California v. Acevedo: The Ominous March of a Loyal Foot Soldier

John Michael Harlow
California v. Acevedo: The Ominous March of a Loyal Foot Soldier

Table of Contents

I. Introduction ........................................................... 1206
II. History and Background to the Automobile Exception 1208
   A. The Fourth Amendment ........................................... 1208
   B. Early British Search and Seizure ................................ 1209
   C. Search and Seizure in the American Colonies .................. 1210
   D. Evolution of the Automobile Exception: The Slippery Slope 1213
      1. The Seminal Case ........................................... 1214
      2. The Affirmation ........................................... 1216
      3. The Expansion ........................................... 1218
      4. The Limitation ........................................... 1221
      5. The Conflict ........................................... 1226
      6. The Resolution ........................................... 1231
III. The Acevedo Decision ............................................ 1231
      A. The Factual Setting and Procedural History ............... 1231
      B. The Supreme Court’s Reasoning ............................ 1234
IV. Critical Analysis of Acevedo .................................... 1236
      A. Flawed Assumptions ........................................ 1236
         1. Privacy is Expected in an Automobile ................. 1236
         2. Seizure of the Container is Not as Intrusive as the Search 1240
         3. Chadwick and Sanders Were Not Confusing ... 1244
      B. Poor Policy Choices ........................................ 1248
         1. Acevedo: A Bull in the China Shop ...................... 1248
         2. Bad Solution to War on Drugs ............................ 1254
      C. Harmful Results ............................................ 1255
         1. Constable Blunders or Constable Batters ............. 1255
         2. Emergence of a Police State ............................. 1257
V. Conclusion ........................................................... 1262

Copyright 1992, by Louisiana Law Review.

1. "No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime." California v. Acevedo, 111 S. Ct. 1982, 2002 (1991) (Stevens, J., dissenting).
I. INTRODUCTION

The automobile captured the hearts of Americans in the 1920s. Since then the criminal justice system has struggled with how to apply the Fourth Amendment of the Constitution to the search of automobiles or any containers found within them. On one hand, many Americans spend much of their time in automobiles, and many consider their cars to be hallmarks of their individuality. Next to ownership of a home, an automobile is the largest single asset held by most Americans. Many citizens conduct either part or all of their trade or business from their automobile. Under this realist view, the Fourth Amendment should afford to automobiles the same degree of protection which it provides for buildings. On the other hand, automobiles create a practical difficulty for the agents of law enforcement. The rapid and unpredictable mobility of the automobile gives a wrong-doer an easy means to evade capture and avoid police searches. Just like many Americans who conduct their trade or business from their automobile, criminals can similarly be expected to use their automobiles in furtherance of their crimes. Under this pragmatist view, many wrong-doers would escape the authority of police officers if the Fourth Amendment required law enforcement agents to conduct searches of automobiles in the same manner as searches of buildings.

Over the course of several years, the Supreme Court adopted an intermediate, compromise approach where most of the automobile could be lawfully searched without a warrant pursuant to the “automobile exception.” However, the Warrant Clause of the Fourth Amendment still protected some areas within the automobile. Despite this hard-
fought compromise, the Justice Department advocated a uniform rule which would allow police officers to search, without a search warrant, both the entire car and any containers within.\footnote{See, e.g., United States v. Chadwick, 433 U.S. 1, 16, 97 S. Ct. 2476, 2486 (1977) (Brennan, J., concurring) ("[I]t is deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments.")} The Supreme Court agreed and so ruled in \textit{California v. Acevedo}.\footnote{111 S. Ct. 1982 (1991).}

This comment will examine the \textit{Acevedo} decision. It will show that the Supreme Court decided the case incorrectly and unwisely overturned \textit{Arkansas v. Sanders}\footnote{442 U.S. 753, 99 S. Ct. 2586.} and \textit{United States v. Chadwick}.\footnote{433 U.S. 1, 97 S. Ct. 2476.} \textit{Acevedo} cannot be reconciled with a Fourth Amendment designed to protect an individual's privacy from unwarranted state searches. Part II will provide an overview of the "automobile exception" jurisprudence as pronounced by the United States Supreme Court. Part III will explain the history and rationale of \textit{Acevedo}. Part IV will then provide a critical analysis of the \textit{Acevedo} decision. The analysis will point out many problems with the Court's reasoning, problems of policy, and the long-term problems which will develop from the Court's present dereliction of the Bill of Rights. A brief look at the criminal justice system of the now-defunct Soviet Union will be used to illustrate the inherent failure and danger of broad police powers.\footnote{The use of the Soviet Union as an example is not designed to play upon patriotic emotions. Many other states throughout the world with differing political, economic, and social systems could have been used as examples. However, the recent dissolution of the Soviet Union offers a very fresh and clear illustration of the dangers of a state which emphasized strong police power over its citizens. It may be argued that the abuses which occurred in the Soviet Union could not happen in the United States because we are not a communist country, and our police are controlled by a unique American ethic to "do the right thing." Unfortunately, the abuses of excessive police power have infected numerous states of all backgrounds—even democracies and nations who also felt they had unique ethical restraints. Certainly, functioning democracy can retard the growth of police power, but once the police are systemically freed of constitutional limits, the result is analogous to a police state.} Part V will conclude that the Supreme Court of Louisiana, as well as the highest courts of other states, should not follow the reasoning of the United States Supreme Court in \textit{Acevedo}. Instead, the Louisiana Supreme Court should decide that the Declaration of Rights in the Louisiana Constitution requires

\begin{footnotes}
\footnotetext{Ct. 2586 (1979); United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977). To a lesser extent the trunk of the car was also protected since it was not subject to a warrantless search incident to an arrest. See, e.g., New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860 (1981).}
\footnotetext{7. See, e.g., United States v. Chadwick, 433 U.S. 1, 16, 97 S. Ct. 2476, 2486 (1977) (Brennan, J., concurring) ("[I]t is deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments.").}
\footnotetext{8. 111 S. Ct. 1982 (1991).}
\footnotetext{9. 442 U.S. 753, 99 S. Ct. 2586.}
\footnotetext{10. 433 U.S. 1, 97 S. Ct. 2476.}
\footnotetext{11. The use of the Soviet Union as an example is not designed to play upon patriotic emotions. Many other states throughout the world with differing political, economic, and social systems could have been used as examples. However, the recent dissolution of the Soviet Union offers a very fresh and clear illustration of the dangers of a state which emphasized strong police power over its citizens. It may be argued that the abuses which occurred in the Soviet Union could not happen in the United States because we are not a communist country, and our police are controlled by a unique American ethic to "do the right thing." Unfortunately, the abuses of excessive police power have infected numerous states of all backgrounds—even democracies and nations who also felt they had unique ethical restraints. Certainly, functioning democracy can retard the growth of police power, but once the police are systemically freed of constitutional limits, the result is analogous to a police state.}
a law enforcement officer to get a warrant before searching a container found within the trunk of an automobile.

II. HISTORY AND BACKGROUND TO THE AUTOMOBILE EXCEPTION

A. The Fourth Amendment

All searches by government agents must comport with the requirements of the Fourth Amendment, which reads:

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.\(^\text{12}\)

Any evidence which is obtained in violation of the Fourth Amendment is subject to the exclusionary rule and may not be used against the individual whose constitutional rights were violated.\(^\text{13}\) Therefore, the precise interpretation and application of the Fourth Amendment by the courts is of paramount importance to the law enforcement agent as well as those accused of committing crimes. The police officer often makes decisions and acts under stressful conditions. He therefore needs a clear rule of thumb regarding the applicability of the Fourth Amendment. The individual citizen demands a rule which provides him the largest possible amount of liberty; and, society-at-large relies upon the effective operation of the criminal justice system to remove criminals from the streets of America.

The courts have faced the delicate task of striking a fair balance between the rights of the individual and the welfare of society. If the police were to have carte blanche authority to ignore individual rights, the result would be a police state. On the other hand, if the police are constrained from any impingement upon individual rights, the result would be anarchy.\(^\text{14}\) Not surprisingly, the jurisprudence on the Fourth Amendment has reflected a heated, emotional debate. Moreover, searches and seizures of automobiles have been even more problematic than other classes of searches.\(^\text{15}\) Therefore, one must review the history and origins of the Fourth Amendment to glean the theory and philosophy behind the search and seizure jurisprudence; only then will one have

---

12. U.S. Const. amend. IV.
the basis needed to construct a thoughtful framework through which to critique the Court’s search and seizure jurisprudence.

B. Early British Search and Seizure

The American laws concerning search and seizure were greatly influenced by English laws and customs. Early British common law did not make use of any search warrant, but gradually, search warrants came into use by the British constables. Initially, the use of warrants was restricted to the search for stolen goods, but over time the warrant was used to recover virtually any evidence. The Secretary of State issued so-called “general warrants” which directed the constable to search for and seize any books or libelous writings—at any time and any place. By the mid-eighteenth century, general warrants allowed the constable to conduct virtually unlimited searches and seizures of any person, property, or home.

The widespread use of general warrants led to so many violations of personal rights that the English courts, in response to widespread public discontent, had to circumscribe their issuance. In 1765, Lord Camden ruled that the use of general warrants “in the case of seditious libel is illegal and void.” He wrote: “The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.”

18. The general warrants were originated by the Star Chamber. See, e.g., Boyd v. United States, 116 U.S. 616, 629, 6 S. Ct. 524, 531 (1886).
19. “General warrant” means a warrant which does not specify the place, thing, or person to be searched or seized; see Frey v. State, 237 A.2d 774, 779 (Md. Ct. Spec. App. 1968). At that time, the Secretary of State was “the keeper of the King’s signet wherewith the King’s Private letters are signed.” Entick v. Carrington and Three Other King’s Messengers, 95 Eng. Rep. 807, 816 (1765).
20. Edward C. Fisher, Search and Seizure 2-3 (1970) [hereinafter Fisher]. The term “libelous” included any writing critical of the King or of others in high places.
22. Fisher, supra note 20, at 3.
23. Boyd v. United States, 116 U.S. 616, 629, 6 S. Ct. 524, 532 (1886) (citing Entick, 95 Eng. Rep. 807). Lord Camden was well-known in the colonies and England as a vocal supporter of the colonies’ right to representation in Parliament. In his honor, cities were named after him in New Jersey and South Carolina.
24. Id. at 627, 6 S. Ct. at 530. The primary protection for this property right was the common law tort of trespass. Lord Camden explained:
   By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man may set his foot upon my ground without my
He then concluded that neither positive law nor common law justified the use of general warrants. Therefore, the constable was liable for trespass.

Lord Camden's opinion was "applauded by the lovers of liberty in the colonies" as well as in England. American statesmen of both the revolutionary and formative periods of the United States were well aware of the opinion and regarded it "as the true and ultimate expression of constitutional law." Indeed, in Boyd v. United States, Justice Bradley asserted that the propositions of Lord Camden's opinion were foremost in the minds of the drafters of the Fourth Amendment and were sufficiently explanatory of what the drafters meant by unreasonable searches and seizures. The Court pointed out that:

The principles laid down in [Lord Camden's] opinion affect the very essence of constitutional liberty and security. They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.

The year following Lord Camden's opinion, the English Parliament considered resolutions to condemn the general warrants. During the debates, William Pitt, the Earl of Chatham, argued: "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 may not enter; all his force dares not cross the threshold of the ruined tenement." The resolutions passed in April, 1766.

C. Search and Seizure in the American Colonies

Across the Atlantic in the American colonies, the general warrants, labeled "writs of assistance," were facing a similar challenge. The writs
of assistance originally arose in Massachusetts to aid the revenue officers’ war upon smuggling. The writs of assistance allowed the King’s revenue officers to authorize the constable to search any ship, cellar, warehouse, or other place where the constable suspected he could find smuggled goods or goods on which duty had not been paid. The writs of assistance also allowed the constable to arrest any person suspected of complicity in smuggling or duty evasion. In 1760, the British Crown began in earnest to stifle the highly profitable but illegal smuggling trade. In furtherance of its aim, the Crown issued an avalanche of writs of assistance resulting in large scale seizures of illicit cargoes in Boston. Immediately, the smugglers and other notable citizens, many of whom were to become America’s founding fathers, erupted in protest. In February of 1761, a large group of merchants assembled in a Boston courthouse and denounced the writs of assistance. James Otis called the writs “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book. . . . [because they placed] the liberty of every man in the hands of every petty officer.” According to John Adams: “Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.” Certainly the founding fathers did not forget the arguments made in that Boston courtroom or the arguments by Lord Camden and William Pitt.

Fifteen years later the American colonies declared their independence from England. Curiously, nothing was written in the Declaration of Independence (1776) about searches, seizures or warrants. This omission does not mean that the drafters did not consider the issue worthy. Rather, either the drafters did not wish to mention the writs of assistance due to the implicit linkage to smuggling, or the drafters felt that all Englishmen and colonists already tacitly accepted the citizen’s right to be free of such writs. The Articles of Confederation (1781), the Northwest Ordinance (1787), and the original Constitution (1787) also omitted the subject.

33. Miller, supra note 31, at 46.
36. Fisher, supra note 20, at 7 n.20. One should keep in mind that the resolutions condemning general warrants had been passed in England in 1766, ten years before the Declaration of Independence.
37. Fisher, supra note 20, at 8. The original Constitution did not address the rights
However, searches and seizures were mentioned in two dominant state Bills of Rights. The Virginia Bill of Rights, adopted June 12, 1776, stated:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted. 38

The Virginia Bill of Rights plainly adopted a minimalist approach which discouraged the use of only pure general warrants. On the other hand, the Massachusetts Bill of Rights, adopted in 1780, stated: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. . . . And no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." 39 The Massachusetts Bill of Rights adopted a much broader scope of protection from searches and seizures. It expressly supplied a right "to be secure" rather than a mere prohibition of general warrants. No doubt the drafters of the Fourth Amendment carefully scrutinized the pertinent provisions in the Massachusetts and Virginia Bills of Rights since those two states were dominant in the political affairs of the young nation. 40 Between the two, however, the Fourth Amendment more clearly reflects the language of the Massachusetts Bill of Rights. As Justice Frankfurter suggested, "This is clear proof that Congress meant to give wide, and not limited, scope to this protection against police intrusion." 41

Indeed, the Supreme Court has historically viewed the Fourth Amendment as a broad guardian of an individual's right to privacy. 42

---

40. For example, until Andrew Jackson's election in 1828, the President of the United States had always been a native of one of these two states.
42. See, e.g., Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 301, 87 S.
Initially, the Court interpreted the Fourth Amendment to apply mainly to homes and the immediate effects of a person. More recently, the scope of the Fourth Amendment was redefined in *Katz v. United States*, which stated that the Fourth Amendment "protects people, not places."

In summary, the unjust use of general warrants in England led to the tyrannous use of writs of assistance in the American colonies. This in turn contributed to the American Revolution and the creation of the Fourth Amendment. Thus, the drafting of the Fourth Amendment embodies a monumental moment in history where the relationship between the individual and his government was purposefully reshaped.

**D. Evolution of the Automobile Exception: The Slippery Slope**

It is upon this history of conflict between the individual and the government that the jurisprudence on the search of automobiles and

---

43. 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967). *Katz* set up a two-prong test to determine whether the Fourth Amendment requirements are implicated. First, the accused must have had a subjective expectation of privacy regarding the object or target of the search or seizure. Second, the accused's expectation of privacy must be one which society-at-large is prepared to accept as reasonable. Id. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

44. The "automobile exception" is also known as the "moving vehicle" rule, and thus also applies to any highly mobile object such as a ship, boat, wagon, airplane, or other object. See generally, California v. Carney, 471 U.S. 386, 105 S. Ct. 2066 (1985) (upheld warrantless search of a motor home); United States v. Nigro, 727 F.2d 100 (6th Cir. 1984) (upheld warrantless search of a DC-6 aircraft); United States v. Lauchli, 724 F.2d 1279 (7th Cir. 1984) (upheld warrantless search of a fishing boat); United States v. Wilson, 524 F.2d 595 (8th Cir. 1975) (upheld warrantless search of a duffel bag in transit); United States v. Sigal, 500 F.2d 1118 (10th Cir. 1974) (upheld warrantless search of airplane); United States v. Bozada, 473 F.2d 389 (8th Cir. 1973) (upheld warrantless search of a trailer); United States v. Miller, 460 F.2d 582 (10th Cir. 1972) (upheld search of mobile home); Lederer v. Tehan, 441 F.2d 293 (6th Cir. 1971) (upheld warrantless search of U-Haul truck); United States v. Trayer, 701 F. Supp. 250 (D. D.C. 1988)
their contents was built. This comment will next outline the major cases which have shaped the law on the constitutionality of searches of automobiles and the containers found within. The reader should note that the cases have often reflected the shifting balance of power between those on the Court who champion personal rights and those who support a strong police power.

1. The Seminal Case

_Carroll v. United States_, 6 decided in 1925, was the first major case which considered the constitutionality of automobile searches. The Court held that a law enforcement officer may, without a warrant, search an automobile and seize contraband liquor found during the search if the officer has "reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." On September 29, 1921, federal prohibition agents working undercover in Grand Rapids, Michigan, negotiated with Carroll and his associates for the delivery of three cases of illegal whiskey the following day. Carroll did not make the promised delivery. Ten weeks later Carroll’s Oldsmobile roadster passed prohibition agents patrolling the road. The agents followed the car for several miles and noticed that it was carrying an unusually heavy load. The agents then stopped the roadster and searched the interior. The agents slashed the upholstery of the seats and discovered sixty-eight bottles of whiskey and gin hidden inside.

In upholding the search, the Court first examined the statutory authority upon which the agents relied. The Court pointed out that the National Prohibition Act stated that no property rights could exist in liquor. At the same time, an act supplemental to the National Prohibition Act penalized any agent who searched private property without a warrant. Unless the object searched was a private dwelling, the agent was also required to have reasonable cause.


45. Although the history is lengthy, it is advisable that the reader be acquainted with all the major cases in order to better understand the values which are at stake. It is also appropriate to review the history of the automobile exception at this time, since it appears that Acevedo has ended any meaningful discussion on the issue for the foreseeable future.

47. Id. at 156, 45 S. Ct. at 286.
48. Id. at 134-36, 45 S. Ct. at 281.
NOTES

statutes, the Court concluded that Congress clearly intended to "make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act." The Court continued that such a distinction by Congress would be constitutional as long as it did not lead to unreasonable searches.

To determine what is an unreasonable search, the Court said: "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." The Court noted that the first, second, and fourth Congresses of the United States had passed statutes which accepted a legal difference in the requirements for a search for illicit goods concealed in a building and illicit goods concealed in a mobile vessel, as the mobile vessel could quickly move the goods beyond the reach of the warrant. Accordingly, these early statutes supported the notion of a warrantless search of the mobile vessels. Since many of the early congressmen were also influential persons during the ratification of the Bill of Rights, presumably, the early statutes adopted by the Congresses followed the intentions of the Fourth Amendment. Therefore, the Court reasoned, a warrantless search of an automobile which conceals and transports illegal goods was held to be reasonable within the meaning of the Fourth Amendment.

One must note, however, that the Court would only accept the search as reasonable upon a showing of two circumstances. First, the agent must have acted upon reasonable or probable cause to believe that the automobile carried contraband. Second, the circumstances must have indicated that it would have been impracticable to get a warrant. Justice Taft warned that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used." Without a showing of either circumstance, the law enforcement agent would be subject to trespass actions.

It is also important to note that the Court decided Carroll in the shadow of the 18th Amendment and during the extreme turmoil of Prohibition. Even so, in a separate opinion Justice McReynolds cau-

52. Id. at 147, 45 S. Ct. at 283.
53. Id. at 149, 45 S. Ct. at 284.
54. Id. at 151, 45 S. Ct. at 284.
55. Id. at 153, 45 S. Ct. at 285.
56. Id. at 156, 45 S. Ct. at 286.
57. "[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes is hereby prohibited. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." U.S. Const. amend. XVIII, §§ 1 and 2 (repealed 1933).
tioned, "[t]he damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods." He then quoted Sir William Scott: "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment . . . is as little consonant to private morality as to public justice."58

2. The Affirmation

When Congress repealed the 18th Amendment in 1933, many questioned whether the rule pronounced in Carroll was still good law. Many years later in United States v. Di Re59 the Court hinted that it was not. Justice Jackson explained that the lesser protection given to automobiles by Carroll was justified only during the enforcement of the National Prohibition Act.60 After briefly reviewing the reasoning employed in Carroll, he pointed out the delicate politics underlying the Court's earlier decision:

Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," the Carroll decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without [a] warrant in enforcement of all federal statutes. This Court has never yet said so.61

And the Court did not take the opportunity to say so in Di Re. Instead, the Court avoided the issue and found that the car had not been searched at all.62 Nevertheless, the opinion concluded with some words of guidance for future cases:

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the fore-

60. Id. at 584, 68 S. Ct. at 223. For an interesting examination of the effect which Prohibition had upon Carroll and the Fourth Amendment in general, see Murchison, supra note 4, at 496-502, 524.
61. Di Re, 332 U.S. at 585, 68 S. Ct. at 224.
62. Id. at 586, 68 S. Ct. at 224.
fathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.63

Thus, the dicta and tenor of Di Re suggested that the rule announced in Carroll would not survive.

Nevertheless, one year later, the Court in Brinegar v. United States64 relied heavily upon Carroll to uphold the warrantless search of an automobile which was transporting illegal liquor. The facts of the case were very similar to those of Carroll. Brinegar was driving his Ford coupe near the Oklahoma-Missouri border when he passed two police officers who were parked on the side of the road. The officers recognized Brinegar as a past offender of bootlegging laws. The coupe was heavily loaded, and Brinegar increased his speed after passing the officers. The officers gave chase and were finally able to force Brinegar off the road. Brinegar admitted that he had twelve cases of liquor in the car. A warrantless search of the coupe confirmed his confession.65

The Court, assuming that the rule announced in Carroll allowing the warrantless search of an automobile was still controlling, concerned itself primarily with deciding if there was enough probable cause to justify the warrantless search. The Court did not devote any effort to the second step of the Carroll test, deciding if the circumstances made it impracticable for the officers to get a search warrant. Thus, the Court in Brinegar adopted the rule of Carroll with two major changes. First, the Court relieved the rule from requiring any authorization under the 18th Amendment or an act of Congress, as was relied on in Carroll. Second, the Court ignored the requirement that the circumstances for getting a warrant must be impracticable.

Justice Jackson wrote a scathing dissent. He accused the Court of “voluntarily dispensing with [a] warrant in this case as a matter of judicial policy”66 whereas the Court in Carroll had simply given due deference to an Act of Congress. Hinting that the Court had betrayed those who fought in World War II, he wrote that “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."67 Though abuses like those committed by the fascist governments existing during World War II could not occur in the United States, he warned:

63. Id. at 595, 68 S. Ct. at 229.
65. Id. at 162-63, 69 S. Ct. at 1304.
66. Id. at 183, 69 S. Ct. at 1314 (Jackson, J., dissenting).
67. Id. at 180, 69 S. Ct. at 1313 (Jackson, J., dissenting).
We must remember that the extent of any privilege of search and seizure without a warrant which we sustain, the officers interpret and apply themselves and will push to the limit. . . .

And we must remember that the authority which we concede to conduct searches and seizures without a warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.\(^6\)

Despite Justice Jackson's heartfelt arguments, the Court's majority decided that the exigency created by the mobility of the automobile outweighed the individual's right to be left alone.

3. The Expansion

Although the *Carroll* rule was very straightforward and had been simplified by *Brinegar*, many doubts remained, particularly in the lower courts.\(^69\) For instance, what was the scope of the warrantless search? May the warrantless search include all parts of the car and the persons and containers found in the car? When must the warrantless search occur? Does the rule apply only to searches of contraband in which the individual, by definition, has no property right?

In 1970, the Court tried to answer some of these questions in *Chambers v. Maroney*.\(^70\) The Court held that where the police officers had probable cause to believe that the automobile carried evidence of a crime, the police may search it later at the station house without a warrant. One hour after a robbery of a gas station on May 20, 1963, Pennsylvania police officers sighted a station wagon matching the description of the getaway car. The police arrested the occupants and then drove the station wagon to the police station where the car was thoroughly searched. The warrantless search revealed two .38-caliber guns under the dashboard and other evidence of the robbery.\(^71\)

The Court first reaffirmed *Carroll* as a valid basis to uphold the constitutionality of the warrantless search. The Court explained that *Carroll* had identified a basic difference between the search of automobiles and the search of houses, and then conspicuously mentioned the half dozen Supreme Court cases which had either followed, affirmed, or approved of *Carroll* from 1925 to 1970. After concluding that *Carroll* had established the warrantless search of an automobile based on prob-

\(^{68}\) Id. at 182, 69 S. Ct. at 1314 (Jackson, J., dissenting).

\(^{69}\) Klotter, supra note 16, at 212.


\(^{71}\) Id. at 44, 90 S. Ct. at 1977.
able cause alone, the Court decided that it made no difference that
the search was conducted at the station house and not at the scene of
the police stop. Justice White explained, "The probable-cause factor
still obtained at the station house and so did the mobility of the car
unless the Fourth Amendment permits a warrantless seizure of the car
and the denial of its use to anyone until a warrant is secured." Chambers
was the first case to address the difficult question of which police action better protects an individual's Fourth Amendment
rights—a warrantless search or the seizure of the automobile until a
warrant is issued or denied. Justice White suggested:

[A]rguably, 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 prob-
able 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.

In dissent, Justice Harlan seized upon the majority's acceptance of
the temporary seizure as reasonable. He noted that the majority did
not argue that the temporary seizure to wait for a warrant would not
fully protect the interests of effective law enforcement. Going beyond
the majority, Justice Harlan reckoned that in nearly all circumstances
the immobilization of the automobile would be a lesser intrusion since
the facts which would give probable cause to search would also provide
probable cause to arrest the individual. He continued:

Since the occupants themselves are to be taken into custody,
they will suffer minimal further inconvenience from the tem-
porary immobilization of their vehicle. Even where no arrests
are made, persons who wish to avoid a search—either to protect
their privacy or to conceal incriminating evidence—will almost
certainly prefer a brief loss of the use of the vehicle in exchange
for the opportunity to have a magistrate pass upon the justi-
fication for the search.

72. Id. at 48-52, 90 S. Ct. at 1979-81.
73. Id. at 52, 90 S. Ct. at 1981.
74. Id. at 52-53, 90 S. Ct. at 1981.
75. Id. at 63, 90 S. Ct. at 1987 (Harlan, J., dissenting).
76. Id., 90 S. Ct. at 1987 (Harlan, J., dissenting).
77. Id. at 63-64, 90 S. Ct. at 1987 (Harlan, J., dissenting).
Those people who would submit to a warrantless search rather than have their car immobilized are, of course, free to give their consent to the search. Just the same, "[w]here consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure." 78

The Court's insistence upon upholding the search in Chambers despite a questionable fact pattern led the Court, in South Dakota v. Opperman, 79 to announce a second justification for the existence of the automobile exception. 80 Carroll had justified the automobile exception upon the inherent mobility of automobiles which created a danger that the contraband could be removed from the jurisdiction before a warrant could be issued. In Opperman, Chief Justice Burger concluded that Chambers had shown in contradiction that a warrantless search would be constitutional even "where no immediate danger was presented that the car would be removed from the jurisdiction." 81 Thus, to explain the aberration of allowing warrantless searches of automobiles in less than exigent circumstances, he wrote:

[L]ess rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles [for various minor violations] . . . .

The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. 82

This new rationale for the automobile exception greatly expanded the permissible use of the exception. First, Brinegar detached Carroll from its justification in light of the 18th Amendment and the National Prohibition Act. Next, Chambers divorced Carroll from its justification

78. Id. at 64, 90 S. Ct. at 1888 (Harlan, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968)). This appeared to hint at the practicability requirement of Carroll which had apparently been forgotten by the Court in Brinegar.
80. Although two earlier cases had initially formulated the basis for the second justification, Opperman became the primary case relied upon for this proposition in later opinions. See Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464 (1974); Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523 (1973).
81. Opperman, 428 U.S. at 367, 96 S. Ct. at 3096.
82. Id. at 367-68, 96 S. Ct. at 3096 (citation omitted).
that a citizen could not have Fourth Amendment property rights in contraband. But Opperman stripped from the rule of Carroll its realistic basis that under certain circumstances the police simply could not get a warrant. Instead, Opperman justified a police infringement of the Fourth Amendment simply because in some esoteric way Americans did not adequately protect their privacy interests in automobiles from legislative regulations.

While Chambers answered some questions, an issue of immense importance remained: what was the scope of the warrantless search of an automobile? The dicta in Opperman had hardly begun to be seriously tested when the Court took the opportunity to place some limits on the use of the automobile exception. Within a few years, the broad exception which had been born of Carroll was to come face to face with the traditional protections granted to the personal effects placed by an increasingly mobile society into containers such as briefcases, luggage, safes, crates, boxes, and sacks.

4. The Limitation

The following year, in 1977, Chief Justice Burger tried to limit Opperman's broad dicta in United States v. Chadwick. The Chief Justice held that the warrantless search of a footlocker one and a half hours after being removed from the trunk of a car was unreasonable. On May 10, 1973, narcotics agents in Boston closely watched two passengers arriving from San Diego claim their unusually heavy footlocker. The agents had been alerted that the footlocker and its possessor were possibly trafficking marijuana or hashish. The agents released a drug-sniffing dog which signaled the presence of drugs within the footlocker. The defendant Chadwick then joined the couple, and together they carried the footlocker to a car. They placed the footlocker in the trunk. The agents then promptly arrested Chadwick and the couple, transported the footlocker to the Federal Building, and opened it one and a half hours later. The footlocker contained large amounts of marijuana.

Chief Justice Burger first reasoned that the Warrant Clause of the Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy regardless of the locale of the object of the search. The Warrant Clause itself does not distinguish between the search of homes and other searches. Looking to the history of the clause, he concluded that the record was inconclusive because searches outside of the home were not a large issue in

84. Id. at 3-5, 97 S. Ct. at 2479-80.
85. Id. at 7, 97 S. Ct. at 2481.
colonial America. He wrote, "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."6

Chief Justice Burger pointed out that the footlocker had been both locked and padlocked. Such a sign of an expectation of privacy in the contents of the footlocker was due the protection of the Fourth Amendment. Without either an exigency or a warrant, the search was found to be unconstitutional. In this case, the police had no warrant, and no exigency existed because the footlocker had been under the absolute control of the police for over an hour at the time of the search.8

One should note that the government did not contend on appeal that the automobile exception justified the search of the footlocker.8 However, the government did argue that the rationale of the automobile exception should apply to luggage.9 The Court declined to accept this argument. Chief Justice Burger acknowledged that the Court had recognized crucial differences between searches of automobiles and other property, and he again explained that automobiles are subject to a lesser expectation of privacy. Nevertheless, he conceded that the factors which diminish the privacy aspects of an automobile do not apply to a footlocker.9 He asserted: "Luggage contents are not open to public view ... nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects."91 Thus, Chief Justice Burger continued to propagate the assumption of a lesser expectation of privacy in an automobile, while plainly recognizing the need to limit this rationale to the automobile itself and to not apply it to any containers found within the automobile.

Justice Blackmun, joined by Justice Rehnquist in dissent, wrote against any such retreat. He speculated that had the agents waited a few minutes longer, after Chadwick had begun to drive away, the warrantless search of the footlocker would have been permissible under the automobile exception. He explained that the scope of the exception

86. Id. at 8-9, 97 S. Ct. at 2482.
87. Id. at 15, 97 S. Ct. at 2485-86.
88. The First Circuit Court of Appeals and the district court rejected any claim of justification under the automobile exception. The car's engine had not even been started at the time of the initial seizure of the footlocker. See 532 F.2d. 773 (1st Cir. 1976); 393 F. Supp. 763 (D. Mass. 1975).
89. The automobile exception had always been justified in part by the rapid mobility of the vehicle which would allow a suspect to flee the jurisdiction of the law officer before a warrant could be issued. Luggage, it was argued, could also be easily removed from the officer's jurisdiction.
90. Chadwick, 433 U.S. at 11-13, 97 S. Ct. at 2483-84.
91. Id. at 13, 97 S. Ct. at 2484.
extends to the contents of locked compartments, including glove compartments and the trunk.\textsuperscript{92} He then went on to cite a handful of cases from the Courts of Appeals which had construed the automobile exception to include briefcases, suitcases, and footlockers found inside automobiles.\textsuperscript{93} Even though the car was not moving, Justice Blackmun believed that the footlocker was subject to a warrantless search because of its presence in the automobile's trunk.

\textit{Arkansas v. Sanders},\textsuperscript{94} considered in 1979, presented the question which Justice Blackmun had hypothecated in \textit{Chadwick}: may the police conduct a warrantless search of a suitcase found in the trunk of a moving car? The Court held that the warrant requirement of the Fourth Amendment applies equally to all personal luggage whether taken from an automobile or elsewhere,\textsuperscript{95} and, that the automobile exception will not justify the warrantless search of luggage "merely because it was located in an automobile lawfully stopped by the police."\textsuperscript{96} The facts of \textit{Sanders} were very much like those in \textit{Chadwick}, with the major difference being that the container in question was an unlocked suitcase which was recovered from the trunk of a moving taxi. On April 23, 1976, an officer of the Little Rock Police Department received word from a reliable informant that Sanders would arrive at the Little Rock Airport later that day carrying a green suitcase full of marijuana. Sanders arrived and placed the green suitcase in the trunk of a taxi, and the police stopped the taxi shortly after it drove away from the airport.\textsuperscript{97}

Justice Powell, writing for the majority, began his opinion with a summary of Fourth Amendment principles, notably writing that a search must be both reasonable and made pursuant to a warrant.\textsuperscript{98} He noted, however, that the Court had created some exceptions to the warrant

\begin{itemize}
  \item \textsuperscript{92} Id. at 22-23, 97 S. Ct. at 2489 (Blackmun, J., dissenting).
  \item \textsuperscript{93} 433 U.S. at 23 n.4, 97 S. Ct. at 2489 n.4 (Blackmun, J., dissenting). The cases which Judge Blackmun cited for this proposition were not based on the automobile exception, but instead on the inventory exception to the Fourth Amendment. Justice Blackmun also seemed to be a bit confused about the differences between the automobile exception and a search incident to an arrest. He complained that "[t]he Court's opinion does not explain why a wallet carried in the arrested person's clothing, but not the footlocker in the present case, is subject to 'reduced expectations of privacy caused by the arrest.'" 433 U.S at 20, 97 S. Ct. at 2488. A discussion of inventory searches and searches incident to arrest are beyond the scope of this comment.
  \item \textsuperscript{94} 442 U.S. 753, 99 S. Ct. 2586 (1979).
  \item \textsuperscript{95} Id. at 765-66, 99 S. Ct. at 2594.
  \item \textsuperscript{96} Id. at 765, 99 S. Ct. at 2594.
  \item \textsuperscript{97} Id. at 755, 99 S. Ct. at 2588.
  \item \textsuperscript{98} Id. at 758, 99 S. Ct. at 2590 ("The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.").
\end{itemize}
requirement where it "concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search." He continued:

Thus, a few "jealously and carefully drawn" exceptions provide for those cases where the societal costs of obtaining a warrant; such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate. But because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment "the burden is on those seeking the exemption to show the need for it." He explained that the distinction between automobiles and other personal property is based, first, upon the exigent circumstances which can exist due to the inherent mobility of the vehicle. Second, "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." Justice Powell concluded that the suitcase was subject to neither of the traditional rationales for the automobile exception. The suitcase was no longer mobile, for "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control." Also, the expectation of privacy in the suitcase is not reduced by being placed in a car since the "very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them." Therefore, the search of the luggage without a warrant was not justified by any exception to the Fourth Amendment. Justice Powell stressed that the Supreme Court had never, before Sanders, ruled on the constitutionality of a warrantless search of luggage taken from a lawfully...

99. Id. at 759, 99 S. Ct. at 2590.
100. Id. at 759-60, 99 S. Ct. at 2590-91 (citations omitted).
101. Id. at 761, 99 S. Ct. at 2591.
102. Id. at 763, 99 S. Ct. at 2593. At first blush, such an assessment of probable cause would eliminate the exigency exception to the Fourth Amendment. However, the test would still allow inadvertent searches, and an exigency could still exist in situations in which the police absolutely could not secure the item until a warrant is issued (for example, when luggage suspected of containing cocaine is on fire).
103. Id. at 764, 99 S. Ct. at 2593. Arguably, Justice Powell's analysis would apply to all containers found in an automobile, assuming the container is not an integral part of the vehicle. However, Justice Powell recognized that some containers, such as a kit of burglar tools or a gun case, could not support a reasonable expectation of privacy. The contents of such containers can be inferred from their outer appearance, and thus would not deserve the full protection of the Fourth Amendment. Id. at 765 n.13, 99 S. Ct. at 2594 n.13.
stopped automobile. He explained that *Carroll, Chambers,* and *Opperman* had all involved searches of some integral part of the automobile.\(^{104}\)

A vigorous dissent written by Justice Blackmun and joined by Justice Rehnquist adamantly argued that the luggage was as mobile as the automobile which carried it. Justice Blackmun also doubted that an individual's expectation of privacy in luggage was significantly greater than in the trunk or locked glove compartment of the car.\(^{105}\) Further, the dissent lamented that *Sanders* undermined the automobile exception and would lead to "greater difficulties for law enforcement officers, for prosecutors, for those suspected of criminal activity, and, of course, for the courts themselves."\(^{106}\) Justice Blackmun proposed that the Court adopt a clear-cut rule which would allow a warrantless search and seizure of any personal property found in an automobile.\(^{107}\)

A concurring opinion written by Chief Justice Burger and joined by Justice Stevens sharply criticized the dissent’s approach:

The dissent complains that the Court does not adopt a "clear" rule, presumably one capable of resolving future Fourth Amendment litigation. That is not cause for lament, however desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise. We are construing the Constitution, not writing a statute or a manual for law enforcement officers.\(^{108}\)

The concurrence also argued that *Sanders,* like *Chadwick,* did not involve the automobile exception. Instead, the Chief Justice offered a novel approach. He suggested that cases in which the suspected locus of contraband is a container and in which the relationship between the automobile and the container was purely coincidental do not invoke the automobile exception. Chief Justice Burger explained, "The fact that the suitcase was resting in the trunk of the automobile at the time of [Sanders'] arrest does not turn this into an 'automobile' exception

\(^{104}\) Id. at 763, 99 S. Ct. at 2592-93. For example, in *Carroll* the police had searched the inside of the car seats.

\(^{105}\) Id. at 769, 99 S. Ct. at 2596 (Blackmun, J., dissenting).

\(^{106}\) Id. at 768, 99 S. Ct. at 2595 (Blackmun, J., dissenting).


\(^{108}\) *Sanders,* 442 U.S. at 768, 99 S. Ct. at 2595 (Burger, C.J., concurring).
This analysis gave birth to the "particular" versus "general" probable cause approach to searches involving vehicles.

Under Chief Justice Burger's approach, where the facts which established probable cause focused on a container which happened to be in an automobile, the police were said to have "particular" or "specific" probable cause. To search the container, the police would have to get a search warrant. Conversely, where the facts establishing probable cause indicated that contraband was located in an unknown location somewhere within the car, the police were said to have "general" probable cause. With "general" probable cause the police may search the entire automobile without a warrant. This search would include any containers located in the car, regardless of whether the contraband was ultimately located in a specific container. This distinction between "general" and "specific" probable cause, suggested by the concurring opinion, would eventually be the downfall of Sanders and Chadwick.

5. The Conflict

In an attempt to reconcile Carroll and Chambers with Sanders and Chadwick, the Court had created an arbitrary line distinguishing between probable cause which focused on a container which happened to be in an automobile ("particular" or "specific" probable cause) and probable cause which led police to believe that contraband or evidence of a crime would be found somewhere within the car ("general" probable cause). Although many on the Court were uncomfortable with drawing such lines, this analysis became accepted and applied to Fourth Amendment cases throughout the 1980s. The threshold question no longer asked about the object or locale of the search, but rather concerned the locus or initial impetus of the probable cause which led to the search. Chadwick and Sanders were not regarded as automobile exception cases, and their effect upon the exception was questionable. Thus, the question remained: what is the scope of a warrantless search justified by the automobile exception?

In United States v. Ross, the Court held that the police may conduct a warrantless search of the vehicle as thoroughly as if conducted under a warrant "particularly describing the place to be searched." Thus, where the police have lawfully stopped an automobile and have probable cause to believe that contraband or evidence of a crime is located somewhere within the car, they may search all compartments and containers found in the car which might contain the object of the

109. Id. at 767, 99 S. Ct. at 2595 (Burger, C.J., concurring).
111. Id. at 800, 102 S. Ct. at 2160.
search. In Ross, the District of Columbia Police Department had been told by a reliable informant that Ross was selling narcotics from the trunk of his Chevrolet Malibu. Three policemen drove to the area described by the informant and located Ross’ car. Nobody was in or near the vehicle. The policemen then left the area to avoid arousing suspicion. They returned five minutes later to see the Malibu being driven around the corner. The police then stopped the car and ordered Ross out of the vehicle for a body search. While searching the interior of the car, the police found a bullet on the front seat and a pistol in the glove compartment, whereupon they arrested Ross. The police then opened the trunk and found a paper bag which contained many glassine bags of heroin. The police drove the car to the police station where they conducted a more thorough search. The search discovered a zippered red leather pouch containing $3200 cash in the trunk.

Justice Stevens, writing for the majority, reasoned that the “specifically established and well delineated” exception recognized in Carroll 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” since contraband, due to its secretive nature, will rarely be placed inside an automobile unless it is enclosed in a container. He argued that Chadwick and Sanders could have no effect on the case since neither involved probable cause to search the automobile or anything within it except the footlocker and suitcase. Thus, the Court held they were not automobile exception cases. Ross, however, was an automobile case because the police had probable cause to search the entire vehicle, or at least the entire trunk, an integral part of the car. Furthermore, Justice Stevens argued, courts had, before Chadwick and Sanders, routinely allowed the warrantless search of containers during a warrantless search of the automobile.

The Court decided that the rule announced in Ross would apply to all containers regardless of their ostensible security, and although a case could be made for distinguishing between “worthy” and “unworthy” containers, such an approach would be antithetical to the Fourth Amendment. Thus, the fragile, wrinkled paper bag would

112. Id. at 825, 102 S. Ct. at 2173.
113. Id. at 800-01, 102 S. Ct. at 2160.
114. Id. at 825, 102 S. Ct. at 2173.
115. Id. at 820, 102 S. Ct. at 2170.
116. Id. at 814, 102 S. Ct. at 2167.
117. Id. at 817, 102 S. Ct. at 2168-69.
118. Id. at 819 n.25, 102 S. Ct. at 2170 n.25.
119. Id. at 821-22, 102 S. Ct. at 2171. The Court did not explain why such an approach would be inconsistent with the Fourth Amendment. Why is the Court’s distinction between houses and automobiles not equally inconsistent?
receive as much protection as the triple-locked steel chest. The Court also recognized that an individual may very well have an expectation of privacy in the automobile, its trunk, its glove compartment, and the containers placed within the vehicle. Nevertheless, "[t]hese interests must yield to the authority of a search . . . which—in light of Carroll—does not itself require the prior approval of a magistrate." 120 Justice Stevens pointed out that in Carroll, the owner of the car certainly had a significant interest that the upholstery of his car not be ripped apart, yet, such concerns were not dispositive in 1925 and were still not dispositive in 1982. Justice Blackmun, in a concurring opinion, disagreed: "[O]ne's 'reasonable expectation of privacy' is a particularly relevant factor in determining the validity of a warrantless search." 121 Nonetheless, Justice Blackmun explained that an individual can have only very limited expectations of privacy in an automobile.

Justice Brennan recognized that the majority had taken "a first step toward an unprecedented 'probable cause' exception to the warrant requirement." 122 In Brennan's opinion, the majority had not relied upon the justifications underpinning the automobile exception—mobility and a lesser expectation of privacy. Instead the majority had justified the warrantless search of containers found in the car only upon a general probable cause standard, determined by the police officer in the field. Presumably the majority circumvented the requirement of a magistrate's prior determination of probable cause, which provides much more protection to the individual than a post hoc judicial review of a police officer's determination in the pursuit of police efficiency. 123 Justice Brennan also pointed out that the majority had inadvertently created an enigma where the prosecutor "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." 124

Following Ross, the conflict between Chadwick/Sanders and Carroll/Ross became clear. The true key to any automobile case would be in presenting the probable cause in terms which would allow the search of the automobile itself, including any containers therein, and thereby fall under the broad exception granted by Ross. Any probable cause which focused too closely on the container would presumably be controlled by Chadwick and Sanders. Of course, some puzzles remained. For instance, which line of cases would be determinative where the

120. Id. at 823, 102 S. Ct. at 2172.
121. Id. at 826, 102 S. Ct. at 2173 (Blackmun, J., concurring).
122. Id. at 828, 102 S. Ct. at 2174 (Brennan, J., dissenting).
123. Id. at 828-34, 102 S. Ct. at 2174-77 (Brennan, J., dissenting).
police initially seize a container toward which they have specific probable cause, but at the scene, circumstances show probable cause to search the entire vehicle? Might the warrantless searches of containers allowed by Ross be conducted at a later time, as the search of the vehicle itself might according to Chambers? Which line of cases would control when local police have probable cause to believe the car contains marijuana while the FBI has probable cause to believe that a suitcase in the trunk contains stolen treasury plates? The Court answered most of these questions three years later.

The Court held in United States v. Johns that the warrantless search of containers allowed by Ross may be reasonably conducted three days after the containers had been removed from the vehicle. Furthermore, the facts of the case and the disposition of the Court imply that when in doubt, Ross prevails over Chadwick and Sanders.

United States Customs officers in Arizona, suspecting a drug smuggling operation, mounted a ground and air surveillance through which they saw two pickup trucks travel over 100 miles to a remote private airstrip less than 50 miles from the Mexican border. Two small aircraft then landed in succession. The customs officers in the air saw one of the trucks approach the first aircraft. Shortly after both aircraft left, one of the Customs officers on the ground crept up to watch one of the trucks. He saw a person at the rear of the truck cover the contents with a blanket. The officer then ordered the suspects to lie on the ground. As other Customs officers approached the trucks, they smelled marijuana. Exposed in the back of the truck were many packages wrapped in dark green plastic and sealed with tape. Similarly wrapped packages were commonly known to contain smuggled marijuana. The police then arrested the suspects. The police did not search the packages at the airstrip, but instead, the police drove the packages to DEA headquarters in Tucson where the packages were stored in the DEA warehouse. Three days after the initial seizure of the packages, the officers opened them without a warrant.

Justice O'Connor, writing for the majority, decided that the officers had probable cause at the airstrip to believe that the two pickup trucks...
contained contraband. Therefore a warrantless search was approved under Ross. She explained that this probable cause arose when the officers first smelled the marijuana even though they did not know the odor's exact origin. She explained that the officers were unaware of the packages at that time, and contraband might have been hidden elsewhere within the trucks. Moreover, under Chambers, the police need not conduct the search contemporaneously with the stop of the automobile. As long as probable cause still exists, the police may conduct a warrantless search of the containers.

One must note that the majority deliberately found probable cause to search the entire truck despite facts which indicated otherwise. While admittedly at one point in time the Customs officers were briefly unaware of the packages and therefore could only assume that contraband was somewhere in the trucks, the officers were aware of the packages at the time of the search. Indeed, the officers quickly became aware of the packages after walking toward the trucks, at most 90 feet. Once the officers saw the packages, they had little cause to believe contraband would be located elsewhere in the trucks. The courier airplanes had left shortly before the seizure, and the two trucks which had earlier traveled 100 miles were loaded with packages which are commonly used to smuggle marijuana. The smugglers did not have the time or motive to unwrap and hide contraband within the trucks.

Furthermore, the officers never searched the trucks themselves. Justice O'Connor found this fact "meritless," but the fact illustrates the point that the officers themselves never developed probable cause regarding the trucks. If the police did have general probable cause to believe that the truck contained contraband, aside from the packages, then
they would have been remiss to limit their search to the packages. Rather, probable cause to search the trucks was a fiction created by the Court, exemplifying the point that the Court was adamant on favoring Ross over Chadwick whenever possible.

6. The Resolution

Although Chadwick and Sanders remained good law on the search of containers, the Court was likely to find that Ross applied to virtually any search of any object found in an automobile. Johns had expanded Ross to include cases where the officers at some point had probable cause to believe that the vehicle contained contraband, even where their probable cause was seconds later limited to containers therein. In the same term, the Court expanded Ross to include the search of motor homes.135

Chadwick remained the prevailing law where the police focus was aimed at a particular container in an automobile.136 Nevertheless, the Court would find Ross controlling in practically any situation which could create probable cause in the entire car, thereby dispensing with the need for a warrant.137 In the conflict between Ross and Chadwick, the former had clearly dominated. California v. Acevedo138 challenged the Court to decide whether Chadwick had been entirely vanquished. In Acevedo, the Court decided that even where the police have particular probable cause to search a container found in an automobile, the automobile exception applies. Consequently, a search warrant is not necessary. This comment will next examine the facts and reasoning which led the Court to this conclusion.139

III. The ACEVEDO Decision

A. The Factual Setting and Procedural History

In October of 1987, federal drug enforcement agents in Hawaii discovered a picnic cooler containing bags of marijuana. The cooler

137. Really, Johns was the only case which presented a confrontation between the two cases. Obviously, the Court held that Ross controlled in that case. Moreover, after Ross, the Court never again followed (in a Shepard's sense) Chadwick. Within the Courts of Appeals, Chadwick was followed only nine times. Ross was followed fifty-four times.
139. Given the strongly conservative outlook of the current Court and its apparent long term hold on the later make-up of the Supreme Court, it appears that Acevedo will be the final statement of the law of searches of containers found in cars for many years.
was to be mailed by Federal Express to a J.R. Daza of Santa Ana, California. The DEA agents contacted Officer Coleman of the Santa Ana Police Department and arranged a "controlled delivery" to discover and arrest the recipient. The package containing the picnic cooler was sent directly to Officer Coleman who made arrangements for the controlled delivery with the local Federal Express office.\textsuperscript{140}

Upon receipt of the package, Officer Coleman opened the package to make sure that it did in fact contain nine clear plastic bags of marijuana, each bag weighing approximately two pounds and measuring 12"x4"x3". He then repackaged the box and left it at the Federal Express office to be picked up, presumably by the addressee. On October 30, 1987, at 10:30 a.m., a man who identified himself as Jamie Daza claimed the package. He then drove the package back to his apartment, secretly followed by the police. He took the package into his apartment. Several policemen remained in the area to watch for a sign that Daza was aware of the contents of the package, establishing criminal intent. At 11:45 a.m. Daza exited his apartment and disposed of the emptied package and wrappings in a trash bin. Officer Coleman then left the scene to get a search warrant for the apartment, Daza, and Daza's automobile. Other policemen remained in the area to secure the apartment.\textsuperscript{141}

At 12:05 p.m., Richard St. George, previously unknown to the police, emerged from the apartment wearing a blue knapsack which looked half full. St. George then began to drive out of the apartment complex. Suspecting that he was carrying marijuana, the police stopped St. George and searched his knapsack. The police found about one and a half pounds of marijuana.\textsuperscript{142}

At 12:30 p.m., Charles Steven Acevedo, also unknown to the police observers, entered the apartment empty handed. Ten minutes later he emerged, carrying a full brown paper lunchbag. According to the police, the lunchbag was the approximate size of the wrapped marijuana packages seen earlier by Officer Coleman. Acevedo walked to his silver Honda in the parking lot and placed the lunchbag into the trunk. He then tried to drive out of the apartment complex. To prevent the possible loss of evidence, a marked police car stopped the Honda and opened the trunk. The police opened the lunchbag and found about three eighths of a pound of marijuana.\textsuperscript{143} A magistrate issued a search warrant for the apartment at 12:40 p.m., and Officer Coleman returned to the

\textsuperscript{140} \textit{Acevedo}, 111 S. Ct. at 1984.
\textsuperscript{141} Id.; Petitioner's Brief on the Merits at 7-10, \textit{California v. Acevedo}, 111 S. Ct. 1982 (No. 89-1690).
\textsuperscript{142} \textit{Acevedo}, 111 S. Ct. at 1984.
\textsuperscript{143} Id. at 1984-85; Petitioner's Brief on the Merits at 10-11, \textit{Acevedo}, (No. 89-1690).
scene a short time later. A search of the apartment revealed several bags of marijuana.

On June 24, 1988, the District Attorney of Orange County charged both Acevedo and St. George with one count of possession of marijuana for sale. Acevedo entered a plea of "not guilty." On October 7, 1988, the Superior Court heard and rejected Acevedo's motion to suppress the evidence discovered during the warrantless search. In response, Acevedo entered into a plea bargain. Acevedo entered a guilty plea and was granted probation on certain terms and conditions, including thirty days in custody and a $100 fine. Acevedo then filed a Notice of Appeal on November 10, 1988, seeking to reverse the Superior Court's refusal to suppress the evidence of the warrantless search.

Over a year later, on December 12, 1989, a California Court of Appeal agreed with the defendant and reversed the Superior Court. The court found that the police did have probable cause to believe that the lunchbag contained contraband. Despite this, the court decided that under Chadwick the police officers could not open the lawfully seized lunchbag without first getting a warrant. However, the court expressed some dissatisfaction with the state of the search and seizure jurisprudence:

We recognize the anomalous nature of the Ross-Chadwick dichotomy: If police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. If the investigation has, for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located somewhere in an automobile, officers may conduct a warrantless search of any container in the car that could reasonably conceal the evidence...

One unfortunate feature of the rule is an incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of Ross. Despite misgivings concerning the continuing validity of Chadwick after Ross, we are in no position to ignore the Supreme Court's current mandate.

144. Petitioner's Brief on the Merits at 11, Acevedo, (No. 89-1690).
145. Acevedo, 111 S. Ct. at 1985 (They were in violation of Cal. Health & Safety Code § 11359 (West 1991)).
146. Petitioner's Brief on the Merits at 5-6, California v. Acevedo, 111 S. Ct. 1982 (No. 89-1690).
148. Id. at 25.
149. Id. at 27.
Notwithstanding any misgivings, and since Chadwick was controlling, the court held a search warrant was required. Furthermore, the court explicitly rejected the State's contention that probable cause to get a search warrant is the equivalent of having done so.\footnote{150}

On March 15, 1990, the California Supreme Court denied the State's petition for review which claimed that Ross justified the search. However, Justice O'Connor stayed the enforcement of the Court of Appeal's judgment pending the disposition of the State's petition for certiorari which was granted.\footnote{151}

\textbf{B. The Supreme Court's Reasoning}

Justice Blackmun delivered the majority opinion ordering the reversal of the California Court of Appeal. The majority held, "The interpretation of the Carroll doctrine set forth in Ross now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause."\footnote{152}

Justice Blackmun began his opinion, following a summary of the case facts, with a brief review of Carroll, Chambers, Ross, Chadwick, and Sanders. He then concluded that the conflict between Chadwick and Carroll had led the Court to create a senseless distinction between particular and general probable cause. In Ross, the Court tried to assuage the problem and had taken the "critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile."\footnote{153} However, in deference to the rule in Chadwick and Sanders, the Court delayed taking the final step of ruling that the Fourth Amendment allows a warrantless search of a container in a movable vehicle even if the police lack probable cause to search the entire car. Justice Blackmun decided that it was time for the Court to explicitly overrule the lingering decisions of Chadwick and Sanders.\footnote{154}

Justice Blackmun began the dismantling of the Chadwick-Sanders rule:

We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy. In fact, we see no

\footnotesize
\begin{itemize}
\item \footnote{150}{Id. at 28.}
\item \footnote{151}{California v. Acevedo, 111 S. Ct. 39 (1991).}
\item \footnote{152}{California v. Acevedo, 111 S. Ct. 1982, 1991 (1991). Although the Court explicitly overruled only Sanders, it seems that Chadwick is also implicitly overruled.}
\item \footnote{153}{Id. at 1987.}
\item \footnote{154}{Id. at 1988.}
\end{itemize}
principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in *Ross* and the paper bag found by the police here. Furthermore, by attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy and have impeded effective law enforcement.\(^5\)

Justice Blackmun presented three reasons why the *Chadwick-Sanders* rule did not protect an individual’s privacy interest. First, the anomalous dichotomy of particular and general probable cause encouraged police to search the entire car so as to persuade the courts that the police had a good faith belief that contraband was located in an unknown location within the car. The police would thereby be able to take advantage of the warrantless search exception granted by *Ross* which would extend to the search of any container located in the automobile. Presumably the police would engage in such specious behavior even where they have marginal or no probable cause to believe that the car contains contraband in any place aside from a specific container.\(^6\)

Second, Justice Blackmun, citing *New York v. Belton*, argued that any protection which *Chadwick* offered the individual would in all likelihood be transitory or illusory. Since the police had probable cause or at least a strong basis to seize the container, in all probability a judicial warrant will be routinely forthcoming for the search of the container. Also, the facts or information which supported the seizure of the container will usually be enough to support an arrest of the individual. If the person is near his car at the time of arrest, the police could conduct a warrantless search of any containers within the passenger compartment.\(^7\) Thus, often the police could search the container without a warrant regardless of *Chadwick* and *Sanders*.\(^8\)

Third, he argued that the search of a lunchbag cannot breach a protected privacy interest when such a search is much less intrusive than the upholstery slashing search which the Court sanctioned in *Carroll*. He wrote that “'[i]f destroying the interior of an automobile
is not unreasonable, we cannot conclude that looking inside a container
is.\footnote{159}{Id.}

Justice Blackmun then went on to explain that while Chadwick and Sanders serve little or no privacy interests, the two cases had strongly hampered the criminal justice system and effective police investigation. In his view, Chadwick's conflict with Carroll and Ross had confused the police officer in the field who could not be expected to fathom the subtle distinctions between the two lines of cases. However, Justice Blackmun did not explain how such confusion actually hampered effective law enforcement. Additionally, the Court noted that this confusion had also permeated the lower courts as shown by the twenty-nine Fourth Amendment cases that the Supreme Court had decided since 1982. Justice Blackmun finished his argument:

\[\text{T}he \text{ existence of the dual regimes for automobile searches that uncover containers has proved as confusing as the Chadwick and Sanders dissenters predicted. We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in Sanders.}^{160}\]

Justice Blackmun claimed that the holding in Acevedo did not extend the "Carroll doctrine" or "broaden the scope of the permissible automobile search" as developed in Carroll, Chambers, and Ross. He also claimed that the Fourth Amendment still required that warrantless searches are unreasonable per se, subject only to a few specifically established and well-delineated exceptions.\footnote{161}{Id. at 1991.}

\section*{IV. CRITICAL ANALYSIS OF ACEVEDO}

\subsection*{A. Flawed Assumptions}

\subsubsection*{1. Privacy Is Expected in an Automobile}

Justice Blackmun perpetuated the belief, first promoted in South Dakota v. Opperman,\footnote{162}{428 U.S. 364, 96 S. Ct. 3092 (1976). See supra notes 79-82 and accompanying text.} that an individual does not harbor much of an expectation of privacy in an automobile. That belief has been the linchpin of many of the recent automobile exception cases. However,
the belief is actually more of a myth and bears little resemblance to the truth.

In reality, most Americans expect and require a high degree of privacy in their automobile. The auto manufacturers, whose business it is to know what Americans expect in a car, design cars with or without a trunk. Many trunks require a special key to open them. Virtually all automobiles have some compartment inside in which to store personal items. In states where it is legal, many people choose to spend extra money to have their windows tinted so others may not see into the vehicle. Some people customize their automobile, purchase personalized plates, and assemble various bumper stickers to make vicarious statements to others. Despite high gas prices and immense traffic problems, most Americans refuse to carpool; they refuse to share their automobile with others. Many people identify personally with their automobile; the car itself becomes an extension of their own personalities. People often take damage or insult to their car personally.6

For many people, their automobiles are their most valuable assets.164 People routinely store valuable items in their automobile, especially while they are "out and about." The car becomes a home away from home.165 The fact that more valuables are kept in a house does not


164. See supra note 3. In general, a household's equity in automobiles is second only to equity in the home. However, only 64% of American households have equity in a home, compared to 86% of Americans who have equity in an automobile.

165. See, e.g., South Dakota v. Opperman, 428 U.S. 364, 388 n.6, 96 S. Ct. 3092, 3106 n.6 (1976) (Marshall, J., dissenting) (it is customary for people to carry their most personal and private items in a car from time to time); Martin R. Gardner, Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-Ross World, 62 Neb. L. Rev. 1, 36 (1983) ("[A]t one time or another, almost everyone carries these highly private containers in their automobiles.").

It has been suggested that in some ways a car offers more privacy than a home. Lloyd Weinreb wrote, "Many people resort to their cars, however, for a privacy of presence and a privacy of place that they lack in crowded living conditions." Lloyd L. Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 75-76 (1974).

reflect the relative expectations of privacy in a house or automobile. Rather, most valuables by virtue of their intended usage are found in the home, for example, computers, televisions, and jewelry. Additionally, houses usually provide more security for protection of the items against thieves.166

The legitimate and large expectation of privacy which people do have in automobiles is not significantly diminished by government regulation of automobiles. Despite the Court's claims otherwise, regulation of automobiles does not decrease the individual's expectation of freedom from pervasive police searches. The government's regulation of automobiles primarily concerns safety and ownership matters. To drive a car legally, the driver must infrequently take the car before a gas station or garage attendant who then checks the brakes, lights, and so forth. These checks are usually brief and superficially performed. The person who checks the automobile sits inside the car, if at all, perhaps five minutes at most to pull various levers and latches. These checks do not expose the car as a whole to scrutiny, the trunk is not opened, and the attendant does not check into nooks and crannies inside the car.

Traffic stops and such by the police are not expected or anticipated by drivers unless the driver has done something to merit the stop. Even if a police officer has lawful authority to make random checks, the average American does not expect a regulatory stop to lead to a police search throughout the automobile, the trunk, and containers within the car. If such a search did occur, the citizen would likely view it as harassment. During ordinary traffic stops, it is expected that the police officer will approach the side of the car and ask to see a driver's license.167 Unless contraband is in plain sight of the police officer, or emits a noticeable odor, an individual does not believe that the police officer may conduct a general search of the automobile. Furthermore, to the extent that government regulation or police stops do subject the automobile to scrutiny, the superficial searches in no way affect the expectation of privacy in the trunk of the car. One especially does not expect the police officer to open containers located in the car.168

166. Although there is some correlation between security and expectations of privacy, one should not conclude that since cars lack the security of a home persons do not have legitimate expectations of privacy in their automobile. First, fear of a burglary is much more striking than the fear of the police search of an automobile, especially considering that a person and his family are at their most vulnerable (i.e., sleeping) while in a home. Second, if possible, people prefer to place their cars within their house (i.e., a garage) when the automobile is not in use. The car is then just as secure as the house.

167. Certain groups may expect a much more thorough search due to police prejudice, but such police prejudice cannot be held to reduce expectations of privacy in the automobile.

Clearly, the Court's reliance upon a lack of expectation of privacy in an automobile is fallacious. Rather than accept the fact that Americans do indeed expect privacy in their vehicles, the Court has created a myth. *Katz v. United States*\(^6\) held that the Fourth Amendment protects against unreasonable searches in all places where the individual manifests a legitimate expectation of privacy. The automobile exception was originally rooted primarily upon the exigency arising from an automobile's extreme mobility. At variance, *Chambers v. Maroney*\(^7\) allowed the police to conduct a search even after the automobile had been immobilized. Therefore, the Court had to find another justification aside from mobility to uphold the search approved in *Chambers*. As a solution, the Court rationalized that an individual's expectation of privacy did not strongly attach to his automobile.\(^7\) The Court did not provide much reasoning behind its pronouncement, but did find a convenient way to dispense with the requirements of the Fourth Amendment. The Court did not frankly and forthrightly announce that the analysis of automobile searches really revolved upon the conflict between individuals' privacy rights in their automobiles and the practical needs of law enforcement. Instead, the Court created a myth that automobiles are subject to inferior expectations of privacy. This unrealistic approach easily reconciled the past cases with *Katz*, but the approach eventually led to virtual removal of vehicles from the protections of the Fourth Amendment in *Acevedo*.

If indeed an individual no longer has any expectation of privacy in his automobile, it is precisely because of the procession of Supreme Court rulings which have steadily eroded the Fourth Amendment protections in a car.\(^12\) If true, the Court's entire analysis of automobile

---

\(^12\) See *California v. Carney*, 471 U.S. 386, 392, 105 S. Ct. 2066, 2070 (1985) ("The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation."). Arguably, the American populace may
searches has been impermissibly muddied by its own fabrications. The cart would be pulling the horse, and the Court would essentially be a panel of self-fulfilling prophets. Indeed, the Court’s analysis would parallel the dangers noted in Smith v. Maryland.\(^\text{173}\)

For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation or [sic] privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual’s subjective expectations had been “conditioned” by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a “legitimate expectation of privacy” existed in such cases, a normative inquiry would be proper.\(^\text{174}\)

Practically all modern automobile exception cases could be considered “alien to well-recognized Fourth Amendment freedoms” since they relied upon the ipse dixit myth of weak expectations of privacy in an automobile.

2. Seizure of the Container is Not as Intrusive as the Search

The Court has often argued that probable cause sufficient to seize the container will nearly always be enough to satisfy a search warrant. Therefore, the individual has no appreciable privacy interest in requiring the police to get a search warrant after seizing the container. The argument presumes that probable cause to seize is equivalent to probable cause to search. Furthermore, it presumes that a probable cause determination by a magistrate before a search is equivalent to an after-the-fact judicial review of the police officer’s field determination of probable cause. Neither of these presumptions can withstand scrutiny.

In theory, probable cause remains the same whether the police seize, search, or arrest. Even so, the jurisprudence of the Supreme Court suggests that probable cause, as a quantum or standard, does indeed vary from seizure to search to arrest. If the standard was always the

---


\(^{174}\) Id. at 740 n.5, 99 S. Ct. at 2580 n.5.
same, then the question presented in *Acevedo* would be moot since the police could simply arrest Acevedo and then conduct warrantless searches incident to arrest\textsuperscript{775} or conduct a warrantless inventory search.\textsuperscript{776} However, the Court has implicitly recognized that the quantum does not remain constant. Instead, *Illinois v. Gates*\textsuperscript{777} describes probable cause as a “fair probability.” The word “fair” connotes a balancing approach which should consider the relative degree of intrusiveness of the police activity.

The Court has recognized that various quanta of cause will justify various degrees of either seizures or searches.\textsuperscript{178} This approach has measured the importance of the governmental intrusion and the degree of the intrusion against the individual’s right to be left alone. Thus, under “articulable suspicion” the police may briefly stop an individual and conduct a pat down search.\textsuperscript{179} Aside from the stop and frisk, the individual retains his privacy rights. Any further intrusion would require a warrant.

While various searches and seizures are recognized as increasingly violative of privacy interests, the Court has also recognized that a seizure is usually less intrusive than a search.\textsuperscript{180} A seizure of a personal effect, such as a container, is an intrusion into the individual’s possessory or proprietary interests. At most the individual is deprived of his property.\textsuperscript{181} On the other hand, the search of that same personal effect is an intrusion into that person’s privacy interest. The search may ultimately injure his dignity, restrain his liberty, and possibly end his life. Privacy interests are of much more importance than proprietary interests.\textsuperscript{182} Unfortunately, the Court has not yet consistently applied this dichotomy to search and seizure law. Be that as it may, one can


\textsuperscript{177} See, e.g., *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

\textsuperscript{178} Circumstances which lead a police officer to believe that criminal activity may be occurring are a “sufficient basis to justify an investigative stop” of an automobile. *United States v. Cortez*, 449 U.S. 411, 413, 101 S. Ct. 690, 692 (1981).

\textsuperscript{179} Of course, some seizures may in fact be more intrusive than a certain search. Most notably, the seizure of the person—an arrest—is often at least as intrusive as a search, because a seizure of the person intrudes upon privacy rights.

\textsuperscript{180} If this property is obviously contraband or evidence, then a search is not necessary, and the possessor of the object will likely be immediately arrested and convicted. But in the case of containers, the mere seizure of the property cannot convict the individual since its contents remain unknown to the police.

scarcely doubt that, given the differing values at stake, an individual is much more likely to view a search as more intrusive than a seizure. Certainly Charles Steven Acevedo would have chosen to allow the seizure of the lunchbag rather than the later warrantless search.

Therefore, an individual has a greater privacy interest in preventing the warrantless search of a container than in preventing the warrantless seizure of the container. This greater privacy interest is deserving of the constitutional protection of the warrant requirement even in circumstances in which the warrantless seizure of the container is necessary. The fact that warrants will be predominantly forthcoming is of little consequence to the individual. The privacy interest at stake demands a constitutional right to judicial supervision and overview—before the container is searched and its contents made public.

Arguably, whatever privacy interest the individual has in a magistrate’s review is outweighed by the inconvenience which the police would suffer. Since a magistrate will almost always approve the warrant, requiring the police to detain the container and suspect until the warrant is issued is simply a waste of the police officers’ time, which could be better spent hunting down more criminals.\(^\text{183}\) However, such detentions need not last long. Many police departments can phone in warrant requests, and developing communications technology will only quicken the warrant process. Warrants can even be issued within one hour.\(^\text{184}\)

\(^{183}\) The State raised an interesting argument that the detention of an individual until a warrant is issued or denied will, at some point in time, become essentially an arrest. Nevertheless, most individuals would usually be better served by the seizure/arrest than the warrantless search. If the person is truly guilty, he is deserving of an arrest yet retains the chance that the warrant request will be denied. If the person is truly innocent, then his seizure may be quickly ended upon his consent to the warrantless search. One wonders if such a person could subjectively believe he was “not free to go”? Recent Supreme Court decisions seem to make these seizures of persons, or unintentional arrests, like that argued by the State, very elusive. See Florida v. Bostick, 111 S. Ct. 2382 (1991) and California v. Hodari, 111 S. Ct. 1547 (1991).

\(^{184}\) In some locales a warrant can be issued in about an hour. See United States v. Lynch, 934 F.2d 1226, 1233 n.5 (11th Cir. 1991) (one hour); United States v. Berick, 710 F.2d 1035, 1037 (5th Cir. 1983) (one to four hours); United States v. Baker, 520 F. Supp. 1080, 1083-84 (S.D. Iowa 1981) (not more than thirty minutes).

In most cases, obtaining a search warrant requires two or three hours, even if using a telephone. See, e.g., United States v. Good, 780 F.2d 773, 775 (9th Cir. 1986); Llaguno v. Mingey, 763 F.2d 1560, 1572 (7th Cir. 1985) (en banc). Unquestionably, telephonic warrants could be made much quicker if certain procedural requirements, such as possessing an actual affidavit form, were abolished. Other measures could be taken to make magistrates or other warrant-issuing officials more accessible. It is better to cut corners on procedure than to do so on substance.
Furthermore, those individuals who value their time more than their privacy interest in a container may waive the warrant requirement and consent to an immediate search. Of course, for those who do not consent, the police will be required to spend some time to satisfy the warrant requirement. But, the police cannot say that their time is too valuable to recognize a citizen's constitutional right to a magistrate's approval of the search.\footnote{185}

Some practical concerns of the policemen are good arguments against requiring a warrant. The automobile exception of Carroll was largely set up in recognition of the concern that the police could not be expected to detain an automobile until a magistrate could be summoned to issue a warrant. At that time, police departments did not have the facilities to store automobiles. Moreover, the time required to get a warrant was on average much longer than it is today.\footnote{186} Oppositely, modern police have adequate facilities to store most containers,\footnote{187} and a lot of time is not required to get a warrant.\footnote{188}

Arguably, an after-the-fact judicial review of the police officer's field determination of probable cause adequately protects the individual's privacy interest in the container. Far from it, such a review of probable cause has many infirmities which a magistrate's prior determination does not.\footnote{189} First, the after-the-fact review may be jaded by the magistrate's knowledge of the result of the search. A person may be more likely to find probable cause to search the container of a known criminal rather than of a suspected criminal. Second, the reviewer will likely have knowledge of other information surrounding the case which would not have been known to the police or the magistrate at the time of the search. For instance, the reviewer will know of evidence which shows the breadth and severity of the crime. A person may be

\begin{notes}

186. Today, police may use a telephone to submit a warrant. Even in overworked metropolitan judicial systems, a search warrant can be obtained within four hours.


188. Indeed, under Shadwick v. Tampa, 407 U.S. 345, 92 S. Ct. 2119 (1972), the probable cause determination may be made by a wider variety of personages. This further aids the rapid issuance of a warrant.

189. "[A]n on-the-spot determination of probable cause is \textit{never} the same as a decision by a neutral and detached magistrate." United States v. Ross, 456 U.S. 798, 833-34, 102 S. Ct. 2157, 2177 (1982) (Marshall, J., dissenting).\end{notes}
more likely to find probable cause to search the container of a courier of a large criminal organization than of a casual user of narcotics.\textsuperscript{190} Third, the review of probable cause takes place in the context of the exclusionary rule.\textsuperscript{191} If the reviewer decides that the police did not have probable cause to search the container, the case will likely fail against the offender. Often the opportunity to bring the offender to justice will have been permanently lost. The magistrate who gives prior review to a warrant does not face such a dilemma. If the magistrate decides that the police do not have probable cause, the potential offender goes free, but the entire case against that offender has not been ruined. The government has not yet spent many hours and effort to build a case against the person. Often the police still retain a good opportunity to apprehend the individual later.\textsuperscript{192} It is beyond dispute that our nation's judges try with all their strength to remain impartial when they decide issues such as probable cause. Nevertheless, the after-the-fact reviewer must fight the natural inclinations described above. Most judges are quite aware of the innate prejudices created by an after-the-fact judicial review, and these judges steadfastly uphold the Fourth Amendment even when it causes them personal grief to free a known criminal. However, over time—in the aggregate—it is likely that some reviews will be jaded to the detriment of an individual's Fourth Amendment rights.

3. Chadwick and Sanders Were Not Confusing

Justice Blackmun in \textit{Acevedo} argued that Chadwick and Sanders had created confusion for all concerned. The State and its supporters made much ado about the so-called absurdity of requiring police, on one hand, to get a warrant to search containers in which there exists particular probable cause. Meanwhile, the police may conduct a warrantless search of the entire automobile, including containers, if there exists general probable cause that the automobile contains contraband. According to Justice Blackmun, "The Chadwick-Sanders rule not only has failed to protect privacy but it has also confused courts and police officers and impeded effective law enforcement."\textsuperscript{193} However, it is highly questionable whether Justice Blackmun's conclusions have any basis in fact or are mere rhetoric.


Justice Stevens astutely points out that Justice Blackmun provided no evidence that the police were confused by the rule of Chadwick-Sanders and its potential conflict with the holding of Ross. Justice Stevens retorted that the authority upon which the Court had found the confusion was:

primarily ... predictions that were made by Justice Blackmun in his dissenting opinions in Chadwick and Sanders. The Court, however, cites no evidence that these predictions have in fact materialized or that anyone else has been unable to understand the “inherent opaqueness,” ... of this uncomplicated issue.\footnote{194}

The finding of confusion among law enforcement officers was probably a myth or self-fulfilling prophecy. It is very questionable that well-trained policemen would find it difficult to determine when there is general probable cause as to the entire automobile or when there is probable cause particular to a container. Certainly some police in the field today do not have the ability to make accurate probable cause determinations, but this is much more a reflection of inadequate training than a lack of capacity.\footnote{195}

Often the nature of probable cause is abundantly clear. In Acevedo it was clear that the police only had probable cause to search the lunchbag. Chadwick and Sanders were similarly clear. And in cases like Carroll and Ross the police were clearly interested in illegal activities taking place in or from the automobile and not in any specific container. As a rule of thumb, the question could be easily resolved by asking which object the police became aware of first—the vehicle or the container. The Supreme Court plainly adopted this rule of thumb in Johns regardless of contradictory circumstances. Therefore, the determination of whether Ross or Chadwick would apply was relatively clear cut. Of course, some cases would fall in the gray area between the two cases. But Johns certainly showed that Ross controlled the gray area searches. Given such guidance by the Supreme Court, police would have to be a very dull lot to remain confused.

Likewise, it is questionable that the lower courts were confused. Justice Blackmun pointed to what he considered a large number of

\begin{footnotes}
\footnote{194. Id. at 2000 (Stevens, J., dissenting) (footnote omitted).}

Justice Blackmun would have it believed that police officers are unskilled in legal nuances and simply cannot operate without “bright-line rules.” To the contrary, many police officers understand the legal standards better than the bulk of attorneys. If those officers are the rare exception and police generally are hopelessly confused by Ross and Chadwick, then America is in much more danger than even this writer supposed.
Fourth Amendment cases heard after Chadwick as a sign of turmoil among the ranks. Even so, the number of cases heard by the Supreme Court is not an accurate measure of confusion in the lower courts. First, according to the rules of appeal, the Court basically determines for itself which cases it will hear. Second, the number of search and seizure cases is more likely a measure of the Supreme Court's recent activism. Justice Stevens stated it best:

In recent Terms, the Court has displayed little confidence in state and lower federal court decisions that purport to enforce the Fourth Amendment. Unless an order suppressing evidence is clearly correct, a petition for certiorari is likely to garner the four votes required for a grant of plenary review. Much of the Court's "burdensome" workload is a product of its own aggressiveness in this area. By promoting the Supreme Court of the United States as the High Magistrate for every warrantless search and seizure, this practice has burdened the argument docket. It has also encouraged state legal officers to file petitions for certiorari in even the most frivolous search and seizure cases.

Third, the number of narcotics cases which have entered the judicial system has increased dramatically since the Court decided Chadwick nearly fifteen years ago. It is only natural that a result of this increase of cases entering the docket would be an increase in the number of cases which are appealed to and heard by the Supreme Court. Even if the lower courts were occasionally confused or indecisive, effective law enforcement was not hindered. All the cases which reached the Supreme Court, including Acevedo, were decided in favor of the government. Not a single accused went free because the Court found a warrantless search to be unconstitutional where either Chadwick or Ross might apply. Furthermore, there is no evidence that judicial indecision leads to ineffective day-to-day law enforcement. No case has

198. In the Supreme Court, only Ross and Acevedo presented the question of containers found in an automobile, and both cases were decided in the government's favor. But of twenty-seven cases heard by the Court after Ross involving a search or seizure without a warrant or with a defective warrant where the government was the petitioner, the Court upheld the search or seizure twenty-four times. Id. at 2002 (Stevens, J., dissenting).

The Courts of Appeals also overwhelmingly sided with the government in cases involving the warrantless search of a container found in an automobile. Only one of
ever been reported where a police officer allowed a suspect to escape while pondering the most recent debates between judges.

Assuming arguendo that the conflict between Chadwick-Sanders and Ross did confuse the police and courts, there is no compelling reason to jettison Chadwick and Sanders and expand Ross. Even a cursory review of the two lines of precedents reveals that Chadwick and Sanders derive their justification from the text of the Fourth Amendment itself. On the other hand, Ross derives its justification from an exception to the Fourth Amendment based upon pragmatic concerns of the Court. To prefer the rule of Ross is to allow the exception to master the basic rule.\textsuperscript{199} This makes no sense. In the beginning, the Fourth Amendment provided the clearest "bright line" for a reasonable search—get a warrant. Over time, as American society gained access to rapid transportation, it became clear that in some circumstances getting a warrant just was not practicable if the police were to be effective in their jobs. So in Carroll the Court wisely established an automobile exception based upon the mobility of the vehicle and the impracticability of getting a warrant under the circumstances. If any uncertainty existed, it was the inevitable price to be exacted by the creation of an exception. A widely-accepted principle of constitutional adjudication mandated that the Court must not interpret any exception more broadly than required by its justification.\textsuperscript{200} Therefore, if there is conflict between Chadwick and Ross, the proper solution is to curtail the exceptional case—Ross. Unfortunately, the Court felt compelled to do just the opposite.

Perhaps the most ironic and disturbing aspect of the Acevedo decision is that it discards the supposed probable cause "anomaly" of

\begin{quote}
\end{quote}
Chadwick and Sanders and replaces it with a much more threatening and senseless anomaly. Though Acevedo would allow the warrantless search of a suitcase full of marijuana once it was placed inside a locked car trunk, the police could not search this very same suitcase as it was being carried through the public streets. Justice Stevens wrote:

One's privacy interest in one's luggage can certainly not be diminished by one's removing it from a public thoroughfare and placing it—out of sight—in a privately owned vehicle. Nor is the danger that evidence will escape increased if the luggage is in a car rather than on the street. . . . Any line demarking an exception to the warrant requirement will appear blurred at the edges, but the Court has certainly erred if it believes that, by erasing one line and drawing another, it has drawn a clearer boundary.20

One wonders if the Court will next use this anomaly to justify the warrantless search of containers found anywhere except perhaps a private residence. After all, in a few years, looking back at Acevedo, it will be easy for the Court simply to say if in cars, why not elsewhere?

B. Poor Policy Choices

1. Acevedo: A Bull in the China Shop

The balance between Ross and Chadwick was not confusing and did not create anomalies. But assuming arguendo that the jurisprudence was unwieldy, the new rule announced in Acevedo is a poor replacement.


Professor LaFave has been a vocal supporter of bright-lines, but even he has recognized the potential problems: "[A] line that is bright is not necessarily also right." Wayne R. LaFave, Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 855 (1990). Professor LaFave offers four criteria to rate a bright-line rule:

1) Does it have clear boundaries so it makes case-by-case evaluation unnecessary?
2) Does it approximate results which would have been determined in a case-by-case application of the underlying principle if such were practicable?
3) Is it responsive to a genuine need to forego a case-by-case application of a principle?
4) Is it immune from manipulation and abuse?

Although Acevedo may satisfy the first criterion, the decision fails to meet the professor's three remaining tests.
The rule does not withstand scrutiny under either a test of "fundamental fairness" or a test of "reasonableness." The rule is improper because it introduces a high chance of error that innocent parties will be adversely affected, subjecting these individuals to quite severe damages and indignities. Meanwhile, the governmental interest in expanding warrantless automobile searches is truly not high. When these concerns are balanced, it becomes clear that the rule introduces more harm than good.

Acevedo increases the risk that the government will intrude upon the privacy of innocent people. Acevedo inflicts upon the nation a rule which essentially places automobiles beyond the scope of the Fourth Amendment. This rule will have far-reaching effects upon the rights of all people who drive automobiles in America. Most of these people will not be aware that no object within an automobile is beyond a police officer's power to search without a warrant. Acevedo goes beyond the scope of Ross. Although Justice Blackmun denied that Acevedo extends the previous authority of the police to conduct warrantless searches, the decision ultimately will allow police to search the entire car even where probable cause is attached to, only a specific container within the car. Dicta in Ross suggested that such searches would not be permitted, but the Court has not since taken any actions to suggest that the words were anything more than posturing. In the real world, who would actually stop the search short after discovering

---


203. See supra note 172.

204. Acevedo, 111 S. Ct. at 1991. For instance, suppose a police officer stops Mr. X for running a yellow light. Mr. X seems disoriented, and there is a faint odor of marijuana. The officer sees a cigar box in the passenger's seat with the tip of a rolled cigarette sticking out. The police officer has probable cause to believe that marijuana is located in the cigar box. He may suspect that other illegal remnants can be found throughout Mr. X's car, but he does not have probable cause as to the rest of the car, unless the Court is now prepared to allow utter bootstrapping, in which case the police may as well search Mr. X's home too. Nevertheless, Acevedo would likely allow the warrantless search of the entire car. If the cigar box does contain marijuana then Mr. X may be arrested and his car may be taken to the police station and subjected to a warrantless inventory search. Therefore, Mr. X would not be constitutionally injured by a warrantless search of the entire car under Acevedo. If the cigar box does not contain marijuana, the police officer has probable cause to believe that the marijuana is located elsewhere in the car. Either way, after Acevedo, Mr. X's entire car may be searched by the police officer in the field without a warrant. For a case with similar facts, see Berry v. State, 574 N.E.2d 960 (Ind. App. 1st Dist. 1991).

205. United States v. Ross, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982) ("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.").
the illegal contents of the container? *Acevedo* says that the search of any container found within an automobile falls within the purview of the automobile exception. *Ross* held that the scope of a search following the automobile exception is precisely the same as the scope of a search authorized by a warrant.

If the police know that a person has carried a lunchbag of marijuana into his house, the magistrate will issue a warrant to search for contraband throughout the house regardless of the form of packaging. It is unlikely that the magistrate would limit the object of the search to a "lunchbag of marijuana." The warrant would authorize the police to search for contraband anywhere within the house which could contain marijuana. And the police officer would not end the search upon finding a bag of marijuana on the kitchen table. In the same manner, upon introduction of a bag of contraband into an automobile, under *Acevedo*, the police may search throughout the car in any areas which might conceal the contraband.

Clearly the Court has expanded the automobile exception far beyond its original rational justifications. *Acevedo* weakens the Fourth Amendment to the detriment of every person in the United States. Additionally, the decision places Americans at risk in a less obvious, though perhaps ultimately more threatening, way. When police can conduct a warrantless search on the basis of plainly innocuous activities like *Acevedo*'s, it is likely that many innocent persons will be subjected to similar, and even more severe, searches. It is debatable whether probable cause existed to search *Acevedo*. Taken at face value, *Acevedo* behaved much more like a person coming home for a lunch break than a criminal. *Acevedo* arrived around noon and entered the apartment without knocking. The police did not know who he was, nor did the police know who resided in the apartment. *Acevedo* stayed inside for about ten minutes and then left carrying a lunchbag. He placed this bag in his trunk. Despite the assertions of the police, the lunchbag was not the same size as the packages of marijuana seen earlier in Hawaii. *Acevedo*'s bag was only one-fourth the size of the packages seen in Hawaii and Santa Ana by Officer Coleman. Nor did the lunchbag feel or smell of marijuana. *Acevedo*'s only suspicious activity was that he briefly entered an apartment under surveillance by the police. *Acevedo* was guilty by association. Undoubtedly, each day thousands of people unwittingly come into

---

206. For example, in *Acevedo*, the warrant issued to Officer Coleman authorized the search of Daza's apartment and car for "[m]arijuana and items commonly associated with storage and use of marijuana consisting of sifters, baggies, scales and other weighing devices." Any of those items could be located anywhere, and in practically anything, within the apartment or car. Joint Appendix at 12, California v. Acevedo, 111 S. Ct. 1982 (No. 89-1690).
contact with nefarious activity. If *Acevedo* is any indication, in the future these innocent people will be subject to warrantless searches of their entire car and whatever containers are inside.\(^{207}\)

The increased risk to innocent individuals created by the rule of *Acevedo* must be multiplied by the severity of the damage which these individuals would suffer. The Court continues to hold out the seat-slash search conducted in *Carroll* as a paragon of reasonableness. Thus, the search may be quite intrusive in terms of property damage, and this damage must be borne by the car owner who has no recourse against the police officers.\(^ {208}\) Likewise, the damage inflicted upon an individual's privacy is very considerable. Under *Acevedo*, the police may search the entire automobile in any place which could conceal the object of the search. A warrantless search of an automobile could reveal any number of items aside from the object of the search. The police may discover personal items, may open packages and gifts, and may uncover embarrassing items.\(^ {209}\)

\(^{207}\) Furthermore, the safety and rights of many completely innocent citizens who have done absolutely nothing to arouse the suspicion of the police will be put at risk by *Acevedo*. Since the search of containers within automobiles is uniformly beyond meaningful Fourth Amendment scrutiny, the police will have an incentive to allow suspects to enter a vehicle before trying a search. When the police allow a suspect to enter a vehicle, the police create a situation which stimulates high speed chases through the busy streets of America. These chases very often end in extreme damage and fatalities to completely innocent citizens and our policemen who happen to be at the wrong place at the wrong time as a squad car caroms over a sidewalk. Also, during a chase, or in the time it takes to pull over the automobile, the suspect may destroy evidence or even escape from the reach of the law.

In the past, the Court has warned that police cannot purposefully manipulate an exception to the Fourth Amendment, but a survey of the automobile exception cases suggests that the Court will not vigilantly enforce this warning. For example, why did the police allow Acevedo to enter his car? The Court never asked for an explanation.

\(^{208}\) The Civil Rights Act of 1871, 42 U.S.C.A. § 1983, created a federal statutory cause of action against state officers who violated federal constitutional rights. Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971), inferred from the Constitution a parallel cause of action against federal officers who violated one's Fourth Amendment rights. Of course, a key element of the cause of action is a violation of the Fourth Amendment. Since *Acevedo* curtails the protections of the Fourth Amendment from automobiles, the individual's tort claim against the officer has been eliminated. For a provocative look at the use of tort remedies as constitutional safeguards, see Robert L. Spurrier, Jr., Rights, Wrongs, and Remedies: Section 1983 and Constitutional Rights Vindications (1986).

\(^{209}\) The fact that enclosed packages may have no chance of containing the contraband would likely be of little consequence. Such a basis in reality has often been ignored by the Court in order to help law enforcement. For example, during an arrest, the police may search the immediate area without a warrant. Ostensibly, the search is allowed so police may protect themselves by discovering weapons and to prevent the destruction of evidence. However, the Court will allow the use of searches incident to an arrest even under circumstances where the arrestee has no way of moving, e.g., handcuffed and in the back of a squad car.
The searches may also discover condemning and illegal items which the police did not expect. Such a windfall would be entirely good evidence for a later prosecution since the police discovered the items during a lawful search. While the police would certainly discover more law breakers by using Acevedo-type automobile searches, the traditional American sense of justice is denigrated by such unfocused law enforcement. Those individuals unfortunate enough to arouse the suspicion of the police must withstand a warrantless, scrutinizing search of their entire vehicle and hope nothing incriminating is found. Those who are in more frequent contact with the police or who live in higher crime areas are thus held to a high standard of behavior previously reserved for parolees. One momentary indiscretion or betrayal of trust may quickly lead to incarceration. Arguably, since those individuals did break the law, they deserve punishment. But American justice requires that law breakers be apprehended according to lawful procedures. A principle of lawful procedure requires that the police search a suspect only upon a particular and individual cause. Suspicious activity alone should not be a pretext for a penetrating search aimed at rooting out any potential wrongdoing. A police search is not a device to be used to discover sinners wholesale, but is a method of collecting physical evidence of a particular crime. This principle was embodied in the Fourth Amendment, and it is a principle which Acevedo ignores.

The increased number of intrusive searches of innocent persons must be countered by equal state interests in order for the rule of Acevedo to be reasonable. Without a doubt, the need to fight crime is a very important state interest. Indeed, the state interest is probably greater today than at any other time in our nation's history. However, Acevedo makes unnecessary changes which do not significantly advance crime fighting goals. First, as discussed earlier in section IV.A.3., Acevedo will not cure any confusion which was impeding law enforcement. No such confusion existed. Second, law enforcement agents did

---


211. Despite better trained police officers, many policemen still operate with deeply held prejudices. See, e.g., Richard Lacayo, Law and Disorder, Time, April 1, 1991, at 18, 20 ("To [many police officers], virtually any young black male with a gold chain is a potential drug courier. Any well-dressed black man in an expensive car might be a big time dealer.").

212. Sadly, millions of Americans are outraged when foreign fishermen kill dolphins in oversized nets designed to catch tuna, while hardly an outcry is raised when decisions like Acevedo aid American police in the use of analogous indiscriminate, net-like searches on "born-criminal" American citizens.
not need carte blanche authority to make warrantless searches of automobiles. Under Ross the police could usually search the containers found in automobiles without a warrant. The police needed a warrant only in situations when they operated under probable cause regarding a specific container. This was not a major restriction upon the power of the police to fight crime effectively. In practice, there are only relatively few instances when the officer knows with particularity where the contraband is located. Furthermore, these few instances are precisely the circumstances which most demand a warrant before the search. Usually, the offender has been under surveillance for a time sufficient for the police to gain particular knowledge of the contraband's location—certainly time enough to make arrangements for a warrant. In other cases, the officer has gained particular knowledge from an informant. Surely we desire a magistrate's scrutiny of probable cause supplied by an informant before invading an individual's right to privacy. And lastly, as in Acevedo, occasionally the officer has probable cause regarding an illegal object, and suddenly this object or part of it appears to be escaping via some sort of container, which is then abruptly placed inside an automobile. Certainly, such instances are rare, especially when the police are performing their jobs properly. The nature of the probable cause in these cases is not completely clear, so the scrutiny of a magistrate is again needed.

One must note that the state interest in fighting crime has changed since the 1920s. The risks to individuals created by Carroll were balanced by the very strong state need to conduct searches of the mobile vehicle itself, particularly considering the lack of an alternative to a speedy warrantless search on the spot. But no strong state need justifies the search of containers as authorized by Acevedo. Moreover, unlike the situation in Carroll, today a viable alternative does exist. The police may seize the container and then get a search warrant. Usually, it would also be necessary to detain the suspect until a magistrate issues a warrant. Further, with modern technology the request and issuance of a warrant need not take much time.

Justice Stevens concluded his dissent with this vexed foresight: "It is too early to know how much freedom America has lost today. The magnitude of the loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its

213. Of course, the police need not let the item escape. The police should properly stop the car and seize the container. However, a magistrate should be consulted before opening the container since the police are not sure if the container does in fact contain the item.

214. The era of Prohibition also had a profound effect upon the Carroll Court. See Murchison, supra note 4, at 496-502, 524.

215. See supra notes 184-188 and accompanying text.
rejection of prior law."\(^\text{216}\) The prior Fourth Amendment jurisprudence had reflected a delicate balance between the interests of law enforcement and individual rights. At times the jurisprudence was difficult to apply and navigate, but its great value and the fear of destroying the balance necessitated extra concentration and caution by our nation's judges. Unfortunately, the current Court has loosened a rampant bull in the Fourth Amendment china shop. *Acevedo* is the latest piece of china to fall and crash on the floor.

2. *Bad Solution to War on Drugs*

It really does not require much insight to understand that the rule of *Acevedo* is primarily designed to make the policing, arrest, and conviction of drug possessors and dealers easier. One cannot honestly question that the containers in question are most likely to contain either illegal drugs or nothing incriminating at all. Once one cuts through the arguments of the various Justices for the majority, it remains that the primary justification for the warrantless search is to aid the "War on Drugs."

Certainly America faces a drug crisis. Use of illegal drugs saps the productivity of our citizens, disrupts families, and drives many people to commit other crimes to support their drug habit. The drug trade creates a tremendous windfall profit for those who can fight their way to gain so-called "turf." The result is a war on the streets which leads to thousands of fatalities among the drug sellers and users as well as innocent parties who happen to be in the wrong place at the wrong time. Many brave police officers have also lost their lives. There is no question that drugs present a national crisis. The question is how to deal with the crisis. Law enforcement is certainly one important measure which must be taken. However, it is not the only measure and must be used along with education and treatment. The leaders of our country have come to recognize that drugs are a health problem and not just a legal problem.

*Acevedo*, no doubt, encourages and aids very aggressive law enforcement against drug possessors. But the Court's decision promotes a one-dimensional assault on drugs. This approach has failed in the past and will fail in the future.\(^\text{217}\) Last year, over 800,000 people were arrested on drug charges. Catching the drug possessors is not the problem. The problem for the criminal justice system is that many of those people who were arrested do not go to prison. And those who


do go to prison stay there for less than a year and a half on average.\textsuperscript{218} The criminal justice system just cannot handle this large mass of offenders. \textit{Acevedo} offers no cure for this and may even make the problem more acute.

The "War on Drugs" must be a multi-dimensional coordinated effort. By increasing police ability to arrest and convict drug possessors, \textit{Acevedo} allows the law enforcement dimension to become too powerful and broad. Overly powerful law enforcement disrupts coordinated efforts by providing a simple and supposedly effective solution. In the long run this will defeat our purposes and goals.

C. \textit{Harmful Results}

1. \textit{Constable Blunders or Constable Batters}

The flawed assumptions and poor policy decisions of the Court's majority led to a holding in \textit{Acevedo} which will in time harm American society much more than any immediate benefits of a placated Justice Department. This comment has already mentioned that the rule of \textit{Acevedo} encourages the police to allow suspects to enter their vehicles in order to have any subsequent search fall under the \textit{Ross/Acevedo} automobile exception. The results are property damage, the loss of evidence, and the escape of criminals. \textit{Acevedo} also drastically limits the possibility of a civil claim for damages resulting from police searches of an automobile or any container within the vehicle.\textsuperscript{219} While such results are certainly harmful, the truly ominous repercussions of the \textit{Acevedo} decision attack the very core of American society.

The majority decision in \textit{Acevedo} states that individuals have no meaningful expectation of privacy in their automobiles. The Court rules that the police may search our automobiles and anything found within them. The only protection for the citizen, be he good or evil, guilty or innocent, is a finding of probable cause that the vehicle somehow harbors evidence of a crime. Beyond a good faith finding of probable cause by the police in the field, the citizen lies prostrate and defenseless before the police search and seizure of his property and person.\textsuperscript{220}

---

\textsuperscript{218} The median term served in prison before release was 15 months in 1987. Since 1970 the median has ranged between 14 and 19 months. Patrick A. Langan, America's Soaring Prison Population, 251 Science 1568, 1570 (1991) (Table 1). After taking into account the probabilities of arrest, prosecution, conviction, and imprisonment, a person who commits a serious crime can expect to spend about eight days in prison. Ed Rubenstein, Crime Pays, National Review, June 25, 1990, at 15.

\textsuperscript{219} See supra note 208.

\textsuperscript{220} The Court by-passes the protective aspects of warrants. First, the judicial warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard
A determination of probable cause made by the police in the field is simply not enough in most cases to protect individual rights reasonably. The police have the unenviable task of ferreting out crime and operate under extreme pressure. Not surprisingly, the rigors of the job leads dutiful officers to becoming impassioned. Often the police view themselves as heroes upon white horses while the suspects are equally evil, rotten to the core, and worthy of righteous contempt. All too often the haze of the city streets becomes the set of a morality play. The fever of the law enforcer is pervasive throughout the system, affecting even the most even-natured police officer from time to time. The result is that the individual citizen who is spotted in suspicious circumstances becomes the victim of self-righteous police prejudice of unparalleled intensity. The police are accountable mainly only through Section 1983 actions, which the Acevedo Court has essentially removed as a public remedy.

It should also be noted that the quantum needed to establish probable cause has been steadily eroding. At one time the legal community thought that probable cause meant “more likely than not.” However, recent cases like Illinois v. Gates have set the quantum at a “fair probability” that the citizen has engaged in a crime. Moreover, upon review of a magistrate’s finding, the standard is further reduced to a “substantial basis” of a “fair probability.” So under current law, if a citizen behaves in a manner which leads a police officer to believe that in fair probability connects that person to a crime, then that citizen may be arrested. If a magistrate issued a warrant, evidence found during a search may be used against the individual—and may even convict against improper and unreasonable searches than the hurried judgment of a law enforcement officer. See United States v. Chadwick, 433 U.S. 1, 9, 97 S. Ct. 2476, 2482 (1977); South Dakota v. Opperman, 428 U.S. 364, 383, 96 S. Ct. 3092, 3104 (1976); United States v. United States Dist. Court for Eastern Dist. of Michigan, 407 U.S. 297, 317, 92 S. Ct. 2123, 2136 (1972); Abel v. United States, 362 U.S. 217, 252, 80 S. Ct. 683, 704 (1960) (Brennan, J., dissenting). Second, once a lawful search has begun, it is more likely that the search will not exceed proper and reasonable bounds when the search is conducted following judicial authorization. See United States v. Chadwick, 433 U.S. 1, 9, 97 S. Ct. 2476, 2482 (1977); Camara v. Municipal Court, 387 U.S. 523, 532, 87 S. Ct. 1727, 1732-33 (1967). Third, the warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, of his needs to search, and the limits of his power to search. See United States v. Ross, 456 U.S. 798, 829, 102 S. Ct. 2157, 2175 (1982) (Marshall, J., dissenting); United States v. Chadwick, 433 U.S. 1, 9, 97 S. Ct. 2476, 2482 (1977).

See, e.g., Ted Gest, Why Brutality Persists, U.S. News & World Report, April 1, 1991, at 24, 26 (“[M]any officers develop an us-against-them mindset . . . .”); Richard Lacayo, Law and Disorder, Time, April 1, 1991, at 18, 21 (“Experts on police psychology insist that most officers are attracted to police work by the opportunity to protect and serve.”).


him—where the search was justified only by a substantial basis of probable cause. One wonders whether the warrantless search of an automobile authorized by Acevedo will also receive the benefit of a "substantial basis" or "good faith" standard.

So, in all honesty, a citizen's constitutional right to a finding of probable cause has been emasculated and reduced almost to a point where probable cause is devoid of any substantive content. One might agree that such a construction of probable cause makes good sense in the context of a courtroom, which is loathe to exclude convicting evidence. Our judges are usually of strong heart and mind such that they can properly balance the needs of society and the rights of the individual. And when the judge fails, the defendant has able counsel present to help prevent mistakes and, if necessary, secure an appeal. But this same construction of probable cause is a threat to all citizens when in the hands of the police. The police are actively engaged in the heated task of ferreting out crime and cannot be expected to fully take into account the rights of their suspects. The beating given by several Los Angeles policemen to Rodney King sadly reminds us of this basic truth.224 Suspects do not have attorneys present in the trunks of their automobile to protect their interests.

The issue is not about excluding incriminating evidence to the benefit of lawbreakers. The true issue ignored by the majority in Acevedo is in empowering the police to detain any person, search throughout the vehicle, and ransack any personal items found within, all upon the police officer's own determination of probable cause made in the field and in the heat of passion. The Founding Fathers and the Court long ago recognized the danger of this fervor and required the police to get a warrant from a neutral magistrate whenever practicable. The reasoning was sound those many years ago; today, with a decreased quantum necessary for probable cause, the reasoning is even more sound. The current Court ignored this danger and instead chose to place the privacy of all individuals who use automobiles into the sweaty hands of America's law enforcement agents.

2. Emergence of a Police State

Perhaps even more frightening is the possible emergence of a police state, which may be foreshadowed by Acevedo. A police state exists where the police have unrestrained authority to ignore personal liberties in their quest to incarcerate all criminals. The current Court has con-

sistently sought to improve police and prosecutorial efficiency to the
detriment of a slowly dissolving Bill of Rights. If the Court believes
that the end of ridding our streets of criminals and drugs is worth
these chosen means, then it is in great error. A similar approach has
been tried before and has failed. The police state does not end crime;
instead, the common citizen is inevitably subjected to State tyranny,
usually leading to revolution and rebellion. A brief examination of the
criminal justice system of the recently dissolved Soviet Union will offer
a clear example of a police state which has failed. The reader is
invited to notice the similarities between the Soviet criminal justice
system and the American criminal justice system which Acevedo aspires
to create.

Many commentators have argued that the Constitution of the Soviet
Union guaranteed the political, civil, economic, and social rights of its
citizens more clearly and in more abundant measure than any other
constitution on Earth. The Soviet Constitution did not merely proclaim
these rights and freedoms but also created methods and guarantees for
their implementation. By and large, however, the Soviet Constitution
provided class liberties and not individual liberties. These basic rights
of the citizens were comprehensive and served the interests of the entire
people. Thus, an individual could not use his liberties to the detriment
of the citizenry as a whole. The Constitution was proclaimed as the
fundamental law of the land, and all other laws had to conform to
its provisions. The Constitution could only be amended by a majority
of not less than two-thirds of the votes of each chamber of the Supreme
Soviet of the USSR.

225. See Silas J. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am.
226. The criminal justice system and Constitution of the Soviet Union have undergone
many changes since 1917. However, for purposes of this comment, all laws and practices
of the Soviet Union regardless of their time period will be treated as indicative of the
police state. Generally, the picture of the Soviet Union is most indicative of the 1950s
and 1960s. The Soviet Union no longer exists. Though the police power was not the
sole cause of the collapse of the regime, the signs of a police state can be considered
symptomatic of a nation with deep internal infirmities, often fatal. See supra note 11.
227. N. T. Vanamamalai, Law and Justice in the USSR 38 (1980) [hereinafter Van-
amamalai].
228. Id. at 43.
229. Roger N. Baldwin, Liberty Under the Soviets 17 (1928). According to the
Communist view, individual liberties arose as political issues in the Western struggle of
private capitalist enterprises against feudalism. The Communists note that individual
liberties took root only in western Europe, particularly England, France, and America.
230. Fundamentals of Soviet Law 92 (P. Romashkin ed. 1961) [hereinafter Ro-
masokin].
The Soviet Court was the state organ charged with administering socialist justice designed to protect against transgressions of the Soviet system. The Procurator’s Office was a special organ created to supervise the precise and undeviating observance of the laws by all persons, establishments, and organizations.233 Whenever evidence was presented which showed a criminal action or inaction, a criminal case was opened.234 The investigating magistrate then had the right to conduct a preliminary examination. Usually, this magistrate was actually a procurator.235 The law prescribed for the investigating magistrate to take all measures provided by law for a thorough, complete and objective investigation into all aspects of the case. The investigation was charged with bringing forward all evidence, incriminating and exculpatory, as well as aggravating and mitigating evidence.236 However, no arrests, searches, seizures or correspondences nor other similar actions could be undertaken without the procurator’s written authorization.237 Even if a given search was not authorized, the evidence discovered was nevertheless admissible since the Soviet system favored the bringing forward of any evidence, regardless of its source and acquisition. The court admitted and weighed evidence according only to its own “inner conviction.”238 This was justified by the belief that the court is charged with a duty to discover the absolute, objective truth.239

If the preliminary investigation revealed the guilt of the accused, it was the duty of the procurator to take any steps necessary to bring the accused to trial. In court the procurator represented the State and prosecuted the accused. The procurator had to prove the charges against the accused and substantiate his proposed penalty for the criminal.240 Although Soviet laws provided many procedural guarantees against unjustified prosecutions, it is widely recognized that not every person who was prosecuted was truly guilty. Nevertheless, the operative presumption was that only the guilty are brought to trial, and the court need only assess the gravity of the crime.241

In practice, the police, procurators, and courts often ignored established legal standards. According to Stanislaw Pomorski:

233. Id. at 89, 91.
234. Samuel Kucherov, The Organs of Soviet Administration of Justice: Their History and Operation 379 (1970) [hereinafter Kucherov]. Precisely what quantum is needed to open a case is not defined by law. However, it is clear that complete certainty of criminal activity is not required.
235. Id. at 381.
236. Id. at 400.
237. Vanamamalai, supra note 227, at 161.
238. Kucherov, supra note 234, at 598.
239. Id. at 600.
240. Romashkin, supra note 230, at 91.
The tension between broadly understood political expediency and legality have more often than not been resolved in favor of the former. This has happened on a massive scale during fairly regularly launched anticrime campaigns or any other “anti” campaign with repressive overtones. . . . Consequently, during campaigns, the party apparatus and the police overshadow regular agencies of prosecution and adjudication and usurp part of their powers.242

The judiciary quickly became entirely subservient to the police and procurators. Criminal trials were little more than “uncritical, mostly ritualistic, rehearsals of the police file.”243 The Soviet criminal justice system gained a very strong prosecutorial bias and was “prone to victimize individuals dragged into its wheels.”244 The abuses of the system are well known:

For years numerous Soviet citizens suffered mistreatment, false accusations, convictions on fabricated charges, and long imprisonment at the hands of the overzealous or corrupt operators of the criminal process. At the same time the powerful, the influential, the “well connected” enjoyed virtual immunity from arrest, prosecution, and punishment. There have been several reported . . . cases of innocent people condemned to death and executed.245

Despite the enormous protections written into the Soviet Constitution, they provided little protection from the abuses of the police and State after the liberties had been sacrificed for the “good of the whole.”

Several frightening comparisons can be made to the recent trends in American criminal justice. First, the Soviet Constitution shows the meaninglessness of grand words when they are ignored by the courts. The Soviet Constitution promised a tremendous array of personal liberties yet delivered relatively few. Instead, the liberties were withdrawn to ease the prosecution of criminals. The current Court has likewise been stripping the Bill of Rights of any meaning, one case at a time. Acevedo removes the Fourth Amendment’s meaning and application from automobiles, which is a vital part of American society. Second, in the Soviet Union, the legality of searches was essentially under executive control. The judiciary merely rubberstamped the procurator’s

---

243. Id. at 595.
244. Id.
245. Id. at 594.
investigations. Acevedo has placed the search of automobiles under executive control, with the courts relegated to a mere review of the police officer’s determination of probable cause, which itself is subject to a decreasing quantum. Third, in both the Soviet Union and, now, the United States the balance in favor of the procurators and police is justified by an attack on criminals.

The real targets of the unregulated police power in the Soviet Union were political dissidents and anti-Soviet thinkers such as entrepreneurs and pacifists. Acevedo cracks down on drug dealers and possessors. But the erosion of individual rights—through the dereliction of the Bill of Rights—affects everyone. The Constitution cannot be eviscerated only for criminals. Weakened protection for criminals is weakened protection for all. The average citizen may not realize this because he feels immune or removed from the immediate crackdown. He may think: “Only criminals are hurt. I am not a criminal. So what?” He would be wise to understand that the rule of Acevedo will adversely affect anyone who the police have suspicion to believe is a criminal. Further, we should take no consolation in the fact that the police may predictably employ the warrantless search only upon certain “target groups” of American society.

246. The Soviet Union never embraced a separation of powers doctrine, but did acknowledge that a division of labor has many advantages.

247. Rex D. Davis, Federal Searches and Seizures, at vii-viii (1964) (“Every citizen has a vital interest in preserving a reasonable relationship between individual liberties and law enforcement in view of the intolerable alternatives which are possible.”). Sadly, the abuses of imbalance can be seen quite clearly in other locales. See John Dugard, The Judiciary in a State of National Crisis—With Special Reference to the South African Experience, 44 Wash. & Lee L. Rev. 477 (1987).

248. Such widespread apathy is not surprising given the results of a recent poll of 507 Americans. Only 9% knew that the Bill of Rights had been added to the Constitution to limit abuses by the federal government. Bill of Rights Unfamiliar to Many in U.S., Baton Rouge Morning Advocate, Dec. 15, 1991, at A2, col.2. Richard Lacayo, speaking of the Rodney King beating, observed an intentional ignorance of middle and upper class Americans: “Los Angeles is far from the only place where police play hardball, dispensing curbside justice with disturbing regularity, especially in crime-plagued ghetto neighborhoods and to people whose only offense is the color of their skins. Those who live outside such areas can usually ignore that reality. Fed up with violent street crime, they are often content to send in the police force and demand that it do whatever is necessary while they look the other way.” Richard Lacayo, Law and Disorder, Time, April 1, 1991, at 18, 19.

249. This practice is, of course, reprehensible. One would wish such uneven police work did not occur, but scholarly evidence suggests that the police have intentionally targeted specific minority groups and willfully abused their police discretion, at least in urban areas. See Frank Donner, Protectors of Privilege: Red Squads and Police Repression in Urban America (1990); Ted Gest, Why Brutality Persists, U.S. News & World Report, April 1, 1991, at 24 (“It is clear that indefensible brutalities—most of them inflicted on powerless minority victims—still take place too frequently in inner cities.”).
This comment does not mean to suggest that the American criminal justice system is the equivalent of the Soviet police state. However, the trend of the Court, as shown in *Acevedo*, has been to gradually transform our criminal justice system such that it begins to resemble a police state more and more. If it walks like a duck and talks like a duck, then it may very well be a duck. *Acevedo* gives the Court webbed feet upon which to continue the ominous march of a loyal footsoldier in the "War on Drugs." The Court has adopted measures which other nations have tried before and which have resulted in repression and revolution. Judge Alex Kozinski of the United States Court of Appeals of the Ninth Circuit has stated the danger well:

> Few people, it seems, have acknowledged a connection between what’s happening in Eastern Europe and what’s going on here. To paraphrase President Kennedy, we should ask not what Eastern Europe can learn from us, but what we can learn from Eastern Europe. Once burned, the people of Eastern Europe are not likely to fall prey to the notion that all things can be achieved if only government gets involved. The question is, are we going to pay heed, or are we destined to make some of the same mistakes with some of the same consequences?²⁵⁰

The people of Eastern Europe and the Soviet Union have realized that it is far better for some criminals to go free than for the State to have unrestrained power over its citizens. In fact, the new proposed Constitution of the Russian Republic strongly protects the home and mandates that only a court may issue a search warrant.²⁵¹

V. CONCLUSION

A balance must be struck between the liberty of the individual, on one hand, and society’s need for law, on the other. Cicero said that we are all in bondage to the law in order that we may be free.²³² A society without law or without effective law enforcement is an anarchy. A society without individual liberty is a tyrannous police state. America’s

---

²⁵⁰. Other Comments, Forbes, Oct. 14, 1991, at 30. Judge Kozinski was speaking primarily about economic control used by government. However, his general observation is equally applicable to the political and social control used by the government, i.e., the police.

²⁵¹. Article 2.3.4. of the proposed constitution of the Russian Republic provides:

1. Home is sacred. Nobody has the right to search a home against the will of its residents or to violate the sanctity of the dwelling. It may be done only in cases prescribed by law.

2. The search warrant is issued upon the decision of the court.

NOTES

Founding Fathers had first-hand experience with both extremes of society. The frontier approximated anarchy, and the writs of assistance of the Crown approximated tyranny. Knowing the abuses and dangers of each extreme, the Founding Fathers struck a delicate balance embodied in the Fourth Amendment. The individual was to be predominantly free from police searches. However, the government could intrude upon the individual's privacy when such would be reasonable, primarily shown by a warrant supported by probable cause. In this original balance, the individual was paramount. Nonetheless, society's need for effective law enforcement would justify a search or seizure of the individual or his property when the police (executive branch) acted with the magistrate (judicial branch). The magistrate was in turn constrained by the requirement of probable cause.\footnote{233}

The current Supreme Court, through Acevedo and other cases, is trying to strike a new balance which strongly favors law enforcement, that is, state control, over the individual. As far as automobiles are concerned, the police no longer must act with the magistrate. This departure from the wisdom of the Founding Fathers is extremely dangerous and threatens to destroy many of the virtues of American society. The United States was built upon the notion that individual freedom is paramount; it is at the core of democratic politics and the free-market economy. Acevedo is not alone the ruination of the United States, but it reflects a recent trend towards stronger governmental control over the individual. A seduction is comprised of many innocuous acts—a glance, a smile, a friendly hug, a kiss on the cheek. One wonders if the Court has already irreversibly compromised the Fourth Amendment to the debaucher Tyranny. Over a century ago Justice Bradley warned:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations . . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be \textit{obsta principiis}.\footnote{254}

\footnote{253. Many years ago the Supreme Court explained: The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police . . . .

\footnote{254. Boyd v. United States, 116 U.S. 616, 635, 6 S. Ct. 524, 535 (1886).}
The Supreme Court has failed in this duty. Moreover, the current conservative dominance of the Court makes it very unlikely that the Court will correct its errors soon. Therefore, some other power must try to restore the original balance of the Fourth Amendment.

Neither the executive branch nor Congress are likely candidates. The executive has been the leader of the Court in its war on crime and drugs which has led to decisions like *Acevedo*. Congress too has been generally supportive of the war on crime and drugs. Moreover, Congress is particularly sensitive to the political machinations of special interest groups and the public outcry against crime. Few congressmen could afford to risk appearing to be pro-crime or pro-drugs. The executive and legislative branches of state governments are also subject to similar concerns.

Therefore, it is the state courts which must restore and maintain a sensible balance between the individual and law enforcement. Esteemed commentators of all backgrounds have recognized the crucial importance of state courts willing to support individual rights in the face of federal retrenchment. Justice Brennan pleaded that the decisions of the Supreme Court should not be dispositive of questions involving individual rights which are also guaranteed by the provisions of state law. The Court's decisions may be persuasive but should be carefully scrutinized, by practitioners as well as state judges. He concluded:

> Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. . . . Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. . . . With federal scrutiny diminished, state courts must respond by increasing their own.

From perhaps a different perspective, Judge Bork has written that the "limitation of national power to preserve a large degree of autonomy in the states . . . [has] guaranteed our liberties as much as, perhaps more than, the Bill of Rights itself." Today, the Bill of Rights is being interpreted into oblivion, necessitating an immediate and cou-

principiis roughly means to "nip it in the bud." In *Remedia Amoris* Ovid advises us to literally "resist the beginnings" of problems, difficulties, and evil before they grow and develop into major problems. See Eugene Ehrlich, *Dictionary of Latin Tags and Phrases* 165 (1987).


256. Id. at 502-03.

rageous move by the high courts of every state to reclaim the torch of liberty.

Up to now, every state has basically followed the lead of the Supreme Court regarding search and seizure law. However, each state has a constitutional provision which can be used as a point of departure from the Court’s recent jurisprudence. For example, Article 1, Section 5, of the Louisiana Constitution of 1974, prohibits “unreasonable searches, seizures, and invasions of privacy” by governmental agents. Usually the Louisiana Supreme Court has interpreted this provision to parallel the interpretation of the Fourth Amendment. Nevertheless, on occasion the Louisiana Supreme Court has rejected the lead of the United States Supreme Court. For example, in State v. Church, the supreme court refused to accept the “reasonableness” of allowing D.W.I. roadblocks. In State v. Hernandez, the Louisiana Supreme Court departed from the implications of New York v. Belton allowing the warrantless search of the entire interior of an automobile incident to an arrest. Justice Dennis explained the basis for the divergence:

We, of course, give careful consideration to the United States Supreme Court interpretations of relevant provisions of the federal constitution, but we cannot and should not allow those decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana. . . . Our state constitution’s declaration of the right to privacy contains an affirmative establishment of a right of privacy, explicit protections against unreasonable searches, seizures or invasions of property and communications, as well as houses, papers and effects, and gives standing to any person adversely affected by a violation of these safeguards to raise the illegality in the courts. . . . This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.

Justice Dennis was entirely correct. In Acevedo, the Supreme Court has discarded the Warrant Clause of the Fourth Amendment. The highest courts of the fifty states should similarly discard the recent decisions of the Court if they value individual liberty. There is no other

258. 538 So. 2d 993 (La. 1989).
259. 410 So. 2d 1381 (La. 1982).
261. Hernandez, 410 So. 2d at 1385.
peaceful way to restore the balance between the citizen and the police.  

John Michael Harlow

262. One basic question still remains: is the Bill of Rights worth fighting for? Are the principles and balances struck by the Founding Fathers still valuable today in the face of rampant crime and drug abuse? Arthur Selwyn Miller has offered an interesting, provocative, and different Machiavellian perspective. According to Miller, the written Constitution has been inadequate to face even mild crises when the government has consequently grasped for raw power. He writes:

Constitutionalism to many is the glory of the American experience. With ups and downs and some unacknowledged changes, the original Constitution of 1787 has survived—but only because of extraconstitutional adjustments that were made to meet the various exigencies of successive generations.

The theory of American constitutionalism has, therefore, long been askew with the facts of American life. Unless major changes are made, that gap will be even more pronounced in the future. Constitutionalism, as Madison and others have defined it, is dying, gasping out its life as the waves of repeated crises roll over and inundate the traditional political and legal order. Government, always as strong as circumstances required, will in the future become even stronger. The idea of limited government is giving way to one of burgeoning powers. The facade remains as a legal Potemkin Village; but lurking behind the false front will be the reality of authoritarianism.