ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

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standard suggested by both Illinois and the Solicitor General as defining the scope of a suggested objective good faith defense. Given the virtual identity between probable cause as it has been defined by this Court and the concept of an objective good faith defense which is the centerpiece of the Solicitor General's brief, a finding that objective good faith existed is the functional equivalent of a finding that probable cause, in fact, existed. If, on the other hand, the Solicitor General's concept of objective reasonableness requires a lower threshold of probability than traditional conceptions of probable cause, he is arguing not for a good faith defense, but for a substantive dilution in the definition of the degree of probability required by the Fourth Amendment. In place of the traditional test of probable cause defined as an objectively reasonable assessment

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that it is more likely than not that evidence of crime will be obtained, the Solicitor General would substitute a test of objectively reasonable belief that an objectively reasonable probability existed -- an exercise in linguistic reductionism leading to the inevitable dilution of the substantive meaning of probable cause.

I. THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD ALREADY AFFORDS LAW ENFORCEMENT OFFICERS THE SCOPE FOR OBJECTIVELY REASONABLE ERRORS WHICH COULD CONSTITUTIONALLY BE PROVIDED BY A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

By authorizing search where law enforcement officers reasonably believe and a magistrate reasonably determines that evidence of crime is likely to be found

in a particular place, the probable cause standard already affords precisely the scope for errors of fact and law which proponents of a good faith exception claim is necessary. Petitioner Illinois concedes as much, and quite correctly urges that this case can and should be decided under traditional probable cause standards recognizing that adoption of a good faith exception for cases like this is unnecessary because redundant.[5] If a good faith exception were broader -- as broad as that apparently sought by the Solicitor General who seems to urge that the seizure of evidence pursuant to a warrant renders such evidence admissible at trial even if the magistrate lacked probable cause[6] -- it would effectively eliminate the requirement at the historical heart of the Fourth Amendment -- that "no warrants shall is-

5. See Petitioner's Brief for Reargument (hereafter "Pet. Supp. Br.") 19; see also n.15 infra

6. See Supplemental Brief for the United States (hereafter "U.S. Supp. Br.") 43-44.

sue, but upon probable cause".

A. The Fourth Amendment Requires Only Probable Cause, Not Certainty, And Is Not Defeated By Reasonable Errors Of Fact Or Of Law.

A search warrant is valid if, on the basis of facts officers reasonably believed to be true,[7] a magistrate reasonably determined that a prudent person would be justified in believing that a search would yield either contraband or the fruits, instrumentalities, or evidence of a crime.[8] Certainty is not required; the likelihood of engaging in a fruitful search must only be more probable than not, and may be based on rumors, hearsay, a suspect's prior record, or other evidence inadmis-

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7. Franks v. Delaware, 438 U.S. 154 (1978).

8. The critical judgment, of course, is the magistrate's, not the officer's. See, e.g., United States v. United States District Court, 407 U.S. 297, 316 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); Whiteley v. Warden, 401 U.S. 560 (1971). See also infra at 21-23.

sible at trial.[9]

As this Court's cases demonstrate, this standard expressly provides scope for reasonable errors of fact and of law. Probable cause is not defeated if the "facts" which the officers present to the magistrate turn out to be inaccurate (so long as the officers themselves reasonably credit those facts), or if the assessment that a search would produce evidence of crime turns out to have been misjudged.[10] Similarly, probable cause does not dissipate because a substantive criminal statute is

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9. See, e.g., United States v. Ventresca, 380 U.S. 102, 107-09 (1965); Draper v. United States, 358 U.S. 307 (1959); Aguilar v. Texas, 378 U.S. 108 (1964); Hill v. California, 401 U.S. 797 (1971); cf. Brinegar v. United States, 338 U.S. at 172-77.

10. See, e.g., Franks v. Delaware, 438 U.S. at 165; United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, supra; cf. New York v. Adams, 53 N.Y.2d 1, 443 N.E.2d 537, 439 N.Y.2d 877 (1981); United States v. Matlock, 415 U.S. 164 (1974).

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later construed differently or held unconstitutional.[11] So long as the magistrate reasonably determines that a search will be fruitful -- whether or not the information he bases his determination on is accurate, and whether or not a crime has even been committed -- there is no Fourth Amendment violation and evidence seized in a search pursuant to the warrant is admissible.

B. In Ruling On A Suppression Motion Challenging Search Pursuant To A Warrant As Lacking Probable Cause, The Question Which Proponents Of An Objective Good Faith Exception To The Exclusionary Rule Would Make Determinative -- Did The Magistrate Reasonably Assess The Existence Of Probable Cause -- Is Precisely The Same As Asking Whether Probable Cause Existed.

Where, as here, the only alleged Fourth Amendment violation is the deter-

11. Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979).

mination of probable cause, a good faith exception to the exclusionary rule would be wholly redundant.

If the facts presented to the magistrate would warrant a good faith, reasonable belief that the search comports with the Fourth Amendment, then the probable cause standard has been met.[12] If, on subsequent review, a court determines that probable cause (defined by this Court as an objectively reasonable assessment of probability) was not present, it necessarily follows that the assessment of probable cause was objectively unreasonable. To go further, and ask whether even though probable cause was not present, a magi-

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12. Like the United States, we assume that inquiry under the good faith exception which this Court requested supplemental briefing to explore would emphasize objective reasonableness, see U.S. Supp. Br. 58 n.39; see also Scott v. United States, 436 U.S. 128, 135-36 (1978), although subjective belief is necessarily an element to some extent as well. E.g., Franks v. Delaware, 448 U.S. at 164-65.

strate (or even the presenting officers) could reasonably have believed it was present, makes no sense: if they could reasonably have believed that probable cause existed, then by the definition of Draper, Brinegar and Aguilar -- by "the substance of all known definitions of probable cause"[13] -- probable cause was present.[14] This is especially so since, as this Court has repeatedly made clear, the reviewing court is not to substitute its own judgment; the test is whether the initial judgment was reasonable, and significant deference is due when the initial determination was that of a magistrate. United States v. Ventresca, 380 U.S. at 108;

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13. Brinegar v. United States, 338 U.S. at 175.

14. This point has been made, in a different context, by Judge Jon Newman. See Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Remedy for Law Enforcer's Misconduct, 87 Yale L.J. 447, 460 (1978).

Aguilar v. Texas, 378 U.S. at 110-11; United States v. Jones, 362 U.S. 257, 270-71 (1960).

To its credit, Illinois appears to recognize the identity between probable cause and a good faith exception.[15] The

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15. See, e.g., Pet. Supp. Br. 11-13 ("at least in the area of probable cause and similar factual questions ... so long as the officer's or magistrate's error was a reasonable one, the exclusionary rule should not be applied"); Pet. Supp. Br. 19 ("As a practical matter, it may not make much difference, at least in the area of probable cause, whether this Court adopts the modification of the exclusionary rule ... or decides this case on the basis of the traditional Carroll-Brinegar-Jones standard of probable cause); Pet. Supp. Br. 26 ("[T]he proposed modification of the exclusionary rule is, in essence, a return to the traditional standard of probable cause"); see also id. 16-19.

Perhaps because the position urged here by amicus (and on which petitioner's brief on reargument is premised) might be thought unresponsive to the question this Court ordered the parties to rebrief, in portions of its brief Illinois essays an unconvincing "good faith exception" that would differ from probable cause. Thus, petitioner's submission that "Judge Lewis' assessment of the probabilities was a reasonable one, even assuming arguendo that it was mistaken", Pet. Br. 27, is meaningless. If the assessment was reasonable, it was not "mistaken" within the meaning of this Court's practical approach to probable cause exemplified by Brinegar and Vencresca.

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good faith exception proposed by the United States may differ from the probable cause standard, since it appears to focus solely on the officers, rather than the magistrate, and seems to insulate evidence seized pursuant to a warrant from suppression, even when the magistrate could not have reasonably determined that probable cause existed. See U.S. Supp. Br. 43.[16] Exclusive atten-

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16. We are told that exclusion may nevertheless be appropriate where "the factors relied on by the magistrate were so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable," quoting Brown v. Illinois, 422 U.S. at 610-611 (Powell, J., concurring), but the line between after-the-fact reasonableness under Aguilar, 378 U.S. at 111, and "entirely unreasonable" is left quite uncertain. Professor Kaplan, on whom the United States heavily relies, has criticized a similarly unclear standard under which an unreasonable determination of probable cause would not bar admissibility so long as it was not "reckless" or "deliberate". Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L. Rev. 1027, 1044-45 (1974).

tion to the officers' judgment rather than the magistrate's, however, is squarely inconsistent with the core Fourth Amendment requirement that a magistrate's objectively reasonable judgment of probable cause -- not merely his signature, not his incorrect assessment of probable cause, and not an officer's belief that probable cause exists -- is the fundamental prerequisite for most lawful searches. See, e.g., Nathanson v. United States, 290 U.S. 41 (1933) and Franks v. Delaware, supra (rejecting proposition that magistrate's signature on warrant sufficient to establish valid search); Ybarra v. Illinois, 444 U.S. 85 (1979) and Torres v. Puerto Rico, 442 U.S. 465 (1979)(undoubted good faith of police searching under clear statutory authority irrelevant where probable cause is lacking); Delaware v. Prouse, 440 U.S. 648 (1979) and Dunaway v. New York, 442 U.S. 200 (1979)(undoubted

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good faith of officers acting pursuant to state court determinations that the particular searches at issue did not require probable cause irrelevant where appropriate substantive standard not met); Whitely v. Warden, supra (officer's belief that valid warrant issued irrelevant where magistrate could not properly have found probable cause).[17]

As we now show in greater detail, the good faith exception proposed by the United States, if broader than the probable cause standard, has precisely the vice this Court found in each of these cases: it would "denude the probable cause requirement of all real meaning." Franks v. Delaware, 438 U.S. at 168.

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17 The failure of the United States to discuss any of these cases except Franks -- each of which would have been decided differently under its approach -- is striking.

C. If A Good Faith Exception Would Afford Any Broader Scope For Error Than Probable Cause, It Would Violate The Fourth Amendment By Systematically Failing To Deter And Indeed Inducing Searches On Warrants Absent Probable Cause.

Law is what law does. A rule of law, especially a constitutional rule, which finds no sanction, and which need not be applied in the courts even in appropriate cases, is empty rhetoric. Davis v. Passman, 442 U.S. 228, 242 (1979).[18] To say that the Constitution forbids search warrants to issue on less than probable cause, but permits the admission of evidence seized when probable cause was lacking, is effectively to protect "the right of the people to be secure" only procedurally, through search warrants, but without the sub-

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18. "[U]nless such rights are to become merely precatory, the class of litigants who allege that their own constitutional rights have been violated and who at the same time have no effective means other than the judiciary to enforce these rights must be able to invoke the existing jurisdiction of the courts for [their] protection .... " Id.

stantive protection of probable cause. Nathanson v. United States, supra; Aguilar v. Texas, supra; Franks v. Delaware, supra.

One need look only so far as the history of the Fourth Amendment in states without exclusionary rules between Wolf and Mapp to demonstrate the truth of these observations. Commentators, state courts, and ultimately this Court found the tension between the "right" enunciated in Wolf and its utter meaninglessness unbearable. See generally Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 323-24 (prior to Mapp, Fourteenth Amendment search and seizure guarantees were not protected by states); Elkins v. United States, 364 U.S. 206, 224-32 (1960) (listing post-Wolf state court decisions on admissibility of unlawfully seized evidence); People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955)(Traynor, J.). Leading law enforcement authorities

throughout the nation reacted to Mapp as if the Supreme Court had suddenly created the probable cause and warrant requirements, rather than merely enforced rules applicable to the states all along.[19]

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19. Commissioner Michael Murphy of New York observed:

> I can think of no decisions in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this .... I was immediately caught up in the entire program of reevaluating our procedures which had followed the DeFore rule, and modifying, amending, and creating new policies and new instructions for the implementation of Mapp .... Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen.

Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?", 62 Jud. 66, 72 (1978)(quoting Murphy, Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments, 44 Texas L.Rev. 939, 941 (1966)). Similarly, when the California Supreme Court adopted the exclusionary rule, Los Angeles Police Chief William Parker bitterly attacked it for prohibiting "affirmative action" by the police against crime until and unless police possess "sufficient information to constitute probable cause". Nevertheless, mistaking the newly-applicable exclusionary rule for the substantive guarantee which had theoretically, but not in reality, long been law in California, Chief Parker continued:

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If evidence seized under warrants based on less than probable cause were admissible, that lesser standard would quickly measure the substantive protection afforded by the Fourth Amendment. Contrary to the suggestion that exclusion of evidence seized pursuant to an erroneous and, by definition, unreasonable judicial determination of probable cause is "irrational" (U.S. Supp. Br. 37), exclusion is essential because it is the only means for giving life to the probable cause standard.[20] Damage suits are

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> [a]s long as the exclusionary rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.

Id. (quoting W. Parker, Police 117, 131 (emphasis added). See also id. at 70-72 (similar experience in Minnesota); Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing", 62 Judicature 337, 349 (1979)(New York).

20. As pointed out supra at 9-12, had the Fourth Amendment been complied with, of course, the evidence would also have been "excluded". Although

impossible because the warrant-issuing magistrate is immune from suit, Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978), and the officers searching pursuant to a warrant normally have a secure good-faith defense. United States v. Ross, 72 L.Ed. 2d 572, 593 n.32. Injunctive relief is similarly barred. See Brinegar v. United States, 338 U.S. at 182 (Jackson, J., dissenting); Rizzo v. Goode, 423 U.S. 362 (1976). Nor could a court, consistent with Article III of the Constitution, rule on the legality of the warrant where the

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the United States criticizes application of the exclusionary rule in cases such as Coolidge v. New Hampshire, 403 U.S. 443 (1971), agreeing with Justice Harlan that nothing in Coolidge touched on "core" Fourth Amendment values, id. at 491, that very criticism suggests the need to apply the exclusionary rule at least where, as here, such "core" values are implicated. With good historical reason, see, e.g., Lasson, History and Development of the Fourth Amendment to the United States Constitution, 35-36, 47, 100-03 (1937); T. Taylor, Two Studies in Constitutional Interpretation, 23-46 (1969), the Court has long found the probable cause standard the heart, the "minimum requirement" of the Fourth Amendment, Chambers v. Maroney, 399 U.S. 42, 51 (1970). See also United States v. Ross, 72 L.Ed.2d at 583-84.

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good faith standard was made out, the surprising suggestion of the United States (Supp. Br. 61-62) not to the contrary. See, e.g., Bowen v. United States, 422 U.S. 916 (1975)(criticizing Ninth Circuit on Article III grounds for ruling on illegality of a search when decision on retroactivity of Almeida-Sanchez v. United States, 413 U.S. 916 (1975) made constitutional ruling unncessary); Defunis v. Odegaard, 416 U.S. 312, 316 (1974)("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); Stovall v. Denno, 388 U.S. 298, 301 (1967)(Article III precludes announcing rule of law purely prospectively without application to case in which rule is announced).[21] Finally, reliance on the

21. The Court has declined to determine the constitutionality of judicial or executive action where official immunity or a good faith defense has precluded relief. See, e.g., Procunier v.

magistrate's assessment alone, without possibility of judicial review (or with review available only in outrageous cases, see U.S. Supp. Br. 43-44) could not long maintain current substantive standards of probable cause as a bulwark against unconstitutional searches and seizures, as this Court has recently recognized, Franks v. Delaware, supra.[22] Since a principal

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Navarette, 434 U.S. 555, 566 n.14 (1978); Stump v. Sparkman, supra.

Even assuming arguendo that a court admitting evidence pursuant to a good faith exception could go further and measure the magistrate's determination against the probable cause standard as well, moreover, the fact-bound nature of the probable cause determination and its inherent resistance to being captured by formulas and rules would virtually ensure that even a newly-enumerated probable cause assessment would have no operative effect, since the good faith standard would continue to protect all (or nearly all) sub-probable cause warrant searches.

22. The Franks Court observed that "[i]t is the ex parte nature of the initial hearing ... that is the reason for review." 438 U.S. at 169. So far as we are aware, not a single member of this Court since Weeks has voted to decide a case on the ground that a magistrate's erroneous determination of probable cause was beyond review, although it has been generally held that the magistrate's determination is entitled to deference

justification for affording judges and magistrates judicial immunity has been the amenability of their judicial errors to the corrective processes of appellate review, Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 354 (1872); Stump v. Sparkman, 435 U.S. at 369 (Powell, J., dissenting), abolition of review by way of exclusion would be particularly ironic. In light of our constitutional system's commitment to subjecting abridgements of liberty to adversary judicial scrutiny except in the most extraordinary circumstances, particularly where judges may have exceeded constitutional limits, Rose v. Mitchell, 443 U.S. 545 (1979), it would be unthinkable to subject valuable Fourth Amendment freedoms to the unreviewable judgments of

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see supra at 19-20, and there has of course been a modicum of disagreement about particular determinations of probable cause. Under the United States' view, Nathanson v. United States, a unanimous decision and one of the bulwarks of the Fourth Amendment, was wrongly decided.

magistrates without possibility of judicial review, especially in light of the extremely minimal requirements for magistrates issuing warrants, Shadwick v. City of Tampa, 407 U.S. 345 (1972).

Equally importantly, by directing the attention of the police to whether a magistrate could be found to sign a warrant,[23] rather than to whether probable cause sufficient to warrant a magistrate's signature was present, the proposed good faith exception would reverse the present incentive "in close cases ... to err on the side of constitutional behavior." United States v. Johnson, 73 L.Ed.2d 202, 221 (1982); see also Owen v. City of Independence, 445 U.S. 622, 652-56 (1980). As in Johnson, the rule sought by the United States would "encourage police or other courts to disregard the plain purport of [the Court's

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23. There is substantial evidence that magistrate shopping is not uncommon. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith, 43 U.Pitt.L.Rev. 307, 351 (1982).

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decisions and to adopt a let's-wait-until-it's-decided approach". Id. (citation omitted). Moreover, as this Court has recently observed, a rule preventing challenge to unconstitutional conduct except in the most egregious cases "could also have the deleterious effect of freezing constitutional law in its current state of development .... " Owen v. City of Independence, 445 U.S. at 651 n.33.

Application of any sub-probable cause standard a good faith exception might incorporate -- e.g., admission of evidence seized under warrants deficient under Nathanson or Aguilar, or so long as reasonable belief under Terry was present -- would be indistinguishable in practice from the continued full application of the exclusionary rule together with a corresponding relaxation of probable cause. Such a dilution of probable cause standards would perhaps be justified

by some on grounds of social policy, although many, including amici, would strongly oppose it; but it would take either amendment of the Constitution or reversal of every one of this Court's probable cause decisions from Carroll and Brinegar through United States v. Ross to accomplish such a rewriting of a fundamental aspect of our law.

II. ILLEGALLY SEIZED EVIDENCE IS INADMISSIBLE AT TRIAL EVEN WHEN THE ILLEGAL SEIZURE WAS EFFECTED IN GOOD FAITH BECAUSE (A) THE FOURTH AMENDMENT FORBIDS IT; (B) THE USE OF SUCH EVIDENCE WOULD ENCOURAGE UNLAWFUL ACTIVITY; AND (C) RECOGNITION OF A DEFENSE BASED ON IGNORANCE OF THE LAW WOULD DISCOURAGE EFFECTIVE POLICE TRAINING.

Amici have demonstrated that in cases in which the substantive definition of probable cause is at issue, no difference exists between probable cause and the objective reasonableness requires to establish a good faith defense. If, however, this Court believes that the objective reasonableness required to establish a good faith defense is less stringent than the objective reasonableness required to establish probable cause, it must confront the question of whether evidence obtained on less than probable cause may be used in contravention of the wishes of the founders.

A. The Use At Trial Of Evidence Obtained On Less Than Probable Cause Violates The Fourth Amendment.

It is a measure of what we may have lost as a free people that the question of whether unconstitutionally seized evidence may be utilized in a criminal case has been reduced in the minds of many to a strictly utilitarian equation: as long as the benefits of violating the Constitution outweigh the burdens,

the government asserts, the government may rely on "socially efficient" unconstitutional behavior to obtain a criminal conviction. Such an equation cannot, however, be the sole determinant of whether or not the government elects to benefit from its own lawless activity.[24] Both the Fourth Amendment and the imperative of judicial integrity forbids the courts -- and the government -- from becoming accessories to even a good faith violation of the Constitution. One can hardly expect widespread voluntary compliance with law when the government itself is licensed to break it.

It is not merely the illegal seizure of evidence which the Fourth Amendment condemns, but its use as part of an evidentiary transaction commencing with the police and continuing through the prosecutor to the court itself. E.g., Olmstead v. United States, 277 U.S. 438, 468 (1978) (adherence to Weeks for constitutional violations)(Taft, C.J.); Weeks v. United States, 232 U.S. at 391-92.[25] Since the

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24. Neither Weeks v. United States, supra, nor its early progeny rested on deterrence to the slightest degree. No mention of deterrence to support the rule appears in this Court's cases until Wolf v. Colorado, supra, and even in Wolf, the concept of deterrence ironically appeared in the Court's discussion of why the exclusionary rule was not being applied to the states:

> Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn ... a State's reliance upon other methods which, if consistently enforced, would be equally effective.

338 U.S. at 31 (emphasis added). Of course, the premise of Mapp, unchallenged to this day, is that such alternative remedies do not exist in any state in the union, as the United States apparently concedes. U.S. Supp. Br. 63-64.

25. Chief Justice Taft's majority opinion in Olmstead differed from Justices Holmes' and Brandei in refusing to apply the exclusionary rule to evidence seized merely illegally, but not unconstitutionally. The holding in Weeks, accepted by the entire Olmstead Court, was as follows:

> 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 ... against all unreasonable searches and seizures under the guise

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court is integral to the transaction, it cannot insulate itself from responsibility for the unconstitutional nature of the evidence. As Chief Justice Traynor observed:

> When ... the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its hand and by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the government acting as judge.

People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

Accordingly, so far as a discussion of illegally seized evidence against a defendant whose rights were violated by the seizure is concerned, the Constitution itself requires exclusion. Weeks

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of law. This protection reaches all alike ... and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws.

v. United States, 232 U.S. at 391-92; Olmstead v. United States, 277 U.S. at 468; Mapp v. Ohio, 367 U.S. at 655, 657, 660.[26]

Although some have argued that the Court has departed from the views of the Weeks, Olmstead, and Mapp Courts, and have suggested that the judiciary may participate in a tainted evidentiary transaction which commenced with an illegal search of a defendant, the cases relied on (e.g., United States v. Calandia, 414 U.S. 338 (1973)) all involved the collateral use of illegally seized evidence, and none the use at trial for which the illegal seizure -- deliberate or not -- was undertaken. See, e.g., Stone v. Powell, 428 U.S. 465, 492-93 (1976). Amici urge that the concept of judicial integrity be reaffirmed

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26. Mapp could only have been a constitutional rule, since the Court lacks power to reverse state criminal convictions for violation of lesser norms.

as a bulwark of the Fourth Amendment, and that the Court adhere to the original understanding of Weeks. Judicial use is conceptually inseparable from evidentiary seizures because evidentiary seizures make no sense without an expectation of judicial use. The concept of evidence compels attention to the entire transaction. When any part of the government, including a court at a criminal trial, participates in an evidentiary transaction against an individual that includes a search or seizure violating his Fourth Amendment rights, it commits a constitutional wrong.

B. The Use of Illegally Seized Evidence, Even if Obtained in Good Faith, Would Encourage the Commission of Unlawful Acts.

As we have demonstrated, when use at case-in-chief is concerned, the question is not whether the costs of suppression outweigh the deterrent effect, but simply whether "the admission of evidence encourages violations of Fourth Amendment rights." United States v. Janis, 428 U.S. 433, 458 n.35; see also Stone v. Powell, 428 U.S. at 492.[27] Even if one approaches the exclusionary rule as a strict cost/benefit exercise, however, the significance of the exclusionary rule would be seriously compromised when evidence seized illegally -- whether or not in "good faith" -- is admitted as part of the government's case-in-chief.

The cost of the exclusionary rule is, of course, nothing more than doing without evidence which the founders determined should never have been obtained in

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27. By holding that "courts must not commit or encourage violations of the Constitution," the Janis Court appears to have established a constitutional requirement to exclude evidence where failure to do so would encourage unconstitutional conduct. See Janis, 428 U.S. at 458 n.35; Mertens & Wasserstrom, supra n. 3 at 386 n.100. Professor Amsterdam has discerned a similar requirement, see Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 431-433, and it is implicit even in Justice Frankfurter's opinion for the Court in Wolf v. Colorado, 338 U.S. at 31.

the first place. Thus, for example, were we to dispense with the exclusionary rule and rely upon Draconian tort and criminal penalties to deter unlawful search activity, ideally the "cost" would be the same. Police officials, fearing retribution, would refrain from conducting an illegal search, thereby depriving the system of the same evidence currently excluded by the exclusionary rule. See supra at 9-13 and infra Appendix A. As a practical matter, of course, we know that no such retributive system existed either pre-Mapp or post-Mapp, and none is likely to.[28] Thus, the cost analysis submitted by the United States is merely shorthand for the proposition that an effective mechanism should be replaced with an ineffective one because we are not prepared to bear the "cost" of the value judgments embedded in the Fourth Amendment. If, however, heretofore settled Fourth Amendment standards are to be modified, it should be by direct amendment or open judicial reexamination and not by the covert device of rendering them unenforceable.

The benefits of the exclusionary rule are obvious. First, it acts as a powerful incentive to the adoption of police procedures designed to comply with Fourth Amendment guidelines. Second, it reinforces our commitment to the founders' idea by unequivocally reaffirming our respect for the Fourth Amendment. Finally, like legal norms generally, which are enforceable whether or not the actor knows what the law is, it deters both willful and careless activity in viola-

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28. "Self-scrutiny is a lofty-ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clauses ... " Franks v. Delaware, 438 U.S. at 169 (quoting from Mapp v. [illegible] Colorado).

tion of the Fourth Amendment.[29]

The impact of a good faith defense on the benefits of the exclusionary rule is equally obvious.

First, contrary to the submission of the United States, which argues strenuously that an honest mistake such as was made by the Delaware State police "should not be met with the severe sanction of suppression,"[30] it is precisely in close cases where a good faith exception would presumably apply that this Court's enunciation of new law predictably leads to the most substantial reduction, through systemic deterrence, of unlawful activity. A recent detailed study of police reactions to Delaware v. Prouse, 440 U.S. 648 (1979) demonstrates how police departments in Washington, D.C. and Delaware responded immediately by issuing detailed new instructions to officers in the field, setting forth the rules established in Prouse and advising them to desist from present (unconstitutional) practices. Mertens & Wasserstrom, supra n.3, at 399-401. The Legal Liaison Office of the Delaware State Police (and presumably similar offices in similar states as well) disseiminates "[a]ll court decisions affecting daily police operations ... to patrol officers by similar Legal Memorandums." Police in other jurisdictions respond similarly to this Court's decisions where

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29. The proposition that the exclusionary rule cannot deter well-meaning violations is contrary to settled principles of criminal law. See, e.g., Holmes, The Common Law, 48 (1881); Lambert v. California, 355 U.S. 225, 228 (1957).

30. U.S. Supp. Br. 36. Throughout, the United States refers confusingly to the exclusionary rule as a sanction against or punishment of the individual officer. See, e.g., U.S. Supp. Br. at 30, 36. As the United States knows, however, the deterrent effect of the rule has rarely, if ever, been supported as a punishment of offending officers. Its deterrent effect is obviously found in general or systemic deterrence. See generally

good faith would have been shown.[31]

Assuming, as seems extremely reasonable, that such departmental directions lead to substantial compliance from officers in the field, police throughout the country have now abandoned an unconstitutional practice at the suppression of a single marijuana prosecution. Countless motorists have been spared violations of their constitutional rights. The rule, even where good faith is present, prevents abridgement of Fourth Amendment rights through law enforcement's institutional response to changes in Fourth Amendment law.

Moreover, a good faith exception would inhibit the very evolution of vital constitutional guidelines, since courts would inevitably focus on the fact-based issue of good faith before deciding a Fourth Amendment issue. Had a good faith exception to the exclusionary rule existed of the type proposed by the United States, the Delaware courts would undoubtedly have used it to reject Prouse's motion to suppress the marijuana which police had seized and for whose possession he had been charged, without even the occasion to decide the constitutional question; and even if the court had gone on to

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31. Mertens & Wasserstrom, supra n. 3, at 400 n.174 (reaction to Almeida-Sanchez v. United States, 413 U.S. 266 (1973)); id. at 401 n.175 (address by FBI Director Webster detailing FBI's present methods for apprising field agents of relevant Supreme Court and Court of Appeals Fourth Amendment violations.) At a post-Mapp training session, the New York Deputy Police Commissioner commented:

> The Mapp case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the United States Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant -- illegally, if you will -- was admissible in state courts. So the feeling was, why bother?

N.Y. Times, April 28, 1965, p.50. See also supra at n.19 (post-Mapp experience of New York and Los Angeles). See also Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 681, 710-14 (1974)(post-Mapp increase in number of search

"decide" the constitutional question despite denial of the suppression motion, its ruling would have been merely dicta, unreviewable in this Court. See United States v. Bowen and other cases cited supra at 29. Moreover, this Court's cases make clear that no other case could have arisen in which to formulate the rule of law the suppression motion in Prouse occasioned.[32]

In short, since it is readily apparent that many of the vital protections afforded by the Fourth Amendment could never have been enunciated without exclusionary rule applying where the good faith exception advanced by the United States would have been applicable, e.g., Chimel v. California, 395 U.S. 752 (1969), overruling United States v. Rabinowitz, 339 U.S. 556 (1950) (limits of search incident to arrest); United States v. Katz, 389 U.S. 347 (1967), overruling Olmstead v. United States, 277 U.S. 438 (1928) (electronic eavesdropping); Payton v. New York, 445 U.S. 573 (1980) (warrantless entry into house for arrest); Steagald v. United States, 451 U.S. 204 (1981) (entry into third-party house upon arrest warrant), the exception must be rejected on grounds of deterrence.[33]

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32. Injunctive or declaratory relief would appear foreclosed by such cases as Rizzo v. Goode, 423 U.S. 362 (1976) and O'Shea v. Littleton, 414 U.S. 488 (1974), but see City of Los Angeles v. Lyons, No. 81-1064 (decision pending). Damages would appear barred by the good faith defense, see, e.g., Pierson v. Ray, 386 U.S. 547 (1967). See also supra at 27-28.

33. See generally Mertens & Wasserstrom, supra n.3, at 401-06. The cases cited supra, plainly refute the suggestion of the United States that the "lost decisionmaking opportunities will be confined to "grey, twilight area[s]" of Fourth Amendment law. More generally, the underlying premise -- that a good faith exception was unwise for nearly seventy years so that the courts could decide Fourth Amendment cases, but that we now have "enough law" and should now adopt the exception -- represents a Panglossian view of the law and legal development which has no support in our jurisprudence.

C. Maintenance of the Present Scope Of the Fourth Amendment Would Be Impermissible Under a Good Faith Exception. The Fourth Amendment Would Shrink to Reasonableness in Every Case, Without the Specific and Reasonably Bright-Line Rules the Court has Relied on to Cabin Police Investigation Within Constitutional Limits.

Although the Court has correctly recognized that the fundamental test of every search or seizure is its reasonableness, it has resisted relying solely on an unguided inquiry into the reasonableness of police conduct under the circumstances of individual cases. See United States v. Rabinowitz, 339 U.S. 56, 83-84 (1950)(Frankfurter, J., dissenting); Chimel v. California, 395 U.S. 752, 768 (1969), overruling United States v. Rabinowitz.[34] Under the discredited Rabinowitz approach, which left reasonableness to the unguided discretion of the trial court, "appellate courts defer to trial courts and trial courts defer to police."[35] In the absence of clear rules for police to follow, what they do will rarely be found "unreasonable", and the "right of the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." Beck v. Ohio, 379 U.S. 89, 97 (1964). Accordingly, the Court has rested the protection of the Fourth Amendment largely on a process of categorization, relying on reasonably bright lines to enable greater police compliance with the Fourth Amendment.[36]

The good faith exception suggested by the United States is wholly inconsistent with that objective, categorical approach, and would soon turn Fourth Amendment juris-

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34. Justice Frankfurter's criticism in Rabinowitz of the "facts and circumstances" approach to Fourth Amendment reasonableness has been termed the "lore of the Fourth Amendment". Amsterdam, supra n.27, at 394. See United States v. United States District Court, 407 U.S. 297, 315-16 (1972).

35. Amsterdam, supra n.27, at 394.

36. See, e.g., New York v. Belton, 453 U.S. 454 (1981); United States v. Ross, supra.

prudence into the "immense Rorschach blot"[37] that the Court has strenuously avoided. The inexorable tendency of a good faith exception to reduce present probable cause standards has already been analyzed in Point IC, supra. Equally damaged, however, would be the Court's categorical approach to the warrant requirement, which has been seen as "the very heart of the Fourth Amendment directive", United States v. United States District Court, 407 U.S. at 316. As Justice Jackson, himself a former prosecutor, long ago observed, "The extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit", Brinegar v. United States, 338 U.S. at 183 (dissenting opinion).[38]

37. Amsterdam, supra n.27 at 394.

Cases like Torres v. Puerto Rico, 442 U.S. 465 (1979), for example, would not be substantively decided under the approach of the United States. The lower courts would find the action of the searching officers who acted under legislative direction in objective good faith. Similarly, the rule established by Ybarra v. Illinois, 444 U.S. 85 (1980), could not have been settled, since, as in Torres, the officers certainly acted reasonably -- even if illegally -- in searching, under an Illinois

38. Significantly, the number of warrants issued by federal magistrates declined from 7338 in 1972 to 4756 in 1980, the very period during which the exclusionary rule began to be held not to apply beyond direct criminal trials. 1980 Annual Report of the Director of the Administrative Office of the U.S. Courts, at 140. This, during a period when the federal rules were changed to permit telephonic warrants. There is every reason to believe that this 40% drop reflects a drop in warrant applications presented to magistrates, not in grant of applications presented. By contrast, warrant applications rose sharply after Mapp, see Kamisar, On the Tactics of Police - Prosecutor Oriented Critics of the Court, 49 Cornell L.Q. 436 (1964); Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 651, 710-14 (1974).

statute, portions of the bar for which they had a warrant.

In short, the legal question settled by the courts would no longer be whether a warrant was necessary under the circumstances, a ruling which could then disseminated by law enforcement agencies with substantial practical impact, but whether police were reasonable in thinking that it was not. The scope for warrantless searches would be accordingly expanded. Reasonable arguments, of course, have been advanced against this Court's understanding and application of the warrant clause;[39] but if the present substantive and procedural requirements of the Fourth Amendment are to be relaxed, better that it be done directly, rather than indirectly as a consequence of the degree to which purportedly unchanged Fourth Amendment standards are rendered sterile through barriers to their enforcement.

39. See generally, T. Taylor, Two Studies in Constitutional Interpretation (1969).

D. The Remaining Arguments Supporting A Good Faith Exception Are Insufficient to Warrant, and Additional Considerations Militate Against, Its Acceptance.

Emphasizing the importance of maintaining settled law, of clarity, and of "respect for continuity", so far as the Fourth Amendment is concerned, particularly when so many officers in so many localities necessarily make daily decisions under the shadow of this Court's Fourth Amendment jurisprudence, Justice Frankfurter warned against

> reinforc[ing] needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance -- for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.

United States v. Rabinowitz, 339 U.S. at 86.

The approach the United States urges here would not only dramatically

reverse "the course of true law" since the Court's unanimous decision in Weeks, but would severely increase the likelihood of different results in similar cases. Judgments as to the objective good faith of officers in identical cases might well depend on the training of officers in a jurisdiction, or whether a rule of law had been locally settled. Morecver, the unifying forces of appellate review which work when the question is "what is the law?" have far less force when the question is "would a reasonable police officer (in Chicago? in rural Wyoming?) have believed his action was lawful?"

Against this background, the argument of the United States attacking Weeks and supporting creation of a good faith exception lack merit.

1. Cost

We have previously pointed out that the principal "cost" of the exclusionary rule as currently enforced to which the United States and other critics object is a cost imposed by the Fourth Amendment's substantive requirements, see supra at 41-43, and therefore not one which opponents of the exclusionary rule can properly rely on. Moreover, of course, those"costs" are not especially attributable to cases to which a good faith exception would apply and therefore, if compelling, bear on the entire exclusionary question, not to the narrower question before the Court.

Nevertheless, we briefly address the question of costs, first, to show that the evidence relied on by the United States is entirely speculative, erroneous, interested and irrelevant, and second, to show that even on its own terms that evidence fails to support the enormity of the change sought by the United States.

The leading study on costs, the GAO report, fully confirms Professor LaFave's

judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed."[40] Although the United States suggests that GAO figures for federal prosecutorial declinations for Fourth Amendment reasons are unrepresentative, a recent independent study (funded by LEAA) showed that in five localities, declinations for all due process reasons -- not just search and seizure -- ranged from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.[41]

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40. W. LaFave, Search and Seizure § 1.2 n.9 (1981 Supp.).

41. Brosi, A Cross-City Comparison of Felony Case Processing (LNSLAW 1979) at 19. Of more than 15,000 declinations for due process reasons, only one homicide was involved and no rapes. 83% of the declinations in New Orleans involved drug cases. Id.

The other conclusion drawn by the United States from the GAO report -- that "a definite relationship exists between suppression of evidence" and conviction (U.S. Br. 47) since conviction rates are lower for defendants whose suppression motions are granted -- is similarly unjustified. The GAO could not explain and declined to speculate on the reason for that statistic; and it is reasonable to assume that counsel who managed (against heavy odds) to prevail on suppression motions are more energetic, competent, and successful than those who do not.

The conclusions of the NIJ study relied on by the United States are both exceptionally misleading and seriously flawed.[42] Quoting from the report's summary, the United States claims that "4.8%, or the more than 4000 felony cases declined for prosecution [statewide] were rejected because of search and seizure problems," U.S. Supp. Br. 48, with somewhat higher figures in particular communities. Id. at n.29. Yet the relevant measure of the rule's cost is not what percent of rejected cases (86,033)

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42. We note, although the Solicitor General did not, that NIJ is a part of the Department of Justice. The NIJ study was commissioned by political appointees to support the administration's policy directives. When a request for proposals to consultants was entirely unsuccessful, NIJ undertook the study itself in extraordinary haste: it was commenced on October 1, 1982, and completed by December.

were rejected for Fourth Amendment reasons, but what percent of felony complaints (520,993) were so rejected; and on that basis, the NIJ statistics show that less than 0.8% of arrests made by police were reported by the police and prosecutors as declined for Fourth Amendent reasons.[43]

Similarly misleading is the reliance on NIJ figures concerning the re-arrest rate of those "released because their cases had been rejected for prosecution."[44] See U.S. Br. at 49. Neither the United States nor its "study" included any comparative data on re-arrest rates for those with past involvement in the criminal justice system generally; and assuming, as many studies have, that those who have been incarcerated commit more crime after release than those who have not, it would be as reasonable to support the exclusionary rule for preventing (even non-official) crime. Certainly there is no basis for linking the extraordinarily slight incidence of the exclusionary rule to free defendants to the likelihood of vel non of a defendant's future criminal conduct.[45]

Even to the minimal extent that the government's own study points to a dis-

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43. All of the data are self-reports by prosecutors; none were verified in any way. Also misleading is reliance on an NIJ figure of "30% of all felony drug arrests [rejected] because of search and seizure problems." U.S. Br. at 49. The number on which that percentage is based -- 114 cases -- is far too small to be of the slightest statistcal value.

44. Preliminarily, it should be noted that a defendant not tried on the original charge was apparently classified as released even if convicted on other (usually lesser, to be sure) charges.

45. The GAO study reported that evidence was excluded in only 1.3% of 2804 cases (36) accepted for prosecution; a suppression motion was made in only 16% of those 2804 cases, and granted in total in only 3% of the 16%.

Although we are unaware of firm evidence on the subject, reported cases made clear that suppression does not necessarily lead to a failure of prosecution. For example, the defendants in six recent cases in this Court -- Mincey v. Arizona, 437 U.S. 385 (1977); Brewer v. Williams, 430 U.S. 387 (1976)(Sixth Amendment); Franks v. Delaware, 438 U.S. 154 (1977); Davis v. Mississippi, 394 U.S. 721 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); and Coolidge v. New Hampshire, 403 U.S. 443 (1971) were all convicted on remand. See, e.g., Mertens & Wasserstrom, supra n.3, at 445.

cernible "cost", that cost is concentrated nearly wholly in drug cases; only 0.4% of the California cases declined for prosecution for search and seizure reasons involved rape and murder, and even including assault the figure rises only to 3.6%.[46] Cutting a good faith hole in the exclusionary rule for all cases so large as to render decisions like Delaware v. Prouse and Payton v. New York, supra, impossible, when the principal cost to which the United States points is concentrated in only a small fraction of cases, and not those which have led to public concern over street crime, is hardly the proportionality the United States professes to seek.[47]

In any event, since even the United States concedes that modification of the rule will not affect the crime problem to a "material extent", see U.S. Supp. Br. 50, continued reliance on the "costs" of the rule is sheer demagoguery.

2. Premium on Ignorance

Despite the United States' vigorous protestations to the contrary (U.S. Supp. Br. 57), a good faith exception would plainly put a premium on 'police ignorance'. Any departure from standards taught in the training of police in a given locality would be extremely probative, from a

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46. See also INSLAW, supra n. 41, at 19; NIJ at 12-13 (more than 70% drug-related). Significantly, all the figures relied on by the United States from the NIJ study are for arrests, not convictions, and therefore are likely to substantially overstate any "cost" involved.

Available data on suppression motions indicate that they are denied in great proportion. See U.S. Br. at 53. See also Davies, Do Criminals Due Process Principles Make a Difference?, 1982 Am. Bar Assn. Res. J. 247, 265.

47. So far as proportionality is concerned, it can hardly have any place in cases like this, that involve not a claim of a "technicial" violation, but rather the substantive standard of the Fourth Amendment. If probable cause is not present, there is no justification for a search. After Rummel v. Estelle, 445 U.S. 263 (1980), Hutto v. Davis, 70 L.Ed.2d 556 (1982), it is difficult to believe that district courts are to be set out to determine proportionality on a case-by-case basis.

defendant's point of view, of the lack of objective good faith. To the extent that departmental training materials condemned certain procedures -- say, procedures not currently judicially condemned in the local jurisdiction but struck down in other states or appellate courts -- any officer engaging in these procedures could be found not acting as a reasonably trained, cautious and prudent officer.[48] The current incentive to properly train and educate officers would be reversed.

CONCLUSION

Just last term, the Court counted it of the "greatest importance ... that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history." United States v. Ross, 72 L.Ed.2d at 593. The history of the exclusionary rule in this Court admits of no good faith exception. For that reason, and for all the other reasons set forth in this brief, such an exception should be firmly rejected by this Court.

Respectfully submitted,

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February 11, 1983

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48. Professor Kaplan rejects a good faith exception precisely because it would foster police ignorance, see Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1044 (1974), and the United States' reliance on his article in this regard (U.S. Supp. Br. 58) is inexplicable.

APPENDIX

APPENDIX

In response to Wigmore's famous criticism of the exclusionary rule, the American Bar Association published this reply by Connor Hall, a member of the Cabel County Bar in Huntington, West Virginia:

> When it is proposed to secure the citizen his constitutional rights by the direct punishment of the violating officer, we must assume that the proposer is honest, and that he would have such consistent prosecution and such heavy punishment of the offending officer as would cause violations to cease and thus put a stop to the seizure of papers and other tangible evidence through unlawful search.
>
> If this, then, is to be the result, no evidence in any appreciable number of cases would be obtained through unlawful searches, and the result would be the same, so far as the conviction of criminals goes, as if the constitutional right was enforced by a return of the evidence.
>
> Then why such anger in celestial breasts? Justice can be rendered inefficient and the criminal classes coddled by the rule laid down in Weeks only upon the assumption

> that the officer will not be directly punished, but that the court will receive the fruits of his lawful acts, will do no more than denounce and threaten him with jail or the penitentiary and, at the same time, with its tongue in its cheek, give him to understand how fearful a thing it is to violate the Constitution. This has been the result previous to the rule adopted by the Supreme Court, and that is what the courts are asked to continue.
>
> ... If punishment of the officer is effective to prevent unlawful searches, then equally by this is injustice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.

C. Hall, Evidence and the Fourth Amendment, 8 A.B.A.J. 646 (1922), reprinted in Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than an Empty Blessing, 62 Jud. 337, 344 (1979).

NOTES

EXCLUSIONARY RULE: *Not Extended to Deter Excessive Force in Arresting a Fleeing Nonviolent Felony Suspect—State v. Sundberg, 611 P.2d 44 (Alaska 1980)—State v. Sundberg*[1] presented an issue of first impression for the Alaska Supreme Court, namely, whether the exclusionary rule could properly be applied as a deterrent against the use of excessive force by police in arresting a fleeing nonviolent felon. The court declined the opportunity to expand the exclusionary rule to this situation. By examining the concerns of the Alaska Supreme Court, this casenote sets out arguments which advise a reconsideration of the *Sundberg* ruling.

On the night of April 30, 1978, a dispatched police officer spotted a burglary suspect, respondent Russell Sundberg, carrying a pillow case near a broken window of a pharmacy. After respondent dropped the pillow case and began running down the sidewalk, the officer pursued Sundberg for twenty feet and then shouted, "Hold it, police officer." The officer opened fire on respondent from approximately fifty yards, failing to give the warning shot required by departmental guidelines. Hit in the foot and thigh, respondent fell to the sidewalk. Drugs from the pharmacy were found in the pillow case. Cartridges found in Sundberg's jacket were the same type as those in a handgun discovered on the roof of the building housing the pharmacy. While Sundberg's fingerprints were on neither the handgun nor the cartridges, the superior court concluded that Sundberg was armed. Though the street was well lit, the prosecution offered no testimony that Sundberg reached for or discarded a weapon. Respondent moved to suppress all evidence obtained by his arrest and argued that AS 12.25.080[2] was unconstitutional if interpreted to allow the use of deadly force to arrest a fleeing nonviolent felon. Finding that the statute violated Alaska's constitutional guarantee against unreasonable searches and seizures,[3] the superior court granted a sup-

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1. 611 P.2d 44 (Alaska 1980).
2. AS 12.25.080 provides:
   If the person arrested either flees or forcibly resists after notice of intention to make the arrest, the peace officer may use all the necessary and proper means to effect the arrest.
3. ALASKA CONST. art. I, § 14 provides:
   The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or

pression order. The Supreme Court of Alaska reversed, refusing to apply the exclusionary rule as a sanction against the use of excessive force by police in arresting a fleeing nonviolent felon.[4]

I. The Alaska Supreme Court's Analysis

In considering the application of the exclusionary rule to the instant case, the Alaska Supreme Court focused on the constitutionality of the state statutory scheme which permits a police officer to use all force "necessary and proper" to arrest a fleeing felon.[5] By so doing, the court followed the analyses of other state and federal courts which had examined similar statutory schemes allowing the police to use deadly force to arrest felons.[6] Only one court has found such a statutory plan unconstitutional. In *Mattis v. Schnarr*,[7] the Eighth Circuit Court of Appeals held Missouri's statutory scheme unconstitutional, finding that it deprived felons of due process under the fourteenth amendment by maintaining a general presumption that all fleeing felons pose a threat to the arresting officers and the police.[8]

Alaska's statute, AS 12.25.080, permits a police officer to use all force "necessary and proper" to arrest a fleeing felon. The court questioned the constitutionality of this "over-inclusive" statute because it seemingly presumes that all fleeing felons pose a threat to the arresting officers and the public.[9] In addition, the Alaska Supreme Court acknowledged two more fundamental ob-

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It has been stated that Alaska provides broader protection against unreasonable searches than the fourth amendment of the federal Constitution since property is expressly protected under Alaska's constitution.

4. State v. Sundberg, 611 P.2d 44 (Alaska 1980).

5. *Id.* at 49-50.

6. Courts have generally upheld the constitutionality of statutes permitting deadly force in apprehending fleeing felons: Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (a Tennessee statute was not violative of the eighth amendment, was not unconstitutionally overbroad or vague, and was not violative of the fourteenth amendment); Wiley v. Memphis State Police Dep't, 548 F.2d 1247 (6th Cir. 1977), *cert. denied*, 434 U.S. 822 (a Tennessee statute was found constitutional without separate discussion of challenges based on the fourth, fifth, sixth, eighth, thirteenth, and fourteenth amendments). *See* Wolfer v. Thaler, 525 F.2d 977 (5th Cir. 1976), *cert. denied*, 425 U.S. 975 (dismissal of § 1983 action against a police officer affirmed on the ground that the Texas law had been amended after the shooting, though victim's parents had standing to sue); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975) (federal court applied state law affording privilege to use force to arrest a felon and barred an individual police officer's liability for damages in a § 1983 action). *Compare* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *reh. denied sub nom.*, Ash roft v. Mattis, 433 U.S. 915 (1977).

7. 547 F.2d 1007 (8th Cir. 1976), *reh. denied sub nom.*, Ashcroft v. Mattis, 433 U.S. 915 (1977).

8. 547 F.2d at 1019-20.

9. State v. Sundberg, 611 P.2d 44, 49-50 (Alaska 1980).

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jections against the use of deadly force to arrest nonviolent felony suspects. First, the use of such force is morally wrong and highly disproportionate to the alleged crime. Second, the deprivation of life without a trial is offensive to our conception of justice, and in particular, to our presumption of innocence.[10]

However, the court approved the use of a companion statute, AS 11.81.370,[11] which provides a standard of reasonableness for interpreting the term "necessary and proper force" as provided in AS 12.25.080. AS 11.81.370 applies the Model Penal Code policy that life should not be taken except to protect life or bodily security or to arrest one who endangers those interests.[12] Model Penal Code § 3.07(2)(b) provides that a police officer may use deadly force to arrest a felon only when the officer believes that the individual has committed a felony which "involved conduct including the use or threatened use of deadly force," or which involved "substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."[13] The philosophy behind the Model Penal Code and AS 11.81.370 departs from the traditional classifications of crime as a felony or misdemeanor, wherein the common law would only permit the use of deadly force in apprehending felons. Both the Model Penal Code and AS 11.81.370 focus instead upon balancing various interests: the need to secure suspects, the safety of the arresting officers, and the value of human life. By approving AS 11.81.370, the Alaska Supreme Court implicitly found that the stautory scheme strikes a valid balance between the rights of the suspect and interests of society by protecting the suspect's rights to life and to trial, and at the same time, safeguarding society's interests to prevent future crimes and to sustain the efficacy of the criminal justice system.

The court noted that approval of less stringent statutory standards than those provided in AS 11.81.370 would raise grave

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10. *Id.* at 50.

11. Similar to MODEL PENAL CODE § 3.07(2)(b), AS 11.81.370(a) provides:

> A peace officer in making an arrest, or terminating an escape may use deadly force only when and to the extent he reasonably believes the use of deadly force is necessary to make the arrest or terminate the escape or attempted escape from custody of a person he reasonably believes
>
> (1) has committed or attempted to commit a felony which involved the use of force against a person;
>
> (2) has escaped or is attempting to escape from custody while in possession of a firearm on or about his person; or
>
> (3) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

12. *See* 35 ALI PROCEEDINGS 283-93 (1957), discussed in Comment, *The Use Of Deadly Force In The Protection Of Property Under The Model Penal Code*, 59 COLUM. L. REV. 1212, 1222 (1959).

13. MODEL PENAL CODE § 3.07(2)(b)(iv) (Proposed Official Draft, 1962).

doubts as to the constitutionality of the more relaxed statute.[14] Thus, even though the court recognized possible fourth amendment violations in applying AS 12.25.080's "necessary and proper force" to arrest a fleeing nonviolent felon without referring to AS 11.81.370's reasonableness standard, the Alaska Supreme Court rejected the application of the exclusionary rule in the instant case. The court articulated several reasons for its decision. First, the exclusionary rule is not needed since other remedies fulfill the rule's deterrent goal. Second, since the exclusionary rule is not usually applied in the fleeing felon-arrest situation, but only in a setting where the object of police efforts is to obtain evidence of criminal action. Third, invoking the exclusionary rule in the absence of a history of arrests involving excessive force by Alaskan police officers would achieve only a marginal deterrent effect. Fourth, the particular facts of the present case do not compel the imposition of the exclusionary rule.

II. Criticism of the Court's Reasoning in Refusing to Apply the Exclusionary Rule to Excessive Force Arrests

The Alaska Supreme Court considered this case as a statutory violation and not as a constitutional question. However, the court apparently weigned factors both for and against application of the exclusionary rule since the court articulated four reasons in refusing to employ the exclusionary rule in excessive force arrest situations. The court's analysis is not without shortcomings. Moreover, the court's willingness to reassess the applicability of the exclusionary rule indicates that the rule may be appropriate in the context of excessive force arrests.

By upholding a rule of substantive constitutional law which permits reasonable use of deadly force to apprehend suspects, the Alaska Supreme Court apparently subscribes to the proposition that any challenge of excessive force would necessarily be a substantive interpretation of AS 11.81.370 rather than an evidentiary issue under the exclusionary rule. Since AS 11.81.370 is constitutional, allegations of excessive force would be restricted to having a jury weigh the evidence against the statute, which provides guidelines for when a reasonable use of deadly force is necessary and proper to effect an arrest.

A remedy beyond that of following a standard of reasonableness is needed in cases where excessive police force is allegedly used to arrest a fleeing nonviolent felon. While a jury may deter-

14. State v. Sundberg, 611 P.2d 44, 50, n.16 (Alaska 1980).

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17. *Id.* at 375-94

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18. 367 U.S. 643 (1

19. United States v.
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mine that unreasonable force was used to secure a suspect, this accomplishes little for the defendant, as no actual remedies are provided by Alaska's statutory scheme. Moreover, where unreasonable force is found under a fourth amendment analysis, the exclusionary rule, a remedy of the same constitutional dimensions, is appropriate. When an individual's rights against unreasonable search and seizure are violated, deterrence of such future conduct and the maintenance of judicial integrity mandate the application of the exclusionary rule.

At present, if the jury determines that unreasonable force was involved in apprehending a suspect, the suspect remains in custody and the only recourse is to pursue an individual action for damages against the arresting officer.[15] The presumption here is that all evidence would be admissible even when unreasonable force is found. However, the Alaska Supreme Court acknowledged two fundamental objections against the use of deadly force to arrest nonviolent felony suspects. In quoting a commentator, the court stated,

> The First is that use of such force merely to arrest for a nonviolent crime is grossly disproportionate and morally wrong. The Second objection is that the deprivation of life without trial is offensive to the presumption of innocence and other values central to our conception of justice. . . .[16]

These objections weigh in favor of a systematic deterrent against police violations of a suspect's due process rights by asserting the exclusionary rule and suppressing the evidence, as in the present case. The criminal justice system should not condone a law enforcement officer's failure to observe the balance between a suspect's rights to life and to trial and society's interest in preventing crime by using unneeded and unreasonable excessive force.[17]

Alaska has long applied the exclusionary rule. Even before the United States Supreme Court rendered all evidence obtained through an unlawful search and seizure inadmissible in state as well as federal trials in *Mapp v. Ohio*,[18] Alaska enforced the exclusionary rule in its territorial courts.[19] Since approving the exclu-

15. A suspect's remedies against individual police officers' violations of his/her constitutional rights are discussed later in the text.

16. Comment, *Deadly Force To Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L.L. REV. 361, 372-73 (1976).

17. *Id.* at 373-94. *Accord*, Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 366-67 (1974).

18. 367 U.S. 643 (1961).

19. United States v. Pappadementro, 6 Alaska 769 (D.C. Alaska 1922) (evidence procured from defendant's residence from unlawful entry by federal marshalls, who held warrant for defendant's arrest, inadmissible); United States v. Doumain, 7 Alaska 31 (D.C. Alaska 1923) (evidence procured from defendant's residence by a federal marshall in a warrantless search inadmissible).

sionary rule upon entering statehood,[20] the Alaska Supreme Court has explored the limits of the rule.[21] However, in the instant case, the court limited the application of the exclusionary rule where a police officer has used excessive force to arrest a nonviolent felon. The court's four reasons for this result are unconvincing.

First, the Alaska Supreme Court states that other remedies against an offending police officer are available to deter illegal police conduct: criminal sanctions, police departmental proceedings, civil rights actions, and common tort suits.[22] To the extent that other remedies are available, their focus is upon the individual police officer and their effectiveness is inconclusive.[23]

Criminal sanctions against an offending police officer are difficult for a suspect to litigate and are infrequently granted.[24] Several reasons explain the general ineffectiveness of criminal sanctions. Prosecutors, who must maintain a healthy working relationship with law enforcement agents, are not apt to file criminal charges against police officers. Criminal cases require the prosecution to prove beyond a reasonable doubt that the wrongdoing officer acted with specific intent. Juries may be reluctant to find as criminals those who are seeking to enforce the law.[25] Furthermore, criminal sanctions provided under state statutes are often minimal. Alaska's current criminal sanction against police interference with an individual's constitutional rights, AS 11.76.110, renders such illegal behavior only a misdemeanor.[26]

20. Ellison v. State, 383 P.2d 716 (Alaska 1963) (evidence procured from impounded vehicle in a warrantless search inadmissible due to its unreasonable search and seizure).

21. *See, e.g.*, State v. Glass, 583 P.2d 872 (Alaska 1978) (electronically recorded conversation inadmissible in a narcotics prosecution); Cruse v. State, 584 P.2d 1141 (Alaska 1978) (evidence stemming from independent and lawful source admissible even though it could have resulted from the unlawful search); State v. Sears, 553 P.2d 907 (Alaska 1976) (exclusionary rule not applicable in probation and parole revocation hearings since not criminal proceeding).

22. State v. Sundberg, 611 P.2d 44, 51-52 (Alaska 1980).

23. 1 W. LAFAVE, SEARCH AND SEIZURE, § 1.8(c) at 179-80 (1978).

24. Newman, *Suing The Lawbreakers: Proposal To Strengthen § 1983 Damages Remedy For Law Enforcers' Misconduct*, 87 YALE L.J. 447, 449-50 (1978); 1 W. LAFAVE, SEARCH AND SEIZURE, § 1.8(c) at 179-80 (1978). *See also* Annot., 83 A.L.R.3d 174, 224-30 (1976).

25. *Id.*

26. AS 11.76.110 provides:

Interference with Constitutional Rights.

(a) A person commits the crime of interference with constitutional rights if

(1) he injures, oppresses, threatens, or intimidates another person with intent to deprive that person of a right, privilege, or immunity in fact granted by the constitution or laws of this state;

(2) he intentionally injures, oppresses, threatens, or intimidates another person because that person has exercised or enjoyed a right, privilege, or immunity in fact granted by the constitution or laws of this state; or

(3) under color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, he intentionally deprives another of

Not only are authors and commentators in disagreement concerning the effectiveness of administrative remdies,[27] but federal courts may be barred from ordering local police departments to adopt and implement an effective police discipline system. In *Rizzo v. Goode*,[28] the United States Supreme Court reversed the district court's injunctive order which had significantly revised internal procedures of the Philadelphia police department. The Court found that the individual respondents lacked the requisite "personal stake in the outcome" since respondents' injury rested upon what an unnamed group of policemen might do in the future due to the officers' understanding of the department's disciplinary system. None of the petitioner class—the mayor, police commissioner, nor other Philadelphia city officials—had affirmatively deprived respondents of any constitutional rights by adopting a plan authorizing police misconduct. In addition, the Court adhered to the separation of powers doctrine by not asserting federal equitable power over state administration of its own law.[29] Even where a cause of action was brought under a federal statute, 42 U.S.C. § 1983, " 'the principles of equity, comity, and federalism' must nevertheless restrain a federal court."[30]

Civil suits involve direct claims by victims of official wrongdoing to secure compensation for the denial of the victims' constitutional rights. These claims are based upon either common law, such as a traditional tort action for false arrest, statutes, such as § 1983 civil rights actions authorized by Congress,[31] or the Constitution itself, such as civil tort actions against law enforcement agents for violation of fourth amendment rights.[32] In civil rights

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a right, privilege, or immunity in fact granted by the constitution or laws of this state.

At the time of the offense in the instant case AS 11.60.350 was in force, which explicitly set out the punishment for the misdemeanor as imprisonment for not more than one year, or a fine of not more than $1,000, or both.

27. *See* Schwartz, *Complaints Against The Police: Experience Of The Community Rights Division Of The Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970); Note, *The Administration Of Complaints By Civilians Against The Police*, 77 HARV. L. REV. 499 (1964).

28. 423 U.S. 362 (1976).

29. *Id.* at 379-81.

30. *Id.* at 379 (1976), citing Mitchum v. Foster, 407 U.S. 225, 243 (1972).

31. 42 U.S.C. § 1983 (Supp. III 1979) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In 1961, the Supreme Court of the United States ruled that state officials could not avoid sanctions by asserting that their actions were also prohibited by state law. Monroe v. Pape, 365 U.S. 167, 170-71 (1961), *rev'd on other grounds*, 436 U.S. 663 (1978).

32. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

actions, police defendants are afforded qualified immunity from liability based on a good faith belief in the propriety and reasonableness of their actions in accordance with statutory or administrative authority.[33] Likewise, civil tort suits against law enforcement agents for violation of fourth amendment rights are subject to the same good faith defense.

The circular reasoning of the good faith defense doctrine makes it difficult for the plaintiff-suspect to obtain a judgment against police defendants.[34] To succeed in a cause of action for an arrest in violation of a victim's fourth amendment rights, the plaintiff must prove an arrest was made without probable cause.[35] Then, an officer may assert a good faith defense that he reasonably believed he had probable cause to effect the arrest.[36] The full circle is reached because an unlawful arrest, which the plaintiff must prove, is defined as an arrest for which a prudent police officer could not reasonably believe there was probable cause. The good faith defense's anomaly is equally striking where a victim must prove the use of greater force than reasonably necessary to effect an arrest. A police department must controvert the definition of excessive force and prove necessary and reasonable force.[37] A jury is left to choose between the credibility of a plaintiff and of a police department agent.

One federal judge, Jon C. Newman,[38] stated that the § 1983 damage suit has potential as an effective deterrent against police misconduct but that it must be substantially restructured to afford the injured victim a better chance of success. Judge Newman noted the shortcomings of the § 1983 suit as a "suit brought by the wrong plaintiff against the wrong defendant, subject to the wrong

33. Pierson v. Ray, 386 U.S. 547 (1967) (in a § 1983 action, police officers are entitled to a defense of "good faith and probable cause" even though an arrest was pursuant to a statute which might subsequently be ruled unconstitutional). *See* Butz v. Economou, 438 U.S. 478 (1978) (although federal executive officials are afforded qualified immunity from damages liability as a general rule, certain officials such as administrative judges or agency attorneys and officials who serve as prosecutors in an administrative adjudication are absolutely immune).

Although Monell v. Dep't of Social Services, 436 U.S. 658 (1978), held that a city may be liable under a § 1983 action where plaintiff's injury resulted from policy or custom followed by the city, it is an open question whether use of excessive force under a statute permitting reasonable force is within a city's policy or custom. *See* Garner v. Memphis Police Dep't, 600 F.2d 52 (6th Cir. 1979) (action against municipality remanded for consideration of the above open question after *Monell*).

34. Bivens v. Six Unknown Named Agents, *on remand*, 456 F.2d 1339 (2d Cir. 1972), 403 U.S. 388 (1971). Furthermore, an open question still exists as to whether a city is liable for a *Bivens*-type action.

35. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 111-16 (1975).

36. *See* Bivens v. Six Unknown Named Agents, note 34 *supra*.

37. *See* Newman, *supra* note 24, at 460.

38. Judge, United States District Court, District of Connecticut.

defenses, litigated under the wrong burden of proof, and rewarded if successful with the wrong measure of damages."[39] In calling for congressional revision and expansion of the statute, the judge urged that the plaintiff or the "party injured" include the United States, since its own Constitution and laws are violated, and that the defendant or state police officer include his or her superiors as well as federal officers. The good faith defense is characterized at best to present confusion and at worst to defeat legitimate claims due to the doctrine's circular reasoning. The plaintiff's current burden of proof should be shifted partly to the defendant to comport with the criminal law standard of proof.[40] Present low monetary awards should be increased to provide adequate compensation for violations of constitutional rights and for any resulting detention time.[41]

However, the concern of the United States Supreme Court in its promulgation of the exclusionary rule and in its present view of the rule is not primarily with whether other remedies are available: "What remedies the defendant may have against them [police officers] we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."[42] Thus, in spite of arguments concerning the effectiveness of individual remedies, a systematic remedy such as the exclusionary rule is appropriate for fourth amendment violations.

The second reason the Alaska Supreme Court declined to apply the exclusionary rule to the instant case is that the rule is not usually invoked in the felony-arrest situation. Although the exclusionary rule has typically been applied where there is a search for static evidence, the fourth amendment prohibition against unreasonable searches applies to arrests as well.[43] The Alaska court has noted that an unlawful arrest renders a subsequent search in-

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39. *See* Newman, *supra* note 24, at 453.

40. Thus, plaintiff bears the burden of producing evidence to prove a denial of liberty by being arrested by excessive force. Plaintiff should not have to also prove a negative, that the intrusion was unwarranted. The burden of persuasion is better undertaken by defendant due to his access to such evidence. Otherwise, Judge Newman asserts, a fifty-fifty proposition is presented whereby a plaintiff may lose since a jury may tend to weigh credibility in favor of the law enforcement defendant. *Id.* at 463-64.

41. Newman, *supra* note 24, at 465.

42. Weeks v. United States, 232 U.S. 383, 398 (1914) (exclusionary rule promulgated to suppress evidence procured from warrantless search of defendant's residence).

43. United States v. Watson, 423 U.S. 411, 423 (1976) (Powell, J., concurring) (although arrest is "quintessentially a seizure", consent to search is presumed voluntary where defendant is in custody). *See also* Terry v. Ohio, 392 U.S. 1 (1968) (despite the fact that a brief detainment not amounting to an arrest is a "seizure" requiring Fourth Amendment protection and that no probable cause for an arrest or search exists, a stop and frisk is constitutionally permissible).

cident to that arrest invalid.[44] Moreover, the Alaska Supreme Court implicitly accepted the fleeing felon-arrest situation as potentially within the ambit of the exclusionary rule by stating that it would reconsider the rule's applicability in this context should other remedies prove ineffective.

Thus, it seems that the Alaska Supreme Court may be willing to address a troublesome issue which it declined to discuss in the instant case: that there is no evidence resulting from this illegal arrest to be excluded. The exclusionary rule is usually applied in cases where an illegal search and seizure is committed and all the resulting evidentiary fruit are suppressed.[45] However, respondent in the instant case dropped the pillow case before the illegal arrest. The stolen drugs in the pillow case were abandoned and are not fruits of the illegal arrest. This difficulty is compounded by the fact that probable cause to arrest is already established in a deadly force to arrest situation, and the dropped pillow case could be properly seized.[46] Hence, the court may reserve application of the exclusionary rule until a case arises which involves evidence resulting from an excessive force arrest.

Third, the Alaska Supreme Court noted that the imposition of the exclusionary rule was not called for in the absence of a history of excessive force arrests by Alaskan police officers. However, actual occurrences of excessive force arrests by Alaskan police officers are foreseeable. A recorded history of such occurrences should be unnecessary to impose a preventive measure, namely, the exclusionary rule. The premise of our legal system is to prevent injustice, not to repair it.[47]

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44. Schraff v. State, 544 P.2d 834 (Alaska 1975).

45. Wong Sun v. United States, 371 U.S. 471 (1963) ("fruits of the poisonous tree" doctrine applied to exclude evidence obtained indirectly from constitutional violations and "purged taint" exception applied to allow evidence obtained which had been attenuated from the constitutional violations). *See* Anderson v. State, 555 P.2d 251 (Alaska 1976) (pornographic material obtained while conducting a search for marijuana pursuant to a search warrant rendered inadmissible, not on a "fruit of the poisonous tree" doctrine, but on a "plain view" theory).

46. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (evidence discovered from an independent source, despite direct relation to the unconstitutional search and seizure, is admissible).

The exclusionary rule could arguably be invoked outside of the excessive force to arrest context by asserting that the search of a dropped pillow case, in the instant case, is not within the scope of a search incident to arrest. A search incident to arrest may be conducted of the person and the area within his immediate control in order to recover weapons or destructible evidence. Chimel v. California, 395 U.S. 752 (1969). Certainly a bag dropped some distance from the spot of arrest does not necessitate a search under the rationale of *Chimel*. This search also is not included within other exceptions to a general rule that a search requires a warrant: plain view, emergency situation, inventory search, consent search, or stop and frisk. For a review of search and seizure law in federal court and in Alaska state court, *see* Schraff v. State, 544 P.2d 834 (Alaska 1975).

47. *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (exclusionary rule applied as

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Finally, the Alaska Supreme Court found that the facts of the instant case did not warrant the imposition of the exclusionary rule. The court concluded that the officer had probable cause to make the arrest, acted in accordance with departmental guidelines and used a degree of force permitted by AS 12.25.080, which had not yet been reviewed by the court. There is no dispute that the officer had probable cause to arrest Sundberg. However, the officer did not act in accordance with departmental guidelines: although he did give a warning call, he failed to give a warning shot before opening fire on the suspect. Moreover, the officer opened fire when the well-lit street allowed the officer to see that Sundberg was unarmed. Although the court did not find that the facts of the present case warrant favoring the exclusionary rule in balancing the interests of society in preventing crime, a factual situation of more egregious police conduct may require the application of the exclusionary rule. An unarmed burglary suspect's rights to life and to trial should be protected from a police officer's use of excessive or deadly force to arrest him.

Underlying the Alaska Supreme Court's stated concerns is an additional reason for the court's hesitation to apply the exclusionary rule in the fleeing felon-arrest situation—the ineffectiveness of the exclusionary rule as a systematic deterrent against illegal law enforcement action. The Alaska Supreme Court's assertion that deterrence is the primary purpose of the exclusionary rule is consistent with the current Supreme Court view.[48] In *United States v. Janis*,[49] the United States Supreme Court reviewed the three major studies concerning the efficacy of the exclusionary rule[50] and concluded that each study appeared flawed.[51] The Court stated that it was in no better position to determine the deterrent effect of

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a deterrent where state officials unlawfully seized evidence to be used in a federal criminal trial).

43. United States v. Calandra, 414 U.S. 338 (1974) (deterrence of unlawful conduct would not be furthered since illegally seized evidence involved in questioning of grand jury witness could not be used at trial). United States v. Janis, 428 U.S. 433 (1976) (deterrence purpose of the exclusionary rule would not be served since documents unlawfully seized by state agents were to be used in a federal civil tax proceeding).

49. 428 U.S. 433 (1976).

50. Oaks, *Studying The Exclusionary Rule In Search And Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy And The U.S. Exclusionary Rule*, 1 J. POLICE SCI. AND AD. 36 (1973). These two studies indicate that the rule has not significantly affected police behavior and conclude that it has little or no value as a deterrent. Research more favorable to the exclusionary rule has attacked the above studies but has conceded that favorable evidence is no more conclusive: Cannon, *Is The Exclusionary Rule In Failing Health? Some New Data And A Plea Against A Precipitous Conclusion*, 62 KY. L.J. 681 (1974).

51. *See* Critique, *On The Limitations Of Empirical Evaluations Of The Exclusionary Rule: A Critique Of The Spiotto Research And United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

the exclusionary rule than in 1960, on the eve of adopting the exclusionary rule for state prosecutions. At that time, all empirical evidence as to the rule's effectiveness was also inconclusive.[52] Balancing the deterrent effect of an unlawful search and seizure of documents by a state law enforcement officer against the use of the secured evidence in a federal civil tax proceeding, the Court concluded that the purpose of deterrence would not be served and consequently did not apply the exclusionary rule.[53] The continued applicability of the exclusionary rule as a deterrent against unlawful police conduct should depend upon a balancing process in which, according to one commentator,

> The deterrent efficacy of the exclusionary rule can be evaluated without resort to the notion of burdens of proof. If all laws which are justified wholly or partly on the ground that they deter undesirable conduct had to be justified by showing that they actually do deter, very little of the criminal law, at least, could meet the test. Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred. . . .[54]

The Supreme Court in *United States v. Janis* also sustained the vitality of a second, albeit subordinate purpose for the exclusionary rule, that a government should not become a party to the wrong committed by its officers.[55] In considering judicial integrity as well as the deterrence of police misconduct, the focus "must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights."[56] The words of Justice Brandeis could not be easily diluted:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[57]

52. United States v. Janis, *supra* note 48, at 450-52, n.22.

53. *Id.* at 454.

54. Dworkin, *Fact Style Adjudication And The Fourth Amendment: The Limits Of Lawyering*, 48 Ind. L.J. 329, 333 (1973).

55. Alaska's Supreme Court accepted the judicial integrity rationale for the exclusionary rule in State v. Sears, 553 P.2d 907 (Alaska 1976) (Alaska's exclusionary rule does not apply in probation and parole revocation hearings).

56. United States v. Janis, 428 U.S. 433, 458, n.35 (1976).

57. Olmstead v. United States, 277 U.S. 438, 485 (1923) (Brandeis, J., dissenting).

Moreover, Justice Burger in his harsh criticism of the exclusionary rule in *Bivens v. Six Unknown Agents*[58] relented from calling for the rule's destruction until an alternative can be found.

III. Conclusion

Although the Supreme Court of Alaska accepted a statutory standard of reasonableness in this case as a remedy against excessive police force in arrest situations, the exclusionary rule should be applied as a further remedy. Where a jury determines that unreasonable force was used to secure a suspect, Alaska's statutory scheme provides no remedies. Moreover, where unreasonable force is found under a fourth amendment analysis, the exclusionary rule is appropriate since it is a remedy of constitutional dimensions. To the extent that other remedies are available to the victim who is deprived of constitutional rights, their focus is upon the individual police officer and their effectiveness is inconclusive. Practitioners should note that the court did not preclude a reconsideration of the application of the exclusionary rule in the excessive-force-to-arrest situation; an appropriate case should therefore be advanced to the court.

Where shooting a fleeing nonviolent felon to make an arrest is found an unreasonable search and seizure, all secured evidence should be suppressed. Society's interest in guaranteeing the suspect the right to life and trial should outweigh preventing crime at all costs. It is morally reprehensible and contrary to the presumption of innocence in our criminal justice system to permit a government to condone illegal action by its own officers. Since empirical evidence is inconclusive, the public should be able to at least have faith that deterrence of a government's participation in unlawful searches and seizures is effected through the application of the exclusionary rule. Chief Justice Burger's comment in his dissent in *Bivens v. Six Unknown Agents*, where an individual was afforded a civil cause of action for a federal law enforcement agent's violation of fourth amendment rights, is equally appropriate in the instant case:

> I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might

58. 403 U.S. 388 (1971) (Burger, J., dissenting).

conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket, or a shoplifter.[59]

*Velma K. Lim**

59. *Id.* at 419.

* J.D. 1981, University of California, Los Angeles.

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1. *See* note
2. *See* note
3. *See* note
4. 611 P.2d
5. *Id.* at 49
6. Munus
7. 611 P.2d
8. Klippan
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9. Klippan
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III

During his last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:

"The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

In this case, I firmly believe that a proper "sensitivity to the legitimate interests of both State and National Governments" requires invalidation of Titles I and III of PURPA insofar as they apply to state regulatory authorities. Accordingly, I respectfully dissent from the Court's decision to uphold those portions of the statute.

UNITED STATES, Petitioner

v.

Albert ROSS, Jr.

No. 80-2209.

Argued March 1, 1982.

Decided June 1, 1982.

Defendant was convicted before the United States District Court for the District of Columbia, William R. Bryant, Chief Judge, of possession of narcotics with intent to distribute, and he appealed. The Court of Appeals, Ginsburg, Circuit Judge, 655 F.2d 1159, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Stevens, held that police officers who had legitimately stopped automobile and who had probable cause to believe that contraband was concealed somewhere within it could conduct warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since scope of warrantless search of automobile is not defined by nature of container in which the contraband is secreted, but rather, it is defined by the object of the search and places in which there is probable cause to believe that it may be found.

Reversed and remanded.

Justice Blackmun and Justice Powell filed concurring opinions.

Justice White dissented and filed opinion.

Justice Marshall dissented and filed opinion in which Justice Brennan joined.

1. Searches and Seizures ⇐7(1)

A search conducted pursuant to exception to warrant requirement applicable to searches of vehicles that are supported by probable cause is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(10)

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(10)

When a legitimate search is under way, and when its purpose and its limits have

been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks and wrapped packages, in the case of a vehicle, must give way to the interest in prompt and efficient completion of task at hand. U.S.C.A.Const.Amend. 4.

4. Searches and Seizures ⇐7(10)

Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view, but the protection afforded by the Amendment varies in different settings. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures ⇐7(10)

Individual's expectation of privacy in vehicle and its contents may not survive if probable cause is given to believe that vehicle is transporting contraband. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐3.3

The scope of warrantless search based on probable cause is no narrower, and no broader, than the scope of a search authorized by warrant supported by probable cause; only prior approval of magistrate is waived, and the search otherwise is as the magistrate could authorize. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇐8

In choosing to search without a warrant on their own assessment of probable cause, police officers lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. U.S.C.A.Const.Amend. 4.

8. Searches and Seizures ⇐7(10)

Police officers who had legitimately stopped automobile and who had probable cause to believe that contraband was concealed somewhere within it could conduct warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since scope of warrantless search of automobile is not defined by nature of container in which the contraband is secreted, but rather, is defined by the object of the search and places in which there is probable cause to believe that it may be found; overruling *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 644, and modifying *Arkansas v. Sanders*, 44 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235. U.S.C.A. Const.Amend. 4.

9. Courts ⇐90(3)

Although Supreme Court's decision that police officers with probable cause to search a vehicle may conduct a warrantless search of every part of the vehicle, including containers and packages, was inconsistent with one prior Supreme Court decision and with a portion of another prior decision, the doctrine of stare decisis did not preclude the decision since there was no court opinion supporting a single rationale for Court's judgment in the first prior case, and the Court's decision rejected only some of the reasoning in the second prior case. U.S.C. A.Const.Amend. 4.

Syllabus *

Acting on information from an informant that a described individual was selling narcotics kept in the trunk of a certain car parked at a specified location, District of Columbia police officers immediately drove to the location, found the car there, and a short while later stopped the car and arrested the driver (respondent), who matched the informant's description. One of the officers opened the car's trunk, found a closed brown paper bag, and after opening the bag, discovered glassine bags containing white powder (later determined to be heroin). The officer then drove the car to headquarters, where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Respondent was subsequently convicted of possession of heroin with intent to distribute—the heroin and currency found in the
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L.Ed.2d 235. Pp. 2165–21

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the object of the search.

1. "The right of the people
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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, [illegible] 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499

and currency found in the searches having been introduced in evidence after respondent's pretrial motion to suppress the evidence had been denied. The Court of Appeals reversed, holding that while the officers had probable cause to stop and search respondent's car—including its trunk—without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. Pp. 2162–2173.

(a) The "automobile exception" to the Fourth Amendment's warrant requirement established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. Pp. 2162–2164.

(b) However, the rationale justifying the automobile exception does not apply so as to permit a warrantless search of any movable container that is believed to be carrying an illicit substance and that is found in a public place—even when the container is placed in a vehicle (not otherwise believed to be carrying contraband). *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538; *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235. Pp. 2165–2167.

(c) Where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Pp. 2169–2172.

(d) The doctrine of *stare decisis* does not preclude rejection here of the holding in *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, and some of the reasoning in *Arkansas v. Sanders*, *supra*. Pp. 2172–2173.

210 U.S.App.D.C. 342, 655 F.2d 1159, reversed and remanded.

Andrew L. Frey, Washington, D. C., for petitioner.

William J. Garber, Washington, D. C., for respondent.

Justice STEVENS delivered the opinion of the Court.

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. The Court in *Carroll* did not explicitly address the scope of the search that is permissible. In this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view. We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched."[1]

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

I

In the evening of November 27, 1978, an informant who had previously proved to be reliable telephoned Detective Marcum of the District of Columbia Police Department and told him that an individual known as "Bandit" was selling narcotics kept in the trunk of a car parked at 439 Ridge Street. The informant stated that he had just observed "Bandit" complete a sale and that "Bandit" had told him that additional narcotics were in the trunk. The informant gave Marcum a detailed description of "Bandit" and stated that the car was a "purplish maroon" Chevrolet Malibu with District of Columbia license plates.

Accompanied by Detective Cassidy and Sergeant Gonzales, Marcum immediately drove to the area and found a maroon Malibu parked in front of 439 Ridge Street. A license check disclosed that the car was registered to Albert Ross; a computer check on Ross revealed that he fit the informant's description and used the alias "Bandit." In two passes through the neighborhood the officers did not observe anyone matching the informant's description. To avoid alerting persons on the street, they left the area.

The officers returned five minutes later and observed the maroon Malibu turning off Ridge Street onto Fourth Street. They pulled alongside the Malibu, noticed that the driver matched the informant's description, and stopped the car. Marcum and Cassidy told the driver—later identified as Albert Ross, the respondent in this action—to get out of the vehicle. While they searched Ross, Sergeant Gonzales discovered a bullet on the car's front seat. He searched the interior of the car and found a pistol in the glove compartment. Ross then was arrested and handcuffed. Detective Cassidy took Ross' keys and opened the trunk, where he found a closed brown paper bag. He opened the bag and discovered a number of glassine bags containing a white powder. Cassidy replaced the bag, closed the trunk, and drove the car to Headquarters.

At the police station Cassidy thoroughly searched the car. In addition to the "lunch-type" brown paper bag, Cassidy found in the trunk a zippered red leather pouch. He unzipped the pouch and discovered $3,200 in cash. The police laboratory later determined that the powder in the paper bag was heroin. No warrant was obtained.

Ross was charged with possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)[1]. Prior to trial, he moved to suppress the heroin found in the paper bag and the currency found in the leather pouch. After an evidentiary hearing, the District Court denied the motion to suppress. The heroin and currency were introduced in evidence at trial and Ross was convicted.

A three-judge panel of the Court of Appeals reversed the conviction. It held that the police had probable cause to stop and search Ross' car and that, under *Carroll v. United States*, *supra*, and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, the officers lawfully could search the automobile—including its trunk—without a warrant. The court considered separately, however, the warrantless search of the two containers found in the trunk. On the basis of *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, the court concluded that the constitutionality of a warrantless search of a container found in an automobile depends on whether the owner possesses a reasonable expectation of privacy in its contents. Applying that test, the court held that the warrantless search of the paper bag was valid but the search of the leather pouch was not. The court remanded for a new trial at which the items taken from the paper bag from the leather pouch, co

The entire Court of Appe rehear the case en banc. court rejected the panel's distinction of constitutiona isted between the two con respondent's trunk; it hel should not have opened without first obtaining court reasoned:

"No specific, well-deli called to our attention p to dispense with a warr search 'unworthy' contai we believe that a rule validity of a warrantl turn on judgments abo of a container would imp able and unmanageable and courts. For these cause the Fourth Amend persons, not just those or fastidiousness to pla containers that decisio rank in the luggage line, Fourth Amendment war forbids the warrantles closed, opaque paper b extent that it forbids opening of a small unlo

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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 th to be seized." U.S.Const.,

2. The court rejected the ment that the warrantless s pouch was justified as incid arrest. App. to Pe for Government has not c all

3. Judge Tamm, the author opinion, reiterated the view hibited the warrantless se pouch but not the search Judge Robb agreed that th pelled by *Sanders*, althoug his opinion "the right to se should include the right to found within the automob to search a lawfully arres with it the right to examin wallet and any envelope and the right to search a co ty to open and search a containers found within th

taken from the paper bag, but not those from the leather pouch, could be admitted.[2]

The entire Court of Appeals then voted to rehear the case en banc. A majority of the court rejected the panel's conclusion that a distinction of constitutional significance existed between the two containers found in respondent's trunk; it held that the police should not have opened either container without first obtaining a warrant. The court reasoned:

> "No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search 'unworthy' containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decision-makers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch." 655 F.2d 1159, 1161 (CADC 1981) (footnote omitted).

The en banc Court of Appeals considered, and rejected, the argument that it was reasonable for the police to open both the paper bag and the leather pouch because they were entitled to conduct a warrantless search of the entire vehicle in which the two containers were found. The majority concluded that this argument was foreclosed by *Sanders*.

Three dissenting judges interpreted *Sanders* differently.[3] Other courts also have read the *Sanders* opinion in different ways.[4] Moreover, disagreement concerning the proper interpretation of *Sanders* was at least partially responsible for the fact that *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, was decided last Term without a Court opinion.

There is, however, no dispute among judges about the importance of striving for clarification in this area of the law. For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it 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

place to be searched, and the persons or things to be seized." U.S.Const., Amdt. 4.

2. The court rejected the Government's argument that the warrantless search of the leather pouch was justified as incident to respondent's arrest. App. to Pet. for Cert. 137a. The Government has not challenged this holding.

3. Judge Tamm, the author of the original panel opinion, reiterated the view that *Sanders* prohibited the warrantless search of the leather pouch but not the search of the paper bag. Judge Robb agreed that this result was compelled by *Sanders*, although he stated that in his opinion "the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room." 655 F.2d, at 1180. Judge MacKinnon concurred with Judge Tamm that *Sanders* did not prohibit the warrantless search of the paper bag. Concerning the leather pouch, he agreed with Judge Wilkey, who dissented on the ground that *Sanders* should not be applied retroactively.

4. Many courts have held that *Sanders* requires that a warrant be obtained only for personal luggage and other "luggage-type" containers. See, *e.g.*, *United States v. Brown*, 635 F.2d 1207 (CA6 1980); *United States v. Jiminez*, 626 F.2d 39 (CA7 1980). One court has held that *Sanders* does not apply if the police have probable cause to search an entire vehicle and not merely an isolated container within it. Cf. *State v. Bible*, 389 So.2d 42 (La.1980), *remanded*, 453 U.S. 918, 101 S.Ct. 3153, 69 L.Ed.2d 1001; *State v. Hernandez*, 408 So.2d 911 (La.1981); see also *United States v. Ross*, 655 F.2d, at 1180 (Robb, J., dissenting).

enforcement. No single rule of law can resolve every conflict, but our conviction that clarification is feasible led us to grant the Government's petition for certiorari in this case and to invite the parties to address the question whether the decision in *Robbins* should be reconsidered. —— U.S. ——, 102 S.Ct. 386, 70 L.Ed.2d 205.

II

We begin with a review of the decision in *Carroll* itself. In the fall of 1921, federal prohibition agents obtained evidence that George Carroll and John Kiro were "bootleggers" who frequently traveled between Grand Rapids and Detroit in an Oldsmobile Roadster.[5] On December 15, 1921, the agents unexpectedly encountered Carroll and Kiro driving west on that route in that car. The officers gave pursuit, stopped the roadster on the highway, and directed Carroll and Kiro to get out of the car.

No contraband was visible in the front seat of the Oldsmobile and the rear portion of the roadster was closed. One of the agents raised the rumble seat but found no liquor. He raised the seat cushion and again found nothing. The officer then struck at the "lazyback" of the seat and noticed that it was "harder than upholstery ordinarily is in those backs." 267 U.S., at 174, 45 S.Ct., at 292. He tore open the seat cushion and discovered 68 bottles of gin and whiskey concealed inside. No warrant had been obtained for the search.

Carroll and Kiro were convicted of transporting intoxicating liquor in violation of the National Prohibition Act. On review of those convictions, this Court ruled that the warrantless search of the roadster was reasonable within the meaning of the Fourth Amendment. In an extensive opinion written by Chief Justice Taft, the Court held:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149, 45 S.Ct., at 283.

The Court explained at length the basis for this rule. The Court noted that historically warrantless searches of vessels, wagons, and carriages—as opposed to fixed premises such as a home or other building—had been considered reasonable by Congress. After reviewing legislation enacted by Congress between 1789 and 1799,[6] the Court stated:

> "Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151, 45 S.Ct., at 284.

5. On September 29, 1921, Carroll and Kiro met the agents in Grand Rapids and agreed to sell them three cases of whiskey. The sale was not consummated, however, possibly because Carroll learned the agents' true identity. In October, the agents discovered Carroll and Kiro driving the Oldsmobile Roadster on the road to Detroit, which was known as an active center for the introduction of illegal liquor into this country. The agents followed the roadster as far as East Lansing, but there abandoned the chase.

6. The legislation authorized customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it concealed goods subject to duty. The same legislation required a warrant for searches of dwelling places. 267 U.S., at 150–151, 45 S.Ct., at 284.

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The Court reviewed additional legislation passed by Congress[7] and again noted that

> "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153, 45 S.Ct., at 285.

Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods.[8] It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.[9]

In defining the nature of this "exception" to the general rule that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used," *id.*, at 156, 45 S.Ct., at 285, the Court in *Carroll* emphasized the importance of the requirement

7. In particular, the Court noted an 1815 statute that permitted customs officers not only to board and search vessels without a warrant "but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." *Id.*, at 151, 45 S.Ct., at 284.

8. In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

9. Subsequent cases make clear that the decision in *Carroll* was not based on the fact that the only course available to the police was an immediate search. As Justice Harlan later recognized, although a failure to *seize* a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless *search*. *Chambers v. Maroney*, 399 U.S. 42, 62–64, 90 S.Ct. 1975, 1986–1987, 26 L.Ed.2d 419 (opinion of Harlan, J.). The Court in *Chambers*, however—with only Justice Harlan dissenting—refused to adopt a rule that would permit a warrantless seizure but prohibit a warrantless search. The Court held that if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney*, 399 U.S., at 52, 90 S.Ct., at 1981.

The Court also has held that if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded. *Chambers, supra; Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209. These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile—which often could leave the occupants stranded on the highway—the Court rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference.

that officers have probable cause to believe that the vehicle contains contraband.

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 153–154, 45 S.Ct., at 285.

Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. "'[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.'" *Id.*, at 161–162, 45 S.Ct., at 288 (quoting *Director General v. Kastenbaum*, 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146).[10]

[1] In short, the exception to the warrant requirement established in *Carroll* —the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause.[11] In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.[12]

10. After reviewing the relevant authorities at some length, the Court concluded that the probable cause requirement was satisfied in the case before it. The Court held that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.*, 267 U.S., at 162, 45 S.Ct., at 288. Cf. *Brinegar v. United States*, 338 U.S. 160, 176–177, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879; *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134.

11. See *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629; *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538; *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419; *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209; *Colorado v. Bannister*, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1.

Warrantless searches of automobiles have been upheld in a variety of factual contexts quite different from that presented in *Carroll*. Cf. *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730; *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706; *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. Many of these searches do not require a showing of probable cause that the vehicle contains contraband. We are not called upon—and do not—consider in this case the scope of the warrantless search that is permitted in these cases.

12. As the Court in *Carroll* concluded:

"We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* [*v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652] and *Amos* [*v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654] cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them." 267 U.S., at 156, 45 S.Ct., at 286.

III

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III

The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance. That argument, however, was squarely rejected in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538.

Chadwick involved the warrantless search of a 200-pound footlocker secured with two padlocks. Federal railroad officials in San Diego became suspicious when they noticed that a brown footlocker loaded onto a train bound for Boston was unusually heavy and leaking talcum powder, a substance often used to mask the odor of marijuana. Narcotics agents met the train in Boston and a trained police dog signaled the presence of a controlled substance inside the footlocker. The agents did not seize the footlocker, however, at this time; they waited until respondent Chadwick arrived and the footlocker was placed in the trunk of Chadwick's automobile. Before the engine was started, the officers arrested Chadwick and his two companions. The agents then removed the footlocker to a secured place, opened it without a warrant, and discovered a large quantity of marijuana.

In a subsequent criminal proceeding, Chadwick claimed that the warrantless search of the footlocker violated the Fourth Amendment. In the District Court, the Government argued that as soon as the footlocker was placed in the automobile a warrantless search was permissible under *Carroll*. The District Court rejected that argument,[13] and the Government did not pursue it on appeal.[14] Rather, the Government contended in this Court that the warrant requirement of the Fourth Amendment applied only to searches of homes and other "core" areas of privacy. The Court unanimously rejected that contention.[15] Writing for the Court, THE CHIEF JUSTICE stated:

> "[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause al searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of responden's' footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." 433 U.S., at 8–9, 97 S.Ct., at 2481–2482 (footnote omitted).

The Court in *Chadwick* specifically rejected the argument that the warrantless search was "reasonable" because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in

13. The District Court noted:

> "In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in [the federal building]. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of an automobile's open trunk." *United States v. Chadwick*, 393 F.Supp. 763, 772 (Mass.1975).

14. This Court specifically noted: "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes." 433 U.S., at 11–12, 97 S.Ct., at 2483–2484.

15. See *id.*, at 17, 97 S.Ct., at 2486 (BLACKMUN, J., dissenting).

an automobile," *id.*, at 13, 97 S.Ct., at 2484, and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.*, at [illegible] n. 7, 97 S.Ct., at 2484, n.7. In ruling that the warrantless search of the footlocker was unjustified, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant. Cf. *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877; *United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282. In sum, the Court in *Chadwick* declined to extend the rationale of the "automobile exception" to permit a warrantless search of any movable container found in a public place.[16]

The facts in *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, were similar to those in *Chadwick*. In *Sanders*, a Little Rock police officer received information from a reliable informant that Sanders would arrive at the local airport on a specified flight that afternoon carrying a green suitcase containing marijuana. The officer went to the airport. Sanders arrived on schedule and retrieved a green suitcase from the airline baggage service. Sanders gave the suitcase to a waiting companion who placed it in the trunk of a taxi. Sanders and his companion drove off in the cab; police officers followed and stopped the taxi several blocks from the airport. The officers opened the trunk, seized the suitcase, and searched it on the scene without a warrant. As predicted, the suitcase contained marijuana.

The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth Amendment, and this Court affirmed. As in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable; the police had probable cause to seize the suitcase before it was placed in the trunk of the cab and did not have probable cause to search the taxi itself.[17] Since the suitcase had been placed in the trunk, no danger existed that its contents could have been secreted elsewhere in the vehicle.[18] As THE CHIEF JUSTICE noted in his opinion concurring in the judgment:

"Because the police officers had probable cause to believe that respondent's green suitcase contained marijuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States v. Chadwick*, 433 U.S. 1 [97 S.Ct. 2476, 53 L.Ed.2d 538] (1977).

. . . . .

Here, as in *Chadwick*, 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

16. The Court concluded that there is a significant difference between the seizure of a sealed package and a subsequent search of its contents; the search of the container in that case was "a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker." *Id.*, 433 U.S., at 13, n. 8, 97 S.Ct., at 2485, n. 8. A temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual—and without as great a burden on the police—as in the case of the seizure of an automobile. See n. 9, *supra*.

17. The Arkansas Supreme Court carefully reviewed the facts of the case and concluded: "The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it." *Sanders v. State*, 262 Ark. 595, 599, 559 S.W.2d 704, 706 (1977). The court also noted: "The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental." *Id.*, at 600, n. 2, 559 S.W.2d, at 706.

18. Moreover, none of the practical difficulties associated with the detention of a vehicle on a public highway that made the immediate search in *Carroll* reasonable could justify an immediate search of the suitcase, since the officers had no interest in detaining the taxi or its driver.

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The Court in *Sanders* did not, however, rest its decision solely on the authority of *Chadwick*. In rejecting the State's argument that the warrantless search of the suitcase was justified on the ground that it had been taken from an automobile lawfully stopped on the street, the Court broadly suggested that a warrantless search of a container found in an automobile could never be sustained as part of a warrantless search of the automobile itself.[19] The Court did not suggest that it mattered whether probable cause existed to search the entire vehicle. It is clear, however, 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.

Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, however, was a case in which suspicion was not directed at a specific container. In that case the Court for the first time was forced to consider whether police officers who are entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. In the early morning of January 5, 1975, police officers stopped Robbins' station wagon because he was driving erratically. Robbins got out of the car, but later returned to obtain the vehicle's registration papers. When he opened the car door, the officers smelled marijuana smoke. One of the officers searched Robbins and discovered a vial of liquid; in a search of the interior of the car the officer found marijuana. The police officers then opened the tailgate of the station wagon and raised the cover of a recessed luggage compartment. In the compartment they found two packages wrapped in green opaque plastic. The police unwrapped the packages and discovered a large amount of marijuana in each.

Robbins was charged with various drug offenses and moved to suppress the contents of the plastic packages. The California Court of Appeal held that "[s]earch of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him"[20] and that the warrantless search of the packages was justified because "the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents." 103 Cal.App.3d 34, 40, 162 Cal.Rptr. 780, 783 (1980).

This Court reversed. Writing for a plurality, Justice Stewart rejected the argument that the outward appearance of the packages precluded Robbins from having a reasonable expectation of privacy in their contents. He also squarely rejected the argument that there is a constitutional distinction between searches of luggage and searches of "less worthy" containers. Justice Stewart reasoned that all containers are equally protected by the Fourth Amendment unless their contents are in plain view. The plurality concluded that

19. The Court stated 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." 442 U.S., at 764, n. 13, 99 S.Ct., at 2593, n. 13. This general rule was limited only by the observation 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." *Ibid.*

20. 103 Cal.App.3d 34, 39, 162 Cal.Rptr. 780, 782 (1980).

the warrantless search was impermissible because *Chadwick* and *Sanders* had established that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 453 U.S., at 425, 101 S.Ct., at 2845.

In a concurring opinion, Justice Powell, the author of the Court's opinion in *Sanders*, 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 429, 101 S.Ct., at 2847.[21] He noted that possibly "the controlling question should be the scope of the automobile exception to the warrant requirement," *id.*, at 435, 101 S.Ct., at 2850, and explained that under that view

> "when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post*, at 451 and n. 13 [101 S.Ct., at 2859 and n.13] (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders*, neither of which is an 'automobile case,' because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile." *Ibid.*

The parties in *Robbins* had not pressed that argument, however, and Justice POWELL concluded that institutional constraints made it inappropriate to re-examine basic doctrine without full adversary presentation. He concurred in the judgment, since it was supported—although not compelled—by the Court's opinion in *Sanders*, and stated that a future case might present a better opportunity for thorough consideration of the basic principles in this troubled area.

That case has arrived. Unlike *Chadwick* and *Sanders*, in this case police officers had probable cause to search respondent's entire vehicle.[22] Unlike *Robbins*, in this case the parties have squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle. We now address that question.

21. "While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigar box or a Dixie cup in the course of a probable cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain a warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." 453 U.S., at 433–434, 101 S.Ct., at 2849–2850 (POWELL, J., concurring).

The substantial burdens on law enforcement identified by Justice POWELL would, of course, not be affected by the character of the container found during an automobile search. No comparable practical problems arise when the official suspicion is confined to a particular piece of luggage, as in *Chadwick* and *Sanders*. Cf. n. 19, *supra*.

22. The en banc Court of Appeals stated that "[b]ased on the tip the police received, Ross's car was properly stopped and searched, and the pouch and bag were properly seized." 655 F.2d, at 1168 (footnote omitted). The court explained:

"[W]e believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." *Id.*, at 1168, n. 22.

The court further noted that "[i]n this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified." *Id.*, at 1166.

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IV

In *Carroll* itself, the whiskey that the prohibition agents seized was not in plain view. It was discovered only after an officer opened the rumble seat and tore open the upholstery of the lazyback. The Court did not find the scope of the search unreasonable. Having stopped Carroll and Kiro on a public road and subjected them to the indignity of a vehicle search—which the Court found to be a reasonable intrusion on their privacy because it was based on probable cause that their vehicle was transporting contraband—prohibition agents were entitled to tear open a portion of the roadster itself. The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.

In *Chambers v. Maroney* the police found weapons and stolen property "concealed in a compartment under the dashboard." 399 U.S., at 44, 90 S.Ct., at 1977. No suggestion was made that the scope of the search was impermissible. It would be illogical to assume that the outcome of *Chambers*—or the outcome of *Carroll* itself—would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

In its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile. In *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629, the Court upheld a warrantless seizure of whiskey found during a search of an automobile, some of which was discovered in "whiskey bags" that could have contained other goods.[23] In *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151, federal officers seized and searched packages of unstamped liquor found in the trunk of an automobile searched without a warrant. As described by a police officer who participated in the search: "I turned the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper and tied with twine; I think somewhere around thirty packages, each one containing six bottles."[24] In these cases it was not contended that police officers needed a warrant to open the whiskey bags or to unwrap the brown paper packages. These decisions nevertheless "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States v. Deveaux*, 5 Cranch 61, 88, 3 L.Ed. 38 (Marshall, C. J.). The fact that no such argument was even made illuminates the profession's understanding of the scope of the search permitted under *Carroll*. Indeed, prior to the decisions in *Chadwick* and *Sanders*, courts routinely had held that containers and

23. At the suppression hearing, defense counsel asked the police officer who had conducted the search: "Isn't it possible to put other goods in a bag that has the resemblance of a whiskey bag?" The officer responded: "I suppose it is. I did not think of that at that time. I knew it was whiskey, I was sure it was." App., O.T. 1930, No. 477, p. 27.

24. App., O.T.1938, No. 49, p. 23. The brief of then Solicitor General Robert Jackson noted that the items searched "were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted." Brief for United States, O.T.1938, No. 49, p. 6.

packages found during a legitimate warrantless search of an automobile also could be searched without a warrant.[25]

As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history. It is therefore significant that the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle. Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.[26] The Court in *Carroll* held that "contraband goods *concealed* and illegally transported in an automobile or other vehicle may be searched for without a warrant." 267 U.S., at 153, 45 S.Ct., at 285 (emphasis added). As we noted in *Henry v. United States*, 361 U.S. 98, 104, 80 S.Ct. 168, 172, 4 L.Ed.2d 134, the decision in *Carroll* "merely relaxed the requirements for a warrant on grounds of impracticability." It neither broadened nor limited the scope of a lawful search based on probable cause.

[2, 3] A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.[27] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient comple at hand.[28]

This rule applies equally t as indeed we believe it must which the Court was in virtu agreement in *Robbins* was t tional distinction between "unworthy" containers woul Even though such a disti could evolve in a series of paper bags, locked trunks, and orange crates were pla of the line or the other,[30] t pose of the Fourth Amendi such a distinction. For ju frail cottage in the kingdo entitled to the same guaran as the most majestic mansio a traveler who carries a to few articles of clothing in knotted scarf claim an conceal his possessions from tion as the sophisticated exe locked attaché case.

[4] As Justice Stewart bins, the Fourth Amendmen

25. See, *e.g.*, *United States v. Soriano*, 497 F.2d 147, 149–150 (CA5 1974) (en banc); *United States v. Vento*, 533 F.2d 838, 867, n. 101 (CA3 1976); *United States v. Tramunti*, 513 F.2d 1087, 1104 (CA2 1975); *United States v. Issod*, 508 F.2d 990, 993 (CA7 1974); *United States v. Evans*, 481 F.2d 990, 994 (CA9 1973); *United States v. Bowman*, 487 F.2d 1229 (CA10 1973). Many courts continued to apply this rule following the decision in *Chadwick*. Cf. *United States v. Milhollan*, 599 F.2d 518, 526–527 (CA3 1979); *United States v. Gaultney*, 581 F.2d 1137, 1144–1145 (CA5 1978); *United States v. Finnegan*, 568 F.2d 637, 640–641 (CA9 1977). In ruling that police could search luggage and other containers found during a legitimate warrantless search of an automobile, courts often assumed that the "automobile exception" of *Carroll* applied whenever a container in an automobile was believed to contain contraband. That view, of course, has since been qualified by *Chadwick* and *Sanders*.

26. It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise. See nn. 6 and 7, *supra*. Presumably such merchandise was shipped then in containers of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country—whether contraband was transported in a horse drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

27. In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes:

"Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" 2 LaFave, Search and Seizure 152 (1978) (quoting *Massey v. Commonwealth*, 305 S.W.2d 755, 756 (Ky.1957)).

28. The practical consideratio warrantless search of an aut to apply until the entire searc ble and its contents has been gually, the entire vehicle its upholstery) could be searche rant, with all wrapped article found during that search then trate. But prohibiting police i mediately a container in which search is most likely to be fo forcing them first to comb t would actually exacerbate the vacy interests. Moreover, un itself was opened the police certain that the contraband w a yet undiscovered portion of in every case in which a cont the vehicle would need to be warrant was obtained. Such would be directly inconsistent ale supporting the decisions *Chambers*. Cf. nn. 19 and 22,

29. Cf. 453 U.S., at 426–427, 10 2846 (plurality opinion); *id.*, a at 2851 (BLACKMUN, J., dis 443, 101 S.Ct., at 2854 (REH senting); *id.*, at 447, 101 S.Ct VENS, J., dissenting).

prompt and efficient completion of the task at hand.[28]

This rule applies equally to all containers, as indeed we believe it must. One 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.[29] Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other,[30] the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,[31] so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

[4] As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view. 453 U.S., at 427, 101 S.Ct., at 2846 (plurality opinion). But the protection afforded by the Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents. A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause.

[5–7] In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a

28. The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* and *Chambers*. Cf. nn. 19 and 22, *supra*.

29. Cf. 453 U.S., at 426–427, 101 S.Ct., at 2845–2846 (plurality opinion); *id.*, at 436, 101 S.Ct., at 2851 (BLACKMUN, J., dissenting); *id.*, at 443, 101 S.Ct., at 2854 (REHNQUIST, J., dissenting); *id.*, at 447, 101 S.Ct., at 2856 (STEVENS, J., dissenting).

30. If the distinction is based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy, however, the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked "private" might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances.

31. "'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dares not cross the threshold of the ruined tenement!'" *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332 (quoting remarks attributed to William Pitt); cf. *Payton v. New York*, 445 U.S. 573, 601 n. 54, 100 S.Ct. 1371, 1388 n. 54, 63 L.Ed.2d 639.

movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which—in light of *Carroll*—does not itself require the prior approval of a magistrate. The 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.[32]

[8] The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

V

[9] Our decision today is inconsistent with the disposition in *Robbins v. California* and with the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins* relied. Nevertheless, the doctrine of *stare decisis* does not preclude this action. 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. Moreover, it is clear that no legitimate reliance interest can be frustrated by our decision today.[33] Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history.

We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290:

> "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 [88 S.Ct. 507, 514, 19 L.Ed.2d 576] (footnotes omitted)."

The exception recognized in *Carroll* is unquestionably one that is "specifically established and well-delineated." We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

32. In choosing to search without a warrant on their own assessment of probable cause, police officers of course lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. Cf. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. Although an officer may establish that he acted in good faith in conducting the search by other evidence, a warrant issued by a magistrate normally suffices to establish it.

33. Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate.

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It is so ordered.

Justice BLACKMUN, co

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L.Ed.2d 235 (1979); *Robbi*
453 U.S. 420, 436, 101 S.C
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The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring.

My dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation in what is rightly described as "this troubled area." *Ante*, at 2168. See *United States v. Chadwick*, 433 U.S. 1, 17, 97 S.Ct. 2476, 2486, 53 L.Ed.2d 538 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 768, 99 S.Ct. 2586, 2595, 61 L.Ed.2d 235 (1979); *Robbins v. California*, 453 U.S. 420, 436, 101 S.Ct. 2841, 2851, 69 L.Ed.2d 744 (1981).

I adhere to the views expressed in those dissents. It is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established. Justice STEVENS' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed. In order to have an authoritative ruling, I join the Court's opinion and judgment.

Justice POWELL, concurring.

In my opinion in *Robbins v. California*, 453 U.S. 420, 429, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744 (1981), concurring in the judgment, I stated that the judgment was justified, though not compelled, by the Court's opinion in *Arkansas v. Sander*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). I did not agree, however, with the "bright line" rule articulated by the plurality opinion. Rather, I repeated the view 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. See *Arkansas v. Sanders, supra*, at 761, 99 S.Ct., at 2591; *Almeida-Sanchez v. United States*, 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (POWELL, J., concurring). I continue to think that in many situations one's reasonable expectation of privacy may be a decisive factor in a search case.

It became evident last Term, however, from the five opinions written in *Robbins* – in none of which THE CHIEF JUSTICE joined—that it is essential to have a Court opinion in *automobile* search cases that provides "specific guidance to police and courts in this reoccurring situation". *Robbins v. California*, 453 U.S., at 435, 101 S.Ct., at 2850 (POWELL, J., concurring). The Court's opinion today, written by Justice STEVENS and now joined by four other Justices, will afford this needed guidance. It is fair also to say that, given *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the Court's decision does not depart substantially from Fourth Amendment doctrine in automobile cases. Moreover, in enunciating a readily understood and applied rule, today's decision is consistent with the similar step taken last Term in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

I join the Court's opinion.

Justice WHITE, dissenting:

I would not overrule *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981). For the reasons stated by Justice Stewart in that case, I would affirm the judgment of the Court of Appeals. I also agree with much of Justice Marshall's dissent in this case.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself.[1] By equating a police officer's estimation of probable cause with a magistrate's, the Court utterly disregards the value of a neutral and detached magistrate. For as we recently, and unanimously, reaffirmed:

"The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause 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.'" *Shadwick v. City of Tampa*, 407 U.S. 345, 350, 92 S.Ct. 2119, 2122, 32 L.Ed.2d 783 (1972), citing *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

A police officer on the beat hardly satisfies these standards. In adopting today's new rule, the majority opinion shows contempt for these Fourth Amendment values, ignores this Court's precedents, is internally inconsistent, and produces anomalous and unjust consequences. I therefore dissent.

I

According to the majority, whenever police have probable cause to believe that contraband may be found within an automobile that they have stopped on the highway,[1] they may search not only the automobile but also any container found inside it, without obtaining a warrant. The scope of the search, we are told, is as broad as a magistrate could authorize in a warrant to search the automobile. The majority makes little attempt to justify this rule in terms of recognized Fourth Amendment values. The Court simply ignores the critical function that a magistrate serves. And although the Court purports to rely on the mobility of an automobile and the impracticability of obtaining a warrant, it never explains why these concerns permit the warrantless search of a *container*, which can easily be seized and immobilized while police are obtaining a warrant.

The new rule adopted by the Court today is completely incompatible with established Fourth Amendment principles, and takes a first step toward an unprecedented "probable cause" exception to the warrant requirement. In my view, under accepted standards, the warrantless search of the container in this case clearly violates the Fourth Amendment.

A

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The warrant requirement is crucial to protecting Fourth Amendment rights because of the importance of having the probable cause determination made in the first instance by a neutral and detached magistrate. Time and again, we have emphasized that the warrant requirement provides a number of protections that a post-hoc judicial evaluation of a policeman's probable cause does not.

The requirement of prior review by a detached and neutral magistrate limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all. See *United States v. United States District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972); *Abel v. United States*, 362 U.S. 217, 252, 80 S.Ct. 683, 703, 4 L.Ed.2d 668 (1959) (Justice BRENNAN, with whom Chief Justice Warren, Justice Bla Douglas join, dissenting) may also "prevent hindsig the evaluation of the rea search or seizure." *Unite tinez-Fuerte*, 428 U.S. 54 3074, 3086, 49 L.Ed.2d 1116 *Beck v. Ohio*, 379 U.S. 89, 228, 13 L.Ed.2d 142 (1964) even if a magistrate would the search that the police interposition of a magistrat ment reassures the public process of law has been res

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See also *Marshall v. Barlow'* 307, 323, 98 S.Ct. 1816, 1825, (1978); *United States v. Un trict Court*, 407 U.S., at 32 2138. The safeguards embod rant requirement apply as automobile searches as to an

Our cases do recognize a tion to the warrant requirem automobile searches. Throu sions, two major considerati advanced to justify the aut tion to the warrant requirem upheld only those searches th justified by those considerati

First, these searches have on the basis of the exigency of the automobile. See, e.g.

1. The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

2. The fact that the police are remove the occupants from th remove the justification for search. If police could not com ate search of a stopped automo often be left with the difficult

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tice Warren, Justice Black, and Justice Douglas join, dissenting). Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976); see also *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964). Furthermore, even if a magistrate would have authorized the search that the police conducted, the interposition of a magistrate's neutral judgment reassures the public that the orderly process of law has been respected:

> "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." *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 368–369, 92 L.Ed. 436 (1948).

See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1825, 56 L.Ed.2d 305 (1978); *United States v. United States District Court*, 407 U.S., at 321, 92 S.Ct., at 2138. The safeguards embodied in the warrant requirement apply as forcefully to automobile searches as to any others.

Our cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Throughout our decisions, two major considerations have been advanced to justify the automobile exception to the warrant requirement. We have upheld only those searches that are actually justified by those considerations.

First, these searches have been justified on the basis of the exigency of the mobility of the automobile. See, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This "mobility" rationale is something of a misnomer, cf. *Cady v. Dombrowski*, 413 U.S. 433, 442–443, 93 S.Ct. 2523, 2528–2529, 37 L.Ed.2d 706 (1973), since the police ordinarily can remove the car's occupants and secure the vehicle on the spot. However, the inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession.[2] This alternative creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court's automobile exception to the warrant requirement. See *Chambers*, 399 U.S., at 51, n. 9, 90 S.Ct., at 1981, n. 9.

In many cases, however, the police will, prior to searching the car, have cause to arrest the occupants and bring them to the station for booking. In this situation, the police can ordinarily seize the automobile and bring it to the station. Because the vehicle is now in the exclusive control of the authorities, any subsequent search cannot be justified by the mobility of the car. Rather, an immediate warrantless search of the vehicle is permitted because of the second major justification for the automobile exception: the diminished expectation of privacy in an automobile.

Because an automobile presents much of its contents in open view to police officers who legitimately stop it on a public way, is used for travel, and is subject to significant government regulation, this Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas. See *Arkansas v. Sanders*, 442 U.S. 753, 761, 99 S.Ct. 2586, 2591, 61 L.Ed.2d 235 (1979) (collecting cases). This

2. The fact that the police are able initially to remove the occupants from the car does not remove the justification for an immediate search. If police could not conduct an immediate search of a stopped automobile, they would often be left with the difficult task of deciding what to do with the occupants while a warrant is obtained. In the case of a parked automobile, by contrast, if the automobile is unoccupied, this problem is not presented. See, *e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

justification has been invoked for warrantless automobile searches in circumstances where the exigency of mobility was clearly not present. See, *e.g.*, *South Dakota v. Opperman*, 428 U.S. 364, 367–368, 96 S.Ct. 3092, 30[illegible] 49 L.Ed.2d 1000 (1978); *Cady v. Dombrowski*, 413 U.S., at 441–442, 93 S.Ct., at 2528. By focusing on the defendant's reasonable expectation of privacy, this Court has refused to require a warrant in situations where the process of obtaining such a warrant would be more intrusive than the actual search itself. Cf. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A defendant may consider the seizure of the car a greater intrusion than an immediate search. See *Chambers*, 399 U.S., at 51–52, 90 S.Ct., at 1981. Therefore, even where police *can* bring both the defendants and the automobile to the station safely and can house the car while they seek a warrant, the police are permitted to decide whether instead to conduct an immediate search of the car. In effect, the warrantless search is permissible because a warrant requirement would not provide significant protection of the defendant's Fourth Amendment interests.

B

The majority's rule is flatly inconsistent with these established Fourth Amendment principles concerning the scope of the automobile exception and the importance of the warrant requirement. Historically, the automobile exception has been limited to those situations where its application is compelled by the justifications described above. Today, the majority makes no attempt to base its decision on these justifications. This failure is not surprising, since the traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle.

The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate. See *Sanders*, 442 U.S., at 762–766 and nn. 10, 14, 99 S.Ct., at 2592–2594 and nn. 10, 14. The lesser expectation of privacy rationale also has little force. A container, as opposed to the car itself, does not reflect diminished privacy interests. See *id.*, at 762, 764–765, 99 S.Ct., at 2592, 2593. Moreover, the practical corollary that this Court has recognized—that depriving occupants of the use of a car may be a greater intrusion than an immediate search—is of doubtful relevance here, since the owner of a container will rarely suffer significant inconvenience by being deprived of its use while a warrant is being obtained.

Ultimately, the majority unable to rely on the justifications underlying the automobile exception, simply creates a new "probable cause" exception to the warrant requirement for automobiles. We have soundly rejected attempts to create such an exception in the past, see *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and we should do so again today.

In purported reliance on *Carroll v. United States*, *supra*, the Court defines the permissible scope of a search by reference to the scope of a probable cause search that a magistrate could authorize. Under *Carroll*, however, the mobility of an automobile is what is critical to the legality of a warrantless search. Of course, *Carroll* properly confined the search to the probable cause limits that would also limit a magistrate, but it did not suggest that the search could be as *broad* as a magistrate could authorize upon a warrant. A magistrate could authorize a search encompassing containers, even though the mobility rationale does not justify such a broad search. Indeed, the Court's reasoning might have justified the search of the entire car in *Coolidge* despite the fact that the car was not "mobile" at all. Thus, in blithely suggesting that *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause," *ante*, at 2170, the majority assumes what has never been the law: that the scope of the automobile-mobility exception to the warrant requirement is as broad as the "lawful" probable cause search mobile, *i.e.*, one authorized by

The majority's sleight-of- the obvious differences betw tion served by a magistrate determination of probable c function of the automobile ex irrelevant to a magistrate's fi er the items subject to sear may be in danger of destr impractical to store, or wheth ate search would be less int seizure without a warrant. only concern is whether the cause to search them. Wher focused not on a particular it a vehicle, home, or office, t might reasonably authorize closed containers at the loc But an officer on the beat w automobile without a warra tled to conduct a broader s exigency obviating the wa After all, what justifies t search is not probable cause *able cause coupled with the automobile.* Because the s *rantless* search should deper of the justification for dis warrant, the entire premise ty's opinion fails to support

The majority's rule mask assumption that a policem tion of probable cause is equivalent of the determinat and detached magistrate. ignores a major premise requirement—the importan neutral and detached magis whether probable cause ex 2175, *supra*. The majorit that the scope of the war bile search will be "limited" istrate could authorize is t with our cases, which firm an on-the-spot determinat

3. The plurality stated: "[Ch ers] made clear, if it was no a closed piece of luggage fo searched car is constitutiona

quirement is as broad as the scope of a "lawful" probable cause search of an automobile, *i.e.*, one authorized by a magistrate.

The majority's sleight-of-hand ignores the obvious differences between the function served by a magistrate in making a determination of probable cause and the function of the automobile exception. It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction, or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant. A magistrate's only concern is whether there is probable cause to search them. Where suspicion has focused not on a particular item but only on a vehicle, home, or office, the magistrate might reasonably authorize a search of closed containers at the location as well. But an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies. After all, what justifies the warrantless search is not probable cause alone, but *probable cause coupled with the mobility of the automobile.* Because the scope of a *warrantless* search should depend on the scope of the justification for dispensing with a warrant, the entire premise of the majority's opinion fails to support its conclusion.

The majority's rule marks the startling assumption that a policeman's determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate. This assumption ignores a major premise of the warrant requirement—the importance of having a neutral and detached magistrate determine whether probable cause exists. See 2174–2175, *supra.* The majority's explanation that the scope of the warrantless automobile search will be "limited" to what a magistrate could authorize is thus inconsistent with our cases, which firmly establish that an on-the-spot determination of probable cause is *never* the same as a decision by a neutral and detached magistrate.

C

Our recent decisions in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *Arkansas v. Sanders*, *supra*, and *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), clearly affirm that movable containers are different from automobiles for Fourth Amendment purposes. In *Chadwick*, the Court drew a constitutional distinction between luggage and automobiles in terms of substantial differences in expectations of privacy. 433 U.S., at 12, 97 S.Ct., at 2484. Moreover, the Court held that the mobility of such containers does not justify dispensing with a warrant, since federal agents had seized the luggage and safely transferred it to their custody under their exclusive control. *Sanders* explicitly held that "the warrant requirement applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U.S., at 766, 99 S.Ct., at 2594. And *Robbins* reaffirmed the *Sanders* rationale as applied to wrapped packages found in the unlocked luggage compartment of a vehicle. 453 U.S., at 425, 101 S.Ct., at 2845.[3]

In light of these considerations, I conclude that any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile. See *Sanders*, 442 U.S., at 763–765 and n. 13, 99 S.Ct., at 2592, 2593 and n. 13; *Chadwick*, 433 U.S., at 17, n. 1, 97 S.Ct., at 2486, n. 1 (Justice BRENNAN, concurring). *Chadwick*, as the majority notes, "reaffirmed the general principle that closed packages and containers may not be searched without a warrant." *Ante*, at 2166. Although there is no need to describe the exact contours of

3. The plurality stated: "[*Chadwick* and *Sanders*] made clear, if it was not clear before, 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." *Robbins v. California*, 453 U.S. 420, 425, 101 S.Ct. 2841, 2845, 69 L.Ed.2d 744 (1981) (plurality opinion).

that protection in this dissenting opinion, it is clear enough that closed, opaque containers—regardless of whether they are "worthy" or are always used to store personal items—are ordinarily fully protected. Cf. *Sanders*, 442 U.S., at 764, n. 13, 99 S.Ct., at 2593, n. 13.[4]

Here, because appellant Ross had placed the evidence in question in a closed paper bag, the container could be seized, but not searched, without a warrant. No practical exigencies required the warrantless searches on the street or at the station: Ross had been arrested and was in custody when both searches occurred, and the police succeeded in transporting the bag to the station without inadvertently spilling its contents.[5]

II

In announcing its new rule, the Court purports to rely on earlier automobile search cases, especially *Carroll v. United States, supra*. The Court's approach, however, far from being "faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history," *ante*, at 2172, is plainly contrary to the letter and the spirit of our prior automobile search cases. Moreover, the new rule produces anomalous and unacceptable consequences.

A

The majority's argument that its decision is supported by our decisions in *Carroll* and *Chambers* is misplaced. The Court in *Carroll* upheld a warrantless search of an automobile for contraband on the basis of the impracticability of securing a warrant in cases involving the transportation of contraband goods. The Court did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable.[6] "In cases where the securing of a warrant is reasonably practicable, *it must be used*.... In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." *Id.*, at 156, 45 S.Ct., at 286 (emphasis added).[7] As this Court reaffirmed in *Chambers*, 399 U.S., at 50, "[n]either *Carroll, supra*, n this Court require or sugg conceivable circumstance auto even with probable ca without the extra protec that a warrant affords."

Notwithstanding the re cases, the majority argues *Chambers* support its deci tegral compartments of a ally equivalent to containe car, and because the practi the police of the *Carroll* dc largely nullified if the per a warrantless search of a not include containers and inside the vehicle." *Ante* ther of these argument First, the Court's argume warrantless searches of compartments of the car *Chambers*, while protecti tainers within the car, v cal" and "absurd," *ante*, the reason why this Court rantless searches of auto ments. Surely an integr within a car is just as mob the same practical problem as the car itself. This ca movable containers located The fact that there may be tion of privacy in both con partments is irrelevant, si rationale is not, and cannot tion for the warrantless se ments.

The Court's second argu cuses on the practical adva of the *Carroll* doctrine, f The practical considerati cerned the *Carroll* Court in culty of immobilizing a vehi rant must be obtained. Th occasion to address whe present the same practica the car itself or integral c the car. They do not. Se *Carroll* hardly suggested, a

4. This rule may present some line-drawing problems, but no greater than those presented when a movable container is in the arms of a citizen walking down the street. There is no justification for relying on marginal difficulties of definition to reject a warrant requirement in one situation but not the other.

5. The Government argues that less secure containers such as paper bags can easily spill their contents; thus, no privacy interest of the defendant is protected if police are required to seize the container and bring it to the station. Whatever the force of this argument in other contexts, here police succeeded in reclosing the bag after the initial search and transporting it to the station without incident.

6. The Court in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), seems to have assumed that the police could not arrest the occupants of the automobile, since the offense was a misdemeanor and was not deemed to have been committed in the officers' presence. See 2 W. LaFave, Search & Seizure 511 (1978). Accordingly, police were faced with an exigency often not encountered today in searches of stopped automobiles: in order to *seize* the car pending the securing of a warrant, they would have to leave the occupants stranded

7. In *Carroll*, of course, no movable *container* was searched. Although in other early cases containers may in fact have been searched, see *ante*, at 2169–2170, the parties did not litigate in this Court the question whether containers deserve separate protection.

The Court's suggestion that the absence of such an argument "illuminates the profession's understanding of the scope of the search permitted under *Carroll*," *ante*, at 2169, is an unusual approach to constitutional interpretation. I would hesitate to rely upon the "profession's understanding" of the Fourteenth Amendment or of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), in the early part of this Century as justification for not granting Negroes constitutional protection. See *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Moreover, for a number of reasons, including the broad scope of the permitted search incident to arrest prior to *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and the uncertain meaning of a "search" prior to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the profession formerly advanced different arguments against automobile searches than it advances today.

Chambers, 399 U.S., at 50, 90 S.Ct., at 1980, "[n]either *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Notwithstanding the reasoning of these cases, the majority argues that *Carroll* and *Chambers* support its decisions because integral compartments of a car are functionally equivalent to containers found within a car, and because the practical advantages to the police of the *Carroll* doctrine "would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle." *Ante*, at 2170. Neither of these arguments is persuasive. First, the Court's argument that allowing warrantless searches of certain integral compartments of the car in *Carroll* and *Chambers*, while protecting movable containers within the car, would be "illogical" and "absurd," *ante*, at 2169, ignores the reason why this Court has allowed warrantless searches of automobile compartments. Surely an integral compartment within a car is just as mobile, and presents the same practical problems of safekeeping, as the car itself. This cannot be said of movable containers located within the car. The fact that there may be a high expectation of privacy in both containers and compartments is irrelevant, since the privacy rationale is not, and cannot be, the justification for the warrantless search of compartments.

The Court's second argument, which focuses on the practical advantages to police of the *Carroll* doctrine, fares no better. The practical considerations which concerned the *Carroll* Court involved the difficulty of immobilizing a vehicle while a warrant must be obtained. The Court had no occasion to address whether *containers* present the same practical difficulties as the car itself or integral compartments of the car. They do not. See *supra*, at 2178. *Carroll* hardly suggested, as the Court implies, *ante*, at 2170, that a warrantless search is justified simply because it assists police in obtaining more evidence.

Although it can find no support for its rule in this Court's precedents or in the traditional justifications for the automobile exception, the majority offers another justification. In a footnote, the majority suggests that "practical considerations" militate against securing containers found during an automobile search and taking them to the magistrate. *Ante*, at 2171, n. 28. The Court confidently remarks: "Certainly no privacy interest is served . . . by prohibiting police from opening immediately a container in which the object of the search may most likely be found and instead forcing them first to comb the entire vehicle. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle." *Id.* The vehicle would have to be seized while a warrant was obtained, a requirement inconsistent with *Carroll* and *Chambers*. *Id.*

This explanation is unpersuasive. As this Court explained in *Sanders* and as the majority today implicitly concedes, the burden to police departments of seizing a package or personal luggage simply does not compare to the burden of seizing and safeguarding automobiles. *Sanders*, 442 U.S., at 765, n. 14, 99 S.Ct., at 2593, n. 14; *ante*, at 2165 and 2166, n. 16. Other aspects of the Court's explanation are also implausible. The search will not always require a "combing" of the entire vehicle, since police may be looking for a particular item and may discover it promptly. If, instead, they are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant's privacy; whether or not it contains contraband, the police will continue to search for new evidence. Finally, the defendant, not the police, should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant. Cf.

Sanders, 442 U.S., at 764, n. 12, 99 S.Ct., at 2593, n. 12. The more reasonable presumption, if a presumption is to replace the defendant's consent, is surely that the immediate search of a closed container will be a greater invasion of the defendant's privacy interests than a mere temporary seizure of the container.[8]

B

Finally, the majority's new rule is theoretically unsound and will create anomalous and unwarranted results. These consequences are readily apparent from the Court's attempt to reconcile its new rule with the holdings of *Chadwick* and *Sanders*.[9] The Court suggests that probable cause to search only a container does not justify a warrantless search of an automobile in which it is placed, absent reason to believe that the contents could be secreted elsewhere in the vehicle. This, the majority asserts, is an indication that the new rule is carefully limited to its justification, and is not inconsistent with *Chadwick* and *Sanders*. But why is such a container more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable cause search of an entire automobile?[10] This rule plainly has peculiar and unworkable consequences: the Government "must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located." *United States v. Ross*, 655 F.2d 1159, 1202 (CADC 1981) (en banc) (Wilkey, J., dissenting).

Alternatively, the majority may be suggesting that *Chadwick* and *Sanders* may be explained because the connection of the container to the vehicle was incidental in these two cases. That is, because police had preexisting probable cause to seize and search the containers, they were not entitled to wait until the item was placed in a vehicle to take advantage of the automobile exception. Cf. *Coolidge v. New Hampshire*, *supra*; 2 W. LaFave, Search & Seizure 519–525 (1978). I wholeheartedly agree that police cannot employ a pretext to escape Fourth Amendment prohibitions and cannot rely on an exigency that they could easily have avoided. This interpretation, however, might well be an exception that swallows up the majority's rule. In neither *Chadwick* nor *Sanders* did the Court suggest that the delay of the police was a pretext for taking advantage of the automobile exception. For all that appears, the Government may have h sons for not searching a probable cause. In any e to rely on such an uncer guishing between legiti mate searches for contai hardly indicates that t proach has brought clari of the law. *Ante*, at 453 U.S., at 435, 101 S.C POWELL, concurring i

III

The Court today ignor tion that *Chadwick* es movable containers an also rejects all of the re *Sanders*[12] and offers a that appears inconsisto See *supra*, at 2179. S effectively overruled. ambiguously overrules *Robbins*, *ante*, at 2172, avoids stating that it is itself.

The only convincing e for the majority's broad it assists police in con searches, ensuring that ers into which criminal goods will no longe ment shield. See *ant* a legitimate search the Court instructs us

8. Seizures of automobiles can be distinguished because of the greater interest of defendants in continuing possession of their means of transportation; in the case of automobiles, a seizure is more likely to be a greater intrusion than an immediate search. See *Chambers v. Maroney*, 399 U.S. 42, 51–52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970).

9. Both cases would appear to fall within the majority's new rule. In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), federal agents had probable cause to search a footlocker. Although the footlocker had been placed in the trunk of a car and the occupants were about to depart, the Court refused to rely on the automobile exception to uphold the search. (It is true that the United States did not argue in this Court that the search was justified pursuant to that exception, but the theory was hardly so novel that this Court could not have responsibly relied upon it.) In *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), too, the suitcase was mobile and police had probable cause to search it; it was carried in an automobile for several blocks before the automobile was stopped and the suitcase was seized and searched. Again, however, this Court invalidated the search.

10. In a footnote, the Court appears to suggest a more pragmatic rationale for distinguishing *Chadwick* and *Sanders*—that no practical problems comparable to those engendered by a general search of a vehicle would arise if the official suspicion is confined to a particular piece of luggage. *Ante*, at 2168, n. 21. This suggestion is illogical. A general search might disclose only a single item worth searching; conversely, pre-existing suspicion might attach to a number of items later placed in a car. Surely the protection of the warrant requirement cannot depend on a numerical count of the items subject to search.

11. Unless one of these al is adopted, the Court's the holdings in *Chadwic* only unpersuasive but ap Court's own theory. Th in each case, the connect the vehicle was simply c that the police did not h search the entire vehicl surely did have probab vehicle *for the contain* that the scope of the search is determined onl could authorize. *Ante*, found that container, ac own rule, they should search at least the conta There was probable caus was mobile in each case

Government may have had legitimate reasons for not searching as soon as they had probable cause. In any event, asking police to rely on such an uncertain line in distinguishing between legitimate and illegitimate searches for containers in automobiles hardly indicates that the majority's approach has brought clarification to this area of the law. *Ante,* at 2161; see *Robbins,* 453 U.S., at 435, 101 S.Ct., at 2850 (Justice POWELL, concurring in the judgment).[11]

III

The Court today ignores the clear distinction that *Chadwick* established between movable containers and automobiles. It also rejects all of the relevant reasoning of *Sanders*[12] and offers a substitute rationale that appears inconsistent with the result. See *supra,* at 2179. *Sanders* is therefore effectively overruled. And the Court unambiguously overrules "the disposition" of *Robbins, ante,* at 2172, though it gingerly avoids stating that it is overruling the case itself.

The only convincing explanation I discern for the majority's broad rule is expediency: it assists police in conducting automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield. See *ante,* at 2170. "When a legitimate search is under way," the Court instructs us, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Ante,* at 2170. No "nice distinctions" are necessary, however, to comprehend the well-recognized differences between movable containers (which, even after today's decision, would be subject to the warrant requirement if located outside an automobile), and the automobile itself, together with its integral parts. Nor can I pass by the majority's glib assertion that the "prompt and efficient completion of the task at hand" is paramount to the Fourth Amendment interests of our citizens. I had thought it well established that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978).[13]

This case will have profound implications for the privacy of citizens traveling in automobiles, as the Court well understands. "For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle." *Ante,* at 2161. A closed paper bag, a tool box, a knapsack, a suitcase, and an attache case can alike be searched without the protection of the judgment of a neutral magistrate, based

11. Unless one of these alternative explanations is adopted, the Court's attempt to distinguish the holdings in *Chadwick* and *Sanders* is not only unpersuasive but appears to contradict the Court's own theory. The Court suggests that in each case, the connection of the container to the vehicle was simply coincidental, and notes that the police did not have probable cause to search the entire vehicle. But the police assuredly did have probable cause to search the vehicle *for the container.* The Court states that the scope of the permitted warrantless search is determined only by what a magistrate could authorize. *Ante,* at 2172. Once police found that container, according to the Court's own rule, they should have been entitled to search at least the container without a warrant. There was probable cause to search and the car was mobile in each case.

12. The Court suggests that it rejects "some of the reasoning in *Sanders.*" *Ante,* at 2172. But the Court in *Sanders* unambiguously stated: "[W]e hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U.S., at 766, 99 S.Ct., at 2594. The Court today instead adopts the reasoning of the concurring opinion of THE CHIEF JUSTICE, joined by Justice STEVENS, who refused to join the majority opinion because of the breadth of its rationale. *Id.*

13. Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most "efficient" form of government?