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WARRANT REQUIREMENT — THE BURGER COURT APPROACH

ROBERT M. BLOOM*

In the closing week of the 1980 Term the Supreme Court decided two cases with similar facts involving searches of automobiles.[1] With Justice Stewart writing for the Court in both cases,[2] the Court required a warrant in one case and dispensed with a warrant in the other. Justice Powell, recognizing the inconsistency, stated in concurrence: "[T]he law of search and seizure with respect to automobiles is intolerably confusing. The court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided."[3]

If the Supreme Court finds the law intolerably confusing, how are lower courts and police officers in the field to determine whether a warrant is required?[4] This article will identify a cause of the confusion and suggest ways to eliminate it. The analysis will focus on the Burger Court approach to requiring a search warrant under the fourth amendment.[5]

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*The author wishes to acknowledge the valuable assistance provided by Michael McLane, a student in the class of 1983 at Boston College Law School, and Robert Weiland, a 1981 graduate of Boston College Law School.

1. Robbins v. California, 101 S. Ct. 2841 (1981); New York v. Belton, 101 S. Ct. 2860 (1981).

2. 101 S. Ct. 2841 (Stewart, J., joined by Brennan, White, and Marshall, JJ.); 101 S. Ct. 2860 (plurality decision) (Burger, C.J. and Powell, J. concurred in the judgment, *Id.* at 2908).

3. 101 S. Ct. at 2848 (Powell, J., concurring).

4. For an excellent discussion of this problem see La Fave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*,, 1974 SUP. CT. REV. 127, 141:

> Fourth Amendment doctrine, given force and effect by the exclusionary rules, 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 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."(footnotes omitted).

5. We will not examine the scope of a warrant once it has been issued. For an introduction to this area, see Stanley v. Georgia, 394 U.S. 557 (1969) (Stewart, J., joined by Brennan and White, JJ., concurring in the result) (Justice Stewart found that a search warrant, which

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The fourth amendment consists of two clauses joined by the conjunction "and":

> 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.[6]

On its face, this language would indicate that the two clauses should be read together. This has not always been done. The Supreme Court has at times interpreted the first clause, the reasonableness clause, as distinct from the second clause, the warrant clause, so that in determining whether a search was reasonable a warrant would be but one of the many factors to consider. This method of analysis will hereinafter be called the reasonableness approach. At other times the Court has interpreted the reasonableness clause in conjunction with the warrant clause and has held that generally a warrant is necessary for a search to be reasonable. This method of analysis will hereinafter be called the warrant approach.[7] The Court's choice of approach generally dictates whether a warrant will be required. A close analysis of the facts of the cases will demonstrate that the Burger Court has vacillated between the warrant approach and the reasonableness approach.[8]

To better appreciate the differences between the two approaches, their justifications and their impacts, this article will explore the early history of the fourth amendment as well as some pre-Warren Court cases. The Warren Court preferred the warrant approach.[9] It recognized exceptions only in instances in which it would

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was issued because there was probable cause to believe that appellant was involved in an illegal gambling enterprise, did not authorize federal agents to view reels of moving picture film found in appellant's bedroom by means of appellant's projector.); Ybarra v. Illinois, 444 U.S. 85 (1979) (The Court held that a patron of a bar could not be searched simply because he was in the bar when police officers came to search bartender suspected of selling heroin).

6. U.S. CONST. amend. IV.

7. For a discussion of the various approaches to the fourth amendment warrant requirement see discussion of United States v. Rabinowitz, 339 U.S. 56 (1950), text *infra* at notes 46-61.

8. Justices Rehnquist and Blackmun, however, have been consistent proponents of the reasonableness approach. *See* Robbins v. California, 101 S. Ct. 2841, 2851 (1981) (dissenting opinion of Blackmun and Rehnquist, JJ.); New York v. Belton, 101 S. Ct. 2860 (1981); and United States v. Edwards, 415 U.S. 800 (1974).

9. *See infra* text accompanying notes 62-109. *See also* Cooper v. California, 386 U.S. 58 (1967) (for instances where the Warren Court adopted the reasonableness approach); note 63

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not be practical to secure a warrant.[10] A consideration of the Warren Court Era warrant approach will show how the Burger Court has misapplied some of those concepts.

An analysis of the Burger Court will show that from the 1970 Term until approximately the 1976 Term, the Burger Court deviated from the Warren Court's preference for the warrant approach and generally utilized a reasonableness approach to the fourth amendment. Apparently because it was not entirely secure in its adoption of the reasonableness approach, the Burger Court sought to justify its rationale by misapplying the doctrine of expectation of privacy developed by the Warren Court. *Katz v. United States*[11] held that an individual's expectation of privacy was a suitable criterion for determining whether the fourth amendment was applicable. Under *Katz*, once the fourth amendment was implicated, it was a separate question whether a warrant was required.[12] The Burger Court, misapplying *Katz*, has focused on expectations of privacy in determining whether a warrant is required. Even where an expectation of privacy existed, so that the fourth amendment was applicable, a lesser privacy expectation was found to exist which justified the Court's use of the reasonableness approach and the resulting warrantless activity.

In the October 1976 Term, the Burger Court explicitly stated its preference for the warrant approach.[13] To maintain doctrinal consistency with its previous approach, the Court utilized a warrant approach when it believed that there was a sufficient expectation of privacy. This article will examine the considerable confusion in fourth amendment law created by the Burger Court's sliding scale of expectation of privacy.

In the conclusion, the article will argue for a consistent application of the warrant approach and an elimination of the categorization of expectation of privacy. This would provide a more workable fourth amendment standard than the abstract analysis now required to measure degrees of expectation of privacy.

History

A complete appreciation of the fourth amendment requires a

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infra.

10. "The scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry v. Ohio 392 U.S. 1, 19 (1968) (quoting Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

11. 389 U.S. 347 (1967).

12. *Id.* at 353-54.

13. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-53 (1977).

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familiarity with the events in England and the colonies which led to its adoption. Historical interpretation of the amendment has inherent weaknesses.[14] Still, a background understanding is useful to appreciate whether or not a warrant should be required.[15]

To reduce smuggling, the English Parliament authorized the use of writs of assistance in the Navigation Act of 1662.[16] That Act permitted an official armed with a writ of assistance to "go into any House, Shop, Cellar, Warehouse or Room . . . and in case of Resistance, to break open Doors, Chests, Trunks and other Packages, there to seize and from thence to bring any Kind of Goods or Merchandise whatsoever, prohibited and uncustomed."[17]

The writs of assistance, as issued by the courts of the time, bore little resemblance to today's search warrant. The writs were issued without any judicial supervision. There was no requirement of a showing of probable cause, and there was no limit to the scope of what might be searched. Officers had virtually unlimited discretion to search for smuggled goods. Moreover, the writs did not expire until six months after the death of the reigning sovereign.[18]

In 1696, an act of William III extended the use of the writs of assistance to the colonies.[19] Lasson, in his oft-quoted treatise, suggests that the writs were initially accepted in the colonies, but that by the middle of the eighteenth century there was widespread resentment among the colonists over the unlimited authority of customs officials to search their homes.[20]

In 1760, Secretary of State William Pitt ordered that the Sugar Act of 1733,[21] which put a prohibitive duty on molasses entering the colonies, be strictly enforced. Customs officials were issued writs of assistance enabling them to search where they pleased for violations of British tax laws. Also in 1760, King George II died. This resulted in the expiration of all writs of assistance in February, 1761, six

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14. *See* Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting), for an example of the fallacy of a pure historical perspective. For a general discussion of the pitfalls of an historical approach, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-63 (1974).

15. *See infra* text accompanying notes 46-60.

16. 13 & 14 Car. 2, ch. 11, § 5 (1662).

17. *Id.*

18. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 57 (1937).

19. An Act for preventing Frauds and regulating Abuses in the Plantation Trade, 7 & 8 Will 3, ch. 22, § 6 (1696).

20. N. LASSON, *supra* note 18, at 55.

21. 6 Geo. 2, ch. 13 (1733).

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months after his death.[22]

Because the writs Pitt issued were soon to expire, Charles Paxton, chief customs official in Boston, was obliged to petition for new writs in Massachusetts Superior Court. The petition was opposed by a group of Boston merchants who selected James Otis as their attorney.[23] In Paxton's case,[24] Otis attacked the "tyrannical nature of the writs, the absence of judicial supervision, and . . . their unlimited scope,"[25] declaring that they encroached upon "one of the most essential branches of English liberty [which] is the freedom of one's house. A man's house is his castle . . . . This writ, if it should be declared legal, would totally annihilate this privilege."[26] He ended by asking the court to restrict customs officers to the use of special warrants (as opposed to the general warrant/writs of assistance), where such officers would have to "show probable grounds, [and] take his oath on it . . . before a magistrate, [who] if he thinks proper should issue a *special warrant*."[27] The court did not heed Otis's arguments, however, and decided unanimously to issue general writs of assistance.[28]

A number of early state constitutions reflected the sentiment against writs of assistance.[29] These constitutions focused primarily on excluding general warrants. In their place most of the constitutions provided for special warrants which required specificity and probable cause.

James Madison relied heavily on the phrasing of the Massachusetts Constitution of 1780[30] when he presented the fourth amendment to the House of Representatives on June 8, 1789. As originally

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22. N. LASSON, *supra* note 18, at 57.

23. *Id.* at 57-58.

24. J. QUINCY, REPORTS OF CASES ARGUED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 51 (1865).

25. Reed, *Warrantless Searches in Light of* Chimel, 11 ARIZ. L. REV. 457, 469 (1969).

26. 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Wroth and H. Zobel eds. 1965).

27. *Id.* at 144.

28. *Id.* at 115.

29. *See* T.TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969).

30. The Massachusetts Constitution of 1780 provided that:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. OF 1780 art. 14, sec. 15.

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proposed, Madison's prohibition against general warrants would have been a statement of the requirements of a special search warrant:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[31]

The wording indicates that the intent of the Madison draft was to limit overreaching (general) warrants, not to encourage the use of warrants in all searches.[32] Representative Egbert Benson of New York wanted to give the amendment an even broader scope so that it would deal with more than the mere form of the warrant. His proposal for a two-clause amendment (one clause to be a prohibition against "unreasonable searches and seizures" and the other to be a statement of the requirements for the issuance of warrant) was rejected by the House "by a considerable majority."[33] Later, however, when Benson served as the chairman of a committee appointed to present the amendments in their final form, he reported the fourth amendment not in the terms to which the House had agreed but as he had wanted it. The change was not noticed, and the amendment was ratified by both the House and the Senate.[34]

It is "familiar history,"[35] then, that the Framers of the fourth amendment sought to eliminate the use of general warrants.[36] The wording of the amendment, however, was broader than the evil that the Framers intended to eliminate. That broad language created an opportunity for the courts to require generally the use of warrants, an interpretation probably not intended by the Framers.[37]

Rather than focusing on the specific evils of general warrants,

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31. 1 ANNALS OF CONG. 434-35 (Gales & Seaton eds. 1789-90).

32. N. LASSON, *supra* note 18, at 103.

33. 1 ANNALS OF CONG. 754 (Gales & Seaton eds. 1789-90).

34. N. LASSON, *supra* note 18, at 101.

35. Payton v. New York, 445 U.S. 573, 583 (1980).

36. *See* Amsterdam, *supra* note 14, at 410. *See also* United States v. Chadwick, 433 U.S. 1, 7-8 (1976): "It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England."; and Marshall v. Barlow's, Inc., 436 U.S. 307, 328 (1978) (Stevens, J., dissenting), "Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance."

37. *See* T. TAYLOR, *supra* note 29, at 46-47. *But see* Amsterdam, *supra* note 14, at 410-14.

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the Supreme Court took a broader approach to the history of the fourth amendment. In *Weeks v. United States*,[38] a leading case in fourth amendment jurisprudence, the defendant sought to exclude evidence taken during a warrantless search of his home. Utilizing the opinion of Justice Bradley in *Boyd v. United States*,[39] the Court indicated that the fourth amendment was designed to protect against government invasions of an individual's privacy.[40] The warrant was regarded as an instrument of that protection; therefore a constitutional search required a warrant. As a result, the Court did not use the warrant as a device to invade an individual's privacy, but as one to promote privacy:

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law.
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> . . . .
>
> The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made.[41]

While generally following *Weeks*, the Court in subsequent cases held that certain warrantless activity would be consistent with the fourth amendment. In *Carroll v. United States*,[42] the Court recognized that it would be impractical to secure a warrant to search a vehicle which could be quickly moved from the locality in which a warrant is obtained. The Court pointed out, however, that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used."[43]

Carroll typified the pre-1946 cases, which traditionally expressed a strong preference for warrants, although they occasionally allowed for warrantless searches on practicality grounds. Little at-

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38. 232 U.S. 383 (1914).
39. 116 U.S. 616 (1886).
40. 232 U.S. at 389-91.
41. *Id.* at 391-93.
42. 267 U.S. 132 (1925). *See also* Agnello v. United States, 269 U.S. 20 (1925).
43. 267 U.S. at 156.

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tention was paid to the reasonableness clause,[44] and none was given to the relationship between the two clauses of the fourth amendment.[45]

In a series of cases[46] commencing in 1946 and culminating in 1950 with *United States v. Rabinowitz*,[47] the Court debated the relationship between the two clauses of the fourth amendment. Justice Minton, writing for the majority in *Rabinowitz*, believed that the Court should interpret the reasonableness clause separately and distinctly from the warrant clause:

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search . . . . The relevant test [for reasonableness] is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.[48]

This construction of the fourth amendment maintains that the reasonableness of a search is to be determined without regard to the existence of a warrant, and that the two clauses are independent of each other. Professor Taylor, an exponent of this view, has argued that the Framers' prime purpose was to prohibit the oppressive use of warrants rather than to promote their use.[49]

Justice Frankfurter, in his dissent in *Rabinowitz*,[50] argued that a warrant is required to make a search reasonable and that the two clauses should be read in conjunction with one another: "What is the test of reason which makes a search reasonable? . . . There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a

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44. *See* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 39 (1980).

45. In Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931), the Court, in interpreting the Reasonableness Clause, stated that, "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." The Court, however, did not discuss the relationship between the Reasonableness Clause and the Warrant Clause.

46. *See* Davis v. United States, 328 U.S. 582 (1946) (Frankfurter, J., dissenting); Johnson v. United States, 333 U.S. 10 (1948); Trupiano v. United States, 334 U.S. 699 (1948) (Vinson, C.J., dissenting).

47. 339 U.S. 56 (1950).

48. *Id.* at 65-66.

49. Professor Taylor argues convincingly that those "who have viewed the fourth amendment primarily as a requirement that searches be covered by warrants, have stood the amendment on its head." T. TAYLOR, *supra* note 29, at 46-47.

50. 339 U.S. at 68.

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search warrant . . . ."[51]

Professor Amsterdam has joined in this position and has argued that if the Framers were only concerned with general warrants, the second clause would have been sufficient to prohibit the evils of general warrants.[52] Thus, he has concluded that "the framers were disposed to generalize to some extent beyond the evils of the immediate past."[53] This type of broad-based generalization has led Amsterdam to the conclusion that indiscriminate police searches and seizures were the evils to be addressed by the fourth amendment.[54] This evil may be rectified in two ways. First, through the probable cause standard, adequate justification for a search must be shown. Second, through the use of warrants, searches may not be conducted at the discretion of police officials. Consequently, Amsterdam has suggested that, in addition to probable cause, warrants generally must be obtained to make searches reasonable.[55] In other words, to give meaning to the reasonableness clause, he would read it in conjunction with the warrant clause so as generally to require warrants.

These two positions have greater implications than merely an interpretation of historical intent. The interposition of a magistrate, through the warrant procedure, between the officer ferreting out crime and the individual seeks to insure that the privacy interests of the individual are not violated.[56] When courts dispense with this warrant procedure the privacy interests of an individual take a secondary role to the concerns of law enforcement.[57] It is worth noting

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51. *Id.* at 83.

52. Amsterdam, *supra* note 14, at 399.

53. *Id.*

54. *Id.* at 411.

55. *Id.* at 413-14.

56. Johnson v. United States, 333 U.S. 10, 13-14 (1948), states the oft-cited principle that:

> 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. (footnote omitted).

One of the lesser benefits of a warrant is that it lays out the scope of a search. This restricts the extent of the police search. It also provides notice to the person whose property is about to be searched. The fundamental purpose of a warrant, however, is the interposition of a magistrate between the officer ferreting out crime and the individual.

57. *See* Harris v. United States, 331 U.S. 145, 157 (1947): "A decision may turn on whether one gives that [Fourth] Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime."

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here that it has been suggested, based on empirical studies,[58] that the issuance of a warrant is a facade because a magistrate merely rubber-stamps the police requests.[59] This appears especially true with the issuance of arrest warrants, although the same argument has been made with regard to the issuance of a search warrant.[60] Assuming that this rubber-stamp proposition is true, the warrant procedure is nevertheless a worthwhile means of assuring the privacy interests of an individual. First, the same studies indicate that a police officer in the field seeks the advice and supervision of a superior officer or of a prosecutor before seeking a warrant.[61] Consequently, someone who is concerned with the legality of the police action, if only to assure convictions, is likely to review police activities. Further, the warrant procedure reduces to writing the probable cause determination. This documentation permits full review of the warrant's issuance and should make a police officer more cognizant of the legality of his action and should reduce the likelihood an officer will be tempted later to fabricate probable cause. In interpreting the fourth amendment, the Burger Court has at times taken the Minton-Taylor position (the reasonableness approach), and at other times the Frankfurter-Amsterdam position (the warrant approach).

The Warren Court

The Warren Court, in choosing between the two competing views of the relationship between the two clauses of the fourth

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58. The empirical data are derived from the report of the American Bar Foundation's SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES. The results of the survey can be found in LAFAVE, ARREST — THE DECISION TO TAKE A SUSPECT INTO CUSTODY ch.1 (1865) [hereinafter cited as LAFAVE, ARREST]; L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, THE DETECTION OF CRIME — STOPPING AND QUARTERING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT, ch. 8 (1967). It should be pointed out that some of the data relied upon involved instances where the district attorney was intimately involved with the actual issuance of the warrant. *E.g.*, the practice in Wisconsin, LAFAVE, ARREST 33. since that study, the Supreme Court on two occasions has looked into the neutrality of the person issuing warrants: Connally v. Georgia, 429 U.S. 245 (1977); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

59. 8 CRIM. LAW BUL. No. 1 at 27 (1972).

60. *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions* 63, MICH. L. REV. 987, 993 (1965).

61. L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, *supra* note 58, at 114:

> The prevailing practice in large metropolitan areas is for all applications for search warrants first to be reviewed by a member of the prosecutor's staff before they are referred to a magistrate for his signature. Although not required by formal law, this procedure is regarded as an effective method of giving the police the assistance and advice they need on both the form and substance of the documents to be presented to the magistrate.

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amendment, generally adopted the warrant approach and eventually expressly overruled *Rabinowitz*.[62] Although the Court usually adopted the warrant approach,[63] it followed *Carroll* and recognized that in certain situations warrants could not practicably be obtained.[64] The Court, however, was very careful to limit the breadth and scope of these exceptions. The Court reviewed the facts of individual cases to determine both the propriety of a warrantless search and the scope and breadth of the search thereby necessitated.

In *Preston v. United States*,[65] for example, the Court was faced with a warrantless search of an automobile. The petitioner had been arrested for vagrancy, and the car he had been occupying at the time of his arrest was towed to a police garage where it was searched.[66] Evidence found in the automobile was used to obtain Preston's conviction for conspiracy to rob a federally insured bank.[67] The state argued that the search of the car was justified both as a search incident to arrest and by the *Carroll* automobile exception to the warrant requirement.[68] Both arguments were rejected.[69] The Court pointed out that the facts necessary to justify a search as incident to an arrest — the need to seize weapons or prevent the destruction of evidence — were absent "where a search is remote in time or place from the arrest."[70] Likewise, the *Carroll* exception was not applica-

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62. *Rabinowitz* was overruled in Chimel v. California, 395 U.S. 752 (1969). The Court had indicated its preference for requiring a warrant in United States v. Ventresca, 380 U.S. 102, 106-07 (1965), where the Court stated that it would be more inclined to find probable cause in a search conducted pursuant to a warrant than in a warrantless search.

63. *But see* Cooper v. California, 386 U.S. 58 (1967), where, in a 5-4 decision, the Court returned to the reasonableness approach in allowing the search of an automobile that was confiscated pursuant to a state statute allowing the police to hold the car for evidence in a forfeiture proceeding. The Court justified the search even though the state had ample time to secure a warrant, stating "the relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable." *Id.* at 62 (quoting United States v. Rabinowitz, 339 U.S. 56, 66 (1950). *See also* United States v. Harris, 390 U.S. 234 (1968) (*per curium*) (The Court allowed for a warrantless inventory search of an automobile, without any discussion of the relationship between the two clauses of the fourth amendment).

64. In Terry v. Ohio, 392 U.S. 1 (1968), the Court allowed for the warrantless pat-down search of a suspect during an on the street encounter when the police officer had reason to fear for his safety. Another situation where it would have been impractical for the officer to procure a warrant was Warden v. Hayden, 387 U.S. 294 (1967), where police, in hot pursuit of an armed robbery suspect, were allowed to make a warrantless search of a house into which the suspect fled.

65. 376 U.S. 364 (1964).

66. *Id.* at 365-66.

67. *Id.* at 366.

68. *Id.* at 367-68.

69. *Id.* at 368.

70. *Id.* at 367.

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ble, since the car was in police custody and there was no "danger that the car would be moved out of the locality of jurisdiction."[71] Thus, *Preston* stood as a rejection of the notion that warrantless searches of automobiles and searches incident to arrest are reasonable per se. Rather, *Preston* illustrated that a warrantless search is not reasonable unless the facts of the case fit clearly within the parameters of the rationale of a particular exception to the warrant requirement.[72]

Chimel v. California,[73] the last decision by the Warren Court concerning warrants, reiterated the Court's reluctance to dispense with the warrant requirement. In this case, the police, armed with an arrest warrant but without a search warrant, arrested the petitioner, Chimel, at his home for burglarizing a coin shop.[74] Incident to this arrest, the police conducted a warrantless search of "the entire three bedroom house, including the attic, the garage, and a small workshop."[75] In suppressing the evidence obtained by this search, the Court reiterated its *Preston* reasoning and expressly overruled *Rabinowitz*.[76] The police had failed in their burden of demonstrating that their warrantless activity was justified by a specifically established and well-delineated exception.[77] In this case a search incident to arrest was the basis for the warrantless search. Since a search of the entire house was not needed to seize weapons or prevent the destruction of evidence, the search went far beyond the circumstances that justify the exception, thereby making the search illegal.[78]

Justice White, dissenting,[79] suggested that a warrant was not needed since the invasion resulting from the arrest was so great that the subsequent search could proceed without a warrant.[80] Although this approach was later adopted by the Burger Court,[81] the *Chimel* Court disagreed, stating that, "we can see no reason why, simply

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71. *Id.* at 368.

72. *See also* Sibron v. New York, 392 U.S. 40, 59 (1968) (The Court held that a warrantless search must be reasonably limited in its scope by its underlying justification: "The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case.")

73. 395 U.S. 752 (1969).

74. *Id.* at 753.

75. *Id.* at 754.

76. *Id.* at 768.

77. *Id.*

78. *Id.*

79. *Id.* at 770 (White, J., dissenting).

80. *Id.* at 776 (White, J., dissenting).

81. *See* United States v. Edwards, 415 U.S. 800 (1974); and Chambers v. Maroney, 399 U.S. 42, discussed *infra* at text accompanying notes 110-220.

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because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."[82]

In the administrative search area (municipal, fire, health and housing inspections) the Warren Court further extended the prohibition of warrantless searches. *Camara v. Municipal Court*[83] overruled an earlier decision which had allowed warrantless administrative searches.[84] The Court rejected the argument that because an administrative search was less intrusive than a criminal investigative search, it somehow touched upon only the periphery of fourth amendment concerns. *Camara* pointed out the anomaly of this argument, which would afford the protection of a warrant to an individual only when he was suspected of criminal behavior.[85] The Court ruled that a warrant would be required for administrative searches unless "obtaining a warrant is likely to frustrate the governmental purpose behind the search."[86] For all intents and purposes, this requirement meant that a warrant should be obtained whenever practical.[87]

After the Court dealt with the warrant issue in *Camara*,[88] it faced a unique problem concerning probable cause. A discussion of the Warren Court's handling of probable cause in the administrative area, as well as its applicability in the criminal context, serves as a background for the article's later discussion of the Burger Court's misuse of this probable cause analysis. A warrant interposes a theoretically neutral official between the police and individuals. This neutral official evaluates whether there is justification for issuing a warrant. Even when it is not practical to secure a warrant, however, there still must be justification for the police action. This justification

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82. 395 U.S. at 767 n.12.

83. 387 U.S. 523 (1967).

84. Frank v. Maryland, 359 U.S. 360 (1959).

85. 387 U.S. at 530-31.

86. *Id.* at 533.

87. In a companion case, See v. City of Seattle, 387 U.S. 541 (1967), the Court extended *Camara*, which had involved the search of a private dwelling place, to the search of a person's place of business. "[T]he basic component of a reasonable search under the Fourth Amendment — that it not be enforced without a suitable warrant procedure — is applicable in this context, as in others, to business as well as to residential premises." *Id* at 546.

88. 387 U.S. at 534: "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . ."

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is called probable cause. In the criminal context, the standard of probable cause exists where "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient . . . to warrant a man of reasonable caution in the belief that":[89] (1) an offense has been committed or is being committed by the arrested persons (probable cause for an arrest);[90] or (2) certain items are related to a crime and will be found at a specified location (probable cause for a search).[91]

Since traditional probable cause would not have been appropriate in the administrative context (where there was no criminal activity), the Warren Court created a new approach to deal with the apparent lack of probable cause. This approach was designed to circumvent the traditional probable cause requirement and did not involve the issue of whether a warrant was required. The Court, turning to the reasonableness mandate of the fourth amendment, suggested a substitute for probable cause. The Court balanced the need to search (the governmental purpose) with the amount of fourth amendment invasion resulting from the search: "In determining whether a particular inspection is reasonable — and thus in determining whether there is probable cause to issue a warrant for that inspection — the need for the inspection must be weighed in terms of [the] reasonable goals of code enforcement."[92] This statement had the effect of creating a sliding scale of probable cause.

A lesser and different standard than probable cause found its way into the criminal context in *Terry v. Ohio*.[93] *Terry* involved a police "stop and frisk" search of a suspect. This intrusion, although substantial enough to be governed by the fourth amendment,[94] was not as intrusive as an arrest. Once again, the Warren Court turned to the reasonableness clause of the fourth amendment to justify a standard for the "stop and frisk" which was less than the probable cause standard required for a full-fledged arrest. Following *Camara*, the Court in *Terry* concluded that there is "no ready test for deter-

89. Carroll v. United States, 267 U.S. 132, 162 (1925).

90. Draper v. United States, 358 U.S. 307, 313 (1959).

91. *Id. But see* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969)(reliability of informants' unsubstantiated information not sufficient to give police officers probable cause to search).

92. 387 U.S. at 535.

93. 392 U.S. 1 (1968). For an excellent discussion of the *Terry* decision, see Michigan v. Summers, 101 S. Ct. 2587 (1981).

94. 392 U.S. 1, 16-17.

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mining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[95] The Court carefully limited this proposition so that its only affect was the creation of a standard less than probable cause: "We do not retreat from our holdings that the police must whenever practicable obtain advance judicial approval of searches and seizures through the warrant procedure."[96]

Based upon the facts of the case, the Court in *Terry* allowed for an exception to the warrant requirement because it would not have been practical to secure a warrant. "[W]e deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."[97] The Court limited the scope of this exception to the justification for the warrantless search. In *Terry*, the justification was to protect the police officer from the possibility that a suspect may be armed and dangerous, and the scope was therefore limited to a pat-down for weapons.[98]

No discussion of this era would be complete without mentioning *Katz v. United States*,[99] a case which the Burger Court has misapplied. In addition to expressing its strong preference for a warrant, the Warren Court in *Katz* abandoned the old *Olmstead* curtilage test[100] and established the individual's expectation of privacy as the criterion for determining the applicability of the fourth amendment. This provided the basis for broadening the application of the fourth amendment to situations where there was no property intrusion of the kind traditionally associated with the fourth amendment.[101]

Even though in *Katz* the law enforcement officers were found to have acted with considerable restraint and to have had probable cause for their search, the Court held that a warrant should have been obtained before a listening and recording device was attached

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95. *Id.* at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).

96. *Id.* at 20. Unlike *Camara* which adopts a sliding scale for probable cause, *Terry*, in setting up a standard of less than probable cause, indicates that probable cause is not always the standard to be used.

97. *Id.*

98. *Id.* at 24.

99. 389 U.S. 347 (1967).

100. For a discussion of the view that physical trespass was required if the fourth amendment was to apply to a given case, see Olmstead v. United States, 277 U.S. 438, 457, 464-66 (1928); Goldman v. United States, 316 U.S. 129, 134-36 (1942).

101. *See supra* cases cited in note 100.

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to the outside of a public telephone booth.[102] It is likely that the magistrate would have authorized this activity. Even so, the Court found the search improper, emphasizing that the restraint "was imposed by the agents themselves,"[103] and not by a neutral judicial officer "[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police.' "[104] The Court adopted the Frankfurter position in *Rabinowitz*,[105] stating that "searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions."[106]

The *Katz* decision firmly established[107] that an individual's expectation of privacy was the criterion for determining whether a fourth amendment right is involved:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[108]

The expectation of privacy criterion was used solely to decide that a search had in fact taken place. It was accorded no relevance in the Court's determination that a warrant was required. Once the expectation of privacy criterion had been established, whether a warrant was required was a separate question.

Thus, under the Warren Court, if fourth amendment activity, as determined by an individual's expectation of privacy, was implicated, a warrant was generally required. Deviation from this requirement was permitted only where the facts of an individual case indicated that it was not practical to obtain a warrant. In addition, the scope of these warrantless searches was "strictly tied to and justified by the

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102. "The agents confined their surveillance to the brief periods during which [the suspect] used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself." 389 U.S. at 354.

103. *Id* at 356.

104. *Id* at 357 (quoting Wong Sun v. United States, 371 U.S. 471, 481-82 (1963)).

105. 339 U.S. 56 (1950).

106. 389 U.S. at 357.

107. The individual's right to an expectation of privacy (as a basis for determining whether Fourth Amendment activity is involved) was first mentioned in Lewis v. United States, 385 U.S. 206 (1966).

108. 389 U.S. at 351-52 (citations omitted).

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circumstances which rendered its initiation permissible."[109]

For less intrusive activity than is associated with a traditional criminal search and arrest, such as administrative searches, the Warren Court utilized the reasonableness clause of the fourth amendment to permit a standard other than probable cause. This standard had no effect, however, on the general requirement that a warrant be obtained whenever practical.

Burger Court until 1976

The Burger Court adopted the approach suggested by Justice White's dissenting opinion in *Chimel*.[110] If there was a substantial warrantless invasion such as an arrest, the subsequent search could proceed without a warrant. Building upon this analysis, the Burger Court introduced a lesser expectation of privacy element into the warrant equation.[111] This sliding scale of expectation of privacy effectively increased the opportunities for warrantless government activity.[112] Using a reasonableness approach, the Burger Court dispensed with the preference for a warrant through broadly drawn exceptions.[113]

This development can be seen most clearly in the automobile exception[114] and the search incident to arrest exception[115] to the warrant requirement. In the administrative search area,[116] although the Burger Court followed the precedent of the Warren Court, the Burger Court introduced into its analysis a lesser expectation of privacy.[117]

Automobile Exception

In cases involving automobile searches, the Burger Court quickly retreated from the Warren Court's preference for a warrant. In

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109. Terry v. Ohio, 392 U.S. 1, 19 (1968).

110. 395 U.S. 752, 770 (1969).

111. *See infra* text accompanying notes 118-244.

112. *But see infra* text accompanying notes 231-234.

113. Professor Whitebread indicates that this approach is symptomatic of the underlying differences between the Burger and Warren Courts. While the Warren Court was preoccupied with insuring individual rights and protecting the individual from the state, the Burger Court is more concerned with seeing that the guilty are convicted, and that the hands of law enforcement are not tied by strict judicial scrutiny. C. WHITEBREAD, CRIMINAL PROCEDURE 4 (1980).

114. Preston v. United States, 376 U.S. 364 (1964); Carroll v. United States, 267 U.S. 132 (1925).

115. *See* Chimel v. California, 395 U.S. 752 (1969).

116. *See* Camara v. Municipal Court, 387 U.S. 541 (1967).

117. *See infra* text accompanying notes 221-34.

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Preston[118] and *Chimel*[119] the Warren Court had limited warrantless searches to situations which justified that exception; for example, when an automobile was actually mobile.[120] In *Chambers v. Maroney*,[121] the Court upheld a warrantless search of an automobile which occurred after the occupants had been arrested and the car had been driven to the police station. Since the police had probable cause to search and the car could have been searched where it had been stopped, the Court held that "there is little to choose in terms of practical consequences"[122] between a search at the scene and one at the station house. In discounting the factor of mobility, the Court stated, "[f]or 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."[123] This analysis was similar to Justice White's dissent in *Chimel*.[124] The *Chambers* majority justified it deviation from the principles of the Warren Court by citing *Carroll*[125] for the proposition that, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars."[126]

In his opinion,[127] Justice Harlan complained that the majority misstated the meaning of *Carroll*,[128] since the automobile and the other exceptions to the warrant requirement were limited to "accom-

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

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

120. *See* Preston v. United States, 376 U.S. 364, 368 (1964); Carroll v. United States, 267 U.S. 132, 153 (1925).

121. 399 U.S. 42 (1970).

122. *Id.* at 52.

123. *Id.* In a later case, the Court stated: "[t]he rationale of *Chambers* is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station." Coolidge v. New Hampshire, 403 U.S. 443, 463 n.20 (1971) (emphasis omitted).

124. *See supra* text accompanying note 110.

125. 267 U.S. 132 (1925).

126. 399 U.S. at 52. In Vale v. Louisiana, 399 U.S. 30 (1970), decided that same day as *Chambers*, the Court emphasized the importance of securing a warrant before a dwelling is searched. Justice Black argued that there was ample justification for a search of a dwelling following an arrest for narcotics in front of the house. 399 U.S. at 36-41 (Black, J., dissenting). It would appear that the likelihood that narcotics would be destroyed in *Vale* was far greater than the likelihood that the car would be moved from the police station in *Chambers*. Since it was more likely that incriminating evidence would be removed or destroyed in *Vale*, and the Court still required that a search warrant be obtained, these cases point out that the Court is prepared to treat a person's house quite differently from his car for purposes of requiring a warrant.

127. 399 U.S. at 55 (Harlan, J., concurring in part and dissenting in part).

128. *Id.* at 61-63 (Harlan, J., concurring in part and dissenting in part).

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modate the exigencies of particular situations,"[129] and these exceptions were "no broader than necessitated by the circumstances presented."[130] While Justice Harlan would have accepted a warrantless search of the automobile where it had been stopped, "[b]ecause the officers might be deprived of valuable evidence if required to obtain a warrant before effecting any search or seizure,"[131] he could not "condone the removal of the car to the police station for a warrantless search there at the convenience of the police,"[132] where mobility was no longer an issue.

In *Coolidge v. New Hampshire*,[133] a plurality of the court[134] seemed to have misgivings about the *Chambers* decision and took the opportunity to reiterate the Warren Court's position that an exception to the warrant requirement must be limited by its justification.[135] The plurality which invalidated a warrantless search of the arrestee's automobile, distinguished *Coolidge* from *Chambers* in two crucial respects. The automobile in *Coolidge* was parked in a private driveway whereas the *Chambers* car had been moving on a public highway.[136] In addition, the police in *Coolidge* had probable cause for an extended period of time during which they could have secured a warrant, whereas they obviously had to act quickly in *Chambers* since the arrestee's car was on the highway at the time of the arrest.[137]

Justice Black, in his opinion in *Coolidge*,[138] urged the Court to adopt the *Chambers* rationale. Since the majority in *Coolidge* had reasoned that the auto could have been placed under guard while the police obtained a warrant, the reasoning of *Chambers*, that there is

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129. *Id.* (Harlan, J., concurring in part and dissenting in part).

130. *Id.* (Harlan, J., concurring in part and dissenting in part).

131. *Id.* at 62 (Harlan, J., concurring in part and dissenting in part).

132. *Id.* (Harlan, J., concurring in part and dissenting in part).

133. 403 U.S. 443 (1971).

134. Stewart, J., joined by JJ. Douglas, Brennan, and Marshall.

135. Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it." 403 U.S. at 454-55 (quoting from Katz v. United States, 389 U.S. 347, 357 (1967); McDonald v. United States, 335 U.S. 451, 456 (1948); United States v. Jeffers, 342 U.S. 48, 51 (1951)).

136. 403 U.S. at 460.

137. *Id.*

138. *Id.* at 493 (Black, J., concurring and dissenting).

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really no difference for constitutional purposes between a seizure (immobilizing the car) and a search, was applicable.[139] The theoretical underpinning of Justice Black's analysis was the reasonableness approach to the fourth amendment,[140] an approach approved in *Rabinowitz*[141] and overruled by the Warren Court.[142]

With the replacement of Justice Harlan by Justice Rehnquist, the *Coolidge* position lost favor. In *Cardwell v. Lewis*,[143] another plurality decision,[144] the dissenting Justices in *Coolidge* were joined by Justice Rehnquist. They ruled that there was little or no invasion of petitioner's privacy when police examined a tire tread and took paint scrapings from the exterior of an automobile left in a public parking lot.[145] Rather than utilizing the *Katz* expectation of privacy test[146] to conclude that the fourth amendment was not implicated in this situation, and therefore no warrant, or probable cause for that matter, was required, the *Cardwell* plurality instead believed that no warrant was required because of a reduced expectation of privacy. "Stated simply, the invasion of privacy, if it can be said to exist, is abstract and theoretical . . . . Under circumstances such as these, where probable cause exists, *a warrantless examination of the exterior of a car* is not unreasonable under the Fourth and Fourteenth Amendment."[147] The plurality utilized an expectation of privacy analysis to justify a warrantless search rather than to determine whether fourth amendment activity was implicated.

The Justices next considered whether the fact that the car had

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139. *Id.* at 504 (Black, J., concurring and dissenting).

140. The majority rejects the test of reasonableness provided in the Fourth Amendment and substituted a *per se* rule — if the police could have obtained a warrant and did not, the seizure, no matter how reasonable, is void. But the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only "unreasonable searches and seizures." The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts.

Id. at 509-10 (Black, J., concurring and dissenting).

141. 339 U.S. 56 (1950).

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

143. 417 U.S. 583 (1974).

144. Burger, C.J., joined by JJ. White, Blackmun, and Rehnquist. Justice Powell concurred in the result. He felt that collateral habeas corpus review in federal courts was inappropriate for issues not bearing on guilt or innocence. *Id.* at 596. This approach was adopted by the Court, with Justice Powell writing for the majority, in Stone v. Powell, 428 U.S. 465, 489-96 (1976).

145. 417 U.S. at 588-92.

146. 389 U.S. 347 (1967).

147. 417 U.S. at 591-92 (emphasis added) (citation omitted).

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been parked in a public parking lot and had been impounded by the police who had not obtained a warrant prior to the search made the seizure illegal under the fourth amendment.[148] *Coolidge* was distinguished on the basis that the *Cardwell* petitioner had a lesser expectation of privacy.[149] The automobile searched in *Coolidge* had been parked on private property, and its interior had been searched.[150] In *Cardwell*, only the exterior of the car had been searched, and that search occurred while the car was parked in a public parking lot.[151]

Cardwell also rejected the *Coolidge* ruling that a warrant was required where probable cause had existed for some time and where there had been ample opportunity to secure a warrant.[152] Citing *Chambers*, the Court stated:

> 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.[153]

The constitutionality of both the warrantless search and the seizure of the automobile thus was justified by a lower expectation of privacy on the part of petitioner.[154] Although the Court indicated that fourth amendment activity was involved,[155] the lessened expectation of privacy made a warrantless search and seizure reasonable. Reasonableness, not the warrant approach, was the test the Court utilized. As the dissenting Justices pointed out, the plurality was totally discarding the requirements for a warrant in automobile searches.[156]

Less than six months later, *Texas v. White*,[157] a per curiam de-

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148. *Id.* at 592-93.
149. *Id.* at 593.
150. *Id.*
151. *Id.*
152. *Id.* at 595.
153. *Id.*
154. The Court gave these reasons for a lower expectation of privacy in an automobile:
> One has less expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.

Id. at 590.
155. *Id.* at 588-89.
156. "Until today it has been clear the [n]either *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Id.* at 599 (Stewart, J., dissenting).
157. 423 U.S. 67 (1975) (per curiam).

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cision, further extended *Chambers*. In *Chambers*, the police action in bringing the automobile to the station house prior to the search was justified as necessary due to the darkness of the highway.[158] The Court held that a nighttime search of the car at the scene of the seizure would not have been feasible.[159] In *White*, the car was seized in the afternoon, and a search could have occurred at the scene.[160] This fact was irrelevant to the Court, which was concerned only with probable cause, and not at all with exigent circumstances: "In Chambers v. Maroney we held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant."[161] The majority made it clear that, at least with respect to automobiles, warrantless searches were not per se unreasonable, as long as the police had probable cause to search.

In *South Dakota v. Opperman*,[162] an auto inventory case, the Court once again relied on the diminished expectation of privacy of an automobile owner to justify warrantless activity. In this case, a car was towed by police for a parking violation.[163] The police observed some valuables and had the car door opened for purposes of inventorying the car's contents.[164] They found marijuana in an unlocked glove compartment.[165] In upholding the search, the Court indicated that "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[166] The Court did not explain why it was not practicable for the officers to secure a warrant and instead relied on the reasonableness approach in interpreting the fourth amendment.[167] Although the decision in this case is consistent with *Cooper v. California*,[168] an automobile inventory case decided during the Warren Era, the rationale for the decision differs for *Cooper*. In *Cooper*, the Court relied on the length of time the car had to be held by the police,[169] whereas in *Opperman* the

158. Chambers v. Maroney, 399 U.S. at 52, n.10.
159. *Id.*
160. 423 U.S. at 70. (Marshall, J., dissenting).
161. *Id.* at 68.
162. 428 U.S. 364 (1976). *See also* Cady v. Dombrowski, 413 U.S. 433 (1973).
163. 428 U.S. at 365-66.
164. *Id.*
165. *Id.*
166. 428 U.S. at 367.
167. *Id.* at 372-73.
168. 386 U.S. 58 (1967).
169. *Id.* at 60-61.

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rationale was diminished expectation of privacy.

These decisions of the Burger Court represent a substantial expansion of the automobile exception to the warrant requirement. Under the Warren Court, the automobile exception was limited to those situations where, because of the car's mobility, it was impractical to secure a warrant.[170] The Warren Court, in such cases as *Preston*[171] and *Chimel*,[172] inquired as to the facts of the individual case to determine whether they justified an exception to the warrant requirement. The Burger Court deviated from this approach by using the *Chambers* rationale of diminished expectation of privacy. As of 1976, the word "automobile" was indeed "a talisman in whose presence [the warrant requirement of] the Fourth Amendment"[173] had vanished.

The Court, in expanding the automobile exception, did not discuss whether the scope of an automobile search extended to the search of containers found therein. Most of the circuit courts faced with this issue allowed the search of containers.[174] These courts did not distinguish between the various items found within the automobile. Once there was probable cause to search, there could be a thorough search. This issue will have considerable relevance to the article's analysis of post-1976 cases.

Search Incident to Arrest

In *Chimel v. California*,[175] the Warren Court overruled *Rabinowitz*[176] holding that a warrantless search of an entire house incident to the arrest of petitioner in his front hallway was unreasonable under the fourth amendment. The court indicated that a search incident to arrest was justified to remove any weapons that the person arrested might later use in order to resist arrest or to effect his es-

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170. *See* Preston v. United States, 376 U.S. 364 (1964). *But see* Cooper v. California, 386 U.S. 58 (1967) (an auto inventory case discussed *supra* note 63).

171. *Id.*

172. 395 U.S. 752 (1969).

173. Coolidge v. New Hampshire, 403 U.S. at 461.

174. *See* United States v. Milhollan, 599 F.2d 518 (3rd Cir. 1979), *cert. denied*, 444 U.S. 909 (1979); United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974); United States v. Soriano, 497 F.2d 147 (5th Cir. 1974); United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973); United States v. Evans, 481 F.2d 990 (9th Cir. 1973); United States v. Chapman, 474 F.2d 300 (5th Cir. 1973), *cert. denied*, 414 U.S. 835 (1973); United States v. Ganer, 451 F.2d 167 (6th Cir. 1971). *But see* United States v. Johnson, 588 F.2d 147 (5th Cir. 1979) (repudiating United States v. Soriano, 497 F.2d 147 (5th Cir. 1974)).

175. 395 U.S. 752 (1969).

176. United States v. Rabinowitz, 339 U.S. 56 (1950).

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cape.[177] Reaffirming the rule announced in *Terry v. Ohio*[178] that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"[179] the *Chimel* Court stated: "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."[180] The Court indicated that a case-by-case determination was required to know whether the scope of the search was appropriate.[181]

The Burger Court turned *Chimel* on its head in *United States v. Robinson.*[182] In *Robinson,* a suspect was signaled to stop his automobile by a police officer and was then arrested for operating a motor vehicle after his license had been revoked.[183] During a pat-down search, the officer felt an object in the suspect's left vest pocket.[184] Not knowing what this item was, the officer reached into the pocket and pulled out a crumpled cigarette package.[185] He opened the package and found that it contained heroin.[186]

Robinson presented two reasons for allowing a warrantless search of the person incident to arrest. The first was the need to find evidence of the crime charged.[187] The second was to verify whether the suspect was armed.[188] There is no possibility, however, of concealing or destroying evidence of the crime of driving without a license.[189] Further, a crumpled cigarette package can hardly be termed a weapon.[190] Thus, the scope of the search (into the cigarette package) was beyond its justification.

The Court dispensed with any problem the lack of justification

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177. Chimel v. California, 395 U.S. at 762-63.

178. Terry v. Ohio, 392 U.S. 1 (1968).

179. Chimel v. California, 395 U.S. at 762 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

180. *Id.* at 763.

181. *Id.* at 765.

182. 414 U.S. 218 (1973). *See also* Gustafson v. Florida, 414 U.S. 260 (1973), a companion case which utilized the reasoning of *Robinson* to uphold the pat-down search of petitioner, who was arrested for not having his license, despite the fact that the arresting officer had no reason to fear petitioner or to suspect that he was armed.

183. 414 U.S. at 220.

184. *Id.* at 223.

185. *Id.*

186. *Id.*

187. *Id.* at 234.

188. *Id.*

189. *Id.* at 252 (Marshall, J., dissenting).

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

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might have caused by stating that it did not want to engage in a case-by-case determination of whether a valid search incident to an arrest had been made.[191] Instead, the Court held that once an arrest had been made, "that intrusion being lawful, a search incident to the arrest requires no additional justification."[192] No longer were warrantless searches to be limited by their justifications.[193] Rather, some warrantless searches were *per se reasonable*, regardless of the facts of the case. The Court, in its attempt to formulate a simple rule which could readily be applied by the police, avoided analyzing the facts to see whether a warrantless search was justified.

Justice Powell, concurring in *Robinson*,[194] adopted the rationale of the dissenting opinion of Justice White in *Chimel*[195] and the reasoning of the majority in *Chambers*.[196] Once the severe intrusion of arrest had occurred and the arrest was determined to be proper, protection afforded by a warrant against the further intrusion represented by a search was not necessary:

> The Fourth Amendment safeguards the right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These are areas of an individual's life about which he entertains legitimate expectations of privacy. *I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person* . . . . No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guaran-

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191. *Id.* at 235.

192. *Id.*

193. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id.

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

195. Chimel v. California, 395 U.S. at 770.

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

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tee is legitimately abated by the fact of arrest.[197]

Justice Powell, then, asserted that since the arrest was such a significant intrusion, an arrested person had no further expectation of privacy. His concurrence was the clearest explication of a privacy analysis, purportedly based in the fourth amendment, that once someone's privacy is legitimately intruded upon, an additional intrusion need not be supported by a warrant.

Justice Marshall's dissent[198] reiterated the importance of a warrant and pointed to flaws in the majority opinion. In addition to pointing out the fact that a determination of what may be a "lesser" privacy interest is problematic,[199] Justice Marshall took exception to the majority statement 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."[200] Justice Marshall pointed out that there was no precedent for this statement which, in fact, ignored the Warren Court precedent requiring a case-by-case analysis to determine if the scope of the search was consistent with the circumstances which justified the interference in the first place.[201] In response to Justice Powell's argument that an arrested person had no further expectation of privacy, Justice Marshall cited *Chimel* for the proposition that "simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusion should [not] automatically be allowed . . . [without] a warrant that the Fourth Amendment would otherwise require."[202] Justice Marshall did not agree that intrusions into a cigarette package, or, hypothetically, into a wallet, were "negligible incidents to the more serious intrusion into the individual's privacy stemming from the arrest itself."[203] In Justice Marshall's view, "[t]he only reasoned distinction is between warrantless searches which serve legitimate protective and evidentiary functions and those

197. 414 U.S. at 237-38 (Powell, J., concurring) (emphasis added) (footnote omitted).

198. *Id.* at 238 (Marshall, J., dissenting).

199. *Id.* at 257-59 (Marshall, J., dissenting).

200. *Id.* at 248-49 (Marshall, J., dissenting) (quoting the majority, 414 U.S. at 235).

201. *Id.* at 249. *See also id.* at 243: "Exceptions to the warrant requirement are not talismans precluding further judicial inquiry whenever they are invoked . . ., but rather are 'jealously and carefully drawn.'" (Marshall, J., dissenting) (citations omitted).

202. *Id.* at 257 (Marshall, J., dissenting) (quoting from Chimel v. California, 395 U.S. at 766-67, n.12).

203. *Id.* at 259 (Marshall, J., dissenting).

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that do not."[204]

The lines were clearly drawn in *Robinson*. The majority formulated a rule that even absent exigent circumstances, any warrantless search of a person immediately after a valid arrest would be reasonable under the fourth amendment. The reasoning of *Chimel*[205] was rejected. Not only were warrantless searches ratified as exceptions to the fourth amendment, they were once again viewed as independently reasonable. Under this analysis, there was no need to decide whether the facts of a particular case justified the exception. The dissent argued for upholding *Chimel*,[206] and, by implication, Frankfurter's dissent in *Rabinowitz*.[207] No search, argued Justice Marshall, was reasonable unless accompanied by a duly executed warrant or by exigent circumstances.[208] Under this approach, unlike that of the majority, a case-by-case analysis to determine the scope of the warrantless activity would have been necessary.

The inclination to return to the majority view in *Rabinowitz* — the reasonableness approach coupled with a new privacy analysis — became more explicit three months later in *United States v. Edwards*.[209] The issue in *Edwards* was whether it was violative of the fourth amendment to take clothing without a warrant from an incarcerated individual ten hours after his arrest. The decision, written by Justice White, upheld the validity of the search and adopted the reasonableness approach of *Rabinowitz*, which had been overruled by *Chimel*: "It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be not whether it was reasonable to procure a seach warrant, but whether the search itself was reasonable, which it was."[210]

Justice White further justified his argument that a warrant was not necessary by inserting a privacy analysis similar to that utilized in both *Chambers*,[211] and in Justice Powell's concurrence in *Robinson*.[212] Justice White reasoned that once there was an arrest, further

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204. *Id.* (Marshall, J., dissenting).

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

206. *Id.*

207. United States v. Rabinowitz, 339 U.S. at 68.

208. 414 U.S. at 259 (Marshall, J., dissenting).

209. 415 U.S. 800 (1974). *See also* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 48 (1974). Professor Weinreb concludes that *Edwards* and Cady v. Dombrowski, 413 U.S. 433 (1973), indicate the Court has turned again to reasonableness as the ultimate test of whether a warrantless search is constitutional.

210. 415 U.S. at 807 (citing Cooper v. California, 386 U.S. at 62).

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

212. United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring).

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invasions of privacy were constitutionally inconsequential and thus were reasonable.[213]

Justice Stewart, who had joined the majority in *Robinson*,[214] wrote the dissent.[215] He took the view adopted by the Warren Court, that searches conducted without a warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Since this was a search without a warrant, Justice Stewart argued that the Government had the burden of showing that this search fell within those carefully drawn exceptions.[216] He concluded that this search was not incident to an arrest, as it occurred ten hours after the arrest, and the justification that created the search incident to arrest exception was no longer present.[217] Since the police had ample time to secure a warrant, nothing justified bypassing the warrant requirement.[218] By finding that constitutionally inconsequential invasions of privacy justified a warrantless search, the majority, argued Justice Stewart, allowed "the exceptions to the warrant requirement . . . to be enthroned into the rule."[219]

The fourth amendment was once again divided into two separate clauses for the purpose of analyzing whether or not a warrantless search was reasonable. The rule in *Chambers*[220] was expanded beyond the automobile area. Once certain legal invasions of privacy had occurred, such as a valid arrest, lesser invasions of privacy did not require a warrant.

Administrative Searches

In the administrative search area, the Court followed the reasoning of *Camara*.[221] To determine the necessity for a warrant, the Court ascertained whether obtaining a warrant would frustrate the governmental purposes.[222] As an additional means to justify warrantless activity, the Court introduced a lesser invasion of privacy analysis. This was similar to the Court's approach to automobile searches and searches incident to arrest.

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213. 415 U.S. at 806-09.
214. United States v. Robinson, 414 U.S. 218 (1973).
215. 415 U.S. at 809 (Stewart, J., dissenting).
216. *Id.* (Stewart, J., dissenting).
217. *Id.* at 810 (Stewart, J., dissenting).
218. *Id.* at 811 (Stewart, J., dissenting).
219. *Id.* (Stewart, J., dissenting) (quoting from Justice Frankfurter's dissent in United States v. Rabinowitz, 339 U.S. at 80).
220. Chambers v. Maroney, 399 U.S. 42 (1970).
221. Camara v. Municipal Court, 387 U.S. 523 (1967).
222. *See supra* text accompanying notes 85-87.

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In *United States v. Biswell*,[223] the Court allowed the warrantless inspection of a gun dealer pursuant to a federal statute authorizing such inspections.[224] The Court distinguished *Biswell* from *See v. City of Seattle*,[225] a companion case to *Camara*[226] involving inspections for building code violations.[227] In building inspections, the time required for a building code inspector to get a warrant would not frustrate the purpose of the inspection[228] since it would be difficult to correct a building code violation in a short time. Unannounced and frequent inspections were required for gun dealers, and the time taken to get a warrant could easily frustrate the purpose of the inspection, which was to discover illegal guns.[229] Using only the frustration of purpose analysis, the Court easily distinguished the inspection for illegal guns from a building code inspection.

The Court further justified its position by pointing out that a dealer in the business of selling guns realizes that the industry is pervasively regulated so that warrantless searches "pose only limited threats to the dealer's justifiable expectations of privacy."[230] In that manner, the Court moved from the practical frustration of purpose analysis to a speculative analysis of the gun dealer's expectation of privacy.

The Court also used the expectation of privacy analysis to support the necessity for a warrant. In *Almeida-Sanchez v. United States*,[231] a roving patrol conducted a warrantless stop and search of an automobile near the United States border.[232] This search, as in *Biswell*, was authorized by legislation — in this case, an act of Congress.[233] The Court, however, distinguished *Biswell* by pointing out that while a dealer in guns has chosen to be involved in a pervasively regulated business, and therefore must have a reduced expectation of

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223. 406 U.S. 311 (1972). *See also* Colonnade Catering Corp. v. United States, 397 U.S. 72, where the Court ruled that Congress had the power to authorize warrantless searches of closely regulated businesses (in this case, the liquor industry). The Court determined that Congress had not authorized the warrantless forcible entry in *Colonnade*, and thus the Court did not have to reach the issue of whether or not a warrant was required by the fourth amendment.

224. 18 U.S.C. §§ 921-28 (1970).

225. 387 U.S. 541 (1967).

226. Camara v. Municipal Court, 387 U.S. 523 (1967).

227. 406 U.S. at 316.

228. *Id.*

229. *Id.*

230. *Id.*

231. 413 U.S. 266 (1973).

232. *Id.* at 267.

233. 8 U.S.C. § 1357(a)(3) (1970).

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privacy, one who travels near the border can hardly be thought to have submitted to or have knowledge of roving border inspections.[234]

The Court required a warrant for this search. Thus the court sanctioned warrantless activity where there was a lesser expectation of privacy as in *Biswell*, and required a warrant where there was a greater expectation of privacy as in *Almeida-Sanchez*. The Court by implication created a sliding scale of expectation of privacy. When the expectation of privacy was sufficient, a warrant was required; on the other hand, when there were reduced privacy expectations, no warrant was required.

Summary

Prior to the October 1976 Term, the Burger Court deviated from the Warren Court's preference for a warrant. Although the Burger Court did not create any new exceptions to the search warrant requirement,[235] it did expand the existing exceptions.[236]

Based upon the reasoning of *Chambers*,[237] in the automobile search area the Court introduced a reduced expectation of privacy variable into the analysis of whether a warrant must be obtained. When the initial fourth amendment invasion was great, lesser invasions could be made without obtaining a warrant. When, in the Court's opinion, an individual had a reduced expectation of privacy in the place or thing searched, the Court adopted the majority position in *Rabinowitz*[238] (the reasonableness approach). When the expectation of privacy was sufficient, as in *Almeida-Sanchez*,[239] the Frankfurter analysis (warrant approach) was utilized.

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234. 413 U.S. at 271-72. Since there was no probable cause to search, the government sought to justify the intrusion as an administrative search, where a standard of less than probable cause would have been applicable. *Id.* at 270-72. Had there been probable cause, the government might have sought to justify the search as a valid search of a seized automobile pursuant to Chambers v. Maroney, 399 U.S. 42 (1970).

235. In United States v. United States District Court, 407 U.S. 297 (1972), the right of the President to wiretap or to bug suspected subversives without a warrant was at issue. Since this case called into question basic fourth amendment tenets, the protection of the individual from the powers of the state and the unfettered discretion of the executive branch, the Court unanimously espoused Justice Frankfurter's warrant approach in disallowing the warrantless search. *Id.* at 315. For further discussion of this case, see LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 130-33 (1974).

236. *See supra* the discussion of the Court's expansion of the automobile exception, text accompanying notes 118-74, and of the search incident to arrest exception, text accompanying notes 175-220.

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

238. United States v. Rabinowitz, 339 U.S. 56 (1950).

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

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Although the Court never acknowledged this, its analysis was similar to the approach utilized by the Warren Court in *Terry*[240] and *Camara*[241] to justify a different or lesser standard than traditional probable cause. When the physical intrusion is small, as it was in *Terry*, less evidence is required to support it than when the intrusion is great, as it would be in an arrest. Yet, so long as the intrusion is more than *de minimus*, its extent has no bearing on whether it is better for a cop or a judge to make the relevant probable cause determination. Varying invasions of privacy interests have nothing to do with the central purpose of the warrant clause: interposing a neutral party between the police and the individual. By the end of the Burger Court's 1975-76 Term, it was clear that the Warren Court's view of the role warrants should play in protecting individual privacy differed substantially from that of the Burger Court. The Warren Court adopted a presumption that warrantless searches were unconstitutional, which could only be overcome by a "few specifically established and well-delineated exceptions."[242]

Justice Stewart, writing for the plurality in *Coolidge*,[243] indicated the importance of limiting exceptions to the warrant requirement to their appropriate scope: "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. *It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.*"[244] The Warren Court attempted to insure the protection of an individual's privacy by requiring that a warrant be obtained from a neutral magistrate. The Burger Court, however, seemed less concerned with the privacy protection afforded by a warrant and more concerned with broadening the power of law enforcement personnel.

Burger Court - October 1976 to Present.

During the October 1976 Term, due largely to compelling fact situations, the Court began to indicate a strong preference for warrants.[245] Doctrinal consistency could be found, however, with the

240. Terry v. Ohio, 392 U.S. 1 (1968).

241. Camara v. Municipal Court, 387 U.S. 523 (1967).

242. Katz v. United States, 389 U.S. at 357 (footnote omitted).

243. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

244. *Id.* at 481.

245. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Chadwick, 433 U.S. 1 (1977) (discussed *infra* at text accompanying notes 281-320).

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Court's previous ruling[246] by utilizing a sliding scale of expectation analysis. When the expectation of privacy was great enough, as in many of the cases decided during and after the October 1976 Term, the Court utilized the warrant approach. On the other hand, when the expectation of privacy was diminished, the Court utilized a reasonableness approach. In analyzing the Court's decisions from the October 1976 Term to the present, this article will illustrate that such a rationale is confusing. Because the differentiating factor, "expectation of privacy," is so speculative, subjective, and hard to define, it is very difficult to predict which way the Court will turn in an individual case. Further, this analysis allows for vacillating between the warrant and the reasonableness approach despite the fact that since 1976 the Court has repeatedly expressed a preference for the warrant approach. In addition to the confusion of this analysis, it makes the principal purpose of the warrant clause, the interposition of a neutral person between the police ferreting out crime and individual citizens, relevant only to some fourth amendment activity.

The first signs of association between the Court's preference for a warrant and an increased expectation of privacy were seen in the administrative search area in *Almeida-Sanchez*.[247] In *G.M. Leasing Corp. v. United States*,[248] this analysis became more explicit when a unanimous court held that a warrantless seizure of business premises pursuant to a tax forfeiture statute[249] was impermissible. The Court cited the *Camara*[250] decision to indicate its preference for a warrant: "[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[251]

The Court distinguished *G.M. Leasing Corp.* from *Biswell*[252]

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246. *See* South Dakota v. Opperman, 428 U.S. 364 (1976); Texas v. White, 423 U.S. 67 (1975) (per curiam); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. at 237 (Powell, J., concurring); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Biswell, 406 U.S. 311 (1972).

247. 413 U.S. 266 (1973).

248. 429 U.S. 338 (1977).

249. 26 U.S.C. § § 6331(a), (b) (1970).

250. Camara v. Municipal Court, 387 U.S. 523 (1967).

251. 429 U.S. at 352-53 (quoting from Camara v. Municipal Court, 387 U.S. at 528-29).

252. United States v. Biswell, 406 U.S. 311 (1972). *See also* Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (The Court concluded that although Congress had

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because the business in *G.M. Leasing Corp.* was not highly regulated. The Court, in refusing to allow a warrantless search, indicated that both the nature of the business, and the extent to which it was regulated and licensed, were important considerations in determining whether the proprietor had a reduced expectation of privacy, and consequently whether a warrant would be required.[253]

In *Marshall v. Barlow's, Inc.*,[254] a case involving a warrantless search of business premises pursuant to the Occupational Safety and Health Act of 1970,[255] the Court again declined to follow the *Biswell* case and refused to allow a warrantless search. The Court concluded that businesses, solely because of their involvement in interstate commerce, were not a closely regulated industry of the type involved in *Biswell*.[256] The Court placed considerable emphasis on the fact that highly regulated businesses have a reduced expectation of privacy and stressed that this is a justification for the narrowly defined exceptions that permit the warrantless searches referred to in *Camara*: "Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise."[257]

The interesting aspect of *Marshall* and *G.M. Leasing Corp.* is the fact that the Court put most of its emphasis on the reduced expectation of privacy associated with closely regulated businesses. In *Biswell*, this had been the second argument the Court offered to justify the warrantless search.[258] The first rationale for a warrantless search the Court used in *Biswell* followed from *Camara*'s analysis for warrantless administrative searches:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant re-

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"broad authority to fashion standards of reasonableness for searches and seizures," it had "resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to an inspector" in the case of a liquor inspection pursuant to 26 U.S.C. § 7342 (1970).

253. 429 U.S. at 354. *See* Comment, *Fourth Amendment Search and Seizure*, 68 J. CRIM. L. & CRIMINOLOGY 493, 503 (1977). *But see* Michigan v. Tyler, 436 U.S. 499 (1978). (The Court refused to allow extended warrantless searches for the purpose of determining the cause of a fire. Expectation of privacy was discussed as to the extent that it would determine whether fourth amendment activity was involved, but the degree of expectation of privacy was not discussed with regard to the necessity of a warrant.)

254. 436 U.S. 307 (1978).

255. 29 U.S.C. §§ 651-78 (1970).

256. 436 U.S. at 313.

257. *Id.*

258. *See supra* text accompanying note 230.

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> quirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[259]

The Court in *G.M. Leasing Corp.* and *Marshall* did analyze whether a warrantless search was necessary given the governmental purpose,[260] nevertheless, in deciding these two cases, the Court placed more emphasis on expectations of privacy.

In another recent administrative search case, the Court's reasoning again centered on a reduced expectation of privacy analysis. In *Donovan v. Dewey*,[261] a case involving a warrantless inspection of quarries pursuant to Federal Mine and Safety and Health Act of 1977,[262] the Court emphasized the reduced expectation of privacy both because the quarry business is pervasively regulated and because mine safety inspections occur regularly. The owner of such a business should expect periodic inspections:

> Our prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property . . . . The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.
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> . . .[W]arrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials.[263]

Although it is true that the seeds for the allowance of warrant-

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259. Camara v. Municipal Court, 387 U.S. at 533.

260. Marshall v. Barlow's, Inc., 436 U.S. at 316-21; G.M. Leasing Corp. v. United States, 429 U.S. at 357.

261. 101 S. Ct. 2534 (1981).

262. 30 U.S.C. § § 801-818 (1977).

263. 101 S. Ct. at 2537-38 (citations and footnote omitted).

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less administrative searches of closely regulated businesses were sown during the Warren Era, the primary analysis utilized by the Warren Court was whether a warrant was practical, given the governmental purpose for conducting the search.[264] The Burger Court, beginning with *Biswell* and continuing through *Donovan*, has increasingly relied on reduced expectations of privacy associated with closely regulated businesses to justify warrantless searches. This reduced expectation of privacy analysis has not reached the level where the Court has concluded that the fourth amendment is not implicated.[265] Reduced expectation of privacy is utilized only to justify the warrantless inspections.

In the criminal area, the Court has utilized the greater expectation of privacy associated with a person's dwelling to require a warrant. In *Mincey v. Arizona*,[266] for example, a police officer was shot and killed while making a narcotics raid and arrest in Mincey's apartment.[267] Immediately following the shooting, the raiding officers searched the apartment for other occupants.[268] Pursuant to a police directive which precluded police officers from investigating shooting incidents in which they were involved, they did not search further or seize evidence.[269] Within ten minutes homicide detectives arrived.[270] These detectives conducted an extensive four-day warrantless search of the apartment.[271] This search was upheld by the Arizona Supreme Court on the grounds that a warrantless search of a homicide scene is an exception to the warrant requirement.[272]

Seeking to justify the search in the United States Supreme Court, the state's first contention was that Mincey had no expectation of privacy in the apartment because he had waived any reasonable expectation of privacy by shooting the police officer.[273] The Court

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264. *See* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). The Court in *See* indicated that it had not had occasion to consider the fourth amendment's relation to various regulatory statutes allowing entry on business premises. 387 U.S. at 544.

265. "It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy." United States v. Biswell, 406 U.S. at 316. The fact that the Gun Control Act poses only "limited threats" would indicate that the fourth amendment is still a factor in the Court's analysis.

266. 437 U.S. 385 (1978).

267. *Id.* at 387.

268. *Id.* at 388.

269. *Id.*

270. *Id.* at 388-89.

271. *Id.* at 389.

272. *Id.* at 389-90.

273. *Id.* at 391.

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rejected this waiver argument by pointing out that this type of reasoning "would impermissibly convict the suspect even before the evidence against him was gathered."[274] Citing *United States v. Edwards*,[275] the state further argued that, given the fact that Mincey's arrest was a great intrusion, the subsequent search was constitutionally irrelevant.[276] The court distinguished *Edwards* by pointing out that *Mincey* involved the search of a dwelling rather than the search of a person in police custody:

> It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person . . . . It is quite another to argue that he also has a lessened right of privacy in his entire house. Indeed this very argument was rejected when it was advanced to support the warrantless search of a dwelling where a search occurred as "incident" to the arrest of its occupant.[277]

When the expectation of privacy is sufficient, the Court has followed the warrant approach to analyze the fourth amendment, as it did in *Mincey*.[278] The Court rebuked the state for urging the reasonableness approach, and emphasized the importance of the warrant by stating that "it is a cardinal principal that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' "[279]

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274. *Id.* (footnote omitted).
275. 415 U.S. 800 (1974).
276. 437 U.S. at 391.
277. *Id.* (citations omitted).
278. *Id.* at 390.
279. *Id.* (quoting from Katz v. United States, 389 U.S. at 357) (footnotes omitted).

In the related area of arrest warrants, varying degrees of expectation of privacy were also recognized. In United States v. Watson, 423 U.S. 411 (1976), the Court held that a warrantless felony arrest in a public place was constitutional even when the arresting authority had ample opportunity to secure a warrant. *Id.* at 414.

In Payton v. New York, 445 U.S. 573 (1980), however, the significant privacy interest associated with a dwelling was the deciding factor in the Court's decision to require an arrest warrant where an arrest occurred inside a home. *Id.* at 602-03. Justice Blackmun explicitly stressed the fact that the arrest occurred in a dwelling in his concurring opinion. *Id.* at 603.

Thus, an arrest in a public place does not require an arrest warrant, but an arrest warrant is required when the expectation of privacy increases, as it does for an arrest occurring in a dwelling.

NOTE: The area of arrest warrants separated from this Article's analysis of search warrants, since it is subject to a different historical analysis not here pursued. *See* Payton v. New York, 445 U.S. 573, 620-21 (1980) (Rehnquist, J., dissenting).

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Probably the clearest example of the reduced expectation of privacy rationale,[280] and the confusion which it engenders, can be found in *United States v. Chadwick*[281] and *Arkansas v. Sanders*.[282] Chief Justice Burger wrote the *Chadwick* opinion. Burger had consistently voted against requiring a warrant in criminal searches.[283]

In *Chadwick*, a locked footlocker was seized from the open trunk of a parked automobile during the arrests of those who were in possession of the footlocker.[284] Police took the footlocker to the federal building where, over an hour after the arrests, they opened it without a warrant and seized its contents, a large quantity of marijuana.[285] The defendant attempted to suppress the marijuana.

Using its reading of the history of the fourth amendment, the government sought first to justify its warrantless search by arguing that warrants were only applicable to searches in homes, in offices, and of private communications, and that only in those context was the reasonableness of a search or seizure dependent upon whether or

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280. In a related area, a lesser intrusion following an initial intrusion rationale was used to expand upon the justification for a *Terry* (Terry v. Ohio, 392 U.S. 1 (1968)) search. In Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977), the driver of an automobile was lawfully stopped by a police officer. The driver was asked to step out of the car, at which time the officer noticed a bulge under his jacket. The officer frisked the driver and discovered a weapon.

The issue before the Court was whether the request to get out of the car could be justified, not withstanding the fact that the officer had no reason to suspect that the driver was guilty of committing a crime at the time. *Id.* at 109. The Court, as it did in *Terry*, justified the additional intrusion by balancing it with the governmental interest involved: "We think this additional intrusion can only be described as *de minimus*. The driver is being asked to expose to view very little more of his person than is already exposed." *Id.* at 111.

This minimizing of the intrusion allowed the Court to abandon " 'the central teaching of this Court's Fourth Amendment jurisprudence' — which has ordinarily required individualized inquiry into the particular facts justifying every police intrusion — in favor of a general rule covering countless situations." *Id.* at 116 (Stevens, J., dissenting) (quoting from Terry v. Ohio, 392 U.S. at 21 n.18). Here again we see the Court ignoring traditional fourth amendment doctrine to justify additional police activity following an initial intrusion, on the grounds that given the first intrusion (here, stopping the automobile), additional intrusions are insignificant.

281. 433 U.S. 1 (1977).

282. 442 U.S. 753 (1979).

283. *See* South Dakota v. Opperman, 428 U.S. 364 (1976); Texas v. White, 423 U.S. 67 (1975)(per curiam); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Edwards, 415 U.S. 800 (1974); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. United States Dist. Ct., 407 U.S. 297, 324 (1972) (Burger, C.J., concurring in the result); Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Burger, C.J., concurring and dissenting); Vale v. Louisiana, 399 U.S. 30, 36 (1970) (Burger, C.J., joining Black, J., dissenting); Chambers v. Maroney, 399 U.S. 42 (1970).

284. 433 U.S. at 4.

285. *Id.* at 4-5.

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not a warrant had been obtained.[286] As a corollary to that proposition, the government contended that in all other cases "less significant privacy values are at stake"[287] and reasonableness should be determined without regard to a warrant.[288]

Although the Court rejected the specific details of the government's argument,[289] the Court did adopt the theory of the argument.[290] Had the government emphasized a lesser expectation of privacy analysis, instead of limiting its argument to homes, offices, and private communications, its argument would have been consistent with the reasoning of the Court, although the Court still would have found that a sufficient expectation of privacy existed to justify a warrant in this case.[291]

Chief Justice Burger conducted his own review of history and precedent and emphatically disagreed with the Government's argument. He concluded that the warrant clause is not limited to dwellings or to other specifically designated locales because the fourth amendment " 'protects people, not places,' . . . [and] the warrant clause makes a significant contribution to that protection."[292] This reasoning suggests that Chief Justice Burger was adopting the warrant approach whenever activity protected by the fourth amendment was found to exist. This would appear to be inconsistent with the Court's previous rulings; however, later in the opinion, the Court reconciled its previous decisions in *Chambers*,[293] *Robinson*,[294] and *Edwards*[295] by means of a reduced expectation of privacy analysis.[296]

The government further sought to justify the search by using exceptions to the warrant requirement. Drawing an analogy between an automobile search and that of a footlocker, the government argued that the search at issue was legal under the *Carroll*[297] mobility exception.[298] Chief Justice Burger agreed that both automobiles and luggage were mobile but pointed out that automobile searches had

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286. *Id.* at 7.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 12-13.
291. *Id.* at 13.
292. *Id.* at 7 (quoting Katz v. United States, 389 U.S. at 351).
293. Chambers v. Maroney, 399 U.S. 42 (1970).
294. United States v. Robinson, 414 U.S. 218 (1973).
295. United States v. Edwards, 415 U.S. 800 (1974).
296. 433 U.S. at 12.
297. Carroll v. United States, 267 U.S. 132 (1925).
298. 433 U.S. at 12.

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been sustained even when mobility was no longer a factor.[299] In these cases, the warrantless search was justified by a lesser expectation of privacy associated with the automobile.[300] In the case at bar, since the luggage was in custody and mobility was not a factor, and because "a person's expectations of privacy in personal luggage are substantially greater than in an automobile,"[301] the two situations were not analogous.

Thus, Chief Justice Burger distinguished *Chadwick* from *Chambers* by postulating a different degree of expectation of privacy in the two situations. While holding that a warrant was necessary in *Chadwick*,[302] the Chief Justice maintained a precedential consistency with the earlier opinions, by holding that when a court adjudged a search to be a greater intrusion of privacy than an initial valid warrantless seizure, as in the case at bar, the subsequent search was unreasonable without a warrant.[303] This situation was the opposite of those in *Carroll, Chambers,* and *Edwards*, where searches were upheld because they constituted, according to the Court, a lesser intrusion in privacy that followed a prior legitimate seizure. The question not answered by the Court was by what standard police or judges could decide whether a subsequent search was a lesser (constitutionally insignificant) intrusion for which no warrant was needed or, on the other hand, a greater intrusion as in *Chadwick*. The Court simply announced which expectation of privacy it found to be greater or lesser without providing any explanation for its conclusion.

The government in *Chadwick* also sought to justify the warrantless search of the footlocker under the search incident to arrest exception to the warrant requirement.[304] In upholding the validity of the principle of search incident to arrest, Chief Justice Burger, citing *Preston*,[305] concluded that searches of luggage remote in time and place from the arrest cannot be justified under the search incident to arrest exception to the warrant requirement.[306] The Chief Justice cited the reasons for the exception (the possibility that the arrestee might gain possession of a weapon or destroy evidence) and stated that in those cases in which the exigency did not exist, as in the case

299. *Id.*
300. *Id.*
301. *Id.* at 13.
302. *Id.*
303. *Id.*
304. *Id.*
305. Preston v. United States, 376 U.S. 364 (1964).
306. 433 U.S. at 15.

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at bar, the exception could not be applied.[307]

At first glance, this segment of the Court's holding appears inconsistent with that in *Edwards*. The dissent[308] noted the inconsistency, and pointed out that the Court in *Robinson* and *Edwards* recognized that, given the serious deprivations associated with a custodial arrest, lesser invasions were incidental.[309] In answer to this argument, Chief Justice Burger distinguished between searches of the person, as in *Robinson* and *Edwards*, and those of possessions not within an arrestee's immediate control (such as a footlocker).[310] An arrest, argued the Chief Justice, so diminished reasonable expectations of privacy in the person of the arrestee that a warrantless search of his or her person was constitutionally permissible.[311] On the other hand, according to the Chief Justice, an arrest does not lessen expectations of privacy in other possessions.[312] Justice Blackmun was clearly correct, however, when he stated "The Court's opinion does not explain why a wallet carried in the arrested person's clothing, but not the footlocker in the present case, is subject to 'reduced expectations of privacy caused by the arrest.' "[313]

In a manner similar to his rejection of the government's attempted analogy to the automobile exception, Chief Justice Burger presented no guidelines as to when a lesser or greater expectation of privacy might be present. Justice Blackmun argued that the Court should "adopt a clear-cut rule permitting property seized in conjunction with a valid arrest in a public place to be searched without a warrant."[314]

Justice Blackmun sought to avoid the thrust of *Chadwick* by pointing out that "fortuitous circumstances" limited the outcome of this case.[315] Had the police waited a few minutes until the car started to move they could have searched the trunk pursuant to the automobile exception.[316] Or, had they conducted the search on the spot, they could have justified the search, pursuant to *Chimel*,[317] as

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307. *Id.*
308. *Id.* at 17 (Blackmun, J., dissenting).
309. *Id.* at 18 (Blackmun, J., dissenting).
310. *Id.* at 15.
311. *Id.* at 16 n.10.
312. *Id.*
313. *Id.* at 20-21 (Blackmun, J., dissenting) (quoting the majority, at 16 n.10).
314. *Id.* at 21 (Blackmun, J., dissenting).
315. *Id.* at 22 (Blackmun, J., dissenting).
316. *Id.* (Blackmun, J., dissenting).
317. Chimel v. California, 395 U.S. 752 (1969).

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incident to arrest.[318] The majority was silent on these points, although Justice Brennan, in his concurrence,[319] disagreed with the dissent. He pointed out that the dissent had cited only courts of appeal decisions for the proposition that the footlocker could have been searched had the car been moving; the search incident to arrest exception would also not apply because it was difficult to imagine that the footlocker was within the arrestee's immediate control when he was apprehended.[320]

Two years later, *Arkansas v. Sanders*[321] gave the Court a chance to answer the automobile exception situation posed by Justice Blackmun.[322] In *Sanders*, the police had probable cause to search the defendant's suitcase when he arrived at the airport.[323] They watched the defendant drive away with the suitcase in a taxi.[324] The police stopped the taxi and secured the driver's permission to open the trunk, where they found the suitcase.[325] They then opened the suitcase without the defendant's permission.[326]

Justice Powell, writing for the majority in *Sanders*, posed the issue as whether the search fell "on the *Chadwick* or the *Chambers/Carroll* side of the Fourth Amendment line";[327] that is, whether the warrantless search of the suitcase in *Sanders* fell within the automobile exception to the warrant requirement. Justice Powell emphasized many of the doctrines previously established by the Warren court. He reiterated the importance of a warrant in analyzing the reasonableness of a search.[328] He further stated that exceptions to the warrant requirement are few, carefully delineated, and narrow in scope so as to accommodate only the circumstances that justify each exception.[329]

Turning to the automobile exception, Justice Powell delineated two reasons for the difference between the treatment accorded automobiles and that accorded other private property. First, he pointed out that the mobility of the automobile often makes it im-

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318. 433 U.S. at 22 (Blackmun, J., dissenting).
319. *Id.* at 16 (Brennan, J., concurring).
320. *Id.* at 16-17 (Brennan, J., concurring).
321. 442 U.S. 753 (1979).
322. *See also infra* text accompanying notes 346-57.
323. 442 U.S. at 755.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* at 757.
328. *Id.* at 757-59.
329. *Id.* at 759-60.

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possible to secure a warrant.[330] This reason pertains to the traditional rationale of the automobile exception — preventing the destruction of evidence.[331] Second, Justice Powell pointed to the diminished expectation of privacy in an automobile as distinguished from other property.[332]

Justice Powell concluded that the search in *Sanders* was not justified by either the mobility or the lesser expectation of privacy rationale.[333] Since many courts of appeal[334] had previously held that the automobile exception extended to suitcases or to other containers found in the car, this decision could be viewed as a narrowing of the automobile exception to the warrant requirement. Chief Justice Burger, however, concurring in the judgement,[335] suggested that in his view *Sanders* did not involve the automobile exception at all. The Chief Justice pointed out that probable cause existed for a search of the luggage, not the automobile in which it was carried.[336] "The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick* . . . . This case simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle."[337] The Chief Justice did not express an opinion as to the legality of the warrantless search of a container found within an automobile when there was probable cause to search the automobile. He did note that the expectation of privacy associated with luggage was not diminished merely because it was found in an automobile.[338]

Justice Blackmun, in his dissent in *Sanders*,[339] pointed out the illogic of the majority's position. He had trouble distinguishing between the expectation of privacy associated with a suitcase found in a car and the expectation of privacy associated with a locked glove compartment or the car's trunk, which could have been searched under the automobile exception.[340] Justice Blackmun further demon-

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330. *Id.* at 761.
331. *See* Carroll v. United States, 267 U.S. 132 (1925).
332. 442 U.S. at 761.
333. *Id.* at 763-65.
334. 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 535 (1978).
335. 442 U.S. at 766 (Burger, C.J., concurring in the judgment).
336. *Id.* at 766-67 (Burger, C.J., concurring in the judgment).
337. *Id.* at 767 (Burger, C.J., concurring in the judgment).
338. *Id.* (Burger, C.J., concurring in the judgment).
339. *Id.* at 768 (Blackmun, J., dissenting).
340. *Id.* at 769 (Blackmun, J., dissenting).

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strated the weakness of the reduced expectation of privacy analysis when he argued that given the initial seizure of the luggage, a subsequent search is incidental and should not require a warrant:

> But this Court has not distinguished between the "lesser" intrusion of a seizure and the "greater" intrusion of a search, either with respect to automobiles . . . or with respect to persons subject to custodial arrest . . . . And I see no reason to impose such a distinction here. Given the significant encroachment on privacy interests entailed by a seizure of personal property, the additional intrusion of a search may well be regarded as incidental.[341]

The majority in *Chadwick* and *Sanders* was faced with a dilemma. On the one hand they wished to utilize the warrant approach, and on the other hand they were faced with the precedent of *Chambers*,[342] *Robinson*,[343] and *Edwards*.[344] To resolve this dilemma, they avoided the reduced expectation of privacy analysis generally associated with automobiles and with more detailed searches after initial seizures, and devised an exception to this analysis. They recognized increased privacy expectation when dealing with certain personal repositories (for example luggage and footlockers) and, in effect, created two categories of expectation of privacy.

Expectation of privacy is a subjective principle[345] that cannot meaningfully be divided into sub-categories of expectation of privacy after an initial invasion; one requiring a warrant and the other not requiring a warrant. Is a warrantless search of an automobile after a lawful seizure subject to a lesser degree of privacy expectation than a footlocker or a suitcase also lawfully seized? If privacy expectation can be measured at all, how does one measure varying degrees of expectation of privacy?

The Court, aware of the confusion created by *Chadwick* and *Sanders*,[346] sought to provide a so-called "bright line" approach that

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341. *Id.* at 770 (Blackmun, J., dissenting) (citations and footnotes omitted).

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

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

344. United States v. Edwards, 415 U.S. 800 (1974).

345. *See* Note, Katz *and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort* 23 CLEV. ST. L. REV. 63, 74-78 (1974); Note, *The Reasonable Expectation of Privacy* — Katz v. United States, *A Postscript*, 9 IND. L. REV. 468, 471 (1976); Note, *The Concept of Privacy and the Fourth Amendment* 6 U. MICH. J. L. REF. 154, 178-80 (1972). *See generally* Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

346. The confusion resulting from the utilization of an expectation of privacy analysis in

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would eradicate the confusion and give law enforcement officers some direction as to when a warrant was required. In two cases decided July 1, 1981, the Court provided a clearer standard for law enforcement officers; although on substantially the same facts, the Court used a reasonable approach in one case and the warrant approach in the other case.

In *Robbins v. California*,[347] a police officer had probable cause to search a recessed luggage compartment in the back of a station wagon.[348] The officer discovered two packages wrapped in green opaque plastic.[349] The packages were opened without a warrant and marijuana was discovered.[350] Justice Stewart, writing for a plurality,[351] attempted to eliminate the confusion created by the issue of what is a personal repository. The various courts of appeal had drawn distinctions between sturdy containers like suitcases and flimsy containers like cardboard boxes.[352] Justice Stewart stated that

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determining whether a warrant will be required can also be seen in Walter v. United States, 447 U.S. 649 (1980). In *Walter*, packages containing films were erroneously delivered to a company. *Id.* at 651-52. One employee opened one or two of the boxes, which contained movies of homosexual activities. *Id.* at 652. The employees called the FBI. Some time after taking the films, FBI agents viewed them without attempting to obtain a warrant. *Id.*

Justice Stevens, joined by Justice Stewart, delivered the judgment of the Court, stating that "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search." *Id.* at 657. Justice Stevens concluded that the government's argument that no warrant was required because the packages were opened by a private party "must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause." *Id.* at 656.

If the expansion of the private search was less "significant," would Justice Stevens have followed the reasoning of *Robinson* and *Edwards* and hold that no warrant was required because of a diminished expectation of privacy?

The situation in *Walter* but for the first amendment aspect is analogous to a search which is conducted entirely by the government. If an initial government intrusion is justified (as was the private search in *Walter*), are subsequent searches of the same or lesser scope insulated from fourth amendment scrutiny? The rationale we have seen the Burger Court apply would indicate that subsequent searches are indeed insulated, at least from the warrant requirement.

347. 101 S.Ct. 2841 (1981).

348. *Id.* at 2847.

349. *Id.* at 2844.

350. *Id.*

351. Justice Stewart was joined by Justices Brennan, White, and Marshall. Chief Justice Burger and Justice Powell concurred in the judgment but did not join the plurality opinion.

352. *See* United States v. Montano, 613 F.2d 147 (6th Cir. 1980); United States v. McGrath, 613 F.2d 361 (2d Cir. 1979); United States v. Presler, 610 F.2d 1206 (4th Cir. 1979); United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing*, 615 F.2d 10 (2d Cir. 1980); United States v. Miller, 608 F.2d 1089 (5th Cir. 1979); United States v. Meier, 602 F.2d 253 (10th Cir. 1979); United States v. Johnson, 588 F.2d 147 (5th Cir. 1979); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978); United States v. Gaultney,

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a green opaque package was analogous to a footlocker or suitcase and thus a warrant was required before it could be opened:

> What one person may put into a suitcase another may put into a paper bag . . . . And as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative "privacy interests" in a closed suitcase, briefcase, portfolio, duffle bag, or box.[353]

Justice Stewart correctly recognized the problem with assigning varying privacy interests to personal property. Extending this reasoning, however, it is hard to understand how varying privacy interests can be said to exist between an automobile and other personal property.

In this case the plurality explicitly adopted the warrant approach. Quoting the language of *Katz*, they stated: "Although the Court has identified some exceptions to this warrant requirement, the Court has emphasized that these exceptions are 'few, specifically established, and well-delineated.' "[354] To justify this adoption of the warrant approach, the plurality was forced to find a greater expectation of privacy. That caused them to associate a green opaque package with a footlocker rather than with an automobile.

Justice Stewart failed to reconcile the differences in the facts of *Robbins* and *Sanders*. *Robbins* dealt with a situation in which there was probable cause to search the whole vehicle, rather than just the luggage, as was the case in *Sanders*. This was the fact pattern which, according to Chief Justice Burger, was unresolved by *Sanders*,[355] yet Justice Stewart neglected to explain why *Robbins* was not an appropriate case for applying the automobile exception analysis. *Robbins* substantially limited the automobile exception. Almost anything found during an automobile search that was in some sort of container could not be searched without a warrant. As Justice Powell, in a concurring opinion,[356] pointed out, a cigar box or Dixie cup found in a car would require a warrant.[357]

Justice Stewart followed his *Robbins* limitation of the scope of

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581 F.2d 1137 (5th Cir. 1978). *See also* United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, 570 F.2d 352 (9th Cir. 1978), *cert. denied*, 439 U.S. 825 (1978).

353. 101 S. Ct. at 2846 (citation omitted).

354. *Id.* at 2844.

355. *See supra* text accompanying notes 335-338.

356. 101 S. Ct. at 2847 (Powell, J., concurring in the judgment).

357. *Id.* at 2849 (Powell, J., concurring in the judgment).

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the automobile exception with his majority opinion in *New York v. Belton*.[358] In that case he used the reasonableness approach to justify a warrantless search of a "container" (a zipped jacket pocket) found in an automobile on search incident to arrest grounds.[359]

The Court in *Belton* disregarded the mandates of the warrant approach, which require construing exceptions narrowly by limiting the warrantless search to the justification that necessitated the relevant exception. *Chimel*[360] allowed for a warrantless search incident to arrest of anything within the arrestee's control to prevent the destruction of evidence and to protect police officers — the twin aims of the search incident exception. The Court in *Belton* adopted a *Robinson*[361] reasonableness approach to justify the warrantless search.[362] In *Belton*, the arrestee was under arrest outside the car when the search of the jacket found in the backseat of the car took place.[363] There was no possibility that the arrestee could have gained possession of the jacket, and therefore, there was no way to justify the search by using *Chimel*'s search incident to arrest analysis.[364]

Nevertheless, to have a standardized approach, the Court created an absolute exception to the warrant requirement. As in *Robinson*, some warrantless searches are per se reasonable, regardless of the facts.

The facts of *Belton* were similar to *Robbins*. As Justice Stevens[365] pointed out: "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."[366]

Thus, on the same day, with the same Justice writing the Court's opinion, and on similar facts, the Court adopted both a warrant approach and a reasonableness approach. The absurdity of this was pointed out by Justice Stevens in his criticism of the Justices who were part of the plurality in *Robbins* and the majority in *Belton*. "The Chief Justice, Justice Stewart, and Justice Powell reach

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358. 101 S. Ct. 2860 (1981).

359. *Id.* at 2865.

360. Chimel v. California, 395 U.S. 752 (1969). *See also supra* text accompanying notes 175-81.

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

362. 101 S. Ct. at 2862-65.

363. *Id.* at 2862.

364. *Id.* at 2868 (Brennan, J., dissenting).

365. Robbins v. California, 101 S. Ct. at 2855 (Stevens, J., dissenting).

366. *Id.* (Stevens, J., dissenting).

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the curious conclusion that a citizen has a greater privacy interest in a package of marijuana enclosed in a plastic wrapper than in the pocket of a leather jacket."[367] Justice White, in his dissent in *Belton*,[368] also discussed the logical inconsistency between these two cases:

> In *Robbins v. California*, it was held that a wrapped container in the trunk of a car could not be searched without a warrant even though the trunk itself could be searched without a warrant because there was probable cause to search the car and even though there was probable cause to search the container as well. This was because of the separate interest in privacy with respect to the container. The Court now holds that as incident to the arrest of the driver or any other person in an automobile, the interior of the car and any container found therein, whether locked or not, may not only be seized but also searched even absent probable cause to believe that contraband or evidences of crime will be found.[369]

Despite this apparent inconsistency,[370] these two cases do provide a more workable standard for the police. As Justice Powell noted in his concurrence,[371] *Robbins* is limited to the container search cases and *Belton* is limited to the search incident to arrest cases. *Robbins* did help resolve issues raised by searches of personal repositories,[372] while *Belton* provided a standardized approach to the requirements

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367. *Id.* at 2855 n.1 (Stevens, J., dissenting).

368. *Id.* at 2870 (White, J., dissenting).

369. *Id.* (White, J., dissenting) (citation omitted).

370. It should be pointed out that the Supreme Court granted review of a D.C. Circuit case, United States v. Ross, No. 80-2209 (D.C. Cir. 1981), and asked the parties to address the issue of whether *Robbins* should be reconsidered. In argument, however, neither party took the position for a complete reversal of *Robbins*. As a matter of fact, the government argued for varying degrees of expectations of privacy. Andrew L. Frey, of the Solicitor General's Office, argued that a warrantless search of a paper bag which is unlikely to contain personal effects should be allowed. If the Court adopts the government's argument, we are still in the quagmire of diminished expectations of privacy for purpose of allowing a warrant: Is a green opaque package somehow different than a paper bag? This approach is the one suggested by Justice Powell in his concurrence in *Robbins*, 101 S. Ct., at 2849-50. If, on the other hand, the Court affirms *Robbins*, we still face the confusion of assigning various privacy expectations to different government activities (search incident requires no warrant because the fact of arrest creates diminished privacy expectations, whereas a search of any container in a car not justified by the search incident exception would require a warrant). The arguments are summarized at 50 USLW 3707 (March 9, 1982).

371. 101 S. Ct. at 2847-51 (Powell, J., concurring in the judgment).

372. *See supra* text accompanying note 353.

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for searches incident to arrest as long as there has been an arrest, anything in the interior of the car in which the arrestee was riding may be searched). The inconsistency in these approaches is that the former recognizes the importance of a warrant while the latter does not.

The Court in its attempt to find a consistent rule has used the reasonableness and the warrant approaches to the fourth amendment. The justification for this is this sliding scale of expectation of privacy. The Court has created two categories of searches without any clear rationale for distinguishing the categories. In one category, all containers except automobiles (*Robbins*) are subject to warrant approach; in the other category, automobiles (*Chambers*)[373] or more detailed searches after an initial seizure such as an arrest (*Belton* and *Robinson*), are subject to the reasonableness approach.

In adhering to these categories, the Court in *Robbins* decided that all containers have a greater expectation of privacy than an automobile and therefore may not be searched without warrants. However, searches of any containers after the significant privacy invasion of an arrest are subject to a lesser expectation of privacy and consequently require no warrant. This rationale is confusing.

Conclusion

The Burger Court, by misapprehending concepts developed by the Warren Court, has developed a confusing analysis by which it chooses between using the reasonableness or warrant approaches to fourth amendment cases.

In *Terry v. Ohio*[374] the Warren Court recognized that certain limited police intrusions less than the intrusiveness of arrest could be permitted on a lesser, different standard than traditional probable cause.[375] The *Terry* decision was limited to less than full-fledged arrests and only in that limited context permitted the standard to be something less than full-fledged probable cause.[376] This approach did not affect the requirement for a warrant. As a matter of fact, the Court expressly indicated that a warrant was necessary whenever practical.[377]

In *Katz v. United States*,[378] expectation of privacy became the

373. Chambers v. Maroney, 399 U.S. 42 (1970).
374. Terry v. Ohio, 392 U.S. 1 (1968).
375. *See supra* text accompanying notes 93-98.
376. *Id.*
377. *Id.*
378. 389 U.S. 347 (1967).

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test for determining whether or not the fourth amendment was implicated.[379] If it was implicated, the *Katz* decision, relying on the warrant approach, declared that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per so unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions."[380]

Disregarding *Katz*, the Burger Court used the reasonableness approach to interpret the fourth amendment. This approach implicitly extended *Terry* to the warrant requirement by allowing warrantless searches when an individual has reduced expectation of privacy in what is searched. In that way, the Burger Court circumvented the necessity for warrants.

This approach totally ignores the crucial difference between the probable cause requirement and the warrant requirement. Certainly, where there is a lesser privacy invasion less proof should be required to justify that invasion. Any evaluation of that proof when the fourth amendment is implicated, however, should be done by someone other than a law enforcement officer, regardless of the extent of the privacy invasion. It is desirable in the absence of exigent circumstances that a judge, rather than a police officer, determine whether an individual's privacy should be invaded.

The clearest examples of the Burger Court's approach can be found in the automobile area. Beginning with *Chambers*[381] the Court saw the expectation of privacy as diminished where automobiles were concerned (although some privacy expectation survived for fourth amendment purposes). From this rationale the Court developed two approaches to justify warrantless searches. First, the Court created an absolute exception for automobile searches. In addition, once there was an intrusion of a person's privacy through a lawful seizure, subsequent warrantless searches were allowed because the person had a reduced expectation of privacy in any subsequent search: "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."[382] This subsequent search reasoning was incorporated in the search incident to arrest exception

379. *See supra* text accompanying notes 99-108.
380. Katz v. United States, 389 U.S. at 357.
381. Chambers v. Maroney, 399 U.S. 42 (1970).
382. *Id.* at 52.

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in *Robinson*[383] and *Edwards*.[384]

Reduced expectation of privacy also crept into administrative searches for businesses that are pervasively regulated. Although the Court still claimed to adhere to the *Camara*[385] rule that a warrant is required unless it cannot be obtained practicably (since the governmental purpose for conducting the search would be frustrated), commencing with *Biswell*,[386] the Court placed added emphasis on expectation of privacy considerations to determine whether a warrant would be required.

Since 1976, the Burger Court has repeatedly stated its preference for the warrant approach.[387] In *Chadwick*,[388] the court even rejected a government argument that the reasonableness approach should have been used in a situation where the expectation of privacy was diminished.[389] Despite its professed preference for the warrant approach, the Court continued to apply the reasonableness approach in instances when it believed that there was a diminished expectation of privacy. This inconsistency in the Court's approach, which is readily apparent in two recent cases, *Robbins v. California*[390] and *New York v. Belton*,[391] is the result of the Court's attempt to reconcile its rulings that dispensed with the requirement for a warrant when lesser privacy interests are at stake with its expressed preference for requiring a warrant. To maintain superficial doctrinal consistency with the *Chambers*[392] line of cases, yet to avoid their thrust, the Court developed a convoluted sliding scale analysis which purportedly distinguishes various degrees of expectation of privacy.

One problem with this analysis is that it creates a double layer of expectation of privacy. Not only must the Court determine whether or not an expectation of privacy exists for purposes of determining if the fourth amendment is applicable, but it must also deter-

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

384. United States v. Edwards, 415 U.S. 800 (1974).

385. Camara v. Municipal Court, 387 U.S. 523 (1967).

386. United States v. Biswell, 406 U.S. 311 (1972).

387. Justice Rehnquist, however, would prefer to return to the reasonableness approach. *See* Justice Rehnquist's concurrence in New York v. Belton, 101 S. Ct. at 2865, and his dissent in Robbins v. California, 101 S. Ct. at 2851.

388. United States v. Chadwick, 433 U.S. 1 (1977).

389. *See supra* text accompanying notes 286-291.

390. Robbins v. California, 101 S. Ct. 2841 (1981).

391. New York v. Belton, 101 S. Ct. 2860 (1981).

392. Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Robinson, 414 U.S. 218 (1973); United States v. Edwards, 415 U.S. 800 (1974); Cardwell v. Lewis, 417 U.S. 583 (1974); Texas v. White, 423 U.S. 67 (1975)(per curiam); South Dakota v. Opperman, 428 U.S. 364 (1976).

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mine whether there is sufficient expectation of privacy to require a warrant. As Professor Alschuler puts it: "The Supreme Court has developed a sophisticated four-tier analysis" to determine the necessity of a warrant: "big boxes (houses), middle size boxes (automobiles), small boxes (footlockers), and teeny boxes (cigarette packages)."[393] Despite the Supreme Court's attempt to provide a clearer analysis of "small boxes" (every container will require a warrant) and "teeny boxes" (any object subject to search incident to arrest), it still has not reconciled its stated preference for the warrant approach with its persistent reliance on the reasonableness approach (e.g., *Belton*).

The Court, to eliminate the confusion, should give meaning to its expressed preference for the warrant approach by applying it exclusively. Although requiring a warrant does not always interpose a neutral and detached magistrate between the police and citizens, it does have substantial beneficial effects.[394]

To utilize the warrant approach exclusively, the Court needs to eliminate the incomprehensible categories of expectation of privacy which it has created. It needs to overturn *Chambers* and the subsequent auto cases[395] and return to a *Carroll*[396] mobility analysis. It is absurd to hold that there is a greater expectation of privacy in a green opaque package[397] than in the search of the interior of an automobile. *Carroll* created an exception to the warrant requirement because exigent circumstances, the mobility of the car, made it impractical to obtain a warrant.[398] If a warrant were required, the opportunity to search the car's contents could be lost. Once these exigent circumstances disappear, as they did in *Chambers* (where the car was in police custody),[399] requiring a warrant would not frustrate the opportunity to search the car.

In addition, the Court should overturn *Robinson*,[400] *Edwards*,[401] and *Belton*,[402] which, following the rationale of *Chambers*, allowed

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393. Alschuler, *Burger's Failure: Trying Too Much to Lead*, NAT'L L. J., Feb. 18, 1980 at 26.

394. *See supra* notes 57-61 and accompanying text.

395. *See supra* cases mentioned in text accompanying notes 121-174.

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

397. *See supra* the textual discussion of Robbins v. California, 101 S. Ct. 2841 (1981), at notes 349-357.

398. *See supra* text accompanying notes 42-43.

399. *See supra* text accompanying notes 121-124.

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

401. United States v. Edwards, 415 U.S. 800 (1974).

402. New York v. Belton, 101 S. Ct. 2860 (1981).

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for additional warrantless searches following an initial intrusion on a person's privacy. To promote the use of warrants, exceptions should in fact (not just in rhetoric) be narrowly drawn. Otherwise these exceptions eviscerate the warrant requirement. The Court should consider the facts of the individual case and see whether or not the scope of the search was limited by the circumstances which made it necessary for warrantless activity in the first place.

A return to an exclusive warrant approach, although not perfect, would provide a standard which could be applied by police officers in the field, and would insure the fourth amendment rights of the individual. The exceptions to the requirement for a warrant should continue to reflect their origins:[403] a common sense analysis of exigent circumstances. It makes more sense to review the facts of an individual case to determine whether or not it was practical to secure a warrant (i.e., was a car mobile, or was a search necessary to protect an officer?) than to review the abstract distinctions necessitated by the Court's attempt to apply a diminished expectation of privacy rationale.

Adhering exclusively to a warrant approach and eliminating the reduced expectation of privacy analysis would have the following results. Where there was probable cause to search an automobile, as in both *Robbins*[404] and *Belton*,[405] the Court would determine whether the car was mobile immediately before the search. To determine mobility, the following facts might be considered: whether a search could occur at the scene (as determined by lighting and other safety considerations); whether items within the car could be removed (thus eliminating the mobility concern for those items); how necessary it was to tow the car based on the availability of a tow and of a place to store the car. There would be no distinction based on expectations of privacy between the search of the automobile and the various containers found within the automobile. In reviewing the relevant facts of a case to assess the need for a warrant, the critical factor for the Court would be mobility. For instance, the green opaque package could be easily removed. Since there would be no danger that it would drive away, a warrant would be required before the package could be searched. "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation

403. *See supra* text accompanying notes 42-45 and 65-82.
404. Robbins v. California, 101 S. Ct. 2841 (1981).
405. New York v. Belton, 101 S. Ct. 2860 (1981).

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permissible."[406]

If there was no probable cause for the car to be searched, then a search would be inappropriate unless it was consented to or was within another exception to the warrant requirement. This would require further analysis of the facts. In *Belton,* for example, it seems unlikely that the search of the jacket could be justified by the incident to arrest exception to the warrant requirement. Assuming the facts indicated that the seizure of the jacket was appropriate (e.g., if the jacket was within the arrestee's immediate control),[407] a subsequent search of the jacket could not be justified by the same circumstances which allowed for the seizure. Once the jacket was within the exclusive control of the police officer, a search to prevent the destruction of evidence or to protect the officer from the arrestee would no longer be necessary.

If the Court is committed to the warrant approach, it should use that approach exclusively. Expectations of privacy should be examined only to determine whether a particular case implicated the fourth amendment. If the fourth amendment was implicated, a warrant should be required whenever one could be practicably obtained. Practicality should be determined by the facts of individual cases, and the scope of any warrantless search should be limited to the practicality considerations which rendered its initiation permissible.

Addendum

While this Article was in publication, the Supreme Court decided *United States v. Ross.*[408] This case held that when there was probable cause to search an automobile, the scope of the warrantless search included the contents of a container found within the automobile. This decision overrules *Robbins v. California*[409] and helps clarify the apparent inconsistency resulting from the *Robbins* and *Belton* decisions.[410] I might add, however, that this clarification has the ef-

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406. Terry v. Ohio, 392 U.S. 1, 19 (1968) (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

407. *See* New York v. Belton, 101 S. Ct. at 2862.

408. 50 U.S.L.W. 4580 (June 1, 1982). This case was previously discussed. *See supra* note 370.

409. Robbins v.California, 101 S. Ct. 2841 (1981).

410. New York v. Belton, 101 S. Ct. 2860 (1981). United States v. Ross, 50 U.S.L.W. 4582 (Stevens, J., majority opinion):

> There is however, no dispute among judges about the importance of striving for clarification in this area of the law . . . . No single rule of law can resolve every conflict, but our conviction that clarification is feasible led us to grant the Government's petition for certiorari in this case and to invite the parties to address the

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fect of further denigrating the necessity for a warrant.

The *Ross* decision supports the thesis of this article. The Court, by allowing the scope of the warrantless auto search to include containers, has incorporated these containers into the warrantless lesser privacy expectation category associated with automobiles (middle size boxes).[411] Justice Powell explicitly points out the degree of expectation of privacy rationale in his concurrence by stating that "one's reasonable expectation of privacy is a particularly relevant factor in determining the validity of a warrantless search."[412]

In dispensing with the warrant requirement, the Court states its preference for the use of warrants.[413] Nevertheless, as the decision indicates, the Court's preference is in words, not in deeds.

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question whether the decision in *Robbins* should be reconsidered. *See also supra* text accompanying notes 347-73.

411. *See supra text accompanying note 393.*

412. 50 U.S.L.W. at 4588.

413. *Id.* at 4587: We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey v. Arizona*, 437 U.S. 385, 390.The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357.

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