Toward a Functional Fourth Amendment Approach to Automobile Search and Seizure Cases

I. INTRODUCTION

Justice Frankfurter once observed, "The course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth."[1] Within the more limited context of automobile searches this observation is especially appropriate. Although police face the practical application of fourth amendment[2] protections daily, the United States Supreme Court has yet to articulate a cohesive analytical approach to search and seizure.

The diversity of approaches asserted in the Court's two most recent decisions, *United States v. Ross*[3] and *New York v. Belton*,[4] exemplifies the lack of coherence in search and seizure.[5] However, "It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out in a case depends on where one goes in."[6] Similarly, the degree of coherence in the Supreme Court's approach to automobile search and seizure cases depends on the perceived analytical framework. Since the Court often has stated that warrantless searches are "*per se* unreasonable"[7] and that the exceptions to the warrant requirement are "jealously and carefully drawn,"[8] it would be logical to assume that the Court brings a warrant-preference approach[9] to automobile search and seizure cases. Under that approach, however, the course of the law indeed has "not . . . run smooth."[10]

It is possible, however, that the Court implicitly has addressed automobile search and seizure cases with an analytical framework other than a warrant-preference approach; that is, under certain unarticulated principles, perhaps the Court has resolved these cases in a more coherent fashion. The

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1. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).
2. U.S. CONST. amend. IV states:
> 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.

The fourth amendment has been made fully applicable to the states by the fourteenth amendment. *See* Mapp v. Ohio, 367 U.S. 643 (1961). For the Supreme Court's interpretation of various aspects of the fourth amendment's freedoms, see United States v. Chadwick, 433 U.S. 1 (1977); United States v. Robinson, 414 U.S. 218 (1973); Time Inc. v. Hill, 385 U.S. 374 (1967); Warden v. Hayden, 387 U.S. 294 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). *See generally* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).
3. 102 S. Ct. 2157 (1982).
4. 453 U.S. 454 (1981).
5. *See infra* text accompanying notes 12–53.
6. United States v. Rabinowitz, 339 U.S. 56, 69 (1950).
7. Katz v. United States, 389 U.S. 347, 357 (1967).
8. Jones v. United States, 357 U.S. 493, 499 (1958).
9. *See infra* text accompanying notes 60–61.
10. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

implicit analytical framework may signal a movement away from the asserted warrant-preference approach toward a functional theory[11] of fourth amendment principles for automobile searches. This Comment will discuss the possible contours of this automobile search and seizure analytical framework. In so doing, this Comment will postulate that the course of the law in this area is smoother than previously thought. Furthermore, this Comment will propose guidelines for police in this problematical area of search and seizure.

II. Recent Decisions by the Court

In *United States v. Ross*[12] and *New York v. Belton*[13] the Supreme Court recently encountered two opportunities to delineate further the permissible scope of warrantless automobile searches. Counsel argued *Ross*[14] and *Belton*[15] under different warrant-exception theories. A divided Court[16] upheld the search in both *Belton*[17] and *Ross*.[18]

In *Belton* the police stopped the defendant for speeding.[19] After approaching the car and asking for a driver's license and auto registration, the lone officer smelled marijuana.[20] The officer then ordered the defendant and his three companions out of the car and placed them under arrest for the unlawful possession of marijuana.[21] After frisking each of the four men and separating them by positioning each in a different area of the highway, the officer searched the passenger compartment of the car. Besides finding marijuana in an envelope on the floor of the car, the officer found cocaine in a zipped pocket of the defendant's leather jacket that was on the back seat of the car.[22] The officer then drove the four to a nearby police station. The defendant pleaded guilty to a lesser offense, but preserved his claim that the officer had seized the cocaine in violation of the fourth and fourteenth amendments.[23]

Ross differed from *Belton* in that police had been tipped by an informant that the defendant was selling drugs from the trunk of his car at a specific location.[24] Upon arriving at the scene the police observed an automobile that matched the description provided by the informant. Because the police did not see anyone who fit the description given them by the informant, they left the area.[25] Upon returning a few minutes later the police observed the defend-

11. *See infra* text accompanying notes 301–07.
12. 102 S. Ct. 2157 (1982).
13. 453 U.S. 454 (1981).
14. *See infra* text accompanying notes 31–45.
15. *See infra* text accompanying notes 46–53.
16. Both cases were decided by a vote of 6–3 with Justices Brennan, Marshall, and White dissenting.
17. 453 U.S. 454, 462–63 (1981).
18. 102 S. Ct. 2157, 2172 (1982).
19. 453 U.S. 454, 455 (1981).
20. *Id.*
21. *Id.* at 456.
22. *Id.*
23. *Id.*
24. 102 S. Ct. 2157, 2160 (1982).
25. *Id.*

ant driving the suspected automobile. Because the defendant matched the informant's description, the police stopped him, ordered him out of the car, handcuffed him, and searched both the interior of the car and its trunk.[26] In the trunk the police found a paper bag concealing a number of glassine bags containing a white powder, later determined to be heroin.[27]

Defendant Ross was charged with possession of heroin with intent to distribute. Prior to trial in the district court, Ross tried unsuccessfully to suppress the use of the heroin as evidence, arguing that the warrantless search of the paper bag constituted a violation of his fourth amendment rights.[28] After reversal by the court of appeals,[29] the Supreme Court considered whether the warrantless search had been proper.[30]

Although these two cases factually are similar, they were argued under different search and seizure theories. In *Ross* the U.S. Government formulated two basic arguments to uphold the search of the paper bag. First, because there existed both probable cause[31] to believe drugs were in the trunk and an exigency[32] making it impractical to procure a warrant before searching the paper bag, the search fell within the automobile exception[33] to the warrant requirement of the fourth amendment. Second, because the container was flimsy, it was subject to a lesser expectation of privacy.[34] Thus, no search in the constitutional sense had occurred.[35]

This second argument is predicated on the Court's view that the fourth amendment protects primarily privacy interests rather than property interests. In *Warden v. Hayden*[36] the Court stated that "the principal object of the Fourth Amendment is the protection of privacy rather than property."[37]

In *Katz v. United States*[38] the Court articulated the principle that has

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26. *Id.*
27. *Id.*
28. *Id.*
29. United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981).
30. *See infra* text accompanying notes 31–45.
31. Probable cause has been defined by the Supreme Court as "whether . . . the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).
32. The Supreme Court has recognized that "the exigencies of the situation" sometimes may create an exception to the warrant requirement. McDonald v. United States, 335 U.S. 451, 456 (1948). Within the context of automobile searches, the Court initially determined that the inherent mobility of the automobile itself created the requisite exigent circumstances to obviate the necessity of obtaining a search warrant when probable cause to search existed. *See* Carroll v. United States, 267 U.S. 132, 153 (1925). Subsequent decisions that have expanded the variety of circumstances that can create a warrant-obviating exigency have rendered the original meaning devoid of content. *See infra* text accompanying notes 213–17.
33. The expression refers to the permissible scope of a warrantless search when an automobile or other vehicle is stopped and the police have probable cause to believe that it contains evidence of a crime. *See* Arkansas v. Sanders, 442 U.S. 753, 760 (1979). For a detailed analysis of the birth and development of the exception, see W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2 (1978).
34. *See infra* text accompanying notes 36–41.
35. United States v. Ross, 102 S. Ct. 2157, 2178 n.5 (1982) (Marshall, J., dissenting).
36. 387 U.S. 294 (1967).
37. *Id.* at 304.
38. 389 U.S. 347 (1967).

become the basic test for determining whether a search in the fourth amendment privacy sense has occurred. In that case the defendant had been convicted of violating a federal statute prohibiting interstate gambling. The police had obtained evidence through the warrantless use of a surveillance device attached to the public telephone booth that the defendant used to make his bets.

The Court, in holding the action of the government unconstitutional, stated: "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he *justifiably relied* while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[39]

Justice Harlan, in a concurring opinion, gave substance to the phrase "justifiably relied" by articulating a two-part definition: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[40] This two-part "reasonable expectation of privacy" test enables a court to determine whether a search has occurred.[41]

The Supreme Court in *Ross*, while not agreeing with the U.S. Government that no search had occurred,[42] upheld the search as reasonable because it had been "no broader and no narrower than a magistrate could legitimately authorize by warrant."[43] The Court further held that 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."[44] The Court did indicate, however, that this rule may not apply when the locus of probable cause is a particular container rather than the automobile in general.[45]

The State of New York relied on the search incident to arrest exception in its successful effort to justify the search of the defendant's jacket in *New York v. Belton*.[46] Under the modern definition of this exception to the warrant requirement,[47] the arresting officer, to protect himself and to prevent the

39. *Id.* at 353 (emphasis added).

40. *Id.* at 361.

41. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977). The second part of this test—whether the expectation of privacy is reasonable—has caused considerable difficulty in the courts. Opinions have been varied and diverse on the question whether different containers manifest a reasonable expectation of privacy. *See infra* note 132.

42. United States v. Ross, 102 S. Ct. 2157, 2171 (1982). The idea that a constitutional distinction should be made between worthy and unworthy containers in determining whether the police search has invaded any protected privacy interests has been dismissed by the Court as improper. *See* Robbins v. California, 453 U.S. 420, 426–27 (1981).

43. 102 S. Ct. 2157, 2172 (1982).

44. *Id.*

45. *Id.* at 2168 & n.21.

46. 453 U.S. 454 (1981).

47. Chimel v. California, 395 U.S. 752 (1969). For the history and development of this exception, see *infra* text accompanying notes 147–206.

destruction of evidence, is permitted to search "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[48] The search incident to arrest standard has been difficult to apply uniformly when the defendant has been arrested while driving an automobile.[49] Recognizing the problem, the Court in *Belton* attempted to fashion a workable definition:

> In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest search the passenger compartment of that automobile.[50]

Because the Court further held that the permissible scope of this search would include any containers found within the automobile,[51] it also upheld the search of the defendant's jacket as a valid search incident to arrest.[52] Thus, whether the search at issue is incident to arrest or falls under the automobile exception, a warrantless search of any containers found within the passenger compartment of the automobile will be upheld (provided, of course, that the other requirements of the fourth amendment are met, such as probable cause to arrest in a search incident and probable cause to search the automobile in the automobile exception).[53]

The Supreme Court often has stated that the fourth amendment requires a warrant as a necessary element of the reasonableness of the search.[54] As a result of the Court's historical belief that warrantless searches are "*per se* unreasonable"[55] unless they come under the "few"[56] and "well-delineated"[57] exceptions to the warrant requirement of the fourth amendment, the Court has developed several divergent doctrines in an effort to

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48. Chimel v. California, 395 U.S. 752, 763 (1969).

49. *Compare* United States v. Dixon, 558 F.2d 919 (9th Cir. 1977) (defendant arrested for possession of heroin; search of paper bag on floor of car after defendant was handcuffed held valid as a search incident to arrest), *with* United States v. Rigoles, 630 F.2d 364 (5th Cir. 1980) (defendant was one of several passengers in car in which driver was arrested; search of leather pouch on floor of car while defendant remained in the car, which produced a gun illegally owned by defendant, held not incident to arrest of driver).

50. 453 U.S. 454, 460 (1981) (footnotes omitted).

51. *Id.*

52. *Id.* at 462–63.

53. Until *Ross*, an immediate search of the containers was permissible only under the search incident to arrest exception. Robbins v. California, 453 U.S. 420 (1981), had denied these searches under the automobile exception. *See infra* text accompanying notes 138–45.

54. *See, e.g.*, Robbins v. California, 453 U.S. 420, 423 (1981); Arkansas v. Sanders, 442 U.S. 753, 758 (1979); Jones v. United States, 357 U.S. 493, 497 (1958); Agnello v. United States, 269 U.S. 20, 23 (1925); Carroll v. United States, 267 U.S. 132, 153 (1925); Weeks v. United States, 232 U.S. 383, 391 (1914). For a general history of the development of the Court's search and seizure approach, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966). It has been argued, however, that the Court is historically incorrect in placing greater emphasis on the warrant requirement than on the reasonableness of the search. *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 46–47 (1969).

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

56. *Id.*

57. *Id.*

reconcile the practical realities of effective law enforcement with the Court's expressed preference for search warrants.[58]

Because the automobile exception and the search incident to arrest exception often overlap within a particular factual context,[59] it is not surprising that, viewed from the analytical standpoint of a warrant-preference approach to the fourth amendment, the course of the law has "not . . . run smooth."[60] The expression "warrant-preference" refers to the historical approach the Court has taken to fourth amendment cases. The Court will consider the facts before it and—unless some exigency existed that rendered the procurement of a warrant impractical—will hold the search or seizure impermissible if no warrant was obtained. This Comment will focus on whether the Court truly has required an exigency before it has waived the warrant requirement. The allowance of a warrantless search or seizure in the absence of any exigency that renders the procurement of a warrant impractical clearly is inconsistent with the Court's oft-repeated statement that warrantless searches are "*per se* unreasonable."[61]

Thus, it is necessary to examine the development of the two doctrines and, with a warrant-preference approach in mind, to determine whether the Court has remained loyal to its professed approach or, instead, has moved implicitly toward a more functional approach to the fourth amendment in the law of automobile search and seizure.

III. The Evolution of Warrantless Seizure Exceptions

Both the automobile exception and the search incident to arrest exception are different today from their original formulations.[62] The Court's modifications of the original exceptions have been in response to the various circumstances in which police can apply the exceptions. This Comment will focus first on the history of these modifications and then will turn to an analysis of whether these modifications are consistent with a warrant-preference approach.

A. *The Automobile Exception*

Carroll v. United States[63] was the first major case concerning a warrantless search of an automobile to come before the Supreme Court. In *Carroll* two individuals in an automobile were stopped on a highway by federal agents who had probable cause to believe that they were transporting liquor in violation of the National Prohibition Act.[64] After arresting the two individuals the

58. *See infra* text accompanying notes 62–206.

59. Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1012–22 (1976).

60. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). *See infra* part IV.

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

62. *See infra* text accompanying notes 63–206.

63. 267 U.S. 132 (1925).

64. The arrest and subsequent conviction were also for violation of the National Prohibition Act, ch. 85, Title II, § 25, 41 Stat. 305, 315 (1921) (repealed 1933).

agents searched the car and found six cases of whiskey and gin hidden under the seat. In upholding the conviction and by ruling that the evidence was admissible as the result of a reasonable search, the Court recognized that there is a

> necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[65]

Thus, the Court considered the inherent mobility of a vehicle to be a circumstance that would eliminate the need for a warrant before a police officer could conduct a reasonable search. Still, the Court narrowly construed the exception, for it asserted that absent probable cause to search no justification existed for a warrantless search of an automobile.[66] Thus, the automobile exception as originally conceived in *Carroll* consisted of two elements: probable cause to search and mobility of the object to be searched.[67] The mobility gave rise to an exigency that obviated the need to secure a warrant. The Court was careful to note that the right to search under this exception was separate from the right to arrest and that the absence of one would not invalidate the other.[68]

For years after *Carroll* little development of the automobile exception occurred because most automobile searches were upheld under the search incident to arrest doctrine.[69] The few cases argued under the automobile exception were merely routine applications of the exception as originally stated.[70] When the Supreme Court drastically reduced the permissible scope of a warrantless search incident to arrest in *Chimel v. California*,[71] however, the automobile exception gained a renewed importance.

Chambers v. Maroney,[72] the first major case after *Chimel*, worked a significant temporal expansion into the *Carroll* exigency requirement. In *Chambers* the Court considered a search of an automobile at the police station after the police had arrested the occupants for armed robbery of a service station.[73] Because the defendants and their car matched descriptions given to

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65. 267 U.S. 132, 153 (1925).

66. *Id.* at 154.

67. This original understanding is contrary to the implication of the Court in *Ross* that the mobility of the object to be searched was not the critical factor in *Carroll* that justified an immediate search. *See* United States v. Ross, 102 S. Ct. 2157, 2163–64, 2169 (1982).

68. Carroll v. United States, 267 U.S. 132, 158 (1925).

69. Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1000–01 (1976).

70. *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931); Gambino v. United States, 275 U.S. 310 (1927); United States v. Lee, 274 U.S. 559 (1927).

71. 395 U.S. 752 (1969). *Chimel* limited the scope of a permissible search incident to a lawful arrest to the person of the arrestee and the area under his immediate control. *See supra* text accompanying notes 47–48. Because of this limitation police no longer could justify a total search of the automobile as incident to the arrest of its occupant.

72. 399 U.S. 42 (1970).

73. *Id.* at 44.

police by eyewitnesses, the Court found probable cause both to arrest[74] the defendants and to search the car at the scene of the arrest.[75] The issue presented in *Chambers*, however, was whether the later search at the police station could be upheld.

The Court, noting that the warrantless search had occurred after the car had been taken to the police station, held that the search could not be justified as a valid search incident to arrest because it was too removed in time from the arrest.[76] In considering the exigency requirement of the *Carroll* exception, the Court found that an immediate search of the automobile at the scene of the arrest would have been valid.[77] In determining whether the later search also was valid, the Court compared the potential intrusions on the defendant's fourth amendment interests:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[78]

Justice Harlan, who concurred in part and dissented in part, did not find the comparison of intrusions to be at all debatable. He stated that "the lesser intrusion will almost always be the simple seizure of the car for the period . . . necessary to enable the officers to obtain a search warrant."[79] For occupants who might consider the seizure of the automobile as the greater intrusion, Justice Harlan argued that those occupants always could consent to an immediate search.[80]

Chambers thus expanded the temporal scope of the *Carroll* exception. When an immediate search of the automobile would be justified under the *Carroll* exception to the warrant requirement, a subsequent warrantless search at the police station also would be valid.[81]

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74. *Id.* at 46.

75. *Id.* at 47 n.6.

76. In Preston v. United States, 376 U.S. 364 (1964), the Court stated: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest." *Id.* at 367. *But see* United States v. Edwards, 415 U.S. 800 (1974) (After defendant had been placed in jail for attempted breaking and entering, probable cause arose that his clothes contained evidence of the break-in attempt. The next day, the defendant's clothing was exchanged for prison clothes. A subsequent warrantless search of defendant's clothes was held to be a valid search incident to arrest.).

77. 399 U.S. 42, 52 (1970).

78. *Id.* at 51–52.

79. *Id.* at 63 (Harlan, J., concurring in part and dissenting in part).

80. *Id.* at 64.

81. In the later case of Texas v. White, 423 U.S. 67 (1975), the Court upheld the warrantless search of defendant's car at the police station after the defendant's arrest for passing fraudulent checks. Justice Marshall in his dissenting opinion argued that the rationale of *Chambers* should be extended only when seizure of the car was justified. *Id.* at 70. The majority, however, rejected this limitation.

The next major case addressed by the Court, *Coolidge v. New Hampshire*,[82] has been described as "a veritable encyclopedia of fourth amendment law."[83] In *Coolidge* the police were investigating the defendant for the murder of a young girl. After a three-week investigation during which probable cause to arrest the defendant had arisen, the police, acting pursuant to a search warrant, arrested the defendant at his home and towed his two cars to the police station.[84] Three subsequent searches[85] of the defendant's cars produced evidence linking him to the crime. The Court held that the search warrant was constitutionally defective.[86] Thus, it had to determine whether the seizure and subsequent search could be upheld under either the automobile exception or the search incident to arrest exception.[87]

After first determining that the seizure and search of the two automobiles were not incident to the defendant's arrest,[88] the Court turned to the automobile exception. In its previous automobile exception cases the Court had been faced with circumstances in which probable cause to arrest and the arrest itself almost occurred simultaneously.[89] For this reason the Court had the opportunity to consider only whether an exigency existed subsequent to the arrest that eliminated the need to secure a warrant.

In contrast, the Court in *Coolidge* had considered an arrest and a seizure that had occurred some time after probable cause to arrest had arisen. Thus, the Court examined the facts to determine whether any exigency existed before the arrest to prevent the procurement of a search warrant. Finding none, the Court held that the search of the defendant's car was not a valid search under the automobile exception because no exigency had occurred to prevent the procurement of a warrant before the initial seizure.[90]

Thus, the Court viewed the requirement of exigency as existing both prior to and after the arrest. The Court held that because a *Carroll* search would have been invalid if conducted at the defendant's house, the subsequent search at the police station also would be invalid under *Chambers* since

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82. 403 U.S. 443 (1971).

83. Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1004 (1976).

84. 403 U.S. 443, 447 (1971).

85. The first search occurred two days after defendant's arrest, the second a year later, and the final search occurred fifteen months after defendant's arrest. At the defendant's subsequent trial for murder, vacuum sweepings were introduced in evidence against him, as part of an attempt by the State to show by microscopic analysis that it was highly probable that the murder victim had been in his car. *Id.* at 448.

86. The arrest and search warrants had been issued by the Attorney General of New Hampshire, who personally had supervised the investigation and was later to serve as Chief Prosecutor at the trial. *Id.* at 447. This bias violated the neutral magistrate requirement of the fourth amendment and thus rendered the search warrant invalid. *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948).

87. In essence, the Court had to approach the case as though no warrant had been obtained. 403 U.S. 443, 453 (1971).

88. Because Chimel v. California, 395 U.S. 752 (1969), was decided after the defendant's arrest in 1964, the Court decided the search incident to arrest issue under the earlier, more expansive standard. 403 U.S. 443, 455–56 (1971). Even so, the Court held that the search was not incident to arrest because it had not been reasonably contemporaneous with the arrest. *Id.* at 457. *See supra* note 76.

89. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

90. 403 U.S. 443, 478 (1971).

a *Chambers* search is permissible only when a preceding *Carroll* search is allowed.[91] The Court also held that the seizure of the automobiles could not be justified as a valid plain view[92] exception because police knowledge of the cars' presence rendered their discovery inevitable (not inadvertent).[93] Justice Black, in a concurring and dissenting opinion, argued that the Court should distinguish between automobiles seized as instrumentalities of the crime itself and automobiles seized as mere containers of evidence.[94]

Coolidge marked a significant modification of the *Carroll* exigency requirement. It also reaffirmed the limitation of a *Chambers* search to those instances in which a preceding *Carroll* search would be permissible.

The Court's next case in this area was *Cardwell v. Lewis*.[95] *Cardwell* reflected the privacy concepts of *Katz v. United States*[96] and seemed to be a partial adoption of the position urged by Justice Black in *Coolidge*.

In *Cardwell* the police were investigating a murder in which another car had pushed the victim's car over an embankment. At the scene police had taken casts of the tire tracks and paint scrapings from the victim's car.[97] The police questioned the defendant within a week after the murder, and they observed that his car was similar to the make and model of the probable murder vehicle. The police did not question the defendant again for several months, during which time probable cause arose to arrest him.[98] When the defendant reappeared for questioning, the police, acting pursuant to an arrest warrant, arrested the defendant and towed his car to a police impoundment lot.[99] There the police conducted a warrantless search of the exterior of the defendant's car and obtained tire casts and paint scrapings.[100] This evidence was admitted at trial and the defendant was convicted for murder.[101]

Although the police had ample time to secure a search warrant before the defendant returned for questioning,[102] the Court refused to see *Cardwell* as another *Coolidge*. Rather, the Court chose to frame the issue in terms of privacy:

> This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search"

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91. *Id.* at 463. Justice Marshall, in his dissenting opinion in *Ross*, indicated his understanding that *Coolidge* would continue to be applicable to searches of parked cars and that the rule in *Ross* would not be extended to those searches. United States v. Ross, 102 S. Ct. 2157, 2174 n.1 (1982) (Marshall, J., dissenting).

92. Under the plain view exception to the warrant requirement, evidence can be seized by an officer who inadvertently comes across it pursuant to a prior justified intrusion. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). For containers found within an automobile during a warrantless search, this exception has been expanded to include containers whose contents can be inferred from their outward appearance. Arkansas v. Sanders, 442 U.S. 753, 764–65 n.13 (1979).

93. 403 U.S. 443, 469 (1971).

94. *Id.* at 505 n.2 (Black, J., concurring in part and dissenting in part).

95. 417 U.S. 583 (1974).

96. 389 U.S. 347 (1967).

97. 417 U.S. 583, 586 (1974).

98. *Id.* at 587.

99. *Id.* at 587–88.

100. *Id.* at 588.

101. *Id.*

102. *See supra* text accompanying notes 97–98.

> that implicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the *exterior* and an observation of the tread of a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect. [103]

The Court asserted that the defendant had a lesser expectation of privacy in his automobile "because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." [104] The Court distinguished *Coolidge* on the grounds that the search in *Coolidge* did not concern the exterior of the car[105] and that the defendant's car was seized on public property,[106] not on private property as in *Coolidge*.

The Court responded to the defendant's argument that, because probable cause to search the car had arisen before his arrest, no exigency prevented the police from obtaining a search warrant:

> Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action. [107]

Justice Stewart, who wrote the *Coolidge* opinion, argued in a dissenting opinion that the initial seizure was not justified because "[w]here there is no *reasonable likelihood* that the automobile would or could be moved, the *Carroll* doctrine is simply inapplicable." [108] Thus, Justice Stewart implicitly rejected the inherent mobility of the automobile alone as an exigent circumstance.[109]

A search of a container found within an automobile (compared to a search of the automobile itself) was the issue the Court faced in *United States v. Chadwick*.[110] In *Chadwick* federal agents in San Diego notified federal narcotics agents in Boston that two individuals on a train to Boston were suspected of carrying a brown footlocker containing marijuana or hashish.[111] The federal agents arrested the defendants two days after they arrived, as the defendants were placing a footlocker, identified by a police dog as containing marijuana, into the trunk of a waiting automobile.[112] An hour and a half later

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103. 417 U.S. 583, 588–89 (1974).
104. *Id.* at 590.
105. *Id.* at 591.
106. *Id.* at 593.
107. *Id.* at 595–96.
108. *Id.* at 598 (emphasis added). This statement supports the position taken by Justice Marshall in his dissenting opinion in Texas v. White, 423 U.S. 67 (1975). *See supra* note 81.
109. If inherent mobility alone cannot satisfy the impracticality requirement of the automobile exception, *see supra* text accompanying note 65, one wonders why the Court upheld the search in *Chambers*.
110. 433 U.S. 1 (1977).
111. *Id.* at 3.
112. *Id.* at 4.

at the federal building, the agents searched the footlocker without first obtaining consent or a search warrant.[113] The Government used the marijuana found in the footlocker as evidence against the defendants.

The Government, although failing to argue that this search was within the automobile exception, nevertheless contended that the Court should extend the rationale of those searches to the case before the Court. Thus, when a warrantless search of an automobile would be permissible, a warrantless search of any luggage or containers found therein also would be permissible.[114] The Court, although noting that both luggage and automobiles have mobility characteristics,[115] answered that the Court's separate treatment of automobiles depended not only on their mobility but also on their lesser privacy interests; this lesser privacy interest, the Court argued, did not characterize personal luggage.[116]

The Court further indicated that "when no exigency[117] is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority."[118] The majority rejected the dissenting opinion's[119] argument that the search was a valid search incident to arrest, because it was too "remote in time [and] place from the arrest."[120] In a concurring opinion Justice Brennan also rejected the search as a valid search incident to arrest, but on the grounds that although the footlocker might have been within the defendant's "immediate control,"[121] its contents were not.[122]

Although *Chadwick* arguably is not an automobile exception case,[123] it established a distinction in privacy interests between automobiles and personal luggage contained therein. Thus, the Court created a line of reasoning separate from that of the *Carroll-Chambers* line of cases.

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113. *Id.*

114. *Id.* at 11–12. This argument also was advanced by the Government in *Ross*, and in that case, the Court accepted it. *See supra* text accompanying notes 43–44. In *Ross* the Court distinguished *Chadwick* because, unlike *Ross*, probable cause had been focused on one particular container rather than on the automobile in general. United States v. Ross, 102 S. Ct. 2157, 2167 (1982). Thus, *Ross* creates an implication that an immediate warrantless search of a container shall be disallowed when the container itself is the object of probable cause and is not merely an incident of the search of the automobile itself. For an analysis of the logical inconsistencies of this distinction, see *infra* text accompanying notes 316–25.

115. 433 U.S. 1, 13 (1977).

116. *Id.* at 13.

117. The Court in an earlier passage stated that the elements which would constitute an exigency were "[the] belie[f] that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once." *Id.* at 4.

118. *Id.* at 15.

119. *Id.* at 19 (Blackmun, J., dissenting).

120. *Id.* at 15 (quoting Preston v. United States, 367 U.S. 364, 367 (1964)).

121. 433 U.S. 1, 17 n.2 (1977) (Brennan, J., concurring).

122. *See supra* text accompanying notes 47–48. The *Belton* Court ignored this distinction. *See supra* text accompanying notes 51–53.

123. Arguably, *Chadwick* is not an automobile exception case because the focus of police suspicion had been the particular footlocker itself and not the automobile as a general container of evidence as in previous cases. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). In addition, the footlocker's relationship to the automobile had been described as "coincidental" by the district court. 433 U.S. 1, 5 (1977). However, the case has been cited as a part of the automobile exception doctrine. *See, e.g.*, Robbins v. California, 453 U.S. 420, 426 (1981). *See supra* note 114.

Arkansas v. Sanders[124] presented a factual background in which the two lines of thought met directly. The issue was whether, in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile pursuant to a *Carroll* search.[125]

As in *Chadwick*, an informant had notified the police that the defendant would be arriving the same day on a plane and that he would be carrying a green suitcase containing marijuana.[126] Contrary to the police action in *Chadwick*, in *Sanders* the police waited until the defendant had placed the suitcase in the trunk of a taxi and had driven away before stopping him several blocks from the airport.[127] At the request of the police, the taxi driver opened the trunk. The police opened and searched the suitcase, finding 9.3 pounds of marijuana packed in 10 plastic bags.[128]

The State argued that the search was valid under the *Carroll* rule,[129] but the Court rejected the State's argument:

> A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in *Chadwick*, the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control. . . . Once the police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. 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.[130]

The Court did not extend the logic of this statement to all containers; rather, in a footnote the Court stated:

> Not all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.[131]

Sanders has caused considerable confusion in the courts.[132] The decision seemed to inject the *Katz* reasonable expectation of privacy test[133] into the

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124. 442 U.S. 753 (1979).

125. *Id.* at 756.

126. *Id.* at 755. Compared with *Chadwick*, the police here had little time to secure a warrant before going to meet the defendant. *See supra* text accompanying notes 111–12.

127. 442 U.S. 753, 755 (1979).

128. *Id.*

129. *Id.* at 761. Note again that the focus of probable cause was a specific container and not the automobile in general.

130. *Id.* at 763–64 (footnotes omitted). The *Ross* Court subsequently rejected the latter part of this reasoning. United States v. Ross, 102 S. Ct. 2157, 2172 (1982).

131. 442 U.S. 753, 764–65 n.13 (1979).

132. *Compare* United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (no reasonable expectation of privacy in plastic bag inside paper bag) *and* United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (no reasonable expectation of privacy in cardboard box), *with* United States v. Benson, 631 F.2d 1336 (8th Cir. 1980) (reasonable expectation of privacy in leather tote bag) *and* United States v. Miller, 608 F.2d 1089 (5th Cir. 1979) (reasonable expectation of privacy in plastic portfolio).

133. *See supra* text accompanying notes 34–41.

everyday decision-making process of police faced with the practical application of fourth amendment protections.

In a concurring opinion Chief Justice Burger argued that *Sanders* was not an automobile exception case because the focus of police suspicion had remained only on the green suitcase and not on the taxi in general.[134] The Chief Justice further asserted that the relationship of a piece of luggage to an automobile does not, by itself, give rise to an automobile exception case.[135]

Justice Blackmun, in a dissenting opinion joined by Justice Rehnquist, argued that "the expectation of privacy in a suitcase found in the car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk"[136] and that the additional intrusion of a search is incidental compared to the intrusion engendered by the initial seizure.[137]

Thus, in *Sanders* the Court extended the rationale of *Chadwick* to a *Carroll* or *Chambers* situation so that some containers and luggage would not be susceptible to a warrantless search as would the rest of the automobile. Within this framework the Court recently decided *Robbins v. California*.[138]

In *Robbins* the police stopped the defendant for erratic driving. After approaching the car and asking for a driver's license, the officers smelled marijuana.[139] The officers ordered the defendant out of his car. A search of the passenger compartment revealed marijuana and equipment for using it. After putting the defendant in the patrol car, the policemen searched the trunk, finding a tote bag and two opaque plastic packages.[140] The officers opened the packages; each contained fifteen pounds of marijuana.[141] On review the Supreme Court considered the search of the opaque containers that was subsequent to the defendant's placement in the patrol car.[142]

In a decision later partially overruled by *Ross*,[143] the Court held that (unlike the search of the automobile) no exigency existed that warranted an immediate search, rather than seizure, of the packages.[144] The Court further rejected the Government's argument that the plastic packages, as "unworthy containers," manifested no significant privacy interest that would invoke

134. 442 U.S. 753, 767 (1979) (Burger, C.J., concurring).

135. *Id.*

136. *Id.* at 769 (Blackmun, J., dissenting). The *Ross* Court later agreed with Justice Blackmun that no significant distinction can be made in relative privacy interests among containers and automobile compartments. United States v. Ross, 102 S. Ct. 2157, 2171–72 (1982).

137. 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting).

138. 453 U.S. 420 (1981).

139. *Id.* at 422.

140. Each wrapped and sealed package was described as "resembl[ing] an oversized, extra-long cigar box with slightly rounded corners and edges." *Id.* n.1 (1981) (quoting People v. Robbins, 103 Cal. App. 3d 34, 44, 162 Cal. Rptr. 780, 785 (1980) (Rattigan, J., dissenting)).

141. 453 U.S. 420, 422 (1981).

142. *Id.* at 423.

143. United States v. Ross, 102 S. Ct. 2157, 2172 (1982).

144. 453 U.S. 420, 424 (1981).

fourth amendment protections.[145] With this background, the Court recently decided *United States v. Ross*.[146]

B. *The Search Incident to Arrest Exception*

It is somewhat of a misnomer to term the search incident to arrest doctrine an exception to the fourth amendment warrant clause. The doctrine has historical and theoretical roots separate from those of the automobile exception. One commentator has observed, "There is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself."[147] In England the reasonableness of these searches was not challenged until the end of the nineteenth century, and even then the English courts gave the matter little attention.[148] Evidence also exists that the framers of the fourth amendment gave little thought to the search incident to arrest; it was considered inherently reasonable.[149]

If the framers did indeed give the search incident to arrest little thought, even more evidence exists that the courts accepted these searches as inherently reasonable.[150] Justice Rehnquist has noted that "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta."[151]

The search incident to arrest doctrine consists of two parts: search of the person of the arrestee and search of the premises on which he is arrested.[152] Two justifiable purposes exist for each: securement of the arresting officer's safety by preventing the defendant from obtaining a weapon, and avoidance of the destruction of evidence.[153] The permissible scope of the search of the arrestee's person has remained unchanged;[154] a full personal search is a reasonable search.[155] It is within the second part of the doctrine—the search of the premises on which the arrestee is arrested—that the Court has modified the permissible scope of a warrantless search.

In two early decisions the Court delineated the general contours of the search incident to arrest. In *Weeks v. United States*[156] the Court recognized "the right on the part of the Government, always recognized under English

145. *Id.* at 426–27. This part of the *Robbins* opinion was reaffirmed by the *Ross* Court. United States v. Ross, 102 S. Ct. 2157, 2171 (1982).

146. *See supra* text accompanying notes 24–45.

147. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969).

148. *See, e.g.*, Elias v. Pasmore, 2 K.B. 164 (1934).

149. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 27–46 (1969).

150. *Id.* at 188 n.77.

151. United States v. Robinson, 414 U.S. 218, 230 (1973).

152. Agnello v. United States, 269 U.S. 20, 30 (1925).

153. *Id.*

154. *See, e.g.*, Chimel v. California, 395 U.S. 752, 763 (1969); Preston v. United States, 376 U.S. 364, 367 (1964); United States v. Rabinowitz, 339 U.S. 56, 61 (1950); Harris v. United States, 331 U.S. 145, 150 (1947); Carroll v. United States, 267 U.S. 132, 158 (1925).

155. United States v. Robinson, 414 U.S. 218, 235 (1973).

156. 232 U.S. 383 (1914).

and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime."[157] In *Agnello v. United States*[158] the Court, in dictum, also recognized the right of police to search the premises on which the arrestee is arrested:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.[159]

Thus, after *Agnello* the Court considered warrantless searches incident to arrest of the arrestee's person and of the premises on which he was arrested as reasonable within the meaning of the fourth amendment. The Court, however, had yet to articulate the temporal and spatial limits of the permissible scope of the search of the premises.

In initially analyzing the spatial elements of a search incident to arrest, the Court in *Harris v. United States*[160] formulated a broad definition for the permissible scope of the search of the premises incident to an arrest. In *Harris* police had arrested the defendant pursuant to an arrest warrant at his four-room apartment for violation of the Selective Training and Service Act of 1940.[161] After police handcuffed the defendant, they conducted a thorough five-hour search of his apartment and found eight Notice of Classification cards and eleven Registration Certificates in a sealed envelope in a bedroom drawer.[162] The evidence was used against the defendant at his subsequent trial.

Although the defendant physically was unable to secure a weapon or destroy evidence, the Court upheld the search as a valid search incident to arrest.[163] Finding that the "[p]etitioner was in exclusive possession of a four room apartment,"[164] the Court held the search to be reasonable.

Justice Frankfurter, in a dissenting opinion, rejected the majority opinion as creating a rule of "constructive possession,"[165] thus unnecessarily broadening the permissible scope of searches incident to arrest. He argued that the limits of these searches should not be coequal with those of the right to arrest: "Authority to arrest does not dispose with the requirement of authority to search."[166]

The Court reaffirmed this implicit equality of authority in *United States v. Rabinowitz*.[167] In *Rabinowitz* police arrested the defendant at his one-room

157. *Id.* at 392.
158. 269 U.S. 20 (1925).
159. *Id.* at 20.
160. 331 U.S. 145 (1947).
161. Ch. 720, 54 Stat. 885 (1940) (expired 1947).
162. 331 U.S. 145, 147–49 (1947).
163. *Id.* at 156.
164. *Id.* at 152.
165. *Id.* at 164 (Frankfurter, J., dissenting). *See infra* text accompanying notes 269–70.
166. 331 U.S. 145, 165 (1947).
167. 339 U.S. 56 (1950).

office for stamp forgery.[168] Although the police had secured an arrest warrant, they failed to get a search warrant. After the defendant's arrest the police conducted a ninety minute search of his desk, safe, and file cabinets.[169] This search revealed forged stamps that later were used as evidence against the defendant.[170] The Court upheld the search, finding the entire room to be within the defendant's "immediate control."[171]

Justice Frankfurter, in another strong dissent, admonished that "[t]he exceptions cannot be enthroned into the rule."[172] He argued that the permissible scope of the search incident to arrest should be more spatially limited than that allowed by the majority and that confinement of warrantless searches to the area under an arrestee's "physical control"[173] would be more consonant with fourth amendment protections. The Court did not adopt this narrower exception until years later.[174]

In *Preston v. United States*[175] the Court analyzed the temporal elements of a valid search incident to arrest. Police observed the defendant and two companions sitting in a parked car for five hours. When their answers to a questioning police officer were unsatisfactory, all three were arrested for vagrancy.[176] After searching the defendant at the scene of the arrest, the police took the car to the police station and then ordered it towed to a garage. At the garage a search of the glove compartment and trunk produced two loaded revolvers, caps, women's stockings, rope, pillow slips, and an illegally manufactured license plate.[177] After one of the defendant's companions confessed, the police used the evidence to convict the defendant of conspiring to rob a federally insured bank.[178]

In reviewing the search of the automobile, the Court did not accept the Government's argument that the later search of the automobile was incident to arrest. Rather, it held that "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest."[179] The Court thus narrowed the exception to those searches that are contemporaneous to the arrest.

The Court next addressed both the temporal and spatial elements of the search incident to arrest doctrine in *Chimel v. California*,[180] in which the

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168. *Id.* at 58.
169. *Id.* at 59.
170. *Id.*
171. *Id.*
172. *Id.* at 80 (Frankfurter, J., dissenting).
173. *Id.* at 72.
174. *See infra* text accompanying notes 180–91.
175. 376 U.S. 364 (1964).
176. *Id.* at 365.
177. *Id.* at 365–66.
178. *Id.* at 366.
179. *Id.* at 367. Although the logic of a decision dealing with an automobile search is not inexorably applicable to a similar later search of fixed premises such as a home, it would be difficult to justify a lesser protection since automobiles generally have been perceived by the Court as deserving less protection under the fourth amendment than houses and buildings. *See* Katz v. United States, 389 U.S. 347 (1967).
180. 395 U.S. 752 (1969).

Court articulated what has become the modern rule for searches incident to arrest. In *Chimel* the police arrested the defendant, a suspect in a burglary of a coin shop, as he arrived at his home. Although the police had arrested him in his living room, they conducted a warrantless search of the entire house.[181] In the master bedroom and sewing room police found several coins and other objects inside the dresser drawers.[182] At the defendant's trial these items were used as evidence over his objection that they had been seized unconstitutionally.[183]

The Court refused to adopt the State's argument that the search was a valid search incident to arrest under *Rabinowitz*, commenting that *Rabinowitz* was "hardly founded on an unimpeachable line of authority."[184] Instead, it chose to rely on the rationale of its recent decision in *Terry v. Ohio*[185] that "'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'"[186] Accordingly, the Court retreated from the spatially broad *Rabinowitz* rule and held:

> There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only after the authority of a search warrant.[187]

Although *Rabinowitz* had concerned a single room[188] and *Harris* a four-room apartment,[189] the Court rejected the logic of those decisions as removing "any point of rational limitation [to the search], once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items."[190]

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181. *Id.* at 754. The police had procured an arrest warrant, however. *Id.* at 753.

182. *Id.* at 754.

183. *Id.*

184. *Id.* at 760.

185. 392 U.S. 1 (1968). In *Terry* a policeman had stopped three men walking on the street for questioning after the policeman had observed the men's behavior and had become suspicious that they were planning a robbery. *Id.* at 6. A pat-down search of the men revealed two guns. *Id.* at 7. The two men carrying guns were charged and convicted for carrying concealed weapons. *Id.* at 7–8. On appeal the Court was faced with determining the permissible scope of a search pursuant to an investigatory stop. Because of the need for investigatory stops, *id.* at 22, and the need for police to insure their own safety, *id.* at 23, the Court reasoned that a pat-down search was reasonable under the circumstances. *Id.* at 30. It noted, however, that a full search comparable to one incident to arrest would not be reasonable in this context; rather, it asserted that this limited search was justified only by the need to disarm the suspect, not to avoid the destruction of evidence. *Id.* at 29.

186. 395 U.S. 752, 762 (1969) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

187. 395 U.S. 752, 763 (1969) (footnotes omitted). The limitations expressed by the *Chimel* Court in the second paragraph of the quoted material apparently were overlooked by the *Ross* Court when it implied that a warrantless search of fixed premises may extend to any container found within those premises. United States v. Ross, 102 S. Ct. 2157, 2170 (1982).

188. *See supra* text accompanying note 168.

189. *See supra* text accompanying note 161.

190. 395 U.S. 752, 766 (1969) (footnotes omitted).

Chimel, then, implicitly reaffirmed the temporal limitation of *Preston* and signaled a dramatic retreat from the spatially broad limitations of *Rabinowitz*. After *Chimel* the scope of a permissible search incident to arrest that is contemporaneous with the arrest extended to a search of the person and the area "within his immediate control."[191]

The Court's next major holding, *United States v. Robinson*,[192] re-examined the permissible scope of the search of the person incident to arrest. What historically had been taken for granted[193] was for the first time the subject of concrete debate.

In *Robinson* the defendant had been arrested while driving his car by an officer who, because of a previous investigation following a check of the defendant's driver's license four days earlier, had probable cause to believe that the defendant was operating a motor vehicle after the revocation of his license.[194] A pat-down search of the defendant's coat revealed a crumpled cigarette package in which heroin was found.[195] The defendant was convicted for possession of heroin after the heroin was admitted as evidence at his trial.[196]

Because no evidence exists to be seized to prove the crime for which the defendant had been arrested—operating a motor vehicle without an operator's permit—the Court split on whether a full search[197] or only a more limited *Terry* weapons search should have been permitted.

Justice Rehnquist, writing for the majority, rejected the idea that the existence of probable cause to fully search the person of the arrestee must be litigated in each case:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.[198]

Justice Rehnquist further held that when police make a custodial arrest based on probable cause "a search incident to the arrest requires no additional justification."[199]

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191. *Id.* at 763.

192. 414 U.S. 218 (1973).

193. *See supra* text accompanying notes 147–51. Previous decisions by the Court, although reaffirming the right of an officer to search the person of the arrestee incident to arrest, nonetheless were concerned with searches of the permissible area beyond the person of the arrestee. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 374 (1964); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Carroll v. United States, 267 U.S. 132 (1925).

194. 414 U.S. 218, 220 (1973).

195. *Id.* at 223.

196. *Id.*

197. The court of appeals had argued that the purpose of a full search could only be evidentiary. *Id.* at 233.

198. *Id.* at 235.

199. *Id.*

Justice Marshall argued in his dissenting opinion that the scope of the search in nonevidentiary crimes should be limited to a *Terry* search because the only plausible purpose is to seize weapons.[200] Even if the seizure of the cigarette package could be justified, Justice Marshall felt that "clearly there [could be] no justification consistent with the Fourth Amendment which would authorize [the officer's] opening the package and looking inside."[201]

Despite Justice Marshall's concern, *Robinson* and *Chimel* constitute the current standard for searches incident to arrest. Once an arrest has occurred, a contemporaneous[202] warrantless search of the person[203] and the area under his immediate control is reasonable under the fourth amendment.

Although these standards seem simple, courts have found them difficult to apply to automobile searches. Prior to *New York v. Belton*[204] courts were diverse in their interpretation of the "area within the arrestee's immediate control" as it applied to containers found in an automobile incident to its occupant's arrest.[205] In *Belton*, however, the Court definitely interpreted "the area within the arrestee's immediate control" to include all containers found in the passenger compartment of the automobile.[206]

IV. Departure From a Warrant-Preference Approach

A review of the development of the automobile exception and the search incident to arrest exception indicates that the two doctrines have undergone considerable change. It is doubtful, however, whether the development of these doctrines reflects a true warrant-preference approach to the fourth amendment. Indeed, separate examinations of the historical origins and theoretical justifications of each doctrine will reveal that any relationship between their doctrinal development and an expressed judicial preference for warrants is tenuous at best. Furthermore, this Comment will show that compelling reasons exist for the Court to retreat from strict adherence to a warrant-preference approach.

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200. *Id.* at 252–54 (Marshall, J., dissenting).

201. *Id.* at 255–56.

202. But see United States v. Edwards, 415 U.S. 800 (1974), in which probable cause to believe the defendant's clothing contained paint chips from an attempted burglary arose after the defendant had been arrested and placed in a cell. The next morning the police exchanged prison clothes for the defendant's and conducted a warrantless search of defendant's clothes. The Supreme Court upheld the search as incident to arrest, stating that "the normal processes incident to arrest and custody had not been completed when [the defendant] was placed in his cell [that night]." *Id.* at 804.

203. A limited search of the person for evidence that was not incident to arrest was upheld by the Supreme Court in Cupp v. Murphy, 412 U.S. 291 (1973). The defendant's wife had died by strangulation and, while her husband was at the police station for questioning, dark spots similar to dried blood were observed on his fingernails. *Id.* at 292. Over the defendant's objections, and without a warrant, the police took a sample scraping from the defendant's fingernails. *Id.* The scraping revealed traces of the victim's blood and nightgown, but the defendant was not arrested for more than a month after the scraping was taken. *Id.* at 294. Although the Court held that the full *Chimel* search would not have been justified, *id.* at 296, it upheld the search because of its limited nature and the ready destructibility of the evidence. *Id.*

204. 453 U.S. 454 (1981).

205. *See supra* note 49.

206. *See supra* text accompanying notes 46–52.

A. *The Automobile Exception*

The creation of the automobile exception was the result of judicial recognition that "[a] necessary difference [exists] between a search of a store, dwelling house or other structure . . . [and] a search of a ship, motor boat, wagon or automobile . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved . . . ."[207] The *Carroll* Court realized that procurement of a search warrant would be impractical under these circumstances; thus, because of the necessity for effective law enforcement the Court recognized an exception to the warrant requirement of the fourth amendment. Recognition of this exception was a critical development in the law, for it marked a substantial departure from the underlying policy of the fourth amendment as stated later in *Johnson v. United States*[208]:

> 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.[209]

Police officers, rather than a "neutral magistrate," now would make the initial determination whether probable cause existed to search an automobile.[210]

Because of this substantial departure, the *Carroll* Court required an exigency[211] before it would allow the police to exercise their discretion in searching an automobile. The original exception, as thus understood, was consistent with a warrant-preference approach[212] because the requirement of a warrant ostensibly would be waived only when it was impractical to obtain one.

Later decisions have broadened the original scope of this exception, thus marking a departure from a warrant-preference approach. The expansion of the exception is attributable to two sources: the judicial emasculation of the

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207. Carroll v. United States, 267 U.S. 132, 153 (1925).

208. 333 U.S. 10 (1948).

209. *Id.* at 13–14 (footnote omitted). Although *Ross* would indicate that the rationale of *Johnson* has been abandoned, the Court implied that only the timing of the protection afforded by interposition of a neutral magistrate had been changed; the neutral magistrate now would determine the reasonableness of a search on an ad hoc basis. United States v. Ross, 102 S. Ct. 2157, 2172 (1982).

210. This initial decision, of course, is not conclusive. The issue of probable cause, if raised, would be reviewed by the trial court prior to trial.

211. *See supra* note 32.

212. One may wonder why the Court, to adhere more closely to a warrant-preference approach simply did not require the federal agents to tow the car to a police station or to immobilize it until a search warrant could be obtained. Although the Court did not address this point, it may have allowed an immediate search rather than a seizure because the items seized—bootleg whiskey and gin—were contraband and thus inherently illegal (rather than evidence only of a crime). The Court rejected this contraband-evidence dichotomy in Warden v. Hayden, 387 U.S. 294, 300 (1967). See also Justice Marshall's explanation of the *Carroll* Court's allowance of an immediate search rather than seizure. United States v. Ross, 102 S. Ct. 2157, 2178 n.6 (1982) (Marshall, J., dissenting).

meaning of exigency and the often illogical use of privacy concepts in the analysis of the permissible scope of police action in an automobile search.

In *Chambers v. Maroney*[213] the Court substantially altered the meaning of exigency. The Court previously had interpreted exigency to imply circumstances under which it is impracticable for police to procure a search warrant before searching an automobile.[214] By allowing a warrantless search of the automobile after it had been taken to the police station solely because a search at the scene of the arrest would have been reasonable under *Carroll*, the Court ignored the original justification for the *Carroll* exception: actual mobility of the vehicle.

Although the Court in *Carroll* had allowed a warrantless search because of the exigency posed by the mobility of the automobile, it had not ruled out a lesser response, such as a seizure, that also would obviate any exigency posed by the mobility of the automobile. That the seizure in *Chambers* eliminated any existing exigency was noted by the Court itself in its *Coolidge* opinion.[215]

The Court's failure to recognize the seizure of the automobile as a sufficient response to the exigency and its allowance of a subsequent search were inconsistent with the Court's preference for warrants. Furthermore, the Court's position cannot be reconciled with the dual nature of the fourth amendment, because the fourth amendment proscribes both "unreasonable searches and seizures."[216] The warrantless seizure of the automobile in *Chambers* can be justified as a reasonable response to the exigency of mobility. The subsequent search of the automobile, however, cannot be similarly justified, for no "reasonable likelihood"[217] of the automobile's being moved existed. Thus, the requirement of exigency was not met.

The Court's further conclusion in *Chambers*, that it is debatable once the automobile is seized whether continued seizure until the police can obtain a search warrant is a greater or lesser "intrusion"[218] than an immediate search, also fails to distinguish the dual elements of privacy—one's possessory interest in his automobile and his secrecy interest.[219] These interests are protected separately by the fourth amendment's proscription of unreasonable seizures and unreasonable searches. Justice Harlan, in a separate opinion more consistent with a warrant-preference approach, argued that only the seizure of the automobile should be allowed unless the driver consents to an immediate search.[220] Thus, the Court's allowance of the subsequent search when an

213. 399 U.S. 42 (1970).

214. Carroll v. United States, 267 U.S. 132, 153 (1925).

215. 403 U.S. 443, 463 n.20 (1971).

216. *See supra* note 2.

217. *See supra* text accompanying note 108. *See also infra* text accompanying notes 343–45.

218. 399 U.S. 42, 51–52 (1970). Only a few months earlier the Court found this to be not at all a debatable question in United States v. Van Leeuwen, 397 U.S. 249 (1970). In that case the Court held that given probable cause to search packages placed in the mails the proper course to follow was to withhold delivery of the packages until a search warrant could be obtained.

219. Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 840 (1974).

220. Chambers v. Maroney, 399 U.S. 42, 64 (1970) (Harlan, J., concurring in part and dissenting in part).

immediate seizure had abated any exigency substantially expanded the permissible scope of warrantless searches and significantly impaired any impracticality connotations of the exigency requirement.

The second source of expansion of the automobile exception has been the use of privacy concepts as a threshold test to determine whether a search in the constitutional sense has occurred. The Court has interpreted the fourth amendment as protecting primarily privacy interests;[221] and only those privacy interests having a reasonable expectation of privacy[222] are subject to constitutional protection. As a result, the narrow scope of infringement on fourth amendment rights envisioned by the original understanding of the automobile exception has been substantially supplemented by cases in which the Court held the automobile "search" to be not a search at all because the requisite degree of privacy interest was lacking.[223] In particular, in *Cardwell v. Lewis*[224] the imposition of a reasonable expectation of privacy test served to justify a police search of the car's exterior when no exigency existed to obviate the need for a search warrant.[225]

The greatest expansion of the exception (and, as a consequence, the greatest degree of inconsistency with a warrant-preference approach) has been in the illogical assignment of varying degrees of privacy interest to various aspects of the automobile search. This inconsistent application of the reasonable expectation of privacy test has led to the automobile-container dichotomy exemplified by *Chadwick*[226] and *Sanders*.[227]

The Court has stated that because automobiles are regulated[228] more extensively and because their primary function is transportation,[229] they are imbued with a lesser expectation of privacy than luggage.[230] It cannot logically be argued, however, that a locked glove compartment or trunk manifests any less expectation of privacy than a simple box or plastic container sitting on the seat of the car. Justice Blackmun, in a dissenting opinion in *Sanders*, argued that if one were to allow a search of the car, one also should allow a search of containers found therein because "the expectation of privacy in a suitcase found in the car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk."[231] Although one does not have to accept Justice Blackmun's position that because both the container and the trunk or glove compartment have equivalent expectations of privacy

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

222. *Id.* at 361 (Harlan, J., concurring). *See supra* text accompanying notes 36–41.

223. The most common examples of this result are the container cases prior to *Robbins*. *See, e.g., supra* note 132.

224. 417 U.S. 583 (1974).

225. *See supra* text accompanying notes 97–107.

226. *See supra* text accompanying notes 110–22.

227. *See supra* text accompanying notes 124–37.

228. United States v. Chadwick, 433 U.S. 1, 12–13 (1977).

229. *Id.* at 13.

230. *Id.*

231. 442 U.S. 753, 769 (1969) (Blackmun, J., dissenting). The *Ross* Court has agreed with this rationale by reaffirming Justice Blackmun's rejection of that distinction. United States v. Ross, 102 S. Ct. 2157, 2171–72 (1982).

both should be allowed to be searched, one can agree that an insignificant difference in the expectations of privacy does exist.

The distinction on which the Court relies, however, is the relative difference in the reasonable expectation of privacy between containers in the car and parts of the car itself. Yet it is not apparent why it is more reasonable to expect privacy in one's luggage than it is to expect privacy in one's locked glove compartment or trunk. What other reason exists for these securable areas if not privacy?[232]

Another reason arises for the Court's disparate treatment of these two items, a reason unrelated to the relative privacy interests. The Court in *Sanders* noted that "[t]he difficulties in seizing and securing automobiles have led the Court to make special allowances for their search."[233] Also, the imposition of a requirement to seize rather than search automobiles would create "severe, even impossible, burdens on many police departments."[234]

A concern for potentially excessive administrative burdens on police departments is legitimate; yet its proper relation to a warrant-preference approach to the fourth amendment is unclear. It also is questionable whether the administrative burden consideration has played a significant role in determining the reasonableness of privacy expectations. If it has, then the analytical framework of privacy is a facade behind which a different judicial process has been operating. These two developments—the emasculation of the impracticality connotation of the exigency requirement and the Court's illogical application of a reasonable expectation of privacy standard—cast considerable doubt on the Court's continued adherence to a warrant-preference approach under the automobile exception.

B. *The Search Incident to Arrest Exception*

The search incident to arrest exception is based solely on the existence of probable cause to arrest;[235] once that requirement is met, the subsequent search of the arrestee requires no further justification.[236] Courts historically have justified the search incident to arrest exception "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime."[237]

Because probable cause to believe that weapons or evidence will be found is not required,[238] it can be said that the exception is based on a func-

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232. "Privacy" is used here in the sense that one has both a possessory interest and a secrecy interest in his automobile and his possessions. *See* Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 840 (1974).

233. 442 U.S. 753, 763 n.10 (1979).

234. *Id.* at 765–66 n.14. This administrative burden distinction also was recognized by the *Ross* Court. United States v. Ross, 102 S. Ct. 2157, 2166 n.16 (1982).

235. United States v. Robinson, 414 U.S. 218, 235 (1973).

236. *Id.*

237. Preston v. United States, 376 U.S. 364, 367 (1964).

238. *See supra* text accompanying note 199.

tional presumption of exigency; that is, the courts will assume a weapon or destructible evidence exists because it is preferable to allow officers to insure their own safety than to create a situation in which the officer must either risk his safety or show probable cause for the search.

The Court's response to this functional presumption of exigency has been to allow an extensive search of the person of the arrestee[239] and a search of the area "within his immediate control."[240] Consistent with a warrant-preference approach, the scope of the search of the area in which the person is arrested has diminished through the years.[241]

The scope of the permissible search of the person and the search of containers found in an automobile, however, has not been consistent with a warrant-preference approach. Ostensibly, the aims of an extensive search of the person of the arrestee are the seizure of weapons and the prevention of the destruction of evidence.

If the search is for weapons, the more limited *Terry* search[242] is sufficient to protect an officer who stops individuals for investigatory reasons. This limited pat-down search also would protect an arresting officer. The Court has asserted the need for a more thorough search because the danger " 'is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed.' "[243] The problem with the Court's argument is that it presupposes an inadequate search. It also does not consider any steps the police may take to insure the inability of the arrestee to use any weapons a search may fail to reveal.

If a limited search is effective to assure an officer's safety (as in *Terry*), it is not clear how the passage of time can change the effectiveness of that initial search. In addition, the simple expedient of handcuffing an arrestee would eliminate any possibility of using a weapon that the pat-down search may have failed to detect. If the search is for destructible evidence, it again appears that the simple expedient of restraining the arrestee in some manner would prevent the possibility of destruction.

In the search for weapons some evidence will come into plain view. The propriety of seizing that evidence is not questioned. Yet there seems to be little rationale for allowing a full search solely for evidence.

In *Robinson* the Court allowed the search of a cigarette package after it had been taken from the defendant.[244] The majority failed to recognize the distinction, noted by Justice Marshall's dissenting opinion, that the seizure of the cigarette package satisfied any interest of the police; thus no further justification existed for the immediate search.[245]

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239. United States v. Robinson, 414 U.S. 218 (1973).

240. Chimel v. California, 395 U.S. 752, 763 (1969).

241. *See supra* text accompanying notes 155–91.

242. *See supra* note 185.

243. United States v. Robinson, 414 U.S. 218, 253 (1973) (Marshall, J., dissenting) (quoting People v. Superior Court, 7 Cal. 3d 186, 214, 496 P.2d 1205, 1225, 101 Cal. Rptr. 837, 857 (1972) (Wright, C.J., concurring)) (emphasis in original).

244. 414 U.S. 218, 224 (1973).

245. *Id.* at 256 (Marshall, J., dissenting).

Justice Powell in his concurring opinion sought to provide justification for the search of the cigarette package, arguing:

> If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. . . . The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.[246]

Justice Powell's monolithic approach to the fourth amendment is inconsistent with the Court's statement in *Chadwick* that, once the footlocker had been seized, "it was unreasonable to undertake the additional and greater intrusion of a search without a warrant,"[247] because, "[t]hough surely a substantial infringement of [the defendant's] use and possession, the seizure did not diminish [the defendant's] legitimate expectation that the footlocker's contents would remain private."[248] In *Chadwick* the Court ruled that the search was not incident to arrest solely because the search had been removed in time from the arrest.[249] It is not clear how temporal proximity changes the legitimate expectation of privacy once the item already has been seized.

Furthermore, the *Robinson* Court's allowance of the search, when no exigency justified it, is inconsistent with the Court's position that a "search . . . must . . . be strictly circumscribed by the exigencies which justify its initiation."[250] Seizure alone often will serve the objectives of confiscation of weapons and avoidance of the destruction of evidence. It was self-evident in *Robinson* when the officer seized the cigarette package that the seizure removed any possibility of the defendant's obtaining a weapon or destroying any evidence contained therein.

Thus, the Court substantially departs from its expressed preference for warrants by permitting a warrantless search when a seizure serves the objectives of the exception. Allowance of this gratuitous search is a substantial retreat from the Court's requirement that any warrantless search be circumscribed by "the exigencies of the situation [making] that course imperative."[251]

A further reason exists to doubt that a Court loyal to a warrant-preference approach would permit an extensive search for evidence based solely on probable cause to arrest: "There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search."[252] Because "in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full

246. *Id.* at 237–38 (Powell, J., concurring) (footnote omitted).
247. 433 U.S. 1, 13 (1977) (footnote omitted).
248. *Id.* at 13–14 n.8.
249. *Id.* at 15.
250. Terry v. Ohio, 392 U.S. 1, 25–26 (1968).
251. McDonald v. United States, 335 U.S. 451, 456 (1948).
252. United States v. Robinson, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting). The potential for police abuse is discussed below as an element of the Court's functional approach to automobile searches.

arrest is discretionary with the officer,"[253] it is extremely difficult for a court to review effectively the legitimacy of any arrest. The coupling of arbitrary police power with an extensive right to search the person of the arrestee is in contravention of the Court's belief that the protection offered by the fourth amendment is assured only when a neutral magistrate can evaluate the reasonableness of any police search or seizure.[254]

As discussed earlier,[255] limitation of police searches to a *Terry* frisk and to seizure of objects found as a result thereof would eliminate much of the problem. One commentator has suggested further that the Court "exclude from evidence anything but a weapon found in a search incident to arrest for a crime, such as a traffic violation, for which there existed no justification to search for anything but a weapon."[256] To date, however, the Court has not been receptive to this rule.[257]

The second and more radical departure from a warrant-preference approach is the *Belton* Court's recent "bright-line" rule[258] for the search of containers found in an automobile incident to its occupant's arrest. Prior to *Belton* the Court in *Chimel* had determined that the scope of a permissible search of the area in which one is arrested extends only to "the area into which an arrestee might reach in order to grab a weapon or evidentiary items."[259] Because application of this standard to searches of containers found in a car produced diverse results in the lower courts, the Supreme Court recognized the need for "'[a] single, familiar standard . . . to guide police officers.'"[260]

Consistent with that need, the Court in *Belton* interpreted the *Chimel* standard to include the passenger compartment of an automobile.[261] The Court further held that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach."[262] "Container" was defined as "denot[ing] any object capable of holding another object";[263] and thus included glove compartments and luggage.[264]

Despite the Court's assertion in *Belton* that its conclusion "in no way alters the fundamental principles established in the *Chimel* case regarding the

253. *Id.*
254. Terry v. Ohio, 392 U.S. 1, 21 (1968).
255. *See supra* text accompanying notes 244–51.
256. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 156.
257. *Id.*
258. 453 U.S. 454, 469 (1981) (Brennan, J., dissenting).
259. Chimel v. California, 395 U.S. 752, 763 (1969).
260. 453 U.S. 454, 458 (1981) (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).
261. 453 U.S. 454, 460 (1981).
262. *Id.* (footnote omitted).
263. *Id.* n.4.
264. *Id.*

basic scope of searches incident to lawful custodial arrests,"[265] it is clear that the formulation does a great deal more than merely "determine the meaning of *Chimel*'s principles in this particular and problematic context."[266] First, the formulation does not distinguish between a container and its contents.[267] If one assumes (and it is a questionable assumption) that containers within the passenger compartment are within the arrestee's immediate control, it does not follow inexorably that their contents also are within his immediate control. The Court's interpretation is even more removed from any rational definition of the *Chimel* standard because the Court's view of the area under the arrestee's immediate control includes glove compartments (apparently locked or not) and luggage. In addition, the search can be performed even after police remove the occupant from the automobile.[268]

The Court's interpretation of the *Chimel* standard is a perverse extension of any rational meaning of the words "area within one's immediate control"; this liberal interpretation is a retreat to the "constructive possession"[269] rationale of *Harris*.[270]

Moreover, this formulation ignores the lesser intrusion engendered by seizure of the container.[271] Because "searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest,"[272] little apparent reason exists for the Court to hold as coexistent the permissible scope of a search of an automobile and containers found therein pursuant to probable cause to arrest.[273] Absent probable cause to believe that the container "contains some immediately dangerous instrumentality"[274] or absent an emergency,[275] it is questionable why the Court should permit a search when a less intrusive seizure of the container would be sufficient to fulfill the objectives of the search. In *Belton* seizure of the defendant's jacket served the officer's interests in securing his own safety and in avoiding the destruction of evidence.[276] No justification (under a warrant-preference approach) exists for allowance of the warrantless search.

The broad interpretation adopted by the Court also contravenes its earlier assertion in *United States v. Chadwick*[277]:

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265. *Id.*

266. *Id.*

267. This distinction did not escape Justice Brennan in his concurring opinion in United States v. Chadwick, 433 U.S. 1, 17 n.2 (1977) (Brennan, J., concurring). *See supra* text accompanying notes 121–22.

268. 453 U.S. 454, 456 (1981).

269. 331 U.S. 145, 164 (1947) (Frankfurter, J., dissenting).

270. *See supra* text accompanying notes 160–64.

271. Seizure of a container violates its owner's possessory interest; allowance of an additional search of the container further violates its owner's secrecy interest. *See* Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 840 (1974).

272. United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977).

273. The propriety of a search of containers under the automobile exception will be discussed *infra* at text accompanying notes 308–28.

274. United States v. Chadwick, 433 U.S. 1, 15 n.9 (1977).

275. For example, if the police had reason to believe that safe transport of all containers to the police station could not be achieved, an immediate search might be permissible.

276. *See supra* text accompanying notes 21–22.

277. 433 U.S. 1 (1977).

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[278]

If "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears,"[279] it is difficult to understand how the Court can, consistent with a warrant-preference approach to the fourth amendment, formulate such an expansive exception that breaks so sharply with prior doctrine. Because the seizure of containers found in an automobile, rather than their immediate search, entails none of the severe administrative burdens on police departments associated with a constitutional requirement to seize an automobile,[280] no purpose consistent with a warrant-preference approach could justify the broad exception adopted by the Court in *Belton*.

C. *The Need for a More Functional Approach*

The Court's departure from a warrant-preference approach is due to the necessity for practical guidelines for police. The nature of law-enforcement techniques and the infinitely varying situations in which police must apply those techniques cannot always be reconciled with a requirement for a warrant.

Under a warrant-preference approach a court is faced constantly with a hard choice[281] when reviewing the reasonableness of a warrantless automobile search—if the search was unreasonable, the court's ad hoc knowledge of the defendant's guilt renders exclusion of the evidence exceedingly difficult for the court to order. Thus, the court either must exclude the evidence seized and, consequently, allow an apparently guilty defendant to go free, or somehow fit the search within one of the exceptions to the warrant requirement. The choice is especially hard when it is clear to the court that a warrant would have been issued if it had been sought.[282]

The all-or-nothing dichotomy imposed on the courts by the exclusionary rule creates pressure to expand the "few"[283] and "well-delineated"[284] exceptions to the warrant requirement. The resulting decisions often are tortured interpretations of an exception's requirements. An example of the problem is *Chambers*,[285] in which the Court viewed the inherent mobility of the auto-

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278. *Id.* at 15 (footnote omitted).

279. Coolidge v. New Hampshire, 403 U.S. 443, 461–62 (1971).

280. Arkansas v. Sanders, 442 U.S. 753, 765–66 n.14 (1979). *See also* United States v. Ross, 102 S. Ct. 2157, 2166 n.16 (1982).

281. This result primarily is due to the various interests, societal and individual, involved in the determination whether a search should be considered within one of the exceptions to the warrant requirement. *See generally* Haddad, *Well-delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198 (1977).

282. *Id.*

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

284. *Id.*

285. *See supra* text accompanying notes 72–81.

mobile as sufficient to meet the exigency requirement of the *Carroll* exception despite the automobile's presence at the police station and the slight possibility that the car would be moved.[286] Regardless of the Court's reluctance to strike down a search that most likely would have been allowed if a search warrant had been sought, this interpretation of the exigency requirement only dilutes its meaning and, consequently, leads to a broadening of the exception.[287]

The Court's reluctance to strictly adhere to a warrant requirement also is due to its perception that in some cases that adherence will protect privacy interests only marginally while imposing substantial costs on effective law enforcement. In particular, the Court's allowance of a full search of the person incident to arrest is reflective of this perception. The search incident to arrest exception, while fulfilling law enforcement's "need to disarm the suspect in order to take him into custody [and its] need to preserve evidence on his person for later use at trial,"[288] also has been justified on the ground "that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person."[289] Because of the "legitimate and overriding governmental concern"[290] for the protection of the officer and the avoidance of the destruction of evidence, "[n]o reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest."[291]

This comparison of law-enforcement costs and perceived marginal privacy interests also has been advanced as a justification for the Court's adoption in *Belton* of a broad interpretation of the *Chimel* standard. The Court in *Robbins* observed that "[a]ny 'bright line' rule does involve costs. *Belton* trades marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence. The balance of these interests strongly favors the Court's rule."[292]

Finally, the Court's departure from a warrant-preference approach may be attributable to its recognition of the disparate results obtainable by application of the automobile exception and the search incident to arrest exception to the same facts. The incongruity of such a possibility did not escape Justice Stevens in his dissenting opinion in *Robbins*:

> It is quite clear to most of us that this case and *New York v. Belton* . . . should be decided in the same way. Both cases involve automobile searches. In both cases, the automobiles had been lawfully stopped on the highway, the occupants had been lawfully arrested, and the officers had probable cause to believe that the vehicles contained contraband.[293]

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286. *Id.*

287. Another example of this process is United States v. Edwards, 415 U.S. 800 (1974). *See supra* note 76.

288. United States v. Robinson, 414 U.S. 218, 234 (1973).

289. *Id.* at 237 (Powell, J., concurring).

290. *Id.*

291. *Id.*

292. Robbins v. California, 453 U.S. 420, 431 (1981) (Powell, J., concurring).

293. *Id.* at 444. *Ross*, of course, is a step toward uniformity of application of fourth amendment policies under both the automobile exception and the search incident to arrest exception.

Although it is not certain that the divergent holdings in *Robbins* and *Belton* were predicated solely on the difference in theories argued,[294] the *Robbins* Court expressly noted that "[i]n particular, it has not [been] argued that the opening of the packages was incident to a lawful custodial arrest."[295] It is difficult to see any rational distinction between *Belton* and *Robbins* other than the separate exception theories under which each was argued. Distinguishing between the relative privacy interests of a plastic package and a jacket pocket is tenuous at best.[296] In addition, any distinction between the passenger compartment and the trunk of a car also would be irrational once the arrest has occurred. Thus, because divergent and irrational results are possible when courts can apply overlapping[297] exceptions to the same facts, the Court may feel compelled to move toward a more uniform analytical framework.[298]

V. THE IMPLICIT ANALYTICAL FRAMEWORK AND ITS APPLICATION IN VARIOUS CONTEXTS

If the Court indeed has moved away from a warrant-preference approach to automobile search and seizure cases, upon what implicit analytical course has it embarked? This Comment takes the position that the Court has chosen a course of analysis more cognizant of the competing interests present in all automobile searches and that it has engaged in a balancing of those interests.

The Court's movement toward a more uniform analytical framework has been compelled by certain societal and individual interests present in all automobile searches: the government's interest in efficient law enforcement[299] and the individual's interest in his privacy.[300] Utilizing several considerations, the Court has sought to resolve the cases before it in a manner most consistent with the importance of these two interests.

The more functional approach to automobile searches attempts to reconcile the practical realities of effective law enforcement with the values of personal autonomy and privacy rather than to strictly adhere to a warrant requirement. Under the functional approach the Court first will look to the benefits to society of the practice employed by the police in their efforts to

294. *See supra* text accompanying notes 31–35 & 46–48.

295. 453 U.S. 420, 429 n.3 (1981).

296. Justice Stevens remarked that this distinction would be a "curious conclusion." *Id.* at 444 n.1 (1981) (Stevens, J., dissenting).

297. For an excellent discussion of the degree to which the automobile exception and the search incident to arrest exception apply to and overlap in the same factual circumstances, see Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1012–22 (1976).

298. United States v. Ross, 102 S. Ct. 2157 (1982), in which the Court used a quasi-*Belton* standard in an automobile exception case (in terms of the permissible scope of the search), is evidence of this movement.

299. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 234 (1973); Carroll v. United States, 267 U.S. 132, 153 (1925).

300. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

"ferre[t] out crime."[301] There are two major benefits: effective law enforcement[302] and avoidance of excessive administrative burdens.[303]

Administrative burdens, for purposes of this Comment, are only those additional burdens that a warrant requirement would impose on police. For instance, when the normal police procedure would be to seize the automobile anyway, a requirement that a warrant be obtained prior to a search would not impose any significant burden on police departments. As a matter of constitutional policy, then, the Court should be concerned only with those requirements that impose burdens beyond the normal police procedure.

The Court then will weigh the benefits against the detriments the practice may impose—the degree of infringement of individual privacy interests[304] and the potential for abuse of the practice[305]—and against any less intrusive yet comparably efficient alternatives.[306]

If the benefits substantially outweigh the detriments or alternatives, the Court will uphold the practice. If the benefits equal the detriments, or especially if a less intrusive yet comparably efficient alternative exists, the Court will strike down the practice.[307] Application of this more functional approach in various contexts will reveal a greater degree of coherence in the Court's decisions.

A. *Search of the Automobile Versus Search of Containers Found Within the Automobile*

Despite Chief Justice Burger's assertion that one should view differently the search of luggage as part of the general search of the car compared with a specific search of luggage as "the suspected locus of the contraband,"[308] application of the more functional analytical framework reveals similar resolutions to the two searches.

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301. Johnson v. United States, 333 U.S. 10, 14 (1948).

302. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 234 (1973).

303. This concern was noted by the Court in *Sanders* when it stated that "[t]he difficulties in seizing and securing automobiles have led the Court to make special allowances for their search," 442 U.S. 753, 763 n.10 (1979), and further that "[s]uch a constitutional requirement [to seize rather than search an automobile] therefore would have imposed severe, even impossible, burdens on many police departments." *Id.* at 765–66 n.14.

304. In both *Chadwick* and *Sanders* the Court distinguished between the search of an automobile and the search of any luggage contained therein by their relative privacy interests, the luggage being characterized as having a greater privacy interest. *See supra* text accompanying notes 110–37. Under *Ross*, however, those distinctions apparently are irrelevant, unless the locus of probable cause is a specific container. United States v. Ross, 102 S. Ct. 2157, 2168 (1982).

305. *See supra* text accompanying notes 252–53. For an excellent discussion of this potential problem, see LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127.

306. In *Chadwick* the Court struck down the search of the luggage because "[t]he initial seizure and detention of the footlocker . . . [was] sufficient to guard against any risk that evidence might be lost." 433 U.S. 1, 13 (1977). See also Justice Marshall's assertion in *Ross* that seizure alone of containers found within an automobile will efficiently serve law enforcement objectives. United States v. Ross, 102 S. Ct. 2157, 2176 (1982) (Marshall, J., dissenting).

307. *See, e.g.*, United States v. Ross, 102 S. Ct. 2157 (1982) (upholding the search); United States v. Chadwick, 433 U.S. 1 (1977) (striking down the search).

308. Arkansas v. Sanders, 442 U.S. 753, 767 (1979) (Burger, C.J., concurring).

In most cases an immediate search of the automobile clearly will be instrumental in both furthering the goal of effective law enforcement and avoiding excessive administrative burdens through the imposition of a requirement to seize the automobile. Avoidance of excessive administrative burdens was recognized expressly by the *Sanders* Court: "The difficulties in seizing and securing automobiles have led the Court to make special allowances for their search."[309]

No such difficulties, however, attend luggage or containers found within the automobile. The *Sanders* Court, in discussing the rationale for the *Chambers* search, noted:

> In *Chambers*, if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. . . . Such a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments. . . . No comparable burdens are likely to exist with respect to the seizure of personal luggage.[310]

Furthermore, the *Robbins* Court held that "[w]hile both cars and luggage may be 'mobile,' luggage itself may be brought and kept under the control of police."[311]

Thus, the lack of excessive administrative burdens coupled with the existence of a less intrusive yet comparably efficient alternative—seizure rather than search—serves as a rational point of distinction between automobiles and luggage or containers found within those automobiles. Reliance on this distinction is more sensible than any distinction between the relative privacy interests of containers found in an automobile and the automobile's glove compartment or trunk.[312]

Reliance on an administrative burden-efficient alternative distinction also eliminates any possible reason to distinguish various types of containers according to their relative privacy interests. As the *Robbins* Court noticed, "[E]ven if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished."[313] The distinction would reduce one's constitutional protections to a function of his economic means.[314]

Thus, reliance on a warrant requirement based on privacy concepts is unnecessary to justify the separate treatment of automobiles and containers found therein. Instead, courts can find justification in the separate administrative burden and less intrusive alternative concepts. An exception to this distinction, however, should be recognized whenever there is an emergency or a

309. *Id.* at 763 n.10.

310. *Id.* at 765–66 n.14.

311. 453 U.S. 420, 424 (1981).

312. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 12–13 (1977).

313. 453 U.S. 420, 426 (1981).

314. "What one person may put into a suitcase, another may put into a paper bag." *Id.* The *Ross* Court has reaffirmed the *Robbins* Court's rejection of an unworthy container rule. United States v. Ross, 102 S. Ct. 2157, 2171 (1982).

reasonable suspicion that the container contains an inherently dangerous object[315] (such as a bomb), thus justifying an immediate search.

The automobile-container dichotomy should be maintained for fourth amendment purposes despite the *Ross* Court's assertion that no administrative burden distinction can be made between containers and automobiles.[316] Indeed, the Court's treatment in *Ross* of *Chadwick* and *Sanders* undermines its argument that "until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus, in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained."[317]

The logic of this statement is inconsistent with the Court's retention of a distinction between a *Ross* search and a *Chadwick-Sanders* search. In particular, the Court argued that "[a] temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual—and without as great a burden on the police—as in the case of the seizure of an automobile."[318] In its discussion of *Sanders*[319] the *Ross* Court further emphasized that "[m]oreover, none of the practical difficulties associated with the detention of a vehicle on a public highway that made the immediate search in *Carroll* reasonable could justify an immediate search of the suitcase, since the officers had no interest in detaining the taxi or its driver."[320]

Thus, to be consistent internally, the majority opinion in *Ross* apparently is drawing a distinction between those cases in which the locus of probable cause is the automobile in general[321] and those in which the locus of probable cause is a specific container.[322] Besides producing absurd results,[323] this distinction is inconsistent with the underlying assumption of the *Ross* Court majority opinion that until a container is searched, the automobile from which it was removed is imbued somehow with a latent sense of probable cause that becomes more concrete as each container fails to reveal the suspected contraband.[324]

If, as the Court implies, the absence of evidence creates probable cause to find it elsewhere (a curious notion), then certainly a seizure of the auto-

315. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 14 n.9 (1977).

316. United States v. Ross, 102 S. Ct. 2157, 2171 n.28 (1982).

317. *Id.*

318. *Id.* at 2166 n.16.

319. For a description of the facts of *Sanders*, see *supra* text accompanying notes 124–28.

320. United States v. Ross, 102 S. Ct. 2157, 2166 n.18 (1982).

321. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

322. Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

323. To illustrate the absurdity: If police are tipped by a reliable informant that an individual is carrying drugs inside a suitcase within the trunk of his car, the allowance of an immediate search will depend on the contents of the trunk. If the trunk contains several suitcases, *Ross* would permit an immediate search; if, however, police found only one suitcase, *Chadwick* and *Sanders* prohibit an immediate search because the locus of probable cause is a single container. Thus Justice Marshall's assertion that "[s]urely the protection of the warrant requirement cannot depend on a numerical count of the items subject to search." United States v. Ross, 102 S. Ct. 2157, 2180 n.10 (1982) (Marshall, J., dissenting).

324. *See supra* text accompanying note 317.

mobile also would be required in a *Chadwick-Sanders* search. Consequently, the retention of a distinction between *Ross* and *Chadwick-Sanders* undermines the basic premise of *Ross* —avoidance of excessive administrative burdens on police departments.[325] Moreover, the majority opinion in *Ross* fails to explain why seizure of containers cannot be accomplished after a thorough search of the automobile—the search would obviate any possibility that probable cause to search the automobile will arise upon the absence of contraband in the containers. Although the functional approach allows for a distinction in treatment of containers and automobiles based on the differences in administrative burdens, the Court's retention of a dichotomy between *Ross* and *Chadwick-Sanders* only creates confusion and undercuts the validity of this distinction.

It also is noteworthy that the *Ross* Court did not explicitly address the potential police abuse of a *Ross* search. Apparently, the Court considers the ad hoc determination of probable cause by a neutral magistrate[326] to be a sufficient safeguard.[327] Justice Marshall correctly pointed out that the inherent purpose of a prior determination of probable cause by a neutral magistrate is the avoidance of police abuse.[328]

This functional approach also cannot justify the broad rule adopted by the Court in *Belton*. There seems to be no rational explanation of the broad, all-inclusive exception save the simplicity of application, yet surely a blanket requirement of a seizure also meets this goal. Although the more functional approach may explain more coherently the direction the Court has taken in automobile search and seizure cases, because of the various weights each Justice may assign to the competing interests it cannot explain every holding by the Court.

B. *Search and Seizure of the Person in the Automobile*

Under *Robinson* a full search of the person of the arrestee is permitted.[329] Because the reasonableness of the search is based on a functional presumption of exigency,[330] it is not clear how the search, consistent with a warrant-preference approach, can exceed the protective scope of a *Terry* frisk.[331] That type of search, however, is more readily explainable under a functional approach.

In furthering the goals of disarming the suspect in order to take him into custody and preserving evidence on his person for later use at trial, a full search provides a benefit to society through effective law enforcement. It is

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325. *Id.*

326. It is questionable how neutral a magistrate can be once the evidence showing that the defendant is actually guilty has been produced.

327. United States v. Ross, 102 S. Ct. 2157, 2172 (1982).

328. *Id.* at 2175 (Marshall, J., dissenting). *See also supra* text accompanying note 209.

329. *See supra* text accompanying notes 192–99.

330. *See supra* text accompanying note 238.

331. *See supra* text accompanying notes 242–43.

not clear, however, that courts would impose any excessive administrative burden by limiting the search to a *Terry* frisk and to seizure of any objects discovered on the arrestee's person.

Still, under the Court's perception that "[t]he danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop,"[332] the Court may choose to disregard the potentially negligible administrative-burdens limitation that a *Terry* frisk would impose. Furthermore, because of the Court's belief that a full search is necessary to eliminate the "far greater" danger it perceives, the less intrusive alternative of a *Terry* frisk coupled with seizure of any objects found would be (to the Court) a less efficient safeguard for police.

As a consequence of the Court's perception, distinguishing a weapons-motive search from an evidence-motive search is pointless because a full search for weapons necessarily will render any evidence found subject to the plain view[333] exception.

The point of dissension between the majority and the dissent in *Robinson* centered on the detriments of allowing a full search. Justice Powell in his concurring opinion asserted that once a person is arrested, he "retains no significant Fourth Amendment interest in the privacy of his person."[334] Justice Marshall, while recognizing that the Court had to balance "the individual's interest in remaining free from unnecessarily intrusive invasions of privacy and society's interest that police officers not take unnecessary risks in the performance of their duties,"[335] chose not to resolve the issue on that ground.[336] Instead, Justice Marshall argued that no justification existed for the search of the cigarette pack after its seizure.[337] Justice Rehnquist, in writing the majority opinion, responded that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search."[338]

Thus, a major point of contention in *Robinson* between the Justices within this functional approach was the relative merits of the benefit to effective law enforcement by allowing a full search versus the protection of individual privacy interests by insisting on a less intrusive alternative. Therefore, deter-

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332. United States v. Robinson, 414 U.S. 218, 234 (1973).

333. *See supra* note 92.

334. 414 U.S. 218, 237 (1973) (Powell, J., concurring).

335. *Id.* at 254 (Marshall, J., dissenting).

336. *Id.*

337. *Id.* at 256. Justice Marshall evidently resolved the issue on the existence of a comparably efficient alternative. *See supra* text accompanying notes 301–06.

338. 414 U.S. 218, 235 (1973).

mination of an issue within the functional approach framework can turn on the Court's perception of the relative merits of the interests asserted.

A further point of contention within this framework in *Robinson* was the potential for abuse of the practice. Justice Marshall voiced his concern that allowing a full search could lead to a "pretext arrest"[339] in traffic arrests. Because the defendant in *Robinson* had been arrested lawfully,[340] the *Robinson* majority merely stated that it would "leave for another day questions which would arise on facts different from these."[341] Within the functional approach framework, then, the Court has asserted that because of the large benefit to society that a full search confers through its contribution to effective law enforcement, it would permit the practice despite the possible existence of a less intrusive yet comparably efficient alternative and the potential abuse of the practice through the pretext arrest.

C. *The* Chambers-*Type Search*

The Court's decision in *Chambers* to permit a warrantless search of an automobile at the police station when the *Carroll* rule would have permitted the search at the scene of the arrest is reflective of the value judgments the Court will incorporate into the calculus of this functional approach. The decision clearly falls outside a warrant-preference approach because under the facts of the case[342] the search failed to meet the exigency requirement of the *Carroll* exception. Justice White's tenuous assertion that "[t]he probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured"[343] was a shaky reliance on the inherent mobility of the automobile to meet the exigency requirement.

In striking down the search in *Coolidge*,[344] the Court expressly rejected inherent mobility as sufficient to meet the *Carroll* exigency requirement:

> In this case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plainclothesmen, and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense "mobile." A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.[345]

Thus, *Chambers* cannot be reconciled rationally with a warrant-preference approach.

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339. *Id.* at 248 (Marshall, J., dissenting). *See supra* text accompanying notes 252–53.
340. 414 U.S. 218, 221 n.1 (1973).
341. *Id.*
342. *See supra* text accompanying notes 63–64.
343. 399 U.S. 42, 52 (1970).
344. *See supra* text accompanying notes 82–94.
345. 403 U.S. 443, 461 n.18 (1971).

Under a functional approach the decision makes more sense. Although arguably little additional administrative burden exists in requiring a seizure until a warrant is procured,[346] there is a benefit to effective law enforcement by allowing an immediate search.

Furthermore, the potential for police abuse of later searches is minimal because a prior *Carroll* search must be justified before the later search will be permitted.[347] The *Chambers* Court thus saw little reason to impose a formalistic exercise when search warrants would be issued in the vast majority of cases.

The *Chambers* Court was undecided on the degree of invasion of privacy interests that an immediate search would pose; in essence, it viewed an immediate search as "debatably"[348] equivalent to a continued seizure in its relative invasion of privacy interests. In this process of weighing the detriments of the police practice Justice Harlan disagreed with the majority. In reviewing the degree of privacy interest invasion, he argued that "the lesser intrusion will almost always be the simple seizure of the car for the period . . . necessary to enable the officer to obtain a search warrant."[349]

Justice Harlan also condemned the police practice because of the existence of a less intrusive alternative—seizure and detention of the automobile until a search warrant could be obtained, unless the occupant consented to an immediate search.[350] This alternative would permit the occupant of the automobile to determine for himself which is the lesser or greater intrusion. Although the majority did not respond to this argument, they may have felt that this alternative was not comparably efficient because of the greater expenditure in police time and effort.[351]

VI. Police Guidelines Under the Functional Approach

A review of the development of the law in automobile searches clearly shows that this development has not been loyal to a warrant-preference approach. The Court's recognition of the necessity of reconciling effective law-enforcement needs with an expressed judicial approach to the fourth amendment has forced the Supreme Court to expand the warrant requirement exceptions to the point that the requirement has lost much of its efficacy.

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346. Despite the *Sanders* Court's assertion that the *Chambers* Court did not want to impose a requirement on police departments to seize an automobile, 442 U.S. 753, 765 n.14 (1979), the issue of this imposition was not before the *Chambers* Court. In *Chambers* the police voluntarily had seized the vehicle without any prior requirement to do so. *See supra* text accompanying notes 72–73. Thus, the issue before the *Chambers* Court was, given the initial seizure and given that a *Carroll* search would have been permissible, whether the police were under a requirement to continue that seizure until a warrant was procured. The difference in administrative burdens is obvious. *See also supra* text between notes 303 & 304.

347. As discussed earlier, under the functional approach, administrative convenience will, in most cases, justify the initial search unless the normal police procedure is to seize the automobile anyway. *See supra* text accompanying notes 303–04.

348. 399 U.S. 42, 51 (1970).

349. *Id.* at 63 (Harlan, J., concurring in part and dissenting in part).

350. *Id.* at 64.

351. *See supra* text accompanying notes 287–92.

The Court's ambiguous adherence to a warrant-preference approach, rendered all the more inarticulable by the expansion of the meaning of exigency[352] and the introduction of inapplicable concepts of privacy,[353] is in contravention of the principle that

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field." [354]

A further incongruity in this approach consists of the divergent results obtainable by application of different exception theories to similar facts.[355]

These weaknesses are not attendant to the more functional approach under which this Comment asserts the Court implicitly has been operating. This approach recognizes the competing interests present in all automobile searches and has the advantage of incorporating consideration of all these searches into a single analytical framework.[356]

A. *Search of the Automobile*

The allowance of a warrantless search of an automobile pursuant to the automobile exception or to the search incident to arrest exception is a response by the Court to the difficulty of seizing and securing automobiles.[357] The guidelines that the Court has formulated for this search under the Court's asserted warrant-preference approach are indeterminate because of the Court's ambiguous adherence to the requirement of exigency and the requirement of a reasonable expectation of privacy.[358]

Under the functional approach the general rule for searches of automobiles, subject to several exceptions, is simple: when the police have probable cause[359] to search the automobile, a full search of the automobile is permissible. This general search, however, does not extend necessarily to any containers found within the automobile; searches of containers are subject to a different rule.[360]

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352. *See supra* text accompanying notes 213–17.

353. *See supra* text accompanying notes 221–32.

354. New York v. Belton, 453 U.S. 454, 458 (1981) (quoting LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141).

355. *See supra* text accompanying notes 292–98.

356. *See supra* text accompanying notes 301–06.

357. Arkansas v. Sanders, 442 U.S. 753, 763 n.10 (1979).

358. *See supra* text accompanying notes 213–32.

359. In search incident to arrest cases probable cause to search is presumed, to assure the officer's safety. This presumption, however, also is subject to the exceptions to the general rule. *See infra* text accompanying notes 360 & 364. Furthermore, the presumption does not exist for those arrests, such as a traffic violation, for which no evidence is required. This limitation will eliminate the possibility of pretext arrests.

360. *See infra* subpart VI(C).

Although no significant difference exists between the privacy interests of an automobile and a container found therein,[361] allowing the warrantless search of the automobile when an accompanying warrantless search of a container found therein would be impermissible is grounded in the different administrative burden posed by a requirement to seize rather than search. The Court in *Arkansas v. Sanders*[362] noted that recognition of a requirement to seize rather than search the automobile "would have imposed severe, even impossible, burdens on many police departments."[363] Because a requirement of seizure would create such an excessive administrative burden, it would not be a comparably efficient alternative to an immediate search. Furthermore, because the police must have probable cause to search, the potential for abuse is minimal.

This general rule, however, ceases to be operative when the requirement to seize the automobile would not impose an excessive administrative burden on police departments. In particular, when the standard police procedure is to seize the automobile, a constitutional requirement to do so imposes no additional administrative burden.[364] The most common example of this standard procedure is the seizure of the automobile pursuant to the arrest of its occupants. Thus, in most instances in which probable cause to arrest exists before any search is initiated, and when the standard police procedure is to seize the automobile, the courts should disallow an immediate search.

When probable cause to arrest the occupants of the car arises during the search, however, the search should be permitted to continue. In addition, the requirement to seize when the seizure does not create excessive administrative burdens for police is subject to several exceptions. The first exception arises when the object seized from the automobile is in plain view. That seizure does not violate any reasonable privacy interest of the arrestee (or potential arrestee). In the absence of any indication that the discovery was not inadvertent,[365] problems of potential police abuse are minimal.

A second exception to the requirement of seizure arises when the police have a reasonable suspicion that the automobile contains an inherently dangerous object, such as a bomb. The need to insure the officer's safety is sufficiently important to outweigh the privacy interest the arrestee has in the automobile. Again, because reasonable suspicion that an inherently dangerous object exists is required, there is little danger of police abuse.

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361. *See supra* text accompanying notes 228–32. Indeed, the *Ross* Court firmly stated its understanding that "the privacy interests in a car's trunk or glove compartment may be no less than those in a moveable container." United States v. Ross, 102 S. Ct. 2157, 2171–72 (1982).

362. 442 U.S. 753 (1979).

363. *Id.* at 765–66 n.14.

364. For example, the police in New York v. Belton, 453 U.S. 454 (1981), probably would have impounded the automobile as a standard procedure pursuant to a custodial arrest. Conversely, in Carroll v. United States, 267 U.S. 132 (1925), the police would not have arrested the defendants or seized their automobile until after the search revealed the incriminating evidence. *See* United States v. Ross, 102 S. Ct. 2157, 2178 n.6 (1982) (Marshall, J., dissenting).

365. *See supra* note 92.

A final exception to the requirement of seizure is the existence of an emergency that renders the standardized police seizure impractical. The Court in *Belton* alluded to this consideration when it emphasized that when the lone officer searched the defendant's jacket he was on a deserted highway with four defendants standing nearby.[366]

B. *Search of the Person*

The permissible scope of the search of the person as incident to the search of the automobile is contingent on the existence of probable cause to arrest. When the search essentially is a *Carroll* automobile exception, for example, when no probable cause to arrest arises until after a search is initiated or completed, only a *Terry* frisk should be allowed.[367]

When the encounter concerns an arrest, the interest in assuring the officer's safety requires a more extensive *Robinson* search.[368] Because of the arrestee's continuing privacy interest in his personal possessions[369] and the need to avoid police abuse through a pretext arrest,[370] however, the search should be limited to seizure of any items found on the person of the arrestee.

As in the seizure requirement for automobiles, the requirement to seize items from the person of the arrestee is subject to the exceptions of plain view, reasonable suspicion that the object seized is inherently dangerous, and the existence of an emergency that renders mere seizure impractical. Absent probable cause to arrest, any search beyond a *Terry* frisk would require probable cause to believe that the occupant had destructible evidence on his person.

C. *Search of Containers Found Within the Automobile*

As noted by Chief Justice Burger in his concurring opinion in *Arkansas v. Sanders*,[371] a distinction should be made between those searches in which the locus of probable cause is a particular piece of luggage or a particular container and those in which the locus of probable cause is the automobile in general.[372] Because the functional approach considers the potential for abuse,[373] it is logical to require those police investigations that have focused on a particular container to be limited in scope to that container.[374] Thus, a

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366. 453 U.S. 454, 457 (1981) (quoting People v. Belton, 50 N.Y.2d 447, 454, 407 N.E.2d 420, 424, 429 N.Y.S.2d 574, 578 (1980) (Gabrielli, J., dissenting)).

367. *See supra* note 185.

368. *See supra* text accompanying notes 192–99.

369. *See supra* text accompanying notes 247–48.

370. *See supra* text accompanying notes 252–53.

371. 442 U.S. 753 (1979).

372. *Id.* at 767 (Burger, C.J., concurring). The *Ross* Court apparently adopted this position. *See supra* text accompanying notes 316–22.

373. *See supra* text accompanying notes 301–06.

374. The *Ross* Court agreed with this limitation. "Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." 102 S. Ct. 2157, 2172 (1982). Of course, if, by the defendant's actions prior to the search or by some other source, probable cause to

specific investigation such as that at issue in *United States v. Chadwick*[375] or *Arkansas v. Sanders*[376] should not, in the absence of probable cause, become a general investigation solely because of the presence of an automobile.

The interest in effective law enforcement is circumscribed by the locus of probable cause, which also indicates the boundaries beyond which the potential for police abuse becomes more realistic. Reconciliation of the need for effective law enforcement with the protection of individual privacy interests and the avoidance of police abuse also circumscribes the limits of police action for those containers within the permissible scope of police investigation. As a consequence, the proper course of police action (whether the investigation is general or specific) is seizure of the container until a warrant can be obtained to search it.

Seizure fulfills the interest in effective law enforcement because it deprives the arrestee of any potential weapon or evidence in the container. If no probable cause exists to arrest, seizure still will serve the law enforcement objective of preserving evidence. Analogous to Justice Harlan's observation in *Chambers v. Maroney*,[377] the occupant of the automobile always can consent to an immediate search.[378]

Although the requirement of seizure will create some administrative burdens for police departments, this concern is outweighed by the protection the requirement affords, both to the secrecy aspect of a person's privacy interest and to the avoidance of police abuse, by interposing a neutral magistrate's judgment between the seizure and the search.

The requirement of seizure, however, is subject to several exceptions. These exceptions are in response to situations in which it is either unnecessary or impractical to impose the requirement of seizure. As in the search of the automobile and of the person, these exceptions arise when the object is in plain view, when a reasonable suspicion exists that the container conceals an inherently dangerous substance, and when an emergency makes mere seizure impractical.

An emergency may be found when there are too many containers for the officer to handle safely while trying to control the actions of the arrestee. An emergency also may be found when the container simply cannot be seized, because it is either too large or too heavy.

Under the functional approach inquiry into the relative privacy interests of various containers is unnecessary. Thus, it has the advantage of removing such an ambiguous criterion from the decision-making process of police.

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believe the evidence or contraband sought has been removed from the original point of suspicion, the locus of probable cause can become general, embracing the whole automobile. Thus, the police standard of conduct would be governed by the standard for a general search. *See supra* subpart VI(A).

375. 433 U.S. 1 (1977).

376. 442 U.S. 753 (1979).

377. 399 U.S. 42 (1970).

378. *Id.* at 64 (Harlan, J., concurring in part and dissenting in part).

Furthermore, the removal of the reasonable expectation of privacy test as a standard for police obviates the possibility that protection under the fourth amendment will become a function of economic means.

The requirement of seizure of the container also serves the need for relatively clear guidelines for police. Moreover, because it serves police objectives of assuring the officer's safety and avoiding the destruction of evidence, the requirement of seizure meets the functional-approach goal of effective law enforcement. Finally, because the requirement of seizure places a neutral magistrate's judgment between the seizure and the search, it serves the functional-approach goals of protecting individual privacy rights and avoiding police abuse.

VII. CONCLUSION

The functional approach explains the history of automobile search and seizure cases more coherently than the Court's expressed warrant-preference approach.[379] Furthermore, the functional approach has the advantage of efficiently reconciling the practical realities of effective law enforcement with the need to protect individual privacy rights. Because the process of judicial analysis is not necessarily coexistent with that of the police decision-making process, the functional approach also provides the judiciary with the tools to propose clear standards for police in automobile search and seizure cases.

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379. *See supra* text accompanying notes 60–61.