CONSTITUTIONAL LAW—*UNITED STATES v. ROSS*: FINAL OBLITERATION OF FOURTH AMENDMENT PROTECTION FROM WARRANTLESS SEARCHES OF CARS AND THEIR CONTENTS

United States v. Ross[1]

I. INTRODUCTION

Over the last ten to twelve years the Supreme Court has decided a number of cases[2] wherein it has attempted to clarify the dilemma caused by a plethora of cases involving the constitutionality of automobile searches and seizures.

The most recent case decided by the Supreme Court involving a warrantless automobile search was *United States v. Ross*.[3] In *Ross*, the Court held that under the "automobile exception," first enunciated in *Carroll v. United States*,[4] and expanded later in *Chambers v. Maroney*,[5] that "[I]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[6]

With this century has come the dramatic rise of the automobile as the primary means of personal transportation in America. In fact, "[T]oday, many people spend as much time in their cars as they do in their homes."[7] With the ever-increasing use of autos, however, has come the erosion of motorists' fourth amendment rights. This "erosion" is being justified on the grounds that the law of automobile searches and seizures is "intolerably confusing"[8] and because an individual travelling in an automobile has a lesser expectation of privacy which must "yield to the authority of the search."[9]

One reason for the confusion surrounding warrantless automobile

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1. United States v. Ross, 102 S. Ct. 2157 (1982).

2. *See, e.g.*, Robbins v. California, 453 U.S. 420 (1981); New York v. Belton, 453 U.S. 454 (1981); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977); Chambers v. Maroney, 399 U.S. 42 (1970).

3. *Ross*, 102 S. Ct. 2157 (1982).

4. Carroll v. United States, 267 U.S. 132, 156 (1925). The Court in *Carroll* distinguished situations involving seizure of items from movable vehicles and seizure of items from a house. The Court reasoned that the mobility of an automobile obviated the fourth amendment's warrant requirement. *Id.* at 151, 153.

5. Chambers v. Maroney, 399 U.S. 42 (1970).

6. *Ross*, 102 S. Ct. at 2172. The holding in *Ross*, as the Court stated "is inconsistent with the disposition in *Robbins v. California*." *Id.* at 2172. In *Robbins*, the Court held that closed, opaque containers found in autos during a search were "immune" from examination by police officers "unless the container is such that its contents may be said to be in plain view," were fully protected under fourth amendment. *Robbins*, 453 U.S. at 427.

7. Mandiberg, *The Oregon Court of Appeals and the Warrantless Search of Autos on the Highway*, 18 WILLIAMETTE L.J. 249, 249 (1982).

8. *Robbins*, 453 U.S. at 430 (Powell, J., concurring).

9. *Ross*, 102 S. Ct. at 2172.

searches has been the Supreme Court's desire to preserve the privacy of closed containers such as luggage and briefcases, when these items are seized during the search of an automobile conducted by police. Searches of containers found in automobiles is a relatively new area of the law, tracing its development back to the decision in *United States v. Chadwick*.[10] In *Chadwick*, the Court did not apply the automobile exception principle and refused to extend that principle by analogizing movable containers to cars.[11] *Ross* essentially restores the status of the law of automobile searches to the position it occupied prior to the *Chadwick* decision. In the aftermath of *Ross*, Professor Latzer noted that there were still five major principles which govern auto searches.[12] The first is the automobile exception to the search warrant requirement.[13] Next is the situation when an occupant of an automobile is arrested, and the search-incident-to-arrest doctrine is triggered.[14] Third is the inventory search rule relating to searches conducted by the police for safeguarding objects in an automobile which is in police custody.[15] The fourth principle, border searches, involves special rules which apply to searches of vehicles conducted at or near the borders of the United States.[16] Last are those searches conducted with the consent of the occupants.[17]

The first two principles will be the primary focus of this Comment. The remaining three will be noted, but not textually discussed. Initially, this article will trace the evolution of the fourth amendment from its origins in English common law until the Supreme Court's decision in *Chambers*. The second part discusses the search-incident-to-arrest doctrine, examines the confusion created by the new rules for searching containers, and concludes with an analysis of the practical impact of *Ross*.

II. HISTORICAL BACKGROUND

The fourth amendment provides two standards for determining the permissibility of searches and seizures.[18] The first clause requires that all searches and seizures be reasonable and the second clause provides for the issuing of warrants only upon probable cause. These two principles first enunciated by Lord Camden in the case of *Entick v. Carrington and Three Other King's Messengers*[19] in 1762. In that case, the Secretary of State on

10. 433 U.S. 1 (1977).

11. *Id.* at 11. *See also* Latzer, *Searching Cars and Their Contents: United States v. Ross*, 18 CRIM. L. BULL. 381, 389 (1982) (analysis of the law of auto searches: search incident to arrest; container searches; consent searches; and moving vehicle searches).

12. Latzer, *supra* note 11 at 382.

13. *Carroll*, 267 U.S. 132. *See generally* Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987 (1976).

14. New York v. Belton, 453 U.S. 454 (1981).

15. South Dakota v. Opperman, 428 U.S. 364 (1976).

16. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

17. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

18. U.S. CONST. amend. IV provides:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

19. 95 Eng. Rep. 807 (K.B. 1762). *Entick* has been cited as "one of the landmarks of English liberty." Boyd v. United States, 116 U.S. 616, 626 (1886).

behalf of the English government had established the practice of issuing general warrants for searching private houses for the discovery and seizure of books and papers that might be used to convict their owners.[20] Pursuant to such a warrant, the plaintiff's house was entered and his papers seized by the government. The plaintiff brought an action for trespass and had judgment under a special verdict.[21] The court held that "[E]very invasion of private property, be it ever so minute, is a trespass. . . . If the defendant in an action for trespass admits facts in which the action is grounded, such defendant is bound to show, by way of justification, that some positive law has authorized or executed his acts."[22]

Over one hundred years later, in 1877, in the case of *Ex parte Jackson*,[23] the petitioner was indicted for knowingly and unlawfully depositing in the mail of the United States, a circular concerning a lottery offering prizes.[24] He was subsequently tried, convicted, and sentenced to pay a fine of $100, plus the costs of prosecution, and was committed to the county jail until the fine and costs were paid.[25] The petitioner alleged that the act under which the indictment was drawn was unconstitutional and void; and that the court exceeded its jurisdiction in committing him until the fine was paid. He also filed for a writ of habeas corpus and a writ of certiorari to the Supreme Court.[26] Before the writs were issued, the Attorney General for the United States was permitted to explain why they should not issue. He responded by averring that the petition and accompanying exhibits did not provide the Court with jurisdiction to order the writs to issue and that the appellant was in lawful custody by virtue of the aforementioned proceedings.[27] In denying the writs, the Court upheld the constitutionality of Congress's power to exclude various articles from the mails for the distribution of matter deemed injurious to public morals.[28] However, the Court also stated that

> [R]egulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation. In the search for prohibition matter, regulations may be enforced upon competent evidence of their violation obtained in other ways.[29]

Nine years after the decision in *Jackson*, the Court heard the case of *Boyd v. United States*.[30] In *Boyd*, petitioner was charged with importing goods into the United States by way of the port of New York which were subject to the payment of duties and that fraud was committed to avoid payment in violation of customer-revenue laws.[31] The government then seized thirty-five cases of plate glass as being forfeited to the United States

20. *Id.* at 808. *See generally* F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH COMMON LAW (2d ed. 1909).
21. *Entick*, 95 Eng. Repg. at 808.
22. *Id.* at 812.
23. 96 U.S. 727 (1877).
24. *Id.* at 730.
25. *Id.* at 728.
26. *Id.* at 729.
27. *Id.*
28. *Id.* at 736.
29. *Id.* at 735.
30. 116 U.S. 616 (1886).
31. *Id.* at 617.

by the commission of fraud within the meaning of the Act.[32] At trial, it became important to show the quantity and value of the glass contained in twenty-nine cases that were previously imported. The trial court invoked its authority under section 5 of the Act to compel appellant to produce the invoice of the twenty-nine cases.[33] Appellant complied with the order, but argued that in a forfeiture action, no evidence could be compelled from the claimants themselves, and that the statute, to the extent that it compels the production of evidence to be used against him was unconstitutional and void.[34] In reversing the judgment of the circuit court, the Supreme Court held that it did not require actual entry upon the premises to search for and seize certain papers to constitute an unreasonable search and seizure with the meaning of the fourth amendment.[35]

In the landmark case of *Weeks v. United States*,[36] the petitioner was arrested without a warrant. While he was detained, several police officers went to his home, entered his room and took possession of various papers and articles. Among the items seized were several lottery tickets which were later introduced into evidence.[37] Weeks was convicted, after his petition to regain possession of the items was denied and his objections to the introduction of the items into evidence were overruled.[38] In reversing the conviction, the Court characterized the search as an "unlawful invasion of the sanctity of [Week's] home."[39]

The ruling in *Weeks* was significant in that it marked the Court's initial effort to exclude items from being introduced into evidence to convict a defendant when the items had been illegally seized by the police.[40]

A. *The Automobile Exception*

The so-called automobile exception to the fourth amendment's warrant requirement was first postulated by the Court in the 1925 case of *Carroll v. United States*.[41] Carroll and a companion were stopped by prohibition

32. *Id.* at 618.
33. *Id.*
34. *Id.*
35. *Id.* at 631-32. The Court stated that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers to convict him of a crime . . . is contrary to the principles of a free government." *Id.*
36. 232 U.S. 383 (1914).
37. *Id.* at 386.
38. *Id.* at 388-89.
39. *Id.* at 394. The Court elaborated further by way of dictum that:

> [T]he effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their houses, papers, and *effects* against all unreasonable searches under the guise of law.

Id. at 391-92 (emphasis added).
40. The Court indicated that the means by which evidence was obtained must be examined by the judiciary because if illegally seized evidence could be used "against one accused of an offense the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those placed are concerned, might as well be stricken from the Constitution." *Id.* at 393. Note that *Weeks* placed no prohibition on the introduction into federal court evidence which had been seized illegally by state officials then given to federal authorities. This rule became known as the "Silver Platter Doctrine" and was found invalid in Elkins v. United States, 364 U.S. 206, 223-24 (1960).
41. 267 U.S. 132 (1925).

agents as they were driving towards Detroit, which was acknowledged as an active bootlegging center. Earlier, the same agents had tried to purchase whiskey from the defendants, but the deal fell through.[42] While searching the vehicle, one of the agents poked at the back seat upholstery. Finding it unusually hard, he tore it open and uncovered several bottles of bootlegged whiskey.[43] The above facts led the Court to conclude that the agents had probable cause to believe that the vehicle was transporting contraband whiskey and therefore the warrantless search was permissible.[44]

The Court also indicated that the situation was such that "seizure [was] impossible except without a warrant" because of the mobility of the automobile.[45] The Court distinguished situations involving seizure of items from "a movable vessel" from seizure of items from a house.[46]

Carroll arguably involves two elements: first, police must have probable cause to believe that a vehicle is transporting contraband or evidence of a crime. The second requirement has been "described as the exigency created by the mobility of automobiles which denies the police adequate time to procure a search warrant."[47] When combined, these two elements form the basis for what has become known as the automobile exception.

Although the Court in *Carroll* emphasized the reasonableness of a search, the search itself in *Carroll* was clearly unreasonable and therefore violated the defendants' right to privacy.[48] Moreover, the opinion in *Carroll* "did not discuss the possibility that a car could be *seized* without a warrant and secured until a magistrate's authorization to search could be obtained."[49] Instead, the Court focused on establishing a strict requirement of probable cause as a predicate for conducting warrantless searches and did not place any limitations on the extent in which searches could take place after a finding of probable cause had been made.[50]

Since the decision in *Carroll*, the Court has expanded the mobility ra-

42. *Id.* at 135. The agents had agreed to pay $130 a case for three cases of whiskey. The defendants agreed to go to get the whiskey and return by a certain time but they failed to do so. There was speculation that the defendants became suspicious that they were dealing with agents.

43. *Id.* at 163, 172 (McReynolds, Sutherland, JJ., dissenting).

44. *Id.* at 162. The only guideline for determining if there is probable cause to stop an automobile proffered by the *Carroll* Court was that the officers judgment must be based "upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *Id.* at 149.

45. *Id.* at 156.

46. The *Carroll* Court summarized the mobility requirement in these words written by Chief Justice Taft:

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

Id. at 153.

47. Latzer, *supra* note 11, at 384.

48. See *supra* note 43 and accompanying text.

49. Latzer, *supra* note 11, at 384 (emphasis in original).

50. *See* Note, *The Supreme Court Opens A Pandora'a Box In the Law of Warrantless Automobile Searches and Seizures*, 26 How. L.J. —, — (1938) [hereinafter cited as Note, *Pandora's Box*] (analysis of the future impact the *Ross* decision is expected to have on the rights of the driving public).

tionale to its breaking point by justifying, on mobility grounds, the seizure of a parked and unoccupied car[51] and the search of a car which had been seized and towed away by police.[52]

The decision in *Chambers v. Maroney*[53] in 1970 extended the *Carroll* doctrine to vehicles towed by the police and later searched. In *Chambers*, police arrested appellant and four companions because their descriptions matched that given by witnesses to the robbery of a service station.[54] The men and the car were taken to the police station where a search of the vehicle revealed two revolvers, a glove taken during the reported robbery, and several identification cards which had been stolen in a previous robbery.[55] The Court upheld the search on the ground that the immobilization of the vehicle and a search of it were not constitutionally distinguishable.[56] The Court held that "[G]iven probable cause, there is no difference under the fourth amendment between seizing and holding a car before presenting the issue of probable cause to a magistrate and carrying out an immediate warrantless search."[57]

The Court again placed emphasis on the mobility of the vehicle in upholding the validity of the search.[58] Justice White in summarizing the Court's position on the question of vehicular mobility inisisted that

> [t]he probable cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.[59]

To summarize, the exigency of mobility has been distorted to cover both the seizure of parked cars and the searching of impounded ones. References by courts to mobility and/or exigent circumstances[60] to justify warrantless automobile searches and seizures have become mechanical and few attempts have been made to demonstrate actual mobility or exigency.[61]

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51. Cardwell v. Lewis, 417 U.S. 583 (1974) (plurality opinion). *But see* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (search and seizure of car parked in private driveway ruled unconstitutional).

52. *Chambers*, 399 U.S. 42. *See* Latzer, *supra* note 11 at 384.

53. 399 U.S. 42 (1970).

54. Chambers v. Maroney, 408 F.2d 1186, 1187 (3d Cir. 1969).

55. *Id.*

56. *Chambers*, 399 U.S. at 52.

57. *Id.*

58. *Id.* at 48-51. *See* Note, Pandora's Box *supra* note 50 at —.

59. *Chambers*, 399 U.S. at 52. *Cf. Cardwell*, 417 U.S. 583 (1974) (plurality opinion) Lewis was suspected of having murdered another man by forcing his car over an embankment. While Lewis was being interrogated at the station house, police acting without a warrant, seized his car from a public parking lot in order to test exterior paint scrapings and to make a cast of the tire tread for comparative purposes. A four-justice plurality upheld the warrantless seizure finding that an exigency existed in "the incentive and potential for the car's removal." *Id.* at 595.

60. Many courts have held that both probable cause and exigent circumstances must exist in order to justify a warrantless search. *See, e.g., Cardwell*, 399 U.S. 42, 47; United States v. McBee, 659 F.2d 1302, 1304 (5th Cir. 1981); United States v. Matthews, 615 F.2d 1279, 1287 (10th Cir. 1980); United States v. Milhollan, 599 F.2d 518, 526 (3rd Cir. 1979); United States v. Alden, 576 F.2d 601, 602-05 (5th Cir. 1976); United States v. Beck, 511 F.2d 997, 1001 (6th Cir. 1975).

61. Latzer, *supra* note 11, at 386.

B. *The Search Incident to Arrest Doctrine*

The principal case on point in this area of the law is *Chimel v. California*.[62] The *Chimel* Court held that when a lawful arrest has occurred, an officer may search the person of the arrestee, in addition to any area thought to be "within the arrestee's immediate control" construing that phase to mean "the area within which he might gain possession of a weapon or destroy evidence."[63] In sum, the Court in *Chimel* restricted the spatial scope of searches in arrest situations to the area which is under the control of an arrestee, but did not expressly indicate the precise point in time when the arrestee's control becomes decisive.[64]

Another question left unanswered by *Chimel* was the search and seizure of closed containers found on, or near an arrestee's person. As to those containers found on an arrestee's person, the Supreme Court indicated in *United States v. Robinson*[65] that the search of such containers could be justified because of the exigencies inherent in arrest situations. Robinson was observed driving by an officer who determined that he was operating a motor vehicle after the revocation of his operator's permit.[66] The officer informed him that he was under arrest and proceeded to conduct a search of his person in accordance with procedures prescribed in police department instructions.[67] During the search, the officer reached into Robinson's pocket and removed a "crumpled up cigarette package." He opened the package and found 14 gelatin capsules, later found to contain heroin and which was used as evidence.[68] In reversing the ruling of the court of appeals, the Court found that the lawful custodial arrest of the appellee created an exception to fourth amendment and therefore the search was reasonable. The Court held that:

> [t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon

62. 395 U.S. 752 (1969). For an interesting discussion of *Chimel see* Note, *Chimel v. California, A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. REV. 626 (1970).

63. *Chimel*, 395 U.S. at 763. In *Chimel*, police officers armed with an arrest warrant but no search warrant were admitted into appellant's house whereupon he was arrested. Although appellant objected to a search of the premises, he was advised that by virtue of the lawful arrest, the search would be conducted anyway. The search lasted approximately an hour during which time the officers found and seized from a drawer in the bedroom, numerous items—primarily coins, medals, and tokens believed to have been taken during the robbery of a coin shop. The Court reversed appellant's conviction declaring that a search is unreasonable if it extends beyond an arrestee's person and is not limited to the area within the arrestee's immediate control. *Id.*

64. Logically, for search-incident-to-arrest purposes the area considered controlled by an arrestee should be restricted to the immediate area which an arrestee is standing just prior to his arrest. *See id.* at 762-63, Latzer, *supra* note 11 at 394. In Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), the court stated that:

> A search incident to an arrest must have as one of more of its purposes of discovery of (1) the fruits of the crime; (2) instrumentalities used to commit the crime; (3) weapons or like material which put the arresting officer in danger or might facilitate escape; (4) contraband, the possession of which is a crime, and, . . . (5) material which constitutes evidence of the crime or evidence that the person arrested has committed it. (footnotes and citations ommitted).

65. 414 U.S. 218 (1973).

66. *Id.* at 221.

67. *Id.*

68. *Id.*

the person of the suspect.[69]

The *Robinson* Court upheld the warrantless search despite the fact that a cigarette package was unlikely to contain a weapon or evidence of crime. The view of the Court was that small, closed containers on an arrestee are extensions of the arrestee and therefore may be seized and searched without regard to the probability that they may contain weapons or evidence of crime.[70]

Prior to the Supreme Court's decision in *New York v. Belton*,[71] the *Chimel* doctrine restricted police to a search of those parts of a car which were within the immediate control of the arrestee. In *Belton*, the Court was confronted with the problem of developing a workable definition of the area within the immediate control of an arrestee when that area arguably included the interior of an automobile.

Belton and three companions were stopped for speeding by a highway patrolman. After smelling marihuana emitting from the car's interior, the officer ordered Belton and his companions to disembark from the vehicle. Whereup he proceeded to search the vehicle, finding a small quantity of marihuana. After placing the defendants under arrest, the officer conducted a second search of the car and discovered some cocaine in the zippered search of the car and discovered some cocaine in the zippered pocket of a letter jacket located on the rear seat of the vehicle. The Court upheld the search on the ground that it was incidental to the defendant's arrest for possession of marihuana and was limited to the area within his immediate control, within the meaning of *Chimel*.[72]

It is important to note that the Court did not consider whether the jacket was *actually* within Belton's immediate control just prior to his arrest, instead, the Court simply *presumed* that he had control over all the contents in the vehicle when it stated that "[O]ur reading of the cases suggests the 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.' "[73] The irony of *Belton* is that the court relied on *Chimel* to uphold the search, but did not truly apply its control doctrine to the facts, thereby opening automobile passenger compartments to warrantless searches in every instance when the occupants are arrested.

The decision in *Belton* extends the rationale of *Robinson* to all containers located in the passenger compartment of automobiles. This ruling in effect, encourages police to make full traffic arrests as a pretext for making a warrantless search of the car and its contents.[74] The potential consequences of *Belton* on the privacy of millions of drivers in America could be disasterous, given the frequency of traffic violations and the general mobility of the public.[75]

69. *Id.* at 234-35.
70. *See* Latzer, *supra* note 11, at 387.
71. 453 U.S. 454 (1981).
72. *Id.* at 457-63.
73. *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763). *Belton* applies only where there is a "lawful custodial arrest"; it does not apply to automobile stops that do not develop into a full arrest.
74. *See* Latzer, *supra* note 11, at 398.
75. *Id.*

C. *The Closed Container Doctrine*

In the 1977 case of *United States v. Chadwick*,[76] federal agents were informed that a man matching a profile used to spot drug traffickers had been seen loading a foot locker into a west coast train bound for Boston. The footlocker was unusually heavy for its size and was leaking talcum powder, a substance often used to mask the odor of marihuana. When the train arrived two days later, alerted agents were waiting with police dogs trained to detect marihuana. The dogs signalled the presence of a controlled substance without tipping the suspects. Agents watched at Chadwick joined his two companions and assisted them in loading the footlocker into the trunk of his car; before the trunk was closed and the engine started, the defendants were arrested. Agents drove Chadwick's car to the federal building where he was being held and opened the footlocker approximately an hour and a half later without bothering to first obtain a search warrant.[77] As suspected, the footlocker contained a large quantity of marihuana.

The Court in *Chadwick* held that the search was not conducted incidental to the arrest nor justified by an exigency. The Court stated that:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest if either the 'search is remote in time or place from the arrest'; or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of arrest.[78]

The Court did not apply the automobile exception principle of *Carroll* in *Chadwick* because at the time of the search the footlocker was under the "exclusive control" of the police and "there was not the slightest danger that the footlocker could have been removed before a valid search warrant could be obtained."[79]

The *Chadwick* decision is noteworthy because the Supreme Court refused to uphold the search on the basis of an automobile exception analogy. Automobiles historically have been held to the subject to warrantless searches because of diminished privacy expectations.[80] The Court in *Chadwick* clearly stated that "[t]he factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker."[81] Unlike a car, luggage is used primarily as a repository of personal effects, its contents are not in plain view and it is not subject to periodic inspection.[82]

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76. 433 U.S. 1 (1977).

77. *Id.* at 3-4.

78. *Id.* at 11.

79. *Id.* at 13. Although this would appear to conflict with the Court's decision in *Chambers v. Maroney*, the *Chadwick* Court distinguished the container from the towed automobile on the grounds that a car is harder to secure than luggage, the lack of proper facilities for storage, the size of cars, and their inherent mobility.

80. *See, e.g.*, *Robbins*, 453 U.S. at 424 (plurality opinion) (search of car justified but not containers therein); Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (search of car justified but not luggage therein); *Chadwick*, 433 U.S. at 12-13 (search of luggage not justified); *Opperman*, 428 U.S. at 367-68 (inventory search).

81. *Chadwick*, 433 U.S. at 13.

82. *Id. See* United States v. Roberson, 650 F.2d 84, 87 (5th Cir. 1981) ("distinguishing articles of evidentiary value through the doors or windows of an automobile is entirely within the scope of

The container search rule of *Chadwick* was first applied by the Court in *Arkansas v. Sanders*.[83] In *Sanders*, an informant's tip led the police to believe that Sanders would be arriving at a certain time aboard a specific flight and would be carrying agreen suitcase containing marihuana. After watching Sanders place the suitcase in the trunk of a taxi and drove off, the police gave chase and stopped the cab. When the trunk was opened, the suitcase was confiscated and opened, without consent or a warrant at the scene. The Court held that the trial court committed reversible error when it permitted the marihuana to be used as evidence against Sanders. Justice Powell writing for a five-man majority stated that:

> [a] closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But . . . the exigency of mobility must be assessed at the point immediately before the search . . . . Once police have seized a suitcase, as they did here the extent of its mobility is in no way affected by the place from which it is taken.[84]

Although the *Sanders* Court held that there was no diminished expectation of privacy for luggage merely because it was placed in the trunk of a car, it nevertheless stated that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment."[85] The Court in *Sanders* relied on the exclusive control argument of *Chadwick* and reasoned that since the officers had the suitcase in their control, there was little or no danger of anyone tempering with potential evidence that could be hidden inside.

In the case of *Robbins v. California*,[86] the Supreme Court extended the reasoning of *Chadwick* to give forth amendment protection to closed opaque containers found in automobiles during a warrantless search. Robbins had been stopped by California Highway Patrol Officers who observed him operating his vehicle in an erratic manner. When he exited from the car the officers smelled marihuana smoke and proceeded to arrest him. They also searched the vehicle and found two sealed packages wrapped in green opaque plastic inside a recessed luggage compartment. The Court declined to uphold the search and held that the "[f]ourth amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal.' The contents . . . were immune from a warrantless search because appellant had reasonably manifested an expectation that the contents

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the plain view doctrine."); United States v. Bertucci, 532 F.2d 1144, 1146 (7th Cir. 1976) (officer rightfully in position to have the view); United States v. Bradshaw, 490 F.2d 1097, 1100 (4th Cir. 1974). In announcing the prerequisites for a valid retention of objects said to be within the officer's plain view, the court held:

> First, the officer' presence at the vantage point from which he discovers the evidence in plain view must not amount to an unjustifiable intrusion into an area with respect to which defendant's expectations of privacy are protected by the fourth amendment . . . . Secondly, the discovery of the evidence in plain view must have been inadvertent.

490 F.2d at 1100. *Accord* United States v. Sifuentes, 504 F.2d 845, 848 (4th Cir. 1974). *See also Roberson*, 650 F.2d 84. *Cf.* United States v. Kelley, 414 F. Supp. 1131, 1136 (W.D. Mo. 1976). This court felt that the "incriminating nature" of the evidence must also be readily apparent.

83. 442 U.S. 753 (1979).

84. *Id.* at 763.

85. *Id.* at 764 n.13. This raises the so-called worthy container problem; distinguishing those closed containers worthy of warrant protection (luggage, briefcases) from others which may, because of lesser privacy interests, be searched without a warrant (paper bags, boxes).

86. 453 U.S. 420.

would remain free from public examinations."[87]

In analogizing the *Chadwick* and *Sanders* cases in the facts in *Robbins*, the Court indicated that the fourth amendment did not make a distinction between personal and impersonal effects. The Court firmly established in *Robbins* that "no containers recovered from an automobile search pursuant to *United States v. Carroll*, could be opened without a search warrant, unless their contents could be discerned from an examination of the exterior."[88]

The practical effect of *Robbins* was that although the police could search a vehicle as incident to an arrest or under the *Carroll* rationale, they could not open any closed containers found without a search warrant regardless of its flimsiness or whether it could be used as a repository for personal effects. The decision in *Robbins* is consistent with *Chadwick* and *Sanders* because these cases upheld the expectation of privacy people have in their belongings even though they are stored in an automobile.[89] Logically, when a person conceals his or her possessions in sealed or locked opaque containers, they have strengthened their intention to be free from warrantless police searches.

D. *United States v. Ross*

In *Ross* an informant told District of Columbia police that a man nicknamed "Bandit" was selling narcotics out of the trunk of a purplish maroon Chevrolet Malibu located at 439 Ridge Street. Upon arrival at the scene the detectives saw the vehicle parked at the given address, but no one around it. A license check revealed that the car was registered to one Albert Ross; a subsequent identification check provided officers with a description of "Bandit". To avoid arousing suspicion, the detectives circled the area. As they returned, they saw the vehicle turning the corner. A man matching the description was driving so the police stopped the car.[90]

The driver and the car's interior were searched; a bullet was found on the front seat and a pistol in the glove compartment. Ross was then arrested and handcuffed. One of the detectives took Ross' keys and searched the trunk, where he found a closed brown paper bag. He opened the bag and discovered a number of glassine bags containing a white powdery substance later determined to be heroin. At the police station, an extensive search of the trunk revealed a zippered red leather pouch. When it was opened, $3,200 in cash was discovered.[91]

Ross was convicted on drug charges,[92] after his motion to suppress the heroin and cash was denied. On appeal, the conviction was reversed.[93] The Court of Appeals for the District of Columbia held that "[w]here . . . the police, without endangering themselves or risking loss of the evidence, lawfully have stopped a car, detained any person in it suspected of criminal

87. *Id.* at 427.

88. Latzer, *supra* note 11, at 393.

89. *See* note, Pandora's Box, *supra* note 50, at —.

90. *Ross*, 102 S. Ct. at 2160.

91. *Id.* at 2160-61.

92. 21 U.S.C. § 841(A)(1) (1976) provides in pertinent part that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense a controlled substance." *Id.*

93. United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981).

activity, and secured parcels found in the car, they must delay search of the parcels until after judicial approval has been obtained."[94] The court of appeals decision was reversed by the Supreme Court on June 1, 1982.

In ruling the contents of the paper bag admissible, the Court overruled *Robbins*[95] and considerably modified the holding of *Sanders*.[96] Justice Stevens, writing for a six-justice majority took a radical approach by rejecting the container search limitation of automobile searches under *Carroll*.[97] The Court indicated that to bar a warrantless search of containers found in automobiles would largely nullify the principle of *Carroll* because while police could search the car for contraband, they could not open any containers where were likely to hold the object of their search.

In its discussion of *Robbins*, the Court stated that the *Robbins* decision was based on the plain view doctrine; in that whenever a package did not disclose its contents, the contents were not in the seizing officer's plain view; thus, he could not retrieve the package as contraband.[98] The *Ross* Court summarized that the fourth amendment did not make distinctions between containers:

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[99]

The Court indicated that the scope of the search is "as the magistrate could authorize," and that scope is not defined by the "nature of the container" but by the object for which the search is made.[100]

The gist of the *Ross* decision is centered on *Carroll*. The Court cited *Carroll* for the proposition that when probable cause to make a warrantless search exists, conducting such a search is not violative of the fourth amendment prohibition against unreasonable searches and seizures.[101]

The Court in *Ross* also cited the mobility of the automobile as a determinative factor in upholding the warrantless search. But the movability exigency referred to in previous cases was used in regard to the automobile as a "fleeting target."[102] In *Ross*, however, the Court analogized the potential

94. *Id.* at 1171 (quoting *Sanders*, 442 U.S. at 766).

95. *Robbins*, 453 U.S. 420.

96. *Sanders*, 442 U.S. 753.

97. *Carroll*, 267 U.S. 132.

98. *Ross*, 102 S. Ct. at 2171-72.

99. *Id.* at 2170-71. The Court reasoned that "contraband goods are rarely strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *Id.*

100. *Id.* at 2172.

101. *Id.* at 2162. The Court argued that if the scope of the searches in *Carroll* and *Chambers* was reasonable, a search of closed containers in cars is also reasonable:

> [I]f it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would be reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

Id. at 2169.

102. For examples of cases holding that mobility is a factor to be considered in the search of

mobility of an automobile to its actual mobility to reach its decision. In doing so, the Court ignored the basic fact that containers, because they can be easily removed from a vehicle, are easily accessible for seizure. As soon as a container is discovered and reduced to the exclusive control of the police, any exigency which would support a warrantless search ceases because there is no longer any likelihood that a person could reach to grab the containers to destroy or hide the contents.

The principal dissent in *Ross* was written by Justice Marshall. In his opinion, the majority's reasoning showed contempt for fourth amendment values and was inconsistent with previous opinions.[103] Justice Marshall argued that neither the mobility of cars nor the diminished privacy expectations in cars justifies container searches. He concluded that "any container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it deserves if found at a location outside the automobile."[104]

III. THE PRACTICAL APPLICATION OF *BELTON*, *ROBBINS*, *ROSS*

The major reason for concern stems from the practical application of these cases to any set of facts. Police may be baffled over which case will govern the scope of a warrantless search when they determine (1) that there is probable cause to stop and search a vehicle, or (2) when the search is made incidental to an arrest.

The *Ross* rule "applies only to [warrantless] searches of vehicles that are supported by probable cause."[105] The *Ross* Court construed probable cause to mean a determination based on "objective facts" which would permit the issuance of a warrant by a magistrate and which is not based solely on the "subjective belief" that the action sought to be taken is reasonable.[106] Therefore, under *Ross*, an officer has authority comparable to a magistrate's if he determines that there is probable cause to believe an automobile is carrying contraband and the scope of his warrantless search "is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause."[107] Whether a police officer who is trained to enforce, rather than interpret the law is capable of making such a "neutral and detached" determination remains in doubt. As Justice Marshall pointed out: "the warrant requirement provides a number of protections that a post-

automobiles, see South Dakota v. Opperman, 428 U.S. 364, 367-68 (1978); Cady v. Dombrowski, 413 U.S. 433, 441 (1973); United States v. Menke, 468 F.2d 20, 22-24 (3rd Cir. 1972) (movement is a "critical" factor.). *Contra* United States v. Powers, 439 F.2d 373, 375 (4th Cir.) (mobility alone is not enough), *cert. denied*, 402 U.S. 1011 (1971). State v. Patino, 83 N.J. 1, 2, 414 A.2d 132, 133 (1970) ("one operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the vehicle is mobile and subject to government regulation.").

103. *Ross*, 102 S. Ct. 2157, 2174 (Marshall, J., dissenting).

104. *Id.* at 2177.

105. *Id.* at 2164. *See* Brinegar v. United States, 338 U.S. 160, 175 (1949). In *Brinegar*, the Court stated that "[P]robable cause exists where 'the facts and circumstances within . . . [the offices'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. at 175 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). *See also* Husty v. United States, 282 U.S. 694 (1931) (probable cause justifies search of motionless vehicle).

106. *Id.*

107. *Id.* at 2172.

hoc judicial evaluation of a policeman's [determination of] probable cause does not."[108]

The *Belton* rule applies when an officer has made a lawful custodial arrest of the occupants of an automobile and as a "contemporaneous incident" of the arrest, conducts a search of the automobile's interior. Under *Belton*, the exigency of the arrest eviscerates the fourth amendment's warrant requirement. Thus, the officer may search the interior along with any containers found inside thought to be within the arrestee's immediate control.[109] The timing of the arrest is critical. The moment that an occupant of an automobile is arrested, the *Belton* rule indicates that the arrestee has "no significant expectation of privacy in his person or in the contents of any containers located in [the] car's passenger compartment."[110] However, if the container is seized prior to an arrest the officer must obtain a search warrant unless its exterior "clearly announces its contents"[111] because he has obtained exclusive control over the container.[112] There is no longer any danger that the arrestee might reach the container to grab a weapon or destroy evidence to justify the warrantless intrusion.

The *Ross* decision has considerably undermined the reasoning of *Robbins*.[113] Although the *Ross* Court rejected the precise holding of *Robbins*, it indicated that "one's 'reasonable expectation of privacy' is a particularly relevant factor in determining the validity of a warrantless search."[114]

Arguably, under the *Robbins* rule, police cannot search packages or containers found in automobiles which ordinarily serve as repositories for personal effects.[115] Justice Harlan argued that there "is a twofold requirement to invoke expectation-of-privacy protection. First, the person must manifest an actual expectation of privacy.[116] Second, the expectation must

108. *Id.* at 2174 (Marshall, J., dissenting).

109. New York v. Belton, 453 U.S. 454, 460-61 (1981). *See also* Latzer *supra* note 11 at 398; Note, *Expanding the Automobile Search Incident To Arrest*, 12 GOLDEN GATE L. REV. 473, 473 (1982) (analysis of the practical impact of the *Belton* decision); Wainger, *The Warrant Requirement for Container Searches and the "Well-Delineated" Exceptions: The New "Bright Line" Rules*, 36 U. MIAMI L. REV. 115, 127-28 (1981) (discussion of the policies that form the bases for traditional exceptions to the fourth amendment's warrant requirement).

110. Wainger, *supra* note 110 at 134.

111. *Robbins*, 453 U.S. at 428. The Court indicated that expectations of privacy were established by "general social norms." Such expectations may be diminished by a "distinctive configuration" of the container's exterior. *See id.* at 426-28.

112. *See, e.g.*, *Robbins*, 453 U.S. at 425; *Sanders*, 442 U.S. at 763-64; *Chadwick*, 433 U.S. at 12-13.

113. *Robbins*, 453 U.S. 420.

114. *Ross*, 102 S. Ct. at 2173 (Powell, J., concurring).

115. *Compare* United States v. Benson, 631 F.2d 1336 (8th Cir. 1980) (leather totebag); United States v. Presler, 610 F.2d 1206 (4th Cir. 1979) (briefcase); United States v. Miller, 608 F.2d 1089 (5th Cir. 1979) (plastic portfolio); United States v. Meier, 601 F.2d 253 (10th Cir. 1979) (backpack); United States v. Johnson, 588 F.2d 147 (5th Cir. 1979) (duffle bag); United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (suitcase); *with* United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (plastic bag inside paper bag); United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) (two plastic bags inside three brown paper bags wrapped in two more plastic bags); United states v. Mackey, 626 F.2d 684 (9th Cir. 1980) (paper bag); United States v. Gooch, 603 F.2d 122 (10th Cir. 1979) (plastic bag); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (cardboard box).

116. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See generally* Note, *The Warrantless "Search Within A Search" of Containers in Motor Vehicles—State v. Duers and the Reasonableness of Privacy Expectations*, 17 WAKE FOREST L. REV. 425, 447-48 (1981) (ex-

be one which is recognized by society as being reasonable."[117] Under Justice Harlan's test, courts should consider all relevant factors to evaluate the reasonableness of the expectation. However, the "most important factor . . . is the nature of the container itself since an individual's choice of container is the best measure of his reasonableness."[118]

Finally, there is the situation where both probable cause and the exigency of an arrest occur simultaneously. The *Belton* rule, which expanded the search incident to arrest doctrine, will apply, rather than the more restrictive automobile exception to justify the warrantless search of all containers found *inside* the vehicle.[119]

IV. CONCLUSION

The Supreme Court in *Ross* held that police may search all containers found in automobiles when such a search is predicated on probable cause. *Ross* represents the Court's latest attempt to provide police with a bright line, or straightforward rule governing warrantless automobile searches and seizures.[120]

The Court upheld the warrantless search of Ross' trunk on the basis of the vehicle's inherent mobility, the lesser expectation of privacy for items placed in vehicles by their owners; and the exigency created by Ross's arrest. This holding returns the law of automobile searches to the pre-*Chadwick-Sanders* era when no fourth amendment protection for containers found in autos was available.

Ross, as a practical matter, significantly diminishes privacy rights in closed containers by overruling *Robbins* and undermining *Sanders*. This reasoning expands the automobile exception to an unprecedented degree and signals the beginnings of police acting in a quasi-judicial fashion. Taken together, *Ross* and *Belton* could trigger pretextual arrest situations in which police, acting under color of law could intrude upon the rights of honest citizens who have no recourse or protection from such intrusions solely because they happened to be riding in or driving an automobile which police have stopped for a minor traffic violation.[121]

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amines rationale used by Supreme Court to harmonize fourth amendment privacy expectations with the needs of law enforcement) [hereinafter cited as Note, *Warrantless Search*].

117. *Id.*

118. Note, *Warrantless Search*, *supra* note 116, at 448.

119. *See* Wainger, *supra* note 109, at 132-33; Latzer, *supra* note 11, at 398-99. The Supreme Court in *Belton* stated that all "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the control area." 453 U.S. at 460. Note that this view conflicts with the reasoning of *Chimel* which limits the scope of a warrantless search to areas within the arrestee's immediate control. *See* Latzer at 397-98.

120. *See, e.g.*, *Ross*, 102 S. Ct. at 2161-62; *Belton*, 453 U.S. at 458-59; *Robinson*, 414 U.S. at 218.

121. Although *Ross* was supposed to have cleared up the dilemma associated with search and seizures of automobiles, three recent decisions still reflect some uncertainty about how *Ross* applies. *See, e.g.*, United States v. Kelly, 683 F.2d 871, 875 (5th Cir. 1982) (search of a Winnebago recreational vehicle and subsequent forced opening of locked compartment therein without a warrant held not to be violative of the fourth amendment); United States v. Floyd, 681 F.2d 265, 266 (5th Cir. 1982) (per curiam) (search of opaque package found in trunk of automobile upheld on ground that arresting officers had probable cause to believe the suspects' automobile contained contraband); *but cf.* United States v. White, 541 F. Supp. 1114, 1119-20 (N.D. Ill. 1982) (mem.)

(defendant's consent to a search of a flight bag was limited to permission to search for narcotics, the announced purpose of the search, rather than broad consent to search for stolen money and jewels actually found inside the flight bag).