moreover, in *McDonald*, the Court said that police inconvenience does not constitute such an emergency. Those situations which satisfy the "grave emergency" test have been "jealously and

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<sup>86</sup> See *infra* Part IV.

<sup>87</sup> See *infra* Part V.

<sup>88</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967); see also *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

<sup>89</sup> *United States v. Ventresca*, 380 U.S. 102, 105-07 (1965) (search warrant); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (arrest warrant).

<sup>90</sup> *Katz v. United States*, 389 U.S. at 357.

<sup>91</sup> 335 U.S. 451 (1948).

<sup>92</sup> *Id.* at 455.

carefully drawn" to ensure that the exceptions do not become the general rule and are "justified by absolute necessity."<sup>93</sup>

As the Court has observed, the warrant requirement does not commit protection of privacy to the discretion of "zealous officers" who are "engaged in the often competitive enterprise of ferreting out crime."<sup>94</sup> The amendment does not seek to deny police opportunities to search for criminal evidence, but simply requires that a magistrate prescreen certain police activities to ensure that individual privacy is not unreasonably invaded.<sup>95</sup> Thus, the warrant process provides an objective determination of probable cause coupled with reasonable limitations on the scope of intrusions, rather than placing total reliance for the protection of privacy on an after-the-fact suppression process which is "too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."<sup>96</sup>

From 1925 until 1970, the automobile exception was confined to searching vehicles whose occupants were not under arrest. There was no pressure for its expansion because most automobile searches followed arrests, and the scope of searches incident to arrest was then virtually limitless.<sup>97</sup> Thus the automobile exception was rarely invoked. How-

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<sup>93</sup> *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting); *McDonald v. United States*, 335 U.S. 451, 455 (1948); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). Attempting to limit warrantless intrusions through the judicial preference for a warrant is consonant with the intent of the framers of the amendment. Though not faced with the plethora of warrantless searches found in modern America, the framers were highly suspicious of official incursions into individual privacy not subject to prior judicial review. For a recent discussion of the historical background and circumstances which led to the fourth amendment, see Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 617-20 (1982).

In colonial times warrantless searches, except for those incident to arrest, were unknown and unauthorized under English law. The warrant requirement suited the temper of the colonists whose privacy the colonial authorities had systematically invaded. By imposing an independent judiciary between law enforcement officers and the people and requiring warrants with adequate particularization supported by probable cause, the framers conformed the rules to their vision of a society in which individual rights would be protected. *Id.*

<sup>94</sup> *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

<sup>95</sup> *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

<sup>96</sup> *Beck v. Ohio*, 379 U.S. 89, 96 (1964). Although developed largely through rhetoric, the preference for a warrant evolved not without action. The Court indicated that in a close case where reasonable appellate judges might differ on whether the facts constituted probable cause, "a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965). Even if the court did not always follow through with the promise implied in *Ventresca*, see, e.g., *Spinelli v. United States*, 393 U.S. 410 (1969); *Draper v. United States*, 358 U.S. 307 (1959), it was engaged in the process of educating lawyers and law enforcement officers that the Constitution, absent exceptional circumstances, see *Chapman v. United States*, 365 U.S. 610 (1961), required a warrant. Delineation of the exceptions was cautious, extending only as far as necessary to accomplish the limited, but substantial, societal needs that underlay and generated the creation of an exception.

<sup>97</sup> See *Scher v. United States*, 305 U.S. 251 (1938), cited by Justice Stevens in *Ross* to support his application of the *Carroll* doctrine. 102 S. Ct. at 2169. However, in *Scher*, the



ever, when the Supreme Court reviewed the scope of searches incident to arrest in *Chimel v. California*,<sup>98</sup> it reduced their range to the area within the reaching or grabbing distance of the arrestee. Once the driver of a vehicle was arrested and removed from the automobile, he was no longer within reaching distance of objects within the vehicle.<sup>99</sup> The automobile exception reemerged as a device to allow police to conduct warrantless searches of vehicles following an arrest, assuming there is independent probable cause to conduct a search.

One year after the end of the Warren era, the Court abandoned mobility as the *sine qua non* for warrantless searches of vehicles, eliminating that factor which had allowed the *Carroll* Court to categorize as exceptional the circumstances which necessitated an immediate search in that case. In *Chambers v. Maroney*,<sup>100</sup> the vehicle was stopped and its occupants arrested. Just one year earlier, a search of the vehicle would have been upheld as incident to the arrest of the car's occupants. With that channel now closed by the standard imposed in *Chimel*, the Court looked to the automobile exception for justification of the warrantless search. The only problem was that the critical test relied upon by the *Carroll* Court—that an immediate search was necessary to prevent losing the opportunity—would not have authorized the warrantless intrusion in *Chambers*. After groping for a rationale, the Court concluded that a car on the highway, though under police control, is always mobile.<sup>101</sup> The *Chambers* rationale, however, promised still broader application of

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defendant was under arrest *before* the search took place and, in deciding the case, the Court used *both* the automobile exception and the search incident to arrest rationale to justify the search. 305 U.S. at 255.

<sup>98</sup> 395 U.S. 752 (1969).

<sup>99</sup> Nevertheless, some courts continued to use search incident to arrest as a rationale for upholding warrantless searches of an automobile after the arrestee was out of the car and in police custody. For example, the New York courts, prior to the decision in *Belton*, followed such a course. See, e.g., *People v. McDonald*, 61 A.D.2d 1081, 403 N.Y.S.2d 337 (1978) (upholding an automobile search by officer driving defendant's car to station while defendant transported in police car); *People v. Abramowitz*, 58 A.D.2d 921, 396 N.Y.S.2d 729 (1976) (mem.) (upholding as incident to arrest two searches of leather bag found behind driver's seat, after defendant out of car); *People v. Cofield*, 55 A.D.2d 113, 389 N.Y.S.2d 602 (1976), *aff'd mem.*, 43 N.Y.2d 654, 371 N.E.2d 533, 400 N.Y.S.2d 815 (1977) (although search justified under automobile exception, court relied on *Chimel*, upholding search because "the maximum intrusion—detention of the individual—had already taken place"); *People v. Goldstein*, 60 Misc. 2d 745, 304 N.Y.S.2d 106 (Sup. Ct. 1969) (upholding search of glove compartment as incident to an arrest when an officer was driving the car to the police station, even though the arrestee was in a different car and in the custody of another officer).

Professor LaFave has cataloged the reluctance of some courts to apply the *Chimel* standards in his treatise. See W. LAFAVE, *supra* note 71, at 413-19, 499-506.

<sup>100</sup> 399 U.S. 42 (1970).

<sup>101</sup> *Id.* at 51; see also *Robbins v. California*, 453 U.S. 420, 440 (1981) (Rehnquist, J., dissenting).

the *Carroll* exception to cars in police custody even after they are removed from the highway.

The result of the Court's holding in *Chambers* was to legitimize a warrantless search where there was no conceivable need for police to proceed without first obtaining a warrant. When the Court approved warrantless searches of automobiles in police custody, securely immobilized and removed to the police station, solely for the sake of police convenience, it strained theoretical justifications for the automobile exception.

The Court could have achieved the same result in *Chambers* with a limited rule permitting warrantless searches of vehicles stopped on the highway when there is probable cause to conduct a search. In addition, such a rule could have countenanced searches conducted away from the highway where a search at the scene is demonstrably unsafe.<sup>102</sup> Even this rule, however, would have marked a significant deviation from *Carroll*. Instead, the *Chambers* Court fashioned a rule to allow police officers with probable cause to search an automobile at the scene or later at the police station in the absence of both a warrant and exigent circumstances.<sup>103</sup> The mobility of the automobile lost all significance when the Court adopted a general exception applicable even to those vehicles "in which the possibilities of the vehicle's being removed or evidence in it destroyed were . . . non-existent."<sup>104</sup>

The Court substituted a rationale based upon the diminished expectation of privacy in the automobile.<sup>105</sup> It reasoned that the privacy expectation of a person who reveals himself to public view by occupying an automobile is necessarily reduced. In addition, the Court considered the fact that a vehicle is primarily used for transportation rather than as a repository for personal effects, and that government extensively regulates its use.<sup>106</sup> The Court has never explained convincingly how this reasoning supports searches of separate locked compartments or of objects which are not in plain view and are stored in the recesses of a vehicle. Moreover, it completely contradicts the principle recognized by the

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<sup>102</sup> In *Chambers v. Maroney*, 399 U.S. 42, 52 n.10, the Court recognized that police safety deserved special consideration:

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

<sup>103</sup> *Texas v. White*, 423 U.S. 67, 68 (1975) (per curiam).

<sup>104</sup> *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973).

<sup>105</sup> See *Arkansas v. Sanders*, 442 U.S. 753, 762-66 (1979); *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974).

<sup>106</sup> See *Robbins v. California*, 453 U.S. at 424; *Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979); *United States v. Chadwick*, 433 U.S. at 12-13; *Cardwell v. Lewis*, 417 U.S. at 590.

Court that one demonstrates an expectation of privacy by exerting caution and removing conduct and effects from public scrutiny.<sup>107</sup>

The majority in *Ross* peremptorily abandoned the privacy rationale as the theoretical linchpin of the expanded automobile exception. Instead, Justice Stevens returned to *Carroll* and argued that the exception has always rested upon the impracticability of requiring a warrant for the search of automobiles.<sup>108</sup> The Court cited language in the *Carroll* opinion purportedly demonstrating that impracticability is the basis of the exception and that, to goods in transport, the exception is as old as the fourth amendment itself.<sup>109</sup> The *Carroll* language pertaining to impracticability, however, does not support a general rule allowing warrantless searches when an immediate search is unnecessary and a warrant could be practicably obtained. Chief Justice Taft's discussion of practicability was inextricably linked to his discussion of mobility and the search for objects which could be "put out of reach of a search warrant."<sup>110</sup> He was particularly concerned with the search in which "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."<sup>111</sup> The Taft opinion was limited to situations where the opportunity to seize evidence would be thwarted if a warrantless search could not be conducted.

Under the vague rubric of "impracticability,"<sup>112</sup> the Court has thus created a general exemption, despite the overwhelming number of situations in which the warrant requirement imposes no great burden upon police and frustrates no legitimate law enforcement objective. The automobile exception repudiates a central teaching of the fourth amendment that police inconvenience does not justify bypassing the constitutional warrant requirement.<sup>113</sup> Moreover, the Court has not even limited the exemption to situations where police could demonstrate that the warrant requirement posed a serious inconvenience. Instead, the Court has created a blanket exemption covering, as well, those cases where recourse to a warrant imposes no inconvenience other than that intended under the fourth amendment. Finally, and perhaps most trag-

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<sup>107</sup> "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

<sup>108</sup> 102 S. Ct. at 2169-70; *cf.* *Arkansas v. Sanders*, 442 U.S. 753, 761-66 (1979).

<sup>109</sup> *See* Grano, *supra* note 93, at 617-20.

<sup>110</sup> *United States v. Carroll*, 267 U.S. 132, 151 (1925).

<sup>111</sup> *Id.* at 153.

<sup>112</sup> The Court has succumbed to Justice Rehnquist's argument that requiring a warrant imposes frustrating burdens on law enforcement agencies in the "sparsely populated 'cow counties' located in some of the southern and western states" where "the nearest magistrate may be 25 or even 50 miles away." *Robbins v. California*, 453 U.S. at 438-39 (Rehnquist, J., dissenting).

<sup>113</sup> *McDonald v. United States*, 335 U.S. 451, 454-55 (1948).

ically, the Court made no effort to demonstrate that requiring a warrant prior to the search of either an immobilized vehicle or the containers found within the vehicle frustrates legitimate law enforcement objectives. Rather, the Court has simply devised a general rule which diminishes constitutional protection and enhances unchecked police discretion.

*Ross*' extension of the automobile exception to containers found in a lawfully searched vehicle proved a more difficult hurdle. That barrier existed because the Court's rationale for the automobile exception does not remotely apply to closed, opaque containers discovered in an automobile. Containers seized outside automobiles may be held but may not be searched until judicial authorization is obtained. Containers hidden in a vehicle would reasonably fall within the rationale of this rule and not be subject to an exception resting upon a diminished expectation of privacy in vehicles.<sup>114</sup> Moreover, the inconvenience justification associated with towing and securing a vehicle does not extend to a package found in the car. There is simply no greater inconvenience involved in transporting and securing a container seized from an automobile than one found anywhere else.

Justice Stevens, in *Ross*, did not attempt to construct an independent justification for the search of containers found in an automobile. Instead, the Court held that an officer who has probable cause to conduct a warrantless search of an automobile may, as a matter of course, search the entire vehicle and any container found within the vehicle that may house the sought-after object.<sup>115</sup> Thus, the search of containers flows automatically from the automobile exception. This approach will, in the long run, be more pervasively destructive of the warrant requirement than any strained necessity argument would have been.<sup>116</sup> It equates the scope of a warrantless search, at least one accompanied by probable cause, to a search undertaken with a warrant. It extends the scope of such searches beyond what was necessary to fulfill the societal objectives which gave rise to the exemption from the warrant requirement.

According to Justice Stevens, the *Carroll* rationale supports the expansive view of the scope of warrantless searches. Once again, however, the *Carroll* opinion never focused on this issue.<sup>117</sup> There, the Court upheld the admissibility of contraband which was found only after the li-

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<sup>114</sup> The notion that one's privacy interest in an automobile is diminished because of the state's regulation of vehicles is inapplicable as well. See Katz, *supra* note 73, at 572 n.80.

<sup>115</sup> 102 S. Ct. at 2172.

<sup>116</sup> See *infra* Part IV.

<sup>117</sup> See *supra* notes 69-80 and accompanying text.

quor agents "opened the rumble seat and tore open the upholstery."<sup>118</sup> From this, Justice Stevens assumed that the Court would have also authorized a warrantless search if the agents had then encountered closed containers under or within the upholstery.<sup>119</sup> The significant change in the law engineered in *Ross* rests only on this unsupported assumption.

Having assumed that the *Carroll* exception applies to all vehicles and their contents, Justice Stevens reintroduced the privacy formula to fortify his conclusion. Just as an individual's interest in the privacy of his home must give way to a magistrate's warrant, "an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband."<sup>120</sup> Then Justice Stevens quite correctly concluded that the privacy interests in a car's trunk or glove compartment are no less than those in a movable container. However, the flaw in the argument is that the *Carroll* Court did not exempt all automobiles from the warrant requirement. By starting with the diminished expectation of privacy in automobiles, the Burger Court expanded the *Carroll* exception to all vehicles. But the Court has never successfully explained how that rationale, absent a necessity to conduct a warrantless search, applied to the separate, locked compartments of immobilized vehicles. Now Justice Stevens has taken the exception full circle. He discarded the privacy rationale as the basis for the exception and used *Carroll* to support a broad general exemption never anticipated by the *Carroll* Court. He then concluded that the privacy interest presents no obstacle to extending the exception to closed containers.

Treating the contents of a vehicle differently from the vehicle itself was certainly anomalous. The confusion, however, was not caused by *Sanders* or *Robbins*, which correctly applied traditional fourth amendment doctrines. The unsupported and result-oriented growth of the automobile exception created the confusion and left no analytical structure with which to work out future cases. The majority opinion in *Ross* ends the confusion in the area of automobile searches and attempts to create a new analytical framework in which to resolve these questions, but it is a framework that requires a revisionist reading of the automobile cases that preceded it. Moreover, it is inconsistent with the parameters which the Court had developed for the consideration of warrantless searches. Not only has the Court finally succeeded in making the word "automobile" "a talisman in whose presence the Fourth Amendment

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<sup>118</sup> 102 S. Ct. at 2169 (citing *Carroll v. United States*, 267 U.S. at 136).

<sup>119</sup> 102 S. Ct. at 2169. Justice Stevens went further and maintained that an opposite decision would have been "illogical." Similar support is found in the *Chambers* opinion where the evidence was found concealed in a compartment under the dashboard. 399 U.S. at 44.

<sup>120</sup> 102 S. Ct. at 2171.

fades away and disappears,"<sup>121</sup> but again has cast doubt upon the limits of warrantless searches and the need for warrants when intrusions occur in public places.

#### IV. THE SCOPE OF WARRANTLESS SEARCHES AFTER *ROSS*

Aside from its anomalous treatment of automobile searches, *Ross* promises to affect other fourth amendment issues. By merging the automobile and its contents and abandoning the effort to establish an independent exemption for searching receptacles contained in the vehicle, the Supreme Court was forced to offer a new analysis of the scope of warrantless searches generally and of automobile searches in particular.

For more than a quarter of a century, warrantless intrusions were treated as extraordinary and subject to strict control.<sup>122</sup> That control was exercised over the decision to make the initial intrusion as well as over the scope of that intrusion.<sup>123</sup> By requiring the law enforcement authority to justify the scope of the warrantless search as well as over the initial intrusion, the Court emphasized the extraordinary nature of these exceptions.<sup>124</sup> Relieving the government from justifying the scope of its search strips the warrant requirement of half its protection. The abuses of power which led to the enactment of the fourth amendment involved not only entry by the Crown's representatives but the ransacking that took place once entry had been accomplished.<sup>125</sup> Prior to *Ross*, warrantless searches were not considered an equally acceptable and broad alternative to searches with warrants. Such intrusions were sanctioned only when the costs of obtaining a warrant outweighed the

<sup>121</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971).

<sup>122</sup> See *supra* notes 90-93 and accompanying text; see also *Mincey v. Arizona*, 437 U.S. 385, 390-95 (1978).

<sup>123</sup> See Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1388 & n.292 (1977).

<sup>124</sup> *Id.*

<sup>125</sup> An indication of the abuse which concerned the colonists was set forth in a declaration by a committee authorized by a town meeting in Boston to compile a list of "Infringements and Violations of Rights" in 1772:

Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they suspect there are in the house wares &c for which the dutys have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened in this and other Sea Port towns. By this we are cut off from that domestick security which renders the lives of the most unhappy in some measure agreeable. Those Officers may under colour of law and the cloak of a general warrant [sic] break thro' the sacred rights of the Domicil, ransack mens houses, destroy their securities, carry off their property, and with little danger to themselves commit the most horred murders.

B. SCHWARTZ, *The Bill of Rights: A Documentary History* 206 (1971); see also Grano, *supra* note 93, at 618-20.

benefits attributable to the warrant process.<sup>126</sup> The possible permanent loss of evidence while a warrant is sought creates the type of necessity which will justify a warrantless search. Once the possibility of loss of the evidence is neutralized, the necessity evaporates as should the authority to proceed further without judicial authorization.<sup>127</sup>

This analysis led to the result in *Robbins*.<sup>128</sup> The plurality concluded that the reasons offered in support of the automobile exception were inapplicable to the vehicle's contents and found no independent justification for a warrantless search of the packages.<sup>129</sup> After the officers in *Robbins* discovered and exercised control over the two packages, there could be no argument that it was necessary to conduct an immediate search. Moreover, an individual who has placed his effects in sealed, opaque containers has demonstrated an expectation of privacy meriting constitutional protection. There was no threat that the evidence would be lost, nor was it argued that it was impracticable to transport and safeguard the packages. As a general rule, there is a greater assurance that the entire contents of such packages will end up in the police property room if the packages remain unopened until they are safely at the police station and then opened in accordance with a court directive. The *Robbins* Court simply concluded that there were no exceptional circumstances to justify bypassing a warrant.

But in *United States v. Ross*,<sup>130</sup> the Supreme Court devised a new norm. While Justice Stewart, a year earlier in *Robbins*, had required a showing of necessity for each step of the warrantless intrusion,<sup>131</sup> Justice Stevens for the *Ross* majority has chosen instead an approach which guarantees minimal judicial control over the scope of warrantless searches. The intrusion itself remains subject to the traditional inquiry and must fit within a "specifically established and well-delineated" exception,<sup>132</sup> although the rigor of that inquiry will likely diminish now that the automobile exception is firmly anchored in nothing more than the "impracticability" of obtaining a warrant. Under the *Ross* doctrine, however, no link remains between the scope of the warrantless search and the exceptional nature of the warrantless intrusion. Once an exception permits the initial intrusion, the scope of the search is no more limited than a search with a warrant.<sup>133</sup> The scope of the search has no relationship to the objectives which justified the initial intrusion, and

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<sup>126</sup> *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979).

<sup>127</sup> *Chimel v. California*, 395 U.S. 752, 763, 768 (1969).

<sup>128</sup> 453 U.S. 420.

<sup>129</sup> 453 U.S. at 425-26.

<sup>130</sup> 102 S. Ct. 2157 (1982).

<sup>131</sup> 453 U.S. at 428-29.

<sup>132</sup> *Katz v. United States*, 389 U.S. at 357.

<sup>133</sup> 102 S. Ct. at 2172. "The scope of a warrantless search thus is not defined by the nature

extends to any container which could house the object, whether or not there is any justification for searching the container without prior judicial approval.

Examination of the facts in *Ross* fails to disclose any cost to society had police merely seized the containers pending judicial authorization to search them. There was no risk that the evidence would have been lost to the police had the paper bag and zippered pouch remained closed until a warrant was issued.<sup>134</sup> The police were entitled to seize and protect the two containers. Because the defendant was already in custody, there would be no question of inconveniencing him while police waited for the warrant. Moreover, since the zippered pouch was not searched until it was removed to the police station, nothing was gained by bypassing the warrant.<sup>135</sup>

In short, abandonment of the traditional analysis in favor of this expansive rule accomplishes nothing in *Ross* and similar cases to promote effective law enforcement. The rule alleviates the burdens associated with police having to obtain a warrant. But *Ross* involved no greater burden and inconvenience than normally is involved in obtaining a warrant; indeed, it is precisely the type of burden and inconvenience that the fourth amendment intends. Instead, that burden has been alleviated without any suggestion that the corresponding diminution in constitutional protection will promote a significant social interest. The substitution for the traditional analysis of a broad new rule can be viewed as evidence of the diminished importance accorded by this Court to the warrant process. The Court recognizes little inherent value in the prior determination of a judge or magistrate when it dictates that the warrant process must give way to mere inconvenience and defines the scope of warrantless searches to be the same as those conducted with a warrant.<sup>136</sup>

Two other decisions within the twelve months prior to *Ross* also involved broad definitions of the scope of warrantless searches. Both cases, *Washington v. Chrisman*<sup>137</sup> and *New York v. Belton*,<sup>138</sup> involved

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of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Id.*

<sup>134</sup> Justice Marshall pointed out in his dissent that "the police succeeded in transporting the bag to the station without inadvertently spilling its contents." 102 S. Ct. at 2178 & n.5.

<sup>135</sup> By approving a search in which the warrant requirement could as easily have been fulfilled, the Court cast doubt upon its rule in *United States v. Chadwick*, 433 U.S. 1 (1977). There the Court emphasized that a footlocker had not been opened until it was at the police station several hours after it was seized. The very factors which led to the result in *Chadwick*, exclusivity of police control and delay, were present in *Ross*. 102 S. Ct. at 2160.

<sup>136</sup> See, e.g., *California v. Minjares*, 443 U.S. 916, 921 (1979) (Rehnquist, J., dissenting from denial of stay).

<sup>137</sup> 102 S. Ct. 812 (1982).

<sup>138</sup> 453 U.S. 454 (1981).



searches incident to arrest. That exception requires only that police officers have probable cause to believe that an arrestee had committed a crime. While neither of these decisions announced a rule comparable in scope to *Ross*, they are part of a similar pattern. It is far easier to understand *Belton* and *Chrisman* after the *Ross* opinion because all three uphold a broader search than the reasons supporting the exception to the warrant requirement would justify.

In *New York v. Belton*,<sup>139</sup> a majority of the Court extended the scope of a search incident to arrest to the interior compartment of a vehicle and all containers found therein, following the arrest of an occupant of the vehicle. The Court severed the scope of incidental searches of a vehicle from the reasons for excusing the warrant requirement following an arrest. Warrantless searches incident to arrest are permitted to protect the police officer and to prevent the arrestee from destroying evidence.<sup>140</sup> Once it is assured that the arrestee cannot reach a weapon to threaten the officer's safety or gain access to evidence, those reasons disappear. Any further intrusion does not protect the officer or the evidence but serves the singular purpose of searching for evidence.

Since *Chimel v. California*,<sup>141</sup> searches incident to arrest were confined to the area within the control of the arrestee. The genius of the "control" test is that it imposes a limitation upon the scope of incidental searches perfectly consistent with legitimate law enforcement needs without unduly sacrificing fourth amendment protection. *Belton* disregarded the principle that warrantless intrusions are extraordinary; in so doing, it implicitly foreshadowed the rule in *Ross* that an exception to the warrant requirement permits a virtually unlimited search.

Waiver of the warrant requirement in *Belton*, as in *Ross*, did not promote essential law enforcement interests. Neither police possession of the evidence nor the opportunity to search would have been jeopardized if a warrant had been sought.<sup>142</sup> Further, the searches in *Belton* and *Ross* did not promote the policy reasons underlying the exceptions which authorized search without a warrant. Neither the officer nor the evidence in *Belton* was endangered by the arrestees at the time the search was conducted; similarly, the search in *Ross* was not justified by the policies underlying the automobile exception. In both cases, once the receptacles

<sup>139</sup> *Id.*

<sup>140</sup> See *United States v. Robinson*, 414 U.S. 218, 234 (1973); *Chimel v. California*, 395 U.S. 752, 762-63 (1969). But see *United States v. Edwards*, 415 U.S. 800 (1974) (seizure of clothing from defendant 10 hours after entering jail did not violate fourth amendment).

<sup>141</sup> 395 U.S. 752 (1969).

<sup>142</sup> The officer in *Belton*, for instance, could have obtained a warrant. On remand, the New York Court of Appeals declined to follow the Supreme Court, relying upon the state constitution. Instead, the New York court upheld the search under the automobile exception. *People v. Belton*, 55 N.Y.2d 49, 447 N.Y.S.2d 873, 432 N.E.2d 745 (1982).

were under exclusive police control, law enforcement objectives would not have been thwarted by recourse to a warrant. The result is a diminution of protection of fourth amendment interests without cognizable benefit.

Justice Stevens disagreed with the *Belton* majority's analysis of the broad scope of searches incident to arrest. He disagreed because any exception to the warrant requirement, under his analysis, supplants only the warrant requirement and not the other prong of the fourth amendment test requiring the existence of probable cause to search.<sup>143</sup> Search incident to arrest, the exception relied upon in *Belton*, traditionally does not require probable cause to believe that evidence will be found. Despite their distinctive purposes, however, the Court treats the scope of the exceptions in an identical fashion.<sup>144</sup>

A similar theory upheld the intrusion in *Washington v. Chrisman*.<sup>145</sup> There, a state university police officer stopped the defendant's roommate who appeared to be under the age of twenty-one and carrying a half-gallon bottle of gin.<sup>146</sup> The officer accompanied the student to his dormitory room to retrieve identification.<sup>147</sup> The student entered the room while the officer remained in the open doorway where he could observe the student and the defendant, who was in the room when they arrived.<sup>148</sup> He observed the defendant, who appeared nervous at the sight of the officer, place a small box in a medicine cabinet. The officer also observed a small pipe and seeds, which he believed to be marijuana, on a desk within the room. Then the officer completed entry into the room and examined the pipe and seeds, confirming that the seeds were marijuana and observing that the pipe smelled of marijuana.<sup>149</sup>

In an opinion by Chief Justice Burger, a majority held that a police officer has the right to remain literally at an arrestee's elbow and that it is not unreasonable under the fourth amendment for the officer to monitor, "as his judgment dictates," the movement of an arrested person.<sup>150</sup> The police officer did not testify that he entered, and examined the marijuana, because of fear that the original arrestee or the defendant could

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<sup>143</sup> 453 U.S. at 452-53 (Stevens, J., dissenting).

<sup>144</sup> Justice Stevens may not be happy with the way *Ross* is being used. See *United States v. Sharpe*, 102 S. Ct. 2951 (1982) (mem.) (Stevens, J., dissenting). The Court remanded the case to the Fourth Circuit "for further consideration in light of *United States v. Ross*." *Id.* at 2951. Justice Stevens did not agree that *Ross* helped determine whether the warrantless search in question was supported by probable cause. *Id.* at 2952.

<sup>145</sup> 102 S. Ct. 812 (1982).

<sup>146</sup> *Id.* at 815.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 817.

reach it and destroy it, nor because the item was perishable and might disappear while he was obtaining a warrant. Similarly, he never claimed that he entered the room to ensure his safety or to effectuate his control over the original arrestee.<sup>151</sup> The officer completed entry into the room and walked over to the desk solely to confirm his suspicion of the presence of marijuana.<sup>152</sup>

The Supreme Court majority was unconcerned with the total absence of a nexus between the reason for the additional intrusion and the underlying reasons that allow a warrantless search incident to arrest. The majority focused exclusively on the fact that the officer could have entered the room initially with the arrestee; it ignored the principle that the need for a search must be demonstrated at the moment the search takes place, regardless of what could have been done moments earlier. The Court held that the officer had not abandoned his right to be in the room whenever he deemed it essential,<sup>153</sup> although his determination that it was essential was entirely unrelated to the reasons which originally gave him legal access to the room and was not based upon a subsequently arising exigency.

*Ross*, *Belton* and *Chrisman* constitute a watershed for the fourth amendment. The course that the Court has undertaken became clear only in *Ross* where Justice Stevens presented the bright-line rule defining the scope of searches under the automobile exception. Justice Stevens' rationale for that rule is consistent with the *Belton* and *Chrisman* decisions, despite his disagreement with the rule in *Belton*. All three mark a retreat from the principles set forth in *Chimel v. California*, which required a close link between the scope of warrantless searches and the underlying justification for the warrantless intrusion. Although the Court in *Belton* indicated continued support for the *Chimel* doctrine, it eviscerated the doctrine when the scene of the arrest is a vehicle. *Chrisman* in turn belies the suggestion that *Chimel* principles would be eroded only in the context of automobile searches.

A majority of today's Court concurs in supporting the broadest scope for warrantless searches, which it claims is based at least in part upon its "realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests."<sup>154</sup> This change is also based, again in part, upon the view that the importance accorded the fourth amendment by the Warren Court frustrates valid law enforcement interests.<sup>155</sup> It is uncertain whether this majority will prove

<sup>151</sup> *Id.* at 819 (White, J., dissenting).

<sup>152</sup> *Id.* at 815, 819 (White, J., dissenting).

<sup>153</sup> *Id.* at 818.

<sup>154</sup> *Ross*, 102 S. Ct. at 2163 n.9.

<sup>155</sup> Although there is some risk in categorizing the Burger Court as one capable of forming

cohesive when *Chadwick* and *Sanders* are reconsidered in light of the doctrine set forth in the three most recent cases. The ultimate test may prove to be a reconsideration of the actual holding in *Chimel*, and limitation of the rule to intrusions into homes.<sup>156</sup>

majorities to undermine fourth amendment interests and protections, see *United States v. Steagald*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); Israel, *supra* note 123, at 1388, a body of case law exists which supports the argument that to read those cases any other way is to disregard the intent of the Justices who most often support the majority positions. The Court has limited the applicability of the exclusionary rule in proceedings that the Court contends would not further the underlying deterrent purpose of the rule. See *Michigan v. DeFillipo*, 443 U.S. 31 (1979); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974). The Court has also developed a constricted notion of privacy, the fourth amendment litmus test, strained in its application to declare certain intrusions subject only to a reduced test of reasonableness or totally beyond any review. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 742-46 (1979); *Bell v. Wolfish*, 441 U.S. 520, 557 (1979); *United States v. Miller*, 425 U.S. 435, 440-43 (1976); see also, Kamisar, *The Fourth Amendment*, in 1 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 144 (1979), where Professor Kamisar wrote:

We do not have a free society if a citizen is put to the choice, to cite but three examples, of, one, foregoing use of the phone or having the police record all the numbers he dials, or, two, foregoing use of the postal service or having the police collect the names and addresses of all his correspondents, or, three, foregoing use of banks or providing the police with access to an enormous quantity of highly personal data. We are talking about unrestrained access to data.

A third line of cases involves the broad interpretation of the scope of warrantless searches, the subject of this Article.

<sup>156</sup> If the Court were to follow the *Belton* lead and reverse *Chadwick* and *Sanders*, eliminating the applicability of the *Chimel*-control test as a limitation upon the scope of searches incident to arrests in public places, the question undoubtedly would arise whether *Chimel* should even be retained as a limitation upon searches incident to arrests that take place in homes. Justice Blackmun, who most consistently has argued against the applicability of the *Chimel* standard to public arrests, has specifically indicated that different concerns apply when the arrest takes place in a home. See *United States v. Chadwick*, 433 U.S. 1, 20 n.1 (1977) (Blackmun, J., dissenting). It is also unlikely that *Chrisman* would serve as the basis for overruling *Chimel*, as the majority never seemed able to get beyond the point that the arresting officer had the right to be inside the room at the elbow of the arrestee, rather than serving as the basis for a wide-ranging search once inside room or home. Moreover, the decisions in *Payton*, 445 U.S. at 573, and *Steagald*, 451 U.S. at 204, clearly evidence this Court's intent to treat invasions of homes far differently from intrusions that occur in public places.

Some exception may be taken to the use of *Belton* here as the basis for extension of the scope of searches incident to arrests that occur in public. Although search incident to arrest provided the theory on which the majority allowed a search of the interior compartment of the vehicle and all containers found in that compartment, the *Belton* majority was overwhelmed by the fact that the site of the search was an automobile, a factor of great importance for this Court. At least one commentator has suggested that the Court may dispense with the *Belton* bright-line rule now that *Robbins* has been overruled, and a search of the entire car and all containers is permissible under the automobile exception. See Kamisar, *supra* note 85.

On the other hand, this author does not see the Court letting go of *Belton*, even though Justice Stevens would like to see that decision reversed, because *Belton* and *Ross* serve law enforcement interests differently and the Court is unlikely to deny police the authority to conduct automobile searches permissible under *Belton* but impermissible under *Ross* where probable cause would not support a search of the vehicle.

## V. A PUBLIC PLACE-PROBABLE CAUSE EXCEPTION

Among Justice Marshall's arguments in his *Ross* dissent is the contention that the decision "takes a first step toward an unprecedented 'probable cause' exception to the warrant requirement."<sup>157</sup> At the outset it is imperative to note that Justice Stevens did not advocate such an exception; in fact he took great pains in *Ross* to fit the result within a "well-established" exception.<sup>158</sup> Moreover, when given the opportunity to approve the probable cause exception in *United States v. Chadwick*,<sup>159</sup> the Court unanimously rejected it.<sup>160</sup> Finally, nothing in *Ross* makes inexorable the development of such an exception. Nevertheless, various aspects of the reasoning in *Ross* lend credence to Justice Marshall's complaint.

The facile manner in which the majority expanded the automobile exception indicates that the exception, which is "well-established" because it was formally recognized in 1925,<sup>161</sup> provided a handy tool to reach the desired result rather than an analytical framework which dictated that result. The Court's difficulty in agreeing upon a rationale for the automobile exception evokes suspicion that its growth may not be completed. The Court was evidently self-conscious about the seeming anomaly between its treatment of the hidden recesses of a vehicle and containers found in the same automobile. The *Ross* concurring opinions herald the decision as an end to the confusion.<sup>162</sup> But as the Court addresses subsequent fourth amendment cases, the same confusion will arise concerning packages found in a vehicle and those seized elsewhere in public. At that time, a Court might elect to end the confusion by finding within *Ross* the foundation for a public place-probable cause exception.<sup>163</sup>

The public place-probable cause exception originally surfaced in *Chadwick* with a search that fell between the fine lines separating the automobile exception and searches incident to arrest.<sup>164</sup> Railroad personnel in San Diego first became suspicious when they noticed two men,

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<sup>157</sup> 102 S. Ct. at 2174.

<sup>158</sup> *Id.* at 2172.

<sup>159</sup> 433 U.S. 1 (1977).

<sup>160</sup> See *infra* notes 164-176 and accompanying text; see also LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 315 n.50 (1982).

<sup>161</sup> 102 S. Ct. at 2162-63; see *Carroll v. United States*, 267 U.S. 132, 151 (1925).

<sup>162</sup> 102 S. Ct. at 2173 (Blackmun, J., and Powell, J., concurring).

<sup>163</sup> It may be that once the Court recognizes that there is no meaning to its use of impracticability, it will unabashedly recognize that once it departed from the mobility factor, it was operating, beginning with *Chambers*, under a public place exception to justify the search of automobiles. See *Kamisar*, *supra* note 85.

<sup>164</sup> *United States v. Chadwick*, 433 U.S. 1 (1977).

who matched a profile used to spot drug traffickers, load an unusually heavy footlocker onto a Boston-bound train.<sup>165</sup> The railroad officials notified federal authorities after they observed talcum powder, a substance often used to mask the odor of marijuana and hashish, leaking from the trunk. A description of the two defendants and the footlocker was radioed to federal agents in Boston, who, along with a police dog trained to detect marijuana, met the train at its destination.<sup>166</sup> After the defendants reclaimed the footlocker and while they were sitting on it, the police dog was released near the footlocker. Without triggering the defendants' attention, the dog acted in a manner to suggest to the agents that the footlocker contained a controlled substance. Thereafter, the two defendants and a porter moved the footlocker outside where the three lifted it and placed it into the trunk of a waiting confederate's car.<sup>167</sup> The agents moved in and arrested the two travelers and their confederate while the trunk of the car was still open and before the car had been started. They also seized the footlocker and found the keys to the footlocker on one of the defendants.<sup>168</sup> The defendants and footlocker were removed to the federal building where, an hour and a half later, with neither a warrant nor the defendant's consent, the footlocker was opened, revealing a large quantity of marijuana.<sup>169</sup>

The government offered as justification for the warrantless search the authority recognized under both the automobile exception and search incident to arrest.<sup>170</sup> Recognizing that the facts of their case did not squarely lie under either alternative, the government suggested instead that a warrant is necessary only for intrusions which implicate the historically essential purposes of the fourth amendment.<sup>171</sup> This theory would confine the warrant requirement to the core subjects of fourth amendment protection: homes, offices and private communications. Consequently, the reasonableness of a search of personal effects seized outside of the home would turn only on the existence of probable cause to support the search.<sup>172</sup> In order to consider this position, however, the Court was forced to reexamine its adherence to the principle "that the police must, whenever practicable, obtain judicial approval of searches and seizures. . . ." <sup>173</sup>

The Court in *Chadwick* was not prepared for such a direct assault

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<sup>165</sup> *Id.* at 3.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 4.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 4-5.

<sup>170</sup> *Id.* at 11-12, 14.

<sup>171</sup> *Id.* at 6.

<sup>172</sup> Cf. W. LaFAVE, *supra* note 71, at 5-6; LaFave, *supra* note 160, at nn. 47-50.

<sup>173</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

upon its stated preference for a warrant and the Chief Justice's majority opinion dismissed the broad proposition, citing to the language of the amendment as well as its history. The Court acknowledged the "strong historical connection"<sup>174</sup> between the warrant clause and the initial clause of the amendment which protects against unreasonable searches and seizures of effects as well as persons, houses and papers. It further noted the absence of evidence that the framers had intended to exclude from the protection all searches conducted outside the home. The warrant clause itself makes no distinction between searches of private homes and other searches. In *Chadwick*,<sup>175</sup> the Court held that law enforcement officers, having probable cause to believe that the suspect footlocker contained a controlled substance, could legitimately seize and safeguard the container without a warrant, but could not search the container until a warrant was obtained. Thus, the Court minimized the warrantless intrusion without compromising legitimate law enforcement objectives.<sup>176</sup>

In *Arkansas v. Sanders*,<sup>177</sup> the Court extended its *Chadwick* holding to a suitcase seized from a taxicab. The police stopped the taxicab in which the defendant was riding, although they had had sufficient probable cause to seize the suitcase prior to the cab's departure from the airport terminal.<sup>178</sup> With a broad stroke, the Court rejected an approach which distinguished between searching luggage in a vehicle where there is probable cause to search the entire vehicle and a search in which probable cause focused upon the container prior to its being placed in the automobile. The Court held that "the warrant requirement . . . applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations."<sup>179</sup>

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<sup>174</sup> 433 U.S. at 8.

<sup>175</sup> *Id.* at 1.

<sup>176</sup> Prior decisions of the Court illustrate the understanding that the warrant clause was not intended to have the narrow limits the government suggested. *See, e.g.*, *United States v. Chadwick*, 433 U.S. at 11 & n.6. Even the dissenters in *Chadwick* labeled the government's argument "an extreme view of the Fourth Amendment," *id.* at 17 (Blackmun, J., dissenting), but would have upheld the search as incident to arrest; they advocated an alternative rule which would permit the warrantless search of "any movable property in the possession of a person properly arrested in a public place." *Id.* at 19 (Blackmun, J., dissenting). Although Justice Blackmun labeled the government's position as extreme, in relation to his own proposal, the exception the government offered was extreme only in that it would recognize and require creation of a new exception. On the other hand, while Justice Blackmun's solution fits within an established exception—incident to arrest—it would eliminate not only the warrant requirement but the probable cause requirement, as well, antecedent to a search for evidence. It would also extend the warrant exemption fashioned later in *Belton* to include as incident to arrest a search of the trunk of the vehicle and all property found in the trunk.

<sup>177</sup> 442 U.S. 753 (1979).

<sup>178</sup> *Id.* at 761.

<sup>179</sup> *Id.* at 766.

As a result of *Ross*, the broad proposition stated in *Sanders* no longer applies; however, Justice Stevens explicitly affirmed support for the narrow holding in *Sanders* though he rejected its reasoning.<sup>180</sup> Consequently, the propositions of *Sanders* and *Ross* together hold that the warrant requirement does not apply to containers taken from automobiles unless there is probable cause to search the container before it is placed in the automobile.

In the earlier cases of *Chadwick*, *Sanders* and *Robbins* the Court focused upon the privacy interest in the container to be searched. Justice Powell argued that the size, construction and effort at sealing of certain containers entitled them to greater fourth amendment protection than others and that a warrant must be obtained before these containers are searched.<sup>181</sup> The remainder of the Court refused to allow the outcome to turn on the worthiness or unworthiness of a particular container.<sup>182</sup> In *Robbins*, Justice Stewart maintained that once an object is placed in a closed, opaque container it is fully protected by the fourth amendment,<sup>183</sup> and Justice Stevens did not disagree with this aspect of the *Robbins* decision.<sup>184</sup>

The *Ross* Court shifted the focus of the inquiry from the particular object searched to the place searched.<sup>185</sup> The Court pointed to the diminished expectation of privacy of one whose home is searched under a warrant. As a result of this diminished expectation, any receptacle that may contain the searched-for items may be opened without a separate analysis of the privacy interest in the container. In *Ross*, the Court held that the search which is justified by a warrant, as well as the search which is justified under the automobile exception, destroys any privacy interest in the place to be searched.<sup>186</sup> Consequently, any container which falls within the warrant or the automobile exception may be opened and searched.

The impact of the *Ross* rule becomes apparent with its application to related fourth amendment issues. Situations which appear logically indistinguishable take on varying fourth amendment significance. Consider the problem arising after *Ross* when police receive a tip from a reliable, confidential informant<sup>187</sup> that he just returned from a house where he purchased narcotics from a supplier identified as Bandit, whose full description and address are provided by the informant. The

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<sup>180</sup> *United States v. Ross*, 102 S. Ct. at 2172.

<sup>181</sup> *Arkansas v. Sanders*, 442 U.S. at 764 n.13.

<sup>182</sup> *United States v. Robbins*, 453 U.S. at 447 (Stevens, J., dissenting).

<sup>183</sup> *Id.* at 428.

<sup>184</sup> *Id.* at 449 n.9.

<sup>185</sup> *United States v. Ross*, 102 S. Ct. at 2170-71.

<sup>186</sup> *Id.* at 2171.

<sup>187</sup> *McCray v. Illinois*, 386 U.S. 300 (1967).



informant also tells police that Bandit advised him that he would be leaving the area within the hour because it was getting "too hot," taking with him his remaining, large quantity of narcotics.<sup>188</sup> Whether police need a warrant to search for those narcotics when they apprehend Bandit may depend upon relatively insignificant factors. If police arrive and apprehend Bandit on the street, carrying a footlocker, after he has left his house, *Chadwick* dictates that the officers may seize the footlocker but that they must obtain a warrant before they may search it.<sup>189</sup>

A different result obtains if Bandit is apprehended just as he drives out of his driveway onto the street. Since the police have probable cause to believe that he is transporting narcotics in the car, they may conduct a warrantless search of the vehicle, and *Ross* would permit the police to open and search the footlocker which they will find stored in the trunk of the automobile.<sup>190</sup> Obviously, the difference in results occurs because, in one case, the footlocker was found in an automobile and, in the other, it was not; automobiles are, by the Court's definition, different and subject to one of the "'few,' 'specifically established,' and 'well-delineated'" exceptions.<sup>191</sup>

A third possibility could arise if the informant advises the officers that Bandit will transport the narcotics in a footlocker, and the footlocker is seized by the officers when they search the vehicle that he is driving. Under the *Ross* endorsement of the holding in *Sanders*, if probable cause focused specifically on the footlocker prior to its placement in the vehicle, a warrant remains a prerequisite to the search of the container.<sup>192</sup>

If the court intends, as it said it did, to preserve the *Sanders* holding, the footlocker in this example would be comparable to one seized on the street, and treated differently from *Ross*, even though it was actually seized from a moving car which was lawfully stopped and searched. However, if the police did not observe Bandit place the footlocker in the automobile, or if the informant neither saw it placed in the vehicle nor advised police that Bandit would leave by car, the reasoning in *Ross* may dictate a different result. It is possible that the Court will confine *Sanders* to those situations where the police had probable cause *and* an opportunity to seize the container before it was placed in the vehicle and waited only in order to exploit the automobile exception. If this two-pronged test were read into *Sanders*, the Court would uphold the search

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<sup>188</sup> *Aguilar v. Texas*, 378 U.S. 108 (1964).

<sup>189</sup> This is close to the fact situation in *Chadwick*, 443 U.S. 1, with regard to the footlocker in that case.

<sup>190</sup> The result is dictated by *Ross*, 102 S. Ct. 2157.

<sup>191</sup> *Robbins v. California*, 453 U.S. at 423 (citing *Katz v. United States*, 389 U.S. at 357).

<sup>192</sup> The Court endorsed this specific holding of *Sanders* in *United States v. Ross*, 102 S. Ct. at 2172.

in this third hypothetical since the police did not have the opportunity to seize the footlocker before it was placed in the trunk of the automobile.

The facial absurdities of the results in these cases will create within the Court the same internal pressure for a sense of order that led it to the decision in *Ross*. After all, the law after the decision in *Robbins* distinguishing a vehicle from its contents was clear enough. The only question remaining at that time was whether the protection applied to all opaque containers. The rule following the decision in *Ross* distinguishing containers found in a vehicle from those seized in other public places is as clear. The remaining questions will require the Court to draw a line between containers placed in a vehicle after probable cause has focused on the package and those containers found in a vehicle where the probable cause focused upon the automobile and not upon the particular package. The gray areas between the two rules are bound to create difficulty.

As the Court enters the gray areas, the warrant requirement will hang in the balance. Least attractive to the Burger Court is an approach that would require reconsideration of the automobile exception itself. Such an examination should result inevitably in restoration of the limited *Carroll* exception which restricted waiver of a warrant to those few and unique situations where the mobility of the vehicle creates an actual necessity for immediate search.<sup>193</sup> Such an approach would reverse the Court's clear trend toward minimizing the necessity for a warrant to conduct searches in public areas. It would also require the Court to acknowledge that the rationales offered in support of the automobile exception in the line of cases from *Chambers* to *Ross* were fashioned of whole cloth.

A second approach would expand the scope of warrantless searches by applying the principles of search incident to arrest and deemphasize the dependence upon the automobile exception as the basis for an exemption. Support for this alternative was advanced by the dissenters in *Chadwick*, where Justice Blackmun suggested "that a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place."<sup>194</sup> The dissent acknowledged that the fact of arrest does not necessarily obviate the privacy interest of the arrestee in the objects in his possession at the time of the arrest. It also conceded that impoundment pending issuance of a search warrant protects the privacy interest remaining in those objects. But Justice Blackmun offered several reasons why a search warrant is irrele-

<sup>193</sup> See Grano, *Rethinking the Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 645-46 (1982).

<sup>194</sup> *United States v. Chadwick*, 433 U.S. at 19. (Blackmun, J., dissenting).

vant following a lawful arrest in public and why it should be unnecessary to impound the container sought to be searched. He asserted that search warrants in such situations are routinely forthcoming.<sup>195</sup> Further, he contended that a bright-line rule would end the irrational distinction between a person carrying a wallet and one carrying a footlocker.<sup>196</sup>

According to Justice Blackmun, there are no strong policy arguments in favor of requiring a search warrant following a lawful arrest in public because the "formality of obtaining a warrant" has "little practical effect in protecting Fourth Amendment values."<sup>197</sup> Justice Blackmun's proposal involves a thorough rethinking of the holding in *Chimel*, perhaps limiting *Chimel* to its facts. At least for public arrests, however, it would formally constitute the death of any required nexus between the scope of incidental searches and the underlying reasons which justify that exemption from the warrant requirement.

The Court took the first step toward such a rule when it upheld the search of the vehicle in *Belton* as incident to arrest, absent any conceivable argument that the search was necessary either to protect the arresting officer or to prevent destruction of evidence within the arrestees' reach. While Justice Stevens in *Ross* exhibited sensitivity to the argument that requiring a search warrant is not necessarily desirable when it offers "relatively minor protection . . . for privacy interests,"<sup>198</sup> the Blackmun approach would undoubtedly meet Justice Stevens' opposition for the same reasons that he opposed the bright-line rule advanced by the majority in *Belton*. Although Justice Blackmun has suggested that search warrants are routinely forthcoming to authorize the search of packages seized following a lawful arrest in public,<sup>199</sup> his approach does not require a determination that probable cause existed to justify the search of movable property in the possession of a person lawfully arrested in a public place.

According to Justice Blackmun, whether or not a search warrant could be issued following an arrest, the authority to search anything not bolted down would flow automatically from the probable cause which gave rise to the authority to arrest. As a result, such a rule would extend the scope of the search of the automobile in cases like *Belton* to the trunk of the vehicle because the Blackmun proposal eliminates the *Chimel*-control test as a limitation upon searches incident to public arrests. It would disregard the *Ross* majority's explicit endorsement of the require-

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<sup>195</sup> *Id.* at 20 (Blackmun, J., dissenting).

<sup>196</sup> *Id.* at 20-21 (Blackmun, J., dissenting).

<sup>197</sup> *Id.* at 20 (Blackmun, J., dissenting) (footnote omitted).

<sup>198</sup> 102 S. Ct. at 2163 n.9.

<sup>199</sup> *Chadwick*, 433 U.S. at 20 (Blackmun, J., dissenting).

ment that the search of an automobile and its contents remains dependent upon the existence of independent probable cause to support the search of the vehicle.

The third approach involves recognition of the automobile exception as a "well-established" anomaly permitting distinctions to be made between automobiles and their contents on the one hand and, on the other, receptacles which are seized elsewhere in public places. Accordingly, the automobile is exempted from the protection of the warrant requirement primarily because the exemption is so "well-established." It is submitted that the anomalous character of the exception will once again lead to anomalous treatment of each new case. Consequently, any factual situation that does not fall squarely within the automobile exception or the rule provided by *Chadwick* and the narrow *Sanders* holding must be decided on a case-by-case basis. The automobile exception will rest, then, squarely and solely upon its venerable age, and the Court will be relieved of the frustrating task of creating new rationales or resurrecting old ones to justify the exception's existence.

The very unsatisfactory nature of this explanation leads directly to the fourth approach, a public place-probable cause exception to the warrant requirement. Justice Marshall warned of this potential development in his *Ross* dissent.<sup>200</sup> Such a development is not inevitable and is, at least, partially dependent upon the unwillingness of the Court to accept the longevity of the automobile exception as the sole justification for its continued existence. An attempt to explain why it is impracticable to obtain a warrant to search an immobilized vehicle, especially one that has been removed to the security of police headquarters, inexorably leads to the conclusion that obtaining a warrant is no less impracticable for any object that is not nailed down. The Court refused to limit the automobile exception to those instances in which application for a warrant is demonstrably impracticable. It is generally just as impracticable, however, to seek warrants for other movable objects found in public places.<sup>201</sup> Ultimately, only the legal fiction surrounding automobiles allows police to conduct warrantless searches of containers found in vehicles but requires a warrant when the container is seized elsewhere.

Although the *Ross* majority discounted the importance of the diminished expectation of privacy in the automobile as the justification for the automobile exception, the privacy argument lurks in the background. Once it is acknowledged that the impracticability supporting the automobile exception is no less applicable to any container discov-

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<sup>200</sup> 102 S. Ct. at 2174.

<sup>201</sup> See *United States v. Ross*, 655 F.2d 1159, 1200 (D.C. Cir. 1981) (Wilkey, J., dissenting) (suggesting that it is difficult to believe that any police force cannot either tow or otherwise maintain control over a car while a warrant is being sought).

ered in a public place, the privacy argument can be made again. The privacy interest in a suitcase or other object carried in public is no greater than the privacy interest in the same object when it is stored in the trunk of an automobile. A realistic appraisal of the comparative privacy interests can lead to the reasonable conclusion that an object carried in public is entitled to even less protection than if the object had been stored in the locked trunk of a vehicle.<sup>202</sup> Just as the expectation of privacy in containers stored in the trunk of a car "may not survive if probable cause is given to believe that the vehicle is transporting contraband,"<sup>203</sup> it will be argued that the expectation of privacy in property found in other public places should also give way if there is probable cause to believe that it contains contraband.

Adoption of this argument involves acceptance of the position advanced by the government in *Chadwick*, that the protection of the warrant clause should be limited to homes, offices and private communications.<sup>204</sup> The line of automobile exception cases from *Chambers* to *Ross*, as well as *Belton* and *Chrisman*, indicates that this Court no longer believes that warrantless searches should be exceptional. All of these cases seek to eliminate the alleged frustration imposed on law enforcement agencies by the "judicially-created preference for a warrant,"<sup>205</sup> without any empirical evidence of the burdens that the warrant requirement imposes. The Court has adopted bright-line rules relaxing the warrant requirement, which imposed no great burden or inconvenience upon police nor frustrated legitimate law enforcement objectives in the overwhelming number of situations.

The *Ross* decision need not evolve into a public place-probable cause exception to the warrant requirement. The primary obstacle to recognition of this broad new exception out of the automobile exception

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<sup>202</sup> The presence of the suitcase carried in public is immediately known to the prying eyes of one who would do it mischief, and it is more likely to be lost or fall and break open than a suitcase stored in the trunk of an automobile.

<sup>203</sup> *Ross*, 102 S. Ct. at 2171.

<sup>204</sup> This would involve repudiating the broad principles enunciated in *United States v. Katz*, 389 U.S. 347 (1967), and limiting the holding in that case to its facts. But the Court already minimized the privacy rationale in the automobile cases decided between *Katz* and *Ross*, permitting warrantless searches because of a diminished privacy interest in automobiles. Moreover, in *Ross* itself, the Court allowed the warrantless search on the basis of impracticability despite the Court's recognition of an expectation of privacy in an automobile and its contents. The *Katz* rationale was dependent upon the Court's perception of the per se impermissibility of warrantless searches absent exigent circumstances and was advanced by a Court that firmly believed that the scope of warrantless searches must be linked to the necessity which gave rise to the exception. The Court's continuing adherence to those principles cannot be measured simply by whether the Court continues to quote from the language in *Katz*. That commitment must be considered in light of the Court's developing attitude towards the warrant requirement.

<sup>205</sup> *Robbins v. California*, 453 U.S. at 438 (Rehnquist, J., dissenting).

is that the latter is "well-established," and the Court has been reluctant to create entirely new exceptions. But the Court appears much firmer now in its belief that there is little valuable difference between the checks upon a search conducted with a warrant and one conducted without. To be sure, the Court continues to discuss the importance and value of a warrant, but, in light of these decisions, such words ring hollow. The creation of a public place exception seems altogether possible given the groundwork now in place.