Drawing Lines around the Fourth Amendment: Robbins v. California and New York v. Belton

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NOTES

DRAWING LINES AROUND THE FOURTH AMENDMENT: ROBBINS V. CALIFORNIA AND NEW YORK V. BELTON

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.¹

No student of the fourth amendment would seriously dispute the statement that the amendment has produced a "branch of law [that] is something less than a seamless web."² In Robbins v. California³ and New York v. Belton,⁴ the Supreme Court yet again attempted to clarify fourth amendment jurisprudence by adopting a bright line test to determine the constitutionality of any automobile search.

Specifically, the Supreme Court in Robbins addressed the issue of "whether closed containers found during a lawful warrantless search of an automobile may themselves be searched without a warrant,"⁵ and, in Belton, addressed the issue of whether the scope of the search incident to the arrest of an occupant of an automobile includes "the passenger compartment of the automobile in which he was riding."⁶ Although the facts of the two cases were remarkably similar,⁷ the Court found the warrantless search in Robbins to be

1. U.S. CONST. amend. IV.
5. 101 S. Ct. at 2844.
6. 101 S. Ct. at 2861.
7. See 101 S. Ct. at 2855 (Stevens, J., dissenting); text accompanying notes 14-18, 29-

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unconstitutional and the search in Belton to be constitutionally permissible. In so holding, the Supreme Court abandoned numerous fourth amendment doctrines, including a longstanding analysis of each case’s "own facts and circumstances," the principle that the scope of a search "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," and the doctrine that the fourth amendment protects the legitimate expectations of privacy of "people not places."

In place of these doctrines and analyses, the Court in both cases adopted bright line tests intended to be capable of easy application by the courts and law enforcement personnel. Simply stated, the Court held that if an opaque container or parcel not clearly announcing the presence of contraband is located in the trunk area of an automobile, that container or parcel cannot be searched without a warrant in the absence of circumstances that would trigger an exception to the fourth amendment's general warrant requirement. If, however, a container is in the passenger compartment or interior of an automobile, the container is automatically subject to a warrantless search incident to arrest.

This note, after setting forth the factual backgrounds of Robbins and Belton, explores the reasoning of the Court, and of the concurring and dissenting opinions in both cases. Robbins and Belton are then considered as they relate to the three major lines of cases relevant to container searches: the automobile exception cases, the luggage cases, and the search incident to arrest cases. The note concludes with a critique of the two holdings and suggests that the Court adopt a case-by-case, factually sensitive analysis, which is responsive to established fourth amendment doctrine.

**Factual Background**

*Robbins v. California*

On the morning of January 5, 1975, California Highway Police

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33 infra.


11. See 101 S. Ct. at 2851 (Blackmun, J., dissenting); Belton, 101 S. Ct. at 2866 (Brennan, J., dissenting).

12. Robbins, 101 S. Ct. at 2847. For a list of the generally recognized exceptions to the search and seizure requirement, see note 46 infra.

Officers Ronald DePue and Richard Stoltz observed a 1966 Chevrolet station wagon being driven erratically. Jeffrey Robbins, the driver and sole occupant of the car, pulled over on command and got out to meet Officer DePue. When asked to produce his car registration, however, Robbins was unable to find it in his wallet and so returned to look for it in his car. Officer DePue followed Robbins back to the station wagon and smelled marihuana smoke. He then arrested Robbins for driving under the influence of marihuana and, after finding no weapons on his person, handcuffed him.

Leaving Robbins with Officer Stoltz, Officer DePue then searched the passenger area of the automobile. The search revealed two tweezers, a hand-rolled cigarette butt, and a cookie tin containing rolling paper and one-eighth of an ounce of marihuana. At this point, Robbins allegedly told Officer Stoltz: “What you are looking for is in the back.” The officers then placed Robbins in the rear of the patrol car and opened the tailgate of the station wagon. Officer DePue next lifted up the handle set flush in the deck and uncovered a recessed baggage compartment. Inside this compartment were a tote bag, two green plastic bags, a briefcase, and a pint glass jar. The tote bag was then opened and three additional plastic bags removed. All of the plastic bags were found to contain marihuana.

After his pre-trial motion to suppress the marihuana was denied, Robbins was convicted by a jury of possession of marihuana, possession of marihuana for sale, and transportation of marihuana. The California Court of Appeals affirmed his conviction, upholding the warrantless search of the luggage and sealed packages.
in the luggage compartment as within the rule that authorizes warrantless searches of automobiles and their contents upon probable cause.\textsuperscript{22} The United States Supreme Court granted certiorari, vacated the judgment, and remanded\textsuperscript{23} the case to the court of appeals in light of the Supreme Court's recent decision in \textit{Arkansas v. Sanders}.\textsuperscript{24}

On remand, the California Attorney General conceded that the searches of both the tote bag and the cookie tin were controlled by \textit{Sanders} and therefore invalid, but contended that the search of the two plastic bags sitting separately in the trunk was properly conducted without a warrant.\textsuperscript{25} The court of appeals again agreed in a two-to-one opinion that the packages "did not support a reasonable expectation of privacy." Furthermore, "[t]he bulky tape-secured packages do not present an appearance of containing anything other than contraband."\textsuperscript{26} One Justice dissented on the ground that there was a reasonable expectation of privacy in the innocuous, unmarked packages, which appeared to be "tightly wrapped for shipment by mail, or to protect its contents, or for both purposes."\textsuperscript{27} The United States Supreme Court once again granted certiorari to determine the constitutionality of the searches.\textsuperscript{28}

\begin{thebibliography}{9}

\bibitem{23} For a discussion of the automobile exception, see text accompanying notes 128-154 infra.

\bibitem{24} 442 U.S. 903 (1980).

\bibitem{25} 442 U.S. 753 (1980); see text accompanying notes 195-200 infra.

\bibitem{26} Brief for Petitioner at 11. The California Supreme Court again refused to grant a hearing, with Chief Justice Bird and Justice Tobriner dissenting. See People v. Robbins, 103 Cal. App. 3d 34, 45, 162 Cal. Rptr. 780, 786 (Ct. App. 1980).


\bibitem{28} People v. Robbins, 103 Cal. App. 3d 3d 34, 44, 162 Cal. Rptr. 780, 785 (Ct. App. 1980) (Rattigan, J., dissenting). Judge Rattigan went on to observe that:

\textit{[F]or all that I see, [the package] could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile.}

\textit{Id.} (Rattigan, J., dissenting).

\bibitem{29} 449 U.S. 1109 (1981).
\end{thebibliography}
On April 9, 1978, New York State Trooper Douglas Nicot was passed by a car travelling at approximately seventy-five miles an hour in a fifty-five mile-per-hour speed zone. He gave chase and succeeded in pulling the automobile over. Trooper Nicot approached the automobile and asked whether the driver or any of the three passengers had a license or registration. While at the automobile window, Trooper Nicot smelled marihuana and saw on the front seat an envelope commonly used to carry the drug. He then placed all four individuals (including Roger Belton, who was a passenger in the back seat) under arrest for unlawful possession of marihuana. Trooper Nicot ordered the four men to leave the car and frisked each one as he alighted. Because he had only one pair of handcuffs, the officer placed the four men at different points around the automobile so that there could be no physical contact between them.

He then reentered the automobile and retrieved the envelope, labeled “Supergold,” from the front seat and a partially burned marihuana cigarette from the ashtray. Trooper Nicot next searched the five jackets in the back seat by first patting the jackets’ exteriors for weapons, and, feeling none, by unzipping the pockets. In the zippered pocket of Roger Belton’s jacket, the officer found a rolled-up twenty dollar bill in which there was a substance later identified as cocaine. He placed the jacket in his patrol car and drove the four men to court for arraignment.

Belton was charged with possession of a controlled substance. He unsuccessfully moved to suppress from evidence the cocaine seized from his jacket pocket. Belton then pled guilty to a lesser included offense but preserved and exercised his right to appeal.

The appellate division unanimously affirmed the judgment, holding that the search of Belton’s jacket was a reasonable search.

30. Id. at 2861-62.
31. Brief for Petitioner at 3.
32. Id.
33. Id. Two marihuana cigarettes and a plastic bag containing a large amount of cocaine were also discovered in the jacket. Joint Appendix at A-21 to A-22.
35. Id.
36. Id. at 199, 416 N.Y.S.2d at 923-24. The lesser included offense was attempted possession of a controlled substance in the sixth degree, N.Y. PENAL LAW §§ 220.06, 220.110 (McKinney 1980). See 68 A.D.2d at 199, 416 N.Y.S.2d at 923-24.
incident to arrest. The Court of Appeals reversed the appellate division, holding that "[o]nce [the] defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and the control of the police may not be upheld as [a search] incident to his arrest." Two judges dissented, taking issue with the majority's conclusion that the suspects and their property were in the exclusive control of the police. Rather, the dissenters argued, one policeman with four unknown suspects on a busy highway presented a "fluid situation" which required a search of the jackets in order to protect the officer and preserve evidence. The dissenters called for an honest assessment of the facts of the case and the degree to which the arrestee and his property had actually come within the exclusive control of the police. The Supreme Court granted certiorari to decide whether the search of Belton's jacket pocket was a proper search incident to arrest.


38. People v. Belton, 50 N.Y.2d 447, 452, 407 N.E.2d 420, 423, 429 N.Y.S.2d 574, 577 (1980). The majority assessed the critical inquiry to be the "extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search." Id. at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576 (citation omitted). In so holding, the court overruled People v. De Santis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), cert. denied, 443 U.S. 912 (1979). See 50 N.Y.2d at 451 n.1, 407 N.E.2d at 422 n.1, 429 N.Y.S.2d at 576 n.1. Thus considered, once property is within the exclusive control of the police, the exigency dissipates, and a search of the property can no longer be viewed as incident to an arrest. See id.


40. Id. at 454, 407 N.E.2d at 424, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

41. Judge Gabrielli stated:

Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption.

Id. at 454-55, 407 N.E.2d at 425, 429 N.Y.S.2d at 579 (Gabrielli, J., dissenting).

42. 449 U.S. 1109 (1981).
THE COURT’S REASONING

Robbins v. California

The search in Robbins was found to be unconstitutional. 43 Justice Stewart, writing for a plurality of the Court, 44 held that unless a closed opaque container “clearly announc[es] its contents” 45 or a search of such a container falls under one of the other established exceptions to the fourth amendment, 46 a warrant must be secured before the container may be searched. In so holding, Justice Stewart responded to three basic arguments: First, that a closed container found in an automobile is subject to a warrantless search because it is located in an automobile; 47 second, that the nature of the container may diminish its constitutional protection; 48 and third, that the opaque bags at issue fell within the class of items subject to a warrantless search because their contents could be inferred from their outward appearance. 49

Justice Stewart began by stating that the automobile exception 50 has no place in an analysis of container searches. Simply stated, the automobile exception provides that a warrant to search an automobile is unnecessary where probable cause exists that the car is connected with criminal activity, 51 and where the fleeting nature of

44. Id. at 2843 (Stewart, J., joined by Brennan, White & Marshall J.J.). Chief Justice Burger concurred in the judgment without filing an opinion. Id. at 2847. Justice Powell while concurring in the judgment wrote a separate opinion. Id. (Powell, J., concurring). Three separate dissents were filed. Id. at 2851 (Blackmun, J., dissenting); id. (Rehnquist, J., dissenting); id. at 2855 (Stevens, J., dissenting).
45. Id. at 2847.
46. Id. at 2847 n.3. The generally recognized exceptions to the fourth amendment search warrant requirement are: consent searches, see, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973); hot pursuit, see, e.g., Warden v. Hayden, 387 U.S. 294 (1967); stop and frisk, see, e.g., Terry v. Ohio, 392 U.S. 1 (1968); plain view, see, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971); search incident to a lawful arrest, see, e.g., Chimel v. California, 395 U.S. 752 (1969); and automobile searches, see, e.g., Carroll v. United States, 267 U.S. 132 (1925).
47. 101 S. Ct. at 2844-45; see Brief for the United States as Amicus Curiae at 22-23.
48. 101 S. Ct. at 2845-46.
49. Id. at 2846-47.
50. See text accompanying notes 128-154 infra.
51. 101 S. Ct. at 2844. Probable cause to search is present “if the facts and circumstances would persuade a reasonably prudent person that a crime has been committed and that evidence of the crime can be found at the location to be searched.” Note, The Automobile Exception to the Warrant Requirement: Speeding Away From the Fourth Amendment, 82 W. Va. L. Rev. 637, 637 n.4 (1980); see Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132, 159-62 (1925). See generally Armentano, The Standard for Probable Cause Under the Fourth Amendment, 44 CONN. B.J. 137 (1970).
the automobile makes the procurement of a warrant to search the automobile impracticable and unreasonable; that is, when either the driver or confederates might circumvent law enforcement officials' attempts to secure the automobile by driving out of the jurisdiction while a search warrant is sought. Another argument, in lieu of or in addition to the mobility of the automobile as obviating the need for a warrant, is that the pervasive regulation of the automobile bestows upon it a lesser expectation of privacy and, therefore, the automobile is subject to a warrantless search upon probable cause regardless of its mobility.

Justice Stewart held that neither the fleeting nature of the automobile nor the lesser expectation of privacy therein extends to container searches. He answered the argument, advanced by the United States Government and dissenting Justices Blackmun and Stevens, that the very placing of containers into an automobile reflects a failure to guard one's expectation of privacy as to those containers, by holding that the issue had been dispositively settled in United States v. Chadwick and Arkansas v. Sanders. Briefly, Chadwick held that luggage, because of its primary function as a "repository of personal effects," carries a greater expectation of privacy than does an automobile. Sanders 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."

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54. 101 S. Ct. at 2845.

55. Brief for the United States as Amicus Curiae at 23 (citing United States v. Mackey, 626 F.2d 684, 687 (9th Cir. 1980)(special qualities of paper bag, combined with fact that bag "stuffed under the seat of a car is naturally viewed as an item demanding or deserving no more privacy than any other part of the automobile").

56. 101 S. Ct. at 2851 (Blackmun, J., dissenting); see text accompanying notes 92-100 infra.

57. 101 S. Ct. at 2855 (Stevens, J., dissenting); see text accompanying notes 92-100 infra.

58. 433 U.S. 1 (1977); see text accompanying notes 180-192 infra.

59. 442 U.S. 753 (1979); see text accompanying notes 195-200 infra.

60. 433 U.S. at 13.

61. 442 U.S. at 766.
Sanders Court thus concluded that packages seized from an automobile are subject to an immediate, warrantless search only when their outward appearance readily supports the inference that they contain contraband.62

Having thus disposed of the automobile exception, Justice Stewart next addressed the contention that containers which are not common repositories of personal effects, such as the plastic bags in Robbins, merit less constitutional protection than luggage.63 He cited circuit court cases which drew distinctions between sturdy and flimsy containers,64 and held that such distinctions have no constitutional basis.65 Rather, the critical inquiry under Chadwick and Sanders is whether the defendant, in placing something within a container, "had thereby reasonably 'manifested an expectation that the contents would remain free from public examination.'"66 Justice Stewart felt, moreover, that the objective criteria by which to distinguish between the various types of containers would be "difficult if not impossible"67 to determine and, therefore, the courts, constables, and citizens would have little guidance as to which receptacles carry a sufficient privacy interest so as to fall within the warrant requirement.68

In support of his contention that "[w]hat one person may put into a suitcase, another may put into a paper bag,"69 Justice Stewart cited the recent decision of the United States Court of Appeals, District of Columbia Circuit in United States v. Ross.70 Ross invali-

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62. Id. at 765 n.13.
63. 101 S. Ct. at 2845. The state proposed the rule that:
[i]f a reasonable person, in light of all the circumstances, has cause to believe that the container in question is a repository of personal effects, then a warrantless search is prohibited. If, however, there is no reason to believe that the container is a receptacle of such articles, then probable cause alone is sufficient to justify the search.

Brief for Respondent at 51. Posing a different test, the United States argued, as amicus, that "insubstantial containers," such as plastic bags or paper cups, invoke less expectation of privacy than substantial containers, and that a warrant should therefore not be required where the container is insubstantial. Brief for the United States as Amicus Curiae at 22-23.
64. 101 S. Ct. at 2846.
65. Id.
66. Id. (quoting Chadwick, 433 U.S. at 11). It should be noted, however, that the Court did not determine whether a subjective or objective standard with regard to Robbins' expectation of privacy in the parcels should have been utilized.
67. Id.
68. Id.
69. Id.
dated the warrantless search of a brown paper bag found in the course of a lawful warrantless search of an automobile trunk. The court in Ross held that a container or parcel could not be searched unless it fell within the Sanders justification for an immediate search; that is, there is no expectation of privacy in a container where its very nature and appearance announce its contents.

By utilizing this concept of the ability to infer the contents of a container, Justice Stewart next met the argument advanced in Sanders that "not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." Justice Stewart narrowly interpreted this phrase, holding that the examples of such containers provided by the Court in Sanders, including a gun case, a kit of burglar tools, and open containers in plain view, were "the very model of exceptions which prove the rule." Unlike the suitcase in Sanders, the paper bag in Ross, and the plastic-wrapped parcels in Robbins, the items listed in Sanders clearly met the test that "a container must so clearly announce its contents, whether by distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer."

Justice Powell concurred in the judgment on the ground that the result was justified by Sanders and that Robbins specifically evi-

71. 655 F.2d at 1171.
72. Id. at 1170 (citing Sanders, 442 U.S. at 765 n.13).
73. 101 S. Ct. at 2846 (quoting Sanders, 442 U.S. at 764 n.13).
74. Id. at 2864 (citing Sanders, 442 U.S. at 764-65 n.13).
75. Id.
76. 442 U.S. at 766.
77. 655 F.2d at 1171.
78. 101 S. Ct. at 2847.
79. Id. Justice Stewart went on to note that the evidence did not reliably indicate that the package could only have contained marihuana. Id. Additionally, the California Court of Appeals opinion that the package containing marihuana was in the ken of any experienced observer, People v. Robbins, 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (Ct. App. 1980), was found to be unsupported by the vague hearsay testimony of the arresting officer. 101 S. Ct. at 2847. This testimony was as follows:

Q. And just one further question: You stated in response to Mr. Ross' question, when you first saw the brown tote bag there was nothing unusual about it: Nothing unusual about these two plastic wrapped green blocks that attracted your attention?
A. I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely hearsay. I had never seen them before.
Q. You had heard contraband was packaged this way?
A. Yes.

Joint Appendix at 41. An interesting question is raised by the scope of the plain smell doctrine and its possible applicability in this case. See text accompanying notes 259-260 infra.
denced an expectation of privacy in the plastic-wrapped parcels. He took exception, however, to the plurality's departure from the Court's previous "basic concern with interests in privacy [and its adoption of a] mechanical requirement for a warrant before police may search any closed container." Justice Powell found the mechanical rule neither supported by precedent nor justified by a balancing of the interests of law enforcement with the fourth amendment privacy interests of the individual. The rule's sole virtue, he concluded, was "simplicity." Justice Powell was attracted to the dissenters' argument that the automobile exception should control for a search of containers where probable cause exists to search the automobile, as opposed to probable cause focused on a particular item therein. He felt, however, that the sua sponte consideration of the doctrine late in the term would be inappropriate.

Justices Blackmun, Rehnquist, and Stevens dissented on three grounds. The first, advanced by Justice Rehnquist, was that Robbins presented yet another opportunity to discard the exclusionary rule. He argued that this rule places too great a burden on law enforcement personnel by suppressing evidence found during searches which, though conducted in good faith, are later ruled illegal. Justice Rehnquist further argued that the exclusionary rule forces the courts to "engraft subleties" onto the fourth amendment in order to

80. 101 S. Ct. at 2847 (Powell, J., concurring).
81. Id. at 2849 (Powell, J., concurring).
82. Id. (Powell, J., concurring). Indeed, Justice Powell contended that Sanders explicitly foreclosed application of mechanical rules by noting the difficulties that would attend the determination of privacy interests, and limiting the holding to only personal luggage. Id. (Powell, J., concurring); see Sanders, 442 U.S. at 765 n.13.
83. 101 S. Ct. at 2849-50 (Powell, J., concurring). While no privacy interest would be protected in, for example, a Dixie cup, the police would be forced to go through the time-consuming process of securing a warrant, thereby removing police personnel from other law enforcement tasks. Id. (Powell, J., concurring).
84. 101 S. Ct. at 2850 (Powell, J., concurring).
85. Three Justices dissented. They are Justice Blackmun, id. at 2851 (Blackmun, J., dissenting), Justice Rehnquist, id. (Rehnquist, J., dissenting), and Justice Stevens, id. at 2855 (Stevens, J., dissenting).
86. Id. at 2850 (Powell, J., concurring); see id. at 2855 (Stevens, J., dissenting). See also Sanders, 442 U.S. at 766-68 (Burger, C.J., concuring). Interestingly, the Chief Justice merely concurred in the Robbins judgment without opinion. 101 S. Ct. at 2847 (Burger, C.J., concurring in the judgment); see text accompanying notes 160-163 infra.
87. 101 S. Ct. at 2850-51 (Powell, J., concurring).
88. Id. at 2851-52 (Rehnquist, J., dissenting); see California v. Minjares, 443 U.S. 916 (1979)(Rehnquist, J., dissenting from denial of stay)(arguing that stay should be granted and exclusionary rule overruled).
89. See 101 S. Ct. at 2852 (Rehnquist, J., dissenting).
provide simple formulas by which police will know in advance how to conduct a particular search legally.\textsuperscript{90} He called for a recognition of the reasonableness requirement of the fourth amendment as controlling, rather than "the judicially-created preference for a warrant.\textsuperscript{91}

A position taken by all three dissenters was that the automobile exception should be extended to encompass any items found inside an automobile.\textsuperscript{92} While both Chadwick\textsuperscript{93} and Sanders\textsuperscript{94} focused on the probable cause as to the container itself, in Robbins probable cause existed for the automobile generally.\textsuperscript{95} Justice Stevens therefore argued that if a warrant had been issued to search the automobile, the police "surely would not need to return to the magistrate for another warrant before searching the suitcase [found therein].\textsuperscript{96} Justice Rehnquist, in particular, argued that an expectation of privacy in a locked trunk or glove compartment is no less than the expectation of privacy in luggage in an automobile.\textsuperscript{97} He viewed as illogical the proposition that a trunk or glove compartment of an automobile should be deemed by law to carry less of an expectation of privacy than luggage found in the same automobile.\textsuperscript{98}

The final dissenting argument, advanced by Justice Rehnquist, was that an analysis of Robbins' particular expectation of privacy in the plastic-wrapped parcels would conclude that no reasonable expectation of privacy existed.\textsuperscript{99} The facts of the case included the dis-

\begin{itemize}
  \item 90. \textit{Id.} at 2851 (Rehnquist, J., dissenting).
  \item 91. \textit{Id.} at 2852 (Rehnquist, J., dissenting).
  \item 92. \textit{Id.} at 2851 (Blackmun, J., dissenting); \textit{Id.} at 2852-54 (Rehnquist, J., dissenting); \textit{Id.} at 2855-58 (Stevens, J., dissenting); cf. Sanders, 442 U.S. at 769 (Blackmun, J., dissenting) (insofar as luggage is as mobile as automobile in which it is located and since expectation of privacy attending luggage in automobile is no greater than locked glove compartment or trunk, luggage, like automobile itself, should be susceptible to warrantless search).
  \item 93. 433 U.S. at 3-4 (footlocker); see text accompanying note 181 infra.
  \item 94. 442 U.S. at 755 (suitcase); see text accompanying note 196 infra.
  \item 95. 101 S. Ct. at 2843 (stop of automobile due to erratic driving); see text accompanying note 86 supra and notes 160-163 infra.
  \item 96. 101 S. Ct. at 2857 (Stevens, J., dissenting).
  \item 97. \textit{Id.} at 2853 (Rehnquist, J., dissenting)(citing Sanders, 442 U.S. at 769 (Blackmun, J., dissenting)).
  \item 98. \textit{Id.} (Rehnquist, J., dissenting)(citing Sanders, 442 U.S. at 769 (Blackmun, J., dissenting)).
  \item 99. 101 S. Ct. at 2854 (Rehnquist, J., dissenting). In fact, Justice Rehnquist agreed with Justice Blackmun's dissenting argument in Sanders that determining the reasonable expectation of privacy in differing types of containers would provide the police and the courts with difficult, if not impossible, questions. Sanders, 442 U.S. at 771-72 (Blackmun, J., dissenting). Like Justice Blackmun, Justice Rehnquist would have drawn the bright line at the other extreme to the effect that anything found in an automobile is itself subject to a warrantless search. 101 S. Ct. at 2854 (Rehnquist, J., dissenting).
\end{itemize}
covery of marihuana in the front seat, Robbins' inculpatory statement that the police should check the trunk, and the discovery of plastic bags wrapped around something in a manner commonly used to wrap contraband. Justice Rehnquist argued that these facts not only demonstrated a diminished expectation of privacy, but in view of all the other facts and circumstances, rendered the contents of the parcels readily inferrable from their outward appearance.

New York v. Belton

In Belton, Justice Stewart, writing for a majority of the Court, held the search of Belton's jacket to be constitutional as incident to a lawful arrest. The jacket was deemed to have been in Belton's immediate control because it was located in the passenger compartment of the automobile in which he had been riding, and because it was searched immediately after his arrest. In supporting this holding, Justice Stewart principally relied on two prior cases: Chimel v. California and United States v. Robinson.

Chimel was cited for the proposition that a search incident to arrest may be no broader than necessary to protect the arresting officer and preserve evidence. In Chimel, the Court delineated the boundaries of a reasonable search as the arrestee's person and the area within his or her immediate control. Immediate control was construed as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." Robinson held that police may lawfully search the person of an arrestee, even if the arrest is for a traffic violation, and that the search may extend to all items found on the person. It was cited in Belton for the principle that since the search of a person under law-
ful custodial arrest is reasonable per se — the fact of arrest giving rise to the right to search — the issue of whether either of the justifications for the search incident to arrest exception was actually present should not be litigated in each case.109

Justice Stewart reviewed Chimel and Robinson and noted a split in the circuits as to the permissible scope of a search incident to arrest of individuals inside a car.110 He then observed that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within"111 the Chimel grab area. Moreover, since the intrusion occasioned by an arrest temporarily overrides any privacy interests of the arrestee, any expectation of privacy in articles located within the grab area—the passenger compartment of the car—is similarly overridden and consequently subject to a warrantless search.112 Justice Stewart answered the argument that the search of Belton's jacket was invalid under Chadwick and Sanders118 by pointing out, first, that the search in Chadwick occurred well after the arrest and therefore could not be upheld as a search incident to arrest,114 and, second, that the search incident to arrest exception was explicitly not at issue in Sanders.115

Justice Rehnquist joined the opinion since the majority was unwilling to override the exclusionary rule.116 Justice Stevens concurred in the judgment only. He felt that Robbins and Belton should have been decided the same way and for the same reason; that in both cases the search should have been upheld under the automobile exception to the warrant clause.117

110. 101 S. Ct. at 2863.
111. Id. at 2864.
112. Id. Justice Stewart defined a searchable container as "any object capable of holding another object." Id. at 2864 n.4. This definition includes "luggage, boxes, bags, clothing and the like," in addition to glove compartments or consoles. Id.
113. Id. at 2864-65. The New York Court of Appeals reasoned that since the automobile could have been easily guarded, its occupants were under arrest and a safe distance from the vehicle, removal to the police station was imminent, and the jacket was in the policeman's exclusive control with no reasonable possibility that the arrestee could or would have reached for it, a search warrant should have been obtained. People v. Belton, 50 N.Y.2d 447, 452, 407 N.E.2d 420, 423, 429 N.Y.S.2d 574, 577 (1980).
114. 101 S. Ct. at 2865 (quoting Chadwick, 433 U.S. at 15); see Preston v. United States, 376 U.S. 364 (1964)(searches "remote in time and place from the arrest" are unconstitutional).
115. 101 S. Ct. at 2865 (citing Sanders, 442 U.S. at 764 n.11).
116. Id. (Rehnquist, J., concurring).
117. Id. (Stevens, J., concurring).
Justice Brennan dissented on the ground that the search incident to arrest exception under *Chimel* ceases to apply at the "point there is no possibility that the arrestee could reach weapons or contraband." He contended that in its attempt to fashion simple rules, the Court had adopted the fiction that the passenger compartment of the automobile is always within the arrestee's immediate control. This fiction, Justice Brennan argued, was unsupported by the facts of *Belton* as analyzed by the New York Court of Appeals. He noted, moreover, that the exception carved out by the Court could have been applied even if Trooper Nicot had handcuffed the arrestees and extended his search to locked luggage, a result he deemed inconsistent with past cases. Finally, Justice Brennan argued that the bright line test enunciated by the majority was illusory in that it left a number of questions unresolved and provided no principles by which to resolve them. These questions included the allowable time period between an arrest and a search, whether the warrantless search of an automobile interior conducted incident to an arrest is valid when probable cause to arrest arises after the arrestees have left the car, whether the *Belton* holding should be limited to automobiles, and how to measure the physical boundaries of the interior or "passenger compartment of an automobile."

Justice White separately dissented on the ground that the Court's holding extended *Chimel* to extreme limits. In particular, he found unacceptable the fishing expeditions into luggage permitted under *Belton* without any probable cause to believe that the luggage contains contraband.

**FOURTH AMENDMENT CONTAINER SEARCHES**

Three major lines of cases were implicated in the *Robbins* and *Belton* decisions: the automobile exception, the luggage cases, and

118. *Id.* at 2867 (Brennan, J., dissenting).
119. *Id.* (Brennan, J., dissenting).
121. *Id.* at 2868 (Brennan, J., dissenting).
122. *Id.* at 2869 (Brennan, J., dissenting).
123. *Id.* (Brennan, J., dissenting).
124. *Id.* (Brennan, J., dissenting).
125. *Id.* (Brennan, J., dissenting). The status of a hatchback automobile is also in doubt as to the primary question of what is the trunk and what is the passenger compartment. *But see note* 311 infra.
126. 101 S. Ct. at 2870 (White, J., dissenting).
127. *Id.* (White, J., dissenting).
the search incident to arrest exception. Although these doctrines were necessarily touched upon in the discussion of the Court's rationale, this section explores the doctrines in greater detail and examines how they are affected by Robbins and Belton.

**The Automobile Exception**

The roots of the automobile exception can be traced back to *Carroll v. United States*. *Carroll* involved the warrantless search of an automobile upon probable cause that it contained illegal liquor. The search resulted in the seizure of contraband which had been hidden in the upholstery of the automobile. After noting that the Court had historically distinguished searches of movable vehicles from searches of immobile locations for fourth amendment purposes, the Court balanced the interest of law enforcement officials in being able to search and seize contraband against the interest of individuals in “free passage without interruption or search.” This balancing resulted in the holding that the necessity of an immediate seizure of contraband from an easily movable vehicle outweighed the driver's right to travel freely. The Court reasoned that if a warrant were to be required in such situations, the contraband in the automobile might be removed or destroyed before it could be lawfully seized.

Confusion remained, however, as to when a warrantless search of an automobile could take place. The problem centered around the statement in *Carroll* that “[i]n cases where the securing of a warrant is reasonably practicable, it must be used.” This confusion was alleviated to some extent when the Court, in *Chambers v. Maroney*, held that if the search of an automobile was permissible at the time of the seizure, then the right to search extended to a subsequent warrantless search of the automobile at the police station. The rationale of this holding was two-fold. First, the Court noted

129. 267 U.S. 132 (1925).
130. Id. at 136.
131. Id. at 153.
132. Id. at 156.
133. Id. at 154.
134. Id. at 153.
135. Id.
136. Id.
138. Id. at 52.
that a search of the automobile at the time of the stop might be "impractical and perhaps not safe for the officers," and, second, the Court found "no difference [for constitutional purposes] between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other, carrying out an immediate search without a warrant." Two years later, however, in *Coolidge v. New Hampshire,* the Court held that if there was no real possibility that the automobile was going to be moved, then the automobile exception could not be invoked to justify a warrantless search. Therefore, because the defendant in that case had been under observation, the automobile had remained immobile in the driveway, and a warrant to search the automobile, albeit invalid, had been obtained. Mobility was not a problem and the police could have and should have obtained a valid search warrant. The Court concluded that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."

The relevance of mobility as a justification for warrantless searches has been questioned on the ground that insofar as the automobile's occupants and the automobile itself are in custody, the automobile is de facto immobilized. Moreover, warrantless searches of automobiles not actually in motion have been upheld under the automobile exception. While this might imply that the "potential

139. *Id.* at 52 n.10.
140. *Id.* at 52. The Court adverted to the "lesser intrusion" concept, which holds that only immobilization should be allowed until a warrant is obtained. The Court rejected this approach, however, noting that "which is the 'greater' and which is the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances." *Id.* at 51-52.
141. 403 U.S. 443 (1971).
142. *Id.* at 460.
143. *Id.*
144. *Id.*
145. *Id.* at 447.
146. *Id.* at 462. *But see id.* at 505 (Black, J., dissenting)(majority's rationale depended upon faulty assumptions that defendant's wife could be refused entry to house and automobile, and that nobody else had any motivation to remove automobile).
147. *Id.* at 461-62.
149. *See, e.g., Scher v. United States,* 305 U.S. 251 (1938)(warrantless search permissible after automobile had been parked and driver was leaving); *Husty v. United States,* 282 U.S. 694 (1931)(warrantless search permissible after automobile has been under observation, and after driver has entered it but before automobile was actually in motion).
mobility of the car was sufficient,"¹⁵⁰ the automobile in Coolidge was certainly potentially mobile.¹⁵¹ It therefore seems as though mobility alone is an insufficient justification for the automobile exception.

Another justification advanced by the Court for the automobile exception is that contraband in an automobile is often in the plain view of police who come into contact with the automobile for non-criminal purposes.¹⁵² In addition, "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements."¹⁵³ For these reasons, the reduced expectation of privacy in an automobile may justify a warrantless search.¹⁵⁴

While the automobile exception was a major point of dispute in Robbins, its role in the Belton decision was much less clear. At least for the moment, it is clear that under Sanders and Robbins containers found in an automobile are not automatically submitted to a warrantless search under the automobile exception. Yet, one may ask why containers within an automobile may not be searched while a locked trunk,¹⁵⁵ a locked glove compartment,¹⁵⁶ and the upholstery of an automobile¹⁵⁷ are all subject to a warrantless search under the exception? One answer is that the trunk, glove compartment, and upholstery, as integral parts of the automobile, retain the same mobility as the automobile.¹⁵⁸ As noted above, however, mobility alone is an insufficient justification for the automobile exception.¹⁵⁹ If the rationale of the automobile exception is that the automobile has less of an expectation of privacy than luggage, it is still unclear why one has less expectation of privacy in a locked trunk or glove compartment than in a paper bag. When an individual places an object in

¹⁵⁰ Note, supra note 128, at 842; cf. 101 S. Ct. at 2853 (Rehnquist, J., dissenting) ("automobiles are inherently mobile").
¹⁵¹ As observed earlier, see note 149 supra, searches of automobiles have been upheld where the possibility of mobility is remote. See Chambers, 399 U.S. 42 (automobile searched while at police station); Harris v. United States, 390 U.S. 234 (1968)(search of impounded automobile at precinct); Cooper v. California, 386 U.S. 58 (1967) (automobile searched one week after defendant had been arrested).
¹⁵⁹ See text accompanying notes 148-151 supra.
the locked trunk or glove compartment of an automobile, he or she has manifested an expectation of privacy perhaps greater than if the object had simply been placed in a paper or plastic bag. Moreover, reasonable persons could surely differ as to which of these items—a locked trunk or a paper bag—should be deemed a repository of personal effects or generally more open to public view.

Also unanswered in Robbins is the vitality of Chief Justice Burger's distinction between probable cause that a particular container holds contraband, and probable cause that contraband is located somewhere within an automobile. While in Sanders the Chief Justice was unwilling to decide in which of the situations a warrant is more necessary, Robbins provided an opportunity to decide the issue. That is, while the locus of the probable cause in Sanders and Chadwick was the luggage—the connection between the luggage and the automobile being "purely coincidental"—Robbins differed from Sanders precisely because no probable cause to believe that the plastic bags contained marihuana existed before the stop and search.

It is clear, however, that the Belton majority did not utilize the automobile exception to uphold the search of Belton's zippered jacket, but relied instead on the search incident to arrest exception. Indeed, there is very little in the Belton rationale that limits the holding to automobiles with regard to allowing the warrantless search of a container within the fictional grab area regardless of the

160. As noted in Chief Justice Burger's concurrence in Sanders:
This case simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located somewhere in the vehicle, but when they do not know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure.
161. 442 U.S. at 768 (Burger, C.J., concurring).
162. Id. at 768 (Burger, C.J., concurring).
163. Arguably, however, Robbins' statement "[w]hat you are looking for is in the back," Brief for Petitioner at 6, gave specific probable cause to search the trunk. Nonetheless, the specific probable cause is far more attenuated than in Chadwick or in Sanders where specific probable cause existed that a particular container held contraband. See notes 180-200 infra and accompanying text.
164. Justice Stevens would have used the automobile exception to uphold searches in both cases. See Belton, 101 S. Ct. at 2865 (Stevens, J., concurring); Robbins, 101 S. Ct. at 2855 (Stevens, J., dissenting).
165. See 101 S. Ct. at 2862-65.
arrestee's ability to reach it. That is, if the rationale of Belton is that containers are "generally, even not if inevitably" within the grab area, the same must be said of luggage carried by an individual as he walks down the street. Similarly, nothing that distinguishes an automobile from other places—mobility, travelling in the open, pervasive regulation—affects the scope of the grab area. Nevertheless, as will be demonstrated shortly, to extend the search incident to arrest exception to luggage within the exclusive control of the police and outside the grab area of the individual would require a reinterpretation of Chadwick and an overruling of Chimel. If one assumes that the custodial arrest of an individual walking along the street would not justify a warrantless search of the luggage he or she is carrying, the automobile must be viewed as taking on talismanic qualities for the purposes of the search incident to arrest exception.

The Luggage Cases

Modern law relating to the search of luggage is rooted in the seminal case of Katz v. United States, which held that a warrantless wiretap of a public telephone booth violated the fourth amendment. Noting that "the Fourth Amendment protects people, not places," the Supreme Court shifted the focus of fourth amendment analysis from the government intrusion into a place and whether the place was endowed with an expectation of privacy, to whether or not the individual legitimately expected or sought to preserve privacy in the place searched. Accordingly, when Katz shut the door of the public telephone booth and deposited the toll money, he manifested a legitimate belief that his conversation would remain

166. Id. at 2867 (Brennan, J., dissenting).
167. Id. at 2869.
168. See text accompanying notes 303-307 infra.
169. Id.
170. But see Moylan, supra note 52, at 1015:
The point is that the automobile is simply the coincidental locus in which we apply a Chimel analysis and not a crucial factor calling for some special analysis of its own under Carroll. Carroll, which deals with the warrantless search of an automobile as the search of the automobile, has nothing whatsoever to do with the coincidental fact that an automobile may fall within a Chimel perimeter under "search incident" law.
172. Id. at 359.
173. Id. at 351.
Justice Harlan, concurring in *Katz*, highlighted this reformulated mode of analysis by enunciating a two-fold prerequisite to fourth amendment protection. First, the individual must exhibit a subjective expectation of privacy; that is, he must manifest an actual belief that he regards the place or thing as private. Second, this expectation of privacy must be objectively reasonable; it must be clear that "society is prepared" to recognize the expectation as reasonable. Overall, *Katz* can be reduced to "a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."179

This value judgment was adopted in the two major luggage cases preceding *Robbins—Chadwick* and *Sanders*. In *Chadwick*, Federal agents were notified by railroad officials that two suspected drug dealers had placed a suspicious and heavy footlocker onto a train in San Diego. When the train arrived in Boston the suspects and their footlocker were watched, and a specially trained dog signalled the presence of marihuana. The two suspects were joined by Chadwick and the three of them lifted the footlocker into Chadwick's waiting automobile. At that point, with the trunk of the automobile still open and the car engine off, the agents moved in and arrested all three men. The footlocker was taken to the Federal

175. 389 U.S. at 352.
176. Id. at 361 (Harlan, J., concurring).
177. Id. (Harlan, J., concurring). In United States v. White, 401 U.S. 745 (1971), Justice Harlan downplayed the importance of the subjective element, noting that the *Katz* analysis must "transcend the search for subjective expectations." Id. at 786 (Harlan, J., dissenting); accord, Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 384 (1974).
179. Amsterdam, supra note 177, at 403. This value judgment has been criticized both as "a perfectly impossible question," id., and as "a tautology." 1 W. LaFave, supra note 178, § 2.1(d), at 233.
180. See text accompanying notes 58-62 supra.
181. 433 U.S. at 3.
182. Id. at 4.
183. Id.
Building and opened without a warrant ninety minutes after it had been seized, and outside the presence of the defendants.\footnote{184} The Supreme Court invalidated this search, holding that luggage carries a substantially greater expectation of privacy than an automobile and, hence, is not as readily subject to a warrantless search.\footnote{185} The Court again rejected the argument that the warrant clause protected “only interests traditionally identified with the home”\footnote{186} and, citing \textit{Katz}, held that the fourth amendment “protects people from unreasonable government intrusions into their legitimate expectation of privacy.”\footnote{187} The expectation of privacy in \textit{Chadwick} had been manifested by placing the contents inside a double-locked footlocker.\footnote{188} Therefore, in the absence of an exigency, a warrant was required before the footlocker could be opened.\footnote{189} The Court, as noted earlier,\footnote{189} reasoned that luggage, unlike the automobile, is a common “repository of personal effects,”\footnote{189} the contents of which are neither open to public view nor subject to regular inspection or official scrutiny.\footnote{189}

Justice Blackmun, dissenting in \textit{Chadwick}, contended that the police could have assured the validity of the warrantless search of the footlocker at the Federal Building merely by postponing “the arrest just a few minutes longer until the respondents started to drive away,”\footnote{190} thereby bringing the search within the automobile exception. A number of lower courts subsequently followed Justice Blackmun’s cue and distinguished \textit{Chadwick} from cases where an automobile was lawfully stopped on the ground that the automobile in \textit{Chadwick} was never in motion prior to the seizure.\footnote{190}

\begin{footnotes}
\footnotetext[184]{Id. at 4-5.}
\footnotetext[185]{Id. at 13.}
\footnotetext[186]{Id. at 6.}
\footnotetext[187]{Id. at 7 (citing \textit{Katz}, 389 U.S. at 351).}
\footnotetext[188]{Id. at 11.}
\footnotetext[189]{Id.}
\footnotetext[190]{See text accompanying notes 60, 152-154 supra.}
\footnotetext[191]{433 U.S. at 13.}
\footnotetext[192]{Id.}
\footnotetext[193]{Id. at 22-23 (Blackmun, J., dissenting). Justice Brennan disputed this contention, asserting that it is “not at all obvious” that a legal search could have been made if respondents had begun to drive off. \textit{Id.} at 16-17 (Brennan, J., concurring). Justice Blackmun also suggested that the police could have searched the footlocker at the time of the seizure as a search incident to arrest. \textit{Id.} at 23 (Blackmun, J., dissenting).}
\footnotetext[194]{E.g., \textit{United States v. Finnegan}, 568 F.2d 637, 641 (9th Cir. 1977) (luggage found inside of moving automobile may be searched without warrant if it appears from totality of circumstances that probable cause exists to search luggage, and that exigent circumstances are presented by moving automobile); \textit{accord}, \textit{United States v. Tramunti}, 513 F.2d 1087, 1104-05}
\end{footnotes}
In *Sanders*, however, the Court ruled that the warrant requirement applies to “personal luggage taken from an automobile to the same degree it applies to such luggage in other locations.” In *Sanders*, police received word that two individuals would be flying into an airport with a green suitcase containing marihuana. Two such individuals did arrive when scheduled and claimed a green suitcase. The suspects left the airport in a taxi with the suitcase in the trunk. The taxi was stopped by the police, who opened the trunk and searched the suitcase. While upholding and commending the search of the automobile and the seizure of the suitcase, the *Sanders* Court ruled that the suitcase should have been held at the police station until a search warrant had been obtained. The Court found that the state had failed to prove the necessity of allowing a warrantless search of everything found in an automobile as well as of the automobile itself. The Court went on to note that insofar as luggage, unlike an automobile, can be quickly and effectively reduced to the exclusive control of the police, the exigencies accompanying the search of an automobile do not extend to searches of luggage contained therein. Further, the fact that the suitcase in *Sanders* was unlocked and unusually small did not “alter its fundamental character as a repository for personal, private effects.”

Justice Blackmun again dissented, this time on the ground that the *Sanders* decision mandated “inherently opaque” line-drawing between containers which can and cannot be characterized as repositories of personal effects, and therefore provided police with little guidance as to when a container could be searched without a warrant. He argued that an officer approaching an auto-


195. 442 U.S. at 766.
196. *Id. at* 755.
197. *Id. at* 761.
198. *Id. at* 763.
199. *Id. at* 763-66.
200. *Id. at* 762 n.9.
201. *Id. at* 772 (Blackmun, J., dissenting).
202. *Id. at* 771 (Blackmun, J., dissenting).
203. *Id. at* 772 (Blackmun, J., dissenting).
mobile is forced to divide the world of personal property into three groups. If there is probable cause to arrest the occupants . . . he may search objects within the occupants' immediate control, with or without probable cause. If there is probable cause to search the automobile itself, then . . . the entire interior area of the automobile may be searched, with or without a warrant. But under Chadwick and the present case, if any suitcase-like object is found in the car outside the immediate control area of the occupants, it cannot be searched, in the absence of exigent circumstances, without a warrant.\footnote{204}

Justice Blackmun asked how the police or the courts, when faced with an automobile trunk containing "an orange crate, a lunch bucket, an attache case, a duffel bag, a cardboard box, a backpack, a totebag, and a paper bag,"\footnote{205} could be expected to decide which items were subject to immediate search.

In fact, lower courts undertook precisely this analysis, holding that a briefcase,\footnote{206} a duffel bag,\footnote{207} a backpack,\footnote{208} and a totebag\footnote{209} were common repositories of personal, private effects, and could therefore not be searched without a warrant unless such a search was conducted as incident to a lawful arrest\footnote{210} or in the face of exigent circumstances.\footnote{211} On the other hand, the lunchbox,\footnote{212} paper bag,\footnote{213} and plastic bag\footnote{214} were generally not viewed as repositories of...
personal effects, although a warrant might be required where the owner of such an item takes additional steps that manifest an expectation of privacy.215

In United States v. Ross,216 however, where the issue before the Court was whether Sanders established a worthy container rule—a rule limiting the expectation of privacy to luggage only, and not to "smaller, less solid, or less durable [containers]"217—the District of Columbia Circuit implicitly rejected the Katz analysis, holding 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 zipperred leather pouch."218 In invalidating the warrantless search of a closed but unsealed paper bag located in the trunk of an automobile, the Ross court rejected the government's proposed unworthy container rule as discriminatory in "[en]snar[ing] those without the means or the sophistication to use worthy containers,"219 and as being too fraught with fine distinctions to guide the police.220 To this extent, the Ross Court agreed with Justice Blackmun's dissenting opinion in Sanders.221 Ross, however, drew a bright line in the oppo-

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217. Id. at 1160.

218. Id. at 1161.

219. Id. at 1170; see United States v. Ross, No. 79-1624, slip. op. at 13-14 (D.C. Cir. April 17, 1980)(Bazelon, J., dissenting), rev'd on rehearing, 655 F.2d 1159 (1981). Judge Bazelon, in dissent, noted that "in some of our subcultures paper bags are often used to carry intimate personal belongings. And the sight of some of our less fortunate citizens carrying their belongings in brown paper bags is too familiar to permit such class biases to diminish protection of privacy." Id. at 14 (Bazelon, J., dissenting).

220. 655 F.2d at 1170.

221. 442 U.S. at 772 (Blackmun, J., dissenting).
site extreme from Justice Blackmun's. While Justice Blackmun would have permitted the warrantless search of any parcel, package, or luggage located inside a lawfully stopped automobile, \(^{222}\) Ross held that a warrant was required before searching any closed opaque bag located in an automobile. \(^{223}\) Since an unworthy container rule would punish those individuals without the means to purchase worthy containers and would "destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant," \(^{224}\) the Ross court found the search of the paper bag to be unconstitutional. Such a result, the court held, was mandated by Sanders' limited list of the particular types of containers that would justify an immediate search. \(^{225}\)

Judge Tamm, dissenting, applied the Katz test to Ross' paper bag and found that the bag was supported by neither objective \(^{226}\) nor subjective \(^{227}\) expectations of privacy. First, Judge Tamm discussed whether a paper bag is normally a repository of personal effects insofar as society associates a paper bag with an expectation of privacy. \(^{228}\) After reviewing the precedents, \(^{229}\) and after finding that, unlike luggage, "[p]aper bags offer at best only minimal protection against accidental or deliberate intrusions [and] are not inevitably associated with the expectation of privacy," \(^{230}\) Judge Tamm considered whether under the facts of the case Ross had a reasonable expectation of privacy in the paper bag. \(^{231}\) Finding no indication that the bag was used to carry personal effects, \(^{232}\) Judge Tamm concluded that the general vulnerability of paper bags coupled with the reasonable belief that Ross' bag was not used to store intimate objects, should have operated to validate the warrantless search of the bag. \(^{233}\)

Since Ross and Robbins are factually similar and involve the

\(^{222}\) Id. (Blackmun, J., dissenting).
\(^{223}\) 655 F.2d at 1161.
\(^{224}\) Id. at 1170.
\(^{225}\) Id. (citing Sanders, 442 U.S. at 765 n.13).
\(^{226}\) 655 F.2d at 1177-78 (Tamm, J., dissenting).
\(^{227}\) Id. at 1178 (Tamm, J., dissenting).
\(^{228}\) Id. at 1177 (Tamm, J., dissenting).
\(^{229}\) Id. at 1174-77 (Tamm, J., dissenting).
\(^{230}\) Id. at 1177 (Tamm, J., dissenting)(emphasis added).
\(^{231}\) Id. at 1178 (Tamm, J., dissenting).
\(^{232}\) Indicia suggested by Judge Tamm would have included the finding of the bags among suitcases or conventional luggage or Ross having sealed the bag shut. Id. at 1178 n.6 (Tamm, J., dissenting).
\(^{233}\) Id. at 1178 (Tamm, J., dissenting).
same issues of law, the criticisms of Ross are equally applicable to the Robbins holding. In this regard, Judge Tamm’s opening remark that the Ross majority was “sensitive to theory but insensitive to reality” is only a half truth. In fact, the Ross and Robbins decisions alike demonstrate a marked insensitivity to both reality and the theoretical underpinnings of Katz and its progeny. To this end, one searches Robbins in vain for the application of an expectation of privacy test. Instead, the plurality simply states that once contents are placed within a closed, opaque container, an individual has thereby “reasonably ‘manifested an expectation that the contents would remain free from public examination.’” Such a statement, without more, replaces analysis with boilerplate and retreats from the Katz doctrine recently adhered to in Rakas v. Illinois and Rawlings v. Kentucky. In those cases, the issue of whether one has standing to contest a search revolves around the concept that “[o]nly legitimate expectations of privacy are protected by the Constitution.” The following factors are therefore relevant to the analysis: “the precautions taken to preserve privacy, the manner in which the person claiming fourth amendment protection has used the place or item searched, the treatment accorded that place or item at the time the Framers adopted the fourth amendment, and finally, the applicable property rights.” No such analysis was made by the Robbins plurality.

234. Recognizing that Ross could not be reversed without overruling Robbins, the Supreme Court had asked the petitioner to brief the question of “whether the Court should reconsider Robbins v. California.” United States v. Ross, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981)(No. 80-2209). But see Virgin Islands v. Rasool, 657 F.2d 582, 593 (3d Cir. 1981)(dicta)(distinguishing plastic parcel in Robbins from unsealed paper grocery bag, finding latter supported by lesser expectation of privacy notwithstanding opaqueness); United States v. Martino, No. 81-1009, slip op. at 5292-93 (2nd Cir. Nov. 5, 1981); United States v. Mefford, 658 F.2d 592, 593 (8th Cir. 1981); Petition for a Writ of Certiorari at 8 n.7, Ross (distinguishing Robbins and Ross on grounds of retroactivity issue, question of whether contents were divulged from outward appearance, and fact that bag in Ross was unsealed).

235. 655 F.2d at 1171 (Tamm, J., dissenting).

236. 101 S. Ct. at 2846 (quoting Chadwick, 433 U.S. at 11).

237. 439 U.S. 128 (1978). Rakas held that a legitimate expectation of privacy must be shown in order to have standing to contest a warrantless search of the glove compartment or passenger area of an automobile. But see Jones v. United States, 362 U.S. 257 (1960)(automatic standing to contest warrantless search where defendant is legitimately on premises).

238. 448 U.S. 98, 104-05 (1980)(contrasting Chadwick and Katz as cases where defendants took normal precautions to preserve their privacy, and noting that petitioner in Rawlings actually stated that “he had no subjective expectation” of privacy).


240. Ross, 655 F.2d at 1173 (Tamm, J., dissenting)(citing Rakas, 439 U.S. at 152-53 (1978)(Powell, J., concurring)).
In addition, the Robbins rationale is not compelled by either Chadwick or Sanders. In Chadwick, the container at issue was a double-locked, 200-pound footlocker, while the issue in Sanders was limited to personal luggage. The Sanders Court specifically noted that difficulties would necessarily accompany a determination of which containers would require a warrant and which would not. Presumably, these difficulties are to be worked out by the lower courts on a case by case, container by container basis. In fact, the Court stated that "not all containers . . . will deserve the full protection of the Fourth Amendment." While the Robbins plurality argued that the examples listed in Sanders were meant to be exclusive as "the very model of exceptions which prove the rule"—cases in which the container "clearly announce[s] its contents"—it was clear that under Sanders at least some containers would remain unprotected.

Moreover, it seems factually untenable to accord an expectation of privacy to a Dixie cup or an unenclosed paper bag. It seems unrealistic to assume that an individual has an expectation of privacy in such items or that society ought to recognize such an expectation as legitimate. In this regard, it cannot be forgotten that in exchange for the negligible, if any, expectation of privacy, highly probative evidence of criminal activity is going to be suppressed. While commentators on both ends of the spectrum agree that law enforcement personnel need to be given easy-to-follow rules, it must be remembered that the Court is "construing the Constitution, not writing a statute or a manual for law enforcement officers."

However clear the proscription on searches of containers in an automobile trunk appears to be, searches of opaque packages and

241. 442 U.S. at 765 n.13.
242. See id.: "There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched . . . ."
243. Id. at 764 n.13.
244. 101 S. Ct. at 2846. The Sanders Court found that "some containers (for example a kit of burglary tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." 442 U.S. at 764 n.13. The Court has never, however, explained what a kit of burglary tools looks like or how it differs from any other tool box in its outward appearance.
245. 101 S. Ct. at 2847.
246. Compare LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 141 (rules governing exclusionary rule ought to be capable of easy understanding and application) with Amsterdam, supra note 177, at 403-04 (fourth amendment must speak to police intelligibly).
247. Sanders, 442 U.S. at 768 (Burger, C.J., concurring).
containers found any place in an automobile are not necessarily foreclosed. As noted below, Belton radically expanded the search incident to arrest exception. To this end, the Robbins plurality specifically commented that the state had not argued that the packages were opened as a search incident to a lawful arrest. The Sanders Court also specifically noted that their decision in that case involved no consideration of the search incident to arrest exception. While the Belton holding only encompassed the interior of the passenger compartment and not the trunk, the applicability of the search incident to arrest exception to the search of containers inside of the trunk of Belton's automobile was not at issue.

In addition, the parameters of inventory searches of automobiles have yet to be fully developed with regard to containers located therein. The inventory search is the standardized procedure of cataloguing automobiles (and the contents thereof) that have been impounded by the police. In fact, such searches are not deemed searches at all and thus require no probable cause before they can be conducted. Rather, the procedure is justified under the caretaking function of the police, who may make inventories in order to protect the owner's property while it remains in police custody, to protect the police from claims that the property was lost or stolen while in police custody, and to protect the police from potential danger. Any inculpatory evidence of a crime found during a lawful police inventory is deemed to have been in plain view and, as such, admissi-

248. See text accompanying notes 303-309 infra.
249. 101 S. Ct. at 2847 n.3.
250. 442 U.S. at 764 n.11.
251. 101 S. Ct. at 2864 n.4.
253. See Moylan, supra note 52, at 1043-48; Wilson, supra note 148, at 147-52.
254. Moylan, supra note 52, at 1043-44.
These policies apply with equal force to containers taken from an automobile. In fact, the case for inventories may be more compelling considering the ease with which many containers could be removed by thieves, and because those containers most likely to contain personal effects are also most likely to contain valuables. Allowing inventories would make the most sense where the police either do not know the identity of the owner (negating any argument that permission should be sought) or reasonably believe that there are valuables within the automobile.

Finally, assuming the continued validity of the Sanders list of containers clearly announcing their contents, such containers, as well as open containers and parcels, remain subject to warrantless searches. In drug cases, the doctrine of plain smell and the extent to which it may be used in drug prosecutions may result in increased litigation.

The Search Incident to Arrest Exception

*Preston v. United States* held that a warrantless search must be contemporaneous to an arrest in order to be upheld as incident thereto. The *Preston* Court reasoned that searches remote in time or place from an arrest, which serve neither to protect police nor

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256. Moylan, supra note 52, at 1044-48; cf. Harris v. United States, 390 U.S. 234, 235 (1968)(per curiam)(in process of protecting car while it was in police custody, “[o]nce the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible”).

257. As a benign procedure, however, the inventorying process must be done as part of the caretaking function and not as an investigatory technique. The inquiry will therefore often focus on the intent of the searching policeman. See Note, supra note 128, at 851-52.

258. Id. at 853. The doctrine of inventory, however, is not without its critics. One commentator notes the “serious threat [of] potentially limitless authority for the warrantless search of automobiles whether impounded as instrumentalities of crime or pursuant to motor vehicle regulations.” Wilson, supra note 148, at 152. Another commentator balances the security of property with the violation of privacy, and concludes that in light of the possibility that no property will be in the automobile, and because property is insurable while privacy is not, “[a]s a routine matter . . . the protection of privacy is more important than the possibility of preventing theft.” Note, supra note 128, at 853.

259. Robbins, 101 S. Ct. at 2846; see text accompanying notes 73-79, 243-245 supra.


262. Id. at 368.
preserve evidence are unreasonable and therefore violate the fourth amendment. Four years later, in *Chimel v. California*, the Court limited the permissible scope of such searches to the arrestee's person and the area from which he or she might gain control of a weapon or destructible evidence. In so holding, the Court overruled cases in which a one-room office and four-room apartment had been thoroughly searched incident to arrests made therein, noting that the two primary justifications for the exception—protection of police and preservation of evidence—were adequately met by a search of this grab area. The Court reasoned that to hold otherwise would merely give the police a pretext to search the entire premises in which an arrest is made on something less than probable cause by simply waiting for a suspect to go home before making the arrest.

The Court arguably retreated from *Chimel* in the 1974 cases of *United States v. Robinson* and *United States v. Edwards*. *Robinson* held that a warrant is not required to search the person and personal effects of an individual placed in police custody. Under the rationale of the case, the arrest itself gives rise to the authority to search. Moreover, this authority to search is not subject to hindsight review by a court as to the probability that a particular arrestee possessed a weapon or evidence. This issue is especially relevant to custodial arrests for traffic violations and other activities—those not normally associated with violence or tangible evidence—where the usual justifications for a warrantless search incident to arrest are not present. In *Edwards*, the Court upheld the

263. Id. at 367-68.
265. Id. at 763; see text accompanying notes 104-107 supra.
268. 395 U.S. at 768.
269. Id. at 762-63.
270. Id. at 767.
271. 414 U.S. 218 (1973); see text accompanying notes 105, 108 supra.
275. Both *Robinson* and *Gustafson* v. Florida, 414 U.S. 260 (1973), involved arrests for violations of motor vehicle laws. In *Robinson*, the defendant was stopped and arrested for driving after the revocation of his driver's license. A body search uncovered a cigarette package which contained capsules of heroin. 414 U.S. at 223. In *Gustafson*, the defendant was
post-incarceration seizure and search of a prisoner's clothes for evidence of a burglary as "no more than taking from respondent the effects in his immediate possession that constituted evidence of [a] crime." Ruling that the right to seize and search the prisoner's clothes existed at the time of the arrest, the Court went on to note that the delay in the search was reasonable, and no more of an imposition than would have occurred at the time and place of the arrest. Edwards clearly eroded the Preston-Chimel requirement of contemporaneity by upholding a warrantless search conducted well after the seizure and by providing no alternative definition regarding the time frame in which a search must be conducted. This provided an opening for law enforcement personnel to seize containers and search them well after the containers or their contents could be of any danger to the police. Such searches may be upheld under the rationale—similar to that employed in Chambers v. Maroney—that if the search were permissible at the time of the original seizure it would be permissible to extend the search to the police station.

Chadwick mandated that the scope and intensity of a search of luggage and other objects not intimately related to the person would be governed by the Chimel-Preston line of cases rather than the Robinson-Edwards line. In Chadwick, the state contended that a warrantless search of an arrestee's property is proper upon probable cause that the property contains contraband or other evidence of a

arrested for failing to have a driver's license. A search of his coat pocket revealed a cigarette box containing marihuana cigarettes. 414 U.S. at 262.

276. 415 U.S. at 805.

277. Id. The reasonableness of the search was predicated, in part, on the fact that the arrest took place late at night when no substitute clothing was immediately available. Since it would have been unreasonable to confiscate Edwards' clothing and leave him "exposed in the cell throughout the night," waiting until the next morning was viewed as a reasonable alternative. Id.

278. Id, at 810-12 (Stewart, J., dissenting); see Comment, supra note 272, at 162-63.

279. 399 U.S. 42 (1970); see id. at 52 (finding no difference between searching automobile at curbside and presenting probable cause issue to magistrate). See generally text accompanying notes 137-140 supra.

280. Edwards, 415 U.S. at 805: "[A] reasonable delay in effectuating [the seizure] does not change the fact that [the defendant] was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention."

281. 433 U.S. at 16 n.10. The majority distinguished the two lines on the ground that while the expectation of privacy in a possession is not eliminated by an arrest, the intrusion occasioned thereby does operate to reduce the expectation of privacy in the person. Id.; see text accompanying notes 180-192 supra.
crime. In rejecting this argument, the Court delineated the test that in the absence of an exigency, a warrant must be secured for the search of personal property not immediately associated with the person "at the point where the property to be searched comes under the exclusive dominion of police authority." The Court once again referred to the rationale underlying the search incident to arrest exception and reasoned that where law enforcement personnel have exclusive control of an article, there no longer exists any danger that the arrestee will gain access to any weapon or evidence which may be located therein.

Justice Blackmun, dissenting in Chadwick, would have combined the Robinson-Edwards rationale of allowing a search incident to arrest of the clothing and effects of an arrestee, with the automobile exception cases. Under this formula, he would have held 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." He would have adopted the lesser intrusion concept espoused in Robinson, that a custodial arrest is such a great intrusion into an individual's privacy that the ensuing search is de minimis. Finally, Justice Blackmun interpreted the majority's holding to be based on a requirement of contemporaneity; the police could have conducted a valid warrantless search of the footlocker if they had done so at the time and place of Chadwick's arrest, while the footlocker was still within Chadwick's immediate control.

Exactly when a search incident to arrest may be undertaken has been the subject of numerous lower court decisions. While at least one circuit has taken the position that the search incident to arrest

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282. 433 U.S. at 14.
283. Id. at 15.
284. Id.
285. Id. at 18-22 (Blackmun, J., dissenting); see text accompanying notes 128-154 supra.
286. 433 U.S. at 19 (Blackmun, J., dissenting).
287. Id. at 20 (Blackmun, J., dissenting). For a discussion of the demise of the lesser intrusion doctrine and an argument for its adoption in lieu of Chadwick's reasonableness test, see Note, United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable, 58 B.U. L. REV. 436 (1978).
288. 433 U.S. at 23 & n.5 (Blackmun, J., dissenting); see text accompanying notes 261-263 supra.
289. 433 U.S. at 23 & n.5 (Blackmun, J., dissenting). But see id. at 17 n.2 (Brennan, J., concurring). If Justice Blackmun is correct, however, the search need not have taken place immediately after the arrest, but could rather have been carried out as soon as practicable. Under Chambers, the search at the Federal Building might also have been permissible. See notes 137-140 supra.
exception disappears when an object comes under the physical control of a policeman.\textsuperscript{290} Other courts have minimized Chadwick's effect by narrowing the concept of the exclusive control of the police while expanding the area considered to be within the immediate control of the arrestee.\textsuperscript{291} This has been done by distinguishing Chadwick on the nature of the article (a bulky, 200-pound footlocker) and the proximity of the search to the arrest (ninety minutes later, out of the presence of the arrestees).\textsuperscript{292} Still other courts have reviewed the particular factual circumstances to determine whether the article was actually within a police officer's exclusive control or whether it was within the grab area of the arrestee.\textsuperscript{293} Relevant variables have included, among others,\textsuperscript{294} the distance between the arrestee and the object searched,\textsuperscript{295} the number of policemen as compared to arrestees,\textsuperscript{296} and whether or not, and when, the arrestee was handcuffed.\textsuperscript{297}


http://scholarlycommons.law.hofstra.edu/hlr/vol10/iss2/8
Two additional observations should be noted about the search incident to arrest exception prior to Belton. First, Chadwick's requirement that an article once reduced to the officer's exclusive dominion and control can be searched only pursuant to a warrant did not apply where exigent circumstances were present. For example, police were not required to reduce to their exclusive control and bring back to the police station a container that they believed contained a bomb. Second, Chadwick did not purport to apply to possessions intimately related to the person. Surely, under Robinson and Edwards, clothing fell into this category. The issue of whether such items as wallets, purses, and attaché cases were embraced by the intimate relationship rule was, however, left unresolved by Chadwick.

Under Belton, however, no such inquiry is required for a search of a container, package, or parcel located in the passenger compartment of an automobile. No exigency need be present to search even a 200-pound footlocker if it is located in the passenger compartment of the automobile. Whether luggage, containers, packages, and parcels are reduced to the exclusive dominion of the arresting officer and lie outside of the grab area is now of no relevance if the items are located in the passenger compartment. Under the Belton bright line rule, anything "capable of holding another object" in the interior of an automobile is subject to a warrantless search incident to a lawful arrest.

While seemingly clear in its application, the fiction estab-
lished in Belton—that containers within the passenger compartment of an automobile are thereby within the grab area—abandons the limitation established in Chadwick that property within the exclusive dominion of the police generally cannot be searched without a warrant. The rule will also result in a judicial tendency to ignore reality. In particular, it abandons the factual determinations regarding the type of object searched, the number of policemen present, the proximity of the arrestee to the object searched, whether the arrestee was handcuffed at the time,305 and the degree of control exercised by the police over the object.306 In place of these factual determinations the Court substituted a bright line rule based on a “generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary item.’”307

Constitutional doctrine should not be predicated on such generalizations. This is especially clear when the doctrine compels a finding of a valid search incident to arrest where, for example, the search has taken place after an arrestee is handcuffed and seated in a police car surrounded by four policemen. Certainly, in such a case, the arrestee is unable to grab a weapon or destroy evidence. A rule that imputes such ability as a matter of law also implies that all individuals arrested in an automobile are “possessed of the skill of Houdini and the strength of Hercules.”308 Therefore, in much the same way that the principle of expectation of privacy is eviscerated by Robbins,309 the notion that a search incident to arrest is justified by protecting the police officer and preserving destructible evidence is undermined by a bright line rule that fails to take these justifications into account.

Even more disturbing is that Belton practically invites unscrupulous or overzealous law enforcement personnel to engage in pretextual arrests. Under the Belton rule, police without probable cause sufficient to obtain a search warrant for an item of property

305. See notes 294-297 supra and accompanying text.
306. See notes 290-293 supra and accompanying text.
309. Interestingly, the search of the cookie tin found in the front seat of Robbins’ car, conceded by the California Attorney General to have been improper, would have been permissible under Belton. See notes 15, 25 supra and accompanying text.
need only wait until a suspect has entered a car with the property before making an arrest. The Court’s eschewing of factual determinations surrounding the search, and its reluctance to second-guess the police, will make the discovery of such searches more difficult.

Finally, the supposed clarity of the Belton rule is not so evident after a careful reading. What encompasses the passenger compartment or interior of an automobile? Where does one compartment begin and another end, for example, in a hatchback automobile? Since the time in which a search can take place is no longer circumscribed by when the item in question comes into the officer’s exclusive control, how soon after an arrest must the search take place? Additionally, as noted earlier, does the trunk of an automobile fall within the Belton rule? If so, why? Finally, will the Belton rationale be extended to apply to non-automobile related searches? Certainly, luggage and other containers carried by an individual are generally within his or her immediate control. If the justification for allowing a search incident to arrest of objects in which an individual reposes a substantial expectation of privacy is that the very intrusion of arrest temporarily overrides any expectation of privacy that the individual has in the object, such a rationale would be equally applicable to searches incident to arrests unrelated to automobiles. As Justice Brennan notes, the bright line rule not only fails to address these issues, but “offers no guidance to the police officer seeking to work out these answers for himself.”

PROPOSAL AND CONCLUSION

When Robbins and Belton are read together, it is clear that the

310. See Belton, 101 S. Ct. at 2869 (Brennan, J., dissenting).
311. One commentator maintains that the entire hatchback automobile is subject to a search incident to arrest, and has proposed plans for a “Fourth Amendment Hatchback.” Kamisar, 4th Amendment Hatchback, Washington Post, Oct. 15, 1981, at 29, col. 3. Similar questions might also be raised about the status of motor homes. See United States v. Wiga, 662 F.2d 1325, 1332 n.9 (9th Cir. 1981)(“limited search of passenger areas of motor home” within ambit of Belton).
312. The United States Government’s amicus brief appears to have supplied the rationale for the Belton opinion. See Brief for the United States as Amicus Curiae. In that brief, the government urged the Court to repudiate the “exclusive control” test as “fundamentally inconsistent with traditional principles governing searches incident to a lawful arrest.” Id. at 16. Instead, the government proposed at test that would allow a search incident to arrest of the area “within the potential reach of the suspect,” id. at 13, if such search is conducted “during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed.” Id. at 14.
313. See text accompanying note 251 supra.
314. 101 S. Ct. at 2869 (Brennan, J., dissenting)(emphasis omitted).
interior of an automobile and all of the contents therein may be searched without a warrant incident to a lawful arrest. On the other hand, any opaque articles whose contents are not clearly identifiable as contraband from their outward appearance may not be searched without a warrant, absent an exigency, if the article is located in the trunk of the automobile.

The following scenarios can therefore be envisioned. In case A, two policemen pull over two suspects in a car they have probable cause to believe has been involved in a recent drug sale. The men alight, are arrested, and patted down. The interior of the car is searched and heroin is found. One suspect tells the policemen that what they are looking for is in the trunk. While one policeman watches the suspects, the other opens the trunk and sees several cardboard boxes. One of the boxes on the top is open just enough so that the police officer can see a small plastic-wrapped parcel. Also in the trunk are upside down Dixie cups, the contents of which the police officer cannot see.

In case B, police pull over a car with a defective headlight and, upon their approach to request the driver’s license and registration, smell marihuana. The driver is arrested, handcuffed, and placed in the back seat of a second patrol car which has recently arrived. While three police officers stand guard around the second police car, a fourth begins a careful search of the passenger compartment of the automobile. A locked combination briefcase lying on the back seat is opened, as well as a zippered pouch locked inside the glove compartment.

Under Robbins, the cardboard boxes, plastic-wrapped parcels, and Dixie cups would all have to be brought back to the police station and held until a warrant to search them is secured. Under Belton, however, the locked glove compartment, zippered pouch, and briefcase could all be searched without a warrant. An anomalous situation therefore exists: Police, with probable cause, will be unable to conduct a warrantless search of an article found in the trunk of an automobile; they may, however, without probable cause, search the interior of an automobile and all of the contents thereof without having to obtain a warrant.

In addition, contrary to the proposition that “the Fourth Amendment protects people, not places,” under Robbins and Belton, police could search the interior of an automobile and all of the contents therein without a warrant, incident to a lawful arrest. On the other hand, any opaque articles whose contents are not clearly identifiable as contraband from their outward appearance may not be searched without a warrant, absent an exigency, if the article is located in the trunk of the automobile.

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315. See notes 100-112 supra and accompanying text.
316. See notes 43-79 supra and accompanying text.
ton it is the place which is protected. In short, the automobile is broken into two distinct parts with concomitant zones of privacy. Thus, the relevant analysis will now focus on whether a container is located in the trunk or passenger compartment, instead of on the particular privacy interests of the person who has placed the container there.

It is unlikely that the Robbins bright line test will survive the 1982-1983 Supreme Court Term. On October 13, 1981, the Supreme Court granted certiorari in United States v. Ross. That Ross could not be reversed without overruling Robbins was recognized in the order granting certiorari, wherein the Court requested briefing and argument on the issue of whether it should reconsider Robbins v. California. Because Justice Stewart, who wrote only for the plurality in Robbins, has since retired, it seems likely that the decision will be overruled.

On what ground Robbins will be overruled, if at all, remains to be seen. To be sure, the Ross case provides a perfect opportunity to extend the automobile exception to all objects located in the automobile. This approach was found “attractive” by Justice Powell in his Robbins concurrence, and was supported by Chief Justice Burger when the locus of the probable cause at the time of the seizure is the automobile generally rather than a particular container located therein. Such an approach would provide an alternative ground for the Belton holding and might also “provide ground for agreement by a majority of the presently fractured Court on an approach that would give more specific guidance to police and courts in this recurring situation—one that has led to incessant litigation.” While both clear in its application and arguably consistent with the Chadwick and Sanders holdings, however, adopting this approach would necessarily entail a “rejection of a good deal of the reasoning in Sanders.” It would mandate a rejection of factual and theoretical distinctions between containers and automobiles; distinctions

318. See text accompanying notes 236-240 supra.
320. Id.
321. The vacancy created by Justice Stewart’s retirement has been filled by the appointment of Justice Sandra Day O’Connor.
322. 101 S. Ct. at 2850 (Powell, J., concurring).
323. See Sanders, 442 U.S. at 767 (Burger, C.J., concurring).
325. Id. (Powell, J., concurring).
which are reasonable and ought to be preserved.\textsuperscript{326}

The better approach would be to analyze the search of Ross’ bag with regard to the objective and subjective manifestations of an expectation of privacy therein.\textsuperscript{327} Such a return to the principles underlying the fourth amendment and its exceptions would be equally applicable to the Belton holding and should be adopted at the first available opportunity. A new analysis should be premised on a case-by-case approach.

Justice Rehnquist, dissenting in Robbins, noted that “[o]ur entire profession is trained to attack ‘bright lines’ the way hounds attack foxes.”\textsuperscript{328} Justice Brennan, dissenting in Belton, criticized the formulation of an “arbitrary ‘bright line’ rule.”\textsuperscript{329} Analysis based on a review of the facts of the cases as they arise, while perhaps leaving some ambiguity in the case law, would tend to reduce the total num-

\textsuperscript{326} See text accompanying notes 190-192, 195, 199-200 supra.

\textsuperscript{327} In fact, the Government is seeking certiorari in Ross on the ground that an expectation-of-privacy test was and should have been applied to the extent that, “because paper bags . . . lack the integrity, security, and privacy attributes of luggage, they are not ‘inevitably associated with the expectation of privacy’ . . . ‘which the law recognizes as “legitimate.”’” Petition for A Writ of Certiorari at 11 (quoting Sanders, 442 U.S. at 762); Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)). Additionally, the “insubstantial character of the paper . . . bag did not meaningfully differentiate its contents from the other contents of his automobile” which the police could properly have searched without a warrant. Id. at 12. Furthermore, the government urged the Court to articulate guiding principles “in any fashion that commands a majority of the Court.” Reply Memorandum for the United States at 1; see id. at 1-2.

It should be noted that three circuit courts of appeals have already rejected the Robbins bright line test. See United States v. Martino, 664 F.2d 860, 872-74 (2d Cir. 1981)(construing Robbins as narrowly as possible, based upon Justice Powell’s concurrence in that case, and holding that a closed but unsealed bag, absent “other objective external evidence,” did not manifest “a reasonable expectation of privacy sufficient to justify independent constitutional protection”); United States v. Mefford, 658 F.2d 588, 592-93 (8th Cir. 1981)(characterizing Robbins test as dictum, and holding that brown paper bag which “was not sealed . . . was not in a car trunk, and [contents of which] could not have been easily lost or destroyed” was not imbued with expectation of privacy); Virgin Islands v. Rasool, 657 F.2d 582, 590 (3d Cir. 1981)(dictum)(Robbins viewed as not controlling because, first, grocery bag not demonstrated to have been closed or sealed does not “possess the same degree of ‘privacy expectations’ as a sealed opaque plastic package,” second, bag in Robbins was in trunk rather than interior, and third, Robbins was plurality opinion which depended upon Justice Powell’s concurrence, “which eschew[ed] the lead opinion’s rationale”). But see United States v. Weber, 664 F.2d 841 (1st Cir. 1981)(combining broad definition of container in Belton with Robbins’ bright line test to find search of rolled up rainslicker impermissible); Sharpe v. United States, 660 F.2d 967, 972 & n.3 (4th Cir. 1981)(search of “a tube of marijuana wrapped first in paper bags, then in a taped plastic bag, and finally in burlap tied with twine,” held invalid under both Robbins bright line test and Powell concurrence).

\textsuperscript{328} 101 S. Ct. at 2854 (Rehnquist, J., dissenting).

\textsuperscript{329} Id. at 2866 (Brennan, J., dissenting).
ber of ambiguous borderline cases by encouraging police to exercise caution and secure a search warrant whenever practicable. Moreover, such an approach would make better doctrinal sense in the long run by producing results consistent with established fourth amendment principles.

The following analysis should therefore be adopted: A container, parcel, or package should be measured by both objective and subjective expectations of privacy. If society is prepared to recognize a particular class of container as beholden to an expectation of privacy, the warrantless search of the container would be illegal. If, however, society is unprepared to make such a recognition, a warrantless search is permissible unless there is some subjective manifestation that the container is imbued with an expectation of privacy. This could be determined either by affirmative efforts of the individual to manifest an expectation of privacy (for example, by taping, tying, or wrapping) or by the factual situation indicating that the container is being used as a repository of personal effects (by the presence of clothing and/or other personal effects therein). Once the police have reason to believe that the container is a repository of personal effects, either through personal knowledge or by discovering personal effects during the course of a search, the search must be terminated until a warrant is obtained.

When a lawful arrest is made, expectation of privacy considerations must be temporarily overridden by a concern for the safety of the arresting officer. Warrantless searches of both the person and the area within that person's immediate control should therefore continue to be permitted when conducted incident to arrest. The scope may also include a search of any parcels or containers within the arrestee's immediate control provided that the search takes place at the time of the arrest or as the arrest process continues. Once the container has been reduced to the officer's exclusive control, however, a warrant should be required. Thus, the determination de-

330. See 655 F.2d at 1164 n.9; Id. at 1178 n.6 (Tamm, J., dissenting).

331. Contrary to the argument that the adoption of the exclusive control test would emasculate the search incident to arrest exception because containers "will almost always be under the 'exclusive control' of the police," Brief for the United States as Amicus Curiae at 15-16, Belton, such determinations would be factual rather than mechanical. The exclusive control prong therefore provides the temporal measuring rod. Compare People v. Belton, 50 N.Y.2d 447, 452 n.2, 407 N.E.2d 420, 423 n.2, 429 N.Y.S.2d 574, 577 n.2 (1980)(nothing in record that jackets were within reach of arrestees) with Id. at 453-55, 407 N.E.2d at 423-25, 429 N.Y.S.2d at 577-79 (Gabrielli, J., dissenting)(one police officer with four suspects allowed to make search incident to arrest insofar as neither arrestees nor property reduced to police...
pends partly on whether the arrestee could have reached the container from the time the arrest is made to the time when either the arrestee is secured or the container is reduced to the exclusive control of the arresting officer. This analysis should be undertaken from the viewpoint of the police officer making the arrest.

Finally, while the location of a container in an automobile should have no bearing on the expectation of privacy associated therewith, it should be one factor in the analysis of searches incident to arrest. Stops of multi-passenger vehicles often present volatile situations. Objects located in the passenger compartment of an automobile are often, though not always, within the immediate control of the passengers. The fluidity of an arrest and the mobility of the automobile cannot be ignored in determining whether the container is within the exclusive control of the arresting officers.

Under this analysis, Robbins and Belton do not appear to have been decided incorrectly. As for Robbins, society does not inevitably associate plastic garbage bags with an expectation of privacy. Yet, Robbins nevertheless manifested an expectation of privacy by carefully wrapping and sealing the bag so that it essentially resembled "an oversized, extra-long cigar box." He thereby demonstrated that there was something personal wrapped within the plastic which he did not wish to show to the public. Insofar as the trial record did not reflect that the contents were readily inferable from the outside wrapping, and did reflect that Robbins had manifested an expectation of privacy in the container, a warrant was correctly required before searching. Belton was also correctly decided. That case involved a highway stop of an automobile carrying four unknown suspects. While the policemen did pat down the jackets for weapons, the search incident to arrest exception is also designed to prevent the destruction of evidence. Because the police officer could not handcuff the arrestees before transporting the arrestees and their jackets to the police station, his search of the jackets was permissible at the time of the arrest.

On the other hand, the Ross decision was incorrect. Paper bags, especially of the lunch-bag variety are not associated with an expectation of privacy, but are often used to carry food or drink rather

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332. People v. Robbins, 103 Cal. App. 34, 47, 162 Cal. Rptr. 780, 785, (Ct. App. 1980) (Rattigan, J., dissenting); see notes 17, 27 supra.
333. See note 79 supra.
334. See text accompanying note 31 supra.
than items traditionally classified as personal effects. Ross himself made no effort to demonstrate an expectation of privacy in the contents of the bag by sealing or taping the bag. The police were not aware, nor did they have reason to believe either before or during the search, that the paper bag was being used as a repository of personal effects. As a result, the warrantless search was conducted in a manner consistent with fundamental fourth amendment principles.

While such an analysis may seem trite and artificial, it is necessary both to remain consistent with precedent and to adhere to principles basic to our society. On the one hand, people should be afforded the opportunity of a neutral magistrate's intervention when they have reasonably manifested an expectation of privacy in an item to be searched. On the other hand, the safety of law enforcement officials depends upon their right to search an arrestee and the area from which the arrestee can reach a weapon or destroy evidence, so long as it can be realistically reached.

The only way to successfully adhere to established fourth amendment principles is to leave the fact-finding to a case-by-case determination. Any other approach, including those mandated by Robbins and Belton, will lead to overruling those principles. The formulation and use of artificial prophylactic rules—as espoused in the Belton and Robbins decisions—will result in the exceptions swallowing up the rules, and will render the application of fourth amendment doctrine less sensitive to the principles behind its formulation.

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336. One commentator has suggested that the formulation of bright line rules in the fourth amendment context is primarily due to a "distrust of state-court factfinding in these cases." Amsterdam, supra note 177, at 351.
337. Although not technically a fourth amendment principle, but rather a vehicle to protect constitutional rights, there has been significant pressure for the forthright abandonment of the exclusionary rule. See, e.g., California v. Minjares, 443 U.S. 916 (1979)(Rehnquist, J., joined by Burger, C.J., dissenting from denial of stay); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. denied, 449 U.S. 1127 (1981). Such an abandonment, it is argued, would foreclose the engrafting of permutations onto the fourth amendment, rendering it more understandable and easier to apply, while alternative civil remedies for the citizen whose constitutional rights have been violated by the illegal search would still be available. See Minjares, 443 U.S. at 925-26 (Rehnquist, J., dissenting from denial of stay).