United States v. Ross: Search and Seizure Made Simple

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United States v. Ross: Search and Seizure
Made Simple

The United States Supreme Court in United States v. Ross vastly simplified the process of searching closed containers found in an automobile during a lawful Carroll search yet, at the same time, placed in question the importance of the search warrant in the scheme of fourth amendment jurisprudence by equating the policeman's determination of probable cause with that of the magistrate.

I. INTRODUCTION

After a streak of bad luck, things finally seemed to be going Albert's way.¹ When the police arrested him for selling heroin from the trunk of his car, Albert's lawyer could not keep the United States Attorney from introducing as evidence the heroin found at the time of his arrest. As a result, a District of Columbia jury convicted Albert of possession of heroin with the intent to distribute the drug.² But after Albert had cooled his heels in jail for some time, two things happened which convinced him his luck had changed: the United States Supreme Court decided Robbins v. California,³ and the United States Court of Appeals for the District of Columbia Circuit reversed his conviction.⁴ Albert's lawyer was able to convince the court of appeals that the police should not have searched a paper bag found in the trunk of Albert's car⁵ without a warrant. That left the United States with no evidence and no case against Albert. The United States appealed the decision and the Supreme Court agreed to hear the case.⁶ But that did not worry Albert; after all, had not the Supreme Court decided Robbins not more than a year ago?

¹. A certain amount of license—as to what the participants thought and said—has been taken in the relation of the events leading up to the published decision of this case. This reflects an interpretation of the events by the author in an attempt to make the note more readable.
⁵. Albert had placed the heroin in the trunk of his car.
In *Robbins*, the Supreme Court told the State of California its highway patrolmen should not have opened two packages wrapped in opaque plastic,\(^7\) found in the depressed luggage compartment of Robbins' car, without a search warrant. The facts in Albert's case were nearly identical. It seemed unlikely the Court would distinguish the search of Albert's trunk with that of Robbins' luggage compartment. It was even less likely that the Court would reverse the *Robbins* decision, not much more than a year old, knowing the confusion and uproar it would cause in the legal community. Surely the Court took the case, at least in Albert's mind, to re-express its support for the principle of law stated in *Robbins*.

Albert's celebration proved premature, however. The Supreme Court dashed his hopes,\(^8\) reversing the appellate court, overruling *Robbins v. California*, eliminating some of the language in *Arkansas v. Sanders*,\(^9\) and declaring a general rule that police may, with probable cause to stop and search an automobile, open any container found therein without a warrant.\(^10\) That the Court's decision came as a surprise to those involved in *Ross* goes without saying. Those in the legal community who thought they perceived a trend in the troubled area of search and seizure were shocked.

Easily missed in all the excitement and confusion, however, is something of greater long-range significance. Underlying the surface of *Ross* appears the unexpressed opinion that the warrant requirement of the fourth amendment\(^11\) has outlived its usefulness, is archaic and unnecessary, and imposes a burden on law enforcement completely out of proportion to any benefit it gives to the public.

Although the Court does not air this issue openly, it is implicit in the decision. Perhaps the Court felt the time was not ripe for such grave criticism, or perhaps it felt this debate was best left to the legislature. Regardless of its motive, if it is true that a major-

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7. Robbins had hidden marijuana in the packages.
9. 442 U.S. 753 (1979). The case was relied upon by both the court of appeals in *Ross*, and the Supreme Court in *Robbins*.
10. 102 S. Ct. at 2172. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.*
11. U.S. CONST. amend. IV.

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

*Id.* See infra note 143 and accompanying text.
ity of the justices of the nation's highest court has lost respect for the warrant requirement, the Court works a disservice on the public by not voicing its belief. Since this question is potentially the most important aspect of United States v. Ross, it will be the focus of this note.

II. FACTS OF THE CASE

There was never any serious doubt that Detective Marcum had probable cause to search Albert's car. On a cold November evening in 1978, an anonymous informant, who had proved reliable in the past, phoned Marcum at police headquarters and told him "Bandit" was selling heroin from the trunk of a "purplish maroon" Chevrolet Malibu with District of Columbia license plates. The informant gave Marcum a detailed physical description of Bandit and related how he had just witnessed him complete a sale of heroin. Bandit told the informant he had more heroin in the trunk of his car.

Detective Marcum, accompanied by Detective Cassidy and Sergeant Gonzales, immediately drove out to the street address given him by the informant. There they found a parked automobile fitting the description given by the informant. Marcum checked the car's license plates and found they were registered in the name of Albert Ross. A computer check on Ross revealed a physical description identical to the one given by the informant. It also disclosed that Ross used the alias "Bandit." The officers drove past the car and through the area to avoid alerting the driver to their presence.

They returned in five minutes and observed the Malibu turning off of the street it had been parked on. They pulled alongside to get a look at the driver and found he fit the specific description of Bandit given by the informant. The officers then stopped the car and instructed its driver to get out. While the detectives searched the driver, Sergeant Gonzales saw a bullet on the front seat of the car. An interior search turned up a pistol in the glove compartment. The officers arrested Albert and handcuffed him. Detective Cassidy took Albert's keys and opened the trunk of the car, finding a closed "lunch-type" paper bag. Cassidy opened the bag and found inside a number of clear plastic bags containing white powder. He closed the bag, replaced it in the trunk, and drove the car to headquarters.
At headquarters, Cassidy made a thorough search of the car and trunk finding, in addition to the previously mentioned paper bag, a zippered leather pouch. Cassidy unzipped the pouch and found $3,200 in cash. The police laboratory confirmed what the officers already suspected: the powder in the plastic bags was heroin. Albert was charged with possession of heroin with intent to distribute. The police laboratory confirmed what the officers already suspected: the powder in the plastic bags was heroin. Albert was charged with possession of heroin with intent to distribute. At no time did the officers obtain a search warrant.

The trial court readily disposed of Albert’s contention that the search of the bag and pouch were illegal. The court ruled that the search of Albert’s car was proper because the police, having received information from an informant who had proved reliable in the past and personally verifying the information once they found Albert’s car, had probable cause to make the search. The trial court also found the search of the bag and pouch to have been well within the boundaries of a proper automobile search. The court of appeals, however, was not so easily convinced.

The three-member panel of the Court of Appeals for the District of Columbia Circuit was troubled by the Supreme Court’s decision in Arkansas v. Sanders. Compelled by Sanders to consider the search of the bag and pouch separate from the search of the car, the court of appeals inquired whether Albert had such a reasonable expectation of privacy in the bag and pouch as to make the police officer’s search of such items illegal without a warrant. The court of appeals concluded that the search of the pouch was illegal but that the search of the bag was proper because it was not the kind of receptacle “worthy” of a protected privacy interest. The United States was satisfied with the decision because it left the prosecution’s case intact. But the rest of

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12. Albert was charged with violating 21 U.S.C. § 841(a) (1976), which reads in part: “It shall be unlawful for any person knowingly or intentionally . . . (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” Heroin is a controlled substance by definition of 21 U.S.C. § 812 (c) Schedule 1 (b)(10) (1976).

13. Albert did not testify at the pre-trial suppression hearing. At trial, Albert tried to convince the jury that he did not know the bag was in his trunk when he was arrested in order to contest the intent requirement of the crime of possession with intent to distribute.

14. 102 S. Ct. at 2160.

15. See infra notes 64-74 and accompanying text. The United States Supreme Court in Sanders rejected the government’s argument that the search of containers and automobiles is to be governed by the same fourth amendment standard.

16. For discussion of reasonable expectation of privacy see infra notes 54 and 55.

17. Even though the court of appeals reversed Albert’s conviction, it remanded his case to the trial court for a new trial instructing the court to exclude the items found in Albert’s leather pouch, but allowing the introduction of the contents of the paper bag.
the court of appeals was not content with the three-member panel's "worthy/not worthy" distinction.

An en banc court of appeals chose to rehear the case on its own motion. It heard arguments from both sides on the issue of whether the owner of a paper sack may lay claim to fourth amendment protection for the privacy of its contents. The court reviewed *Arkansas v. Sanders* and, as a result, determined the fourth amendment made no distinction between a paper bag and a pouch. Since both bag and pouch are capable of being receptacles of privacy, the search of the paper bag must have been ille-

18. 102 S. Ct. at 2161.
19. The court of appeals, en banc, first disposed of two points not raised by the government in its original proceeding before the court of appeals. First, the government argued *Arkansas v. Sanders* should not have retroactive effect on *Ross*, since proceedings in *Ross* had been initiated prior to the decision in *Sanders*. (See United States v. Peltier, 422 U.S. 531, 535 (1975)). The court, however, reasoned that when a decision "does not expand the exclusionary rule, but merely restates and applies doctrine already in place," police officers have notice of the rule and their good faith reliance on the doctrine is not disturbed. 655 F.2d at 1162.

Second, the government argued that Albert did not have standing to complain of fourth amendment violations. The government ironically argued for the retroactivity of United States v. Salvucci, 448 U.S. 83 (1980). The Court in *Salvucci* expressly overruled the "automatic standing" rule of United States v. Jones, 362 U.S. 257 (1960), allowing defendants in possession cases to challenge searches and seizures producing evidence against them without having to make proof of standing. *Salvucci* requires defendants to prove a violation of their personal ownership rights before claiming the benefit of the exclusionary rule. Since Albert claimed not to know about the paper bag when he testified at trial, the government argued he did not meet the *Salvucci* burden.

Still the court of appeals stated that the Supreme Court meant for *Jones* to bind the district courts. 655 F.2d at 1165. See 448 U.S. at 85. Even if *Salvucci* applied, the jury convicted Albert of possession, necessarily determining that Albert had possession of the paper bag when he was arrested.

20. The court of appeals considered, but expressly rejected the position ultimately taken by the Supreme Court in *Ross* (that the search in *Ross* could be distinguished from the search in *Sanders*, see infra text accompanying note 64), on the ground that the police in *Sanders* had focused on a specific container before searching the car, whereas the police in *Ross* did not. Judge Ginsburg believed that, based on the resolution of the conflict between United States v. Finnegan, 566 F.2d 637 (9th Cir. 1977), and United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 911 (1979), by the Supreme Court in *Sanders*, the point had been decided. In *Finnegan*, police inquiry was directed toward an automobile, but in *Stevie*, the police had focused on a particular piece of luggage placed in the car, just as in *Sanders*. The Ninth Circuit ignored the reasoning later adopted in *Sanders* (see United States v. Chadwick, 433 U.S. 1 (1977), and discussion *infra* notes 57-63 and accompanying text), and permitted the warrantless search of a container found in the car. The Eighth Circuit, however, followed the *Sanders* rationale and found the search of the luggage unlawful. Judge Ginsburg interpreted the *Sanders* Court as finding in favor of the *Stevie* decision, noting that the Ninth Circuit later reversed its direction and followed *Sanders*. 655 F.2d
gal, too. To decide otherwise would be to discriminate against the poor who could not afford to house their effects in expensive luggage. The court of appeals felt its decision was constrained by Sanders which proscribed the warrantless search of all containers in which their owners may repose an expectation of privacy. Even with this decision, however, the court remained bitterly divided.

In the meantime, the United States Supreme Court decided Robbins v. California. Robbins presented the Court with its first opportunity to apply the language in Sanders (relied upon by the court of appeals in Ross) to the fact situation for which it was intended. The Court in Robbins affirmed Sanders in all re-
Although Robbins came too late to influence the court of appeals in Albert's case, it appeared to dispose of the issue on appeal to the Supreme Court.

The Supreme Court decided to review the decision in Ross because it was dissatisfied with the way the court of appeals framed the issue. The Supreme Court was reluctant to see the whole area of law become bogged down into forcing judges to decide, in each case, which containers would be afforded fourth amendment protection. Before committing itself to that line of reasoning, the Court wanted to re-examine the Robbins/Sanders rule in an adversary proceeding. For that reason, the Court instructed both parties to address the question of whether Robbins (and the passages in Sanders which spawned Robbins) should stand.26

That instruction necessarily involved the respective treatment of three lines of cases.27 United States v. Ross was born out of the convergence of those lines. However, Justice Stevens ultimately chose to ignore one of them in his opinion for the majority.28 Rather than a disavowal, Stevens' decision not to treat that line serves to underscore the focus of this paper: a majority of the Court believes the warrant requirement is useless, at least insofar as automobiles are concerned.

III. HISTORICAL BACKGROUND

A. Automobile Cases

The emergence and popularization of the automobile as an instrument of crime has continually hindered, at least in part, attempts to provide for the orderly development of fourth

suitcase) when he stopped the car in which Sanders was riding. Id. at 755. But the highway patrolmen in Robbins did not know where the marijuana might have been hidden (or if it even existed), or in what type of container it might have been hidden. See infra notes 75-93 and accompanying text. The Court in Sanders did not see this as making any difference, even though Chief Justice Burger pointed it out in his concurring opinion. 442 U.S. at 766-68.

25. 453 U.S. at 425.


27. See infra notes 29-119 and accompanying text for discussion of historical background of Ross. The three lines of cases are those involving the warrantless search of automobiles (see infra notes 29-52), the warrantless search of closed containers found in an automobile during a lawful search (see infra notes 53-98), and the "bright-line" cases. See infra notes 99-119 and accompanying text for definition and general description of bright-line rules.

28. Justice Stevens did not treat the bright-line cases in his opinion for the majority.

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amendment principles. Criminals nationwide have only too hap-
pily transferred their illegal activities to the automobile urging, at
the same time, the same measure of protection for the mobile
cars that the fourth amendment provides for their stationary
homes. Unwilling, however, to make the fourth amendment the
dupe of bootleggers, specifically, the Supreme Court fashioned its
so-called "automobile exception" to the warrant requirement in
Carroll v. United States.29

By its terms, the exception allows police officers to stop and
search a car without a warrant as long as the officers have prob-
able cause to believe the vehicle is transporting contraband.30
The proper scope of such a search was not really addressed in
Carroll and has remained a missing piece of the overall puzzle
ever since.31

Carroll arises out of the late, great attempt of the United States
to enforce sobriety. Officers of the United States were empow-
ered by the National Prohibition Act32 to enforce the eighteenth
amendment to the Constitution33 by seizing contraband liquor for
subsequent court-ordered destruction. The officers were required
by the Act to obtain a search warrant if the exercise of their duty
carried them into a "private dwelling."34 If a private dwelling was

30. The fourth amendment of the Constitution generally requires a warrant
before any search and seizure may take place. But when that rule has proved un-
workable, police have been excused from their violation of the fourth amendment
because of the exigent circumstances accompanying the situation making the pro-
curing of a warrant unreasonable. See infra notes 101-105 and accompanying text
for discussion of exceptions to the warrant requirement.
31. One of the Ross Court's avowed purposes was to supply that missing
piece. 102 S. Ct. at 2159.
32. Ch. 85, 41 Stat. 305 (1919).
33. U.S. Const. amend. XVIII (repealed 1933, see U.S. Const. amend. XXI),
which reads in part:

Section 1. [T]he manufacture, sale, or transportation of intoxicating li-
quors within, the importation thereof into, or the exportation thereof from
the United States and all territory subject to the jurisdiction thereof for
beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent
power to enforce this article by appropriate legislation.
34. An Act Supplemental to the National Prohibition Act, ch. 134, 42 Stat. 222,
223-24 (1921). Section 6 of the Supplemental Act reads:
That any officer, agent, or employee of the United States engaged in the
enforcement of this Act, or the National Prohibition Act, or any other law
of the United States, who shall search any private dwelling as defined in
the National Prohibition Act, and occupied as such dwelling, without a
warrant directing such search, or who while so engaged shall without a
search warrant maliciously and without reasonable cause search any
other building or property, shall be guilty of a misdemeanor and upon con-
vention thereof shall be fined for a first offense not more than $1,000, or im-
prisoned not more than one year, or both such fine and imprisonment.

Id.
entered without a warrant, the offending officers could be fined up to $1,000 and imprisoned for up to one year. However, the statute specifically directed the officers to seize contraband liquor being transported in a “wagon, buggy, automobile, water or aircraft, or other vehicle” without a warrant, because Congress recognized that by the time enforcement officers could obtain a warrant, the object of the search would often be gone.35 The mobile nature of motor vehicles made it virtually impossible for officers to both obtain a warrant and still be certain of making the seizure.36

A federal prohibition agent, posing as a prospective client, contracted with three suspected bootleggers for the purchase and delivery of three cases of whiskey. The bootleggers, Messrs. Carroll, Kiro, and Kruska, suspicious of “Mr. Stafford” (Agent Cronenwett), left to get the whiskey but returned in forty-five minutes claiming to be unable to find their contact. They promised to deliver the whiskey some time during the next day, but wisely made no attempt to get back in touch with Mr. Stafford.

While patrolling the road leading from Grand Rapids, Michigan to Detroit two and one-half months after the night-time meeting, Cronenwett, another prohibition agent, and a state patrolman observed an Oldsmobile roadster they recognized as belonging to

35. 267 U.S. at 144-47. Chief Justice Taft gleaned this from the legislative history leading up to the enactment of the Supplemental Act, specifically § 6. The House judiciary committee objected to the predecessor § 6 (known as the Stanley Amendment) because it penalized the warrantless search of “property or premises” instead of only “private dwellings.” The committee reported an amended § 6 with the words “private dwellings” (and an accompanying definition) substituted for “property or premises” on the grounds that the latter restriction would prohibit all warrantless searches and “cripple enforcement of the National Prohibition Act.” The judiciary committee continued by warning that if officers are required to obtain search warrants before searching any “property” or “premise,” “it will make it impossible to stop the rum-running automobiles engaged in like illegal traffic.” Chief Justice Taft related that the effect of the judiciary report on Congress was the adoption of a § 6 (different than the House judiciary committee version) penalizing warrantless searches of “private dwellings,” but merely requiring good faith and probable cause to search any other “building or other property.” The Chief Justice concluded: “[section 6] left the way open for searching an automobile, or vehicle of transportation, without a warrant, if the search was not malicious or without probable cause.” Id. at 147.

The foregoing is important because it was relied upon extensively by Justice Stevens in his Ross majority opinion. See 102 S. Ct. at 2163. See also infra notes 121-30 and accompanying text.

36. 267 U.S. at 146. Chief Justice Taft quoted from the House report as follows: “[I]t is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.”
the “Carroll boys” pass them going the opposite direction. The officers turned their car around and began to follow. The Carroll boys apparently did not recognize the officers and therefore did not attempt to flee. The officers stopped the Oldsmobile. Although an immediate search of the car proved unsuccessful, Agent Cronenwett bumped against the back of the front seat while looking underneath and felt something hard. When the upholstery of the seatback was ripped open, sixty-eight bottles of whiskey and gin previously concealed in the seat where the fill material had been removed were exposed.

The Supreme Court posed the issue as whether the distinction made by Congress in the National Prohibition Act between dwelling places and vehicles, in terms of the requirement of a search warrant, was permissible under the fourth amendment. The Court began its analysis of the issue with the now famous statement, that the “Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests, as well as the interests and rights of individual citizens.”

While the first proposition is debatable, the second is well accepted as a rule for determining reasonableness in a search. What is reasonable under the fourth amendment necessarily depends on a balancing of the need to maintain the security of the public with the right of the individual to be left alone. Chief Justice Taft, however, focused on the first principle in his search for authority.

The penalty for transporting liquor under the National Prohibition Act was forfeiture of the liquor and the means used in transporting it. The Court analogized this penalty to the process of forfeiture of goods for non-payment of imposts and duties under

37. Id. at 147.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established. . . . Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

38. Id. at 149.

39. See Robbins, 453 U.S. at 437 (Rehnquist, J., dissenting). If an impediment to law enforcement efforts is not somehow balanced by a reciprocal benefit to the public in the form of heightened security from unreasonable governmental intrusion, then the impediment is unjustified.

40. The liquor was ordered destroyed, and the vehicle used to transport the liquor was impounded until it could be sold at public auction with the proceeds going into the United States Treasury.
the original Revenue Act of 1789.\textsuperscript{41} The Court cited a portion of the Act which authorized officers of the United States to enter upon any "ship or vessel" to seize forfeitable goods without a warrant.\textsuperscript{42} Conversely, the Act required officers to obtain a warrant if they wanted to enter a "particular dwelling house, store, building, or other place." The Court reasoned that the Congress which enacted the Revenue Act of 1789 was the same Congress which ratified the fourth amendment.\textsuperscript{43} By inference, then, that Congress—composed of Constitutional Congress conferees as well—recognized a distinction between habitable places and moving vehicles in terms of the requirement of a search warrant. The Court referred to similar provisions in subsequent acts and concluded it had proven contraband goods in automobiles could be seized without a warrant.\textsuperscript{44}

The Court did not stop there. It went on to explain that not all warrantless searches of vehicles would be permissible. Officers of the United States were still under a duty to obtain a warrant

\begin{itemize}
\item \textsuperscript{41} Act of July 31, 1789, ch. 5, 1 Stat. 29.
\item \textsuperscript{42} Id. at 43. Section 24 of the Act reads:
\begin{quote}
That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which duties shall not have been paid or secured, shall be forfeited.
\end{quote}

\item \textsuperscript{43} Id. See generally Act of August 4, 1790, ch. 35 §§ 48-51, 1 Stat. 145, 170; Act of February 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of March 2, 1799, ch. 22, §§ 68-71, 1 Stat. 627, 677-78.
\item \textsuperscript{44} Id. at 151-53; see, e.g., Act of March 3, 1815, § 2, 3 Stat. 231, 232, codified in § 3061 of the Revised Statutes; see also Cotzhausen v. Nazro, 107 U.S. 215, 219 (1882) (customs officer not liable for warrantless seizure of mail unlawfully imported into United States).
\end{itemize}
"whenever practicable." The rule would be enforced by requiring an officer who had conducted a warrantless search to carry the burden of proving he had probable cause to conduct the search. Failure to carry the burden would necessitate returning the liquor and means of transporting it to the arrestee, essentially setting him free, while exposing the officer to a civil suit for money damages for violating the arrestee's constitutional rights. Officers were encouraged to obtain warrants whenever there was a question of practicability by insulating them from such civil actions if they conducted the search pursuant to a warrant. Inherent in the foregoing is the belief that the judgment of the magistrate is somehow better than that of the prohibition agent. No other reason existed for offering the agents the bone of civil immunity.

The Carroll Court's analysis may be inadequate because it takes for granted the possibility that Congress, when enacting the revenue acts spoken of, expected the fourth amendment to have a broader protective scope than that expressed in the particular acts of legislation. The Court in Carroll, however, does no more than state, in a very conclusory fashion, that the rule it formulated was in "keeping with the requirements of the Fourth Amendment." The Court needed to do more than merely recite a test. It failed to conduct the kind of searching policy analysis which Congress made in exempting the search of vehicles from the warrant requirement. It is not the job of the legislature to establish fourth amendment boundaries. After Carroll, the legal

45. "In cases where the securing of a warrant is reasonably practicable, it must be used..." 267 U.S. at 156.
46. Id. at 155-56.
47. Id. at 156. "[W]hen [the warrant is] properly supported by affidavit and issued after judicial approval [it] protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." United States v. Kaplan, 286 F.2d 963, 972 (S.D.C. 1923).
48. See supra notes 30, 44-47 and accompanying text.
49. 267 U.S. at 159.
community was still left wondering what the fourth amendment really required.

Another important automobile search case was presented to the Court in *Chambers v. Maroney*. In *Chambers*, the Court stressed that while the exigency justifying the initial warrantless seizure of the moving automobile is eliminated with the seizure, an immediate search is still proper under *Carroll*. The Court wanted to establish that the *Carroll* decision was not dependent upon an immediate search being the only alternative to letting the car's driver go free for lack of a search warrant. The Court in *Texas v. White* made this clear when it allowed a car to be seized and impounded at police headquarters until a warrant could be obtained to authorize the search.

The line of automobile cases would appear to have been dispositive of the issue raised in *Ross*. But there was another line of cases dealing with the search of closed containers found in an automobile during a lawful search with which the Court in *Ross* had to contend.

**B. Container Cases**

The container cases owe their existence to *Katz v. United States*. The Supreme Court in *Katz* disposed of the notion that fourth amendment protection applies only to places. *Katz* made clear that the fourth amendment protects people, and thus, is not

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51. Id. at 52. The Court refused to recognize any difference between "seizing and holding a car" before getting a warrant, and making an immediate search of the car. "[E]ither course is reasonable under the Fourth Amendment." Id. This issue becomes important in *Ross* when the Court attempts to expand the scope of *Carroll*. Since warrantless searches are tied to the exigent circumstances which justify their existence, the majority stressed this reasoning from *Chambers* in order not to unnecessarily restrict the justificational basis of the automobile exception. 102 S. Ct. at 2163 n.9. Justice Marshall picked up on this argument in his dissenting opinion. See infra note 152 and accompanying text. Justice Marshall read *Carroll* as stating that the policeman's *only* alternative to an immediate search of the automobile is letting the car and driver go for lack of a warrant. For this reason, the automobile exception to the warrant requirement could not be stretched beyond excusing the immediate warrantless search of the automobile. The Court in *Carroll* justified nothing else in Justice Marshall's view.
52. 423 U.S. 67 (1975). See also 102 S. Ct. at 2163 n.9.
53. 389 U.S. 347 (1967). *Katz* involved the warrantless, electronic surveillance of an individual's conversation in a public phone booth. The government argued that the public locality of the phone booth took it out from under the kind of fourth amendment protection provided for dwelling places. The Court rejected this theory.
tied to traditional notions of privacy in dwellings. The rule derived from *Katz* is that fourth amendment protection extends to whatever the individual reasonably expects to keep private from the government, and wherever he expects such privacy. It is a two-fold inquiry: first, a subjective determination of whether the particular individual in a particular situation really had an expectation of privacy, and second, whether that expectation is reasonable when balanced against the security interest of the public.

In *Chadwick v. United States*, the Supreme Court was presented with its first opportunity to apply the *Katz* rule to a factual setting involving closed containers found in an automobile during a search. Federal narcotics agents in San Diego, California became suspicious when a 200-pound footlocker leaking talcum powder was loaded onto a train going to Boston. Agents in Boston were notified that the footlocker might contain contraband. They stopped the footlocker while it was still in transit and had a trained dog smell its exterior for traces of narcotics. The dog reacted positively, signalling the presence of narcotics inside. The agents did not seize the footlocker at that point, but allowed it to proceed to the baggage terminal. They watched as Chadwick and his two companions picked the footlocker up and carried it to their car. The three men placed the footlocker in the trunk, but did not close the trunk lid. Before Chadwick could start his car, the agents arrested him and his companions. The footlocker was then removed to a secured place where it was opened, revealing a large quantity of marijuana. No search warrant was obtained.

At the trial level, the government argued that the warrantless search was excused by the *Carroll* exception to the warrant requirement. The trial court rejected the argument and found the

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54. *Id.* at 351. The Supreme Court in United States v. Chadwick, 433 U.S. 1 (1977), interpreted *Katz* as follows: "We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales. As we have noted before, the Fourth Amendment 'protects people not places;' *Katz v. United States*, 389 U.S. 347, 351 (1967); more particularly, it protects people from unreasonable governmental intrusions into their legitimate expectations of privacy." *Id.* at 7.

55. 389 U.S. at 351-52. *Katz* has come to stand for the proposition that the fourth amendment protects the individual's "reasonable expectation of privacy." See 102 S. Ct. at 2173 (Powell, J., concurring).

56. Stated in this way, the rule in *Katz* is identical to the rule stated in *Carroll*, except that *Katz* has come to symbolize an expansion of fourth amendment protection. See *supra* text accompanying notes 38 and 39. Although no one has picked up on this coinidence, such an evaluation would have proved interesting in *Ross* because the *Carroll* decision would have been viewed as being much broader.


58. Talcum powder is a substance which the narcotics officers recognized as typically used to mask marijuana odors.
search to have been illegal.\(^5\) On appeal to the Supreme Court the government changed its tactic and argued that the justification behind the *Carroll* exception applied equally well to luggage, which was just as mobile, and that the warrantless search of the contents of Chadwick's footlocker was therefore reasonable.\(^6\) The United States made the mistake of pressing a losing argument to its logical conclusion: it contended in its briefs to the Supreme Court that the fourth amendment applied only to certain core areas of privacy. The government forced the Court into rejecting this argument unanimously.\(^6\)

The Court ruled that the warrantless search was unreasonable because the fourth amendment protects a luggage owner's reasonable expectation of privacy in the contents of his luggage.\(^6\) That expectation in the contents of luggage was found to be greater than the expectation of privacy in the interior of an automobile. Because police could more easily detain luggage while securing a search warrant, they were required to do so in Chadwick's case.\(^6\)

*Arkansas v. Sanders*\(^6\) came up to the Supreme Court with practically the same set of facts. A Little Rock policeman was given the tip that Sanders would arrive at a certain time, on a certain flight, carrying a green suitcase full of marijuana. The officer waited at the terminal until someone matching Sanders'...

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In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in [the federal building]. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of the automobile's open trunk.

See 102 S. Ct. at 2165 n.13.


61. Although Justices Blackmun and Rehnquist dissented, they, along with the other justices, expressed their disapproval of the government's "extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy' areas." 433 U.S. at 17-18 (Blackmun, J., dissenting).

62. Id. at 13. The luggage owner's expectation of privacy is not diminished in the same way that the automobile owner's expectation of privacy is legitimately diminished. In fact, the luggage owner's expectation of privacy is greater than the automobile owner's.

63. Id. Once the officers had Chadwick's footlocker safely in their possession, "it was unreasonable to undertake the additional and greater intrusion of a search without a warrant."

64. 442 U.S. 753 (1979).
description retrieved a green suitcase. The officer watched as Sanders loaded the suitcase in the trunk of a taxi which drove off. Before proceeding too far, the officer stopped the cab, opened the trunk and then the suitcase, finding the marijuana he was looking for. He did not have a search warrant.

The Court could have disposed of Sanders' fourth amendment claim by merely citing Chadwick. But for some reason the Court decided to take the Chadwick principle further than it needed to decide the case before it. Perhaps it felt constrained to do so when the State of Arkansas tried to distinguish its case from Chadwick on the basis that the taxi, in which Sanders was riding, was already in motion when the policeman stopped it, whereas Chadwick's car was still parked. Arkansas argued that this fact brought the case under the Carroll exception because the connection between the automobile and the suitcase was real in Sanders' case, while it was just "coincidental" in Chadwick's.

The Court remained unconvinced, believing that the prosecution was still trying to use the automobile as a way of avoiding the warrant requirement by waiting for contraband goods to be placed in an automobile before making the seizure and search. The Court viewed the issue as being whether Carroll should be extended to allow warrantless searches of containers found in a car. The Court refused to do so. It reasoned that the Carroll exception could never apply to luggage which, once seized, cannot be transported. The Court stated that the expectation of privacy in luggage is not diminished by its presence in an automobile. Police are under a duty to seize containers and present them to a magistrate for a warrant.

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65. Chief Justice Burger, in his concurring opinion, argued that Chadwick and Sanders were indistinguishable. He chided the majority for treating Sanders as if the automobile exception to the warrant requirement were at issue; he believed it was not. In that case, Sanders did not warrant the extra discussion which Justice Powell gave it. See 442 U.S. at 766-68 (Burger, C.J., concurring).


67. Justice Stevens would later write that the "nexus" between the automobile and the object of the search in both Chadwick and Sanders was "coincidental." 102 S. Ct. at 2166-67 (quoting Arkansas v. Sanders 442 U.S. at 766-67 (Burger, C.J., concurring)). That being so, the scope of the automobile exception to the warrant requirement was not at issue in those cases.

68. 442 U.S. at 762-63.

69. "Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." Id. at 763-64. The fact that luggage rides in an automobile, which has a diminished expectation of privacy, does not lessen the expectation of privacy in the luggage itself. Justice Stevens apparently believes, however, that it does. 102 S. Ct. 2171; see infra notes 134-36 and accompanying text.

70. 442 U.S. at 766.
The concurring opinion of Chief Justice Burger added an interesting sidelight to Sanders. The Chief Justice felt that the automobile exception to the warrant requirement was not at issue in Chadwick or Sanders. The focus of the police officer's search was a specific piece of luggage which he could have seized, having probable cause to do so, before it was placed in the trunk of the car or cab. For this reason, the relationship between the automobile and the suitcase and the footlocker was "purely coincidental." He argued that the Court did not need to go further and implicate all warrantless searches of containers found in a lawfully stopped automobile. The facts of Chadwick and Sanders were special; the general rule of law established by the Court in Sanders was overbroad and unnecessary.

Robbins v. California was the unfortunate result of the unnecessary language described above in Arkansas v. Sanders. Robbins had been smoking a considerable amount of marijuana and should not have been driving. Two California highway patrolmen stopped him because they viewed his progress as "erratic." Robbins stepped out of his car and approached the patrol car. He began to converse with one of the patrolmen until he was asked to produce his driver's license. He had not brought it with him, so he returned to his car. One of the patrolmen followed him. When Robbins opened his car door, a plume of marijuana smoke greeted the officer. Robbins was arrested for possession of marijuana.

The police searched Robbins' car. They worked their way to the back of the compact station wagon, opened the tailgate and found a recessed luggage compartment under the carpeting. They opened it and discovered two packages wrapped in opaque, green plastic. Without a warrant, they opened the packages and found a large supply of marijuana in each.

When the case first appeared before the Supreme Court, Sanders had only recently been decided. The California Court of Appeals was instructed to review its affirmance of Robbins'...
conviction in light of the Sanders decision. California reached the same result and the Court granted certiorari. In an opinion joined only by Justices Brennan, Marshall, and White, Justice Stewart reversed the court of appeals.

Justice Stewart said the language in Chadwick and Sanders compelled the result. He noted that in both cases the Court had been urged to expand the scope of the automobile exception to the warrant requirement in order to permit the warrantless search of containers found inside. The Court refused to do so then because the two circumstances justifying a warrantless search of an automobile did not apply to containers. First, containers are no longer mobile once their owner has been placed in police custody. Second, the container owner's expectation of privacy is not diminished in the same way the automobile driver/owner's expectation is diminished. The automobile driver voluntarily exposes himself and the contents of his vehicle to law enforcement officials of the state, and the state takes it upon itself to regulate the use of the vehicle. The same cannot be said for the owner of packages or containers.

Justice Stewart also rejected the state's argument that the nature of the container is relevant to the determination of reasonable expectations of privacy. The state attempted to convince

75. 443 U.S. 903 (1979).
76. People v. Robbins, 103 Cal. App. 3d 34, 41, 162 Cal. Rptr. 780, 783-84 (1980). The court of appeals stuck with the trial court's decision that Robbins' expectation of privacy in the contents of the packages, due to the nature of their covering material, was too diminished to be protected by the fourth amendment.
77. Justice Stewart stated that "[t]hose cases made clear...that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 453 U.S. at 425. Justice Stewart apparently relied on the language in Sanders cited supra at note 69 and 442 U.S. at 764-65 n.13.
78. 453 U.S. at 425.
79. Justice Marshall pointed out in his Ross dissent that containers are never as "mobile" as automobiles because they can more easily be seized and immobilized. 102 S. Ct. at 2176-77. That is why the Carroll rationale of mobility does not justify the warrantless search of a container on that ground alone. See infra notes 153-56 and accompanying text.
80. See infra note 154 and accompanying text.
81. Justice Stevens did not make the mistake of justifying the warrantless search of Albert's bag and pouch solely on the ground that the owner's expectation of privacy is diminished because he places it in an automobile. That reasoning was put to rest in Chadwick and Sanders. Justice Stevens would later define the scope of a Carroll search to include closed containers. See infra text accompanying note 136.
82. 453 U.S. at 425-26. Justice Stewart was no more willing than Judge Ginsburg (in her majority opinion for the court of appeals in Ross) to distinguish among types of containers. See supra note 20. As long as the container is closed and opaque, such that it evidences the owner's intent to keep it private, the fourth amendment will protect it.
the Court that the fourth amendment only protects containers in which the individual may have placed "personal effects." Justice Stewart rejected the argument on two grounds: first, neither Chadwick nor Sanders was decided on that basis; second, such a determination would be impossible for the Court to make post hoc, let alone for the police officer to make ad hoc.

Thus, the highway patrolmen's warrantless search of Robbins' packages was unreasonable. They could have seized the packages and obtained a search warrant. Because the police had Robbins in custody, the burden of obtaining a warrant would not have necessitated letting Robbins go free. Sanders spoke specifically to the situation in Robbins when it declared that just because a container rides in a car does not mean it may be opened without a warrant, even though there is probable cause to do so.83

Justice Powell, the author of the Court's opinion in Sanders, concurred in the judgment, but not in the Court's "bright-line"84 opinion. He agreed with the plurality85 that Robbins' expectation of privacy in his packages was not diminished to the point where a warrantless search was justified.86 He was unwilling, however, to turn that factual determination into a general rule.87 In other

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83. 453 U.S. at 425. The foregoing is essentially the argument employed by Justice Marshall in his dissenting opinion in Ross. See infra note 160 and accompanying text.

84. Bright-line rules are discussed infra notes 99-119 and accompanying text.

85. Only three Justices-Brennan, Marshall, and White-joined Justice Stewart's opinion. Justice Powell concurred separately. The Chief Justice concurred but did not write an opinion. There was no Court majority in Robbins.

86. 453 U.S. at 429 (Powell, J., concurring).

87. Id. at 432-34. Justice Powell was able to distinguish the three container cases, (Sanders, Chadwick, Robbins), and New York v. Belton, 453 U.S. 454 (1981) (search and seizure case decided on same day as Robbins; see infra notes 108-11 and accompanying text) by separating the fourth amendment issue raised in each case into three categories. Belton, a case so similar to Robbins that it should have been decided the same way (see 453 U.S. at 444 (Stevens, J., dissenting)), involved the "scope of the search incident to arrest on the public highway;" Chadwick and Sanders were decided under the question of "whether officers must obtain a warrant when they have probable cause to search a particular container in which the suspect has a reasonable expectation of privacy;" and Robbins should have been addressed with reference to "the scope of the 'automobile exception' to the warrant requirement, which potentially includes all areas of the car and containers found therein." 453 U.S. at 40. Justice Stewart incorrectly treated Robbins the same way the Court treated Chadwick and Sanders. Because the highway patrolmen had probable cause to search Robbins' car, "rather than...a particular container that fortuitously is located in it," an immediate search of that container would not violate the fourth amendment and would be consistent with Chadwick and Sanders. Whether consciously or not, Justice Powell laid the groundwork for his concurring opinion in Ross. See infra notes 138-42 and accompanying text.
circumstances, the nature of the package might demand less stringent fourth amendment protection.\textsuperscript{88}

Justices Blackmun, Rehnquist, and Stevens all dissented on different grounds. Justice Blackmun reminded the reader that he had dissented in \textit{Chadwick} and \textit{Sanders}. He felt the rule coming from those cases was practically unworkable,\textsuperscript{89} pointing to the divided Court and general confusion among the circuits as evidence.\textsuperscript{90}

Justice Rehnquist reiterated his own fond belief that the exclusionary rule, with its concomitant preference for search warrants, is not compelled by the Constitution and creates difficulties for law enforcement which are not offset by reciprocal benefits to the public in the form of privacy from unreasonable governmental intrusions.\textsuperscript{91} He quoted a portion of Justice Blackmun's dissent urging the adoption of a "clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to \textit{Carroll} and \textit{Chambers}."\textsuperscript{92} Instead of arguing for an expanded \textit{Carroll} search, as appears from the surface of his dissent, Justice Rehnquist accused the Court in \textit{Robbins} of unreasonably narrowing the scope of a \textit{Carroll} search.\textsuperscript{93}

Justice Stevens felt that the plurality addressed the wrong issue. What was really at issue in \textit{Robbins}, \textit{Sanders}, and \textit{Chadwick} was the proper scope of a warrantless search conducted by authority of \textit{Carroll v. United States}.\textsuperscript{94} He was able to distinguish \textit{Chadwick} and \textit{Sanders} on the ground that the police in both cases had probable cause to search the \textit{footlocker} and \textit{suitcase},

\begin{itemize}
 \item \textit{Id. at} 433-34.
 \item Confronted with a cigarbox or a Dixie cup in the course of a probable cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. . . . The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values.

\textit{Id.}

\item \textit{Id. at} 436 (Blackmun, J., dissenting).
\item \textit{Id. at} 426, 436.
\item \textit{Id.} at 441; \textit{see} 442 U.S. at 769, 772 (Blackmun, J., dissenting).
\item 453 U.S. at 442-43.\textsuperscript{92}
\item \textit{Id. at} 447-49. This is the position that Justice Stevens took in his majority opinion in \textit{Ross}. 102 S. Ct. at 2167-68.
\end{itemize}
but not the automobile. In this sense, Justice Stevens could not agree with Justice Blackmun’s dissent in all three cases. It was not the mobility of the container that justified the warrantless search: it was the exigency of the automobile search itself, rendering anything short of an immediate search of the container unreasonable.

Given the Court’s “dictum” in Arkansas v. Sanders it is easy to see how Justice Stewart reached his conclusion. The decision was almost unavoidable. Following the Sanders logic, police may never search a container found in an automobile during a lawful warrantless search. They must seize it and take it before a magistrate to obtain a warrant. Justice Stewart was not troubled by the fact that in Robbins, as opposed to Chadwick and Sanders, the police were not looking for a specific container housing contraband; they knew they were looking for marijuana, but did not know where it would be found. Yet the Sanders dictum foreclosed any such distinction.

Robbins was an unfortunate decision because Sanders was an unfortunate decision. The Court was herded into carrying Sanders to its logical extreme by the State of Arkansas’ overbroad argument on appeal. Yet Supreme Court Justices are not so easily herded. Unwilling to be trapped under the opprobrium of the Sanders dictum, they scurried in all directions in Robbins, leaving a hodge-podge of opinions and theories and no Court majority. Robbins is useful, though, as it showcases the arguments that would be made, pro and con, in United States v. Ross. The departure of Justice Stewart enabled the Court to pull the only remain-

95. 453 U.S. at 446.

96. Justice Stevens believed it was too facile to say that the automobile exception should allow police officers to search all containers found during a warrantless automobile search. Such a general rule would not take into consideration the possibility of abuse by police who might wait for suspicious looking containers to be placed in automobiles in order to take advantage of the automobile exception to the warrant requirement. See id. at 449 n.9.

97. Mobility of the automobile has been rejected as the main justification for the automobile exception. In Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973), and South Dakota v. Opperman, 428 U.S. 364, 367 (1976), warrantless searches of the automobiles were upheld even where the automobile’s mobility was irrelevant. See 453 U.S. at 424; Justices Stevens and Blackmun disagree on this point as well. Id. at 440-41 (Rehnquist, J., dissenting) (quoting Blackmun, J., with approval: “The luggage, like the automobile transporting it, is mobile. Therefore luggage may be searched.”) See id. at 440.

98. Query: what is a container? This was the problem the court of appeals had with Ross. 655 F.2d at 1168. See supra note 20.
ing thread of support Robbins had and to expose its inherent weakness, giving the Court new fabric from which to fashion a new, more durable rule.

C. Bright-Line Cases

One important line of cases which the Court in Ross chose not to address, being of particular relevance to the focus of this note, is that of the so-called "bright-line" search and seizure cases.9 Bright-line rules exist in all aspects of the law. But their application to search and seizure cases is so distinct that a general discussion would not prove useful. Neither would a general definition be of any help without reference to a particular fact situation.10

In Katz v. United States, the Supreme Court stated that a warrantless search is "per se unreasonable."11 However, practical necessity forced the Court to recognize exceptions to the general rule. Such exceptions were to be "few, specifically established and well delineated."12 They are justified only because the exigency of the situation requiring the exception would make the obtaining of a search warrant unreasonable. Yet exceptions to the warrant requirement of the fourth amendment do not become rules in and of themselves.13 Warrantless searches are merely excused, not authorized. The burden is always on the party seeking to establish the exception.14 The scope of the applicability and the availability of an exception is always subject to judicial review to see if circumstances justified the lack of a search warrant.15 This has been the traditional fourth amendment philosophy.

The Court departed from this philosophy in United States v.
Robinson. In Robinson, Officer Jenks made a search of Robinson's person after arresting him for driving without a license. Jenks felt something hard under Robinson's jacket; he reached into Robinson's shirt pocket and pulled out a crumpled cigarette packet. Jenks opened the packet and found capsules containing white powder, later found to be heroin. The search and seizure of the capsules was conducted without a search warrant.

The United States argued that the warrantless search was justified by the exception to the warrant requirement established in Chimel v. California. Chimel authorized a search of the defendant's person and the area within his immediate control in order to disarm the defendant and to secure any destructible evidence in the defendant's possession. The warrantless search of Robinson's shirt pocket was arguably justified under the Chimel exception.

But Justice Rehnquist did not rest his majority opinion there. The Court reasoned that the search of Robinson's person need not have been excused by some exception to the warrant requirement. To the contrary, the search was reasonable under the fourth amendment: the power of police to search the person of the arrestee being absolute, no warrant was necessary. The right of police to search the person of an arrestee was not an exception to the warrant requirement, but a rule in and of itself.

106. 414 U.S. 218.
107. Officer Jenks pulled Robinson over because he knew he was driving without a license. He had stopped Robinson four days earlier and had then determined that Robinson's license had been revoked.
108. 395 U.S. 752 (1969). While executing an arrest warrant, police searched through all of the rooms of the arrestee's house. The search turned up some items which were excluded because of the impermissible scope of the search.
109. Id. at 763; see New York v. Belton, 453 U.S. at 457.
110. 414 U.S. at 235. Justice Rehnquist said that the authority of the police to search the person of the arrestee did not depend on an after the fact judicial determination of exigent circumstances justifying the warrantless search. The warrantless search of the arrestee was never unlawful under the fourth amendment—in contradiction to the rule of Katz. See supra text accompanying notes 101-05.
111. Justice Rehnquist stated that it was the "fact of" the custodial arrest which authorized Officer Jenks to conduct the warrantless search of Robinson's person. Such a search "requires no additional justification" because it is not based on judicial recognition of exigent circumstances. The search itself is always legal, always "reasonable" under the fourth amendment.

Compare Justice Rehnquist's treatment of the warrantless search incident to arrest as "reasonable," with the Court's statement in Katz that warrantless searches are "per se unreasonable." 389 U.S. at 357; see supra notes 101-05 and accompanying text. See also LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures:" The Robinson Dilemma, 1974 Sup. Ct. Rev. 127. Professor LaFave
The rationale behind Robinson was relied upon extensively by the Court in New York v. Belton, decided the same day as Robbins. The disputed search in Belton was that of a zippered pocket of a leather jacket lying on the back seat of an automobile in which Belton was a passenger. The car had been stopped for speeding. The police officer smelled marijuana fumes and arrested Belton and his three cohorts for possession. Then the officer found cocaine in Belton's jacket pocket.

There was no question that this warrantless search could not have been justified by the Chimel exception. Justice Stewart, writing for the majority, did try, however. Yet the Court spoke of the need for "[a] single, familiar standard. . . to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances." The Court cited the portion from Robinson which scoffed at the notion that each warrantless search need be reviewed by the Court to determine whether it fit within the narrow parameters of one of the exceptions to the warrant requirement. The search of Belton's jacket was "reasonable," there being no need to justify it under the circumstances.

Belton was a bright-line rule for the same reasons that Robinson, and arguably Robbins, were bright-line rules. They understood the Court in Robinson to have deserted the "myth" of the warrantless search as the exception, and to have replaced case-by-case adjudication for some form of standardized, bright-line rule for policemen to follow. Id. at 162-63.

Justice Marshall, dissenting in Robinson, stated: "The majority's approach represents a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the fourth amendment." 414 U.S. at 239.


113. Chimel authorized the warrantless search of the person and the area within his immediate control for two reasons: to disarm the arrestee, protecting the officer and preventing the arrestee's escape, and to remove any evidence which could be easily reached by the arrestee — preventing its destruction and concealment. Justice Stewart's majority opinion in Belton wrenches Chimel completely out of shape. See Note, New York v. Belton: The Scope of Warrantless Searches Extended, 9 Pepperdine L. Rev. 919, 930-31 (1982); see also Dalton, supra note 100, at 21. First, Belton's jacket was lying on the backseat of the car, not within his immediate reach or control, while Belton was standing outside and away from the car with his three cohorts. Second, the officer's search of Belton's jacket could not have been carried out with the idea of protecting himself since the lone officer had to turn his back on four individuals, each unrestrained by handcuffs, in order to search the backseat of the car. 453 U.S. at 456-57. See also id. at 468 (Brennan, J., dissenting).


115. 453 U.S. at 459 (quoting United States v. Robinson, 414 U.S. at 235); see supra notes 110-11 and accompanying text.

116. A tentative definition of bright-line rules can now be made. In each of the three cases referred to above (Robinson, Robbins, and Belton), the Court is seen as doing two things: first, attempting to provide law enforcement officials with a clear, easy-to-define and apply rule of law for search and seizure situations. The
tempted to supply a rule capable of consistent application: a rule that did not require after-the-fact judicial approval, or, in Robbins' case, disapproval. Under the traditional analysis, the government had to defend its warrantless search by proving sufficient facts to invoke one of the exceptions. This approach necessarily involved a case-by-case analysis. The bright-line approach takes such a determination away from the court: the government need show no facts to justify its warrantless search; it need only convince the court that it did not exceed the bounds of the search which were previously established.

Implicit in the bright-line decisions is the belief that search

Court was sensitive to criticism that past decisions were not consistent and therefore attempted, in these three bright-line cases, to remedy the situation and establish clear search and seizure law which would not need to be changed or distinguished too frequently by subsequent cases. See, e.g., 453 U.S. 459-60. That leads to the second element. Bright-line rules, in order to provide the much desired consistency, necessarily preclude judicial review of the circumstances leading up to the warrantless search. If the search is "reasonable," it is not illegal under the fourth amendment. 414 U.S. at 226. There is nothing further for the court to do than ensure that the officers had probable cause, and did not exceed the scope of the previously authorized search.

117. While Robinson and Belton were bright-line rules authorizing greater police intrusion, Robbins was a bright-line rule which restricted the scope of police activity. This interesting phenomena is highlighted by the Court's line-up in the two cases.

In Belton, Justices Brennan and Marshall objected to the "arbitrary 'bright-line' rule" fashioned by the Belton majority. 453 U.S. at 463. Justice White dissented because he thought Belton was a container case which should have been decided the same way as Robbins. Id. at 472. Justice Stevens concurred saying that he, along with Justices Brennan, White, Marshall, Blackmun, and Rehnquist agreed that Robbins and Belton should have been decided the same way. (Admittedly, Justices Marshall, Brennan, and White would have liked to have seen Belton decided the same way as Robbins; but it is doubtful that Justices Stevens, Blackmun, and Rehnquist would have seen Belton decided any other way). Id. at 463. Justice Stevens saw both cases not as container cases, but as cases involving the scope of a warrantless automobile search. For reasons stated in his Robbins dissent, he believed such a search properly should have included Belton's jacket pocket as well as Robbins' packages. 453 U.S. at 444 and n.1. Justice Rehnquist concurred, albeit unhappily, wishing that the Court would find the resolve to overrule the exclusionary rule and establish the kind of carte blanche automobile search urged by Justice Blackmun in Sanders. Id. at 463, see supra notes 92 and 96 and accompanying text. Justice Blackmun joined Justice Stewart's opinion, as did the Chief Justice, without an opinion of his own. Yet the Chief Justice concurred, sub silentio, in Robbins while Justice Blackmun dissented. Justice Stewart is notable for writing on both sides of the bright-line issue. Compare 453 U.S. 920 with 453 U.S. 454. Apparently, then, the direction bright-line rules will take depends as much as anything, on the hand that holds the pen. See Dalton, supra note 100, at 22.
warrants are an anachronism in today's society. The traditional notion of warrantless searches being "per se unreasonable" served to force officers to consider obtaining a warrant if practicable. They were on notice that their determination of exigent circumstances would be reviewed by the court. But by taking this review away from the court by calling the Robinson and Belton searches "reasonable," destroys the presumption of unreasonability. Either the search warrant is not an effective deterrent to arbitrary exercises of police power, or it is so effective as to be improvident. In either case, the search warrant requirement was eliminated in both cases. The question propounded by this note is whether United States v. Ross is a bright-line case.

IV. Analysis

The rule adopted by the Court in United States v. Ross is easy to state: when police officers have probable cause to stop an automobile on the street and the object of their search is not some specifically identifiable container known to be inside, they may search the entire car and open any package or container the officers find inside whether they have a search warrant or not. It is not as easy, however, to say how the Court got to that rule from where it started.

A. Majority Opinion

When Justice Stevens sat down to pen the majority opinion in Ross, he had before him the three lines of cases described above. While the automobile and bright-line cases were arguable support for the position he would ultimately be required to justify, the container cases stood squarely in his path. He did not consider distinguishing Ross from the container cases because the facts in Ross were virtually identical to the facts in Robbins. He only had two choices: make a frontal attack on the container cases or...

118. Making warrantless searches the rule and not the exception necessarily implicates their usefulness. See 453 U.S. at 469; see also 414 U.S. at 242-43.

119. If United States v. Ross turns out to be a bright-line decision (and there is little doubt that it is; see infra note 184), it would be the broadest application of bright-line rules to date. Belton involved just a piece of the overall scope of the automobile search, and Robbins merely dealt with containers found during the automobile search. Robinson was fairly broad as it extended warrantless searches to cover the person of a lawful arrestee. Ross extends the limits to include an entire automobile.

120. 102 S. Ct. at 2171.

121. If Ross were to be treated as a container case, Justice Stevens' disapproval of Sanders would have been complete, and would have extended to Chadwick. Treating Ross as an automobile search case allowed Stevens to cut gingerly around Sanders and miss Chadwick altogether. See infra notes 167, 176-80 and accompanying text.
fall back and defend his position from the automobile cases. He chose the latter option.

Justice Stevens' opinion rests on two presumptions about United States v. Carroll: first, that the Court in Carroll would have decided the case the same way even if the whiskey bottles had been concealed in the kind of container which troubled the Court in Chadwick and Sanders;122 and second, that the scope of the warrantless search in Carroll was as broad as a magistrate could have authorized if only the police officers had obtained a search warrant.123

Stevens' strongest argument in favor of his first presumption is that the Court in Carroll, and subsequent automobile search cases, never considered whether there was anything different about contraband being concealed in a "secondary container."124 This argument is bolstered by the fact that the Carroll Court did not flinch about the prohibition agents ripping open the back seat of the roadster which was arguably a form of "container."125 Stevens then cited other automobile search cases in which the search of containers housing the contraband was upheld without question by the parties or the Court.126

Justice Stevens looked next to logic for support of his first presumption. He said it would be "illogical" for the Court in Carroll, and the Court in Chambers for that matter, to have decided the

122. Justice Stevens refers to this kind of container as "secondary," impliedly inferring that its protection of the owner's privacy interest is diminished. 102 S. Ct. at 2167.
123. Id.
124. In this case, a secondary container would have been a burlap bag (or something similar) housing the whiskey bottles. See 102 S. Ct. at 2169; see infra notes 125-26.
125. The Carroll Court did not even discuss this aspect of the case; it appeared to take for granted that authority to search the car included authority to take it apart. See 267 U.S. at 158-59.
126. 102 S. Ct. at 2169-70 and nn.23-25; see Husty v. United States, 282 U.S. 694 (1931) (warrantless search of "whiskey bags"); Scher v. United States, 305 U.S. 251 (1938) (warrantless search of packages wrapped in brown paper bag tied with twine). The Court also cited a number of pre-Chadwick/Sanders circuit court opinions upholding the warrantless searches of containers found during automobile searches. 102 S. Ct. at 2170 n.25.

But that is like winning an argument by default; just because the other side does not show up, or decided not to argue an issue does not mean that a later Court should ignore the issue as decided. The short answer to Justice Stevens' argument is that the Court in Chadwick and Sanders was disturbed by just such a situation, albeit for the first time, and disallowed it. Justice Stevens is really left where he started: having to contend with the container cases.
case differently were the contraband housed in a secondary container.\textsuperscript{127} If the police in \textit{Carroll} had not been able to open a hypothetical burlap bag inside the seat back, or if the police in \textit{Chambers} had not been able to open a paper bag crumpled inside the concealed compartment under the dashboard, it would produce "absurd results inconsistent with the decision in \textit{Carroll} itself."\textsuperscript{128}

As final support for his first presumption, Justice Stevens turned to the "practicability" rationale supposedly underlying the \textit{Carroll} decision.\textsuperscript{129} The thrust of \textit{Carroll} was to provide a practical solution to a thorny problem that would not offend the fourth amendment. Stevens asserted that the practical advantages of \textit{Carroll} would be "nullified" if police could not open containers found inside a car.\textsuperscript{130}

As for the second presumption, Justice Stevens began with the statement of a general principle of fourth amendment law: "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."\textsuperscript{131} When an officer has a warrant to search a home, he may search all drawers, closets, and containers in which the object of his search may be found. There is no opposition to this statement. To apply it to the \textit{Ross} situation necessarily presupposes that the warrantless search is

\begin{itemize}
\item \textsuperscript{127} 102 S. Ct. at 2169.
\item \textsuperscript{128} \textit{Id.} As Justice Stevens himself pointed out, the \textit{Carroll} Court did not consider whether a secondary container would have made any difference in the holding of that case. \textit{See supra} notes 125-26. That being so, it is impossible to say that a contrary holding in \textit{Ross} would be "inconsistent" with \textit{Carroll}.
\item \textsuperscript{129} 102 S. Ct. at 2170. Justice Marshall sorely contests Justice Stevens' theory of what was truly "practicable" about \textit{Carroll}. \textit{See infra} text accompanying note 166.
\item \textsuperscript{130} \textit{Id.} "Contraband goods rarely are strewn across the trunk or floor of the car; since by their very nature such goods must be withheld from public view, they are enclosed within some form of container." \textit{Id.}
\item Justice Stevens noted that in the early revenue acts (discussed \textit{supra} at notes 41-44 and accompanying text), the goods subject to duties and imposts would not be shipped without some form of container to protect them against the elements. Congress and the Court's silence on this matter imply their acquiescence. 102 S. Ct. at 2170 n.26.
\item A discussion of this contention, that containers in cars may be searched for practical reasons, is also made by Justice Marshall in his dissenting opinion. It was his opinion that the rationale behind requiring the State of California to obtain a warrant before searching Robbins' packages was based on an assumption that it was not "impracticable" for police officers to have seized the packages until a warrant could issue. 102 S. Ct. at 2177. \textit{See infra} text accompanying notes 155-56, 163-66. Query whether the same rationale would have made a difference to the \textit{Carroll} Court.
\item \textsuperscript{131} 102 S. Ct. at 2170.
\end{itemize}
legally as broad as it would have been with a warrant.\textsuperscript{132} If containers must give way to a lawful search under a warrant, there is no reason why they should not under a warrantless search.\textsuperscript{133} The search of containers during a warrantless search is expressly justified by the purposes for which the search is excused; the same is necessarily true of searches conducted under a warrant.

Even if the foregoing were convincing, Justice Stevens threw in the coup de grace. If containers must give way to a warrant search it must be that the owner's expectation of privacy is diminished or unreasonable.\textsuperscript{134} Because of a magistrate's determination of probable cause, the owner's privacy must yield.\textsuperscript{135} Since it is not unreasonable to search an automobile without a warrant, as long as the police have probable cause, the owner's expectation of privacy must similarly be diminished, authorizing a warrantless search. The warrantless search of a container is therefore justified for the same reasons it would be with a warrant.\textsuperscript{136}

Justice Stevens, therefore, authorized the warrantless search of Albert's paper bag and leather pouch on the basis of \textit{United States v. Carroll}. It was the Court's opinion that the scope of the warrantless search in \textit{Carroll} was at least broad enough to include containers found inside the car. Justice Stevens was able to do this without expanding the apparent limits of the \textit{Carroll} search. He was also able to do this without casting too much

\textsuperscript{132} If it were not, the warrantless search would be useless as it would be restricted entirely to the circumstances excusing it—that is, if one follows the traditional analysis of search and seizure discussed earlier. See supra notes 101-05 and accompanying text.

\textsuperscript{133} That, of course, logically follows only if a warrantless search is legally as broad as a warrant search. As will be seen later, the foregoing depends on a resolution of the question posed by this note: whether a magistrate's determination of probable cause is worth anything today. If it is not, then the policeman's determination of probable cause is just as authoritative as a magistrate's, and the scope of the warrantless search is just as broad as one authorized by a magistrate. Justice Marshall completely rejects this notion. 102 S. Ct. at 2174; see infra note 144.

\textsuperscript{134} 102 S. Ct. at 2171-72.

\textsuperscript{135} The owner's privacy must yield because the magistrate's determination of probable cause to search the container makes any continued maintenance of privacy unreasonable.

\textsuperscript{136} Justice Marshall argued that this analogy was faulty because it failed to recognize what was decided in \textit{Sanders}: the expectation of privacy in luggage is greater than it is in automobiles. 102 S. Ct. at 2177; 442 U.S. at 763-64; see infra notes 154-56 and accompanying text. That being the case, and admitting, only for the sake of argument, that the privacy in a package must yield to a magistrate's warrant, it follows that the privacy interest in a package \textit{always} be higher than in an automobile. Packages are simply different, for fourth amendment purposes, than automobiles. 102 S. Ct. at 2177.
doubt on the container cases, except Robbins, of course. One is left to wonder why Justice Marshall, in dissent, felt constrained to publish such a vituperative opinion.

B. Concurring Opinions

But first, the concurring opinions. Justice Blackmun's concurrence came as no surprise. He dissented in all three of the container cases, and was the only Justice, besides Justice Rehnquist, so consistent. He was not entirely satisfied with Justice Stevens' opinion, but felt it did an admirable job of establishing a clear rule for law enforcement officials to follow.137

Justice Powell's concurrence is interesting. He was the author of Arkansas v. Sanders. Yet in Ross, he said he concurred in Robbins only because he felt the opinion was "justified, though not compelled" by Sanders.138 He criticized Robbins for being a bright-line rule.139 Yet at the same time, he praised Justice Stevens' opinion in Ross for performing a bright-line function.140 Justice Powell felt the Court's decision in Ross was consistent with the Court's decision in Belton; as such, Justice Powell was the only Ross justice to declare his allegiance to New York v. Belton.141 He concurred in Ross because he believed the expectation of privacy in automobiles is attenuated, inferring that this extended to containers found in the car as well.142

C. Dissent

Justice Marshall, writing for Justices Brennan and White in dissent, accused the majority of eviscerating the warrant requirement of the fourth amendment;143 even worse, it did so without admitting it openly. Accordingly, the majority committed two her-

137. 102 S. Ct. at 2173 (Blackmun, J., concurring). It appears that Justice Blackmun, while not wholly satisfied with the majority opinion, joined it also because he was sensitive to criticisms that the Court writes too many hair-splitting concurrences, tending to dilute the cohesiveness of the Court's opinion.

138. Id. (Powell, J., concurring). Justice Powell could do nothing else but concur in Robbins in light of the fact that it was, arguably, his opinion in Sanders which forced the result in Robbins.

139. Id.

140. 102 S. Ct. at 2173. Justice Powell said that the Court's opinion in Ross would provide "specific guidance to police and courts in this recurring situation." Id. (quoting New York v. Belton, 453 U.S. at 435 (Powell, J., concurring)).

141. Is it possible that Justice Powell viewed Ross as having all the advantages, but none of the disadvantages of a bright-line rule?

142. Justice Powell also spoke, along with Justice Blackmun, of providing an authoritative decision with a majority of the justices.

143. "The majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the fourth amendment warrant requirement itself." 102 S. Ct. at 2173. Justice White also agreed with "much" of Justice Marshall's dissent. Id.
esies; it equated the policeman's determination of probable cause with that of the magistrate; and it intimated that the scope of a warrantless search is as broad as could be authorized by a magistrate. 144

The fourth amendment makes no mention of magistrates; it merely requires that warrants be issued upon a showing of probable cause supported by the oath or affirmation of the police officer requesting the warrant. 145 The role of determining probable cause has worked its way to the judicial branch of government because it is best able to check potential abuses by the executive branch. 146 Warrants would cease to provide any protection against unreasonable governmental intrusions if their issuance were committed to the branch which carries them into effect. Justice Marshall believes the warrant requirement stands on its own; it is not merely an archaic institution of American jurisprudence. It provides for a sense and appearance of order and fair play contrary to popular notions. 147 The first heresy allegedly committed by the majority in Ross would be inconsistent with these considerations.

As far as the second heresy goes, Justice Marshall admitted only that Detective Cassidy could have searched Ross' paper bag and pouch if he had a warrant. 148 The scope of a search carried out with a warrant necessarily includes containers and packages. But the scope of a warrantless search cannot be that broad. 149

144. Note that the first contention is not admitted by the majority; the second, however, is the majority's mainstay. The author, as well as Justice Marshall, opine that the first is implicit in the second.
145. See supra note 11.
146. See United States v. United States District Court, 407 U.S. 297, 317 (1972), in which the Court noted that the important function served by the magistrate is that he is neutral and detached from the enforcement of law. Requiring a search warrant checks potential abuses by the executive branch of government, and ensures that unjustified searches do not occur. See generally 102 S. Ct. at 2174-75.
147. Justice Marshall quotes a portion of Johnson v. United States, 333 U.S. 10, 13-14 (1948), which has been widely relied on:

The point of the fourth amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

102 S. Ct. at 2175.
148. 102 S. Ct. at 2175. That is not admitting very much. Yet he also conceded the finding of probable cause.
149. Id; see supra notes 133 and 144. Since Justice Marshall rejects the major-
Justice Marshall said the warrant requirement is excused in some instances only because the circumstances surrounding the particular search would make it ludicrous, dangerous, or offensive to individual liberty to require a warrant. But each warrantless search must be examined carefully to see that it truly was justified by the “exigent” circumstances.150

The warrantless search of a car is excused only because the car is mobile, and the owner’s expectation of privacy in its contents is diminished.151 Justice Marshall argued that these two narrow grounds cannot be used to justify the warrantless search of containers found inside the car.152 Since the warrantless search of a container in an automobile is not justified on the same grounds as the search of the car itself, the search must be illegal. Thus, even though a magistrate could authorize the search of containers found in a car, the warrantless search of such containers is impermissible.

Justice Marshall posited that, in reality, a car is no more mobile than a container once its owner is placed in police custody. But since police may not have cause in every case to detain the driver of the car, their only alternative would be to let the driver go. Police could conceivably detain the car’s driver until a search warrant for the car could be obtained. In that case, however, the act of obtaining the warrant would be more intrusive than the immediate search.153

Countered with that is the idea that the owner’s expectation of privacy in his car is diminished. Justice Marshall cited Arkansas v. Sanders as authority that the warrantless search of a car is not as intrusive as the warrantless search of other areas.154 Police are therefore allowed to carry out the “lesser” intrusion of a car

150. 102 S. Ct. at 2176; see supra notes 101-05.

151. 102 S. Ct. at 2175. If these two circumstances do not exist, according to Justice Marshall, a warrantless search may not be justified by the rule in Carroll.

152. What follows is Justice Marshall’s argument that the warrantless search of containers may not be upheld on the two grounds mentioned as excusing a warrantless automobile search. Justice Marshall also makes the institutional argument that the narrow grounds justifying a warrantless automobile search may never be used to justify the search of a different place or thing. Id.

153. But see 399 U.S. at 51; (see also supra notes 50-51 and accompanying text). Justice White, writing for the majority, rejected the so-called “lesser/greater intrusion” dichotomy. The Court did not believe it possible to determine with any degree of consistency which intrusion, in any given situation, offended the fourth amendment most. Contra 102 S. Ct. at 2176.

154. 102 S. Ct. at 2175-76; see 442 U.S. at 762, 764-65.

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search rather than hold the driver and risk violating the fourth amendment, or simply let him go.\textsuperscript{155}

Justice Marshall argued, however, that the same does not hold true for containers found in the car. A container or package can be seized and detained by police until they can obtain a warrant without holding the package's owner and raising the fourth amendment concerns expressed above. Since mobility is not a problem, there is no significant intrusion which, to be avoided, would necessitate a warrantless search. Also, the policy arguments which dictate a diminished expectation of privacy in an automobile do not apply to packages or containers.\textsuperscript{156} The automobile exception to the warrant requirement, therefore, cannot be used to justify the warrantless search of a package. The scope of a warrantless search of an automobile, limited by the practical necessities creating the exception, does not include the permission to search closed containers; its scope is therefore not as broad as a magistrate's warrant. If police intend to justify the warrantless search of containers found in automobiles, they must do so with other exigent circumstances.

At this point in his opinion, Justice Marshall expressed his fear that the majority may have fashioned a new exception to the warrant requirement instead of broadening, albeit illegitimately, the automobile exception.\textsuperscript{157} He warned of a "probable cause" exception to the warrant requirement,\textsuperscript{158} which is not really an exception but a rule in and of itself. Justice Marshall claimed a similar argument was rejected in \textit{Coolidge v. New Hampshire}.\textsuperscript{159} Justice Marshall then went on to reinforce his support for \textit{Arkansas v.}\n
\begin{thebibliography}{99}
\item 155. \textit{Contra} 102 S. Ct. at 1263 n.9; Texas v. White, 423 U.S. 67 (1975).
\item 156. 102 S. Ct. at 2175-76. The driver of an automobile exposes much of what he carries to the plain view of law enforcement officials. The government has also seen fit to regulate the use of automobiles. Neither of these facts apply to containers. Justice Marshall said the government has no interest in regulating the use of packages, and the package's owner does not exhibit the package's contents to plain view, but precisely because he covers them, intends for them to be kept private.
\item 157. \textit{Id.} This follows from Justice Marshall's institutional argument that the \textit{Carroll} decision justifies the warrantless searches of automobiles, and nothing else. Since the \textit{Carroll} exception will not apply to containers, their warrantless search must be justified by other exigent circumstances, and another exception to the warrant requirement. See supra notes 151-52 and accompanying text.
\item 158. Apparently such an exception authorizes warrantless searches whenever police have probable cause to believe contraband is hidden in the object of their search.
\item 159. 102. S. Ct. at 2176; see Coolidge v. New Hampshire, 403 U.S. 443 (1971).
\end{thebibliography}
Sanders and Robbins v. California. 160

After dealing with the fourth amendment in the abstract, Justice Marshall criticized the majority’s reliance on Carroll v. United States and Chambers v. Maroney in the particular. The Court in Carroll did not excuse all warrantless searches of automobiles. 161 If securing a warrant were reasonably practicable, “it must be used.” 162 Justice Marshall noted that secondary containers were not involved in Carroll or Chambers. The “integral compartments” of automobiles spoken of in Chambers were not the same things as containers for fourth amendment purposes. Such compartments are integral because they are part of the car. They could not be seized apart from the car; they therefore escape the Sanders rationale. But containers are different; they are not part of the car and can be seized until a warrant is obtained. 163

Justice Marshall then disposed of Justice Stevens’ “logical and absurd” argument and his “practical considerations” argument. 164 First, it is not illogical or absurd to require a warrant before searching a container even when one is not required to search an integral compartment. As noted above, Justice Marshall stressed the separateness of the package from the automobile and the policeman’s ability to seize it without significant fourth amendment intrusion. 165 Second, the real practical advantage obtained in Carroll was not having to immobilize the vehicle until a warrant could be obtained. 166 Since cars and containers are different, the practical advantage would not be nullified by requiring a warrant before a search of a package.

Justice Marshall then proceeded with his most interesting criticism. It had to do with the majority’s attempt to distinguish

160. Justice Marshall drew upon the rationale of those cases that movable containers are distinct from the vehicles they ride in. They should not, therefore, be searched without a warrant on the basis of the automobile exception. See supra note 157. Other exceptions, depending on the circumstances, would presumably provide sufficient flexibility where a mere seizure of the container would be unreasonably burdensome to law enforcement efforts. Yet the government in Ross did not try to point to any such exigencies, so in Justice Marshall’s opinion, the search was illegal.

161. Justice Marshall posited in a footnote that the agents in Carroll could not have arrested the bootleggers because such activity was only a misdemeanor. Thus, their only alternative was to leave the bootleggers stranded while they impounded the car to obtain a warrant. Under those circumstances, the obtaining of a warrant would be impracticable. See 102 S. Ct. at 2178 n.6 (Marshall, J., dissenting).

162. 267 U.S. 132 at 156 (1924); see supra note 45 and accompanying text.

163. 102 S. Ct. at 2179; see supra notes 124-26 and accompanying text.

164. See supra notes 127-30 and accompanying text.

165. See supra text accompanying notes 154-56.

166. 102 S. Ct. at 2179, contra id. at 2170.
Chadwick and Sanders from Ross.\(^{167}\) The majority expressed support for the holding in each case:\(^{168}\) the warrantless search of a container cannot be justified simply because it is in a car. In each case, police inquiry had focused on a particular package. Police in each case could have seized the package, having probable cause, and held it until a warrant was obtained. Justice Stevens maintained that this still holds true.\(^{169}\) Where police have focused their search on a particular container, they must seize it and obtain a warrant before opening it. Justice Marshall asked why there was any more compelling reason to seize that package than one which the police did not know was in the car. Justice Marshall complained of the rule's peculiar and unworkable consequences.\(^{170}\) Also, the lack of connection between the automobile and container in both of those cases may not be as important as the majority had thought.\(^{171}\) Police may have had a legitimate reason for waiting until the cars drove off. The Court in both Sanders and Chadwick did not address this point.

Justice Marshall concluded his dissenting opinion with what

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\(^{167}\) As was stated earlier, the majority decided against treating Ross as a container case in order to avoid overruling Sanders and Chadwick. Yet the facts of Ross were so close that some distinction had to be made. See supra note 121 and accompanying text.

\(^{168}\) 102 S. Ct. at 2172.

\(^{169}\) Id. Justice Stevens explained that the scope of the Ross search is defined not by the “nature of the container,” but by the “object of the search and the places in which there is probable cause to believe that it may be found.” Thus, mere probable cause to believe that a “container placed in the trunk of a taxi contains contraband...does not justify a search of the entire cab.” Id.

But is that not what will happen anyway? See infra notes 178-80.

\(^{170}\) “[T]he government ‘must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located.’” 102 S. Ct. at 2180 (quoting United States v. Ross, 655 F.2d 1159, 1202 (Wilkey, J., dissenting)).

\(^{171}\) Justice Marshall set forth that the police in Chadwick and Sanders may have had legitimate reasons for waiting until the contraband was placed in both of the cars before arresting the defendants. If that were so, then the relationship between the automobiles and the contraband would not be so “coincidental,” and part of Justice Stevens’ argument would fail. 102 S. Ct. at 2180. Justice Stevens distinguished Sanders and Chadwick from Ross on the basis that the nexus between the contraband and the automobile in Chadwick and Sanders was so attenuated as to be negligible. 102 S. Ct. at 2165-67; see also 442 U.S. at 766-68 (Burger, C.J., concurring). That being so, the scope of the automobile exception was not at issue as it would be in cases like Ross and Robbins where the nexus was considerable, the police having probable cause to search the car, and not some container housed within. 102 S. Ct. at 2168 (quoting Robbins v. California, 453 U.S. at 435 (Powell, J., concurring)).
has become his favorite theme. He claimed he could see only one “convincing explanation” for the majority’s opinion: expediency. But that is not reason enough for broadening police authority to search; after all, “is not a dictatorship the most efficient form of government?”

In short, Justice Marshall does a marvelous job of contradicting the majority at every conceivable point. He recognized the gravity of the majority’s position on the warrant requirement and provided rational criticism for it. Justice Marshall did a great service for those who read dissents first in order to get a clear picture of the controversy. It is the author’s view that Justice Marshall goes right to the heart of the majority’s opinion when he said its only justification was institutional expediency. Since it is easier for police to conduct their business without a warrant, it is better to do away with it. But Justice Marshall does not adequately explain why institutional expediency is not a proper objective, or why the warrant requirement serves any rational purpose.

V. IMPACT

As might be expected, the impact of United States v. Ross is extensive. It had its most apparent impact on two previous Supreme Court opinions.

The Court in Ross overruled Robbins v. California. The Court makes much of the fact that there was not a majority opinion in Robbins, so that stare decisis did not preclude ignoring it. But too much cannot be made of the fact that Ross overruled a case barely one year old. Admittedly, the step taken in Robbins was not a sure one. And perhaps it was better to have disposed of Robbins in one brush of the pen instead of picking it to death, which has been the current, much criticized practice of the Court. Yet such treatment cannot help but make the public wonder about the value of precedent to the Court today.

Some of the language in Arkansas v. Sanders was eliminated. The Court adhered to the holding of Sanders, however. The Court disposed of the general language which went beyond the

172. Both Justices Marshall and Brennan argue that expediency and efficiency in law enforcement are insufficient reasons for restricting fourth amendment rights. See, e.g., 453 U.S. at 469.
173. 102 S. Ct. at 2181.
175. 102 S. Ct. at 2177. However, the Court never admits it in so many words.
176. Id. The Court in Ross precisely overruled the language in Sanders relied upon by the Court in Robbins. See 442 U.S. at 762-66.
177. 102 S. Ct. at 2172.
The Court in *Ross* did not directly implicate *United States v. Chadwick*. However, the rules in both *Sanders* and *Chadwick* were questioned by *Ross*. The Court was obviously not very enamored with the rule expressed in both cases: requiring police officers to seize packages and hold them in order to obtain a warrant before searching them. The Court did pay lip service to that rule, at least in cases where the object of the automobile search is a specifically recognizable piece of luggage or package. But certainly, as Justice Marshall pointed out in dissent, it would be no harder for police to seize all packages instead of only those which they recognized before the automobile search. The Court's silence on this matter hints at its displeasure with the *Chadwick/Sanders* rule. Rare will be the instance when the Court will strike down a search under *Chadwick* and *Sanders*. *Ross* did just what the majority apparently wanted: it took a big bite out of the *Sanders* rule without overruling the case.

More importantly, it is clear the the *Ross* majority did in theory,
if not in fact, embrace Justice Marshall’s fear that the policeman's determination of probable cause would be equated with the magistrate's by the Court. This proposition follows logically from what the Court specifically addressed in *Ross*: that the scope of a warrantless search is as broad as that authorized by a magistrate. As both the majority and dissent agreed, a magistrate could authorize the search of containers found in an automobile. Yet even a magistrate’s authority to permit a search is limited by his determination of probable cause. Justice Stevens admitted that the only limit on the officer’s authority to conduct a warrantless search is the same probable cause. Neither power, then, is absolute. The policeman’s authority to search is no “broader” than the magistrate’s. But being admittedly no “narrower,” the policeman’s authority must be identical. The policeman may go no further than the magistrate could go; that necessarily equates their determinations of probable cause. The majority’s attempt to steer away from this was question-begging.181

This leads to the most important point of all. If the officer’s determination of probable cause is not different than the magistrate’s, why continue the senseless charade of warrantless searches being “per se unreasonable?” A warrantless search of an automobile is no greater intrusion than a search conducted with a warrant since the policeman and magistrate’s roles are interchangeable. The Court, for obvious reasons, chose not to address this volatile issue openly; but it is implicit in the decision. The Court may legitimately fear treading this ground alone. Even so, it should air the issue so that the public knows it is there.

As a final note, there is the interesting question raised earlier of whether *United States v. Ross* is a bright-line rule. It certainly passes the first test: it is clear and understandable for police officers on the beat. Yet Justice Stevens tried to disavow the bright-line infamy by stating that *Ross* merely expanded, or de-

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181. 102 S. Ct. at 2171-72.
182. See supra notes 131-33 and accompanying text.
183. See supra note 119. If *Ross* is a bright-line rule, then all of the discussion about whether there is any limit on the scope of the *Ross* search besides probable cause would be academic: probable cause would be the only reviewable limit of an automobile search.
fined a pre-existing exception to the warrant requirement. The next question is whether Ross foreclosed judicial scrutiny of the circumstances allegedly justifying the warrantless search, as all good bright-line rules do. Here, Justice Stevens cut with a sharp knife. A court may properly inquire as to whether a specific package was on the minds of the police officers when they conducted their warrantless search of the automobile. If so, the search is illegal by Arkansas v. Sanders. Such a proof is almost a practical impossibility, however. No officer is now going to admit that he knew exactly what he was looking for when he stopped the car. In theory, judicial review is not foreclosed, but in practice, it is doubtful that any court would invalidate the warrantless search of a container found in an automobile. Justice Stevens cited no bright-line rule cases in an attempt to put distance between his opinion and the criticized bright-line rule. Apparently, the letter of the bright-line rules is not favored by the Court. It will be left to an application of Ross to see whether their spirit is still alive.

VI. CONCLUSION

The evil of United States v. Ross, if there is any, lies in the Court's refusal to address the important issue of whether the warrant requirement of the fourth amendment retains any modern significance. There has been research in the last decade or so which suggests that it does not. A constitution must change with the times; slowly perhaps, but it must keep step with its people. Tradition, for tradition's sake, is a poor excuse for retaining

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184. 102 S. Ct. at 2172. Justice Stevens made a point of affirming the "basic rule of fourth amendment jurisprudence" stated in Katz: warrantless searches are per se unreasonable; exceptions to the warrant requirement are few, specifically established and well-delineated. He also referred to automobile searches conducted under Carroll as "not unreasonable," id. at 2159, negating the inference that they were "reasonable," or rules in and of themselves. See supra note 103 and accompanying text. By this, it appears that Ross merely expanded the scope of the automobile exception. Since it operates, theoretically at least, within the exception aegis instead of without, it appears to follow the traditional analysis of fourth amendment jurisprudence. Added to this, Justice Stevens cited neither Robinson nor (surprisingly) Belton, evidencing his intent to put distance between Ross and the bright-line rules.

185. See W. LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY, pp. 34-46 (1985). Professor LaFave explained how the issuance of a search warrant has become a perfunctory exercise of court administration. He related one instance in which a judge was met in the court hallway by a police officer who, while exchanging greetings, handed him a folded warrant form, which the judge signed without reading and then continued on his way.
an institution which flies in the face of public necessity. It may very well be true that search warrants are an intolerable burden on law enforcement and, at the same time, provide no protection for the public from unreasonable searches and seizures. If so, there is no heresy in striking the warrant requirement down. Such a move would be grave; it would strike at one of the roots of Anglo-American jurisprudence. Yet good or bad, it is a decision for all of us to at least consider.

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