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Warrantless Container Searches Under the Automobile and Search Incident Exceptions

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WARRANTLESS CONTAINER SEARCHES UNDER THE AUTOMOBILE AND SEARCH INCIDENT EXCEPTIONS

I. Introduction

The fourth amendment limits governmental intrusion into an individual's person, his house, papers and effects and protects the individual against "unreasonable searches and seizures"[1] by requiring a search warrant in the event of an intrusion. Exceptions to the warrant requirement have developed where the exigencies of the surrounding circumstances demand immediate action.[2]

Warrantless searches of containers have often been sustained under exceptions to the warrant requirement.[3] Prior to the Supreme Court decisions in *United States v. Chadwick*[4] and *Arkansas v. Sanders*,[5] warrantless searches of containers were upheld under the automobile and the search incident to arrest exceptions.[6] In *Chadwick* and *Sanders* the Supreme Court attempted to limit the circumstances under which containers can be searched without a warrant. However, the restrictions outlined in *Chadwick* and

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1. 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. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court stated that, "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable . . . subject to a few specifically established and well-delineated exceptions." *Id.* at 454-55. *See* Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L.C. & P.S. 198, 199 (1977), where the author lists more than fifteen established exceptions to the warrant requirement.

3. Automobile exception: *see* United States v. Halliday, 487 F.2d 1215 (5th Cir. 1973), *rehearing denied*, 488 F.2d 552 (1974) (the use of the automobile exception to validate the search of 31 boxes found inside defendant's trailer); United States v. Evans, 481 F.2d 990 (9th Cir. 1973) (search of a footlocker inside defendant's car sustained under the automobile exception).

Search incident to arrest exception: *see* United States v. Frick, 490 F.2d 666 (5th Cir. 1973), *cert. denied*, 419 U.S. 878 (1974) (search of attache case found in defendant's automobile upheld as incident to arrest); United States v. Mehciz, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971) (search of defendant's briefcase sustained as a proper search incident to arrest).

4. 433 U.S. 1 (1977).

5. 442 U.S. 753 (1979).

6. *See* note 3 *supra*.

Sanders have been subject to varying interpretations by lower courts. Broad constructions of *Chadwick* and *Sanders* have validated the warrantless searches of containers under the automobile and search incident exceptions.[7]

This Note will first discuss the restrictions placed on warrantless searches of containers delineated in *Chadwick* and *Sanders*. Second, the basic areas of conflict among the lower courts involving the warrantless search of containers justified under the automobile and the search incident to arrest exceptions will be outlined. Finally, this Note will suggest that a strict interpretation of the guidelines delineated in *Chadwick* and *Sanders* and an analysis of the rationales supporting the exceptions to the warrant requirement lead to consistent fourth amendment protection against warrantless searches of most containers.

II. History of the Automobile and Search Incident to Arrest Exceptions

A. The Automobile Exception

The automobile exception, currently utilized to justify the warrantless search of certain containers inside a vehicle, was first recognized in *Carroll v. United States*.[8] In *Carroll*, police officers having probable cause to believe that the defendants' vehicle contained contraband liquor,[9] searched the car without a warrant.[10] The search resulted in the seizure of sixty-eight quarts of bonded whiskey and gin.[11] Carroll was convicted of transportation of contraband liquor in violation of the National Prohibition Act.[12]

The Supreme Court validated the search of Carroll's vehicle, pointing out that the mobile nature of an automobile requires the

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7. Automobile exception: *see, e.g.*, United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978); United States v. Gaultney, 581 F.2d 1137 (5th Cir.), *rehearing denied*, 586 F.2d 842 (1978).

Search incident to arrest exception: *see, e.g.*, United States v. Garcia, 605 F.2d 349 (7th Cir. 1979); People v. De Santis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838, *cert. denied*, 443 U.S. 912 (1979).

8. 267 U.S. 132 (1925). For a discussion of the current role of the automobile exception in the justification of warrantless container searches, see note 158 *infra* and accompanying text.

9. *Id.* at 160.

10. *Id.* at 135-36.

11. *Id.* at 136.

12. *Id.* at 134.

application of standards different from those applied to dwellings and structures when determining whether a search warrant is required.[13] *Carroll*, outlining the standards to be applied to the warrantless search of automobiles, articulated the two requirements needed to establish the automobile exception. First, probable cause to believe that the vehicle contains evidence of a crime must be shown.[14] Second, the exigency of mobility, inherent in an automobile, must be present.[15]

Although *Carroll* focused on a mobile automobile as the subject of the warrantless search, the Supreme Court in *Chambers v. Maroney*[16] confronted the question whether inherent or potential mobility will satisfy the mobility requirement of the automobile exception.[17] In *Chambers*, police officers conducted a warrantless search of the defendants' vehicle in an attempt to locate evidence of a robbery.[18] The search of the vehicle was conducted after the car had been removed to a police station.[19] At the time of the search, the vehicle was immobilized. Nevertheless, the Supreme Court held that since the automobile could have been searched when it was stopped under the automobile exception, it could also be searched at a safer location.[20] Courts have subsequently validated warrantless searches of vehicles conducted under the automobile exception where there is a showing of either actual or potential mobility.[21]

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13. *Id.* at 153.

14. *Id.* at 160-61.

15. *Id.* at 153. The exigency requirement for the automobile exception is implicit in *Carroll*, but more fully defined in subsequent cases. Moylan, *The Automobile Exception: What Is It and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 993 (1976) [hereinafter cited as *The Automobile Exception*]. In *Carroll*, the defendant's vehicle was mobile, thereby satisfying the exigency requirement. *Id.*

16. 399 U.S. 42 (1970).

17. *Id.* One commentator concluded that since actual mobility was present in *Carroll*, the decision must have been based on actual mobility. Note, *Misstating the Exigency Rule*, 28 SYRACUSE L. REV. 981, 988 (1977). It has been observed that there are logical inconsistencies endemic to the automobile exception rationale. Once an automobile has been stopped by police officers, it is no longer mobile, and a warrant should then be obtained. Comment, *The Automobile Inventory Search and Cady v. Dombrowski*, 20 VILL. L. REV. 147, 167 (1974).

18. 399 U.S. at 44.

19. *Id.*

20. *Id.* at 52.

21. Actual mobility: *see* United States v. Flickinger, 573 F.2d 1349 (9th Cir.), *cert.*

In *Coolidge v. New Hampshire*,[22] the Supreme Court attempted to curtail the expanding definition of vehicle mobility. In *Coolidge*, police officers arrested the defendant at his home, suspecting his involvement in the murder of a young girl.[23] The officers later returned to tow the defendant's car, which was parked in his driveway, to the police station where it was subsequently searched.[24] Incriminating evidence seized from the car was introduced at the defendant's trial, which led to his conviction for murder.[25]

The Supreme Court held that the search of the defendant's vehicle which led to his conviction was an unconstitutional violation of Coolidge's fourth amendment rights.[26] No exigency was found to exist which would necessitate a warrantless search.[27] Discussing the circumstances which might have supported the warrantless search of the automobile, the Court referred to situations involving actual mobility.[28] Lower courts faced with the warrant-

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denied, 439 U.S. 836 (1978); United States v. Halliday, 487 F.2d 1215 (5th Cir. 1973), *rehearing denied*, 488 F.2d 552 (1974).

Potential mobility: *see* Texas v. White, 423 U.S. 67 (1975); Husty v. United States, 282 U.S. 694 (1931) (although the Court in *Husty* does not specifically state whether the automobile was in motion at the time of arrest, it has been claimed that the circumstances did not approach the exigency which justified the search in *Carroll*. Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Moveable Items*, 58 IOWA L. REV. 1134, 1137 (1973)); United States v. Evans, 481 F.2d 990 (9th Cir. 1973). One commentator, inferring from *Chambers* that the warrantless search of an automobile requires only a showing of probable cause, eliminated entirely consideration of the mobility requirement. 46 NOTRE DAME LAW. 610, 615 (1971).

22. 403 U.S. 443 (1971).

23. *Id.* at 447.

24. *Id.* at 448.

25. *Id.*

26. *Id.* at 473-74.

27. The Court held that the search was not justifiable as incident to the arrest because the search and arrest did not take place in the same vicinity, 403 U.S. at 456-57. The automobile exception was found inapplicable because the defendant had no access to his automobile at the time of arrest. *Id.* at 460. In response to the state's final argument, the Court held that the search of the vehicle could not be justified under the plain view theory since it was also inapplicable to the facts of *Coolidge*. *Id.* at 464-65.

28. The Supreme Court found that there existed, "no alerted criminal bent on flight, no fleeting opportunity on an open highway after a chase . . . no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the vehicle." 403 U.S. at 462. One author noted that *Coolidge* should not be interpreted to require actual mobility in all circumstances. The requirement of actual mobility in *Coolidge* was intended to apply to a limited set of facts. *Misstating the Exigency Rule*, *supra* note 17, at 996. *See* note 21 *supra* and accompanying text. In an attempt to restrict the definition of mobility the Court stated that "the word 'automobile' is not a talisman in whose presence the Fourth

less search of containers found inside vehicles prior to *Chadwick* and *Sanders* utilized the automobile exception as a justification for searches of both stationery and mobile vehicles.[29]

B. The Search Incident to Arrest Exception

The search incident to arrest exception has been described as the oldest exception,[30] perhaps as old as the concept of arrest itself.[31] The search incident exception is based on the need to protect the officer and prevent the arrestee from escaping[32] or destroying evidence.[33] Attempts by courts to determine the scope of a permissible incident search focus on three variables to be considered in judging the reasonableness of a search incident to arrest: (1) proximity in time, (2) geographical scope and (3) intensity.[34]

While the rule that an incident search must be conducted reasonably close to the time of the arrest has remained relatively undisturbed,[35] the Supreme Court has narrowed the geographical scope of the search incident exception.[36] In *Chimel v. California*,[37]

Amendment fades away and disappears." 403 U.S. at 461.

29. *See, e.g.*, United States v. Halliday, 487 F.2d 1215 (5th Cir. 1973), *rehearing denied*, 488 F.2d 552 (1974) (search of cartons taken from mobile vehicle); United States v. Evans, 481 F.2d 990 (9th Cir. 1973) (search of footlocker taken from stationery automobile). Interestingly, it has been noted in *Coolidge* that if *Carroll* is interpreted to permit the warrantless search of an unoccupied vehicle, then it would also permit the warrantless search of a box or suitcase, 403 U.S. at 461.

30. *The Automobile Exception*, *supra* note 15, at 988.

31. Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1051 (1974) [hereinafter cited as *The Plain View Doctrine*].

32. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969); United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978); United States v. Flickinger, 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978); United States v. Kaye, 492 F.2d 744, 746 (6th Cir. 1974). *See also The Plain View Doctrine*, *supra* note 31, at 1053 (citing Closson v. Morrison, 47 N.H. 482, 484 (1867)).

33. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969); United States v. Edwards, 602 F.2d 458, 468 (1st Cir. 1979); United States v. Gardner, 553 F.2d 946, 948 (5th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); United States v. Mehciz, 437 F.2d 145, 147 (9th Cir. 1971). *See also The Plain View Doctrine*, *supra* note 31, at 1053 (citing Reifsnyder v. Lee, 44 Iowa 101, 103 (1876)).

34. Comment, *Broadening the Scope of a Search Incident to Custodial Arrest: The Burger Court's Retreat from Chimel*, 24 EMORY L.J. 151, 152 (1975) [hereinafter cited as *Retreat from Chimel*].

35. *See* Vale v. Louisiana, 399 U.S. 30, 33 (1970); Shipley v. California, 395 U.S. 818, 819 (1969); Stoner v. California, 376 U.S. 483, 486 (1964).

36. 395 U.S. 752 (1969). Prior to *Chimel*, the Supreme Court had wavered on the ques-

defendant was arrested for the burglary of a coin shop.[38] Police officers arrested the defendant at his home and conducted an extensive search of the entire house.[39] The Supreme Court, reversing the Ninth Circuit, suppressed the evidence seized, holding that the search violated Chimel's fourth amendment rights. Finding the extent of the search unreasonable, the Court restricted the geographical area of an incident search to the arrestee and the area within his immediate control.[40]

The permissible intensity of an incident search of a container has been subject to varying interpretations. A number of courts, relying on the search incident exception prior to *Chadwick* and *Sanders*, validated warrantless searches of containers although the possibility of physical harm or destruction of evidence was remote.[41] In *United States v. Kaye*,[42] the warrantless search of the

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tion of the proper geographical scope of an incident search. In Marron v. United States, 275 U.S. 192 (1927), the Supreme Court first confronted the issue of the permissible scope of an incident search. Comment, *Search Incident to Arrest and The Automobile*, 43 MISS. L.J. 196, 197 (1972). In *Marron*, agents possessing a warrant to seize contraband liquor and liquor manufacturing equipment discovered an incriminating ledger inside a closet on the defendant's premises. 275 U.S. at 194. The Supreme Court upheld the seizure as incident to the arrest of a manager of the establishment. *Id.* at 199. Subsequent cases in accord with *Marron* include Harris v. United States, 331 U.S. 145 (1947) (seizure of papers obtained from defendant's desk after a five-hour search of his apartment) and United States v. Rabinowitz, 339 U.S. 56 (1950) (evidence taken from defendant's safe, desk and file cabinets after search lasting longer than one hour). *Harris* and *Rabinowitz* were overruled by the Supreme Court in *Chimel*. 395 U.S. at 766-68.

The Supreme Court advocated a more restrictive scope of an incident search in Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), where papers seized from the defendant's desk after an extensive search of his office were declared inadmissible. Similarly, in Trupiano v. United States, 334 U.S. 699 (1948), the Supreme Court invalidated the seizure of a distillery as incident to the arrest of the distillery operator. *Trupiano* and *Go-Bart* were overruled in *Rabinowitz*. *See The Automobile Exception*, *supra* note 15, at 1061-62.

37. 395 U.S. 752 (1969).

38. *Id.* at 753.

39. *Id.* at 753-54.

40. *Id.* at 766.

41. *Retreat from Chimel*, *supra* note 34, at 167. *See* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (search of a suitcase after it was taken from defendant's possession upheld); United States v. Ciotti, 469 F.2d 1204 (3rd Cir. 1972), *vacated on other grounds*, 414 U.S. 1151 (1974) (search of a briefcase taken from defendant after he was handcuffed sustained); United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972) (police search of a box found in closet six feet from defendant upheld).

It has been observed that prior decisions justified a subsequent search of a receptacle on the premise that a container carried by the arrestee was considered within his immediate control. W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5 at

arrestee's suitcase was upheld although the search took place after the defendant had been placed in custody. Similarly, in *United States v. Eatherton*,[43] the defendant was frisked, handcuffed and placed in a police car before the briefcase that he had been carrying was searched.[44]

C. The "Privacy Exception"

Where the rationale supporting an exception to the requirement of a search warrant is found inapplicable, the exception should not sustain the warrantless search. Analysis will then frequently focus on the privacy interest associated with the searched property to determine whether the search may be upheld.[45] Difficulty in determining privacy interest associated with a particular object stems from the failure of *Sanders* and *Chadwick* to specifically define the objects accorded a legitimate expectation of privacy. Moreover, decisions focusing on privacy are concerned primarily with the problem of standing,[46] but nevertheless provide general standards for use in privacy analysis.

In *Katz v. United States*,[47] the Supreme Court rejected the traditional approach to privacy which evolved from the theory of "private places," and adopted an analysis which focuses fourth amendment protection on people instead of places.[48] Discussing what would constitute a recognizable privacy interest, Justice Harlan concurring in *Katz* outlined a two-pronged test: first the defendant's actual reliance on privacy in a certain place or object, and second, a justifiable privacy expectation according to societal

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350 (1978).

42. 492 F.2d 744 (6th Cir. 1974).

43. 519 F.2d 603 (1st Cir. 1975).

44. *Id.* at 609.

45. *See, e.g.*, United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing*, 615 F.2d 10 (2d Cir. 1980); United States v. Rivera, 486 F. Supp. 1025 (N.D. Tex. 1980); United States v. Morquecho, 474 F. Supp. 1134 (S.D. Tex. 1979).

46. United States v. Ross, No. 79-1624, slip op. at 4 (D.C. Cir. April 17, 1980) (Bazelon, J., dissenting).

47. 389 U.S. 347 (1967). In *Katz*, the Supreme Court held that a wiretap placed on a public telephone booth enabling federal agents to listen to the defendant's conversations constituted an unreasonable search. The Court concluded that a search is more than mere physical penetration into an area. *Id.* at 353.

48. 389 U.S. at 351.

standards.[49]

Whether a privacy interest is protected by the fourth amendment will also depend on the circumstances of the search.[50] Factors to be considered include the precautions taken to preserve privacy,[51] the manner in which the arrestee has used the searched item,[52] and the applicable property rights.[53]

III. *United States v. Chadwick* and *Arkansas v. Sanders*

In *United States v. Chadwick*,[54] federal narcotics agents having probable cause to believe that the defendants were involved in the transportation of illegal drugs, arrested the defendants as they attempted to lift a footlocker suspected of concealing contraband into their car.[55] The defendants were taken to the Federal Building in Boston, where the footlocker was unlocked and searched without a warrant one and one-half hours subsequent to the arrest.[56] A quantity of marijuana was discovered inside.[57]

The government advanced three arguments in support of the search of the defendants' locked footlocker. First, the government

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49. 389 U.S. at 361 (Harlan, J., concurring).

50. United States v. Ross, No. 79-1624, slip op. at 6 (D.C. Cir. April 17, 1980). Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring).

51. It has been observed in *Rakas* that "[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination." *Id.* (quoting United States v. Chadwick, 433 U.S. at 11).

52. 439 U.S. at 152-53 (Powell, J., concurring). Justice Powell stated that in Jones v. United States, 362 U.S. 257 (1960), the Supreme Court concluded that the defendant retained a privacy interest in an apartment in which he slept and kept his clothing. *Id.*

53. The Supreme Court has stated that one who owns or possesses property retains a legitimate expectation of privacy in that property. Rakas v. Illinois, 439 U.S. at 143 n.12 (1978). The Court in *Rakas* defined a legitimate expectation of privacy as more than a subjective desire to keep an area or the contents of an object private. *Id.* The Court, illustrating a privacy interest which would not be accorded fourth amendment protection, stated that "a burglar plying his trade in a summer cabin during the off season" could not challenge the warrantless search of the cabin. *Id.* The burglar's expectation of privacy is not "one that society is prepared to recognize as 'reasonable.'" *Id. See also* United States v. Salvucci, 48 U.S.L.W. 4881 (June 24, 1980) (in all instances one must show a legitimate expectation of privacy in order to have fourth amendment standing); Rawlings v. Kentucky, 48 U.S.L.W. 4885 (June 24, 1980) (requirement that defendant establish that his legitimate or reasonable expectation of privacy was violated by the warrantless search).

54. 433 U.S. 1 (1977).

55. *Id.* at 3-4. The arrest was effected before the engine of the car was started and while the trunk of the vehicle remained open. *Id.*

56. *Id.* at 4.

57. *Id.* at 5.

asserted that the fourth amendment protects only interests related to the home.[58] The Supreme Court rejected this argument, pointing out that the fourth amendment "protects people, not places."[59]

Second, the government argued that although the search in *Chadwick* did not fall within the ambit of the automobile exception, the rationale supporting such an exception could be applied to the search of luggage found inside a vehicle.[60] The government reasoned that a container inside an automobile adopts the mobile characteristics of the vehicle and consequently should enjoy the diminished expectation of privacy associated with the automobile. The Supreme Court disagreed, explaining that the automobile exception is based on the function of the automobile as a source of mobility.[61] The Court observed that once a mobile container is reduced to the control of law enforcement officers the mobility of the container disappears.[62]

The Supreme Court stated that the automobile exception is also based on a diminished expectation of privacy inherent in the nature of the automobile.[63] The Court observed that a vehicle is accorded a diminished expectation of privacy because it periodically undergoes inspection, and normally exposes its passengers and contents in plain view on public roads.[64] Comparing luggage to automobiles, the Court pointed out that vehicles seldom serve as a repository for personal items.[65] Luggage, in contrast, is entitled to a legitimate expectation of privacy because it is intended to hold personal items, and its contents are neither exposed to public view nor subject to regular inspections.[66] The restrictions the Court placed on its holding concerning the privacy interest associated with luggage indicated, however, that different types of containers are entitled to varying degrees of fourth amendment protections.

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58. *Id.* at 6.

59. *Id.* at 7.

60. *Id.* at 11-12. The government unsuccessfully attempted to justify the search of the defendants' footlocker under the automobile exception in the district court. The court pointed out that "there was no nexus between the search and the automobile, merely a coincidence." 393 F. Supp. 763, 772 (D. Mass. 1975).

61. 433 U.S. at 12.

62. *Id.* at 13.

63. *Id.* at 12.

64. *Id.* at 12-13.

65. *Id.* at 12 (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

66. *Id.* at 13.

Finally, the government claimed that a variation of the search incident to arrest theory was applicable to the warrantless search of the defendant's footlocker.[67] It was urged that probable cause to believe that property in the possession of an individual is associated with a crime suffices to permit the warrantless search of that property when the individual is arrested in public.[68] The Supreme Court rejected this argument. Recognizing the lapse of time between arrest and search, the Court stated that property seized could not be justified as incident to an arrest if the search was "remote in time or place from the arrest. . . ."[69]

In addition to refuting the government's third argument, the Court formulated additional restrictions concerning the permissible intensity of an incident search.[70] The Supreme Court stated that once personal property not immediately associated with the person is reduced to the exclusive control of law enforcement officers, the rationale supporting the search incident exception disappears and a warrant is then required to search the seized property.[71]

In *Arkansas v. Sanders*[72] the Supreme Court attempted to extend the privacy analysis of *Chadwick* by clarifying the requirements for a warrantless search of a container. In *Sanders*, police officers, acting on information supplied by an informant, stopped the defendants who were riding in a taxi cab and removed a suitcase from the trunk of the car.[73] The suitcase was immediately opened, revealing a large quantity of marijuana packaged in plastic bags.[74] Sanders was convicted of possession of marijuana in viola-

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67. *Id.* at 14.

68. *Id.*

69. *Id.* at 15. *See* notes 34 and 35 *supra* and accompanying text.

70. It has been these additional restrictions which have troubled lower courts. *See, e.g.*, United States v. Garcia, 605 F.2d 349 (7th Cir. 1979); United States v. Hernandez-Rojas, 470 F. Supp. 1212 (E.D.N.Y.), *aff'd*, 615 F.2d 1351 (1979).

71. The Court stated that

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

Id. at 15.

72. 442 U.S. 753 (1979).

73. *Id.* at 755.

74. *Id.*

tion of an Arkansas statute.[75] On appeal, Sanders challenged the validity of the warrantless search of the suitcase.

In an attempt to justify the search, the state relied squarely on the automobile exception.[76] Distinguishing *Chadwick* from the facts of *Sanders*, the state pointed out that in *Chadwick* the automobile exception was inapplicable because the vehicle was only remotely associated with the defendants' footlocker.[77] It was argued that in contrast, the automobile exception applied in *Sanders* because both vehicle and suitcase were mobile immediately prior to Sanders' arrest.[78] The state asserted, moreover, that all of the requisite elements of the automobile exception could be identified in *Sanders*. The state contended that the officers had probable cause to believe that the taxi was carrying contraband and that the mobility of the automobile supplied the exigency required by the automobile exception.[79]

In rejecting the state's argument, the Supreme Court pointed out that the state had misunderstood the holding of *Chadwick* by construing a small variation in facts as a controlling difference.[80] The Court observed that the state had incorrectly inferred that the application of the automobile exception to the warrantless search of Sanders' vehicle would extend to the search of the defendant's suitcase.[81] The *Sanders* Court stated that "[a] lawful search of luggage generally may be performed only pursuant to a warrant."[82] In addressing the state's argument that the suitcase was mobile, the Supreme Court observed that

> a closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But . . . the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control. . . . Once police have seized a suitcase . . . the extent of its mobility is in no way affected by the place from which it was taken.[83]

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75. *Id.* at 755-56.
76. *Id.* at 761.
77. *Id.* at 762-63.
78. Brief for Petitioner at 13, Arkansas v. Sanders, 442 U.S. 753 (1979).
79. *Id.* at 19-20.
80. 442 U.S. at 757.
81. *Id.* at 762-63.
82. *Id.* at 762.
83. *Id.* at 763.

The Court advised that the state would have to demonstrate a compelling need to justify a warrantless search of a suitcase if the search did not fall under an established exception to the warrant requirement.[84]

While *Sanders* eliminated the automobile exception as a blanket justification for the search of a container, language of the Supreme Court has been construed to provide an alternative justification for the warrantless search of containers. The Supreme Court in *Sanders* indicated that a warrantless search of a container would be permitted because of the diminished expectation of privacy associated with a container. The Court stated that

> [n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not.[85]

IV. The Automobile Exception and Privacy

In limiting the scope of a search pursuant to the automobile exception to integral parts of the automobile,[86] the Supreme Court in

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84. *Id.*

85. *Id.* at 764-65 n.13. The Court added that "[o]ur decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." *Id.* Courts broadly interpreting the language of *Sanders* concerning container privacy have engaged in extended analyses of the relative privacy interest of different containers and arrived at decisions which conflict with those of courts advocating a narrower interpretation. *Compare* Pirner v. State, 45 Md. App. 50, 411 A.2d 135 (1980) (warrantless search of duffel bag found invalid), *with* State v. Schrier, 283 N.W.2d 338 (Iowa 1979) (search of unlatched knapsack sustained); United States v. Rivera, 486 F. Supp. 1025 (N.D. Tex. 1980) (search of narcotics wrapped in plastic garbage bags held unconstitutional) *with* Evans v. State, 368 So. 2d 58 (Fla. Dist. Ct. App. 1979) (no expectation of privacy in contents of plastic garbage bags).

86. Integral parts of an automobile include the glove compartment, South Dakota v. Opperman, 428 U.S. 364, 366 (1976); the trunk, Cady v. Dombrowski, 413 U.S. 433, 437 (1973); a concealed compartment underneath the dashboard, Chambers v. Maroney, 399 U.S. 42, 44 (1970); and the area behind seat upholstery, Carroll v. United States, 267 U.S. 132, 136 (1925). *But see* Commonwealth v. Long, 48 U.S.L.W. 1183 (May 27, 1980) (locked trunk retains greater expectation of privacy than other integral parts of the automobile).

Sanders discussed the relative privacy interests associated with vehicles and luggage. However, decisions of lower courts demonstrate a lack of uniformity in determining the privacy interests surrounding other objects.[87]

A. Cargo

Courts sustaining the search of plastic or burlap bales or similar items avoid a privacy analysis entirely by classifying these containers as cargo.[88] Defined as cargo, a container is automatically stripped of protection against a warrantless search.[89]

In *United States v. Gooch*,[90] defendant's airplane was stopped and searched under the automobile exception[91] by officers who had probable cause to believe that the defendant was involved in the transportation of contraband.[92] Marijuana was discovered in plastic bales on the plane.[93] The Tenth Circuit upheld the search, concluding that the bales represented cargo and consequently retained no expectation of privacy that would protect them from a warrantless search.[94]

In *United States v. Zepp*,[95] a cloth-covered object defined as cargo was denied fourth amendment protection.[96] In *Zepp*, a flatbed truck was stopped because the defendant was thought to be transporting a stolen battery hidden beneath a black cloth on the back of the truck.[97] Officers uncovered the stolen battery and ar-

87. *See* note 85 *supra* and accompanying text.

88. *See, e.g.*, United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, Nos. 77-2923 and 77-3220 (9th Cir. Feb. 10, 1978) (mem.), *cert. denied*, 439 U.S. 925 (1978); United States v. Zepp, 466 F. Supp. 1062 (E.D. Pa. 1978); Flynn v. State, 374 So. 2d 1041 (Fla. Dist. Ct. App. 1979); Evans v. State, 368 So. 2d 58 (Fla. Dist. Ct. App. 1979).

89. "Cargo" refers to a mass shipment of goods. *See* United States v. Gooch, 603 F.2d at 124. The goods are normally intended for resale and not for personal use. *See* Evans v. State, 368 So. 2d at 59.

90. 603 F.2d 122 (10th Cir. 1979).

91. It has been determined that the automobile exception applies to airplanes as well as automobiles. *See* United States v. Sigal, 500 F.2d 1118 (10th Cir.), *cert. denied*, 419 U.S. 954 (1974).

92. 603 F.2d at 123.

93. *Id.*

94. *Id.* at 126.

95. 466 F. Supp. 1062 (E.D. Pa. 1978).

96. *Id.* at 1066.

97. *Id.* at 1063.

rested the defendant.[98] The search of the defendant's truck was sustained on the grounds that the vehicle was properly stopped under the automobile exception and the cloth-draped object was appropriately categorized as cargo.[99]

B. Cartons and Boxes

Sanders has been interpreted in some instances to prohibit warrantless searches of containers under the automobile exception under most circumstances except those specifically described by the Supreme Court as permitting a warrantless search.[100] The Second Circuit in *United States v. Dien*[101] applied a restrictive analysis to a search of a cardboard carton, avoiding classification of the container as cargo.[102] In *Dien,* a police officer stopped the defendant in his van and opened one of the sealed cardboard cartons located inside the vehicle, discovering marijuana.[103] The Second Circuit invalidated the warrantless search, holding that the search could not be justified by the automobile exception.[104] The court, applying a privacy analysis to the search of the carton, concluded that

> [b]y placing the marihuana inside a plain cardboard box, sealing it with tape and placing it inside a van the windows of which had been painted over and in which plywood had been placed behind the drivers' seat, petitioners manifested an expectation that the contents would remain free from public examination.[105]

Although the container searched was a cardboard carton and not a formal piece of luggage, the Second Circuit held that the defendants retained a legitimate expectation that the contents of the box would remain unexposed to public view. It is unclear whether the basis of the court's decision in *Dien* was the additional care

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98. *Id.* at 1064.

99. *Id.* at 1067. The court attempted to conform to the guidelines articulated in *Sanders* by contending that the plain view doctrine was applicable to the search. The court stated that the nature of the cargo was apparent to anyone familiar with that particular type of battery. *Id.* at 1066.

100. *See, e.g.,* United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing,* 615 F.2d 10 (2d Cir. 1980); United States v. Mannino, 487 F. Supp. 508 (S.D.N.Y. 1980).

101. 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing,* 615 F.2d 10 (2d Cir. 1980).

102. *Id.* at 1046.

103. *Id.* at 1041-42.

104. *Id.* at 1045.

105. *Id.*

taken to ensure privacy or whether a closed cardboard box without more would suffice to ensure that the contents of a container would be protected.[106] According to the Supreme Court in *Sanders*, where the defendant's failure to lock his suitcase did not alter its fundamental character as a repository for personal effects,[107] it can be inferred that the sealing tape placed on the cardboard box did not alter the general character of the carton.

Other courts have broadly interpreted *Chadwick* and *Sanders* in formulating an approach to the analysis of privacy interest concerning containers searched without a warrant.[108] In *United States v. Neumann*,[109] police officers, acting on a reasonable belief that the defendants were engaged in illegal drug transactions, stopped the defendants in their car.[110] Believing that a cardboard box inside the vehicle contained contraband, the officers lifted the lid and discovered a quantity of pills.[111] The Eighth Circuit upheld the search, stating that Neumann could not claim a legitimate expectation of privacy in the cardboard box.[112] The court concluded that "there is simply an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile."[113]

In arriving at its conclusion, the Eighth Circuit analyzed the warrantless search in terms of the intensity of the intrusion. Observing that a simple action was required to open the box, the court stated that "[t]he arresting officers merely lifted the lid of

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106. The court in United States v. Mannino, 487 F. Supp. 508 (S.D.N.Y. 1980), based its conclusions concerning the warrantless search of several different types of containers on the manner in which the receptacles were sealed. *Mannino* held, in accordance with *Dien*, that the search of the defendants' sealed cartons was a violation of the fourth amendment. *Id.* at 514. However, the court upheld the search of a carton in which rags or newspapers were placed over the box closed by interlocking flaps. *Id.* at 513. The court recognized that "the distinction between boxes whose flaps are interlocked and those sealed with tape is indeed narrow." *Id.*

107. 442 U.S. at 762-63 n.9.

108. *See, e.g.*, United States v. McGrath, 613 F.2d 361 (2d Cir. 1979); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978); United States v. Gaultney, 581 F.2d 1137 (5th Cir.), *rehearing denied*, 586 F.2d 842 (1978); United States v. Mannino, 487 F. Supp. 508 (S.D.N.Y. 1980); People v. Maldonado, N.Y.L.J. Sept. 26, 1980 at 1, col. 6.

109. 585 F.2d 355 (8th Cir. 1978).

110. *Id.* at 356-57.

111. *Id.* at 357.

112. *Id.* at 360.

113. *Id.*

the box and discovered a large quantity of pills."[114]

Similarly, the Fifth Circuit in *United States v. Gaultney*[115] validated the search of a small cardboard box located in the defendant's truck. Drug enforcement agents, having probable cause to believe that the defendant's vehicle contained illegal contraband, arrested the defendant and searched the box, discovering a quantity of cocaine.[116]

Addressing *Chadwick*, the *Gaultney* court stated that while Chadwick's double-locked footlocker retained a high expectation of privacy, the defendant's box in *Gaultney* enjoyed a significantly diminished privacy expectation.[117] In examining the privacy interest associated with the defendant's box, the Fifth Circuit was influenced by the observation that the defendant's "undoubted purpose was to display the box and its contents to the agents."[118] The court added that the defendant had disclosed to an agent information concerning the contents of the box.[119]

C. Paper Bags and Cups

Warrantless searches of paper bags and cups and other similar containers have been sanctioned by courts which have concluded that these items by their nature possess no protectible expectation of privacy.[120] In *Clark v. State*,[121] defendant's rented car was

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114. *Id.* at 360-61. *Cf.* note 106 *supra* and accompanying text. The court also applied the plain view doctrine to the search of the box, indicating that the box was exposed to the officers' view. *Id.* at 360. Although the box was in plain view, its contents were not, and the plain view doctrine does not authorize the search of the contents of an object which are not exposed to public view. *See* United States v. Jackson, 576 F.2d 749, 752 (8th Cir.), *cert. denied*, 439 U.S. 828 (1978).

115. 581 F.2d 1137 (5th Cir. 1978).

116. *Id.* at 1139.

117. *Id.* at 1144-45.

118. *Id.* at 1145.

119. *Id.* The court's analysis appears strained, because the defendant did not intend to publicize information concerning the contents of the box. Information concerning the narcotics was revealed to an agent because the defendant had been led to believe that the agent was a prospective buyer. *Id.* at 1139.

120. *See, e.g.*, United States v. Ross, No. 79-1624 (D.C. Cir. Apr. 17, 1980); Clark v. State, 574 P.2d 1261 (Alaska 1978); People v. Diaz, 101 Cal. App. 3d 440, 161 Cal. Rptr. 645 (1980); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979). *See also* United States v. Morquecho, 474 F. Supp. 1134 (S.D. Tex. 1979), where the court confronted the search of a plastic garbage bag. The court in *Morquecho* upheld the search, stating that "the plastic garbage bag is not property similar in kind to luggage as contemplated by the decision in *Chadwick*." *Id.* at 1140. In United States v. Mannino, 487 F. Supp. 508 (S.D.N.Y. 1980), the

searched under the automobile exception by police officers who believed that the defendant was involved in illegal drug transactions.[122] A paper bag found inside the vehicle was opened, revealing a quantity of marijuana and L.S.D. tablets.[123] As a result of this evidence, defendant was convicted of possession of an illegal drug.[124] On appeal, the defendant argued that the warrantless search of the paper bag constituted a violation of the fourth amendment. The Alaska Supreme Court affirmed the conviction, finding that the defendant had no protectible expectation of privacy in a paper bag.[125]

Interpreting *Chadwick*, the court in *Clark* concluded that some containers found inside automobiles may be searched under the automobile exception, depending on the relative privacy interest associated with the object to be searched.[126] Comparing the holding of *Chadwick* to its own decision, the Alaska Supreme Court concluded, "the expectation of privacy inherent in locked luggage is incomparably higher than in the container involved here, a paper bag."[127]

The Florida District Court of Appeal in *Webb v. State*[128] also observed that an individual does not have a legitimate expectation of privacy in a paper bag. In *Webb*, defendant's automobile was stopped by law enforcement officers acting on the belief that the defendant's vehicle contained illegal narcotics.[129] The officers seized and opened a brown paper bag found inside the vehicle.[130]

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search of a paper bag found inside a white plastic bag was upheld. The court observed that the plastic bag was not sealed and therefore concluded that the defendants had no reasonable expectation of privacy in either bag. *Id.* at 514. *But see* United States v. Rivera, 486 F. Supp. 1025 (N.D. Tex. 1980), where the court was faced with the search of parcels shaped like marijuana bricks and wrapped in black plastic garbage bags. The *Rivera* court observed that although the bags were not arguably as strong as cartons or duffel bags, *Id.* at 1032, the precaution of choosing opaque bags and sealing the parcels demonstrated a sufficient expectation of privacy to require a warrant for a search of the bags. *Id.*

121. 574 P.2d 1261 (Alaska 1978).
122. *Id.* at 1262.
123. *Id.*
124. *Id.* at 1265.
125. *Id.*
126. *Id.*
127. *Id.*
128. 373 So. 2d 400 (Fla. Dist. Ct. App. 1979).
129. *Id.* at 401.
130. *Id.*

In upholding the search, the *Webb* court stated that the reasoning employed by the Supreme Court in *Chadwick* and *Sanders* supported the search.[131] The *Webb* court distinguished the search of the paper bag from the searches conducted in *Chadwick* and *Sanders*, stating that the containers involved were associated with different privacy interests.[132] The court in *Webb* held that there are "arguable differences between the reasonable expectation of privacy one might attach to a paper bag as opposed to a briefcase or luggage of some type."[133] The Florida appellate court justified the difference in privacy interest by observing that luggage is used as a repository for personal items, while paper bags are not commonly associated with a similar use.[134]

The United States Court of Appeals for the District of Columbia Circuit in *United States v. Ross*[135] was similarly faced with the search of a "lunch-type" brown paper bag. In *Ross*, the search occurred after the defendant was stopped in his automobile by police officers who suspected him of involvement in the sale of illegal drugs.[136] Heroin was found inside the paper bag.[137]

In evaluating the constitutionality of the search of the paper bag, the *Ross* court attempted to determine the fourth amendment protections accorded various kinds of containers. Examining warrantless searches of containers held invalid by other courts, the *Ross* court observed a similarity among the objects searched. The containers held to retain an expectation of privacy sufficient to trigger fourth amendment protection include suitcases,[138] brief-

131. *Id.* at 403. In *Webb*, the appellate court upheld the defendants' conviction without issuing a specific ruling as to the validity of the search of the paper bag. The Florida District Court of Appeal held on procedural grounds that the issue of the search of the paper bag was not properly reserved for appellate review. A ruling on this issue would not have been dispositive, because bales of marijuana were also found in the trunk of the defendant's car, which would have been sufficient evidence to sustain the defendant's conviction. *Id.* at 402-03.

132. *Id.* at 403.

133. *Id.*

134. *Id.*

135. No. 79-1624 (D.C. Cir. Apr. 17, 1980).

136. *Id.* at 2-3.

137. *Id.* at 3.

138. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Montano, 613 F.2d 147 (6th Cir. 1980); United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); State v. Crutchfield, 123 Ariz. 570, 601 P.2d 333 (Ariz. Ct. App. 1979); Haughland v. State, 374 So. 2d 1026 (Fla. Dist. Ct. App. 1979); Buday v. State, 150 Ga. App. 686, 258 S.E.2d 318 (1979); State v.

cases,[139] portfolios,[140] duffel bags,[141] gym bags,[142] backpacks[143] and handbags.[144] According to the *Ross* court, the types of containers not protected by the fourth amendment and thereby subject to a warrantless search include boxes,[145] toolboxes,[146] taped razor cases,[147] plastic and burlap bags,[148] and unlatched knapsacks.[149]

The *Ross* court identified three elements which frequently lead courts to conclude that an object does not enjoy a legitimate expectation of privacy. First, the court pointed out that paper bags offer only minimal protection against intrusion.[150] Second, the contents of a paper bag are much more likely to become subject to public display.[151] Finally, the court observed that paper bags are not invariably associated with an expectation of privacy by society.[152] It was pointed out that a reasonable man would not identify

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Gauldin, 44 N.C. App. 19, 259 S.E.2d 779 (1979).

139. *See* United States v. Presler, 610 F.2d 1206 (4th Cir. 1979); Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979); In re B.K.C., No. 13779 (D.D.C. Jan. 9, 1980); Araj v. State, 592 S.W.2d 603 (Tex. Crim. App. 1979).

140. *See* United States v. Miller, 608 F.2d 1089 (5th Cir. 1979).

141. *See* United States v. Johnson, 588 F.2d 147 (5th Cir. 1979); Pirner v. State, 45 Md. App. 50, 411 A.2d 135 (1980).

142. *See* State v. Marcum, 24 Wash. App. 441, 601 P.2d 975 (1979); People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (1979) (search of tote bag held invalid).

143. *See* United States v. Meier, 602 F.2d 253 (10th Cir. 1979).

144. *See* United States v. Cornejo, 598 F.2d 557 (9th Cir. 1979) (search of defendant's purse upheld, although the court indicated that *Chadwick* would not apply retroactively, stating that "the search of the purse without a warrant may have been illegal under *United States v. Chadwick* . . . ." *Id.* at 559); Ulesky v. State, 379 So. 2d 121 (Fla. Dist. Ct. App. 1979); People v. Pressman, N.Y.L.J. June 11, 1980 at 10, col. 1.

145. *See* United States v. McGrath, 613 F.2d 361 (2d Cir. 1979); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978); United States v. Gaultney, 581 F.2d 1137 (5th Cir.), *rehearing denied* 586 F.2d 842 (1978); United States v. Mannino, 487 F. Supp. 508 (S.D.N.Y. 1980).

146. *See* Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977). *But see* People v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979).

147. *See* Cooper v. Commonwealth, 577 S.W.2d 34 (Ky. App. 1979).

148. *See* United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, Nos. 77-2923 and 77-3220 (9th Cir. Feb. 10, 1978) (mem.), *cert. denied*, 439 U.S. 925 (1978); United States v. Morquecho, 474 F. Supp. 1134 (S.D. Tex. 1979); Flynn v. State, 374 So. 2d 1041 (Fla. Dist. Ct. App. 1979).

149. *See* State v. Schrier, 283 N.W.2d 338 (Iowa 1979). *But see* United States v. Meier, 602 F.2d 253 (10th Cir. 1979) (search of closed but unlocked backpack held invalid).

150. No. 79-1624, slip op. at 14.

151. *Id.*

152. *Id.*

a paper bag as a repository for personal items.[153] In contrast, the *Ross* court noted that luggage functions as a "portable closet and chest of drawers."[154]

Judge Bazelon, dissenting in *Ross*, criticized the majority's reliance on privacy as a new exception to the warrant requirement.[155] He argued that the use of an expectation of privacy test[156] defeats the efforts of the Supreme Court to limit the scope of exceptions to the warrant requirement to situations of absolute necessity.[157] The practical effect of the expectation of privacy test, according to the dissent, is the utilization of the automobile exception to justify the seizure of a container, and the use of the seizure to reduce the expectation of privacy surrounding the container.[158]

The dissenting opinion further criticized the majority for turning *Chadwick* and *Sanders* into a mere luggage rule.[159] Under the majority's rule, luggage cannot be searched when seized under the automobile exception, but other containers may be subject to a warrantless search depending on their respective privacy interests.[160] Analysis would then necessarily focus on whether the object searched could be classified as luggage.

The majority's luggage rule raises complications in the area of equal protection. Judge Bazelon cogently noted that distinguishing between paper bags and luggage creates a class bias, since "in some of our subcultures paper bags are often used to carry intimate personal belongings."[161] Judge Bazelon added that "surely the appli-

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153. *Id.*

154. *Id.* at 15.

155. *Id.* at 3 (Bazelon, J., dissenting).

156. The dissent in *Ross* explained that the expectation of privacy test was developed by the Supreme Court out of necessity, in order to determine standing for those defendants who did not own the property searched. The cases cited by the majority to support the theory that the defendant must demonstrate a privacy interest in the object searched are all concerned with standing and not meant to curtail the fourth amendment rights of property owners. The expectation of privacy test is ancillary to the traditional test of ownership. No. 79-1624, slip op. at 4-5 (Bazelon, J., dissenting).

157. *Id.* at 1-3 (Bazelon, J., dissenting). *See* note 2 *supra* and accompanying text.

158. *Id.* at 11-12 (Bazelon, J., dissenting). Reliance on an expectation of privacy analysis results in the validity of a container search turning on the fortuitous circumstances of the container's previous location. In *Sanders*, the Supreme Court stated that the search of a container must not depend on the location from which it was taken. 442 U.S. at 763-64.

159. No. 79-1624 at 7 (Bazelon, J., dissenting).

160. *Id.* at 7-8 (Bazelon, J., dissenting).

161. *Id.* at 14 (Bazelon, J., dissenting). The question was raised in the reply brief for the

cability of the warrant requirement cannot turn on whether a person carries his belongings in a frayed cloth suitcase or new American Tourister."[162]

Judge Bazelon also observed that the majority required the defendant to demonstrate the entitlement of his container to fourth amendment protection.[163] The dissent pointed out that on the contrary, the burden must rest on those seeking an exemption from the warrant requirement to establish the need for the warrantless search,[164] because "personal property is *presumptively* protected against warrantless searches."[165]

In *People v. Diaz*,[166] the California Court of Appeal sustained the search of a paper cup found inside the defendant's vehicle. In *Diaz*, a police officer stopped the defendant in his truck, believing that the vehicle contained contraband narcotics.[167] Inside the truck the officer found a paper cup with an opaque lid and protruding straw.[168] Lifting the cup, the officer concluded that it contained solid rather than liquid contents.[169] The officer removed the lid of the cup, discovering four packets of heroin.[170]

The *Diaz* court in upholding the seizure concluded that the defendant's vehicle was properly stopped under the automobile exception and the search of the paper cup was valid.[171] In response to the defendant's argument that a warrant was required to inspect the contents of the cup which were not in plain view, the court pointed out that protection against a warrantless search in *Chadwick* extended to "personal luggage intended as a repository for

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petitioner in *Sanders*

> [W]hat then constitutes 'luggage?' Would luggage be limited to 'American Tourister?' Would it be extended to cover briefcases? Would it extend to sacks or paper bags in which a person might keep 'personal effects?' If not, could the poor then raise an Equal Protection claim if they did not have the money to afford 'formal luggage?'

Reply Brief for Petitioner at 8-9, Arkansas v. Sanders, 442 U.S. 753 (1979).

162. No. 79-1624, slip op. at 13 (Bazelon, J., dissenting).

163. *Id.* at 3 (Bazelon, J., dissenting).

164. *Id. See* Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Jeffers, 342 U.S. 48, 51 (1951).

165. No. 79-1624 at 5 (Bazelon, J., dissenting).

166. 101 Cal. App. 3d 440, 161 Cal. Rptr. 645 (1980).

167. 101 Cal. App. 3d at 443-44, 161 Cal. Rptr. at 647-48.

168. 101 Cal. App. 3d at 444, 161 Cal. Rptr. at 648.

169. *Id.*

170. *Id.*

171. *Id.* at 446-47, 161 Cal. Rptr. at 649-50.

personal effects. . . ."[172] The court added that implicit in the *Chadwick* decision is the determination that the nature of the object searched must support a rational expectation of privacy.[173] The California court concluded that "a commonplace soft-drink cup—without more—possesses none of the indicia of a repository for personal effects to which a reasonable expectation of privacy attaches."[174]

Comparison of cartons, paper bags and cups to luggage to determine fourth amendment protection reduces analysis to a question of whether a paper bag is endowed with the characteristics of a suitcase.[175] Determining fourth amendment rights in such a manner ignores not only the individual's subjective privacy interests but also misconstrues the analysis mandated by the Supreme Court to determine whether society will recognize as legitimate the individual's privacy expectation in a particular container.

V. Search Incident to Arrest: The Concepts of Control and Association with the Person

A. Control of a Container

Courts faced with an incident search of a container most frequently do not address the question whether there is a legitimate expectation of privacy in the object being searched.[176] Instead, conflicts have arisen from attempts to interpret the meaning of control of a container searched incident to an arrest. Courts strictly adhering to the rule of *Chadwick* and *Sanders* have invalidated the search of containers once they come within the physical possession of a police officer.[177] Other courts have validated the search of receptacles within the possession of an officer, relying on a broad in-

172. *Id.* at 447, 161 Cal. Rptr. at 649. *See* note 152 *supra* and accompanying text.

173. *Id.* at 447, 161 Cal. Rptr. at 649-50.

174. *Id.* at 448, 161 Cal. Rptr. at 650.

175. The Supreme Court in *Sanders* specifically stated that its decision was confined to the search of luggage. 442 U.S. at 765 n.13.

176. The rationale of the search incident to arrest does not require discrimination between objects searched on the basis of privacy expectation. Incident searches of objects on the arrestee's person or within his control are conducted to protect the arresting officer and prevent the destruction of evidence. *See* notes 31 and 32 *supra* and accompanying text.

177. *See* United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978); Ulesky v. State, 379 So. 2d 121 (Fla. Dist. Ct. App. 1979).

terpretation of control.[178]

In *People v. De Santis*,[179] an airlines ticket agent opened the defendant's suitcase and discovered a quantity of marijuana inside.[180] Local police arrested the defendant in the airlines terminal and took him to a police substation, where his suitcase was opened.[181]

The New York Court of Appeals upheld the search as incident to De Santis' arrest.[182] Discussing the applicability of *Chadwick*, the *De Santis* court distinguished the search of De Santis' suitcase on two factual grounds. First, the court pointed out that the search in *De Santis* was not significantly divorced in time or place from the arrest, while in *Chadwick*, the search of the defendants' footlocker took place more than one hour after the arrest.[183]

Second, the *De Santis* court discussed the difference between the containers searched.[184] The court observed that in *Chadwick*, a bulky, double-locked footlocker was the subject of the warrantless search while in *De Santis*, a small, portable suitcase was the focus of the search by police officers. Applying the rationale supporting the search incident exception, the court observed that the double-locked footlocker could be neither rapidly removed from the control of police officers nor quickly opened to obtain weapons in contrast to De Santis' suitcase.[185] The *De Santis* court concluded that

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178. *See* United States v. Garcia, 605 F.2d 349 (7th Cir. 1979); People v. De Santis, 46 N.Y.2d 82, 88, 385 N.E.2d 577, 579-80, 412 N.Y.S.2d 838, 841 (1978), *cert. denied*, 443 U.S. 912 (1979). *See also* United States v. Hernandez-Rojas, 470 F. Supp. 1212 (E.D.N.Y.), *aff'd*, 615 F.2d 1351 (2d Cir. 1979), where the defendant's briefcase was searched incident to his arrest after he had placed it on the floor. The court concluded that the briefcase was still within the defendant's control, stating that the arresting officers "were not required under such circumstances to attempt to separate the luggage from the defendant with any and all risks that might be attendant thereon." *Id.* at 1223.

179. 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), *cert. denied*, 443 U.S. 912 (1979).

180. *Id.* at 86, 385 N.E.2d at 578, 412 N.Y.S.2d at 839-40.

181. *Id.* at 86, 385 N.E.2d at 579, 412 N.Y.S.2d at 840.

182. *Id.* at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 842.

183. *Id.* at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 841. The *De Santis* court attempted to distinguish *Chadwick* on the basis that the search of a footlocker could not be classified as an incident search. The court nonetheless acknowledged the applicability of *Chadwick* by concluding that De Santis' suitcase was not within the exclusive control of police officers when searched. 46 N.Y.2d at 88, 385 N.E.2d at 580, 412 N.Y.S.2d at 842.

184. *Id.* at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 841.

185. *Id.* at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 841-42. *Sanders*, decided subsequent to *De Santis*, indicates that the distinctions drawn by the *De Santis* court are not disposi-

police officers had not gained exclusive control of De Santis' suitcase.[186] Refraining from defining the concept of exclusive control, the *De Santis* court merely stated "the suitcase was opened, not after the police had gained exclusive control of it, not away from the securely incarcerated defendant as in *Chadwick*, but rather directly upon defendant's arrest in a private airport room with no danger to the public and in the presence of defendant. . . ."[187]

Dissenting in *De Santis*, Judge Wachtler pointed out that there was no reason to search the defendant's luggage for dangerous weapons. The officers had been informed by the ticket agent of the contents of the defendant's suitcase. Consequently, the officers had no reason to fear that weapons or explosives would be inside the container.[188]

In *United States v. Garcia*,[189] the Seventh Circuit similarly validated the search of a suitcase conducted incident to the defendant's arrest. The defendant had been arrested in an airlines terminal while in the possession of two suitcases.[190] Informed that she was under arrest, the defendant dropped both suitcases.[191] An officer picked up the luggage and escorted the defendant to a nearby area free of pedestrian traffic.[192] The suitcases were placed within the defendant's reach and subsequently opened by police officers.[193] One of the suitcases contained heroin.[194] Defendant was convicted in the United States District Court for the Northern District of Illinois for possession of heroin with intent to dis-

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tive. As in *De Santis*, the search of Sanders' suitcase was conducted in close proximity to the defendant's arrest. In addition, the containers searched in *Sanders* and *De Santis* were similar. Finally, the defendant in *Sanders* was present at the time of the search, as was the defendant in *De Santis*. The Supreme Court in *Sanders* stated that the suitcase was not within Sanders' immediate control, indicating that the application of the search incident exception would have been inappropriate. 442 U.S. at 763-64 n.11.

186. *Id.* at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 842.

187. *Id.*

188. *Id.*

189. 605 F.2d 349 (7th Cir. 1979).

190. *Id.* at 352. Information supplied by an informant provided the requisite probable cause for the arrest. The informant provided narcotics agents with an account of the defendant's activities involving the transportation of heroin. *Id.* at 351.

191. *Id.* at 352.

192. *Id.*

193. *Id.*

194. *Id.*

tribute.[195] The Seventh Circuit affirmed the constitutionality of the search, following the reasoning utilized in *De Santis*.

Ignoring *Sanders*, the Seventh Circuit distinguished *Chadwick* on two factual grounds, arguing that first, the difference in proximity of the search and second, the difference between the containers searched justified the result.[196] In an attempt to bolster the validity of the search and demonstrate compliance with the search incident rationale,[197] the court stated that the suitcases were "two hand-carried, portable suitcases which were quite capable of being opened quickly by the defendant in order to gain access to a weapon or evidence. . . ."[198]

In upholding the search of the defendant's luggage, the *Garcia* court emphasized a broad interpretation of the concept of exclusive control. The Seventh Circuit concluded that the defendant's suitcases, although in the possession of a police officer, were not within the officer's exclusive control.[199] Discussing exclusive control, the court stated "to construe the term 'exclusive control' as meaning it attaches immediately upon the seizure of an object located on the person or within the immediate vicinity of the arrestee, is a construction incapable of application consistent with fundamental principles of constitutional law."[200]

The *Garcia* court found that once obtained, exclusive control still may not suffice to protect a container from a warrantless incident search. The Seventh Circuit, noting the language used by the Supreme Court in *Chadwick*, observed that even though a container may be within the exclusive control of an officer, this does not preclude the possibility that there may still exist a danger that the arrestee will seize a weapon or destroy evidence.[201] The

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195. *Id.* at 350.

196. *Id.* at 353.

197. *See generally* notes 32 and 33 *supra* and accompanying text.

198. 605 F.2d at 354.

199. *Id.* at 355-56. The government argued that "the luggage was reduced to the exclusive control of the agents after they left the scene of the arrest with the luggage and the defendant." 605 F.2d at 356 n.9.

200. 605 F.2d at 355. The Seventh Circuit, confusing incident searches of items immediately associated with the person with the search in *Garcia*, reasoned that under such a construction the warrantless search of items, such as wallets and purses, would be forbidden. *Id.*

201. *Id.* at 354. Examining closely the language of *Chadwick*, the Seventh Circuit stated once law enforcement officers have reduced luggage or other personal property not

broad construction of the search incident exception advocated by the Seventh Circuit raises the issue of whether a search warrant would ever be required for an incident search.[202]

On the issue of control of a container, the factual distinctions drawn between *Sanders* and *Garcia* do not support the differing results. First, the fact that the suitcase in *Sanders* was taken from the trunk of an automobile, while the bags in *Garcia* had been within the defendant's grasp prior to the search is not relevant to the question of control.[203] Second, the difference of a few feet separating container and arrestee should be insignificant for fourth amendment purposes.

Analysis of proximity introduces the additional problem that police officers would create the exigency necessary for a warrantless search.[204] In *Garcia,* the defendant alleged that the arresting officers created the exigency permitting a warrantless search of her luggage by placing her bags within her reach.[205] In response to this contention, the Seventh Circuit pointed out that the search was

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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.

605 F.2d at 354 (quoting United States v. Chadwick, 433 U.S. at 15). The *Garcia* court's emphasis on the word 'and' indicates that more than exclusive control is required for a search warrant to attach to the search of a container.

202. Courts interpreting *Chadwick* literally may find that police officers acquire exclusive control over an object only after the defendant is safely separated from the container previously in his possession. The *Garcia* court acknowledged the government's argument that exclusive control was obtained after the arresting officers left the terminal building with the defendant and her luggage. 605 F.2d at 356 n.9. However, courts advocating the finding of exclusive control at a point later in time than the arrest and search may in effect be authorizing warrantless searches of containers in nearly all instances. This view argues that exclusive control cannot be obtained during the period incident to the arrest. This approach stands in sharp contradiction to the statement in *Chadwick* that once exclusive control of an object is obtained, the search of that object is no longer incident to an arrest.

203. *See* note 158 *supra* and acccompanying text.

204. In Hardwick v. State, 149 Ga. App. 291, 254 S.E.2d 384 (1979), police officers waited until the defendant drove away in his car before arresting him, although probable cause to arrest existed before defendant entered his car. *Id.* at 293, 254 S.E.2d at 386. After defendant was arrested, a warrantless search of the car was conducted, revealing a quantity of marijuana. *Id.* at 292, 254 S.E.2d at 385. The court, invalidating the search, observed that "the state may not take advantage of exigent circumstances which the state permitted to occur and thereby be excused from the requirement of securing a warrant." *Id.* at 293, 254 S.E.2d at 386. *See also* State v. Kelgard, 40 Or. App. 205, 594 P.2d 1271 (1979).

205. 605 F.2d at 356.

completed within fifteen seconds of the arrest and that the luggage was only momentarily separated from the defendant.[206] Despite the temporary separation of the defendant from her luggage, the court concluded that the luggage remained continuously within Garcia's reach,[207] even at the point immediately prior to the search.

B. Containers and Immediate Association with the Person

The Supreme Court in *Chadwick* expressly excepted objects immediately associated with the person from the requirements for a warrantless search.[208] Objects immediately associated with the person of the arrestee may be searched even when in the exclusive control of a police officer. Different treatment of objects immediately associated is based on the theory that the additional intrusion is minimal, involving no greater reduction in the individual's privacy expectations where the individual has been arrested.[209]

Supreme Court decisions upholding warrantless searches of objects immediately associated with the arrestee have focused on the objects taken from the person of the arrestee.[210] The Supreme Court's failure to define 'immediate association with the person' has led to confusion in the lower courts concerning the status of certain containers. Handbags represent one source of conflict.

Application of the restrictive language of *Chadwick* may result in the classification of handbags with luggage. In *People v. Pressman*,[211] defendant and a female companion were arrested for possession of a marijuana cigarette.[212] The arresting officers directed

206. *Id.*

207. *Id.*

208. 433 U.S. at 15. *See also* note 71 *supra* and accompanying text.

209. *See* United States v. Berry, 560 F.2d 861, 864 (7th Cir. 1977), *vacated*, 571 F.2d 2 (1978); W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS, § 12.3 at 12-14 (2d ed. 1979).

210. *See* United States v. Edwards, 415 U.S. 800 (1974) (search of defendant's clothing); Gustafson v. Florida, 414 U.S. 260 (1973) (search of cigarette package taken from defendant's coat pocket); United States v. Robinson, 414 U.S. 218 (1973) (search of cigarette box found in defendant's pocket). One commentator has observed that searches of items such as clothing and cigarette packages removed from the arrestee's pockets should be categorized as "searches of the person". Case Note, 27 DRAKE L. REV. 421, 434 (1977-78).

211. N.Y.L.J. June 11, 1980 at 10, col. 1.

212. *Id.*

the defendant and his companion to empty the bags which they had been carrying.[213] Cocaine discovered in defendant's bag[214] was suppressed at trial by the New York Supreme Court. The *Pressman* court, recognizing the different treatment accorded items immediately associated with the person, rejected an immediate association analysis and determined that once the defendants were placed under arrest and had relinquished their bags, the bags were no longer within their immediate control.[215] Noting that the warrantless search of such receptacles as purses, tote bags, knapsacks and satchels had been invalidated on privacy grounds,[216] the *Pressman* court had little difficulty concluding that the defendants' bags were entitled to fourth amendment protection. The court stated that the constitutionality of a search should not depend on the fabric or shape of the receptacle but rather on the legitimate expectation of privacy which the container enjoys.[217]

Similarly, the search of a handbag in *Ulesky v. State*[218] was held invalid by the Florida District Court of Appeal. In *Ulesky*, defendant was stopped in a pickup truck by a police officer who subsequently discovered marijuana in the truck.[219] After the defendant was arrested and placed in the officer's patrol car, the officer searched the defendant's purse which was located inside the truck.[220] The search revealed several bags of marijuana.[221]

The Florida District Court of Appeal held that the purse was not within the defendant's immediate control when seized.[222] Applying the rationale supporting the search incident exception, the court concluded that there was no longer a danger that the defendant would obtain weapons or evidence from her purse at the time of the search.[223]

In contrast to the holdings of *Pressman* and *Ulesky*, the Mary-

213. *Id.*
214. *Id.*
215. *Id.* at 10, col. 2.
216. *Id.*
217. *Id.*
218. 379 So. 2d 121 (Fla. Dist. Ct. App. 1979).
219. *Id.* at 123. The defendant was stopped by the officer for driving recklessly on a public roadway. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 126.
223. *Id.*

land Court of Special Appeals in *Dawson v. Maryland*[224] held that the search of a defendant's purse was a valid search incident to her arrest. In *Dawson*, a police officer found the defendant at the scene of a shooting incident and arrested her after being informed that she was carrying a gun in her purse.[225] The officer searched the defendant's purse incident to her arrest.[226] Validating the search, the Maryland court distinguished *Chadwick* by stating that a handbag is " *'immediately associated with the person of the arrestee'* because it is carried with the person at all times. . . ."[227]

Instances may arise where the defendant's handbag is not located on her arm but within her immediate control at the time of arrest. The definition of 'immediate association' may then have to be extended to articles located beyond the person, in which case the expression loses its identity as a separate classification. Conversely, if a handbag cannot be searched when located within the defendant's reach but not touching her person, the validity of the search will then depend on the location of the object instead of the legitimate expectation of privacy it enjoys.[228]

The classification of handbags among items immediately associated with the person raises questions of equal protection. While certain containers carried by women are defined as handbags, items put to similar use by men described as shoulder bags or briefcases, are more closely related to luggage, and thereby accorded fourth amendment protections. The difficulty courts experience in evaluating the search of items, such as handbags, that are immediately associated with the person was noted by the dissenters in *Chadwick* who stated that the "Court's opinion does not explain why a wallet carried in the arrested person's clothing, but not the footlocker in the present case is subject to 'reduced expecta-

224. 40 Md. App. 640, 395 A.2d 160 (Md. Ct. Spec. App. 1978).

225. *Id.* at 647-48, 395 A.2d at 164.

226. *Id.* at 648-49, 395 A.2d at 164-65.

227. *Id.* at 651-52, 395 A.2d at 166 (quoting United States v. Berry, 560 F.2d 861, 864 (7th Cir. 1977), *vacated*, 571 F.2d 2 (1978)).

228. *See* note 158 *supra* and accompanying text.

The conclusion that a handbag is immediately associated with the person because it is carried by that person at all times is based on the notion that the handbag has become closely identified with the person in a manner similar to clothes worn by the person or objects carried in clothing pockets. While there may be some similarity between items traditionally associated with the person and handbags, a thin line separates items classified as handbags and those classified as luggage.

tions of privacy caused by the arrest.' "[229]

VI. Conclusion

The Supreme Court in *Chadwick* and *Sanders* placed new restrictions on warrantless searches of containers and adopted specific guidelines for the determination of exemptions from these restrictions. In *Sanders,* the Supreme Court stated that the diminished expectation of privacy inherent in the automobile would not extend to containers inside the vehicle, thereby eliminating the automobile exception as a justification for a warrantless container search. *Chadwick* curtailed the use of the search incident exception as a justification for a warrantless container search. *Chadwick* indicates that the determination of exclusive control of a container by an enforcement officer must be evaluated according to the rationale of the incident search, the realistic possibility that an arrestee could obtain weapons or evidence from the container once it is within the officer's possession.

While neither *Chadwick* nor *Sanders* defined the class of objects immediately associated with the arrestee, the intent of the Supreme Court to restrict warrantless searches[230] indicates that containers such as handbags should be treated no differently than luggage, which is accorded strong fourth amendment protection. Reducing an arrestee's privacy expectations to objects located beyond the person defies the meaning of "immediate association" and cannot be reconciled with the retention of privacy by other containers possessing a similar expectation of privacy. The Supreme Court's decisions in *Chadwick* and *Sanders* indicate that containers are to be accorded fourth amendment protection in all possible circumstances. Application of a presumptive warrant requirement to the search of a container and the allowance of exemptions which conform strictly to the guidelines of *Chadwick* and *Sanders* would result in more consistent fourth amendment protection of containers in the possession of an arrestee.

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229. 433 U.S. at 20-21.

230. *See* notes 58-69, 76-84 *supra* and accompanying text.