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THE SUPREME COURT AND ITS PURPORTED PREFERENCE FOR SEARCH WARRANTS

ROBERT M. BLOOM*

The fourth amendment consists of two clauses joined by the conjunction "and".[1] The first clause prohibits unreasonable searches and seizures; the second clause prescribes the requirements for the issuance of a warrant. The relation of these clauses to one another was the subject of a debate between Justice Minton and Justice Frankfurter in *United States v. Rabinowitz*.[2] In the majority opinion, Justice Minton maintained that the "reasonable clause" should be read separately and distinctly from the "warrant clause" so that the existence of a warrant was only one possible factor relevant to judicial determinations of the reasonableness of a search.[3] His interpretation of the amendment tended to diminish the necessity of obtaining a warrant. On the other hand, Justice Frankfurter in dissent asserted that the two clauses should be read together so that warrantless searches were per se un-

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1. The Fourth Amendment of the United States Constitution states:

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

U.S. CONST. amend. IV.

2. 339 U.S. 56 (1950).

3. Justice Minton stated that:

> 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

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reasonable unless the facts of a situation made it impractical to secure a warrant.[4]

Over the past dozen years, the Burger Court (with the exception of Justice Rehnquist) has professed adherence to Justice Frankfurter's reading of the fourth amendment.[5] Expressing its stated preference in a recent decision, the Court said 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.' "[6] Despite this repeatedly expressed preference for the use of search warrants, however, the Court has in fact so expanded the opportunities for warrantless searches that its approach has been far more consistent with the Minton reasonableness approach.[7] This inconsistency between the

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> 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.

Id. at 65-66.

4. Justice Frankfurter maintained that "[w]hen the Fourth Amendment outlawed 'unreasonable searches' . . . the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.* at 70 (Frankfurter, J., dissenting). He also stated that:

> The test [of reason which makes a search reasonable] is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. 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 search warrant.

Id. at 83 (Frankfurter, J., dissenting).

5. For example, in New York v. Belton, 453 U.S. 454 (1981), the Court stated that "[i]t is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." *Id.* at 457. Moreover, in Mincey v. Arizona, 437 U.S. 385 (1978), a unanimous Court affirmed Justice Stewart's expression of the basic rule of fourth amendment jurisprudence:

> 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 magistrates, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

Id. at 390 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). The Court also indicated a strong preference for warrants in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Chadwick, 433 U.S. 1 (1977) (*see* notes 83-93 *infra* and accompanying text); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

Justice Rehnquist, however, has consistently opposed the warrant-preference approach to search and seizure cases. *See* notes 239-42 *infra* and accompanying text.

6. United States v. Ross, 102 S. Ct. 2157, 2172 (1982) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

7. *See* notes 53-76 & 129-201 *infra* and accompanying text.

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deeds of the Court and its expressed language is a result of the Court's disenchantment with the exclusionary rule.[8] Although the present Court does not appear to be willing to eliminate the rule directly,[9] it has taken an indirect approach of distorting other doctrines in order to avoid the costs of the exclusionary rule[10] ("[t]he

8. *See, e.g.*, Justice White's dissenting opinion in Rakas v. Illinois, 439 U.S. 128 (1978), in which he stated that "[i]n the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the Court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed." *Id.* at 169 (White, J., dissenting). Justice White also argued that "[i]f the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases." *Id.* at 157 (White, J., dissenting).

See also McMillian, *Is There Anything Left of the Fourth Amendment?*, 24 ST. LOUIS U.L.J. 1 (1979), in which the author asserted that:

> The justices apparently cannot yet agree on whether the exclusionary rule should be modified, or if so, how, since despite obvious displeasure by the majority of them with the rule, the Court as a whole has not changed the rule or modified its applicability. Instead, the Court has circuitously avoided the rule's effect in many of these cases before it by expanding the concept of what is a legal search.

Id. at 3. The author further stated that "there is no excuse for distorting important constitutional rights because of an inability to address the exclusionary rule directly and alter it in a reasoned and uniform manner." *Id.* at 7. Similarly, another commentator has stated that:

> The main reason that the Court has not extended the right to privacy is the lack of an adequate remedy for fourth amendment violations. If the remedy benefited society as a whole rather than only the criminal, the Court might extend the right to privacy both in its coverage and in its protection. However, until the legislative bodies can devise a reasonable alternative to the exclusionary rule, the Court will be hesitant to extend the right to privacy.

Gilligan, *Continuing Evisceration of [the] Fourth Amendment*, 14 SAN DIEGO L. REV. 823, 875 (1977). *See also* notes 229-30 *infra* and accompanying text.

9. Evidence that the Court is not ready to abandon the exclusionary rule can be found in the recent decision of Taylor v. Alabama, 102 S. Ct. 2664 (1982). In *Taylor* the Court voted 5-4 to reject a "good faith" exception to the exclusionary rule that would have greatly limited the thrust of the rule. Justice Marshall stated in the majority opinion that "[t]o date we have not recognized such an exception, and we decline to do so here." *Id.* at 2669.

In an unusual move, however, just a few months after its decision in *Taylor* the Court restored *Illinois v. Gates* to the calendar for reargument and requested the parties to address the question of whether there should be a good faith exception to the exclusionary rule. Under this exception "evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment" would not be excluded at trial. 51 U.S.L.W. 3415 (U.S. Nov. 30, 1982) (No. 81-430). The Court's desire to hear argument on a good faith exception indicates that a majority of the Court may be ready, if not to abandon the exclusionary rule, then at least to greatly limit the rule's thrust. *See* note 10 *infra* for a discussion of the impact of a good faith exception on the exclusionary rule.

10. *See* note 8 *supra*; *see also* notes 229-30 *infra* and accompanying text. In addition to this indirect means of avoiding the costs of the exclusionary rule, the Court currently is considering the adoption of a good faith exception to the

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criminal is to go free because the constable has blundered").[11] This appears to be the case with regard to search warrants.

This author argued in an earlier article[12] that the Burger Court indeed has vacillated between the Minton and Frankfurter approaches to fourth amendment interpretation.[13] To justify this vacillation, the Court assigned varying degrees of expectation of privacy to situations involving police activity.[14] In those instances when the person subject to the search was labeled as having sufficient expectations of privacy, the Court, in essence, adopted the

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rule. *See* note 9 *supra.* Adoption of a good faith exception would be a direct method of avoiding the costs of the exclusionary rule since such an exception would greatly limit the rule's application. As one commentator has argued, adoption of a good faith standard

> would add one more factfinding operation, and an especially difficult one to administer, to those already required of [the] lower judiciary. . . . It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find a deliberate constitutional violation, and evidence of the officer's state of mind would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted testimony.

Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1044-45 (1974). Furthermore, as Justice Brennan has pointed out, under a good faith standard judges will

> have to probe the subjective knowledge of the official who orders the search, and the inferences from existing law that official should have drawn. . . . [Thus,] if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny an accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts.

United States v. Peltier, 422 U.S. 531, 553-54 (1975) (Brennan, J., dissenting). It therefore appears that a good faith exception would be very difficult to apply and would greatly restrict the thrust of the exclusionary rule.

11. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

12. Bloom, *Warrant Requirement—The Burger Court Approach,* 53 U. COLO. L. REV. 691 (1982).

13. *Id.* at 707-44.

14. *Id.* The concept of diminished expectation of privacy was first used by the Burger Court to expand warrantless searches of automobiles to situations where the mobility rationale for the automobile exception to the warrant requirement no longer existed. *See* notes 53-56 *infra* and accompanying text. This "diminished expectation of privacy reasoning" later found its way into the search incident to arrest exception. *See* notes 77-80 *infra* and accompanying text. The Court reasoned that the scope of such searches could be extended beyond a search merely for weapons or evidence of the crime because the significant invasion of privacy occasioned by the arrest diminished any further expectation of privacy by the arrestee in his person or his possessions. *Id.* In United States v. Chadwick,

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Frankfurter (preference for warrant) approach.[15] On the other hand, in those instances when the expectation of privacy was described as diminished, the Minton reasonableness approach was preferred.[16] The vacillation in fourth amendment interpretation has ended, however, and the Court now appears to have assigned a greatly diminished role to the warrant requirement.

Through an examination of the search warrant cases decided by the Burger Court, this Article will show that the Court has implicitly abandoned the "preference for warrant" approach, at least in those situations not involving a home, office, or private communication, in favor of a less restrictive approach to the warrant requirement. Although the Court has not expanded on the number of search warrant exceptions,[18] it has been willing to find those exceptions more readily and has greatly extended their scope. Further, the few cases other than those involving a home, office, or private communication in which the Court did adopt a warrant-preference approach[19] have since been overturned or limited to their facts.[20] Moreover, the degree of expectation of privacy analysis, which the Court has used to maintain consistency between its "preference for warrant" approach and those cases not favoring warrants, has recently been discounted[21] and probably only re-

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433 U.S. 1 (1977), the Court assigned greater degrees of privacy expectation to permit a preference for warrant approach and maintained doctrinal consistency with earlier decisions that did not use this approach. *See* notes 83-90 *infra* and accompanying text.

The determination of when an expectation of privacy exists is a subjective exercise whose outcome is unpredictable: it depends on who is doing the determining. Assigning degrees to privacy expectations is even more subjective since any one person is unlikely to be able to predict another's conclusions. Despite these difficulties, the Court has used the device of assigning varying degrees of privacy expectation to reconcile cases that take different approaches to the warrant requirement. Since the Court now seems set on its earlier direction of disregarding a preference for search warrants, the rather confusing degrees of expectation of privacy rationale becomes unnecessary, and, in fact, the Court now seems to be questioning its use. *See* notes 192-95 *infra* and accompanying text.

15. Bloom, *supra* note 12, at 707-44.

16. *Id.*

17. *See* notes 202-24 *infra* and accompanying text.

18. For example, in Mincey v. Arizona, 437 U.S. 385 (1978), the Court refused to adopt a homicide exception to the warrant requirement. Moreover, in Torres v. Puerto Rico, 442 U.S. 465 (1979), the Court rejected Puerto Rico's contention "that its law enforcement problems are so pressing that it should be granted an exemption from the usual [warrant] requirements of the Fourth Amendment." *Id.* at 473. Finally, in United States v. United States Dist. Court, 407 U.S. 297 (1972), the Court rejected the Government's contention that the President has the power to authorize electronic surveillance in internal security matters without prior judicial approval.

19. *See* notes 83-127 *infra* and accompanying text.

20. *See* notes 129-201 *infra* and accompanying text.

21. *See* notes 192-95 *infra* and accompanying text. *See also* United States

mains for searches of a home, office, or private communication.[22] Thus, the justification for the vacillation of the Court has ended, and the Court, as evidenced by its deeds not its words, now appears committed to the Minton approach.

The Article first will describe the analysis used by former Courts in arriving at a preference for a search warrant. It then will demonstrate how the Burger Court has departed from this analysis.

The present direction in restricting the use of search warrants was charted early in the Burger years.[23] This course has been fairly straight, with the exception of a brief return to a warrant-preference approach[24] in the 1977 case of *United States v. Chadwick*,[25] and its progeny, *Arkansas v. Sanders*[26] and *Robbins v. California*.[27] However, in light of recent decisions[28] the effect of the *Chadwick* line of cases now appears so insignificant that the expressed preference for a warrant has become largely meaningless, with the possible exception of searches occurring in a home, office, or private communication.[29]

After analyzing the Court's decisions to date, the Article analyzes the position of each of the individual justices in order to hazard a prediction on the Court's future course on these fourth amendment issues.[30]

Preference for Search Warrants

The need for individuals to be protected from intrusive law enforcement activity by the issuance of a warrant by a neutral person was first recognized by the Supreme Court in *Weeks v. United States*[31] in 1914. Years later, this principle was further

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v. Ross, 102 S. Ct. 2157, 2171 (1982), in which the Court stated that "[o]ne point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper."

22. *See* notes 202-24 *infra* and accompanying text.

23. *See* notes 49-76 *infra* and accompanying text.

24. *See* notes 83-128 *infra* and accompanying text.

25. 433 U.S. 1 (1976).

26. 442 U.S. 753 (1979).

27. 453 U.S. 420 (1981).

28. New York v. Belton, 453 U.S. 454 (1981); United States v. Ross, 102 S. Ct. 2157 (1982).

29. *See* notes 202-24 *infra* and accompanying text.

30. *See* notes 229-74 *infra* and accompanying text.

31. 232 U.S. 383 (1914). The *Weeks* Court stated that:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the

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elaborated upon in *Johnson v. United States*:[32]

> 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.[33]

The Court emphasized the importance of a magistrate's review even when warrantless government searches were carefully limited in scope:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order.[34]

The Court developed particular rules to enforce this preference for a warrant. First, the burden was placed on the state to justify warrantless activity.[35] Second, before the warrant requirement could be waived, the state would have to demonstrate that the facts of the case made the securing of a warrant impractical.[36] The Court has stated that "[w]e cannot be true to that constitutional requirement and excuse the absence of a search warrant without a show-

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> land [i.e., the fourth amendment]. 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.

Id. at 393. The Court also stated:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

Id. at 391-92.

32. 333 U.S. 10 (1948).

33. *Id.* at 13-14.

34. Katz v. United States, 389 U.S. 347, 356 (1967).

35. In Chimel v. California, 395 U.S. 752 (1969), the Court stated that "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it.' " *Id.* at 762 (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)).

36. McDonald v. United States, 335 U.S. 451, 454-56 (1948).

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ing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."[37] Last, the scope of each warrantless search would have to be "strictly tied to and justified by the circumstance which rendered its initiation permissible."[38] The justification for a warrantless automobile search, for example, is the possibility that the vehicle might be driven out of the jurisdiction while the police were securing a warrant.[39] This justification would require that once items found within an automobile were removed (seized) the items could not be searched further. Since the seizure of the items was justified by the potential mobility of the car, further search of the items is not justified once the mobility factor is removed.

Chimel v. California,[40] decided in 1969, is a good example of the Court's limiting the scope of warrantless searches. In that case, the police, armed with an arrest warrant but without a search warrant, went to the petitioner's home to arrest him for burglarizing a coin shop.[41] Following the petitioner's arrest, the police conducted a warrantless search of "the entire three bedroom house, including the attic, the garage and a small workshop."[42] The police attempted to justify this search by claiming

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37. *Id.* at 456.

Thus, each of the exceptions to the search warrant requirement has a practical justification. The search incident to arrest exception is based on a concern that the arrestee might have within his control a weapon with which he could harm the police or evidence of the crime that he could destroy before a warrant is obtained. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969). The automobile exception is based on the mobility of an automobile, which can easily be moved while the police secure a warrant. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925). The exigency exception encompasses situations in which there is a high probability, as opposed to a mere possibility, that evidence will be destroyed or someone will be injured if the police do not conduct an immediate search. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967). The plain view exception arose from the practical notion that if the police are somewhere where they have a right to be and they see an illegal object in plain sight, no constitutional rights are infringed if the police seize the object without obtaining a warrant, provided that the seizure would not require a further intrusion. *See, e.g.*, Barker v. Johnson, 484 F.2d 941 (6th Cir. 1973). However, plain view alone will not justify a warrantless seizure of evidence. Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971). Only when the police can seize the evidence without further intrusion will the plain view doctrine permit a warrantless seizure. For example, if the police observe evidence in plain view in the window of a home, they cannot seize the evidence without a warrant unless the seizure falls within one of the practicality exceptions to the warrant requirement. *See id.*

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

39. *See* Carroll v. United States, 267 U.S. 132, 153 (1924).

40. 395 U.S. 752 (1969).

41. *Id.* at 753-54.

42. *Id.* at 754.

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that it was incident to the arrest, a recognized exception to the warrant requirement. In suppressing the evidence obtained by this search, the Court indicated that the police had failed in their burden of demonstrating that the warrantless search was justified by a "well-recognized exception" to the general rule that a warrant was necessary.[43] The incident to arrest exception, which applies when quick action is needed to prevent the arrestee from destroying evidence or harming the police,[44] was inapplicable to the broader search in *Chimel.* The Court held that the warrantless search in *Chimel* was justified only insofar as it was "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."[45] The facts of *Chimel* indicated to the Court that the search had gone well beyond its justifiable scope.[46]

This delineation of the warrant-preference approach allowed for exceptions when the facts of the case indicated that it was not practical to secure a warrant.[47] The scope of these exceptions was limited by the practical reasons that necessitated the existence of an exception to begin with.[48] Both the creation and the scope of exceptions to the warrant-preference principle, however, have been distorted by the Burger Court, leaving the first requirement (that the government has the burden of justifying warrantless activity) nearly meaningless.

Early Departure from the Warrant-Preference Principle

Early in the Burger term the warrant-preference approach was discarded. The Court ignored the notion that a warrantless search must first be justified by a factual determination that the securing of a warrant was impractical.[49] In addition, the Court no longer limited the scope of the warrantless search by the facts that rendered it permissible.[50] One of the stated justifications for this disregard of the warrant-preference principles was the need for providing the police with an easily applicable standardized approach.[51] This justification is merely a thin veil hiding the Court's

43. *Id.* at 763.
44. *Id.*
45. *Id.*
46. *Id.* at 768.
47. *Id.* at 762-63. *See also* note 37 *supra* and accompanying text.
48. *See* 395 U.S. at 762-63.
49. *See* notes 58 & 69-70 *infra* and accompanying text.
50. *See* notes 54-56 & 61-64 *infra* and accompanying text.
51. *See* notes 67-70 *infra* and accompanying text. This rationale for disregarding warrant-preference principles has been expressed by one commentator as follows:

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disdain for the costs of the exclusionary rule.[52]

The first indication of the Burger Court's departure from the warrant-preference approach was *Chambers v. Maroney*,[53] in which the Court upheld a warrantless search of an automobile that occurred after the occupants had been arrested and the car driven to the police station.[54] The Court ignored the warrant-preference principles, and allowed a warrantless search of an automobile even though it clearly would have been practicable to secure a warrant since the vehicle was no longer mobile.[55] By extending the scope of the automobile exception beyond the limits dictated by the rationale for the exception (*i.e.*, mobility) the Court took its first step away from a preference for warrant analysis. The Court justified its discounting of the mobility rationale by minimizing the importance of the delayed warrantless search at the police station given the significant invasion of privacy resulting from the taking (seizure) of the vehicle to the police station. "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 on an immediate search without a warrant."[56] In minimizing the importance of the subsequent search given the initial seizure, the Court relied on a reduced expectation of privacy theory. This theory, however,

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

LaFave, Case-by-Case Adjudication *Versus* Standardized Procedures: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1975) (footnotes omitted) (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting), *rev'd*, 414 U.S. 218 (1973)). Contrary to LaFave's view, this author would argue that the fourth amendment rules under the warrant-preference approach are not sophisticated or difficult to apply by officers in the field. These rules are based on a common sense, practical analysis of the circumstances for determining whether a warrantless search is necessary. Moreover, besides deterring unreasonable searches, the warrant-preference rules further an additional purpose of the exclusionary rule, namely, the promotion of judicial integrity. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961).

52. *See* notes 8-11 *supra* and accompanying text. *See also* notes 229-30 *infra* and accompanying text.

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

54. *Id.* at 44.

55. *Id.* at 51-52.

56. *Id.* at 52.

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was inconsistent with the Court's previous statement in *Chimel* that "we can see no reason why, simply 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."[57] The Court did not bother to explain or distinguish this inconsistency.

In permitting the warrantless search of the automobile in *Chambers*, the Court dispensed with an analysis of whether the search was justified in light of the practical reason (*i.e.*, mobility) for the automobile exception to the warrant requirement.

By deviating from its previous requirement of examining the facts of the case to determine if a warrant exception was appropriate, the Court simply ignored the rationale for the automobile exception.[58]

The Court's deviation from a factual analysis became more pronounced in *United States v. Robinson*.[59] In *Robinson* the defendant was arrested for driving without a license.[60] During a search incident to arrest the police seized and searched a cigarette package[61] which neither felt like a weapon nor could have been evidence of the defendant's crime of driving without a license. Capsules of heroin were found within the package.[62] The seizure and opening of the cigarette package were clearly beyond the justification for and scope of a warrantless search incident to arrest. Under the preference for warrant analysis exemplified in *Chimel*,[63] the police could not have justified seizing the cigarette package since the seizure was not required under the rationale for the exception (*i.e.*, to protect police from the arrestee or prevent the arrestee from destroying evidence);[64] even if the seizure were justified, the police certainly could not have justified the subsequent opening of the package once it was under their control.[65] Nevertheless, the Court held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement

57. Chimel v. California, 395 U.S. 752, 766-67 n.12 (1969).
58. *See* notes 56-57 *supra* and accompanying text.
59. 414 U.S. 218 (1973).
60. *Id.* at 220.
61. *Id.* at 223.
62. *Id.*
63. *See* notes 40-46 *supra* and accompanying text.
64. The argument could be made that the package could have been a weapon. Robinson was wearing a heavy coat, and the officer stated that he "couldn't actually tell the size" of the object he felt in the coat pocket. 414 U.S. at 223.
65. Once the police had control of the package, the arrestee had no means of obtaining control of weapons or evidence that might have been concealed in the package.

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of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[66]

In upholding the search and seizure of the cigarette package the *Robinson* Court, through Justice Rehnquist's majority opinion, emphasized the need to provide a standard for warrantless searches and seizures that could be applied easily by the police.[67] In providing this standard the Court rejected the *Chimel* approach of making a case-by-case factual determination of the justification and permissible scope of a warrantless search.[68] The Court rejected the suggestion "that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the persons incident to a lawful arrest."[69] The Court also stated 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.[70]

In his dissenting opinion, Justice Marshall pointed out the lack of precedent for this standardized approach.[71] Rather, the scope of the warrantless search was to be limited by the reason that necessitated the search in the first place: "In determining whether the seizure and search were unreasonable [the Court's] inquiry is a dual one—whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[72]

It is interesting to note that although *Robinson* was a search incident to arrest case, Justice Powell's concurrence[73] utilized an argument quite similar to that used by the majority in *Chambers* (an automobile exception case). He argued that given the drastically intrusive nature of an arrest, protection against the further intrusion of a search was not necessary.[74] The fact of the defend-

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66. 414 U.S. at 235.

67. *Id.* The Court also was concerned with the safety of law enforcement officers after making an arrest, stating that "the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop." *Id.* at 234-35.

68. *See* notes 40-48 *supra* and accompanying text.

69. 414 U.S. at 235.

70. *Id.*

71. *Id.* at 248-49 (Marshall, J., dissenting).

72. *Id.* at 249 (Marshall, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 19-20 (1968)).

73. 414 U.S. at 237-38.

74. Justice Powell stated:

I believe that an individual lawfully subjected to a custodial arrest re-

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ant's arrest deprived the defendant of further warrant protection,[75] as did the fact of the seizure of the defendant's automobile in *Chambers*.[76]

In *United States v. Edwards*,[77] a search incident to arrest case decided three months after *Robinson*, the Court upheld a warrantless search of the arrestee's clothing that had occurred at the police station some ten hours after the arrest.[78]

Writing for the majority, Justice White, implicitly using an analogy to *Chambers*, reasoned that once there was a lawful arrest, further invasions of privacy were comparatively inconsequential in constitutional terms and thus were reasonable.[79] In expressly adopting the Minton approach, Justice White referred to an earlier decision in which "the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable. . . . "[80] Justice Stewart in dissent argued for application of the warrant-preference approach.[81] He pointed out that the facts of the case did not justify a warrantless search under the accepted rationale, because the practical reasons for the search incident to arrest exception had evaporated over the ten hours of continued police custody during which there had been ample opportunity to secure a warrant.[82] Thus, *Chambers*, *Robinson* and *Edwards* drastically expanded permissible warrantless activity.

A Brief Return to a Warrant-Preference Principle

Given this foundation for the demise of the preference for a warrant, the result in *United States v. Chadwick*[83] was surprising. In *Chadwick* the Court returned to its previous approach of analyzing the facts of the case to determine if a warrant exception

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> tains no significant Fourth Amendment interest in the privacy of his person. . . . If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest.

Id. at 237.

75. *See* note 74 *supra*.
76. *See* note 56 *supra* and accompanying text.
77. 415 U.S. 800 (1974).
78. *Id.* at 802-03.
79. *Id.* at 807-09.
80. *Id.* at 807. The decision referred to by Justice White was Cooper v. California, 386 U.S. 58 (1967). In *Cooper* the Court upheld the warrantless search of a car that occurred a week after the arrest of the owner and the impounding of the car. *Id.* at 62.
81. 415 U.S. at 809.
82. *Id.* at 810-11.
83. 433 U.S. 1 (1977).

was appropriate and if the scope of the search was consistent with the justification for the warrant exception. *Chadwick* involved the warrantless seizure and subsequent search (one and a half hours later) of a footlocker.[84] The suspects possessing the footlocker were arrested at the time of the seizure.[85] The search of the footlocker was unreasonable, the Court held, because there were no exigent circumstances to justify the warrantless search.[86] The Court, by suggesting that greater privacy expectations are associated with a footlocker than with an automobile, distinguished the case from *Chambers*,[87] in which it had stated that for constitutional purposes there was no difference between searching an automobile immediately upon seizure and searching it later while it was still under police control.[88] The Court also tried to reconcile the case, on search incident to arrest grounds, with *Robinson* and *Edwards* by suggesting that luggage or other personal property not immediately associated with the arrestee's person was not entitled to the same expectation of privacy afforded to that property which is normally associated with the arrestee's person.[89] If this sounds confusing, it is. This confusion is the result of an attempt by the Court to reconcile *Chadwick* with the earlier decisions by analyzing the varying degrees of expectation of privacy. In fact, however, the cases are not logically reconcilable.[90]

Why, then, did the Court choose to attempt this difficult reconciliation? Did the Court really feel that the facts of *Chadwick* so clearly required obtaining a warrant? The Court's return to warrant-preference principles, using this rather illogical analysis, was probably a reaction to what the Court perceived as the government's extreme position.[91] In *Chadwick* the government had argued that warrants protect only interests traditionally associated with the home and that warrants, therefore, were to be required only for searches of homes, offices, and private communications, which "lie at the core of the Fourth Amendment."[92] The Court, wishing to rebuke the government, felt the need to demonstrate that it indeed preferred the warrant and "not simply [for] those interests

84. *Id.* at 4.
85. *Id.*
86. *Id.* at 11.
87. *Id.* at 12-13. The Court stated: "The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. . . . Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects." *Id.* at 13.
88. *See* note 56 *supra* and accompanying text.
89. 433 U.S. at 16 n.10.
90. *See* notes 12-16 *supra* and accompanying text.
91. *See* notes 92-93 *infra* and accompanying text.
92. 433 U.S. at 6-7.

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found inside the four walls of the home."[93] Nevertheless, as this Article will show, the Court's demonstration of support for search warrants in *Chadwick* was temporary, and in fact much of the government's argument has subsequently been adopted by the Court. The rhetoric in support of warrant-preference principles was trotted out only to rebuke the government—not to mark the beginning of any actual return to these principles.

The Court's true position, however, did not become immediately obvious, because the Court briefly returned to a warrant-preference approach in the 1979 case of *Arkansas v. Sanders*.[94] In *Sanders* the Court returned to the "mobility" rationale as the justification for warrantless automobile searches and refused to allow a warrantless search of a suitcase found in the trunk of a taxi. The police in *Sanders* had probable cause to believe the defendant was carrying marijuana in his suitcase.[95] Having observed the defendant place his suitcase in the trunk of a taxi and then drive away in the taxi, the police stopped the taxi, searched the suitcase, and arrested the defendant.[96] Justice Powell, writing for the majority, analyzed the facts of the case and concluded that the police were not permitted to search the suitcase[97] even though their suspicions centered specifically on the suitcase (not on the taxi)[98] and even though they opened it immediately after it was removed.[99] This case could have been easily distinguished from *Chadwick*, because there the police had control of the footlocker for more than an hour prior to the search,[100] and in *Sanders* the police opened the suitcase immediately after obtaining control over it. Despite this difference between *Sanders* and *Chadwick*, Justice Powell reasoned that the mobility factor justifying warrantless searches of automobiles ceased to exist in *Sanders* as soon as the suitcase was within police control.[101] Thus,

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93. *Id.* at 11. That the Court's decision in *Chadwick* was largely a reaction to the government's extreme position is evidenced by the amount of space in the opinion devoted to a strong rebuttal of the government's argument. *See id.* at 6-11. Moreover, both Justice Brennan, in a concurring opinion, and Justice Blackmun, in a dissenting opinion, refer to the government's "extreme view of the Fourth Amendment," *id.* at 16-17 (Brennan, J., concurring), which Blackmun noted "has served to distract the Court from the more important task of defining the proper scope of a search incident to an arrest." *Id.* at 17 (Blackmun, J., dissenting).

94. 442 U.S. 753 (1979).

95. *Id.* at 761.

96. *Id.* at 755.

97. *Id.* at 763.

98. *Id.* at 755.

99. *Id.*

100. 433 U.S. at 15.

101. Justice Powell stated:

A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in *Chadwick*, the exigency

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the determination of whether the police had sufficient control of an item to eliminate the necessity for a warrantless search was not based on the length of time the police had the item in their possession. It is interesting to note that Justice Powell discounted the "standardized approach" rationale introduced in *Robinson* to assist the police.[102] Justice Powell quoted the following from *Coolidge v. New Hampshire*:[103] "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 policy efficiency."[104]

In the concurrence of Chief Justice Burger,[105] in which Justice Stevens joined, one gets the sense that at least these two members of the majority in *Chadwick* sought to limit the language of *Sanders* so as to avoid a complete return to warrant-preference principles. Chief Justice Burger disagreed with Justice Powell's language, which on its face seemed to indicate that warrantless searches pursuant to the automobile exception could not extend to containers found within the automobile.[106] Chief Justice Burger suggested that *Sanders* should not turn on the automobile exception to the warrant requirement because the police had probable cause to search the specific luggage and not the entire car.[107] He classified the case as a "container case," not as an automobile case.[108] In this way he used an expectation of privacy analysis to justify a warrant-preference approach without embracing a general principal of preference for warrants. If a search is classified as a container search, with the attendant increase in privacy expectations, a preference for warrant

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> of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control. See 433 U.S. at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken.

442 U.S. at 763.

102. *See* notes 67-70 *supra* and accompanying text.

103. 403 U.S. 443 (1971).

104. 442 U.S. at 758 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).

105. 442 U.S. at 766-68 (Burger, C.J., concurring).

106. *Id.* at 766 (Burger, C.J., concurring).

107. *Id.* at 767 (Burger, C.J., concurring). Burger stated that "[t]he relationship between the automobile and the contraband was purely coincidental . . . . The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case." *Id.* (Burger, C.J., concurring).

108. Burger did not use the phrase "container case," but he emphasized that "it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected

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approach can be used.[109] It logically follows from this approach that an automobile search, with the attendant decrease in expectation of privacy, would not require a search warrant; Chief Justice Burger, however, did not resolve this issue in *Sanders*. Chief Justice Burger's classification of *Sanders* as a container case, where there was probable cause to search only the container and not the automobile in which it is found, also may reflect his inclination to limit the warrant-preference analysis to the specific facts of *Chadwick* and *Sanders*. He certainly did not want those two cases to signify any limitation on the scope of the automobile exception to the warrant requirement.[110]

Robbins v. California,[111] decided on July 1, 1981, represents the last stop on the Court's brief return to the warrant-preference principle.[112] The facts in *Robbins v. California* specifically included probable cause to search the entire car,[113] the very fact situation that Chief Justice Burger had indicated was not within the scope of the *Sanders* decision.[114] In *Robbins* the defendant was stopped by the police for driving erratically.[115] Upon smelling marijuana, the police searched the entire automobile.[116] Two opaque packages were discovered in the luggage compartment[117] and, upon opening, were found to contain marijuana.[118] In *Robbins* a plurality of the

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locus of the contraband." *Id.* (Burger, C.J., concurring) (emphasis in original).

109. For example, Burger stressed the "legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person." *Id.* at 766 (Burger, C.J., concurring).

110. Burger strongly emphasized that in both *Chadwick* and *Sanders* the automobile exception was inapplicable since in both cases there was probable cause to search only a specific container and not the entire vehicle. *Id.* at 766-67 (Burger, C.J., concurring).

111. 453 U.S. 420 (1981).

112. Lest one believes that *Chadwick*, *Sanders*, and *Robbins* were totally representative of the Court's approach at that time, consider Rawlings v. Kentucky, 448 U.S. 98 (1980). In an opinion by Justice Rehnquist, the *Rawlings* Court ignored a practicality analysis and allowed a warrantless search incident to arrest even though the arrest had not yet occurred. Justice Rehnquist stated that "[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." *Id.* at 111.

Moreover, the *Robbins* case, which favored a warrant-preference approach, was decided on the same day as New York v. Belton, 453 U.S. 454 (1981), in which the Court extended the scope of warrantless activity. *See* notes 133-69 *infra* and accompanying text.

113. 453 U.S. at 422.

114. *See* notes 106-07 *supra* and accompanying text.

115. 453 U.S. at 422.

116. *Id.*

117. *Id.*

118. *Id.*

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Court affirmed its decision in *Sanders* by refusing to allow a warrantless search of the containers found in the defendant's car.[119] The plurality stated that such a search went beyond the scope necessitated by the automobile exception since the containers were no longer mobile once the police had control of them.[120] In addition, *Robbins* clarified the confusion over the definition of a container for constitutional purposes by declaring that all containers (in this case a green opaque package) and not merely personal repositories (such as suitcases) are subject to the warrant-preference analysis.[121] Since anything not attached to the car is likely to be a container, the scope of the automobile exception was indeed limited to its mobility justification in *Robbins*.

Although the result of *Robbins* was consistent with a warrant-preference analysis, there were indications that the Court nevertheless felt uncomfortable with this approach. *Robbins* was a plurality decision; the Chief Justice concurred in the judgment without opinion.[122] Utilizing Chief Justice Burger's arguments in *Sanders*,[123] Justice Powell in his concurring opinion stated that he regarded *Robbins* as a container case, not as an automobile case.[124] Justice Powell also stated that *Sanders* was not a case involving the automobile exception.[125] Justice Powell's position, however, conflicted with his analysis in *Sanders*, in which he certainly seemed to treat *Sanders* as an automobile exception case by focusing on the question of the continued mobility of the suitcase, which was the justification for the automobile exception.[126] Nevertheless,

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119. *Id.* at 425. In a plurality opinion, Justice Stewart stated that *Chadwick* and *Sanders* "made clear . . . that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Id.*

120. *Id.* at 424-25. Justice Stewart maintained that "[w]hile both cars and luggage may be 'mobile,' luggage itself may be brought and kept under the control of the police." *Id.* at 424.

121. *Id.* at 425-27. The plurality opinion interpreted *Sanders* as saying that "unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment." *Id.* at 427.

122. *Id.* at 421. Justice Stewart delivered the Court's judgment in an opinion in which Justices Brennan, White, and Marshall joined; Justice Powell concurred in the judgment but wrote separately; Justices Blackmun and Rehnquist dissented, without opinion; Justice Stevens wrote a dissenting opinion. *Id.*

123. *See* notes 105-10 *supra* and accompanying text.

124. 453 U.S. at 432 (Powell, J., concurring). Justice Powell stated: "I will share the plurality's assumption that the police had probable cause to search the container rather than the automobile generally. Viewing this as a 'container case,' I concur in the judgment." *Id.* (Powell, J., concurring).

125. He asserted that *Sanders* was not an automobile exception case because the police had probable cause to search the suitcase before ever coming near the automobile. *Id.* at 435 (Powell, J., concurring).

126. *See* notes 97-101 *supra* and accompanying text.

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Justice Powell's classification of *Robbins* and *Sanders* as container searches rather than automobile searches indicated his desire to limit the warrant-preference principle to specific situations involving searches of containers in which Justice Powell would like to find an increased expectation of privacy.[127]

This after-the-fact categorization of *Sanders* as a container case suggested that, at least with regard to auto exception cases, Justice Powell was not wedded to the notion that the scope of warrantless searches should be limited by the rationale which necessitated them in the first place.[128]

Back to the Departure from the Warrant-Preference Principle

Sanders and *Robbins* appear to be an outgrowth of the container-expectation of privacy analysis utilized in *Chadwick*, and the result in *Chadwick*, as previously indicated, was probably more of a reaction to the government's argument than a true reflection of the Court's position on search warrants.[129] *New York v. Belton*[130] and *United States v. Ross*[131] are indications that the Court is committed to the departure from warrant-preference principles that started with *Chambers*.[132] The *Belton* and *Ross* decisions primarily have the effect of limiting *Chadwick* and *Sanders* to their facts and overturning *Robbins*.

In *Belton* the police arrested the four occupants of an automobile for possession of marijuana.[133] The officer positioned the defendants

127. Justice Powell concurred in the Court's judgment in *Robbins* "because the manner in which the package at issue was carefully wrapped and sealed evidenced petitioner's expectation of privacy in its contents." 453 U.S. at 429 (Powell, J., concurring). Justice Powell would not require search warrants, however, "to examine the contents of insubstantial containers in which no one had a reasonable expectation of privacy." *Id.* (Powell, J., concurring).

128. In *Robbins* Justice Powell acknowledged that expanding the scope of the automobile exception to encompass a search of all containers found in the automobile "is attractive . . . because it may provide ground for agreement by a majority of the presently fractured Court on an approach that would give more specific guidance to police and courts in this recurring situation . . . ." *Id.* at 435 (Powell, J., concurring). He nonetheless declined to treat *Robbins* as an automobile exception case and rejected an expansion of the automobile exception because "[t]he parties have not pressed this argument in this case and it is late in the Term for us to undertake *sua sponte* reconsideration of basic doctrines." *Id.* (Powell, J., concurring).

129. *See* notes 92-93 *supra* and accompanying text.

130. 453 U.S. 454 (1981).

131. 102 S. Ct. 2157 (1982).

132. *See* notes 53-58 *supra* and accompanying text. In addition to *Belton* and *Ross*, Washington v. Chrisman, 102 S. Ct. 812 (1982), which extended the plain view exception to the warrant requirement, also reveals the Court's disenchantment with search warrants.

133. 453 U.S. at 456.

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away from the vehicle while he searched the auto.[134] As part of the vehicle search, he also searched the zippered pockets of a jacket lying on the back seat of the auto, and he found cocaine in one pocket.[135] The Court permitted the search of the jacket as a search incident to a lawful arrest.[136]

Thus, on the same day as the *Robbins* decision,[137] the majority of the Court in *New York v. Belton*—despite its express statement to the contrary[138]—departed from the fundamental principle of the *Chimel* decision. *Chimel*, it will be remembered, had required that the scope of a warrantless search be "strictly tied to and justified by the circumstances which render its initiation permissible."[139] In *Belton* the Court appears to have crafted a standardized rule in which no justification for the scope of the search is required.[140] In an opinion reminiscent of the *Robinson*[141] decision, which emphasized the need for an easily applicable standard for the police, the Court refused to look at the particular circumstances of *Belton* or to limit warrantless searches to the rationale that necessitated it in the first place.[142] Rather, the Court formulated a rule that allowed the police to search the passenger compartment of a car, including containers found therein (in *Belton* a zippered jacket), as incident to the lawful arrest of the vehicle's occupant. This rule obtained regardless whether the arrestees actually had access to the passenger compartment at the time of the search.[143] The Court

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134. *Id.*

135. *Id.*

136. *Id.* at 462-63.

137. Both *Belton* and *Robbins* were decided on July 1, 1981.

138. 453 U.S. at 460 n.3. The Court stated that "[o]ur holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.*

139. 395 U.S. at 762 (1969). *See also* notes 38-46 *supra* and accompanying text.

140. In support of a standardized approach, the Court stated:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

453 U.S. at 458 (quoting LaFave, Case-by-Case Adjudication *Versus* Standardized Procedures: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142.

141. *See* notes 67-70 *supra* and accompanying text.

142. Rather than looking at the particular circumstances in *Belton* in light of the rationale behind the search incident to arrest exception, the Court stressed the importance of finding a straightforward, standardized, easily applied rule. This rule could then be applied to all cases involving the search of an automobile incident to the lawful arrest of its occupants, regardless of the particular facts of the case. 453 U.S. at 459-60.

143. The Court stated: "Our reading of the cases suggests the generaliza-

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attempted to distinguish *Chadwick* and *Sanders* by stating that neither case had involved the search incident to arrest exception.[144] The real question, however, is not which exception is at stake, but rather which general principles govern the exception. Had the Court in *Belton* actually applied the preference for warrant principle used in *Chadwick* and *Sanders* and analyzed the case on its facts, the Court would have found that a justification for a search of the jacket incident to arrest did not exist and therefore, that the permissible scope of the search had been exceeded.

In addition, the Court in *Belton* tried to distinguish *Chadwick* by pointing out that the search in *Chadwick* occurred over one hour after the arrest, whereas in *Belton* it occurred at the time of the arrest.[145] The Court, however, ignored the fact that in *Sanders*, where the search also had occurred immediately after the container was removed from the car, the Court had disallowed the warrantless search.[146] In fact, if we go back to the reasoning articulated in *Sanders*,[147] the time of the search should not be significant. The important factor in *Sanders* was the degree of control exercised by the police over the item searched.[148] Once control was exercised by the police, the rationale that justified the exception (mobility in *Sanders*) no longer existed.[149] The Court stated in *Chadwick* that

> [o]nce law enforcement officers have reduced . . . personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[150]

As Justice Brennan pointed out in dissent in *Belton*, the issue of control should, and indeed must, be decided on a case-by-case basis.[151] Had the Court analyzed the facts in *Belton*, it would

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tion that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area in which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

144. 453 U.S. at 461-62.

145. *Id.*

146. *See* notes 97-99 *supra* and accompanying text.

147. *See* notes 97-101 *supra* and accompanying text.

148. *See* note 101 *supra* and accompanying text.

149. 453 U.S. at 461-62.

150. 433 U.S. at 15. This language of the Court indicates that the control factor does not apply where the item searched is immediately associated with the arrestee's person, such as the clothing in *Edwards* (*see* notes 77-82 *supra* and accompanying text) and the item found in the clothing pocket in *Robinson* (*see* notes 60-70 *supra* and accompanying text).

151. 453 U.S. at 464 (Brennan, J., dissenting). Justice Brennan asserted that

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necessarily have concluded that once the zippered jacket was within the control of the police officer the opening of the jacket without a warrant was unnecessary and should not have been permitted.[152] By not analyzing the facts, the *Belton* Court ignored the notion of limiting the scope of a permissible warrantless search to its justification; instead, the Court substituted a "limit" unrelated to the justification that necessitated the warrantless search.[153] This approach is reminiscent of Justice Blackmun's dissent in *Chadwick*,[154] in which he argued that the Court should adopt a clear-cut rule that would allow the warrantless search of property whenever it was seized in conjunction with a valid arrest.[155]

The Court in *Belton* ignored not only the appropriate limit on the scope of the exception but also the justification for the existence of the search incident to arrest exception itself (*i.e.*, protection of the police and prevention of the destruction of evidence at the time of arrest). In setting out the standard for the "search incident to arrest exception," the *Chimel* Court determined what area was actually within the arrestee's immediate control at the time of arrest and limited the search to that area.[156] *Belton* abandoned the *Chimel* reasoning by allowing a search of anything that may have been within the arrestee's control just before the arrest.[157] *Belton* thus rendered meaningless the definition of the "area of immediate control" and ignored the original practical reason for the "search incident to arrest" exception. Moreover, *Belton* implicitly overruled much of the *Chadwick* decision. Since the

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a fundamental principle of fourth amendment analysis is that warrant exceptions are to be narrowly construed. *Id.* (Brennan, J., dissenting). One corollary of this principle, he stated, is that "in determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright-line rule of general application." *Id.* (Brennan, J., dissenting).

152. As Justice Brennan observed in his dissent, the facts of the case "demonstrate that at the time Belton and his three companions were placed under custodial arrest—which was *after* they had been removed from the car, patted down, and separated—none of them could have reached the jackets that had been left on the back seat of the car." *Id.* at 466 (Brennan, J., dissenting).

153. The "limit" delineated by the Court permits in all cases a search of the passenger compartment of an automobile upon arrest of the occupants regardless of whether the arrestees had access to the passenger compartment at the time of the search. *Id.* at 460.

154. 433 U.S. at 17-24 (Blackmun, J., dissenting).

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

156. *See* notes 40-46 *supra* and accompanying text.

157. The Court permitted the search of the jacket because "[t]he jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus . . . 'within the arrestee's immediate control.'" 453 U.S. at 462 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

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footlocker in *Chadwick* was in the arrestee's control just prior to the arrest,[158] the *Belton* reasoning would seemingly place the footlocker within the scope of "immediate control."[159] Thus, had the search in *Chadwick* occurred at the time of the arrest, it would apparently have been permissible under the *Belton* approach. The time factor, and not the issue of control, was the dominant concern of the *Belton* Court.[160] Largely disregarding its decision in *Sanders*, the *Belton* Court permitted the search of the jacket because the search occurred immediately after the jacket was seized.[161] Thus, in light of *Belton*, it is likely that police officers in the future will search objects shortly after their seizure (rather than wait more than ninety minutes) to avoid the consequences of whatever may be left of the *Chadwick* rule.[162]

There is some indication in *Belton* that the Court wished to limit its holding to searches incident to the arrest of automobile occupants.[163] The Court stated that only the passenger compartment of an automobile was "within the immediate control" of an occupant of the car;[164] therefore, upon arrest of the automobile's occupants, the passenger compartment and all containers within it could be searched pursuant to the search incident to arrest exception.[165] The rationale behind this seemingly narrow holding, however, could easily be extended by the Court to all warrantless searches incident to arrest. The New York Court of Appeals concluded that the search had occurred after the jacket was out of the arrestee's control, when the arrestee no longer had access to any weapons or evidence that might be in the jacket,[166] and on

158. *See* notes 84-85 *supra* and accompanying text.

159. The Court attempted to distinguish *Chadwick* on the ground that it did not involve a valid search incident to arrest since the search occurred more than an hour after the arrest. 453 U.S. at 461-62. Such reasoning, however, implies that the *Chadwick* search would have been upheld had the search occurred immediately after the footlocker was seized.

160. The Court's holding permitted a search of the passenger compartment "as a *contemporaneous* incident of [the] arrest," *id.* at 460 (emphasis added), and the Court stressed that the search in *Belton* occurred immediately after the arrest. *Id.* at 462. Moreover, the Court used the time factor to distinguish *Belton* from *Chadwick*. *See* note 159 *supra*.

161. *See* note 160 *supra* and accompanying text. For a discussion of *Sanders*, see notes 94-103 *supra* and accompanying text.

162. *See* note 159 *supra*.

163. The Court's holding simply stated: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460.

164. *Id. See also id.* at 469 n.4.

165. *Id.*

166. The Court of Appeals cited both *Chadwick* and *Sanders* in holding that "[o]nce defendant had been removed from the automobile and placed under arrest,

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that factual basis, the Court of Appeals disallowed the search of the jacket.[167] In overturning the decision of the New York Court of Appeals,[168] the Supreme Court rejected that court's approach of analyzing the facts to determine whether the search of the jacket was strictly tied to the justification of the "search incident to arrest" exception.[169] The Supreme Court could easily reject a factual analysis in other instances of searches of items that, like the jacket in *Belton*, are no longer within the arrestee's control and the search of which would, therefore, not be an incident to arrest as originally conceptualized in *Chimel*.[170]

United States v. Ross,[171] decided on June 1, 1982,[172] was the Supreme Court's final search warrant decision of the 1981 term.[173]

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a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest." 50 N.Y.2d at 452, 407 N.E.2d at 423, 429 N.Y.S.2d at 576-77 (citations omitted).

167. *Id.*

168. 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980).

169. 453 U.S. at 461 n.5. The Court stated:

> It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the respondent's arrest, because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pocket, had gained "exclusive control" of them. 50 N.Y.2d 447, 451, 407 N.E.2d 420, 422. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive control."

Id.

170. Justice Brennan raised this very issue in his dissent in *Belton*, in which he stated: "Even assuming today's rule is limited to searches of the 'interior' of cars—an assumption not demanded by logic—what is meant by 'interior'? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards?" 453 U.S. at 470 (Brennan, J., dissenting).

171. 102 S. Ct. 2157 (1982).

172. It is not surprising that the Court would decide to hear this case involving the automobile exception so soon after the *Robbins* decision. In *Belton* and *Robbins*, both decided on the same day, the Court reached inconsistent conclusions in two cases with similar facts involving automobiles. As previously discussed, in *Robbins* the Court required a search warrant, but in *Belton* the Court found a search warrant unnecessary. The confusion resulting from these two cases, coupled with the replacement of Justice Stewart (the author of *Belton* and *Robbins*) by Justice O'Connor, led the Court to return to this unsettled area. As the Court noted in *Ross*:

> Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case; although we reject the precise holding in *Robbins*, there was no Court opinion supporting a single rationale for its judgment and the reasoning we adopt today was not presented by the parties in that case.

Id. at 2172.

173. In addition to *Ross*, another case decided during the 1981 term indicated a further deterioration of the warrant-preference principles. In Washington v.

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In *Ross* the police stopped the defendant and, acting upon probable cause, conducted a warrantless search of his car.[174] A brown paper bag was found within the truck; the police opened the bag and found heroin.[175] The Court upheld the warrantless search of the bag.[176] In the majority opinion, Justice Stevens held that the scope of a warrantless search conducted pursuant to the automobile exception extended to a search of containers found in the automobile.[177] Justice Stevens took what appears to be a bold leap by equating the permissible scope of a warrantless search with the scope of a search that could be authorized by a magistrate. He stated that "[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize."[178] This language ignored the fundamental constitutional role magistrates have always played in the guarantee of fourth amendment protections.[179] Further, it contradicts the former requirement that a warrantless search should be "strictly tied to and justified by the circumstances which rendered its initiation permissible"—namely the impracticality of securing a warrant.[180]

Upon closer analysis, Justice Stevens' approach does not seem

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Chrisman, 102 S. Ct. 812 (1982), a policeman had arrested a student and accompanied him to his room so the student could get some identification. *Id.* at 815. As the officer stood by the open doorway of the room, he saw marijuana seeds and a pipe used to smoke marijuana. *Id.* He entered the room and seized these objects. *Id.* The majority justified the warrantless seizure under the plain view doctrine, which permits an officer to seize clearly incriminating evidence observed by the officer from a place in which he was lawfully present. *Id.* at 816-17. The issue in this case was the lawful presence of the officer in the room. *Id.* at 815-18. Justice White, in dissent, argued that since the officer chose to stand by the doorway there was no justification for his further entry and the resulting warrantless seizure. *Id.* at 821. (White, J., dissenting). The majority seemed to adopt a per se rule which would automatically authorize the officer's presence at the arrestee's elbow even to the point of entering the arrestee's home and applying the plain view doctrine to that area. *Id.* at 816-17. Thus, the majority used a standardized rule without analyzing the specific facts of the case, and thereby expanded the plain view exception to the warrant requirement.

174. 102 S. Ct. at 2168. A reliable informant told police that an individual was selling narcotics that he kept in the trunk of a car, and the informant provided police with descriptions of the individual and the car. *Id.* at 2160.

175. *Id.* at 2160.

176. *Id.* at 2172-73.

177. *Id.* at 2171-73. Justice Stevens stated that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 2172.

178. *Id.* at 2172.

179. *See* notes 31-34 *supra* and accompanying text.

180. *See* notes 38-45 *supra* and accompanying text.

to be such a bold leap of constitutional reasoning. *Ross* can be viewed as really nothing more than a continuation of the reasoning in *Robinson* and *Belton*; in neither of those cases was a factual analysis used to define the permissible scope of the search. Instead, the Court developed a standardized rule for warrantless searches in the hope of assisting the police.[181] Furthermore, Justice Stevens sought to limit his bold language in *Ross* to searches based on probable cause. He equated the scope of a warrantless search *based on probable cause* with the scope of a search authorized by a magistrate.[182] This emphasis on probable cause indicated that he intended *Ross* to apply only to searches pursuant to warrant exceptions that require probable cause, such as the automobile exception.[183] *Ross* would thus be inapplicable to searches pursuant to a warrant exception *not* requiring probable cause, such as the search incident to arrest exception, and the scope of such searches would, therefore, not be as broad as the scope of searches authorized by a magistrate.

Justice Stevens attempted to distinguish *Ross* from *Chadwick* and *Sanders* on the basis that the police in *Ross* had probable cause to search the entire vehicle, and in *Chadwick* and *Sanders* the police had probable cause only to search the individual containers.[184] Justice Stevens pointed out that the existence of probable cause to search the entire vehicle in *Ross* made it appropriate to consider the scope of the automobile exception.[185] Although the factual distinction between *Ross* and *Chadwick/Sanders* was correct, the distinction would not have been fundamental to the determination of the case if the Court had followed the principles of *Sanders* and *Chadwick*. In those cases the Court systematically analyzed both the justification for the initial warrantless activity (*i.e.*, seizing footlocker in *Chadwick*,[186] removing luggage from the trunk in *Sanders*[187]) and the scope of the subsequent search (*i.e.*, opening

181. *See* notes 67-70 *supra* and accompanying text; *see also* notes 141-43 *supra* and accompanying text.

182. 102 S. Ct. at 2172.

183. *See also* note 177 *supra*.

184. 102 S. Ct. at 2167-68. The Court stated: "It is clear . . . that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter." *Id.* at 2167.

185. Stevens noted, however, that consideration of the automobile exception had been inappropriate in *Chadwick* and *Sanders*, since those cases had not involved probable cause to search the entire vehicle. *Id.* at 2168.

186. The *Chadwick* Court noted that "[t]he initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost." 433 U.S. at 13.

187. The *Sanders* Court stated that "[t]he police acted properly—indeed commendably—in apprehending respondent and his luggage. . . . Having probable

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the footlocker one and a half hours later in *Chadwick*,[188] opening the suitcase in *Sanders*[189]). Applying a true warrant-preference approach, the Court determined that in *Sanders* and *Chadwick* the scope of the search had not been "justified by the circumstances which rendered its initiation permissible."[190] Under the Court's approach in *Sanders* and *Chadwick*, the existence in *Ross* of probable cause to search the entire automobile would not justify a search that exceeds the scope necessitated by the reason for the warrantless activity.[191] Thus, the difference between *Chadwick/Sanders* and *Ross* lay more in the Court's reasoning than in the facts of the cases.

A salutary feature of *Ross* is that the Court adopted dicta which would eliminate any distinction between containers based on an expectation of privacy.[192] To be precise, the Court stated that a footlocker has the same expectation of privacy as a paper bag.[193] The logical extension of this reasoning would eliminate any expectation of privacy distinction between containers and automobiles. There is no persuasive basis for the Court to claim that a person's expectation of privacy regarding his paper bag is greater than that regarding his automobile. Thus, the reasoning that Chief Justice Burger relied upon in *Chadwick* to distinguish a footlocker from an automobile on the basis of privacy expectations[194] has been implicitly undermined. A demise of the "degrees of expectation of privacy" analysis could also eliminate the justification that the Court has used to permit warrantless searches when the original reasons for the warrant exception no longer existed. Consequently, the Court could not claim, as it did in *Chambers*, that seizing an automobile is so grave an invasion of privacy that a subsequent

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cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase they suspected contained contraband." 442 U.S. at 761.

188. The *Chadwick* Court concluded that "[h]ere the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15.

189. In disallowing the search of the suitcase, the *Sanders* Court observed that "[h]ere, as in *Chadwick*, the officers had seized the luggage and had it exclusively within their control at the time of the search. Consequently, 'there was not the slightest danger that [the luggage] or its contents could have been removed before a valid search warrant could be obtained.' " 442 U.S. at 762 (quoting United States v. Chadwick, 433 U.S. 1, 13 (1977)).

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

191. Since the reason for the automobile exception is the vehicle's mobility, the scope of a warrantless automobile search should not extend to items which can be placed under police control and thus rendered "immobile."

192. 102 S. Ct. at 2170-71.

193. *Id.* at 2171-72.

194. *See* notes 87-88 *supra* and accompanying text.

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warrantless search of the automobile when it is no longer mobile is of minimal constitutional importance.[195] The removal of the expectation of privacy mask would expose the Court's inconsistency in espousing a warrant-preference approach in word while disregarding it in deed as it did in *Ross*.

The *Ross* decision thus rejected the holding and reasoning of *Robbins*[196] and also rejected the warrant-preference reasoning of *Sanders*, albeit without formally abandoning its holding.[197] *Ross* rejected the *Sanders* opinion's careful analysis disallowing a warrantless search of a container found within an automobile when the mobility factor associated with the automobile exception no longer existed.[198] Instead, the *Ross* Court adopted a standardized approach that expanded the automobile exception to allow a search of any containers found within the auto.[199] Further, even though the holding in *Ross* was limited to searches of containers under the automobile exception, the Court's emphasis on the desirability of a standardized approach,[200] which did not include a scrutiny of the scope of the warrantless activity, could all too easily be extended to searches other than those involving the automobile exception. With the *Ross* decision, the *Chadwick* and *Sanders* holdings are now limited to the particular facts of those cases.

It should also be pointed out that the *Ross* decision basically has returned the law to the situation existing prior to *Chadwick* and *Sanders*. Before those cases were decided, most courts allowed searches of containers as part of a warrantless automobile search.[201]

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195. *See* note 56 *supra* and accompanying text.

196. 102 S. Ct. at 2172.

197. *Id.*

198. *Ross* permits a search of all containers found in a vehicle searched pursuant to the automobile exception, regardless of whether the containers have been reduced to the police officer's control. *Id.*

199. *Id.*

200. The Court referred to

> the importance of striving for clarification in this area of the law. . . . [I]t is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement.

Id. at 2161-62. The Court also cited Justice Powell's concurrence in *Robbins,* in which he stated that " '[t]he plurality's approach strains the rationales of our prior cases and imposes substantial burdens on law enforcement without vindicating any significant values of privacy.' " *Id.* at 2168 (quoting Robbins v. California, 453 U.S. 420, 429 (1981) (Powell, J., concurring)).

201. *See, e.g.,* United States v. Vento, 533 F.2d 838, 867 n.101 (3d Cir. 1976); United States v. Tramunti, 513 F.2d 1087, 1104 (2d Cir. 1975); United States v. Soriano, 497 F.2d 147, 149-50 (5th Cir. 1974) (en banc). Moreover, the *Ross* Court offered Husty v. United States, 282 U.S. 694 (1931), and Scher v. United States,

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Conclusion of Case Analysis

In *Chadwick* the government urged the Court to limit the warrant requirement to searches of homes, offices, and private communications.[202] In all other instances, said the government, the reasonableness of searches under fourth amendment activity should be based exclusively on probable cause.[203] This ambitious argument for drastically overhauling the applicability of warrants was decisively rejected by the Court at that time.[204] Today, however, there is a strong indication that the government's argument in *Chadwick* has been adopted by the Supreme Court. It is only with respect to a home, office, or private communication that the preference for a warrant has remained unscathed. Cases involving home searches present good examples of the Court's firm preference for warrants in these three areas.[205]

In cases following *Chadwick*, the Court stressed the necessity of obtaining a warrant to search a dwelling house. *Mincey v. Arizona*[206] involved a narcotics raid on the defendant's dwelling during which a police officer was killed and the defendant arrested.[207] Homicide detectives arrived within ten minutes and conducted an extensive four-day warrantless search of the dwelling.[208] In *Mincey* the Court rejected the state's attempt to

305 U.S. 251 (1938), as examples that "this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile."102 S. Ct. at 2169.

202. *See* note 92 *supra* and accompanying text.

203. 433 U.S. at 7.

204. *See* note 93 *supra* and accompanying text.

205. The Court also has declared a firm preference for warrants in recent cases involving searches of offices and private communications. For example, in Michigan v. Tyler, the Court refused to adopt a reduced expectation of privacy rationale to uphold a warrantless search of fire-damaged business premises for evidence of arson. 436 U.S. 499 (1978). The Court refuted the notion "that innocent fire victims inevitably have no protectible expectations of privacy in whatever remains of their property." *Id.* at 505. Furthermore, this protectable privacy "may be sheltered by the walls of a warehouse or other commercial establishment not open to the public." *Id.* at 504-05.

Similarly, the Court in United States v. United States Dist. Court expressed a preference for warrants in searches of private communications. 407 U.S. 297 (1972). The Court stated that there is no "question or doubt as to the necessity of obtaining a warrant in the [electronic] surveillance of crimes unrelated to the national security interest." *Id.* at 308. The Court further held that this warrant requirement extends even to electronic surveillances ordered by the Attorney General in national security cases. *Id.* at 320-21. Subsequent cases involving surveillance of private communications have not relaxed the Court's warrant preference approach in this area.

206. 437 U.S. 385 (1978).

207. *Id.* at 387.

208. *Id.* at 388-89.

extend the earlier Burger Court case of *United States v. Edwards*[209] to a search of a dwelling.[210] The *Edwards* Court had reasoned that once there was an arrest, the further invasion of privacy from searching the arrestee's clothing ten hours after the arrest was comparatively inconsequential in constitutional terms.[211] In *Mincey* the state likewise argued that given the great invasion of privacy from the arrest of the defendant in his dwelling, the subsequent warrantless search of the dwelling was constitutionally irrelevant.[212] The *Mincey* Court had a different view, however: "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."[213]

The Court continued this restrictive approach to warrantless searches of dwellings in *Steagald v. United States*.[214] In *Steagald* the police conducted a warrantless search of a third party's residence in hope of finding a suspect for whom they had an arrest warrant.[215] The police did not find the suspect, but did find a large quantity of cocaine and arrested the third party.[216] The Court ruled that an arrest warrant was insufficient to allow for a search of the residence.[217] In holding for the defendant the Court stated that "[e]xcept in such special situations [involving consent or exigency], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant."[218]

While recognizing the need for a warrant to search a dwelling or place of business, the Court has greatly limited the requirement of a warrant in non-dwelling situations. As previously indicated, *Robbins* has been overruled and *Chadwick* and *Sanders* have been limited to their facts.[219] In addition, the government's argument in *Chadwick* (that searches not involving a home, office, or private communication should be based exclusively on probable cause

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209. *See* notes 77-82 *supra* and accompanying text.
210. 437 U.S. at 391.
211. *See* note 79 *supra* and accompanying text.
212. 437 U.S. at 391.
213. *Id.*
214. 451 U.S. 204 (1981).
215. *Id.* at 206-07.
216. *Id.*
217. *Id.* at 216.
218. *Id.* at 211. In support of its holding, the Court quoted its language from Payton v. New York, 445 U.S. 573 (1980): " '[I]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.' " 451 U.S. at 212 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).
219. *See* notes 186-200 *supra* and accompanying text.

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without regard for a warrant[220]) is similar to the rationale of the *Ross* decision, which equated these warrantless searches based on probable cause to searches authorized by a magistrate.[221] Thus, much of the government's argument in *Chadwick* (*i.e.*, that the warrant requirement be limited to searches of homes, offices, and private communications) has been adopted by the Court.

Only in the home, office, or private communication setting does the standardized, easily applicable approach for law enforcement officials appear to have been rejected by the Court.[222] In *Mincey v. Arizona*, for example, the Court stated that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard for the Fourth Amendment."[223] Furthermore, in *Steagald* the Court stated that "[a]ny warrant requirement impedes to some extent the vigor with which the government can seek to enforce its laws, yet the Fourth Amendment recognizes that this restraint is necessary in some cases to protect against unreasonable searches and seizures."[224] It appears that "in some cases" has come to mean to the Court "in cases involving a home, office, or private communication" and little else.

By adopting a standardized approach to the warrant requirement, the Court ignored the step-by-step analysis of police action that it had previously required.[225] As the Court stated in *Robinson*, it no longer embraced the two-step analysis of (1) questioning the justification for a warrantless search and (2) determining if the actual scope of the warrantless search was related to this justification.[226] Instead, the Court has ruled that once an arrest occurs, a "search incident to arrest" exception applies and the scope of the search need not necessarily be related to the reason for the exception.[227] Similarly, the Court has held that once there is probable cause to search an automobile, a thorough, warrantless

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220. *See* note 92 *supra* and accompanying text.

221. *See* note 178 *supra* and accompanying text.

222. *But see* Washington v. Chrisman, 102 S. Ct. 812 (1982). In *Chrisman*, the Court adopted a standard rule that allows an officer, following an arrest, to remain at the arrestee's elbow at all times, even if it means following the arrestee into his dwelling. *Id.* at 816-17. In dissent, Justice White argued that an officer should be permitted to follow an arrestee into his dwelling only when necessary to protect the officer or maintain control over the arrestee. *Id.* at 818 (White, J., dissenting). Justice White further stated that "[b]right-line rules are indeed useful and sometimes necessary, . . . but the Court should move with some care where the home or living quarters are involved." *Id.* at 821 (White, J., dissenting).

223. 437 U.S. at 393.

224. 451 U.S. at 222.

225. *See* notes 35-48 *supra* and accompanying text.

226. *See* notes 69-70 *supra* and accompanying text.

227. *See* notes 60-82 *supra* and accompanying text.

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search of the vehicle may be conducted even if the "mobility" factor that justifies the auto exception is not present.[228] The Court is no longer looking at the practical reasons for the exceptions to the warrant requirement or limiting the scope of the warrantless activity to the circumstances that originally justified it.

Since the Court has chosen not to analyze the rationales for each exception, it has become easier for the police to justify their warrantless search on one of the recognized exceptions. Because the Court has declined to circumscribe the scope of searches according to the rationale of each exception, the permissible scope of the exception will inevitably swallow up the warrant requirement itself.

Thumbnail Analysis of the Individual Justices

As detailed above, many of the Court's recent search and seizure decisions have been premised on a desire to provide law enforcement officials with broad, easily applied standards of permissible behavior. An analysis of the individual views of the Justices reveals that this position may be the result of their attitudes toward the costs of the exclusionary rule.[229] This proposition was recently pointed out by Justice Powell in concurrence in *Robbins*. He stated that

> the law of search and seizure with respect to automobiles is intolerably confusing . . . . Much of the difficulty comes from the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.[230]

Chief Justice Burger: Although Chief Justice Burger wrote *Chadwick*[231] and concurred in *Sanders*[232] and *Robbins*,[233] the thrust of his current position indicates disenchantment with search warrants. Rather than adopt the majority language in *Sanders*, which indicated that the decision dealt with the auto exception,[234] he carefully limited his concurrence to instances in which there was specific probable cause to search the container. In this way he sought to narrow his expansive language in *Chadwick*. Questions raised by

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228. *See* notes 171-201 *supra* and accompanying text.
229. *See* notes 8-11 *supra* and accompanying text.
230. 453 U.S. at 430 (Powell, J., concurring).
231. *See* notes 83-93 *supra* and accompanying text.
232. *See* notes 105-10 *supra* and accompanying text.
233. Chief Justice Burger concurred in *Robbins* without opinion. 453 U.S. at 429.
234. *See* notes 105-10 *supra* and accompanying text.

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his silent concurrence in *Robbins* were clarified in his later expressed position in *Ross*,[235] which overturned *Robbins*.[236] Chief Justice Burger's willingness to adopt a standardized approach in *Belton*, and his agreement with the majority in *Ross*, recasts his majority opinion in *Chadwick*, particularly its glowing warrant-preference language,[237] as an aberration. At any rate, given the *Belton* and *Ross* cases, *Chadwick* now appears to be limited to its facts.[238]

Justice Rehnquist: Justice Rehnquist has consistently voted against the search warrant preference.[239] He has explicitly stated that he favors the Minton approach of limiting warrants under the fourth amendment. "[H]istorical study", he has argued, " 'suggest[s] that in emphasizing the warrant requirement over the reasonableness of the search the Court has "stood the fourth amendment on its head". . . .' "[240] As the author of *Robinson*, Justice Rehnquist planted the seeds of the *Belton* and *Ross* decisions.[241] Disregarding the established two-step factual analysis, he introduced the idea of a standardized approach that is supposed to assist law enforcement.[242]

Justice Blackmun: Although Justice Blackmun has not expressly embraced the Minton position, he has consistently joined with Justice Rehnquist and voted against a search warrant-preference approach.[243] His primary concern seems to be to provide law enforce-

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235. Burger joined with Stevens' opinion in *Ross*. *See* notes 174-200 *supra* and accompanying text.

236. *See* note 196 *supra* and accompanying text.

237. 433 U.S. at 7-11.

238. *See* notes 130-200 *supra* and accompanying text.

239. Rehnquist delivered the Court's opinion in *Robinson*, *see* notes 59-70 *supra* and accompanying text. He joined with the majority in *Edwards*, *see* notes 77-80 *supra* and accompanying text. He dissented from the Court's opinions in *Chadwick*, *see* 433 U.S. at 17-24 (Blackmun, J., dissenting), in *Sanders*, *see* 442 U.S. at 768-72 (Blackmun, J., dissenting), and in *Robbins*, *see* 453 U.S. at 437-44 (Rehnquist, J., dissenting). He concurred with the Court's opinion in *Belton*, *see* 453 U.S. at 463 (Rehnquist, J., concurring) and joined with the Court's opinion in *Ross*, *see* notes 171-200 *supra* and accompanying text.

240. Robbins v. California, 453 U.S. at 438 (Rehnquist, J., dissenting) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (quoting T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-24 (1969))).

241. *See* notes 59-70 *supra* and accompanying text.

242. *See* notes 67-70 *supra* and accompanying text.

243. Justice Blackmun joined with the Court's opinion in *Robinson*, *see* notes 59-72 *supra* and accompanying text, and in *Edwards*, *see* notes 77-80 *supra* and accompanying text. He dissented from the Court's opinion in *Chadwick*, *see* 433 U.S. at 17-24 (Blackmun, J., dissenting), in *Sanders*, *see* 442 U.S. at 768-72 (Blackmun, J., dissenting), and in *Robbins*, *see* 453 U.S. at 436-37 (Blackmun, J., dissenting). He joined with the Court's opinion in *Belton*, *see* notes 133-69 *supra* and accompanying text, and concurred with the Court's opinion in *Ross*, *see* 102 S. Ct. at 2173.

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ment with an easily applied rule for search warrants,[244] and thus, he favors a standardized approach.

Justice Powell: Justice Powell's position is somewhat harder to characterize than those of the previous three Justices, but his most recent positions indicate that he now has abandoned the warrant preference as well. He wrote a very favorable warrant-preference opinion in *Sanders*.[245] Since then, however, his last three opinions have indicated a basic change in his position, particularly since *Ross*, in which he joined, overruled much of his own language in *Sanders*.[246] In *Robbins* he indicated his disagreement with the suggestion of eliminating distinctions between containers based upon privacy expectations.[247] Thus, in deciding upon warrant necessity, he seems to put great emphasis upon the privacy expectation analysis.[248] In *Robbins* he recognized a sufficient privacy expectation in a package to necessitate a warrant,[249] and in justifying the warrantless search of a jacket in *Belton*, he recognized a diminished privacy expectation resulting from the arrest.[250] In *Ross*, however, in addition to his concern for the expectation of privacy,[251] he also adopted much of the majority's standardized approach reasoning.[252] Although the privacy expectation analysis is difficult to predict, Justice Powell's acceptance of the standardiz-

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244. Justice Blackmun stated in his dissent in *Chadwick* that

> it would be better, in my view, to adopt a clear-cut rule permitting property seized in conjunction with a valid arrest in a public place to be searched without a warrant. Such an approach would simplify the constitutional law of criminal procedure without seriously derogating from the values protected by the Fourth Amendment's prohibition of unreasonable searches and seizures.

433 U.S. at 21-22 (Blackmun, J., dissenting).

245. *See* notes 94-104 *supra* and accompanying text.

246. *See* notes 196-200 *supra* and accompanying text.

247. Justice Powell stated that he could join in the Court's judgment but not its opinion because "[i]t would require officers to obtain warrants in order to examine the contents of insubstantial containers in which no one had a reasonable expectation of privacy." 453 U.S. at 429 (Powell, J., concurring).

248. *Id.* (Powell, J., concurring).

249. *Id.* (Powell, J., concurring).

250. Justice Powell joined in the Court's opinion in *Belton, see* notes 133-69 *supra* and accompanying text.

251. Justice Powell stated: "I long have held that one's 'reasonable expectation of privacy' is a particularly relevant factor in determining the validity of a warrantless search. I have recognized, that with respect to automobiles in general, this expectation can be only a limited one." 102 S. Ct. at 2173 (Powell, J., concurring).

252. Justice Powell spoke of the importance of providing " 'specific guidance to police and courts in this recurring [automobile search] situation' ", *id.* (Powell, J., concurring) (quoting Robbins v. California, 453 U.S. 420, 435 (1981) (Powell, J., concurring)), and he stated that the *Ross* decision enunciated "a readily understood and applied rule." 102 S. Ct. at 2173 (Powell, J., concurring).

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ed approach in *Ross* is an indication that he may well vote against the warrant-preference principle even more often in the future.

Justice O'Connor: Since Justice O'Connor has completed only one term on the Court, it is difficult to analyze her position regarding search warrants.[253] All indications are, however, that she will not favor a warrant-preference principle. The clearest indication, of course, is her vote with the majority in *Ross*.[254] In addition, in *Washington v. Chrisman* she joined with the majority in extending the plain view doctrine, which avoided the necessity for a search warrant.[255] Furthermore, in other criminal procedure decisions during her tenure on the Supreme Court she has always favored the interests of law enforcement over the rights of the individual[256]

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253. Justice O'Connor's record while a judge on the Arizona Court of Appeals is not particularly helpful in assessing her position regarding search warrants, since she wrote only one opinion involving the search warrant issue. In that case, *State v. Brooks*, 127 Ariz. App. 130, 618 P.2d 624 (1980), the police had arrested the occupants of an automobile and instructed them to lie down on the road in front of the car. *Id.* at 136, 618 P.2d at 630. One of the officers then moved a pile of jackets lying on the back seat of the auto and discovered incriminating evidence under the jackets. *Id.* In upholding this search, Justice O'Connor stated:

> Since the officer suspected that an armed robbery had just been committed, his concern for his safety and the safety of the other officers, manifested by his moving the coats, was entirely reasonable under the circumstances. Moreover, there is probable cause to make a warrantless search of a vehicle when the officer has a reasonable belief, based on facts known to him, that the vehicle contains contraband.

Id. at 130-31, 618 P.2d at 630-31.

254. *See* notes 171-200 *supra* and accompanying text.

255. *See* note 173 *supra*.

256. Justice O'Connor wrote the Court's opinion in Tibbs v. Florida, 102 S. Ct. 2211 (1982), which held that a defendant whose conviction is reversed on appeal due to the weight, as opposed to the sufficiency, of the evidence, may be retried without offending the Double Jeopardy Clause. *Id.* at 2221. Justice O'Connor also joined with the majority in Oregon v. Kennedy, 102 S. Ct. 2083 (1982), in which the Court ruled that a defendant who moves for a mistrial because of prosecutorial or judicial conduct cannot invoke the Double Jeopardy Clause as a bar to retrial unless the conduct was intended to goad the mistrial motion. *Id.* at 2091. Justice O'Connor joined with the majority in United States v. Goodwin, 102 S. Ct. 2485 (1982), in which the Court held that no presumption of unconstitutional vindictiveness arises when a prosecutor decides before trial to increase the charges against a defendant who had exercised his right to a jury trial. Under *Goodwin*, the defendant is required to prove that the decision was motivated by a desire to punish him for doing something that the law permitted him to do. *Id.* at 2493-94.

Justice O'Connor also concurred with the Court's judgment in United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982), in which it was held that neither the Compulsory Process Clause nor the Due Process Clause is automatically violated when illegal aliens who have witnessed an alleged offense are deported prior to the defendant's trial. *Id.* at 3449. *See id.* at 3450 (O'Connor, J., concurring). The defendant must make a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense. *Id.* at 3449-50.

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and has consistently sought to limit the impact of the exclusionary rule.[257] Her introduction to the Court appears to have solidified a majority already favoring law enforcement interests.[258]

In her concurring opinion, Justice O'Connor advocated an approach requiring a brief detention of potential alien witnesses so that both defense counsel and the Government could interview them. *Id.* at 3451 (O'Connor, J., concurring).

In Smith v. Phillips, 455 U.S. 209 (1982), the Court refused to upset the state conviction of a defendant who learned after the trial that one of his jurors had been actively seeking employment with the prosecutor's office. *Id.* at 221. The Court ruled that due process was adequately protected by a post-trial hearing into the matter at which no actual bias was shown. *Id.* Justice O'Connor concurred in the result, but wrote separately to state that the majority opinion did not foreclose the use of implied bias in appropriate circumstances. *Id.* (O'Connor, J., concurring). Finally, Justice O'Connor also joined with the Court's opinion in United States v. MacDonald, 102 S. Ct. 1497 (1982), which held that a period between dismissal of one set of criminal charges and the same sovereign's institution of a new set has no significance for purposes of the Speedy Trial Clause. The sixth amendment clock does not run if the defendant is neither under arrest nor the subject of a formal accusation. *Id.* at 1502.

257. For example, in United States v. Johnson, 102 S. Ct. 2579 (1982), the Court held that fourth amendment decisions, subject to certain exceptions, are to be applied to all convictions that were not final at the time the decision was rendered. *Id.* at 2594. The Court, therefore, applied an exclusionary rule decision retroactively to *Johnson.* Justice O'Connor joined in a dissenting opinion, which stated that retroactive application of new constitutional doctrine is appropriate in those instances when the truth-finding function of the criminal trial has been substantially impaired and that new extensions of the exclusionary rule do not serve this purpose. *Id.* at 2595 (White, J., dissenting).

In addition, Justice O'Connor wrote the dissent in Taylor v. Alabama, 102 S. Ct. 2664 (1982), in which the Court held that a robbery suspect's confession, six hours after his illegal arrest, was not sufficiently purged of taint to be admissible. *Id.* at 2669. Justice O'Connor argued in dissent that sufficient factors existed which purged the taint of the illegal arrest. *Id.* (O'Connor, J., dissenting).

Finally, in the habeas corpus area Justice O'Connor has made it more difficult for defendants to collaterally attack their convictions, which limits the scope of the exclusionary rule's applicability. For example, in Rose v. Lundy, 102 S. Ct. 1198 (1982), Justice O'Connor's majority opinion held that total exhaustion of state remedies is a prerequisite for a federal habeas corpus petitioner who attacks a state conviction. *Id.* at 1203-04. Thus, a federal district court must dismiss any mixed habeas corpus petitions, i.e., those that contain both exhausted and unexhausted claims. *Id.* at 1205. In Engle v. Isaac, 102 S. Ct. 1558 (1982), Justice O'Connor's majority opinion stated that even when the constitutional issue raised by a habeas petitioner involves the truth-finding function of the trial, a state prisoner seeking federal habeas corpus relief must show cause for and actual prejudice from a failure to object to the claimed error at the state level. *Id.* at 1575. This "cause for" and "prejudice from" test was extended by Justice O'Connor's majority opinion in United States v. Frady, 102 S. Ct. 1584 (1982) to the collateral review of federal convictions. *Id.* at 1594. Justice O'Connor's opinion stated that the more lenient "plain error" standard is inappropriate when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal. *Id.* at 1593.

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Justice Stevens: In *Belton* and *Ross* Justice Stevens emphasized the probable cause issue in disregarding the limiting of the scope of warrantless activity.[259] He prefers to equate the scope of automobile searches predicated on probable cause with that of searches authorized by a magistrate's warrant.[260] As to other exceptions to the warrant preference, such as searches incident to arrest when probable cause does not exist for the search, Justice Stevens seems inclined to adopt a warrant-preference approach.[261] Justice Stevens' warrant-preference approach in such situations is indicated by his failure to join with the Court's opinion in *Belton* on the grounds that the majority's characterization of *Belton* as a "search incident to arrest" case would unduly expand the "search incident to arrest" exception to the warrant requirement.[262] He preferred to characterize *Belton* as an automobile exception case, which permitted him to reach the desired warrantless conclusion without expanding the search incident to arrest rule.[263] Justice Stevens bears further observation to determine if his disregard of the warrant preference will continue to be limited to cases involving automobile searches.[264]

Justices Brennan and Marshall: With the exception of their positions in *Chambers v. Maroney*, which permitted a warrantless automobile search occurring after the vehicle had been driven to the police station,[265] Justices Brennan and Marshall have consistently adhered to the warrant-preference principle.[266] Although

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258. Justice Stewart, whom Justice O'Connor replaced on the Court, often voted in favor of search warrants. He dissented from the Court's opinion in *Edwards, see* 415 U.S. at 809-13 (Stewart, J., dissenting); *see also* notes 81-82 *supra* and accompanying text. He joined with the Court's opinion in *Chadwick, see* notes 83-93 *supra* and accompanying text, and in *Sanders, see* notes 94-101 *supra* and accompanying text, and he announced the Court's judgment in *Robbins, see* notes 111-21 *supra* and accompanying text.

259. Justice Stevens dissented in *Robbins* and concurred in the judgment in *Belton* "because the search in both cases was supported by probable cause and falls within the automobile exception." 453 U.S. at 453 (Stevens, J., dissenting). This approach finally was adopted by the Court in *Ross*, where Justice Stevens' majority opinion upheld the search of the entire vehicle pursuant to the automobile exception because the search was predicated on probable cause. *See* notes 171-200 *supra* and accompanying text.

260. *See* note 178 *supra* and accompanying text.

261. *See* notes 182-83 *supra* and accompanying text.

262. *See* Robbins v. California, 453 U.S. at 449-51. (Stevens, J., dissenting).

263. *Id.* at 452-53 (Stevens, J., dissenting).

264. The fact that Justice Stevens joined with the majority in Washington v. Chrisman, *see* note 173 *supra*, is a sign that he is prepared to expand on warrantless activity outside the automobile area.

265. *See* notes 53-58 *supra* and accompanying text. Justices Brennan and Marshall joined with the Court's opinion in *Chambers*.

266. For example, Justice Brennan joined in Marshall's dissent in *Robinson*, 414 U.S. at 238-59 (Marshall, J., dissenting); *see* notes 71-72 *supra* and accom-

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they voted for a warrantless search in *Chambers* on the theory of a reduced privacy expectation,[267] they have consistently voted against extending the *Chambers* holding to warrantless searches in other automobile cases.[268] Given their consistency to date, it is probably a safe prediction that they will continue to analyze the particular reasons for each warrant exception and to require that the scope of any warrantless activity be strictly tied to its justification.

Justice White: Until the 1977 *Chadwick* decision, Justice White had consistently voted against the warrant-preference approach.[269] As early as *Chimel* he had argued that, given the significant invasion of privacy in an arrest, subsequent searches could proceed without a warrant.[270] In fact, in *Edwards* he expressly adopted the Minton analysis.[271] Justice White has also been a leading opponent of the requirement for an arrest warrant in a dwelling[272]

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panying text. Justices Brennan and Marshall both joined in Justice Stewart's dissent in *Edwards*, 415 U.S. at 809-13 (Stewart, J., dissenting); *see* notes 81-82 *supra* and accompanying text. Justices Marshall and Brennan joined in the Court's opinion in *Chadwick*, *see* notes 83-90 *supra* and accompanying text; (*see also* 433 U.S. at 16-17 (Brennan, J., concurring)), in *Sanders*, *see* notes 94-101 *supra* and accompanying text, and in *Robbins*, *see* notes 111-21 *supra* and accompanying text. Both Justices dissented in *Belton*, *see* 453 U.S. at 463-72 (Brennan, J., dissenting); (*see also* note 151 *supra* and accompanying text), and in *Ross*, *see* 102 S. Ct. at 2173-82 (Marshall, J., dissenting).

267. *See* note 56 *supra* and accompanying text.

268. For example, Justices Brennan and Marshall dissented in Cardwell v. Lewis, 417 U.S. 583 (1974), Texas v. White, 423 U.S. 67 (1975), and South Dakota v. Opperman, 428 U.S. 364 (1976), in each of which the Court further expanded the automobile exception. In *Cardwell* the Court upheld the warrantless examination of the exterior of a car found in a public parking lot. The Court ruled that in such a situation, when probable cause exists, no warrant is required because of a reduced expectation of privacy. 417 U.S. at 591-92. In *White* the Court further extended *Chambers* and upheld the warrantless search of an auto after it had been seized and brought to the station house. 423 U.S. at 69. While the *Chambers* Court had justified a search of an automobile at the station house due to the darkness of the highway, 399 U.S. 42, 52, n.10 (1970), the seizure of the vehicle in *White* occurred in the daytime, when a search at the scene was feasible. 423 U.S. at 70 (Marshall, J., dissenting). Nonetheless, the *White* Court upheld the search because probable cause had existed for the search. *Id.* at 68. Finally, in *Opperman* the Court upheld the warrantless search of an automobile that occurred so that the car's contents could be inventoried. The search was upheld because of the diminished expectation of privacy with regard to automobiles. 428 U.S. at 367.

269. For example, Justice White wrote the Court's opinion in *Chambers v. Maroney*, (*see* notes 35-38 *supra* and accompanying text) and joined in the Court's opinion in *Robinson*, *see* notes 39-42 *supra* and accompanying text. (*See also* notes 185-86 *supra* and accompanying text).

270. Chimel v. California, 395 U.S. 752, 781-83 (1969) (White, J., dissenting).

271. *See* notes 77-80 *supra* and accompanying text.

272. Justice White has maintained that the police, after knocking and announcing their presence, should be permitted to make warrantless daytime arrests in dwellings if there is probable cause to believe that the person to be ar-

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and has indicated his willingness to expand the authority of an arrest warrant beyond its present limits.[273] Nevertheless, since *Chadwick* Justice White has consistently joined Justices Brennan and Marshall in voting for the search warrant-preference approach.[274] Thus, over the last few years his consistent voting in favor of search warrants indicates that he has rejected the Minton approach and can be expected to favor a warrant-preference approach in the future.

Summary Justices

Beyond the perimeters of the home, office, or private communication, Chief Justice Burger,[275] and Justices Rehnquist,[276] Blackmun,[277] and Powell,[278] generally appear to have disregarded the warrant-preference principle. Justice O'Connor very likely will join with them to make a majority.[279] Justice Stevens' approach is more difficult to categorize. He has voted with the majority in upholding warrantless searches when probable cause existed, and will likely vote with the minority when probable cause is absent.[280] Justices Brennan,[281] Marshall,[282] and White[283] generally adhere to the warrant-preference principle.

Conclusion

The fourth amendment reflects a balance between the concerns for law enforcement and the protection of the individual. In recent

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rested has committed a felony and is in the dwelling at the time of the police entry. Payton v. New York, 445 U.S. 573, 620 (1980) (White, J., dissenting). This position is due to his interpretation of the common law history of arrests, which he concluded allows for warrantless arrests in dwellings. *Id.* at 604-12 (White, J., dissenting).

273. In Steagald v. United States, 451 U.S. 204 (1981), Justice White indicated his willingness to expand the authority of arrest warrants. He joined in Rehnquist's dissent in *Steagald*, in which Rehnquist asserted that the search of the third party defendant's home pursuant to an arrest warrant for another individual was constitutional. *Id.* at 225-31 (Rehnquist, J., dissenting).

274. Justice White joined the Court's opinion in *Chadwick, see* notes 83-93 *supra* and accompanying text, *Sanders, see* notes 94-104 *supra* and accompanying text, and *Robbins, see* notes 111-22 *supra* and accompanying text. Justice White dissented in *Belton, see* 453 U.S. at 472 (White, J., dissenting), and in *Ross, see* 102 S.Ct. at 2173 (White, J., dissenting).

275. *See* notes 231-38 *supra* and accompanying text.

276. *See* notes 239-42 *supra* and accompanying text.

277. *See* notes 243-44 *supra* and accompanying text.

278. *See* notes 245-52 *supra* and accompanying text.

279. *See* notes 253-58 *supra* and accompanying text.

280. *See* notes 259-64 *supra* and accompanying text.

281. *See* notes 265-68 *supra* and accompanying text.

282. *Id.*

283. *See* notes 269-74 *supra* and accompanying text.

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years the concerns for law enforcement have been loudly articulated because of the Court's view of the costs of the exclusionary rule (a guilty person goes free because the constable has blundered).[284] In what may be seen as an effort to limit these costs, the Court, despite its espoused preference for warrants, has largely ignored the original, practical reasons for the warrant exceptions and has disregarded the previous requirement of limiting the permissible scope of warrantless activity by the practical justification for that activity. It is distressing that basic and fundamental constitutional doctrines have been distorted, and at times disregarded, because the Court has become disenchanted with, and therefore seeks to limit, the application of the exclusionary rule. These basic doctrines are not being disrupted on their merits, but rather because they stand in the way of the Court's determination to limit the exclusionary rule. The search warrant area is no exception to this distortion.

This Article has demonstrated that the *Belton* and *Ross* decisions represent the logical continuation of the Court's departure from a warrant-preference principle that began in 1971 with *Chambers*. Even in the occasional cases in which the Court required search warrants such as *Chadwick*, *Sanders*, and *Robbins*, the Court used an expectation of privacy rationale to maintain doctrinal consistency with the earlier cases that disregarded a warrant preference. In light of *Belton* and *Ross*, it is clear that the circumstances in which the Court will condemn warrantless searches are severely limited, and, in all but searches involving a home, office, or private communication, the continued validity of the "degree of expectation of privacy" rationale has become questionable.

Whatever the motivating cause, it is clear that the Burger Court has charted a course away from the Frankfurter principles which were adopted by the Warren Court.

284. *See* notes 8-11 *supra* and accompanying text.

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