North Dakota Law Review

Volume 60 | Number 4 Article 4

1984

# The Fourth Amendment and Supreme Court Decision Making: Some Thoughts While Awaiting Sheppard

Tim Gammon

## ADDENDUM

During the summer of 1984, subsequent to the writing of the following Article, the United States Supreme Court issued opinions for the two cases discussed in the Article. *See* United States v. Leon, 104 S. Ct. 3405 (1984); Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984). In opinions written by Justice White, who has strived for a modification of the exclusionary rule, the Court adopted a good faith exception to the exclusionary rule. The result of *Leon* is that the prosecution may use evidence seized pursuant to a warrant subsequently found to be unsupported by probable cause, so long as the officer acted in the good faith belief that the warrant was valid. The result of *Sheppard* is that a warrant defective on its face but supported by probable cause will not invalidate the evidence so long as the officer executing the warrant was the one who requested it. For a discussion of *Sheppard* and *Leon,* see C. WHITEBREAD, CRIMINAL PROCEDURE (Supp. 1984).

# THE FOURTH AMENDMENT AND SUPREME COURT DECISION MAKING: SOME THOUGHTS WHILE AWAITING SHEPPARD[1]

TIM GAMMON*

> Citizens are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of the residents. The privacy of citizens, their correspondence. . . (and) communications is protected by law. Citizens have the right to protection by the courts against encroachments of their personal freedom and property. U.S.S.R. CONST. arts. 55-57.

* A.B., Drury College, 1968; M. Ed., Drury College, 1970; J.D., St. Louis University, 1974; LL.M., Harvard University, 1976; currently staff attorney, United States Circuit Court of Appeals for the Eighth Circuit.

1. Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted,* 103 S.Ct. 3534 (1983).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.
>
> [T]he letters in question were taken from the house of the accused by an official of the United States acting under color of his office and in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed on by this court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. *Weeks v. United States,* 232 U.S. 383, 398 (1914).

## I. INTRODUCTION

The difference between the quoted Soviet and American constitutional provisions is the fourth amendment procedural criteria for obtaining a warrant. Different consequences have resulted not from the documents but from the power vested in the American judiciary to breathe life into the words of the fourth amendment as it did in *Weeks.* The exclusionary rule is again before the Supreme Court in the 1983 term.[2] The rule has a long history of controversy, a history that reveals much about constitutional decision making.[3]

---

2. *See id.;* United States v. Leon, 701 F.2d 187 (9th Cir. 1983) (table), *cert. granted,* 103 S. Ct. 3535 (1983).

3. On the history of the fourth amendment, see generally R. DAVIS, FEDERAL SEARCHES AND SEIZURES (1964); T. GARDNER, PRINCIPLES AND CASES OF THE LAW OF ARREST, SEARCH, AND SEIZURE (1974); W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); L. KOLBREK, THE LAW OF ARREST, SEARCH, AND SEIZURE (1965); N. LASSON, *The History and Development of the Fourth Amendment to the United States Constitution* in STUDIES IN HISTORY AND POLITICAL SCIENCE (1937); 8 J. WIGMORE, EVIDENCE §§ 2183, 2184 (3d ed. 1940); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,* 25 COLUM. L. REV. 11 (1925); Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474 (1961); Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49; Stengel, *The Background of the Fourth Amendment to the Constitution of the United States,* 4 U. RICH. L. REV. 60 (1969); Woody & Rosen, *Fourth Amendment Viewed and Reviewed,* 11 S. TEX. L. J. 315 (1970).

History, not logic, is the key to understanding the fourth amendment, the exclusionary rule, and the dilemma they present of how to accommodate the individual's fourth amendment rights and society's interest in convicting the guilty. It is difficult to tear the strand that carries the fourth amendment and exclusionary rule from the seamless web of Anglo-American political and legal history. This Article presents a historical overview of the exclusionary rule, focusing on certain touchstone events and cases. This Article also lists the arguments for and against the rule, discusses alternatives to the rule, and examines the dilemma. The Article offers some observations on Court adjudication and concludes with a "reaffirmation of faith" in the Supreme Court and the exclusionary rule.

## II. HISTORICAL BACKGROUND

### A. ENGLISH LAW

The sanctity of the home provided the foundation for the fourth amendment.[4] In England this sanctity was challenged by general search warrants for stolen property, and by general authorizations or commissions, employed by the time of Charles II and the Star Chamber but refined and extended under George III, which permitted government officers to arrest anyone and search any place to uncover authors, printers, and publications.[5] These roving commissions were necessary, the Crown reasoned, to protect itself from seditious libel.

When Wilkes, the English libertarian, sued those officials who sought the warrants and those officers who executed them, the course was righted first in separate decisions issued by Lord Camden,[6] Lord Loft,[7] Lord Mansfield,[8] and Lord Pratt[9] between 1763 and 1765 and finally by the House of Commons in 1766.[10] In *Entick v. Carrington,*[11] Lord Camden recognized a relationship

4. *See* Frank v. Maryland, 359 U.S. 360, 379 (1959) (Douglas, J., dissenting). In his dissent, Justice Douglas stated: "One of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle." *Id.* (quoting W. TUDOR, LIFE OF JAMES OTIS 68 (1823)).

5. Fraenkel, *supra* note 3, at 362. Professor Lasson traces this sanctity from ancient times. N. LASSON, *supra* note 3, at 13-50.

6. Entick v. Carrington, 19 Howell's State Trials 1029 (1765). The author cites Howell's State Trials because that is the only source that contains the full text of the decision. The case is also reported at 95 Eng. Rep. 807 (1765).

7. Wilkes v. Wood, 98 Eng. Rep. 489 (1763).

8. Money v. Leach, 96 Eng. Rep. 320 (1765).

9. Huckle v. Money, 95 Eng. Rep. 768 (1763).

10. H.C. JOUR. April 22 and 25 (1766).

11. 19 Howell's State Trials 1029 (1765).

between unreasonable searches and self-incrimination by holding that general warrants violated the principle against self-incrimination.[12] He condemned the uncertainty of general warrants and provided the philosophical cornerstone for a right built upon both form, requiring particular procedures in obtaining a warrant, and substance, condemning unreasonable searches regardless of the procedures followed.

### B. THE FOURTH AMENDMENT

While England was remedying the problem of general warrants, America was plagued with writs of assistance, which were general search commissions used to discover smugglers and confiscate their stolen property. Excessive use of these writs provoked attacks on the Crown by John Adams and others.[13] In reaction to the writs, states began to outlaw general searches.[14] The fourth amendment, taken from the 1765 Massachusetts Declaration of Rights, grew out of these state laws and was incorporated into the Bill of Rights (the original version, from the Virginia Constitution, condemned only general warrants).[15]

### C. THE EXCLUSIONARY RULE

The first significant United States Supreme Court pronouncement regarding the exclusionary fourth amendment remedy came from Justice Bradley in *United States v. Boyd,*[16] a forfeiture case. The opinion was noteworthy for several reasons.

---

12. Entick v. Carrington, 19 Howell's State Trials 1029 (1765). In *Entick,* Lord Camden stated:

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle.

*Id.* at 1073.

13. *See* N. LASSON, *supra* note 3, at 51-78; Atkinson, *supra* note 3, at 375, 380; Fraenkel, *supra* note 3, at 364-65 nn.24-26. James Otis, Jr., Attorney General of Massachusetts, was another strong opponent of the writs. N. LASSON, *supra* note 3, at 51-78.

14. *See* F. STIMSON, FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES (1908); Atkinson, *supra* note 3, at 361 nn.1-2; Fraenkel, *supra* note 3, at 12 n.9.

15. Atkinson, *supra* note 3, at 366 n.30 (citing Annals of Congress 1789-91 (Gales & Seaton 1854)); 2 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION (1882); F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1901). *See also* A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA (1974).

16. 116 U.S. 616 (1886). In *Boyd* the defendant was forced, under § 5 of the Act of June 22, 1874, 18 Stat. 186, to produce invoices for 29 cases of plate glass he had received. *Id.* at 618. The glass was imported and subject to duties that were not paid. *Id.* at 617-18. Under § 12 of the Act, the goods were forfeited. *Id.* at 617. The defendant appealed, claiming that in a case for forfeiture, no evidence can be compelled from the defendants themselves. *Id.* at 618. *See* Act of June 22, 1874, ch. 391, § 12, 18 Stat. 186 (repealed 1890).

First, Justice Bradley declared that any procedure, regardless of form, that accomplished the result intended by the unauthorized search would violate the fourth amendment.[17] Second, the court relied on the fourth amendment itself rather than some judicially fashioned exclusionary rule as the basis for forbidding compulsory production of private papers.[18] Third, the Court declared a fourth amendment violation even though a statute expressly authorized the government to receive the evidence produced from the search incident to the compulsory order.[19] Fourth, like Lord Camden, Justice Bradley linked the freedom from unreasonable searches to the privilege against self-incrimination.[20] Fifth, Justice Bradley distinguished between searches for stolen property or contraband and searches for things not illegal in themselves, such as books, papers, or the plate glass invoices in *Boyd*.[21] Finally, the opinion showed that the fourth amendment applied to cases of forfeiture as well as criminal prosecutions.[22] Both the dissent and legal scholars, however, criticized *Boyd* as being unnecessarily broad.[23]

Unlike *Entick*, *Boyd* was short lived. The Supreme Court demonstrated how much less constraining stare decisis was in

---

17. Boyd v. United States, 116 U.S. 616, 622 (1886). Justice Bradley said that even though no search and seizure was actually involved in this case (there was no forcible entry into the defendant's house; nor was a search conducted), the result — "forcing from a party evidence against himself" — was nonetheless the same, and repugnant, therefore, to the fourth amendment. *Id.*

18. *Id.* This issue of *Boyd*, as stated by Justice Bradley, was whether the compulsory production of the defendant's private records was an unreasonable search and seizure and thus, violative of the fourth amendment. *Id.*

19. 116 U.S. at 620-24. *See* Act of June 22, 1874, ch. 391, § 12, 18 Stat. 186 (repealed 1890).

20. 116 U.S. at 633-35. Justice Bradley noted the intimate relationship between the fourth and fifth amendments, pointing out that the

> "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

*Id.* at 633.

21. *Id.* at 623. In making the distinction, Justice Bradley said:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information. . . or of using them as evidence. . . . In the one case, the government is entitled to the possession of the property; in the other it is not.

*Id.*

22. *Id.* at 633. Justice Bradley explained that although the Act of June 22, 1874, ch. 391, 18 Stat. 186 "expressly excludes criminal proceedings from its operation," and thus circumvents the literal terms of the fourth and fifth amendments, the Government's actions nonetheless violated the spirit of the amendments. *Id.*

23. On *Boyd* see generally N. LASSON, *supra* note 3, at 107-10; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); Nelson, *Search and Seizure: Boyd v. United States*, 9 A.B.A.J. 773 (1923); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

America than in England in *Adams v. New York*.[24] The issue in *Adams* was whether the mere receipt at trial of evidence seized in an unlawful search constituted reversible error.[25] Although several lower federal and state courts relying on *Boyd* had reached a contrary result,[26] the Supreme Court in *Adams* upheld a state criminal conviction against the exact kind of fourth and fifth amendment challenge the Court had, perhaps precipitously, invited in *Boyd*. Adams argued that the state court's receipt into evidence of papers containing his handwriting, which were seized from his office pursuant to a warrant that authorized a search for gambling materials, violated the fourth and fifth amendments.[27] He maintained that those amendments were applicable to his state action through the privileges and immunities clause of the fourteenth amendment.[28] The Court rejected his arguments, stating that there had been no denial of any privileges or immunities.[29] The Court stated that it did not want to detract from the authority of *Boyd*,[30] but it did exactly that, taking one giant step backwards. Justice Day opined that if evidence was pertinent to an

---

24. 192 U.S. 585 (1904).

25. Adams v. New York, 192 U.S. 585, 587 (1904).

26. Courts in the following cases refused to admit evidence wrongfully seized: United States v. Flagg, 233 F. 481 (2d Cir. 1916) (defendant's books and papers at his place of business were seized after a warrantless search); United States v. Wong, 94 F. 832 (D. Vt. 1899) (Government wanted wrongfully seized letters admitted as evidence in a deportation case); Town of Blacksburg v. Beam, 104 S.C. 146, 88 S.E. 441 (1916) (chief of police searched defendant, seized the key to defendant's truck, opened it, and seized whiskey therein, all without benefit of a warrant); State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903) (improperly issued search warrant rendered inadmissible evidence seized while searching defendant's house); Blum v. State, 94 Md. 375, 51 A. 26 (1902) (defendants voluntarily turned over business records, but not for purposes of giving the State criminal evidence against them); State v. Slamon, 73 Vt. 212, 50 A. 1097 (1901) (seized letter was not particularly described in the warrant, so it was inadmissible).

27. *Adams*, 192 U.S. at 594. In *Adams*, the defendant was convicted of the crime of possessing gambling paraphernalia used in the game known as policy. *Id.* at 586. Evidence received at trial included some of the defendant's private papers seized in the raid of his premises. *Id.* at 587. The defendant claimed that seizure of these papers, which had no relation whatever to the game of policy, violated his fourth amendment rights. *Id.*

28. *Id.* at 587-88.

29. *Id.* at 594. The Court stated that:

> [W]e do not feel called upon to discuss the contention that the Fourteenth Amendment has made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the States. An. examination of this record convinces us that there has been no violation of these constitutional restrictions. . . .

*Id.*

30. *Id.* at 597. The *Adams* Court distinguished *Boyd*, noting that in *Adams* the papers were seized pursuant to a legitimate search warrant issued in an attempt to find gambling paraphernalia. *Id.* In *Boyd* there was no search warrant; there was simply an order to produce the evidence. *Id.*

This turnaround from *Boyd* actually reaffirmed the general rule at common law that probative evidence should be admitted regardless of source. *See* 1 S. GREENLEAF, GREENLEAF ON EVIDENCE § 254 (a) (1899).

issue in a case, it was not important whether the evidence was legally or illegally seized.[31]

The Supreme Court addressed the contradiction between *Adams* and *Boyd* in *Weeks v. United States.*[32] In *Weeks,* police conducted a warrantless search of Week's house, first alone and then later the same day with federal agents, and seized incriminating evidence.[33] All the evidence seized was subsequently admitted at Week's federal criminal trial. The Supreme Court spurned *Adams* for *Boyd.*[34] The Court refused to sanction the use of such evidence holding that otherwise the fourth amendment would be valueless, and might as well be stricken from the Constitution.[35]

### D. THE EXCLUSIONARY RULE AFTER WEEKS

*Weeks* precipitated fifty years of scholarly and judicial debate on whether the exclusionary rule should be applied to state proceedings. In *Wolf v. Colorado*[36] and *Irving v. California,*[37] two of a

---

31. 192 U.S. at 594-96.

32. 232 U.S. 383 (1914). On *Weeks,* see generally Atkinson, *Prohibition and the Doctrine of the Weeks Case,* 23 MICH. L. REV. 748 (1925); Edwards, *Standing to Suppress Unreasonably Seized Evidence,* 47 NW. U. L. REV. 471 (1952); Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 S. CALIF. L. REV. 60 (1941).

33. Weeks v. United States, 232 U.S. 383, 386 (1914). In *Weeks,* a police officer arrested the defendant at his place of employment while other officers gained access to the defendant's house, searched it, and seized lottery tickets and other incriminating material, all without benefit of a search warrant. *Id.* at 386-89.

34. *Id.* at 397-98. The Supreme Court held that the evidence seized by the local police acting alone could be admitted into evidence but that the evidence seized by the federal agents could not be admitted into evidence. *Id.* at 398. The Court suggested there existed other avenues of redress against the local police (those who violated an individual's rights other than the federal government and its agencies). *Id.*

The Court attempted to distinguish *Adams* on grounds that Adams had waived any objection to introduction of evidence when he failed to seek return of evidence prior to trial. In such a situation, a court will not permit a collateral issue to be raised as to the source of competent evidence. *Id.* The Court noted there was a timely request for return of the property in *Weeks,* and concluded the search in *Weeks* was unreasonable while that in *Adams* had been reasonable. *Id.* at 396.

35. *Id.* at 393-94. The language could be interpreted as meaning the Supreme Court was basing its holding on the fourth amendment itself. If the Court meant the fourth amendment demanded exclusion of such evidence because unless it was excluded the amendment would be a nullity, the fourth amendment would seem to be the basis for the holding.

An alternative interpretation is that the Court created a judicial remedy not based on the fourth amendment but rather on the Court's power to control lower court proceedings. Scholars have adopted this interpretation and consequently they trace the exclusionary rule to *Weeks,* not *Boyd.* Perhaps this is as the Court intended, but any difference in basis for the rulings in *Boyd* and *Weeks* may have been an attempt by the Court to distinguish and circumvent the intervening case of *Adams. See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition?",* 16 CREIGHTON L. REV. 565 (1983); Mathias, *The Exclusionary Rule Revisited,* 28 LOY. L. REV. 1 (1982).

In any event, prohibiting the use of illegally seized evidence in *Weeks* on a judicially created and imposed rule of supervision over lower court processes left open the question of whether Congress might supercede a judicially imposed rule over lower court operations by authorizing particular evidence-gathering acts. *See* Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring).

36. 338 U.S. 25 (1949).

37. 347 U.S. 128 (1954). On *Wolf* and *Irvine* see generally Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties,* 45 ILL. L. REV. 1 (1950); Fraenkel, *Search and Seizure Developments in Federal Law Since 1948,* 41 IA. L. REV. 67 (1955); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State*

parade of cases refusing to extend the exclusionary rule to state proceedings, the Court identified other remedies for unlawful police conduct. The Court noted that if law enforcement officials willfully deprived a United States citizen of a right or privilege secured by the fourteenth amendment (in *Wolf* and *Irving,* the fourth amendment right to be secure in one's home), the unlawful conduct would give rise to a federal cause of action under title eighteen, section 242 of the United States Code.[38]

The Court took a half-step forward in *Elkins v. United States,*[39] when the Court abolished the doctrine that in federal prosecutions, illegally obtained evidence was inadmissible if seized by federal officers, but admissible if seized by state officers.[40] The final blow was struck in *Mapp v. Ohio,*[41] when the Court held that any evidence unconstitutionally obtained is inadmissible in any court, whether state or federal.[42]

---

*Evidence in State and Federal Courts,* 43 MINN. L. REV. 1083 (1959); Knowlton, *The Supreme Court, Mapp v. Ohio and Due Process of Law,* 49 IA. L. REV. 14 (1963); Reynard, *Freedom from Unreasonable Search and Seizure — A Second Class Constitutional Right?,* 25 IND. L. J. 259 (1950); Rudd, *Present Significance of Constitutional Guaranties Against Unreasonable Searches and Seizures,* 18 U. CINN. L. REV. 387 (1949); Comment, *Wolf v. California and Unreasonable Search and Seizure in California,* 38 CALIF. L. REV. 498 (1950).

38. Irvine v. California, 347 U.S. 128, 137 (1954). State and common law actions were catalogued in *Wolf,* 338 U.S. at 30-31 n.1, and a report of federal actions was presented in *Irvine,* 347 U.S. at 153-54. *See* 18 U.S.C. § 242.

39. 364 U.S. 206 (1960). In *Elkins,* the defendants were convicted of intercepting and divulging telephone communications and of conspiracy to do so, in violation of 47 U.S.C. §§ 501 and 605 and 18 U.S.C. § 371. Elkins v. United States, 364 U.S. 206, 206 (1960). Evidence against the defendants included tape recordings and a recording machine. That evidence was illegally seized. *Id.* at 207. It was, however, admitted in evidence against the defendants. *Id.* The Supreme Court reversed, holding that evidence obtained by state officers in a search which, if conducted by federal officers, would have violated the "unreasonable searches and seizures" clause of the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial. *Id.* at 223.

40. *Id.* at 223. On *Elkins,* see generally Berman & Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure — Federal Problems,* 55 NW. U.L. REV. 525 (1960); Eichner, *The "Silver Platter" — No Longer Used for Serving Evidence in Federal Courts,* 13 U. FLA. L. REV. 311 (1960); Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence,* 8 U.C.L.A. L. REV. 1 (1961).

41. 367 U.S. 643 (1961). On *Mapp* see generally Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf,* 1961 SUP. CT. REV. 1; Broeder, *The Decline and Fall of Wolf v. Colorado,* 41 NEB. L. REV. 185 (1961); Burns, *Mapp v. Ohio: An All American Mistake,* 19 DEPAUL L. REV. 80 (1969); Kamisar, *Public Safety vs. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L, CRIMINOLOGY & POLICE SCI. 171 (1962); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions,* 63 MICH. L. REV. 987 (1965); Oakes, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Rogers, *The Fourth Amendment and Evidence Obtained by a Government Agent's Trespass,* 42 NEB. L. REV. 166 (1962); Thompson, *Unconstitutional Search and Seizure and the Myth of Harmless Constitutional Error,* 42 NOTRE DAME LAW. 457 (1967), Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L. J. 319; Wilson, *Perspectives of Mapp v. Ohio,* 11 U. KAN. L. REV. 423 (1963).

42. Mapp v. Ohio, 367 U.S. 643 (1961). Justice Clark wrote for the majority as follows:

> [W]e once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and. . . are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that. . . conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

*Id.* at 654-55.

*Weeks* had left open other avenues of redress, the Court in *Wolf* had mapped those avenues, and *Mapp* observed their dead ends. Justice Clark described the reconciliation of state and federal law as an end to the war between the Constitution and common sense. He lauded the holding for its settling effect, giving the individual his constitutional guarantees, the police the honest law enforcement to which they were entitled, and the courts the judicial integrity so necessary to the true administration of justice.[43]

Notwithstanding the calming assurances of Justice Clark in *Mapp,* debate over the exclusionary rule continued and still continues. Criticism of the exclusionary rule was long led by Justice Black.[44] Winds of change were forecast by Justice White's endorsement in *Stone v. Powell* of a good faith exception to the rule.[45] Justice White reiterated his view in *Illinois v. Gates*[46] and catalogued Supreme Court limitations of the exclusionary rule.

The Court has been hesitant to expand the scope of the rule. In a series of decisions, the Court limited standing to raise exclusionary rule objections to criminal defendants on trial.[47] The

---

43. *Id.* at 660.

44. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 493-510 (1971) (Black, J., concurring and dissenting); Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring); G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949).

45. 428 U.S. 465, 537-39 (1976) (White, J., dissenting). In *Powell,* Justice White stated that *Weeks* and *Mapp* "had overshot their mark insofar as they aimed to deter lawless action by law enforcement personnel. . . . " Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting). Although Justice White did not advocate the abolishment of the exclusionary rule, he stated:

> I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.

*Id.*

46. 103 S. Ct. 2317, 2336-51 (1983) (White, J., concurring in the judgment). In *Gates,* the majority held that the issue of modification of the exclusionary rule was not properly before the Court and therefore refused to rule on the issue. Illinois v. Gates, 103 S. Ct. 2317, 2321 (1983). Justice White disagreed with that position. *Id.* at 2336 (White, J., concurring in the judgment). The Supreme Court reversed the Illinois Supreme Court and held that the police seizure of a quantity of drugs in the defendant's possession was proper because the search warrant was backed by sufficient probable cause. *Id.* at 2336. Justice White would also have reversed the Illinois Supreme Court, but the basis for his decision would have been the good faith actions of the police officers in seizing the evidence. *Id.* at 2336 (White, J., concurring in the judgment). Justice White stated "it was fully reasonable for the Bloomingdale, Illinois police to believe that their search of respondents' house and automobile comported with the Fourth Amendment as the search was conducted pursuant to a judicially-issued warrant." *Id.*

47. *See* United States v. Salvucci, 448 U.S. 83 (1980) (defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own fourth amendment rights have in fact been violated); Rawlings v. Kentucky, 448 U.S. 98 (1980) (defendant did not have standing to challenge validity of the search for drugs of another's purse because defendant did not have a legitimate expectation of privacy); Rakas v. Illinois (armed robbery defendants had no standing to challenge search of vehicle and seizure of weapons and ammunition because the vehicle did not belong to the defendants and they did not assert ownership of the weapons); Brown v. United States, 411 U.S. 223 (1973) (defendants lacked standing to contest search of premises because they were not on the premises at the time of the search, they held no proprietary or possessory interest in the premises, and they were not charged with an offense that included, as an essential element of the

Supreme Court refused to extend the rule to grand jury proceedings.[48] The Court permitted the use in a federal civil suit of evidence illegally seized by state officials on grounds that the social costs of exclusion outweighed the probability of deterring unlawful police conduct.[49] The Court also approved use of illegally seized evidence to impeach defendants testifying on their own behalf,[50] allowed testimony of a live witness notwithstanding the fact that the testimony was derived from a concededly unconstitutional search,[51] and refused to exclude evidence where law enforcement agents acted in good faith reliance upon laws subsequently ruled unconstitutional.[52] These rulings might be considered clarifications of rather than restrictions on the exclusionary rule. It certainly seems, however, that they narrow the broad pronouncement in *Weeks* that illegally obtained evidence should be returned to its owner and its introduction into evidence denied.

### E. CURRENT DEVELOPMENTS: SHEPPARD AND LEON

A Court majority side-stepped the exclusionary rule issue during the 1982 term by reversing *Gates* on procedural grounds. Two cases briefed and argued in the 1983 term, however, squarely present the question of whether the exclusionary rule should be modified, for example to allow evidence obtained in a good faith

---

offense, possession of the seized evidence at the time of the search and seizure); Alderman v. United States, 394 U.S. 165 (1969) (defendants lacked standing to assert electronic surveillance by government tainted their convictions because government did not violate their personal fourth amendment rights); Wong Sun v. United States, 371 U.S. 471 (1963) (defendant had no standing to challenge admissibility of heroin seized from a third party).

48. *See* United States v. Calandra, 414 U.S. 338 (1974). In *Calandra,* Justice White, writing for the majority, stated that the purpose of the exclusionary rule is to deter unlawful police conduct and to effectuate fourth amendment guarantees. *Id.* at 347. However, he said, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. . . . [T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348. Justice White felt the damage the exclusionary rule would cause to grand jury proceedings outweighed the benefit of any deterrent effect. *Id.* at 354.

49. United States v. Janis, 428 U.S. 433 (1976). In *Janis* the Court stated that "the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable." *Id.* at 447. It said the rule's deterrent purpose would not be served by extending it to civil cases because the police were already punished by the exclusion of evidence in the criminal case. *Id.* at 448.

50. United States v. Havens, 446 U.S. 620 (1980) (suppressed evidence was admitted against defendant after he denied knowing anything about it); Walder v. United States, 347 U.S. 62 (1954) (evidence regarding improperly seized heroin was admitted against defendant after he denied having bought, sold, or possessed heroin).

51. United States v. Ceccolini, 435 U.S. 268 (1978) (exclusionary rule is invoked with reluctance when it would suppress the testimony of a live witness).

52. Michigan v. DeFillippo, 443 U.S. 31 (1979) (defendant's arrest, made in good faith reliance on an ordinance subsequently ruled unconstitutional, was valid, so drugs found in search should be allowed as evidence); United States v. Peltier, 422 U.S. 531 (1975) (warrantless automobile search conducted by Border Patrol near Mexican border was valid because it was conducted prior to a Supreme Court decision rendering such searches unconstitutional).

belief that the search and seizure were consistent with the reasonableness and other requirements of the fourth amendment.

In *Massachusetts v. Sheppard*[53] the state trial court refused to suppress evidence despite finding that the search warrant used to find the evidence failed to specifically list the items that were subsequently seized.[54] An affidavit listing those items existed but was not attached to the warrant or incorporated by reference.[55] The state trial court refused to apply the exclusionary rule, finding that "the actual search undertaken was within the limits of the authority the police thought reasonably had been granted."[56] The court concluded that police conduct would not be altered by excluding the otherwise relevant and reliable evidence, and therefore the only consequence of applying the rule would be to impair the truth-finding function of the jury by keeping probative evidence from them.[57] The court thus distinguished between errors committed by the judicial officer in issuing the warrant, the situation in *Sheppard*, and fourth amendment violations by law enforcement officers in executing the warrant.

The Supreme Judicial Court of Massachusetts acknowledged the trial court's distinction between judicial and police blunders and agreed the exclusionary rule was not tailored to deterring judicial misconduct.[58] The court questioned suppression of evidence as a deterrent where police conduct was proper, the defendant was not prejudiced by the judicial officer's error, and an appellate court clearly identified the judicial officer's error of law as a guide to future conduct.[59] Nevertheless, the court reversed the trial court on the grounds that the Supreme Court had yet to approve an exception to the exclusionary rule under such circumstances.[60]

A single dissent argued that failure to attach the existing affidavit that described the items to be seized to the revised warrant was a harmless error with Draconian consequences.[61] The sacrifice of such reliable and highly probative evidence constituted, the dissent maintained, "a dedication to rigid formality. . .

53. 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted,* 103 S. Ct. 3534 (1983).

54. Massachusetts v. Sheppard, 387 Mass. 488, ____, 441 N.E.2d 725, 730 (1982), *cert. granted,* 103 S. Ct. 3534 (1983).

55. *Id.* at ____, 441 N.E.2d at 728.

56. *Id.* at ____, 441 N.E.2d at 730.

57. *Id.*

58. *Id.* at ____, 441 N.E.2d at 735. The court stated that suppression of a particular piece of evidence under the exclusionary rule may not be as effective as disincentive to a neutral judge as it would be to the police. *Id.* This is because "ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted." *Id.*

59. *Id.*

60. *Id.* at ____, 441 N.E.2d at 736.

61. *Id.* at ____, 441 N.E.2d at 746 (Lynch, J., dissenting).

commanded neither by the Constitution nor logic.''[62]

In *United States v. Leon,*[63] the federal district court suppressed evidence obtained from a search conducted under a warrant issued by a state judge.[64] The district court found that the police affidavit used to obtain the warrant relied, in material part, on a confidential police informant whose reliability and credibility had not been established.[65] The court found that other details in the warrant concerned another transaction or were as consistent with innocence as with guilt.[66] The district court concluded that although the police apparently acted in good faith, because the informant's credibility and reliability were questionable the warrant was not supported by probable cause.[67] The court ordered the evidence gathered in the search excluded.[68] A panel of the Court of Appeals for the Ninth Circuit, over one dissent, affirmed the suppression order and specifically refused to recognize a good faith exception to the exclusionary rule.[69]

Supreme Court briefs and arguments in *Leon* and *Sheppard* forcused on the cases' particular facts, the Government's arguments that a good faith exception to the exclusionary rule should be adopted, and the competing interests of society, law enforcement, and the criminal defendant.[70] Justice O'Connor expressed concern over the distinction in *Sheppard* between judicial error and police misconduct.[71] She inquired whether the police had an obligation to execute the warrant as written and return to the magistrate when the warrant failed to specify the place to be searched or the items to be seized.[72] The particular facts in *Sheppard* may beg the question because in that case an affidavit existed fully describing everything, the judicial error being the failure to incorporate that affidavit by reference or attach it to the revised warrant.[73] Defendant's counsel in *Leon* emphasized that the totality of the circumstances rationale in *Gates* obviated any need for modifying the exclusionary rule.[74]

---

62. *Id.*
63. 701 F.2d 187 (9th Cir.) (table), *cert. granted,* 103 S. Ct. 3535 (1983).
64. Appellant's Brief at ____, United States v. Leon, 701 F.2d 187 (9th Cir.) (table), *cert. granted,* 103 S. Ct. 3535 (1983), argument reported at 52 U.S.L.W. 3541 (U.S. Jan. 24, 1984) (No. 82-963).
65. *Id.* at ____.
66. *Id.* at ____.
67. *Id.* at ____.
68. *Id.* at ____.
69. *Id.* at ____.
70. 52 U.S.L.W. at 3542-43.
71. Argument, Massachusetts v. Sheppard, 52 U.S.L.W. 3541 (U.S. Jan. 24, 1984).
72. 52 U.S.L.W. at 3541-42.
73. *Id.*
74. Appellant's Brief at ____, United States v. Leon, 701 F.2d 187 (9th Cir.) (table), *cert. granted,* 103 S. Ct. 3535 (1983), argument reported at 52 U.S.L.W. 3542.

Speculation about the Supreme Court's decisions in *Sheppard* and *Leon* is probably less worthwhile than identifying the reasons for continuing or abandoning the rule. Reconciling interests protected by the fourth amendment with the obligations of law enforcement officers and public outcry to punish the guilty is another consideration. The Court's decision in *Sheppard* will not be the last word on the subject. Nevertheless, the Burger Court's preoccupation with the ultimate question of guilt, thereby avoiding and disregarding procedural and technical sand traps, suggests that unless the Court majority views abandonment or modification of the exclusionary rule as impaling the integrity of the criminal trial process, the rule will at least be modified. The Burger Court has shown greatest interest in those rights that protect the innocent, such as the right to counsel and the prohibition against coerced confessions, and less interest in those rights that may serve to protect the guilty, such as the exclusionary rule.[75] This hierarchy, based on the likelihood that a denial of the particular right claimed will result in conviction of the innocent, suggests that when convictions appear reliable but are challenged on technical grounds of police misconduct or judicial error, the Court will limit rather than expand defendants' rights. The Court's preoccupation with seeing the guilty convicted may result in modification or abandonment of the exclusionary rule.

## III. ANALYSIS

### A. THE RULE

Proponents of the exclusionary rule contend that the overriding public policy considerations of fairness, judicial integrity, and the fourth amendment prohibition against unreasonable searches and seizures are more important than any individual criminal conviction.[76] By corollary, they argue that it is

75. *Compare* Estelle v. Smith, 451 U.S. 454 (1981) (there is no basis for distinguishing between the guilt and penalty stage of a criminal trial as far as the protection of the fifth amendment privilege against self incrimination is concerned); Edwards v. Arizona, 451 U.S. 477 (1981) (an accused, having expressed desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him); United States v. Henry, 447 U.S. 264 (1980) (Government violated defendant's right to counsel by intentionally creating a situation likely to induce an incriminating statement) *with* Michigan v. Summers, 452 U.S. 692 (1981) (for fourth amendment purposes, a search warrant carries with it the limited authority to detain occupants of premises while search is conducted); United States v. Mendenhall, 446 U.S. 544 (1980) (evidence was adequate to support finding that defendant voluntarily consented to accompany officers and submit to search); United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence, although inadmissible in Government's case in chief, is admissible to impeach the defendant's direct testimony).

76. *See, e.g.*, Canon, *The Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. TEX. L. J.

less important that courts admit all reliable and relevant evidence than it is that courts insure that proper evidence gathering methods are followed and constitutionally defective methods are abandoned.[77] Specifically, proponents maintain: (1) exclusion preserves and protects the integrity of the courts; (2) the fourth amendment was adopted to protect individuals from police misconduct; (3) that protection can best be accomplished by excluding illegally seized evidence; (4) exclusion of illegally seized evidence does not of itself free the guilty: it merely returns the status quo so that things are as they would have been but for the unlawful intrusion; thus, a conviction can still be obtained using legally seized evidence.[78] Several functions of the warrant may be frustrated if the warrant, like that in *Sheppard,* fails to specify the items to be seized. For example, defendants may not be provided notice, and police may be denied guidance. In addition, if good faith or reasonable mistake exceptions to the exclusionary rule are recognized, whenever a warrant is subsequently challenged, the police will try to bring in new or additional information beyond that in the warrant to show that the magistrate authorized a search other than that spelled out in the warrant.[79]

Critics of the exclusionary rule counter: (1) admission of evidence should be predicated solely upon its reliability and relevance; (2) excluding reliable evidence will often free the guilty and thereby work against police efforts to eliminate crime.[80] They note that little evidence suggests that the rule has had or will have a deterrent effect when the police are operating in good faith.[81] As championed by Solicitor General Lee, the new standard would require judges to determine first if there had been a fourth amendment violation and then whether a reasonable mistake of law

559 (1982); Kamisar, *A Defense of the Exclusionary Rule,* 15 CRIM. L. BULL. 5 (1979); Oakes, *supra* note 41.

77. *See, e.g.,* Canon, *supra* note 76, at 578-82.

78. *See, e.g., supra* note 76.

79. *See* 52 U.S.L.W. at 3544.

80. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929, 951-53 (1965); Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases,* 57 WASH. L. REV. 635 (1982); Wingo, *Growing Disillusionment with the Exclusionary Rule,* 25 SW. L. J. 573, 584-85 (1971); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 TEX. L. REV. 736, 737 (1972). *See also* Canon, *supra* note 76, at 560; Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* 1975 WASH. U. L. Q. 621, 656-83; Miles, *Decline of the Fourth Amendment: Time to Overrule Mapp v. Ohio,* 27 CATH. U. L. REV. 9 (1977); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?,* 62 JUDICATURE 215, 218 (1978); Note, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis,* 20 U. KAN. L. REV. 768 (1972).

81. 52 U.S.L.W. at 3544. On the good faith exception see Allen, *supra* note 41, at 33; Friendly, *supra* note 80, at 951-53; Geller, *Is the Evidence In on the Exclusionary Rule?,* 67 A.B.A.J. 1642 (1981); LaFave & Remington, *supra* note 41; Oakes, *supra* note 41, at 709; Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotta Research and United States v. Calandra,* 69 NW. U. L. REV. 740 (1974); Note, *Reason and the Fourth Amendment: The Burger Court and the Exclusionary Rule,* 46 FORDHAM L. REV. 139 (1977).

would justify admission of the evidence.[82] He suggested that courts could automatically reject police ignorance as justification for a reasonable mistake. The police could be required to show both that they acted in good faith and that their actions were reasonable.[83] Thus, in *Sheppard,* the police would have to satisfy Justice O'Connor that their search was both conducted in good faith and that their action in failing to return and have the judge attach the affidavit to the warrant was reasonable.[84]

In answer to those advocating modification, the exclusionary rule's defenders respond: (1) Supreme Court decisions have removed abuses; (2) a reasonable mistake exception would encourage ignorance of the law as a defense of misconduct and then require courts to make a subjective determination concerning the executing officer's state of mind absent proof of malicious conduct or perjury; (3) a good faith exception would pass to the police the courts' responsibility for determining whether probable cause existed.[85] On the subjectiveness issues, Professor Wayne LaFave has commented that if an exception to the rule were adopted, the courts would lose control of the fourth amendment the same way they lost control of the fifth amendment under the voluntariness test governing admission of confessions before *Miranda.*[86]

### B. ALTERNATIVES

If, as retired Justice Potter Stewart has suggested, the problem

82. 52 U.S.L.W. at 3542-44. On the good faith exception see United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981); Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process,* 24 WM. & MARY L. REV. 335 (1983); Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?,* 30 DEPAUL L. REV. 51 (1980); Brown, *The Good Faith Exception to the Exclusionary Rule,* 23 S. TEX. L. J. 655 (1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule,* 69 GEO. L. J. 1361 (1981); Comment, *The Exclusionary Rule Revisited: Good Faith in Fourth Amendment Search and Seizure,* 70 KY. L. J. 879 (1982); Note, *The Good Faith Exception to the Exclusionary Rule — Adoption by Williams and Richmond,* 51 U. CIN. L. REV. 83 (1982). *See also* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIMES FINAL REPORT (1981).

83. 52 U.S.L.W. at 3542-44. On the "reasonableness" element in a reasonable mistake or good faith exception, see Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Bernardi, *supra* note 82, at 104; Note, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Propspects,* 20 ARIZ. L. REV. 915, 933 (1978).

84. 52 U.S.L.W. 3546-71.

85. On criticism of the good faith exception see Fyfe, *Enforcement Workshop: Roadblocks and Roving Stops,* 18 CRIM. L. BULL. 346 (1982); Goodpaster, *An Essay on Ending the Exclusionary Rule,* 33 HASTINGS L.J. 1065 (1982); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith",* 43 U. PITT. L. REV. 307 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 GEO. L. J. 365 (1981); Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition,* 35 VAND. L. REV. 501 (1982). Comment, *The Emerging Good Faith Exception to the Exclusionary Rule,* 57 NOTRE DAME LAW. 112 (1981).

86. Fitzhugh, *The New Exclusionary Cases,* 70 A.B.A.J. 58, 61 (1984) (quoting Prof. Wayne LaFave).

is with the fourth amendment, not the exclusionary rule, the amendment could be amended to read:

> (1) The right of the people to be secure in their houses, papers, and effects must be balanced with society's interests in law enforcement and conviction of those guilty of crimes. Judicial and law enforcement officers should act to insure evidence gathering procedures are reasonable. Normally, this requires the use of a warrant, issued by an independent judicial officer, based upon probable cause, and supported by an attached oath or affirmation describing the place to be searched and the person(s) or thing(s) to be seized.
> (2) Notwithstanding section one, any evidence that is relevant and reliable is admissible at trial regardless of its source.
> (3) Whenever evidence gathering or other actions result in a deprivation of the right to be secure from unreasonable searches such injury shall be redressed as Congress provides; or if Congress does not provide, in any state or federal court by a tort action based on this amendment.[87]

Other remedies could be statutorily created or judicially developed. Congress could authorize suits under specific statutes or rules, for example, by enlarging title 18, section 242, or title 28, section 1983, of the United States Code. Fourth amendment rights are as worthy of protection as the right to correct credit information, which is protected by the Truth in Lending Act. Alternatively, Congress could set up an independent administrative procedure like that for veterans' claims, or sanction administrative procedure like those the Supreme Court recommended for processing prisoner property claims in *Parratt v. Taylor*.[88] Either would isolate the fourth amendment deprivation proceeding from any state or federal criminal trial. Administrative proceedings would solve the problems that arise when judges have to decide claims against judges and plaintiff-criminal-defendants have to win jury suits against the police. The United States Courts of Appeals could review such proceedings. A "clearly erroneous"

87. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rules in Search and Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

88. 451 U.S. 527 (1981). *See* Burger, *Who Will Watch the Watchman*, 14 AM. U. L. REV. 1 (1969) (advocating a civil tribunal).

or "against the clear weight of the evidence" standard of review could be employed, or review could be limited to seeing that process was not denied.

Alternatively, Congress could establish police guidelines by statute or regulation. For example, police regulations could spell out all exceptions to the warrant requirement or to the requirement that the warrant must list the items to be seized. Courts could ensure that the guidelines were consistent with fourth amendment dictates. When acting within the guidelines, police conduct would be presumed to be reasonable. This would ensure uniformity of treatment, limit the broad discretion police officers exercise, and provide a standard for evaluation. Actions outside the guidelines, not justified as reasonable, could be punished by named penalties, exclusion of evidence, or both.[89]

Courts could encourage use of judicially recognized tort or *Bivens*[90] actions. But even if the Court authorizes such suits,[91] judgments are difficult to obtain against police and judicial officers because of, respectively, qualified good faith and absolute judicial immunity.[92] Victims, particularly innocent victims, of fourth amendment violations are reluctant to prosecute, and awards are likely to be nominal. If juries refused to make awards against officials, a right to non-jury trials could be recognized.

The exclusionary rule could be limited to lesser crimes, abolishing it, for example, in murder trials.[93] Such differentiation, however, would create havoc in plea bargaining. A defendant charged with first degree murder would have a very strong motive to plead guilty to a lesser offense if incriminating illegally seized evidence could be introduced in a murder trial. In addition,

89. For analysis of jurisdictions employing administrative remedies, see Bradley, *The Exclusionary Rule in Germany,* 96 HARV. L. REV. 1032 (1983); Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternatives,* 57 TUL. L. REV. 648 (1980). *See also* Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared,* 101 MIL. L. REV. 83 (1983).

90. Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971). For criticism of such tort remedies, see 1 W. LAFAVE, *supra* note 3, at 30-33; Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1562-63 (1972); Morris, *The Exclusionary Rule, Deterrence, and Posner's Economic Analysis of Law,* 57 WASH. L. REV. 647 (1982); *but see* Blumrosen, *Contempt of Court and Unlawful Police Action,* 11 RUTGERS L. REV. 526 (1957); Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955).

91. The Court has exhibited a kind of approach-avoidance toward such actions. *Compare* Haring v. Prosise, 103 S. Ct. 2368 (1983) (plea of guilty did not bar subsequent § 1983 action challenging legality of search that produced inculpatory evidence) *with* Allen v. McCurry, 449 U.S. 90 (1980) (inability to obtain habeas corpus relief upon fourth amendment claim does not render doctrine of collateral estoppel inapplicable to § 1983 suit).

92. The Court may simply act to restrict such suits in certain circumstances. *See* Chappel v. Wallace, 103 S.Ct. 2362 (1983) (enlisted military personnel may not maintain suit to recover damages from a superior officer for alleged constitutional violations).

93. *See* Allen, *supra* note 37, at 36; Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction,* 10 GA. L. REV. 1 (1975); Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1037 (1974).

prosecutors would stretch to charge offenses exempted from the rule to get illegally seized items admitted into evidence.

Problems with these alternatives were outlined by Chief Justice Burger in *Stone v. Powell.*[94] Chief Justice Burger explained that even if legislatures were to act, no assurance exists that courts would abolish the rule.[95] He opined that the greatest shortcoming of leaving the defense of the fourth amendment to the exclusionary rule is that it offers no relief to those victims of overzealous police work who never appear in court.[96]

### C. A SOLUTION

No specific "answer" to the dilemma is endorsed. Rather, it is recommended that the question be reformed. As long as the protection of individual rights under the fourth amendment and the problematic exclusionary rule are treated as a single issue, the baby will be thrown out with the bath water, or more precisely, the criminal will be thrown out with the evidence. The proper questions are: (1) should there be either protection from or redress for grievances for fourth amendment violations? and (2) when, if ever, should relevant and reliable evidence be suppressed?

The questions should be answered independently. The first should be answered in the affirmative, but the second is more difficult. As long as remedies are available, courts could decide the second question on its own merits. They might conclude that the alternatives to the exclusionary rule were inadequate and the cost of allowing the guilty to occasionally go free was worth the maximum protection of individual rights afforded by the rule. Alternatively, courts might conclude that the exclusionary rule should be abolished. This could be predicated upon acceptance of *Bivens* actions or conditioned on legislatively created redress procedures. Courts could distinguish between the fourth and fifth amendments by focusing on whether the constitutional violation created doubts

94. 428 U.S. 465, 496 (1976) (Burger, C.J., concurring). In his concurrence, Chief Justice Burger stated as follows:

> It can no longer be assumed that other branches of government will act while judges cling to this Draconian, discredited device in its present absolutist form. Legislatures are unlikely to create statutory alternatives, or impose direct sanctions on errant police officers or on the public treasury by way of tort action, so long as persons who commit serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule.

*Id.* at 500-01.

95. Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J. concurring).

96. *Id.* at 501. For additional discussions of alternatives, see S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977); Geller, *supra* note 80; Miles, *supra* note 80.

about the guilt of the accused. Coerced confessions would be suppressed because they are more likely to be unreliable than voluntary confessions, but illegally seized evidence would be admitted if relevant and reliable.

## IV. SUPREME COURT ADJUDICATION

The following observations may help explain past Court decisions and predict future Court responses, but they are offered primarily to illustrate and explain the complexity of Supreme Court adjudication.

### A. STARE DECISIS

Both exclusionary rule defenders and critics have at different times relied on stare decisis. The Supreme Court decisions in *Adams, Weeks,* and *Mapp* were volcanic eruptions, but only those who maintain that stare decisis is a fundamental principle of American jurisprudence should be surprised. In England they have a rule, perhaps *the* rule, of stare decisis (meaning the decision stands) but in America, sometimes the decision stands and sometimes it does not. Whether openly confessed or not, the case history of school desegregation, rights of the accused and convicted, and voting rights, establish beyond cavil that the Court has not blindly followed stare decisis.

Should American jurisprudence have abandoned stare decisis? Consistency and justice are oftentimes mutually exclusive terms, although clarity and consistency, particularly in areas of constitutional law, are desirable in and of themselves. But the complexity and unpredictability of the first case that follows an announced rule may and frequently does demand a different response with modification or at least clarification of the newly announced rule.[97] When judges see the nuances of their decisions and decline logical extensions or application, should they not be commended for their willingness to rethink instead of condemned for their further insight and understanding? When confronted with inconsistent prior statements or positions, John Kennedy simply replied, "I don't think that way any more." To live is to change, and judges both individually and collectively as a court should be allowed to change their minds within the constraints of constitutional adjudication. The point here is not to champion

97. *Id.*
98. *See* Amsterdam, *Prespectives On The Fourth Amendment,* 58 MINN. L. REV. 349 (1974).

abolishment or modification of the exclusionary rule, but to argue that the Supreme Court should be bound by stare decisis only to the extent that upon considered reflection, the precedents are worth following. The vague language of the fourth amendment in condemning unreasonable searches leaves more than a little room for judicial interpretation and clarification, and why should one Court's view of the indefinite phrase bind another?

The following three points are taken and developed from the 1974 Holmes lecture delivered by Professor Anthony Amsterdam.[98]

### B. COURT AS COMMITTEE

The Court is a committee.[99] It is unlike those committees in which the chairman always prevails and other members only work for and advise the chairman or in which only the committee's consensus is announced without dissent or explanation. On the Court every committee member has an equal vote and voice. Many jurists appear to view the judiciary as a representative democracy in which it is more important to express the views of their philosophical constituency than it is to reconcile their views with others on the Court to produce a unified opinion. "It is far more difficult for the Court than its critics to produce 'a single coherent analytical framework' for decisions that the Court must make."[100] Collegiality and consensus may produce the right result but seldom will there be an agreement on the reasons. When there is a broad underlying philosophical agreement that results in a unified opinion in which the whole Court agrees, the opinion is likely to contain the consistency and lack of tension that elicits respect for the Court, even from individuals who may disagree with the particular holding. More frequently, a majority agrees on the result (by necessity since the Court consists of nine members and most issues present a binary choice) but not on the reasons. Majority opinions are frequently fashioned from trade-offs and compromises. What is gained in harmony in presenting a unified front may be lost in clarity; splitting philosophical differences down the middle may result in a fractured rationale. Finally there are those cases in which a confused or confusing plurality come to the same result but openly disagree on the reasons. To the extent that the separate opinions are coherent and consistent in themselves this may be preferable to the compromise opinion. Opinions in the

99. *Id.* at 350.
100. *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971)).

latter two categories, with botn their articulated and unarticulated compromises and trade-offs, are far less likely to evoke respect for the Court, a clear statement of law, or guidance for future conduct.

### C. HIDDEN AGENDAS

The Court may be reluctant to lay all the cards on the table.[101] It may search to find legal justifications for what it wants to do. In both the fourth amendment search and seizure cases culminating in *Mapp* and the fifth amendment cases culminating in *Haynes,*[102] *Escobedo,*[103] and *Miranda,*[104] the swing votes may not have been based on constitutional commandments of the fourteenth amendment or on a balancing of amendments. Those decisions may have been based in part on an unarticulated growing distrust of certain state criminal trial court practices and procedures.[105] The search for legal justifications for what the court wants to do is a fact of adjudication. When the Court bitterly disagrees it may look to alternative justifications. This may have led the Court to look for solutions to the exclusionary rule dilemma other than the "good faith" exception and to adopt in *Gates*[106] a totality of the circumstances standard of review. In *Sheppard,* the Court is unlikely to say that it distrusts state law enforcement officers or judges and thus cannot adopt a "good faith" exception, even if that distrust is a factor. Nor is the Court likely to articulate as the basis for its holding, if the Court reverses *Sheppard,* that a majority of Americans do not want criminal defendants to go free, especially in murder cases, because of technical judicial or police blunders. The Court is certainly aware that there is a natural limit to law and that law should generally follow society's sense of fairness and justice. The Court is not likely, however, to reverse *Sheppard* on grounds that applying the exclusionary rule in *Sheppard* exceeds that limit.

### D. CONSEQUENCES OF ADJUDICATION

Judges bear responsibility for their decisions, and that responsibility soon teaches that application of clear and consistent principles sometimes produces unacceptable results.[107] The results

101. *Id.* at 350-51.
102. Haynes v. Washington, 373 U.S. 503 (1963).
103. Escobedo v. Illinois, 378 U.S. 478 (1964).
104. Miranda v. Arizona, 384 U.S. 436 (1966).
105. Amsterdam, *supra* note 98, at 351.
106. Gates v. Illinois, 103 S.Ct. 2317 (1983).
107. Amsterdam, *supra* note 98, at 351.

are unacceptable because of countervailing principles that the court may or may not be willing to identify.[108]

Few better examples could exist than the distinction between adopting the exclusionary rule in *Boyd,* a forfeiture case, and extending or applying the rule in *Sheppard,* a murder case. Society is less interested in the exclusionary rule in the latter, but a defendant has a greater interest in and need for the exclusionary rule when charged with murder than when faced with forfeiture of property.

## V. CONCLUSION

The exclusionary rule is in a state of flux. The balance may soon shift to the majoritarian interest in convicting the guilty through recognizing a "reasonable mistake" or "good faith" exception to the rule. The lesson of history, however, is that the pendulum will swing back. A political faction with a particular philosophy may capture the White House and even attempt to pack the Court. No single philosophy has stayed in power, though; sooner or later successful challengers emerge and "unpack" the Court. Also, the judiciary has proved remarkably independent. Faith in the system and the Court to withstand particular philosophies is justified. This optimism is not reposed in a particular jurist, judicial philosophy, or even term of Court, but in the process and form of government. To take one recent example outside the fourth amendment area, in *Lynch v. Donnelly*[109] the Supreme Court upheld, against first amendment challengers, a city's right to display a Christmas creche. While the decision seems inconsistent with both the first amendment and *Lemon v. Kurtzman,*[110] it undoubtedly reflects the constitutional view of the present Court majority and most Americans. If it goes too far or provides precedent for other decisions that go too far, it can be restricted.

Critics may lament the Supreme Court's two-step-forward, one-step-backward approach. But it is a strength of our judicial system and form of government that the Court continues to wrestle with the issues raised in *Lynch* and *Sheppard.* In *Sheppard* the public outcry to punish the defendant may not be reconcilable with the defendant's fourth amendment rights. If the exclusionary rule is a weakness in our criminal law, it is a strength of our individual freedom, and the strain it places on society and our legal system

108. *Id.* at 351-52.
109. 104 S. Ct. 1355 (1984).
110. 403 U.S. 602 (1971).

may be better tolerated than shifted. Justice Holmes cautioned that "where distinctions are vital rather than formal, the problems and conflicts should be existentially endured rather than rationally reconciled."[111] The Court may distinguish between judicial errors and police misconduct, abolish the exclusionary rule in first degree murder cases, or authorize a good faith or reasonable mistake exception to the rule. But the Court may also leave the dilemma unresolved with the exclusionary rule intact.

111. Dunne, *Book Review*, 80 MICH. L. REV. 652, 655 (1982).