Criminal Procedure—Luggage Found During a Lawful Warrantless Search of an Automobile May Not Be Searched Without a Warrant—Arkansas v. Sanders, 442 U.S. 753 (1979)

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In Arkansas v. Sanders, the U.S. Supreme Court held that in the absence of exigent circumstances, police must obtain a warrant before searching luggage taken from an automobile lawfully stopped and searched for contraband. The majority opinion, written by Justice Powell, sharply restricts further extension of the "automobile exception" to the warrant requirement of the fourth amendment. The Court found the exception inapplicable for two reasons. First, a suitcase in the custody of police lacks the inherent mobility of an automobile. Second, there is a much greater expectation of privacy associated with luggage than is associated with a car. A caustic dissent by Justice Blackman joined by Justice Rehnquist argued that the majority's decision creates an impracticable and confusing rule that makes little sense in terms of fourth amendment policy. This note will examine the interaction in Arkansas v. Sanders of the legitimate expectation of privacy doctrine, the "automobile exception," and the exigent circumstances exception. The note will conclude that despite the ambiguity of the majority's method of determining when a container gives rise to legitimate expectation of privacy, Sanders is a reaffirmation of fourth amendment rights which had been threatened by the ever-increasing number of exceptions to the warrant clause.

I. THE FACTUAL SETTING OF SANDERS

Following a reliable informant's tip, Arkansas police placed the Little Rock Municipal airport under surveillance and awaited the arrival of Lonnie Sanders. According to the informant, Sanders would embark carrying a green suitcase packed with marijuana. Sanders arrived as pre-

2. See notes 50–66 and accompanying text infra (explanation of the "automobile exception").
3. See notes 50–73 and accompanying text infra.
4. See notes 74–87 and accompanying text infra.
6. See note 38 infra.
7. See notes 39–49 and accompanying text infra.
8. See notes 50–66 and accompanying text infra.
9. See notes 67–73 and accompanying text infra.
dicted and was joined by a companion who placed Sanders' green suitcase in the trunk of a taxi. The taxi drove away carrying Sanders, his companion, and the suitcase.\(^{12}\)

The officers followed the taxi and stopped it in traffic several blocks from the airport. The driver opened the trunk at the officers' request. With neither a warrant nor permission of the suspects, the officers opened the unlocked suitcase and found 9.3 pounds of marijuana.\(^{13}\) The officers seized the suitcase and arrested Sanders and his companion.\(^{14}\)

Sanders was indicted for possession of marijuana with intent to deliver.\(^{15}\) At a pre-trial hearing, Sanders' motion to suppress the marijuana found in the suitcase was denied.\(^{16}\) Sanders was tried and found guilty.\(^{17}\) Finding the search of the suitcase unreasonable under the fourth amendment in light of United States v. Chadwick,\(^{18}\) the Arkansas Supreme Court reversed the conviction.\(^{19}\) The United States Supreme Court affirmed.\(^{20}\)

II. REASONING OF THE SANDERS COURT

The Court framed the issue as whether, in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband.\(^{21}\) The Court distinguished searches under the "automobile exception"\(^{22}\) to the fourth amendment's warrant requirement\(^{23}\) from war-

\(^{12}\) Id.

\(^{13}\) Id.

\(^{14}\) The Sanders opinion does not state whether Sanders was arrested before or after the search of his suitcase. The State's brief conceded that the arrest took place after the search. Petitioner's Brief On Writ of Certiorari To The Supreme Court of Arkansas at 3, Arkansas v. Sanders, 442 U.S. 753 (1979).


\(^{16}\) 442 U.S. at 756.

\(^{17}\) Id.


\(^{20}\) 442 U.S. at 766.

\(^{21}\) Id. at 754. Given probable cause, police may lawfully stop and search an automobile without a warrant. Carroll v. United States, 267 U.S. 132 (1925). See notes 50–66 and accompanying text infra.

\(^{22}\) See notes 50–66 and accompanying text infra.

\(^{23}\) The fourth amendment to the Constitution provides:

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

U.S. Const. amend. IV.

24. 442 U.S. at 761.
26. 442 U.S. at 761. See also Rakas v. Illinois, 99 S.Ct. 421, 436 (1978) (Powell, J., concurring); United States v. Chadwick, 433 U.S. 1, 12 (1977); South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974); Cady v. Dombrowski, 413 U.S. 433, 441–42 (1973). Nevertheless, an individual operating a car does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. As the Court stated in Delaware v. Prouse, 440 U.S. 648, 662–63 (1979): "Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed."
27. 442 U.S. at 762.
28. Id. at 762–63.
29. Id. at 763–64.
30. Id. at 764–65.
31. Id.
32. Id. at 762–63 n.9.
33. Id. In United States v. Chadwick, 433 U.S. 1 (1977), the Court stated:
The Court refused to justify the luggage search under the "automobile exception" and declined an invitation to extend the doctrine of *Chambers v. Maroney* to luggage. In *Chambers*, the Court upheld a warrantless car search, concluding there was no constitutional difference between the seizure of an automobile prior to the issuance of a warrant and an immediate warrantless search of the automobile. Relying on *Chambers*, the State argued in *Sanders* that if the police were entitled to seize the suitcase, they were entitled to search it. The Court disagreed, concluding that because luggage is easily stored, a constitutional requirement that luggage be held until a warrant is obtained is far less burdensome on police departments than would be a similar requirement for cars.

Since the Court found Sanders' expectation of privacy in his suitcase undiminished by its location in the taxi, the warrantless search of the suitcase manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

*Id.* at 11. Although this dictum in *Chadwick* could be interpreted as requiring a suitcase or footlocker to be locked before an expectation of privacy will be recognized by the Court, *Sanders* makes clear that it is the objective expectation, not the subjective manifestation, of privacy that triggers the fourth amendment's protection. *Arkansas v. Sanders*, 442 U.S. at 762 n.9.

34. 399 U.S. 42 (1970).

35. *Id.* at 51-52. In *Chambers* the suspects matched the description of persons involved in a gas station robbery that had just occurred. The police stopped the suspects' car in a darkened parking lot and arrested them. Police found evidence linking the suspects to the robbery during the course of an intensive search of the car at the police station. The search could not be justified under the search incident to arrest doctrine because the search did not immediately follow the arrest. The evidence was admitted at trial. In affirming the defendants' convictions, the Court observed:

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


36. 442 U.S. at 765 n.14. One commentator finds it "difficult to believe" that there would be serious burdens on police departments with respect to short-term seizure and detention of a car while a search warrant is sought. 2 W. LAFAVE, SEARCH & SEIZURE §7.2, at 541 n.96 (1978).
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case, in the absence of exigent circumstances, violated the warrant requirement of the fourth amendment.

III. BACKGROUND

A. The Right of Privacy

Although the Constitution does not explicitly guarantee a right of privacy, its broad principles and purposes have been found to create such a right. The guarantees of the fourth amendment come closest to an express recognition of a constitutionally protected right of personal privacy.

Early interpretations of the privacy right limited the scope of the fourth amendment to certain "constitutionally protected areas" such as the home and office. The Supreme Court first recognized that the fourth amendment's aegis extended to an individual's expectations of privacy in Katz v. United States. The Katz Court rejected traditional constitutional

37. See notes 50–66 and accompanying text infra (discussion of "exigent circumstances").
38. 442 U.S. at 765–66. Chief Justice Burger and Justice Stevens, concurring in Sanders, stated that the relationship between the suitcase and the car was purely coincidental and therefore the case did not call for an application of the "automobile exception." Id. at 766–67. The concurring justices declined to state whether a stronger or weaker case for requiring a warrant to search a suitcase in a car would be made if police had probable cause to believe contraband was located somewhere in the vehicle, but did not know whether it was inside the suitcase or concealed in some part of the car's structure. Id.

Mr. Justice Blackmun, joined by Mr. Justice Rehnquist, dissented. Justice Blackmun analogized suitcases to cars and would have applied the Chambers doctrine to luggage. Justice Blackmun argued that it would be inconsistent to allow the warrantless search of an automobile while forbidding the search of any luggage found therein. Blackmun was persuaded that luggage, like an automobile, is mobile. Furthermore, the expectation of privacy associated with a suitcase found in a car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk. Finally, Justice Blackmun argued that it will be virtually impossible for courts to determine coherently which containers deserve the protection of the fourth amendment and which do not under the "legitimate expectation of privacy" doctrine. Id. at 768–72. See notes 74–91 and accompanying text infra.

42. 389 U.S. 347 (1967). See Note, A Reconsideration of the Katz Expectation of Privacy Test,
formulas that defined the fourth amendment's scope in terms of property interests on the ground that the fourth amendment "protects people, not places."\(^4\) and protects "what [an individual] seeks to preserve as private."\(^4\) \(^4\) Katz became the basis of a new formula for determining fourth amendment coverage: "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . [that individual] is entitled to be free from unreasonable governmental intrusion."\(^4\)\(^5\)

United States v. Chadwick,\(^4\) Sanders' forerunner, applied the Katz doctrine to the question whether a search warrant is required before federal agents may open an arrested person's locked footlocker, lawfully seized from the trunk of a parked car.\(^4\) The Court found that the defendant had a legitimate expectation of privacy in his footlocker.\(^4\) Given the lack of exigent circumstances, the warrantless search of the footlocker violated the fourth amendment.\(^4\)

\(^{76}\) Mich. L. Rev. 154, 156 (1977); A. Amsterdam, supra note 40, at 382–83.

43. 389 U.S. at 351. In Katz, police eavesdropped on the defendant's conversation in a public pay telephone booth by means of an electronic device attached to the outside of the booth. Katz overruled Olmstead v. United States, 277 U.S. 438 (1928), which held that telephone wiretapping was not a "search" or "seizure" and was therefore outside the scope of the fourth amendment. 277 U.S. at 464–66. See A. Amsterdam, supra note 40, at 356–65. The Katz Court found that the defendant had an expectation that his conversation while in the phone booth would remain private. Since the Government's action violated the privacy upon which the defendant justifiably relied, the electronic eavesdropping constituted a search and seizure within the meaning of the fourth amendment. 389 U.S. at 353.

44. 389 U.S. at 351.

45. Terry v. Ohio, 392 U.S. 1, 9 (1968). Before Katz, the Court focused on the concept of a "constitutionally protected area" to define the scope of the fourth amendment's protection of "persons, houses, papers and effects." E.g., Berger v. New York, 388 U.S. 41, 59 (1966). Katz focused instead on the person, not the place, and concluded that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," while "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351–52. The basic question whether the government has violated the privacy upon which an individual justifiably relied remains the starting point for the determination of fourth amendment coverage. See A. Amsterdam, supra note 40, at 357–58. Professor Amsterdam believes the "reasonable expectation of privacy" formula destroys the spirit of Katz and most of its substance. Id. at 383. He notes that the formula should not be construed to suggest that a particular kind of government activity labeled an "intrusion" is necessary to trigger the fourth amendment. Nor should the word "expectation" refer to an actual, subjective expectation of privacy, because "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced . . . and that we were all forthwith being placed under comprehensive electronic surveillance." Id. at 384.


47. Id. at 3.

48. Id. at 11.

49. 433 U.S. at 15. Justice Blackmun, dissenting, suggested that if the federal agents had postponed the arrest until the car was in motion, "then the car could have been seized, taken to the agents' office, and all its contents—including the footlocker—searched without a warrant." Id. at 22–23. Justice Brennan's concurring opinion predicted the Sanders analysis: "In my view, it is not at all obvious that the agents could legally have searched the footlocker had they seized it after [the
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B. The Automobile Exception

Although automobiles are within the scope of the fourth amendment, they are exempt from the warrant requirement because of their mobility. The "automobile exception" originated in *Carroll v. United States*.\(^{50}\) The *Carroll* Court held that probable cause to believe that a vehicle contains evidence of crime coupled with the exigency of a car's mobility will justify a warrantless search.\(^{51}\) *Carroll* has been held to permit police intrusion into every part of a vehicle.\(^{52}\)

*Chambers v. Maroney*\(^{53}\) added a new dimension to the *Carroll* search: where police safety requires, the search of the car may be postponed a reasonable length of time and carried out at the police station without a warrant.\(^{54}\) As the *Chambers* Court noted, the car's mobility and the probable cause still exist at the station.\(^{55}\) Since the practical effect of an immediate search without a warrant and immobilization until a warrant is obtained is the same, either course is constitutional.\(^{56}\)

Although the facts of *Carroll* and *Chambers* presented only the issue of the warrantless search of cars, not containers within cars, lower courts extended application of the principles enunciated in those cases. Probable cause coupled with the exigency of mobility were often found sufficient to justify the warrantless search of luggage and other containers found in cars properly stopped and searched under the "automobile exception."\(^{57}\) Since the Supreme Court had already declared the warrantless search of a

\(^{50}\) 267 U.S. 132 (1925). In *Carroll*, federal agents fortuitously came across a vehicle driven by suspected rum-runners. An immediate search of their automobile revealed 68 bottles of liquor hidden behind the upholstery of the seats.

\(^{51}\) Id. at 16-17. "While the contents of the car could have been searched pursuant to the automobile exception, it is by no means clear that the contents of locked containers found inside a car are subject to search under this exception, any more than they would be if the police found them in any other place." Id. at 17 n.1.


\(^{54}\) Id. at 51-52.

\(^{55}\) Id. If the fourth amendment permitted the seizure and immobilization of an automobile until a warrant could be obtained, the mobility might not exist at the police station. In that event, the *Chambers* analysis would rest on a faulty premise.

\(^{56}\) 399 U.S. at 51-52.

\(^{57}\) See e.g., United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977); United States v. Giles, 536 F.2d 135 (6th Cir. 1970); United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), cert. denied, 429 U.S. 867 (1976); United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975), cert. denied, 423 U.S. 832 (1975).
car’s trunk, and glove compartment, constitutional, it seemed logical to courts to extend the “automobile exception” to include containers found inside the automobile.

The Chadwick Court, however, refused to extend the rationale of Chambers to justify the warrantless search of the defendant’s footlocker. The Court found Chambers inapplicable because a footlocker has neither the mobility nor the lessened expectation of privacy associated with cars. Some courts interpreted Chadwick to mean that the Supreme Court would not create a new warrant exemption for luggage, but continued to allow the warrantless search of luggage found in a car under the “automobile exception.” Others recognized that Chadwick mandated a reappraisal of the boundaries of the “automobile exception.”

The Sanders Court attempted to clarify the principles enunciated in Chadwick, and emphasized that exceptions to the warrant requirement are based upon societal needs that outweigh the individual’s right of privacy. Because no sufficiently compelling societal need would be served by allowing such a serious intrusion into Sanders’ fourth amendment right of privacy, the automobile exception did not justify a warrantless search beyond the taxi and its component parts.

C. Exigent Circumstances

Although the Supreme Court has expressed a preference for the use of warrants whenever feasible, emergency situations have traditionally

91. See, e.g., United States v. Milhollan, 599 F.2d 518 (3rd Cir. 1979). See also United States v. Finnegan, 568 F.2d 637, 641 (9th Cir. 1977), wherein the court stated:

Were we to rule that Chadwick applies here and renders the search of the suitcase illegal, inconsistent and contradictory results would follow. For instance, a police officer could search and seize a brick of marijuana lying inside the trunk of a car but not a brick of marijuana lying inside a suitcase in the trunk of a car.

93. See United States v. Ochs, 595 F.2d 1247, 1254 (2nd Cir. 1979); United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978); United States v. Finnegan, 568 F.2d 637, 641 (9th Cir. 1977).
95. 442 U.S. at 758-60.
96. Id. at 762. Once the police had seized Sanders’ suitcase and had taken Sanders and his companion into custody, there was no remaining societal need to justify a further invasion of Sanders’ privacy. The police then had ample time to present the issue of probable cause to a magistrate before searching the suitcase.

67. Gerstein v. Pugh, 420 U.S. 103, 113 (1975); Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong
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given rise to warrant exceptions. The Court has recognized a wide variety of circumstances as "exigent." The Chadwick Court defined exigent circumstances in luggage search cases as the danger that the suspect "might gain access to the property to seize a weapon or destroy evidence." Exigent circumstances are to be determined after police have seized the object to be searched and have it securely within their control. Thus, while mobility and a lessened expectation of privacy in an automobile justify its search, neither mobility nor the possibility that the suspect will obtain a weapon or destroy evidence justifies the search of a container or package once police have it securely within their control. Because the police obtained exclusive control over Sanders' suitcase, there was no remaining exigency to justify its search.

Sanders, like Chadwick, narrows the definition of exigent circumstances to instances in which the preservation of evidence or the safety of the police and public require that a suspect's container be searched without a warrant.

IV. ANALYSIS OF THE SANDERS DECISION

Sanders inescapably required resolution of the conflict Chadwick avoided between the "automobile exception" and the search of luggage found inside automobiles. Although the Sanders Court correctly concluded that the "automobile exception" did not justify the search of Sanders' suitcase, the decision would have been more meaningful for the po-
lice, the public, and the courts if it had presented workable guidelines to assist in the determination whether a legitimate expectation of privacy exists in containers other than luggage.

The Court was correct in its distinction between luggage and automobiles because luggage possesses none of the characteristics of automobiles that justify their warrantless search. Its function is not transportation, and its contents are usually not in plain view. Nor is luggage subject to registration, licensing, or routine official inspection. Thus, while both automobiles and luggage are within the scope of the fourth amendment, a person’s expectation of privacy in luggage is substantially greater than in an automobile. This greater expectation of privacy requires adherence to the warrant clause regardless of where the luggage to be searched is found.

Nevertheless, as Justice Blackmun observed in his dissent from the majority opinion in Sanders, the subjective expectation of privacy associated with a suitcase and a glove compartment or trunk may be virtually the same. Although Blackmun was persuaded that the incongruity in the majority’s promulgation of a different policy on warrantless search for areas associated with a similar privacy expectation rendered the Sanders opinion illogical, the distinction between the search of luggage and the search of a glove compartment or trunk is not based upon a supposed difference in the privacy expectation associated with each area. Because a glove compartment is an integral part of the automobile, police cannot obtain exclusive control over it as they can over a suitcase. If the automobile cannot be detained while a warrant is sought, the opportunity to search the car, the glove compartment, and the trunk is fleeting and therefore exigent circumstances justifying a warrantless search exist. Thus, the exigency of mobility overrides the expectation of privacy in a glove compartment or trunk, even though that expectation may be equal to the expectation of privacy in a suitcase found in the same car. Although the impracticality of requiring a warrant for the search of a glove compartment or trunk precludes those areas from receiving the full protection of the fourth amendment, their exception from the warrant requirement does

75. Luggage is subject to inspection upon border entry or common carrier travel, however. Arkansas v. Sanders, 442 U.S. 753, 764 n.12 (1979); United States v. Chadwick, 433 U.S. 1, 13 (1977).

76. Presumably doctrines such as search incident to arrest and exigent circumstances could justify the warrantless search of luggage, whether or not the luggage was found in a car. Thus, if a suspect has access to the luggage and police have probable cause to believe it contains weapons or destructable evidence, an exigency exists to justify the warrantless search of the luggage. Arkansas v. Sanders, 442 U.S. 753, 763 n. 11 (1979). See note 23 supra for a list of exceptions to the warrant requirement.

77. 442 U.S. at 769.
not demand a similar policy for the search of luggage. The fourth amendment guarantee of privacy should be fully implemented within the bounds of legitimate societal law enforcement concerns. In the absence of a compelling societal requirement for a warrantless search, logic should not be invoked to prohibit the protection of one private area simply because all similar areas cannot pragmatically be protected.

Although Sanders dealt only with the search of a suitcase, the Court noted somewhat cryptically 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, while all containers and packages are presumably within the scope of the fourth amendment, the content of the amendment may vary with the type of container. Some containers may not be protected by the warrant requirement at all. Although the Court did not specify the formula for determining which containers deserve the full protection of the fourth amendment, the Court stated that some containers by their very nature cannot support a legitimate expectation of privacy because their contents can be inferred from their outward appearance. The contents of such containers are, in effect, in "plain view," and thereby subject to lawful seizure. But the Court's observation that a container holding contraband in "plain view" will not deserve the full protection of the fourth amendment merely restates a traditional exception and does little to clarify the scope of Sanders' prospective application.

The Sanders Court admitted that there will be "difficulties" in determining which parcels taken from an automobile require a warrant for their search. This suggests that the Court contemplated something more than

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78. Id. at 764 n.13.
79. For the definition of the fourth amendment's "scope," see note 81 infra.
80. For the definition of the fourth amendment's "content," see note 81 infra.
81. See note 23 supra (text of fourth amendment). The words "searches and seizures" and the words "persons, houses, papers and effects" limit the scope of the fourth amendment. Thus, if the governmental intrusion is not a "search" or "seizure" of "persons, houses, papers [or] effects," the fourth amendment does not require it to be reasonable. See A. Amsterdam, supra note 40, at 356–57. Once the governmental intrusion is determined to be a search or seizure, the fourth amendment's content may or may not require a search warrant.
82. 442 U.S. at 764–65 n.13. The Court identified burglar tool kits and gun cases as examples of such items.
83. Because a search is not conducted when officers look at what is in plain view, Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam), a container that constructively places its contents in "plain view" by its outward shape, such as a gun case, may also be seized without a warrant.
84. Furthermore, if Sanders means that all containers and packages deserve the full protection of the fourth amendment unless their contents are in "plain view," then dissenting Justice Blackmun's criticism of the legitimate expectation of privacy rule is unfounded, because the "plain view" doctrine is easily applied to a wide variety of containers. See note 38 supra (Justice Blackmun's dissenting opinion).
85. 442 U.S. at 764–65 n.13.
a simple application of the "plain view" doctrine to parcels taken from an automobile during a lawful warrantless search. If the Court anticipates some gradation of the privacy interest in various containers and packages, then specific guidelines for determining the level of the privacy interest and the corresponding content of the fourth amendment are in order.

V. PROPOSAL

An expectation of privacy in a container which triggers the warrant clause should be one that is recognized as legitimate by society as determined by an objective standard. This determination should include an analysis of the extent the container is commonly used as a repository for personal effects. The transparency or opacity of the container should also be considered, because there can be no expectation of privacy in objects stored in "plain view." The permanence of the container should be relevant to the privacy expectation, since protection of the contents would be a major purpose of the container. The individual's manifestation of a subjective expectation of privacy in the container could enhance or detract from the initial determination of the privacy expectation in close cases. If the fourth amendment guarantee of privacy is to be taken seriously, however, the contents of the container should be irrelevant to the privacy expectation in order to prevent the fourth amendment from becoming a tool for the implementation of government policy.

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86. An application of the plain view doctrine is unlikely to cause any "difficulties."

87. One court has interpreted Sanders to require only an application of the plain view doctrine and not any "gradations of privacy interests" scheme. United States v. Dien, 609 F.2d 1038, 1045 (2d Cir. 1979).

88. The Sanders Court identified luggage as a common repository of personal effects, a factor supporting the Court's conclusion that luggage deserves the protection of the warrant clause. 442 U.S. at 762. In contrast, plastic and burlap bags of the type "customarily used to haul marijuana" will not support a legitimate expectation of privacy. United States v. Stevie, 578 F.2d 204 (8th Cir. 1977), modified, 582 F.2d 1175, 1180 (8th Cir. 1978) (en banc), cert. denied, 443 U.S. 911 (1979).

89. If the container is transparent, it should be subject to warrantless search under the "plain view" doctrine. Furthermore, if the appearance of the container makes known its contents, it will be subject to search under Sanders. See note 83 supra.

90. Professor LaFave suggests that the expectation of privacy in containers like paper bags found in cars exists not so much because of the bag itself, but because of the protection the bag receives from the structure of the car. See 2 W. LaFave, supra note 36, §7.2 at 542–43 (1978).

91. As Justice Frankfurter stated:

It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when involved on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

Davis v. United States, 328 U.S. 582, 597 (1946) (dissenting opinion). But see United States v. Stevie, 582 F.2d 1175, 1181 (8th Cir. 1978) (Gibson, J., dissenting), cert. denied, 443 U.S. 911
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approach should help to establish specific criteria for the determination of the privacy expectation in a container, while preserving the flexibility needed for case-by-case resolution of fourth amendment questions.

VI. CONCLUSION

_Sanders_ is an attempt by the Court to reaffirm the validity of the presumptive warrant requirement. In its resolution of the conflict between the _Katz_ doctrine and the "automobile exception," the Court has placed severe limits on the extent to which the "automobile exception" will justify the warrantless search of containers found within cars. Nevertheless, the existence of exigent circumstances, such as the threat of destruction of evidence or harm to police officers or the public, may justify the warrantless search of luggage found in an automobile, although the exigency will usually disappear once police have the container within their exclusive control. Proper application of _Sanders_ will be difficult, however, since the Court did not clarify the criteria for determining the expectation of privacy in a container. Notwithstanding this uncertainty, _Sanders_ is a significant step toward a revitalization of the fourth amendment right of privacy.

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