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DECLINE OF THE FOURTH AMENDMENT: TIME TO OVERRULE MAPP V. OHIO?

*John G. Miles, Jr.**

I. INTRODUCTION

In reviewing the record of the Supreme Court over the past several years, it is difficult to state any broad generalizations concerning its decisions on issues involving a conflict between governmental and individual interests. On the one hand, the Court has written a wide range of opinions which have effectually reduced the authority of the government to regulate the lives of its citizens.¹ It has also strengthened defense rights at key stages of criminal prosecution² and has significantly expanded due process protection to parolees, probationers, and prisoners.³ On the other hand, the Court has taken a very strong pro-governmental stand on obscenity regulation⁴ and has made a concerted effort to limit

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1. See, e.g., *Doe v. Bolton*, 410 U.S. 179 (1973) and *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Gooding v. Wilson*, 405 U.S. 518 (1972) and *Cohen v. California*, 403 U.S. 15 (1971) ("abusive language" laws); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distribution of contraceptives to unmarried persons); *Spence v. Washington*, 418 U.S. 405 (1974) and *Smith v. Goguen*, 415 U.S. 566 (1974) (flag desecration laws); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (vagrancy and loitering laws).

2. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (unconstitutionality of a jury instruction that a murder defendant bears burden of showing heat of passion on sudden provocation); *Wardius v. Oregon*, 412 U.S. 470 (1973) (reciprocal discovery rights under a state notice-of-alibi rule); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (unconstitutionality of common-law rule of evidence excluding strong defense evidence from the jury's consideration and limiting the defendant's right to cross-examine a damaging defense witness); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel for accused misdemeanants facing possible incarceration).

3. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974) (due process rights of prisoners at prison disciplinary proceedings); *Procunier v. Martinez*, 416 U.S. 396 (1974) (unconstitutionality of prison mail censorship regulations); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process rights of a parolee facing revocation of parole).

4. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Heller v. New York*, 413 U.S. 483 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-ft.*

federal jurisdiction on civil rights issues⁵ and federal intervention in state prosecutions and injunctive proceedings.⁶ Viewed as a whole, the Court's work presents a rather mixed bag.

No such ambiguity exists, however, with respect to the Court's decisions on constitutional questions involving police practices. Nothing has left the Court so open to charges that it is restricting individual liberties as its recent fourth amendment search and seizure opinions. When today's Court resolves a conflict between the rights of a defendant and the purported needs of law enforcement officials, law enforcement interests prevail nearly every time.

Consider the Court's awesome record from 1972 to 1976 of reversing federal courts of appeals decisions. Excluding one decision on standing⁷ and a handful of holdings on esoteric questions limited to Border Patrol Agents,⁸ the Court reversed twelve consecutive federal appellate holdings on matters pertaining to the fourth amendment,⁹ upholding certain

Reels of Super 8mm. Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973). *But see* McKinney v. Alabama, 424 U.S. 669 (1976).

5. Paul v. Davis, 424 U.S. 693 (1976); Imbler v. Pachtman, 424 U.S. 409 (1976); Rizzo v. Goode, 423 U.S. 362 (1976).

6. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Byrne v. Karalex, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971). *But see* Allee v. Medrano, 416 U.S. 802 (1974); Steffel v. Thompson, 415 U.S. 452 (1974).

7. Brown v. United States, 411 U.S. 223 (1973).

8. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Bowen v. United States, 422 U.S. 916 (1975); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Peltier, 422 U.S. 531 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The effect of these decisions was to articulate some limitations on the stop and search authority of Border Patrol and Immigration and Naturalization Agents seeking to curb the flow of illicit drugs and illegal aliens from Mexico. Border searches (or customs searches as they were once called) have always been governed by standards less strict than those which the fourth amendment ordinarily demands. *See* Boyd v. United States, 116 U.S. 616, 623 (1886). Because border searches have long been considered outside the mainstream of fourth amendment law, they are not discussed in this article except insofar as they have a bearing on matters within that mainstream. *See, e.g.*, the majority opinion's discussion of the fourth amendment exclusionary rule in United States v. Peltier, 422 U.S. 531, 535 (1975). It should be mentioned, however, that the United States Court of Appeals for the District of Columbia Circuit has found these decisions a helpful source of guidance for permit inspection stops of motor vehicles. *See* United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977).

9. United States v. Santana, 427 U.S. 38 (1976); United States v. Miller, 425 U.S. 435 (1976); United States v. Watson, 423 U.S. 411 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Matlock, 415 U.S. 164 (1974); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973); Cupp v. Murphy, 412 U.S. 291

law enforcement practices found illegal by a court of appeals. Furthermore, during the 1975-76 Term, two state courts joined the ranks of the reversed.¹⁰

The last day of the Court's 1975-76 Term dramatically reflected the current majority's fourth amendment philosophy. All four of the decisions announced that day presented search and seizure questions. Although one dealt with a highly specialized issue peculiar to Border Patrol searches at the Mexican-American border, each of the other three had broad implications. In *South Dakota v. Opperman*,¹¹ the Court reversed a judgment by the South Dakota Supreme Court, recognizing a broad right on the part of police departments to inventory the contents of lawfully impounded automobiles. In *United States v. Janis*,¹² the Court overturned a federal court of appeals decision and held that the fourth amendment's exclusionary rule does not forbid use in a federal civil proceeding of evidence seized unconstitutionally but in good faith by a state police officer.

Finally, in *Stone v. Powell*¹³ the Court held that the federal courts no longer have habeas corpus jurisdiction over state prisoners' fourth amendment claims that have been fully and fairly litigated in state court. The *Stone v. Powell* opinion also contained ominous undertones for the exclusionary rule. Justice Powell, the majority spokesman, chose to emphasize the price exacted by the exclusionary rule when it precludes the use of reliable evidence¹⁴ and downplayed the lofty purposes attributed to the rule in earlier opinions of the Court. This same dissatisfaction

(1973); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Adams v. Williams*, 407 U.S. 143 (1972).

10. The Texas Court of Criminal Appeals was reversed summarily in *Texas v. White*, 423 U.S. 67 (1975). The South Dakota Supreme Court suffered reversal in *South Dakota v. Opperman*, 428 U.S. 364 (1976). On remand, however, it reinstated its own holding by reaching its original result, this time on state constitutional grounds. *Opperman v. State*, — S.D. —, 247 N.W.2d 673 (1976). See also text accompanying note 377 *infra*.

11. 428 U.S. 364 (1976).

12. 428 U.S. 433 (1976).

13. 428 U.S. 465 (1976).

14. The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. 428 U.S. at 489-90 (citations omitted).

with the rule permeated the majority opinion in the *Janis* case as well.¹⁵ Chief Justice Burger and Justice White wrote separate opinions in *Stone* expressing their willingness to modify the rule in the future if they could muster a majority of the Court.¹⁶

Besides being significant in their own right, these cases reflect the trend of the Court's thinking on search and seizure questions over the past four or five years. They also indicate some of the other features that characterize the Court's decisions during that time. For one thing, they show a marked consistency of approach. In each of the three cases, rather than accepting the fourth amendment as a fixed constitutional standard against which police conduct must be measured, the Court has employed a "balancing" test. The interests protected by the fourth amendment and its exclusionary rule have been balanced against the societal interests served by the intrusive law enforcement activity under scrutiny.¹⁷ This consistency of approach is matched by consistency in result. In each case, the balance between personal liberty and the governmental interest served by the search and seizure is struck in favor of the governmental interest. These decisions are also consistent with each other in that each was a Supreme Court reversal of a state or lower federal court holding that the fourth amendment had been violated.

These latter two consistencies may be explained in part by the role the Court currently appears to assign the fourth amendment. Opinions in earlier eras described it as a primary bulwark of a free society, possessing a history dating back to the struggle for independence.¹⁸ Nowadays, however, the Court tends to treat it as one of many counterweights in the machinery of government. In *Opperman*, a person's privacy interest in his automobile yielded to the smooth functioning of the modern police department in its role as the community caretaker.¹⁹ In *Stone*, the need for finality in judgments and comity in federal-state relations was enough to strip the federal courts of their role as ultimate protectors of the freedoms guaranteed by the fourth amendment.²⁰ The fourth amend-

15. "Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." 428 U.S. at 448-49.

16. 428 U.S. at 496 (Burger, C.J., concurring); 428 U.S. at 536 (White, J., dissenting).

17. "The seminal cases that apply the exclusionary rule to a civil proceeding involve 'intrasovereign' violations, a situation we need not consider here." *United States v. Janis*, 428 U.S. 433, 456 (1976) (citation omitted). As for the "balancing" test applied in *Opperman* and *Stone v. Powell*, see notes 19-20 & accompanying text *infra*.

18. *See, e.g.*, *Gouled v. United States*, 255 U.S. 298, 303-304 (1921); *Weeks v. United States*, 232 U.S. 383, 389-392 (1914); *Boyd v. United States*, 116 U.S. 616, 624-630 (1886).

19. 428 U.S. at 367-76.

20. 428 U.S. at 492-95.

ment's exclusionary rule, once described as the instrument whereby the courts protect their integrity as well as the freedom of the people, was depicted in both *Janis* and *Stone* as a judge-made device of doubtful utility, with no real purpose other than to keep the police in line.²¹ While grudgingly retaining the role for criminal trials, the Court asserted that it has no place in other proceedings.²² Read together, *Stone* and *Janis* formulate a kind of containment doctrine for the exclusionary rule: this far, perhaps, but no further.²³

21. In *Stone v. Powell*, Justice Powell acknowledged that "our decisions often have alluded to the 'imperative of judicial integrity,'" and added that these decisions "demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context." 428 U.S. at 485. To place this view in contrast, see Justice Brennan's dissenting opinions in *Stone v. Powell*, 428 U.S. at 502 (Brennan, J., dissenting); *United States v. Peltier*, 422 U.S. 531, 544 (1975) (Brennan, J., dissenting); and *United States v. Calandra*, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting).

22. In *United States v. Calandra*, 414 U.S. 338 (1974), the Court refused to extend the exclusionary rule to grand jury questions based on illegally seized evidence. In *Janis*, the Court observed:

In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule.

428 U.S. at 454 (citation omitted).

23. The Court's string of fourth amendment decisions adverse to defense claims was broken during the 1976-77 Term. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the Court unanimously condemned IRS agents' warrantless entry of a corporation's office to seize its books and records, refusing to recognize any "broad exception to the fourth amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws." A corporation had sued the government, seeking return of the seized items, suppression of all evidence obtained from them, and damages.

The more significant fourth amendment case this Term was *United States v. Chadwick*, 97 S. Ct. 2476 (1977). In *Chadwick*, the Court held that federal drug agents who had taken three marijuana couriers and their luggage safely into custody violated the amendment's warrant clause by searching the suspects' footlocker without a warrant. The Court unanimously rejected the government's contention that the full protection of the warrant clause should not extend beyond homes, offices, and private communications. Chief Justice Burger's opinion for the majority also indicated that the Court's language about the limited expectation of privacy in vehicles was limited to vehicles and did not extend to other personal property.

Both *G.M. Leasing* and *Chadwick* are line-drawing decisions; nothing in either of them indicates a change of mind about the court's other recent fourth amendment decisions. *Chadwick* represents a rejection of a bold government effort to take advantage of the Court's recent relaxation of fourth amendment standards by suggesting that the Court carve out a new and unprecedented exception to the warrant requirement. Disciples of a strong fourth amendment can take some comfort from these cases but cannot reasonably anticipate that they signal a revitalization of the fourth amendment.

This point was underscored recently by the Court's summary reversal of a Pennsylvania Supreme Court decision concerning police discretion to order traffic offenders out of their cars. *Pennsylvania v. Mimms*, 46 U.S.L.W. 3369 (Dec. 6, 1977). Applying the balancing test for reasonableness developed for police intrusions in *Terry v. Ohio*, 392 U.S. 1 (1968)

The beleaguered state of the fourth amendment today results from a phenomenon which can be traced to the Supreme Court's decision in *Mapp v. Ohio*.²⁴ More than sixteen years have passed since a five-four majority of the Court declared in *Mapp* that the exclusionary rule of the fourth amendment applies through the fourteenth amendment to state court prosecutions. As the Supreme Court explained two Terms later in *Ker v. California*,²⁵ *Mapp* applied the same constitutional standard to all law enforcement searches and seizures, whether carried out by federal officials or by state and local officers. As a result of the *Mapp* decision, state criminal justice systems have had to adopt the same search and seizure standards that applied in the federal courts. Moreover, they have had to enforce these standards by means of an exclusionary rule which, at the time of *Mapp*, nearly half the state supreme courts had declined to adopt on their own.²⁶

This article will examine the manner in which the Supreme Court has adapted the fourth amendment to the demands of state law enforcement interests, as mandated by the Court in *Mapp*. The article will begin with an examination of a line of cases from 1972 through 1976, in which the Court has seriously weakened fourth amendment protections. It will then place these recent opinions in an historical context, offering an overview of the Court's major fourth amendment decisions since *Boyd v. United States*²⁷ in 1886. By examining these key cases from the standpoint of both the Court's perception of the fourth amendment and the kind of law enforcement activity they involve, a pattern in the Court's treatment of the fourth amendment emerges. The Court's response to governmental demands for more latitude in searches and seizures has alternated between brief periods of stout resistance and longer periods of acquiescence. The Court has reacted strongly against startling new law enforce-

and subsequent decisions, the per curiam majority found the minor incremental intrusion involved in ordering a legally stopped motorist to get out of his car clearly was outweighed by the grave danger that a hostile motorist may pose to the officer.

Justice Stevens, joined in dissent by Justices Brennan and Marshall, accused the majority of casually adopting a major new category of police seizures requiring even less justification than the *Terry* standard. The dissenters also found this announcement of a general rule to be at odds with the Court's fourth amendment jurisprudence requiring "individualized inquiry into the particular facts justifying every police intrusion" 46 U.S.L.W. at 3370. In a separate dissent, Justice Marshall emphasized "the extent to which the Court today departs from the teachings of *Terry v. Ohio*, 392 U.S. 1 (1968)." 46 U.S.L.W. at 3370.

24. 367 U.S. 643 (1961).

25. 374 U.S. 23 (1963).

26. See *Elkins v. United States*, 364 U.S. 206, 224-25 (1960) (Appendix to the Opinion of the Court).

27. 116 U.S. 616 (1886).

ment practices, but as these novel techniques have become more familiar, the Court has become increasingly responsive to government assertions of law enforcement needs and societal interest.

The post-*Mapp* era, in which the Court has for the first time considered state law enforcement practices in light of the fourth amendment, reflects yet another cycle in the Court's alternation between vigorous enforcement of the fourth amendment and accommodation of asserted law enforcement interests. Prior to *Mapp*, the Court dealt almost exclusively with federal law enforcement activities and never had to confront the myriad law enforcement problems of state and local officers. As will be seen, these state and local law enforcement practices are quite different from federal practices.

The Supreme Court has not been able to accommodate local law enforcement interests while maintaining a strong fourth amendment barrier to other forms of law enforcement intrusions. A single unitary search and seizure standard for state, local, and federal officers alike simply does not work. The exclusionary rule should be modified, therefore, to free the states from what should be strict federal standards. The answer lies in the overruling of *Mapp v. Ohio*. This approach would permit the states the necessary law enforcement flexibility and, at the same time, enable the federal courts to enforce strictly high fourth amendment standards.

II. RECENT LIMITATIONS ON FOURTH AMENDMENT PROTECTION

In *Opperman, Janis, and Stone*, each of the searches or seizures declared unconstitutional by the lower court had been carried out by state law enforcement officers. This feature is significant when seen as part of an increasing pattern of Supreme Court reversals of federal and state court decisions. The Supreme Court has explicitly upheld law enforcement activities found illegal by the federal or state appellate court in no fewer than fourteen recent cases, all involving state law enforcement officers.²⁸

A. Expansion of the "Stop and Frisk" Doctrine

The first such reversal, in *Adams v. Williams*,²⁹ decided during the Court's 1971-72 Term, involved an extension of the "stop and frisk" doctrine first announced in *Terry v. Ohio*.³⁰ To appreciate the full significance of the *Adams* decision, it is helpful to understand this doctrine and

28. See notes 9-10 *supra*.

29. 407 U.S. 143 (1972).

30. 392 U.S. 1 (1968).

the strict limits placed upon it by the *Terry* decision. In *Terry*, the Court separated the fourth amendment's warrant clause, with its probable cause requirement, from the amendment's general prohibition against unreasonable searches and seizures,³¹ holding that a very limited law enforcement intrusion on the freedom and privacy of the person, commonly known as the "stop and frisk" can be carried out on the basis of "reasonable suspicion."³² This doctrine arose from a Cleveland plainclothesman's observation of three individuals who apparently were "casing" a store. Eventually the officer stopped the men and asked them to identify themselves. When he received a mumbled answer, the officer turned one of them around and patted him down. The patdown yielded a revolver which led to a successful prosecution for possession of a concealed deadly weapon. The officer was later able to recount a wealth of detail about the men's activities that had aroused his suspicion and the Court upheld this "stop and frisk" as reasonable.³³

Although the discretionary "stop and frisk" doctrine recognized in *Terry* arose from the strictly limited circumstances of that case, the Court's decision in *Adams v. Williams* indicated its willingness to apply the doctrine to more questionable situations. In *Adams*, a police officer on early morning patrol in a high crime area of Bridgeport, Connecticut received a tip from an unnamed informant whose reliability was never established, that a man sitting in a nearby parked car had narcotics in his possession and a gun at his waist. After radioing for assistance, the officer approached the car, tapped on the window, and asked the occupant to open the door. When Williams, the occupant, rolled down the window instead, the officer reached in and grabbed a loaded pistol from his waistband.³⁴ A search incident to his arrest for unlawful possession of the gun yielded narcotics.

The officer's course of conduct was upheld by the Connecticut Supreme Court,³⁵ and the United States Supreme Court denied Williams' petition for certiorari.³⁶ However, the Supreme Court agreed to hear the case after the Second Circuit, *en banc*, granted Williams' habeas corpus relief, holding that the narcotics were discovered in violation of his

31. For a more detailed description of *Terry* and the "surgery" the Court performed on the fourth amendment, see text accompanying notes 330-42 *infra*.

32. 392 U.S. at 20-27. See also *id.* at 31-34 (Harlan, J., concurring).

33. *Id.* at 27-31.

34. These are the facts as they were described at the federal court level. Apparently the officer's account went through a metamorphosis of sorts. 436 F.2d 30, 36 n.4 (2d Cir. 1970) (Friendly, J., dissenting).

35. 157 Conn. 114, 249 A.2d 245 (1968).

36. 395 U.S. 927 (1969).

fourth amendment rights.³⁷ A majority of the Supreme Court upheld the officer's actions as reasonable.³⁸ It also held that once the officer's discovery of the gun corroborated the informant's tip in part, the officer had probable cause to believe Williams also had narcotics.³⁹

In certain respects, these holdings are logical extensions of *Terry*: the requisite "articulable suspicion" for a stop can be based on sources other than the officer's own observation; an occupant of a vehicle who has aroused the officer's reasonable suspicion is just as properly the object of a stop and frisk as is a suspicious pedestrian, and an officer with information about the precise location of a weapon may immediately seize that weapon without first completing a standard patdown.⁴⁰ Other features of this opinion, however, signaled a substantial loosening of standards by which a "stop and frisk" will be judged. One is the quantum of suspicion necessary for a "stop and frisk." In *Terry*, the officer was able to relate several clearly suspicious details about the suspects' behavior. The fact that his suspicions were based upon first-hand observation made them inherently more reliable. If he had less than probable cause to make a stop and search, he had very little less.

In *Adams v. Williams*, however, the reliability of the source of information that gave the officer reason to suspect Williams was unproven,⁴¹ and other than the nature of the area and the time of night, nothing about Williams was inherently suspicious. Unlike the *Terry* situation, there was no reason for the officer to fear that the suspect was an immediate threat to anyone's safety. The initial corroboration of the informer's tip—the fact that there was a man in a parked car where the informer said he would be—fell far short of the kind of corroboration that the Court has said is necessary to show that an informer has obtained and imparted reliable information about criminal activity.⁴²

37. 441 F.2d 394 (2d Cir. 1971).

38. 407 U.S. at 146-48.

39. *Id.* at 148-49.

40. These latter two points were not discussed explicitly but are implicit in the Court's holding.

41. This point had been stressed by Judge Friendly, whose dissent from the Second Circuit's original decision denying relief, 436 F.2d 30 (2d Cir. 1970), was virtually adopted by Justices Douglas, Brennan, and Marshall. Compare 436 F.2d 30, 38-39 (Friendly, J., dissenting) with 407 U.S. at 149-50 (Douglas, J., dissenting); 407 U.S. at 151-52 (Brennan, J., dissenting); and 407 U.S. at 159-60 (Marshall, J., dissenting).

42. See *Spinelli v. United States*, 393 U.S. 410 (1969), in which the Court formulated the standard for assessing an informer's reliability in determining whether his information furnished probable cause. The point here is not that the officer needed probable cause but that the gulf between his quantum of suspicion and probable cause was considerably greater than the gulf facing the officer in *Terry*. See 407 U.S. 156-59 (Marshall, J., dissenting).

A second significant feature of *Adams v. Williams* is the nature of the alleged offense the officer was investigating. The officer had been told that Williams had a gun in his possession. Connecticut is a state with lenient gun laws, however, and the mere possession of a pistol in the manner alleged was not at all likely to be a criminal offense.⁴³ The only offense of which the officer had reason to suspect Williams was entirely possessory. Judge Friendly's opinion dissenting from the original Second Circuit decision, which likely influenced the *en banc* Second Circuit in condemning this search,⁴⁴ expressed doubt whether a "stop and frisk" for a purely possessory offense could ever be justified.⁴⁵

B. Consensual Searches: *Schneckloth v. Bustamonte*

The Court's first major break with the developing line of fourth amendment case law, seemingly for the purpose of accommodating state interests, came the following year in *Schneckloth v. Bustamonte*,⁴⁶ in which the Court virtually rewrote the doctrine of voluntariness with respect to consensual searches.⁴⁷ The *Bustamonte* decision arose out of a search by local police officers in Sunnyvale, California. After stopping an automobile with six male occupants, the officers obtained the consent of one of the occupants to search the car. The state never demonstrated that the consenting individual knew he had the right to withhold consent and require the officers to have probable cause to justify a decision to search without a warrant. A California court of appeals⁴⁸ found the consent voluntary under the "totality of the circumstances" test set forth several years before by the state supreme court in *People v. Michael*.⁴⁹ The United States Court of Appeals for the Ninth Circuit ordered *habeas corpus* relief for Bustamonte, who had been convicted on the basis of evidence found in the search.⁵⁰ The Ninth Circuit did so on the ground that California's "totality of the circumstances" test was insufficient to define the validity of a given search.⁵¹

43. 436 F.2d at 38 (Friendly, J., dissenting). See also 407 U.S. at 149 (Douglas, J., dissenting); 407 U.S. at 158-59 (Marshall, J., dissenting).

44. The *en banc* court issued a short *per curiam* opinion, which stated that "Sergeant Connolly had neither probable cause to arrest Williams nor any other sufficient cause for reaching into Williams' waistband" 441 F.2d at 394.

45. See 436 F.2d at 38.

46. 412 U.S. 218 (1973).

47. See Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 240-252 (1974) (hereinafter referred to as Wefing & Miles).

48. *People v. Bustamonte*, 270 Cal. App. 2d 648, 652, 76 Cal. Rptr. 17, 20 (Ct. App. 1969).

49. 45 Cal. 2d 751, 290 P.2d 852 (1955).

50. 448 F.2d 699, 701 (9th Cir. 1971).

51. *Id.* at 700-01.

An impressive array of federal and state authority supported the Ninth Circuit's holding. In recent years, there had existed a consensus among federal and state courts that consent to search is a waiver of fundamental rights, and that such waiver must be knowing and intelligent.⁵² California's position that a valid consent could be based on less than a showing of a knowing and intelligent waiver was the minority view, even among the states. Furthermore, the waiver standard had been derived by state and lower federal courts from the Supreme Court's own opinions dealing with consent searches.⁵³

Nevertheless, the Court abandoned the waiver standard in deciding *Bustamonte*. It relied on interrogation cases predating *Miranda v. Arizona*⁵⁴ to devise a "totality of the circumstances" test for "noncustodial" consents that was, if anything, more lenient than the California standard.⁵⁵ Justice Stewart's opinion for the majority was a tortuous effort to meet "the legitimate need for such searches";⁵⁶ he emphasized that an officer with suspicion but no probable cause may have no other "means of obtaining important and reliable evidence."⁵⁷

C. *The Non-Consensual Warrantless Search Cases*

The Supreme Court's growing tendency to interpret restrictively fourth amendment protections continued in *Cupp v. Murphy*.⁵⁸ Again overruling the Ninth Circuit, the Court upheld a warrantless forcible extraction of material from under the fingernails of a murder suspect. The Oregon police officers who scraped his nails had probable cause to arrest him at the time, but chose to release him temporarily once they had obtained the evidence. Justice Stewart, again writing for the majority, held that the detention of the suspect against his will was a seizure and the scraping was clearly a search.⁵⁹ However, the presence of probable cause to arrest the suspect,⁶⁰ the highly destructible nature of the evidence sought, and the minimal intrusion which the search and seizure entailed, all made the procedure reasonable.⁶¹

52. See Wefing & Miles, *supra* note 47, at 227-40.

53. See *id.* at 217-27.

54. 384 U.S. 436 (1966).

55. See Wefing & Miles, *supra* note 47, at 250.

56. 412 U.S. at 227.

57. *Id.*

58. 412 U.S. 291 (1973).

59. *Id.* at 294-95.

60. Justice Douglas, who dissented in part, contended that the Ninth Circuit never reached the probable cause question. *Id.* at 301. Justice Brennan agreed with him that the case should have been remanded to the court of appeals for a finding on the probable cause issue. *Id.* at 301 (Brennan, J., dissenting).

61. The Court relied on the principles announced in *Chimel v. California*, 395 U.S. 752

The peculiar needs of local law enforcement officers underlay a second decision during the 1972-73 Term upholding a warrantless search. In *Cady v. Dombrowski*,⁶² the Court upheld a warrantless search of a wrecked car belonging to an in-custody drunk driving defendant. The "search" was in the nature of an automobile inventory. The seriously injured defendant was an off-duty Chicago police officer, and the small-town Wisconsin officers who handled the car searched it, pursuant to departmental policy,⁶³ to secure the service revolver which they thought the defendant was required by law to have with him at all times. The officer who performed the search found evidence in the trunk linking the defendant to the murder of which he was eventually convicted. The Seventh Circuit held this search unconstitutional.⁶⁴

Although *Cady v. Dombrowski* is an interesting case for a number of reasons,⁶⁵ its significance for this study lies in its recognition that, at least when automobiles are concerned, there are fundamental differences between the role of federal law enforcement agents and the function of local police officers. As stated in Justice Rehnquist's majority opinion:

[T]he application of Fourth Amendment standards, originally intended to restrict only the Federal Government, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle.⁶⁶

Rehnquist went on to state that under our federal system of government, state and local police officers have much greater contact with vehicles "for reasons related to the operation of vehicles themselves,"⁶⁷ and that due to the extensive regulation of vehicles and traffic, the "police-citizen

(1969), also written by Justice Stewart. See 412 U.S. 295-96. However, the Court did not hold "that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant. But the respondent was not subjected to such a search." *Id.* at 296.

62. 413 U.S. 433 (1973).

63. The officer who made the search testified that the effort to find the revolver "was standard procedure in our department." *Id.* at 437.

64. 471 F.2d 280 (7th Cir. 1972).

65. On its most superficial level, the case is interesting as one of an increasing number of Supreme Court reversals of lower federal court decisions holding state law enforcement officers to strict fourth amendment standards. More significantly, it is one of a series of cases in which the Court moved closer to outright approval of routine inventory investigations. See, e.g., *Cooper v. California*, 386 U.S. 58 (1967) and *Harris v. United States*, 390 U.S. 234 (1968), which were ultimately given "carte blanche" approval in *South Dakota v. Opperman*, 428 U.S. 364 (1976).

66. 413 U.S. at 440.

67. *Id.* at 441.

contact involving automobiles will be substantially greater than police-citizen contact in a home or office."⁶⁸ Accordingly, these local police officers will be called upon to perform a variety of "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."⁶⁹

D. The Custodial Search Cases

The following Term the Court's rollback of fourth amendment protections concentrated on the area of searches incident to arrest, and again its most notable decisions dealt with law enforcement problems peculiar to local rather than federal officers. In two traffic arrest cases, *United States v. Robinson*⁷⁰ and *Gustafson v. Florida*,⁷¹ the Court held that, incident to a lawful arrest, a law enforcement officer's authority to make a full search of the person requires no justification beyond the fact of the custodial arrest itself. The Court squarely rejected the view that a full search of an arrested person is justified only for reasons of safety and securing evidence of the offense. It thus found the "limited search" rationale of *Terry v. Ohio*⁷² inapplicable to custodial arrests for offenses, such as traffic violations, that involve no evidence other than the fact of the illegal act.

In *Robinson*, the majority reversed a District of Columbia Circuit Court of Appeals decision and held admissible heroin discovered by an officer during his search of a traffic offender being taken into custody for a violation carrying a mandatory minimum jail term, a mandatory minimum fine, or both. The search, carried out pursuant to standard District of Columbia "field arrest" procedures,⁷³ was motivated by neither fear on the officer's part nor a belief that there was further evidence of crime on the offender's person. The search went beyond the person to an examination of the contents of a crumpled cigarette package found in a pocket of the offender's coat.

In *Gustafson*, the Court affirmed the Florida Supreme Court and extended its *Robinson* holding to an arrest for a minor traffic offense that was later cleared up. As in *Robinson*, the search went beyond the person to the interior of a cigarette box in which the officer found marijuana. From the record, it is arguable that at the time the officer took the offender, a local college student, into custody, he did not intend

68. *Id.*

69. *Id.*

70. 414 U.S. 218 (1973).

71. 414 U.S. 260 (1973).

72. See notes 30-33 & accompanying text *supra*.

73. See 414 U.S. at 221 n.2 for testimony regarding these "field arrest" procedures.

to put the youth through usual arrest procedures at all. The youth did not have his license in his possession, but explained—truthfully as it turned out—that the license was back at his room. According to the officer's testimony, he took the youth into custody "in order to transport him to the stationhouse for further inquiry."⁷⁴

The implicit premise on which the Court's decisions in these two cases rested was spelled out explicitly by Justice Powell in his concurrence: "[T]he custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to the legitimate and overriding governmental concern."⁷⁵ This premise, as Justice Marshall demonstrated in his dissent, was at odds with numerous state and lower federal court decisions specifically disapproving of searches of traffic offenders that go beyond the need to secure the safety of the arresting officer.⁷⁶ Moreover, as the Marshall dissent also noted, the Supreme Court itself had rejected it less than five years earlier, in *Chimel v. California*.⁷⁷

The *Robinson* and *Gustafson* holdings also had implications beyond the search incident to arrest doctrine. They seemed to imply that in certain situations police have unqualified authority to conduct a full warrantless search. Furthermore, the legality of such searches no longer need be adjudicated on a case-by-case basis. This grant of blanket police power insulated from judicial review may appear inconsistent with the Court's "case-by-case" language in *Cady v. Dombrowski*⁷⁸ and *Schneckloth v. Bustamonte*.⁷⁹ These two seemingly contradictory lines of thought, however, had something in common. As applied in the cases in which they were developed, each expanded the discretionary power of the police by allowing them to engage in intrusive activities without obtaining prior judicial approval.

In *Edwards v. United States*,⁸⁰ the Court further broadened the right of police to make custodial searches by holding that an officer's authority to make a warrantless search of a person incident to an arrest is not limited to a period of time contemporaneous with the actual arrest, as it had indicated in several previous opinions.⁸¹ Thus the Court upheld local

74. *Id.* at 262.

75. 414 U.S. at 237 (Powell, J., concurring). This concurrence accompanied both the *Robinson* and *Gustafson* cases.

76. 414 U.S. at 244-247 (Marshall, J., dissenting).

77. *Id.* at 256-57, citing *Chimel v. California*, 395 U.S. 752 (1969).

78. See 413 U.S. 433, 448 (1973).

79. See 412 U.S. 218, 233 (1973).

80. 415 U.S. 800 (1974).

81. See, e.g., *Chimel v. California*, 395 U.S. 752, 767 (1969); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Preston v. United States*, 376 U.S. 364, 367-68 (1964).

officers' seizure of clothing from a jailed burglary suspect whose arrest had taken place about eight hours earlier. The arrest took place at eleven P.M., the officers had reasonable cause to believe that the clothing of the defendant contained paint particles, and the police were not able to buy replacement clothing for the suspect until the next morning. Given these circumstances, the Court felt it reasonable for the officers to delay their search until they were able to obtain other clothing for the defendant to wear. The Court was also impressed with the fact that the police had custody of the clothing as well as the suspect, without removing the clothing from the suspect or the cell.⁸²

Edwards cannot be characterized as an outright break with previous precedent, as can *Bustamonte*, nor can it be read as a sweeping grant of warrantless police authority as can *Robinson* and *Gustafson*. As Justice Stewart pointed out in his dissent, however, it dealt yet another blow to the idea that the police must take advantage of every opportunity to get a warrant.⁸³ Rather, Justice White's opinion for the majority reflected the view, perhaps developed most fully several years previous in *Chambers v. Maroney*,⁸⁴ that given initial police authority to make a warrantless search at a time when they obtained probable cause under exigent circumstances, there is no reason later to require that a warrant be obtained, even though the exigent circumstances have vanished and it is now possible for the police to obtain judicial approval.

E. The Automobile Search Cases

This same relaxed view of delayed warrantless searches of items taken into police custody underlay the Court's plurality opinion in *Cardwell v. Lewis*⁸⁵ which upheld the warrantless seizure of an in-custody Ohio murder suspect's car from a public parking lot and the warrantless examination of the car the next day for tire and exterior paint matchups. Because the "search" at issue was confined to the car's exterior and because the Court split four to four on the merits, *Cardwell* did not have an immediate major impact on the lower courts. Nevertheless, Justice Blackmun's plurality opinion made a major doctrinal addition to the idea that vehicles enjoy less protection under the fourth amendment than dwellings or other buildings. The Court's previous decisions recognizing exceptions to the warrant requirements with respect to car searches

82. 415 U.S. at 804-805.

83. See 415 U.S. at 809 (Stewart, J., dissenting).

84. 399 U.S. 42 (1970).

85. 417 U.S. 583 (1974). Justice Powell concurred with the majority on the basis of his limited view of the proper scope of federal habeas corpus relief. *Id.* at 596 (Powell, J., concurring).

focused on the mobility of the vehicle.⁸⁶ In *Cardwell*, however, Blackmun, borrowing from a recently announced border search case involving far different considerations,⁸⁷ emphasized that a search of an automobile is generally far less intrusive than a search of a person or building:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.⁸⁸

Since this language was later quoted verbatim by Chief Justice Burger in his opinion for the *Opperman* majority⁸⁹ and has recently become a staple of lower court opinions upholding warrantless vehicle searches,⁹⁰ *Cardwell* has been given far greater significance than its limited facts and plurality status would seem to justify. By providing another major consideration other than the actual mobility of the vehicle in evaluating a warrantless search, this opinion has further reduced the protection of motorists against warrantless searches of their vehicles.

Thus, despite the Court's protestations to the contrary, it has moved closer to recognizing an "automobile exception" to the warrant requirement, rather than the mobility exception heretofore applied to vehicles, which required an additional showing that the vehicle was mobile at the time of the search or seizure. In so doing, it has indicated that some things protected by the fourth amendment against unreasonable searches and seizures are less protected than others. *Cardwell* and subsequent decisions relying upon it offer classic examples of the way in which the continued refinement of fourth amendment law has served to weaken the amendment's protections.

86. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 460-461 n.18 (1971); *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221-22 (1968); *Carroll v. United States*, 267 U.S. 132, 153-159 (1925).

87. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

88. 417 U.S. at 590.

89. 428 U.S. 364, 368 (1976).

90. See, e.g., *United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 945 (1977); *United States v. Robinson*, 533 F.2d 578 (D.C. Cir. 1976); *Haefeli v. Chernoff*, 526 F.2d 1314 (1st Cir. 1975). But see *United States v. Farnkoff*, 535 F.2d 661 (1st Cir. 1976). In all the decisions the courts held that the exigency requirement still applies to automobile searches as well as other searches. Even Judge Leventhal's opinion for the court in *United States v. Robinson*, stopped short of embracing *Cardwell*'s "lesser expectation of privacy" language to the extent that the First Circuit had in *Haefeli v. Chernoff* or the Fifth Circuit had in *United States v. Mitchell*. Also, even seeming acceptance of the *Cardwell* "lesser expectation of privacy" rationale did not mean abandonment of the mobility requirement. See *United States v. Kelly*, 547 F.2d 82 (8th Cir. 1977).

The authority of law enforcement officials to search automobiles without a warrant received yet another boost in *Texas v. White*,⁹¹ a per curiam opinion announced the following Term. Summarily reversing the Texas Court of Criminal Appeals, the Court upheld as reasonable a warrantless stationhouse search of a bad check suspect's car seized by Amarillo police less than an hour before at a drive-in bank window. The majority's summary disposal of this case, as well as the fact that it was a state court whose decision was found to have interpreted the fourth amendment too expansively, can be taken as an indication of the sorry state to which the warrant requirement has now fallen with respect to vehicle searches. This point was underscored by dissenting Justice Marshall who observed that, unlike *Chambers v. Maroney*, upon which the majority purported to rely, this case did not present a vehicle seizure under circumstances in which an immediate search would have been impractical or unsafe.⁹²

F. *Expectation of Privacy Cases*

The 1975-76 Term marked more than the erosion of fourth amendment protections vis-à-vis vehicles; the Court also handed down a series of decisions which significantly limited the "expectation of privacy" doctrine. In the first of these cases, *United States v. Watson*,⁹³ the Court reversed the Ninth Circuit and approved a distinction between arrests and searches. An arrest made in a public place by a postal inspector with probable cause to believe that the suspect had committed a felony was not undone by the inspector's failure to get a warrant despite ample time to do so.⁹⁴ The Court found ample support for its holding; a number of cases had recognized warrantless arrest authority with respect to defendants apprehended in public places, and federal and state laws appeared to confer this authority on specified officers.⁹⁵

The majority explicitly declined to transform the judicial preference for a warrant

into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public

91. 423 U.S. 67 (1975).

92. See *Id.* at 72 (Marshall, J., dissenting).

93. 423 U.S. 411 (1976).

94. Several days before the arrest, an informer of proven reliability had told the inspector about Watson's offer to share the use of a stolen credit card, and the informer had delivered the stolen card to the inspector. The arrest was made pursuant to a prearranged strategy devised by the informer and the inspector. The informer arranged with Watson to meet at a designated restaurant, and the inspector observed the meeting. Upon a signal from the informer that Watson had additional stolen cards, the inspector moved in and made the arrest. *Id.* at 412-413.

95. *Id.* at 414-424.

arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.⁹⁶

Justice Marshall's dissenting opinion contended that the majority's historical analysis of the common-law rule was simply wrong.⁹⁷ He admitted that early decisions had allowed warrantless searches of felony suspects, but went on to note that felonies comprised a much smaller percentage of the number of total crimes. A large number of offenses are today classified as felonies which were earlier categorized as misdemeanors. Accordingly, the Court has actually reduced, rather than maintained, common law protections in dealing with persons suspected of committing a modern felony.⁹⁸ The *Watson* majority, he contended, was adopting the partially overruled and fairly discredited "reasonableness of the search" criterion of *Rabinowitz v. United States*.⁹⁹

United States v. Santana,¹⁰⁰ decided a few months after *Watson*, extended the "public places" concept to the door of a suspect's home.¹⁰¹ In doing so, the Court also made clear that the "reasonable expectation of privacy" doctrine, first set forth in *Katz v. United States*,¹⁰² can narrow a suspect's fourth amendment protections as well as expand them. *Santana* also broadened the "hot pursuit" exception to the warrant requirement, which had been applied in *Warden v. Hayden*¹⁰³ to an obviously dangerous fleeing felon.¹⁰⁴ Nothing in the facts of *Santana* indicated that the fleeing suspect was at all dangerous. Rather, the justification was that the narcotics the officers had probable cause to believe were in the suspect's possession would be destroyed if they did not enter her house and apprehend her immediately.¹⁰⁵

96. *Id.* at 423-424.

97. *Id.* at 434, 436-453 (Marshall, J., dissenting).

98. *Id.* at 438-441.

99. *Id.* at 444. See the discussion of *United States v. Rabinowitz*, notes 220-22 & accompanying text *infra*.

100. 427 U.S. 38 (1976).

101. The police first sought to arrest Santana as she stood in the doorway of her home, holding a brown bag, just minutes after they had arrested one of her street sellers. The officers drove to within 15 feet of her house, shouting "police" and identifying themselves. Santana retreated into the vestibule, where she was apprehended. Heroin-filled envelopes fell out of the bag in the ensuing struggle.

102. 389 U.S. 347 (1967). For a discussion of *Katz*, see notes 290-93 & accompanying text *infra*. While the *Katz* opinion had the effect of extending fourth amendment protections by tying them to the right of the people to be free from governmental intrusions, the Court recognized that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection." *Id.* at 351.

103. 387 U.S. 294 (1967).

104. The defendant in *Hayden* had just committed an armed robbery.

105. 427 U.S. at 43.

United States v. Miller,¹⁰⁶ in which the Court reversed a decision by the United States Court of Appeals for the Fifth Circuit, can be read as yet another decision in which the Court applied the "reasonable expectation of privacy" doctrine to give a suspect less protection against searches and seizure than he or she might have enjoyed under the property law concepts predating *Katz*. In *Miller*, the Court held that neither expectation of privacy nor the venerable fourth amendment protection against compelled production of personal papers, spelled out in *Boyd v. United States*,¹⁰⁷ could shelter a bank customer from a government subpoena directing the bank to turn over the records of its transactions with him.¹⁰⁸ The Court held that the fourth amendment simply does not apply to such a subpoena. Justice Powell's majority opinion stated that these records are not "private papers" of the kind protected by *Boyd*; rather, they are the bank's records of its negotiations with the aggrieved individual. By choosing to deal with the bank, the individual has lost his expectation of fourth amendment protection against government investigation, and this applies as well to the documents involved.¹⁰⁹

G. The Exclusionary Rule Cases

There are several recent decisions with extremely important implications for the exclusionary rule. *Janis* and *Stone v. Powell* are, of course, among these. But two others also bear mentioning, for they reflect the same rather jaundiced view of the exclusionary rule. In *United States v. Calandra*,¹¹⁰ the Court, in reversing the United States Court of Appeals for the Sixth Circuit, held that the policies behind the rule do not require its extension to grand jury inquiries based on illegally seized evidence. *United States v. Peltier*¹¹¹ reversed the Ninth Circuit, holding that the rule's policies did not justify its retroactive application to good-faith Border Patrol searches.

106. 425 U.S. 435 (1976).

107. 116 U.S. 616 (1886).

108. Miller was a moonshine suspect whose operations had begun to unravel. The Alcohol, Tobacco, and Firearms Bureau presented Miller's banks with grand jury subpoenas issued in blank by a United States district court clerk and completed by the United States Attorney's office. The subpoenas ordered the presidents of these banks to appear on a designated day and to produce all records of Miller's accounts for several months. The banks did not notify Miller of the subpoenas or of their compliance with them.

109. 425 U.S. at 442-43. Applying a line of "misplaced confidence" cases in which defendants make incriminating statements or revelations to informers, the Court found the analysis in these cases unchanged by the mandatory recordkeeping requirements of the Bank Secrecy Act of 1970, 12 U.S.C. § 1829b(d) (1970). See *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *Osborn v. United States*, 385 U.S. 323 (1966); and *Lewis v. United States*, 385 U.S. 206 (1966).

110. 414 U.S. 338 (1974).

111. 422 U.S. 531 (1975).

Justice Powell, spokesman for the *Calandra* majority, said nothing of the exclusionary rule's purpose as a protector of judicial integrity; rather, he saw its prime purpose as a deterrence to "future unlawful police conduct [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."¹¹² In a footnote, Powell expressed some doubt about the rule's value even for this purpose. Referring to the frequently cited article by Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*,¹¹³ he noted "some disagreement as to the practical efficacy of the exclusionary rule. . . . We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials."¹¹⁴

Alarmed by this language, Justice Brennan vigorously dissented:

In *Mapp*, the Court thought it had 'close[d] the only courtroom door remaining open to evidence secured by official lawlessness' in violation of Fourth Amendment rights. The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases.¹¹⁵

Of course, Justice Brennan's fears have not yet been fully realized. In *Stone v. Powell*, the Court re-examined the exclusionary rule¹¹⁶ but stopped short of abolishing or modifying it. Justice Powell, writing the majority opinion in *Stone*, expressed the same view of the exclusionary rule as he did in *Calandra*, carefully reiterating the reasons for according the judicial integrity imperative little weight in measuring the value of the rule.¹¹⁷ Although the Court concluded that the exclusionary rule should be retained for state criminal prosecutions, it did not firmly shut the door that Justice Brennan feared had been left ajar in *Calandra*. Powell stressed that the rule "was a judicially created means of effectuating the rights secured by the Fourth Amendment."¹¹⁸ He observed that prior to

112. 414 U.S. at 348.

113. 37 U. CHI. L. REV. 665 (1970).

114. 414 U.S. at 348 n.5.

115. *Id.* at 365 (citation omitted). It is both noteworthy and ironic that the Oaks article cited by Justice Powell and repeatedly referred to by Chief Justice Burger in calling for reexamination of the rule, *see, e.g.*, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting), is quoted at length by Justice Brennan in *defense* of the rule. *See* 414 U.S. at 348 n.5.

116. 428 U.S. at 484-94.

117. *Id.* at 482-89.

118. *Id.* at 482.

Weeks v. United States,¹¹⁹ in which the rule was first explicitly adopted, "there existed no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment."¹²⁰ This language left little doubt that what the Court had given in *Weeks* it could take away at some future date. Even more ominous were the opinions of Chief Justice Burger and Justice White, in which they stated their willingness to modify the reach of the exclusionary rule, even if it is retained for a small and limited category of cases.¹²¹

III. AN HISTORICAL PERSPECTIVE

A. *At The Beginning: Boyd v. United States*

At the risk of some oversimplification it might be said that the state of the fourth amendment today follows naturally from interrelated developments dating back to the last century. These developments have placed heavy pressures on the Court to alter its "original perception" of the fourth amendment as both a natural consequence of the American struggle for independence and an indispensable check on government power in a free society. The term "original perception" is used advisedly, for the Court's first significant declaration of fourth amendment principles came in 1886, in *Boyd v. United States*.¹²²

Justice Bradley's opinion for the *Boyd* majority merits close study, for it has guided generations of judges who have struggled with search and seizure problems. In the words of Mr. Justice Frankfurter, it gave "legal effect to the broad historic policy underlying the fourth amendment."¹²³ *Boyd's* premises regarding the inadmissibility of illegally obtained evidence and the interrelationship of the fourth and fifth amendments led to the formulation of the fourth amendment exclusionary rule. The controversy with which *Boyd* dealt was a harbinger—a sign that times were changing, and that the government was beginning to assume a more active and aggressive role in people's lives.¹²⁴ The majority opinion may be read as a reaction to a particular manifestation of the changing

119. 232 U.S. 383 (1914).

120. 428 U.S. at 482.

121. *Id.* at 496, 536-42.

122. 116 U.S. 616 (1886).

123. *Harris v. United States*, 331 U.S. 145, 160 (1947) (Frankfurter, J., dissenting).

124. The proposition that "the government was on its way to assuming a more active and aggressive role in the lives of the people" means merely that Congress was finally awakening to the need for federal regulation of big business. Although the subpoena powers contained in the customs revenue legislation were found unconstitutionally broad in *Boyd*, subsequent regulatory legislation compelling the production of documents, books and papers was upheld by the Court. *See, e.g., Hale v. Henkel*, 201 U.S. 43 (1906) (a corporation has no fifth amendment right to refuse to submit its books and papers incident

relationship between the government and its citizens. In resolving a newly-felt tension between perceived government needs and citizens' rights, the Court resisted any temptation to compromise the individual's well-established freedoms. It discussed but refused to approve several lower court decisions offering a "balancing" approach to these constitutional issues.¹²⁵

At issue in *Boyd* was the constitutionality of a section in a federal customs revenue statute¹²⁶ authorizing a federal judge to compel production, in a civil forfeiture proceeding, of private business records believed by government attorneys to contain evidence tending to prove "any allegation" that "the defendant or claimant" had defrauded the government of customs revenues.¹²⁷ According to Bradley it was the first legislation authorizing the search and seizure of a man's private papers or their compulsory production for use as evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property.¹²⁸ Originating in the heat of the Civil War, it "was adopted at a period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence."¹²⁹

The Court declared the measure unconstitutional: "[C]ompulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property" is not only within the scope of the fourth amendment "in all cases in which a search or seizure would

to a subpoena under the Sherman Act; and an official of the corporation which is charged with criminal violation of the statute cannot plead the criminality of the corporation as a refusal to produce its books); *ICC v. Brimson*, 154 U.S. 447 (1894) (section 12 of Interstate Commerce Act, which provides that the Interstate Commerce Commission may compel the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation by the Commission, is constitutional).

The law that was considered in *Boyd*, an "Act to amend the custom revenue laws, and to repeal moieties," 18 Stat. 186 (1874) originated as civil war legislation, but was amended after the war had ended. For the *Boyd* Court's account of the legislative history of the Act, see 166 U.S. at 620-22.

125. These lower court decisions, upholding the same basic legislation struck down in *Boyd*, are discussed in the *Boyd* opinion. See 116 U.S. at 635-38. Of particular interest is *Stockwell v. United States*, 23 F. Cas. 116 (C.C.D. Me. 1870) (No. 13,466), cited at 116 U.S. 635. In *Stockwell*, the Court upheld a warrant authorizing the search for books, invoices, and other papers pertaining to an illegal importation. The Court reasoned that since collection statutes authorizing the seizure of goods liable to duty were enacted contemporaneously with the enactment of the fourth and fifth amendments, no objection to a warrant for seizure of papers, invoices, and books pertaining to such goods could be made.

126. 18 Stat. 186 (1874). See also note 124 *supra*.

127. 116 U.S. at 620-21.

128. *Id.* at 622-23. The Court stated elsewhere that forfeiture proceedings of this nature, "though they may be civil in form, are in their nature criminal." *Id.* at 634.

129. *Id.* at 621.

be,"¹³⁰ but is an *unreasonable* search and seizure.¹³¹ Evidence obtained from government attorneys' inspection of the books and papers produced in this case pursuant to the judge's production order should never have been used in the forfeiture proceeding.

Beyond a doubt, Bradley said, "when the Fourth and Fifth Amendments were penned and adopted, the language of Lord Camden"¹³² in *Entick v. Carrington*¹³³ "was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the *true* criteria of the reasonable and 'unreasonable' character of such seizures."¹³⁴ This "true doctrine" of limits on government searches and seizures set forth in *Entick v. Carrington* was the same doctrine which spurred the colonists in February, 1761 to attack the British government's use of the infamous writs of assistance.¹³⁵ The 1761 debate, Bradley suggested, "was perhaps the most prominent event which inaugurated the resist-

130. *Id.* at 622.

131. *Id.* at 635.

132. *Id.* at 630.

133. 95 Eng. Rep. 807 (K.B. 1765). *Entick* was a trespass action brought by a plaintiff whose home had been invaded and whose personal papers and effects had been seized and examined by officers acting pursuant to a general warrant. The case is famous for the landmark opinion of Lord Camden declaring that general warrants for the seizure of papers and personal property were a form of governmental outlawry. The decision ended the practice of the British secretaries of state issuing these warrants for the seizure of books and papers that might be used to convict their owners of libel.

Lord Camden's opinion exhibits a strong Lockean influence, for it is bottomed on the sanctity of property in an ordered society. A man's papers are his dearest personal property, Lord Camden asserted, and their seizure is thus governed by the law of property pertaining to trespass. Since an unauthorized trespass upon another's property renders one liable, even without a showing of damages, Lord Camden reasoned that the seizure of a man's papers would likewise be illegal, unless authorized by the owner or by the courts.

Because even the procedural safeguards for governmental search and seizure of allegedly stolen goods—a far lesser intrusion than the search for and seizure of a man's personal papers—were not followed by the government in *Entick*, the seizure of Entick's personal papers was illegal.

The influence of Lord Camden's opinion upon the language and purpose of the fourth amendment is obvious. *Entick v. Carrington* was a timely case for the development of American constitutional law. Announced in 1765, just four years after James Otis in Boston condemned writs of assistance, it came during a time of bitter controversy in England and America—especially in Massachusetts—over governmental search and seizure practices. Many of the men who drafted the federal constitution and the Massachusetts constitution, from which the fourth amendment was derived, were familiar with *Entick v. Carrington* and the practices it condemned. The seeds of the *Boyd* doctrine of the interrelationship between the fourth amendment and the privilege against self-incrimination, from which the "mere evidence" rule announced in *Gouled v. United States*, 255 U.S. 298 (1921), was derived, are also to be found in *Entick*. Additionally, the exclusionary rule's roots may be found in the right of an aggrieved search victim to the return of items in which his possessory interest is superior to the government's.

134. 116 U.S. at 630 (emphasis supplied).

135. *Id.* at 625.

ance of the colonies to the oppressions of the mother country."¹³⁶ Indeed, John Adams had said that "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."¹³⁷

The rights and values protected by the fourth and fifth amendments were seen by the Court as essential to a free society. They could not yield, consistent with their history and purpose, to measures deemed essential to the efficient collection of revenue.¹³⁸ These amendments simply forbade the seizure of a man's own books and papers for use as evidence against him in a suit designed to punish him as a criminal or deprive him of his property.

A major thesis in the *Boyd* opinion is that the fourth and fifth amendments should work together to protect private papers against seizure or compelled production:

For 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. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.¹³⁹

This point was basic to the Court's distinction between searches for and seizures of "stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof" and searches for and seizures of "a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him In the one case, the government is entitled to the possession of the property; in the other it is not."¹⁴⁰ The distinction between these two kinds of evidence led to the formulation of the "mere evidence rule" thirty five years later.¹⁴¹ The seeds of the exclusionary rule itself are also contained in *Boyd*. Besides explicitly declaring that the law in question

136. *Id.*

137. *Id.*

138. *Id.* at 636.

139. *Id.* at 633.

140. *Id.* at 623.

141. *See* *Gouled v. United States*, 255 U.S. 298 (1921). *See also* text accompanying notes 164-170 *infra*.

was unconstitutional, the Court said that both the United States Attorney's inspection of the telltale invoice and the invoice's admission into evidence "were erroneous and unconstitutional proceedings."¹⁴²

Of course, the mere evidence rule and the *Boyd* Court's perception of the interrelationship between the fourth and fifth amendments have not survived. The mere evidence rule fell in 1967,¹⁴³ at a time when the Court was "freeing" the fourth amendment from property law concepts said to unduly hinder its protection of people and their privacy¹⁴⁴ and led to anomalous results.¹⁴⁵ Indeed, taken as a whole, *Boyd* is limited by its emphasis on private property considerations. It is clear that the present Court, which has used the separation of property concepts from the fourth amendment to *reduce* the strength of the amendment's protection,¹⁴⁶ considers *Boyd* of limited value.¹⁴⁷

If one refuses to give the fourth amendment the broad, liberal interpretation that Justice Bradley thought necessary to serve its historical purpose, then *Boyd* indeed has limited value. But it is worth recalling why Justice Bradley thought such an interpretation was mandated. In response to the assertion that the procedure authorized by the law in question lacked many of the aggravating features of an actual search and seizure, Bradley wrote:

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 from legal modes of procedure It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.¹⁴⁸

This warning emphasizes that *Boyd* was a reaction to an old evil in a new form. The Court perceived in the customs statute a governmental effort to reduce the privacy of its citizens. While different in form from

142. 116 U.S. at 638.

143. See *Warden v. Hayden*, 387 U.S. 294 (1967).

144. *Id.* at 303-06.

145. *Id.* at 308-10. In laying to rest the mere evidence rule in *Warden*, Justice Brennan wrote for the Court that the rule "has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection." *Id.* at 309.

146. See *United States v. Santana*, 427 U.S. 38 (1976). In *Santana*, the Court held that a resident of a dwelling house had no expectation of privacy when police observed her actions as she stood in the doorway of her house. The doorway was equivalent to a public place for fourth amendment purposes, concluded the Court, since she had knowingly exposed her actions to people in public areas. *Id.* at 42.

147. See *Fisher v. United States*, 425 U.S. 391 (1976). In *Fisher*, the Court held that a taxpayer's privilege against self-incrimination was not violated by enforcement of an IRS summons addressed to the taxpayer's attorney for production of an accountant's work papers that had been transferred through the taxpayer to the attorney. *Id.* at 400.

148. 116 U.S. at 635.

general warrants and concededly less obnoxious, the statute's compulsory production provision was, like the general warrants and writs of assistance, another manifestation of a government's propensity for reducing its citizens to subjects. To the *Boyd* Court, the fourth amendment was intended as a bulwark against this threat. It was an adaptable instrument, and was capable of preventing intrusive practices never contemplated by its drafters.

B. *The First Accommodation*

The first cases citing *Boyd* retreated somewhat from its broad pronouncements. In *Adams v. New York*,¹⁴⁹ the Court found no constitutional violation in a seizure of private papers belonging to a state gambling defendant. The police officers seized the papers while executing a warrant to search the defendant's office for policy slips.¹⁵⁰ The papers were introduced at trial to identify the handwriting on the policy slips as the defendant's and to show that they were in the same custody as the slips.¹⁵¹ Since the Court held that the seizure was constitutional, it was unnecessary to decide whether the fourth and fifth amendments applied to the states through the fourteenth.¹⁵² However, Justice Day, the majority spokesman, stated in dictum that there was no constitutional barrier to introducing unlawfully seized evidence in a criminal trial.¹⁵³ The Court was clearly influenced by the position that state courts had taken on this issue.¹⁵⁴ Justice Day referred to *Boyd's* discussion of the origins of the fourth and fifth amendments but went on to say that the amendments

149. 192 U.S. 585 (1904).

150. *Id.* at 588.

151. *Id.* at 588, 594.

152. The legitimacy of the search and seizure had not been challenged at trial. Accordingly, the Court limited its inquiry to the competency of the evidence. *Id.* at 594. In dicta, however, the Court clearly indicated that even if the search and seizure had been illegally conducted, the evidence taken, if competent, would have been admissible. *Id.* at 595-96. Favorably discussed as "perhaps the leading" case supporting that proposition was *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841). In *Dana*, the Supreme Judicial Court of Massachusetts approved the trial court's receipt into evidence of lottery tickets taken from the defendant's premises pursuant to a search warrant. The court found that the search was proper, but in dictum, based upon other Massachusetts decisions, stated that the evidence was admissible regardless of the legality of the search. *Id.* at 337-38. This dictum was reprinted verbatim by the Supreme Court in *Adams* and relied upon by the Court for its conclusion that the propriety of a trial court's use of illegally seized evidence was well settled. 192 U.S. at 595.

Admissibility of illegally seized evidence was not the rule in every state prior to *Adams*. For example, in *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903), decided one year before *Adams*, the Iowa Supreme Court had excluded evidence on the ground that it was illegally seized.

153. 192 U.S. at 598.

154. *See id.* at 595-96.

were never intended to have the effect of excluding illegally obtained but otherwise competent evidence.¹⁵⁵

In *Hale v. Henkel*,¹⁵⁶ the Court distinguished between the order to produce considered in *Boyd* and a subpoena duces tecum. It held that neither the fourth nor the fifth amendments gave a corporate officer the absolute right to refuse to produce corporate papers in an antitrust prosecution, stating:

[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable.¹⁵⁷

The Court observed that despite *Boyd*'s language concerning the near merger of the fourth and fifth amendments, two cases decided subsequent to *Boyd* involving the powers of the courts to aid the Interstate Commerce Commission in obtaining materials from private parties subject to its authority¹⁵⁸ had treated the two amendments "as quite distinct, having different histories, and performing different functions."¹⁵⁹ Although *Hale* and the two ICC cases can be read as efforts to accommodate the other two branches of the government in their early efforts to regulate interstate commerce more effectively, it is clear that in *Adams* the Court took a much narrower view of the fourth amendment's protections than it had in *Boyd*. Nevertheless, in the second decade of the twentieth century, as the Court faced new forms of law enforcement aggressiveness, it rediscovered the broader view it had taken in *Boyd*.

C. *Boyd's Progeny—Weeks, Gouled, and Silverthorne*

In *Weeks v. United States*,¹⁶⁰ the Court squarely held for the first time that a person's materials seized by federal officers in violation of the fourth amendment could not be used as evidence against him in a federal prosecution. The illegal search in *Weeks* which yielded the challenged

155. *Id.* at 598.

156. 201 U.S. 43 (1906).

157. *Id.* at 76.

158. *ICC v. Brimson*, 154 U.S. 447 (1894) (holding that § 12 of the Interstate Commerce Act (current version at 49 U.S.C. § 12 (1970)), which provides that the Interstate Commerce Commission may compel the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation by the Commission, is constitutional). *Accord*, *ICC v. Baird*, 194 U.S. 25 (1904).

159. 201 U.S. at 72.

160. 232 U.S. 383, 386 (1914).

evidence was carried out by a United States Marshal in concert with local police officers. At the time of Weeks' arrest at his place of employment, other officers searched his home without a warrant. Various lottery tickets and letters written to Weeks with respect to the lottery were introduced against him at his trial.

The Court announced the exclusionary rule after indulging in an extensive discussion of the fourth amendment principles set forth in *Boyd*. The Court was clearly troubled by the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . .";¹⁶¹ these practices "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution."¹⁶² If illegally seized letters and private documents could be used in a prosecution, the fourth amendment's declaration against "such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."¹⁶³

The influence of *Boyd* was equally obvious in *Gouled v. United States*.¹⁶⁴ In *Gouled* the Court established the "mere evidence" rule, holding that the government could seize only those items in which it had a possessory interest superior to the defendant's. The Court found it clear that, "at common law and as the result of the *Boyd* and *Weeks* cases,"¹⁶⁵ search warrants could not be used "solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding."¹⁶⁶

161. *Id.* at 392.

162. *Id.*

163. *Id.* at 393.

164. 255 U.S. 298 (1921).

165. *Id.* at 309.

166. *Id.* Warrants could be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken.

Id.

The *Gouled* Court saw both the fourth and fifth amendments as forbidding searches for "mere evidence." The prohibition against searches for mere evidence was a broad one, not confined merely to papers, which were at issue in *Gouled*. No items could be seized from a suspect unless the government had a possessory interest superior to the suspect's. The value of such items to the government in making a case against their possessor did not give the government such an interest, regardless of any lack of pecuniary value in these items. To permit the use against a defendant of items obtained in an unconstitutional search "would be, in effect, as ruled in the *Boyd Case*, to compel the defendant to become a witness against himself." 255 U.S. at 309-12.

Over the years, the "mere evidence" rule has permitted searches only for contraband and the "fruits" or "instrumentalities" of crime. Illegal drugs, illicit alcohol, and smug-

A third decision announced during this time made no reference to *Boyd*, but should be included with *Weeks* and *Gouled* as a case which gave practical effect to the principles spelled out in *Boyd*. In *Silverthorne Lumber Co. v. United States*,¹⁶⁷ the Court held that the government could not take advantage of an illegal search and seizure by photocopying records it had thus obtained. *Silverthorne* is significant in that it contained the Court's first articulation of the "fruit of the poisonous tree" doctrine.¹⁶⁸ It is also interesting because of the Court's strong stand against the government's attempt to circumvent the fourth amendment by means of technological innovation. To allow the government to do in two steps what it could not do in one, Justice Holmes said in his opinion for the majority, would be to reduce the fourth amendment "to a form of words."¹⁶⁹ Thus, during a brief seven-year period, the Court, in confronting various types of warrantless searches and seizures by federal officials, once more gave the fourth amendment a broad and expansive reading. The sanctions against aggressive law enforcement announced in these three cases were to serve as the cornerstone of fourth amendment decisions in the years to come. However, the Court would soon retreat from the broad and lofty concept of the fourth amendment announced in *Boyd*.¹⁷⁰

gled goods are examples of contraband; "fruits" of a crime consist of anything wrongfully obtained as a result of the crime; and "instrumentalities" would include items, such as weapons, which served as the means of committing the crime. For an account of the difficulties the Court later found with this distinction between mere evidence on the one hand and contraband or fruits and instrumentalities on the other, see Justice Brennan's opinion for the Court in *Warden v. Hayden*, 387 U.S. 294 (1967).

167. 251 U.S. 385 (1920).

168. *Id.* at 391-92. For further Supreme Court development of this doctrine, see *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939).

169. 251 U.S. at 392.

170. The forty-year period from *Gouled* to *Mapp* can be viewed as a single era in the history of the fourth amendment, one in which the protections of the amendment gradually atrophied as the Court became increasingly willing to accommodate the demands of modern federal law enforcement. A closer analysis of the Court's response to perceived law enforcement needs, however, is better served by dividing this era into two distinct periods, the first covering the 1920's and '30's and the second the 1940's and early 1950's.

The first of these periods was characterized by the Court's increasingly frequent scrutiny of investigative law enforcement practices akin to those it had condemned in *Weeks*, *Silverthorne*, and *Gouled*. Aggressive federal law enforcement may have been novel and somewhat shocking to the Court in 1914, but by the end of the 1920's it was routine. As government agents became more sophisticated, the practices scrutinized by the Court became less easily condemned. The questions the Court began asking itself were more refined, and less susceptible of a broad general answer. The Court found itself making a conscientious effort to accommodate the governmental interests served by prohibition agents and their colleagues. Initially, the Court sought to reconcile these asserted interests with the broad historic purpose of the fourth amendment. However, as

D. *The Second Accommodation—The 1920's and '30's*

In the years following *Weeks*, *Gouled*, and *Silverthorne*, the entire character of federal law enforcement was changing as new federal agencies were created to enforce legislation such as the Mann Act,¹⁷¹ the Harrison Narcotic Act,¹⁷² the Motor Vehicle Theft Act,¹⁷³ and the Volstead Act.¹⁷⁴ The focus of federal law enforcement activities shifted from the protection of the government's operations and integrity to the aggressive investigation and prosecution of newly defined criminal activity.¹⁷⁵ The drastic sanction attached to fourth amendment violations by the exclusionary rule announced in *Weeks* made the stakes in fourth amendment controversies high indeed.

In its search and seizure cases during this period, the Court dealt with three central issues—the scope of the search incident to arrest exception to the warrant requirement, the recognition of a “mobility” exception, and the reach of the fourth amendment to technological innovations such as wiretapping. The search incident to arrest exception was first mentioned only in dictum in *Weeks* and in *Agnello v. United States*,¹⁷⁶ a federal narcotics case which centered on the warrantless search of a house and seizure of cocaine by state officers. However, three subsequent cases over a seven-year period dealt explicitly with whether a

the questions grew more difficult, an alternative method of interpreting the fourth amendment began to emerge: the fourth amendment should not interfere with the public interest served by vigorous law enforcement. The amendment's history was important, not to discern the freedoms the amendment was intended to protect, but rather to limit its application to the kinds of governmental abuses that existed at the time of its adoption. This alternative mode of fourth amendment interpretation was initially developed and given its most thoughtful expression by Chief Justice Taft in the 1920's. It came into its own, however, during the second period of the post—*Gouled* era, in the 1940's and very early 1950's, when a tenuous majority applied it in an almost casual manner, allowing federal agents unprecedented discretion in their battle against different kinds of federally-defined crimes.

171. 36 Stat. 263 (1910).

172. 38 Stat. 785 (1914).

173. 41 Stat. 324 (1919).

174. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 315 (1919) (repealed 1935). If the nature of the cases that worked their way up to the Supreme Court during the 1920's and 30's is an indicator of federal law enforcement efforts, the greatest part of these efforts went to Volstead Act prosecutions. Certainly the Act was the single greatest stimulus of fourth amendment development in its time.

175. This observation is substantiated by a cursory examination of these laws and a comparison of the nature and volume of these cases with cases predating the spate of new federal criminal legislation. Prior to the criminalization of alcohol and narcotics usage and the federalization of essentially common-law offenses such as bank robbery and transportation of stolen vehicles, the relatively few federal prosecutions that made their way into the official reports were, like those described in *Boyd* and *Hale*, mostly of the “white collar” variety.

176. 269 U.S. 20 (1925).

search incident to arrest was valid. These were *Marron v. United States*,¹⁷⁷ *Go-Bart Importing Co. v. United States*,¹⁷⁸ and *United States v. Lefkowitz*.¹⁷⁹ In each of these cases Justice Butler wrote the opinion for a unanimous Court, but despite this unanimity and common authorship, these three cases are not easily reconciled with each other, as Justice Stewart emphasized years later in *Chimel v. California*.¹⁸⁰

The cases presented strikingly similar factual situations. In *Marron*, federal prohibition agents had obtained a warrant to search the floor of a building in which Marron apparently operated a speak-easy. Agents arrested Marron when they executed the warrant and seized a ledger and bills described by the Court as a part of Marron's illicit operation. The ledger and bills had not been named in the warrant. The search which revealed these items and the resulting seizure was upheld as incident to Marron's arrest since the items were in Marron's "immediate possession and control."¹⁸¹ In both *Go-Bart* and *Lefkowitz*, federal prohibition agents obtained warrants to arrest the defendant and made warrantless searches of the defendant's business premises at the time of arrest. In *Go-Bart*, the warrant was held invalid because of an insufficient affidavit, but the arrest was sustained on the ground that the officer had probable cause to believe that the defendants were committing an offense in their presence. The agents falsely told the president of the company that they had a search warrant and forced him to unlock and open his desk and safe. The Supreme Court sustained an injunction against prosecutorial use of evidence seized in this manner.¹⁸² *Boyd* and *Weeks* were relied upon by Justice Butler for the proposition that the fourth amendment should be liberally construed.¹⁸³ However, he also opened a Pandora's box for future litigants by declaring: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."¹⁸⁴

177. 275 U.S. 192 (1927).

178. 282 U.S. 344 (1931).

179. 285 U.S. 452 (1932).

180. 395 U.S. 752, 755-60 (1969). The thrust of Justice Stewart's observation was that *Marron* had elevated dicta from *Weeks* to a rule that the place where one is arrested may be searched so long as the arrest is valid. *Marron* was limited, in Justice Stewart's view, by the subsequent decisions of the Court in *Go-Bart* and *Lefkowitz*, cases in which the Court invalidated comprehensive searches by the police of the premises in which the defendants were arrested. The later Supreme Court decisions in *Harris v. United States*, 331 U.S. 145 (1947) and *United States v. Rabinowitz*, 339 U.S. 56 (1950), in which the Court rejected the defendants' fourth amendment claims, were similarly dismissed by Justice Stewart as ill-founded.

181. 275 U.S. at 199.

182. 282 U.S. at 358.

183. *Id.* at 357.

184. *Id.*

In *Lefkowitz*, the Court appeared to limit the permissible reach of searches incident to arrest. Unfortunately, Butler's opinion is scarcely a model of clarity. His observation that the fourth amendment should be "construed liberally to safeguard the right of privacy"¹⁸⁵ is followed by the following language:

The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. . . . Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.¹⁸⁶

Implicit in this decision is the limitation that a search incident to arrest could be used only for evidence of an offense currently being committed. But the discussion then digressed to the mere evidence rule,¹⁸⁷ and indeed, this case could be read as based upon the distinction between mere evidence and those items for which the government is entitled to search and seize. The concluding paragraph of the opinion contained yet a third ground as a possible basis; "[a]n arrest may not be used as pretext to search for evidence."¹⁸⁸ In the final analysis, it appeared that the Court was struggling to retain the broad view of the fourth amendment expressed in *Boyd* while attempting to adapt nineteenth-century language to modern law enforcement activities. *Lefkowitz* epitomizes the difficulty that the Court has had in reconciling the broad historical purpose of the fourth amendment with the particularized and troublesome problems presented by modern police activity. In *Carroll v. United States*,¹⁸⁹ the Court considered for the first time the question of whether there existed a "mobility" exception to the warrant requirement permitting a warrantless stop and search of an automobile upon probable cause that it contained contraband or other seizable materials. The prohibition agents who stopped Carroll's car on a public highway had dealt previously with the driver and occupants of the automobile, and the agents knew from these previous dealings that the suspects were bootleggers. The agents searched the vehicle on the highway where they had stopped it without a warrant and discovered contraband liquor concealed

185. 285 U.S. at 464.

186. *Id.*

187. *Id.* at 465-66.

188. *Id.* at 467.

189. 267 U.S. 132 (1925).

behind the back seat. In holding that such searches did not violate the fourth amendment, the Court was supported by powerful statutory precedent. The same Congress which had proposed the adoption of the fourth amendment had also passed legislation setting forth less stringent warrant requirements for searches of vessels than for searches of buildings.¹⁹⁰ This law, the 1789 Duty Act,¹⁹¹ gave the Court a solid foundation for its decision. Although Chief Justice Taft, in his opinion for the majority, could have relied on a statutory interpretation, he chose to address the underlying constitutional issue. In so doing, he gave voice to a view of the fourth amendment far different from that expressed in *Boyd*:

[I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.¹⁹²

According to Taft, the fourth amendment is limited to its historical setting. This is far different than interpreting the amendment in its historical context, *i.e.*, attempting to discern the nature of the evil it was designed to prevent. Rather, in Taft's view, the amendment simply was not intended to apply to law enforcement activities not contemplated by the people who drafted it.¹⁹³ Moreover, the amendment "is to be construed . . . in a manner which will conserve the public interests as well as the interests of individual citizens."¹⁹⁴ Thus the amendment is to be subjected to a kind of balancing test, in which the "public" or law

190. That Congress consciously distinguished between the requirements for a search warrant when goods subject to forfeiture were concealed in a dwelling house and when they were concealed on a movable vessel was documented in the Court's discussion of legislation enacted contemporaneously with the promulgation of the fourth and fifth amendments. *See* *Carroll v. United States*, 267 U.S. 132, 150-51 (1925); *Boyd v. United States*, 116 U.S. 616, 623-24 (1886).

191. 1 Stat. 29, 43 (1789). This Act authorized the warrantless search for and seizure of illegally imported goods if found upon any ship or vessel, while a warrant was required to search for such goods believed to be concealed in a dwelling house, store, or building. *Id.* at § 25. Similar provisions contained in legislation passed in the 1790's are listed in *Carroll v. United States*, 267 U.S. 132, 151 (1925).

192. *Id.* at 149.

193. *See* *Olmstead v. United States*, 277 U.S. 438 (1928), which held that the warrantless wiretapping of telephone conversations of the defendant does not violate the fourth amendment proscription against illegal searches and seizures.

194. 267 U.S. at 149.

enforcement interests are placed on one side of the scale and those of the individual who is the object of the search are placed on the other. Since the fourth amendment's constraints on government power to invade the individual's privacy are balanced against the public interest, the public and the individual are viewed as possessing directly conflicting interests.¹⁹⁵

Chief Justice Taft's static view of the fourth amendment found further expression in *Olmstead v. United States*.¹⁹⁶ *Olmstead* was the leader of a liquor-smuggling conspiracy. Prohibition officers placed taps on his telephone line without trespassing on his property. The lines were tapped, and the intercepted conversations were transcribed for a period of several months. A five-four majority held that conversations passing over telephone wires do not come within the protection of the fourth amendment. After a discussion of *Boyd*, *Weeks*, *Silverthorne*, and *Gouled*, Taft found that these cases emphasized "the misuse of governmental power

195. Two automobile searches which might be described as "follow-ups" to *Carroll* are more notable for the factual setting of the warrantless searches upheld by the Court than for their contribution to fourth amendment jurisprudence. Relying on *Carroll*, both cases approved searches going beyond the *Carroll* search in certain respects and dismissed the fourth amendment contentions in a rather offhanded manner. The first of these cases was *Husty v. United States*, 282 U.S. 694 (1931) which also involved prohibition agents previously acquainted with the targets of their search. The officers had on an earlier occasion arrested Husty for bootlegging offenses. On the day of the search in question, they received a tip from a "reliable informer" that Husty was back in business. His vehicle was parked and unoccupied at the time the officers searched it. The Court had little difficulty upholding this warrantless search:

The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied.

Id. at 701.

In *Scher v. United States*, 305 U.S. 251 (1938), the prohibition agents obtained the information in a manner similar to that in *Husty*, although it was not clear whether the suspected bootleggers were previously known to the officers. After brief references to *Carroll*, *Husty*, and *Agnello*, the Court simply concluded:

[I]t seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.

Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt. The officers did nothing either unreasonable or oppressive.

Id. at 255.

196. 277 U.S. 438 (1928).

of compulsion The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects.”¹⁹⁷ The amendment had no application to the wiretapping. “There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”¹⁹⁸ Recalling his admonition in *Carroll* that the amendment “is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted,”¹⁹⁹ Taft found no case authority to support a fourth amendment violation absent an official search and seizure of the “person, . . . his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”²⁰⁰

Taft’s *Olmstead* opinion, even more than *Carroll*, reflects a rather ambiguous and lukewarm attitude toward the exclusionary rule, and an avowed intention to evade the rule by curbing the fourth amendment. Although the Chief Justice acknowledged that the Court’s recent decisions required application of the exclusionary rule, these decisions “can not justify enlargement of the language employed” in the amendment in such a way as to inhibit modern law enforcement.²⁰¹ *Olmstead* and *Carroll* are significant for reasons beyond their specific holdings. Read together, they support the proposition that the fourth amendment’s coverage was limited to the kinds of governmental abuses practiced at the time the amendment was adopted. More important, however, they established a balancing test, which included the public interests served by effective law enforcement. To this extent, the fourth amendment and its exclusionary rule were viewed as obstacles to effective law enforcement, and as such should not be given interpretations which would further hamper police activities.²⁰²

E. Fall From Grace—The 1940’s and ’50’s

The period following World War II marked a low point in the development of the fourth amendment. Although not all of the Court’s opinions reflected the modest fourth amendment vision of *Olmstead*, the

197. *Id.* at 463-64.

198. *Id.* at 464.

199. *Id.* at 465.

200. *Id.* at 466.

201. *Id.* at 465.

202. *Olmstead* is also famous for the dissenting opinion of Justice Brandeis. It is a classic discourse on the meaning and purpose of the fourth amendment. His major thesis is that the amendment was not intended to be limited to the “necessarily simple” forms of intrusion available to governments at the time it was adopted. *Id.* at 471, 473-74. A constitutional provision, he emphasized, cannot be applied simply on the basis of what has

Court was so closely and bitterly divided during this period that what was good law one term was apt to be overruled the next. During this period law enforcement officers were granted virtually unbridled discretion to search an entire residence or office "incident" to an arrest on the premises and the issue of probable cause was treated almost casually. In *Davis v. United States*,²⁰³ a black marketeering case immediately following World War II, the Court turned the mere evidence rule inside out to uphold an outrageous invasion of an individual's place of business on the theory that the object of the search, gasoline coupons, belonged to the government. In *Goldman v. United States*,²⁰⁴ the Court reaffirmed its *Olmstead* position that electronic intrusion without trespass is not a "search,"²⁰⁵ and in *Brinegar v. United States*,²⁰⁶ it refused to halt the growing abuses of the automobile exception to the warrant requirement.

Moreover, in three search incident to arrest cases, *Harris v. United States*,²⁰⁷ *Trupiano v. United States*,²⁰⁸ and *United States v. Rabinowitz*,²⁰⁹ the Court constructed a monument to judicial inconsistency.²¹⁰ These cases all involved federal officers and factual patterns similar to those of the cases in the 1920's and '30's. The kinds of law enforcement activities that the Court had scrutinized at the end of the 1930's had not changed markedly, but the Court's view of the requirements placed upon law enforcement officials by the fourth amendment had changed, and the Court appeared extremely willing to approve any law enforcement conduct that it deemed "reasonable."

been; its application must include new conditions as well. "Time and again, this court, in giving effect to the principle underlying the fourth amendment, has refused to place an unduly literal construction upon it." *Id.* at 476.

203. 328 U.S. 582 (1946).

204. 316 U.S. 129 (1942).

205. *See id.* at 133-36.

206. 338 U.S. 160 (1949). A majority of the Court upheld the actions of Treasury Officers in giving chase to the heavily loaded car of a known moonshiner and in searching the car at the conclusion of a high-speed chase. The majority and dissenting opinions both focused on the officers' probable cause to arrest Brinegar. The majority found the facts similar to those which were held to constitute probable cause in *Carroll v. United States*, 267 U.S. 132 (1925). *See id.* at 164-78. Justice Jackson, joined in dissent by Justices Frankfurter and Murphy, regarded the decision "as an extension of the *Carroll* case, which already has been too much taken by law enforcement officers as blanket authority to stop and search cars on suspicion." 338 U.S. at 183 (Jackson, J., dissenting). Justice Jackson did touch on the failure of the officers to obtain a warrant, observing that the agents in *Carroll* had congressional authority to make a warrantless search and the officers here did not. *Id.*

207. 331 U.S. 145 (1947).

208. 334 U.S. 699 (1948).

209. 339 U.S. 56 (1950).

210. At the outset it is helpful to note that sharp divisions among the Justices over fourth amendment issues were legion during this period. A sudden proliferation of five-

The Court's abandonment of virtually all limitations that might have been thought to exist concerning searches incident to arrest is chronicled vividly in the first case decided in this period, *Harris v. United States*.²¹¹ FBI agents searched an entire four-room apartment "incident" to the defendant's arrest. During the course of this search, the agents discovered stolen draft cards. The majority opinion by Chief Justice Vinson, after a rather perfunctory quotation from *Gouled* regarding the importance of the fourth amendment rights to constitutional liberty, stated that

[t]his Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdiction. . . .

The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.²¹²

Finding nothing in the Court's previous decisions that precluded a search of rooms other than the one in which the person was arrested, Vinson took the "immediate control" language of the 1920's and '30's and equated "control" with "possession" in the common law sense of ownership or occupancy:

Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. . . . Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.²¹³

The extent to which law enforcement needs had gained ascendancy over "rights of privacy and personal security" was further illustrated by Vinson's explanation that, because a man's papers and records can be more easily concealed than, say, an illegal still, a warrantless search for

four or five-three decisions, at a time when there also were some changes in the Court's composition, may account for the instability in the results the Court reached and the wild inconsistency between the majority opinions of one term with those of the next.

211. 331 U.S. 145 (1947).

212. *Id.* at 150-51.

213. *Id.* at 152.

these papers would necessarily have to be more intrusive than a search for the still.²¹⁴

A different five-four majority came up with a contrary view of the warrant requirement the following year, due largely to a change in position by Justice Douglas. In *Trupiano v. United States*²¹⁵ the Court held that the fourth amendment had been violated by a warrantless governmental destruction of a moonshining operation previously infiltrated by government agents. In this regard, the facts were distinguishable from *Harris*, and smacked more of government outlawry than the FBI's calculated overstepping in *Harris*. The extent of the intrusion itself, however, was far less. One of the still operators was arrested at the still, and the still, along with several vats of mash and 262 cans of alcohol, were seized at about the same time. While the Court distinguished *Harris*—an opinion from which four of its five members had dissented—Justice Murphy also sought to contain the incident to arrest exception:

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. . . . [T]here must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant.²¹⁶

Justice Murphy's opinion in *Trupiano* relied heavily on *Johnson v. United States*,²¹⁷ another five-four majority opinion written earlier in the Term by Justice Jackson. In *Johnson*, Seattle police officers made a warrantless entry of an opium suspect's motel room after approaching the room pursuant to a tip. The officers detected the odor of burning opium in the hallway and proceeded to knock on the door. When a woman opened the door, they promptly arrested her. Although the government tried to justify the arrest and ensuing search on an incident to arrest basis, Justice Jackson noted that the officers had ample opportunity to obtain a warrant and emphasized that mere inconvenience is no ground for not doing so. If a warrant was not required here, he observed, "it is difficult to think of the case in which it should be required."²¹⁸

214. *Id.*

215. 334 U.S. 699 (1948).

216. *Id.* at 708-709.

217. 333 U.S. 10 (1948).

218. *Id.* at 15. The opinion in *Johnson* also employed a "balancing" approach to the fourth amendment and in so doing, spawned subsequent decisions which excused a variety of warrantless and intrusive law enforcement activities. *Id.*

The four dissenters wrote no opinions in *Johnson* although they did so in *Trupiano*,²¹⁹ reaffirming their belief that the fourth amendment had been set in concrete at the time of its adoption. This view, and the generous view of "possession and control" that underlay the *Harris* result, prevailed just two years later in *United States v. Rabinowitz*.²²⁰ In a five-three opinion, the Court flatly overruled *Trupiano* and left the warrant requirement a shadow of its former self. In *Rabinowitz*, following a brief discourse on the right of officers to search places as well as persons incident to arrest, and the unavailability of any "litmus-paper" test for determining the reasonableness of a search or seizure,²²¹ the Court abandoned necessity as a prerequisite to a warrantless search. Upholding an intensive search of a forgery defendant's office as incident to the defendant's arrest, Justice Minton, the majority spokesman, made the following observations:

A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant.²²²

Justice Frankfurter dissented in *Davis*, *Harris*, and *Rabinowitz*. Taken together, his dissenting opinions form the most definitive exposition on the meaning and purposes of the fourth amendment ever offered by a member of the Court.²²³ In *Davis*, Frankfurter reacted strongly to the Court's argument that because of the nature of the items sought (gasoline coupons "belonging" to the government),²²⁴ the site of the search (a business rather than a home),²²⁵ the time of the search (during business

219. See 334 U.S. at 710-16 (Vinson, C.J., joined by Black, Reed, and Burton, JJ.).

220. 339 U.S. 56 (1950).

221. *Id.* at 63.

222. *Id.* at 65.

223. See *United States v. Rabinowitz*, 339 U.S. 56, 68-86 (1950) (Frankfurter, J., dissenting); *Harris v. United States*, 331 U.S. 145, 155-82 (1947) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 594-623 (1946) (Frankfurter, J., dissenting).

224. 328 U.S. at 588-92.

225. *Id.* at 592.

hours),²²⁶ and the lack of any coercion in obtaining consent,²²⁷ the search was therefore reasonable.²²⁸ He argued that this decision marked a major departure from the mainstream of the Court's prior fourth amendment decisions and supported his position with a devastating analysis of the majority opinion.²²⁹ Moreover, he explained the meaning of the fourth amendment in the context of its history—the British and colonial experience that led to its adoption, the evils it was intended to prevent, the broad and liberal interpretation given it in past opinions of the Court, and its vital role in the maintenance of a free society.²³⁰ The essence of his dissent is distilled brilliantly in this paragraph:

The course of decision in this Court has thus far jealously enforced the principle of a free society secured by the prohibition of unreasonable searches and seizures. Its safeguards are not to be worn away by a process of devitalizing interpretation. The approval given today to what was done by arresting officers in this case indicates that we are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.²³¹

Frankfurter's dissent in *Davis* was a conscious extension of Justice Brandeis' dissent in *Olmstead*.²³² *Boyd*, *Gouled*, and *Silverthorne* are

226. *Id.*

227. *Id.* at 593. The Court characterized as "persuasion" the agents' conduct in obtaining the owner's "consent" to search the room in which the coupons ultimately were seized. *Id.* In light of the "persuading" agent's own testimony and other uncontroverted testimony by the defendant, the conduct might better be described as "coercion." The agent testified that he asked the defendant to unlock the room and that the defendant refused. However, when another agent outside the gas station shone a light through the window of the room and attempted to enter the room through that window, the owner unlocked the door and "consented" to the search. *Id.* at 586-87.

228. *Id.* at 593-94. See also 412 U.S. at 219, 222, 233. Justice Stewart employed a "totality of the circumstances" test in *Bustamonte* which differed significantly from the "totality" test employed here by Justice Douglas. The *Bustamonte* test went to the voluntariness of the consent itself; that is, whether or not the consent was based on free will. In *Davis*, Justice Douglas seemed to be saying that the totality of the circumstances surrounding the search somehow expanded "the permissible limits of persuasion" available to the agents.

229. 328 U.S. at 594-603 (Frankfurter, J., dissenting).

230. *Id.* at 604-13.

231. *Id.* at 597.

232. 277 U.S. at 471-85 (Brandeis, J., dissenting). In fact, the heart of Justice Brandeis' dissent in *Olmstead* was quoted by Justice Frankfurter in his dissent in *Davis*. See 328 U.S. at 607-09 (Frankfurter, J., dissenting).

the mainstream of the Court's fourth amendment interpretation. *Olmstead* and *Marron* are short-lived deviations.²³³ Congress, as well as the Court, has been reluctant to expand government search powers—even when urged to do so by an eager executive branch.²³⁴ The states, as well as the federal legislative and judicial branches, have shown a keen awareness of the need to limit governmental search power.²³⁵ Nevertheless, there are constant pressures to whittle away at the freedoms the fourth amendment and its state counterparts were designed to protect.²³⁶ The law enforcement interest asserted—the need to catch and punish criminals like Davis, Harris, and Rabinowitz—must not be allowed to weaken the fourth amendment's demanding standards.²³⁷

Justice Jackson also dissented from *Harris* and *Rabinowitz*, but on a more limited basis—that close judicial scrutiny, in the form of warrants and tough appellate oversight, is necessary to keep federal officers from encroaching on the privacy and security interests protected by the fourth amendment.²³⁸ The courts see only the tip of the iceberg of abusive police practices, he warned, and the exclusionary rule must be unsparingly applied at the federal level to discourage these practices.²³⁹ Jackson's dissents, nevertheless, evinced a willingness to allow for accom-

233. *Id.* at 609, 612-13 (Frankfurter, J., dissenting).

234. *Id.* at 606, 616-23. *See also* *Harris v. United States*, 331 U.S. 145, 162-63 (1947) (Frankfurter, J., dissenting).

235. This conclusion is implicit in Justice Frankfurter's description of the narrow exceptions to the warrant requirement recognized by the states. *See* 328 U.S. at 609. Contrasted with Justice Frankfurter's support of the states' approach is his scathing criticism of the lower federal courts for their "casual and uncritical application" of the search incident to arrest doctrine. *Id.* at 610-12. In his *Harris* dissent, Frankfurter also approved of the states' protections against unreasonable searches and seizures. *See* 331 U.S. at 160-62 (Frankfurter, J., dissenting).

236. *See* *Davis v. United States*, 328 U.S. 582, 614-16 (1946) (Frankfurter, J., dissenting). *See also* *Harris v. United States*, 331 U.S. 145, 171-73 (1947) (Frankfurter, J., dissenting).

237. It is too often felt, though not always avowed, that what is called nice observance of these constitutional safeguards makes apprehension and conviction of violators too difficult. Want of alertness and enterprise on the part of the law enforcers too often is the real obstruction to law enforcement. The present case affords a good instance. . . .

The Court in this case gives a new label to an old practice and to an old claim by police officials. But it happens that the old practice and the old claim now refurbished in a new verbal dress were the very practice and claim which infringed liberty as conceived by those who framed the Constitution and against which they erected the barriers of the Fourth Amendment.

328 U.S. at 614-15 (footnote omitted).

238. *See* *Harris v. United States*, 331 U.S. 145, 196-98 (1947) (Jackson, J., dissenting). *See also* *Brinegar v. United States*, 338 U.S. 160, 181-83 (1949) (Jackson, J., dissenting); *Johnson v. United States*, 333 U.S. 10 (1948).

239. 338 U.S. at 181 (Jackson, J., dissenting).

modations of legitimate law enforcement interests and left room for a "balancing" approach. When the fourth amendment enjoyed a renaissance in the 1960's, it was the spirit of the Jackson opinions, more than the Frankfurter treatises, which animated the Court. Ironically, however, this same balancing approach would ultimately lead to cutbacks in the amendment's protection by accommodating newly perceived law enforcement needs.

The Court's retreat from its initial stand against aggressive federal law enforcement activity, which began with the cautious adaptation of fourth amendment principles in *Marron*, *Go-Bart*, and *Lefkowitz*, concluded with a rout in *Rabinowitz* and left the fourth amendment in considerable disarray. Throughout this period there was one constant—governmental pressure to give law enforcement agents discretion that strict adherence to the *Boyd-Weeks-Gouled* view of the fourth amendment would have denied them. The Court's decisions over the four decades separating *Gouled* and *Mapp* are characterized by an increasing willingness to approve of law enforcement interests by relaxing fourth amendment standards. In *Marron*, *Go-Bart*, and *Lefkowitz*, the Court attempted to accommodate those interests while adhering to the basic precepts of *Boyd*, *Weeks*, and *Gouled*. In *Carroll*, and to a greater extent in *Olmstead*, the Court departed from *Boyd* and its progeny and constructed an alternative theory of the fourth amendment that made this accommodation of law enforcement interests an easy task. The Court's postwar decisions illustrate just how easy this task could become once the Court gained some familiarity with federal law enforcement practices which at first had seemed novel and dangerous. The Court's original perception of the fourth amendment, although preserved in the dissenting opinions of Justice Frankfurter, was largely dormant during this time. However, during the 1960's, as a result of the Court's exposure to abusive searches and seizures at the state level, this dormant original perception was "born again."

F. *The Winds of Change: Wolf, Rochin, Elkins, and Mapp*

In 1949, in *Wolf v. Colorado*,²⁴⁰ the Court held that the fourteenth amendment's due process clause should protect precisely the same privacy interests as were protected by the fourth amendment.²⁴¹ "The

240. 338 U.S. 25 (1949).

241. Justice Frankfurter's view should be contrasted with the view held by a vocal minority of the Court at that time, led by Justice Black, that all the guarantees of the Bill of Rights were embodied in the fourteenth amendment. *See, e.g.,* *Wolf v. Colorado*, 338 U.S. 25, 39-40 (1949) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting). The first Supreme Court proponent of the theory that the

security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society," Justice Frankfurter wrote for the majority. "It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."²⁴² The manner of enforcing this right was another matter. The Court was unwilling to require the states to apply the exclusionary rule, which had been judicially fashioned to deal with federal officers' violations of the fourth amendment, to violations of rights protected by the fourteenth amendment.²⁴³ Although the *Wolf* Court held that the right of privacy was enforceable against the states, the exclusionary rule was viewed as only one possible means of protecting that right.²⁴⁴ Exclusion from a criminal prosecution of illegally seized but otherwise competent evidence was not considered essential by a majority of the states, Frankfurter observed; of the forty-seven that had considered applying the exclusionary rule, only seventeen had adopted it, while thirty declined to follow the Supreme Court's lead in *Weeks*.²⁴⁵ This rejection by the states weighed heavily in the Court's reasoning, especially since the case for the exclusionary rule appeared stronger at

Bill of Rights had been "incorporated" into the fourteenth amendment's due process clause and thereby made applicable to the states was, ironically, the elder Justice Harlan. See *Twining v. New Jersey*, 211 U.S. 78, 114-27 (1908) (Harlan, J., dissenting); *Hurtado v. California*, 110 U.S. 516, 538-58 (1884) (Harlan, J., dissenting). The Court has never adopted the position that the Bill of Rights provisions were incorporated wholesale by the due process clause of the fourteenth amendment. Rather, the Court has applied most of those provisions to the states in a piecemeal fashion.

242. 338 U.S. at 27-28.

243. In support of this proposition, Justice Frankfurter in *Wolf* briefly reviewed the origin of the exclusionary rule and the treatment given the rule by the states. He pointed out that the rule as formulated in *Weeks v. United States*, 232 U.S. 383 (1914), was the product of judicial inference rather than legislative or fourth amendment guarantees. 338 U.S. at 28. Thus, the states were free to adopt or reject the rule, in his judgment, since there was no fourth amendment proscription to be extended to the states by the fourteenth amendment. Justice Frankfurter's research demonstrated further that the states overwhelmingly had chosen different sanctions and afforded protections other than exclusion of the relevant evidence when government officers had illegally seized the evidence. *Id.* at 28-39.

244. Two years earlier, in *Adamson v. California*, 332 U.S. 46 (1947), Justice Frankfurter had written a concurrence rebutting the theory that the due process clause "incorporated" the Bill of Rights. 332 U.S. at 59 (Frankfurter, J., concurring). Several times previously the Court similarly had declined to adopt the incorporation theory or its less ambitious offspring, selective incorporation. See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Hurtado v. California*, 110 U.S. 516 (1884). See also note 241 *supra*. Although certain rights protected by the Bill of Rights had been held enforceable against the states as required by the fourteenth amendment, these rights had been considered essential to the concept of ordered liberty. See *Elkins v. United States*, 364 U.S. 206, 237 (1960) (Frankfurter, J., dissenting).

245. 338 U.S. at 33-39 (Appendix to Opinion of the Court).

the federal level than at the state or local level. Accordingly, the *Wolf* Court held that in a state court prosecution for state crime the fourteenth amendment did not require the exclusion of evidence obtained by an unreasonable search and seizure.²⁴⁶

The *Wolf* decision signaled the beginning of Supreme Court review, through the due process clause, of state search and seizure practices. Five decades had passed since the Court had considered a state court decision on a search and seizure issue,²⁴⁷ but only three years after *Wolf*, the Court again confronted a state practice in *Rochin v. California*.²⁴⁸ In *Rochin*, the Court held that the due process clause of the fourteenth amendment forbids use in a state prosecution of certain evidence obtained by state or local police conduct which "shocks the conscience."²⁴⁹ In 1960, the Court further extended federal control over state searches and seizures. In *Elkins v. United States*,²⁵⁰ a five-four majority forbade the use in federal prosecutions of evidence seized by state officers engaging in conduct that did not not comport with fourth amendment standards. Thus the Court ended what had come to be called the "silver platter" doctrine. The Court, per Justice Stewart, noted that the watershed case which led to the demise of this doctrine was *Wolf v. Colorado*,²⁵¹ although this point was vigorously disputed by Justice Frankfurter,²⁵² the author of the *Wolf* opinion. *Wolf*, according to Justice Stewart, abandoned the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution"²⁵³ Moreover, Stewart continued, the exclusionary rule had proved workable on both the federal and the state level; "[t]he movement towards the rule of exclusion has been halting but seemingly inexorable."²⁵⁴ By this time, at least half of the states had adopted some kind of exclusionary rule.²⁵⁵

246. *Wolf v. United States*, 338 U.S. 25 (1949).

247. *See Adams v. New York*, 192 U.S. 585 (1904). State officers participated in the challenged searches and seizures in *Weeks v. United States* and other federal prosecutions.

248. 342 U.S. 165 (1952).

249. *Id.* at 169, 172. In separate concurring opinions Justices Black and Douglas criticized the majority for the amorphous and potentially abusive standard it had promulgated in outlawing the particular police conduct involved in the instant case. *Id.* at 175-77 (Black, J., concurring); *Id.* 177-79 (Douglas, J., concurring).

250. 364 U.S. 206 (1960).

251. 338 U.S. 25 (1949).

252. 364 U.S. at 233, 237-42 (Frankfurter, J., dissenting).

253. *Id.* at 213.

254. *Id.* at 219 (footnote omitted).

255. *See id.* at 224-25 (Appendix to Opinion of the Court).

The *Elkins* decision, as Justice Frankfurter's dissent aptly demonstrated, brought the Court closer to the position that the exclusionary rule applies to state as well as federal searches and seizures. In simply stating that evidence seized in violation of the federal constitution was inadmissible in a federal court, regardless of the particular provisions violated, the Court also blurred or eliminated the distinction, so carefully drawn in *Wolf*, between the scope and effect of the fourth and fourteenth amendments. Justice Frankfurter emphasized this point in his *Elkins* dissent, writing that not every technical violation of the fourth amendment should run afoul of the fundamental standards "of civilized conduct on which applications of the Due Process Clause turn."²⁵⁶ But nothing in *Elkins* hinted at the fateful step the Court was to take the next Term, when in *Mapp v. Ohio*,²⁵⁷ the Court applied the fourth amendment exclusionary rule to state court prosecutions.²⁵⁸

Wolf had assured the Court of a constant stream of petitions beckoning its attention to allegedly abusive state search and seizure practices. Thus the Court's attention was drawn to an area of law enforcement activity that it had rarely considered in previous Terms, and then only in connection with cases brought in federal court.²⁵⁹ The state law enforcement abuses considered by the Court in several of these cases—*Rochin*, *Irvine v. California*,²⁶⁰ and *Mapp* itself—were flagrant indeed. In *Mapp*, police officers, having been denied access to the suspect's home, forcibly broke in to seize items allegedly violative of Ohio's obscenity statute. Justice Clark's opinion for the Court displayed a strong reaction against such police abuses which had gone unchecked by state courts. Clark's conception of the fourth amendment was grand indeed. The tenor of the first part of his *Mapp* opinion reflects a reverence for the fourth amendment missing from majority opinions since *Weeks*, *Silver-*

256. *Id.* at 239 (Frankfurter, J., dissenting).

257. 367 U.S. 643 (1961).

258. Above all, the *Elkins* decision was confined to the federal courts. The distinction between fourth amendment violations and fourteenth amendment violations was preserved. As Justice Frankfurter pointed out, the Court's opinion refers to state practices which would violate the fourth amendment if committed by a federal officer. 364 U.S. at 244 (Frankfurter, J., dissenting). While Justice Stewart, writing for the Court, referred with approval to gradual state court acceptance of an exclusionary rule for illegally seized evidence, his opinion in no way intimated that this rule should be made binding on the states through the Federal Constitution. Although frequently cited in *Mapp*, the *Elkins* decision simply was not a bridge from *Weeks*, *Wolf*, *Rochin*, or any other decision to the result reached in *Mapp*.

259. See, e.g., *Johnson v. United States* 333 U.S. 10 (1948); *Agnello v. United States*, 269 U.S. 20 (1925); *Weeks v. United States*, 232 U.S. 383 (1914).

260. 347 U.S. 128 (1954). In *Irvine* a five-four majority of the Court held that a conviction based upon police testimony concerning the substance of incriminating conver-

thorne, and *Gouled*. Indeed, much of this part of the opinion consisted of quotations from *Boyd*, *Weeks*, and *Silverthorne*. But Clark's reverence was not confined to the fourth amendment, or even primarily directed to it. Rather, he was seeking to invest the exclusionary rule with constitutional sanctity.

The breadth of the fourth amendment protections expressed in *Boyd*, the need expressed in *Weeks* to effectuate the amendment's broad purposes by excluding unconstitutionally seized evidence from federal prosecutions, and Justice Holmes' admonition in *Silverthorne* that without the rule the amendment would simply be "a form of words,"²⁶¹ outweighed the Court's occasional "passing references to the *Weeks* rule as one of evidence."²⁶² To the extent that the *Wolf* Court's refusal to impose the federal exclusionary sanction on the states rested on factual considerations, said Clark, *Wolf* had been undermined. The states themselves no longer rejected the exclusionary rule. In the dozen years since *Wolf*, "more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule."²⁶³ The Court also noted that the California Supreme Court's conclusion in *People v. Cahan*,²⁶⁴ that alternative remedies for illegal searches and seizures were worthless, was "buttressed by the experience of other States."²⁶⁵

The pressure felt by the Court to apply the exclusionary rule uniformly in the nation's courts was evident in Clark's reference to "a plea made here Term after Term that we overturned [the *Wolf*] doctrine on applicability of the *Weeks* exclusionary rule."²⁶⁶ The Court was not so much overruling *Wolf* as it was acting consistently with *Wolf's* perceptions in light of the dozen years of experience since it was decided; Clark emphasized:

Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic

sations overheard by the police via use of a hidden microphone did not violate the fourteenth amendment, even though entrance to plant the listening device had been secured by the police with the aid of a locksmith and without a warrant.

261. 251 U.S. at 392.

262. 367 U.S. at 649. Despite these references, Justice Clark said, "the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed." *Id.*

263. *Id.* at 651.

264. 44 Cal. 2d 434, 282 P.2d 905 (1955).

265. 367 U.S. 643, 652.

266. *Id.* at 654.

right, reserved to all persons as a specific guarantee against that very same unlawful 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.²⁶⁷

While this holding was considered a logical extension of *Wolf*, in reality it was something else altogether. Clark's explanation, that if the work begun in *Wolf* were to be completed, the Court must now do for state defendants what it had done for federal defendants in *Weeks*, rested on the complete obliteration of *Wolf's* finely drawn distinction between the scope and purpose of the fourth and fourteenth amendments. No longer was the due process clause viewed as protecting the privacy right at the core of the fourth amendment. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth," Clark said simply, "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."²⁶⁸

This misconstruction of *Wolf* left the Court free to overrule that decision while purporting to follow it. Furthermore, the Court accepted without acknowledgment a key element of the "incorporation" theory—that rights protected by the due process clause against state encroachment are precisely the same as corresponding rights enumerated in the Bill of Rights. Although the Court did not expressly hold that the fourth amendment's protections were precisely the same in state and federal prosecutions for another two years,²⁶⁹ this conclusion was clearly implicit in *Mapp*.

Clark went on to explain that an exclusionary sanction against the states for illegal searches and seizures was just as necessary to protect the right announced in *Wolf* as was the exclusionary rule announced in *Weeks* to the enforcement of the fourth amendment in federal prosecutions. He did not explain why the exclusionary rule announced in *Rochin* was inadequate; instead, he analogized to cases in which the Court had held that use of a coerced confession against a state defendant violated the due process clause.²⁷⁰ Although the fifth amendment privilege against self-incrimination had not been held applicable to the states, the Court's analogy between the exclusion of coerced confessions and exclusion of the fruits of illegal searches and seizures provided a tacit endorsement of the interrelationship of the fourth and fifth amendment:

We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from

267. *Id.* at 654-55.

268. *Id.* at 655.

269. See *Ker v. California*, 374 U.S. 23 (1963).

270. 367 U.S. at 655-56.

unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.²⁷¹

Avoidance of needless conflicts between state and federal courts was also cited as a good reason for a uniform exclusionary rule. "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."²⁷² Finally, Clark emphasized the "imperatives of judicial integrity;"²⁷³ this consideration, he implied, outweighed the arguments built on Judge Cardozo's observation in *Defore* that "[t]he criminal is to go free because the constable blundered."²⁷⁴ In closing, Clark delivered the following panegyric: "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."²⁷⁵

It is evident that Clark's opinion in *Mapp* was based on several different considerations; it is not so clear, however, which of these considerations was essential to the actual holding, especially because the Clark opinion had the unqualified support of only four Justices. The crucial fifth vote was cast by Justice Black. Although a wholehearted disciple of the incorporation theory, Justice Black was not so devoted to the fourth amendment exclusionary rule. He stated he was unpersuaded that

the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. . . . [But] when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.²⁷⁶

271. *Id.* at 656-57 (footnote omitted).

272. *Id.* at 658.

273. *Id.* at 659, quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960).

274. 367 U.S. at 659, quoting *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

275. 367 U.S. at 660.

276. *Id.* at 661-62 (Black, J., concurring). The idea that the privilege against self-

The four dissenting justices would have reversed Mapp's conviction on the ground that the obscenity possession statute under which she had been convicted was unconstitutional; this had been her principal ground in the Ohio courts as well as in her petition for certiorari. Justice Stewart agreed with Justice Harlan, who wrote the principal dissent, that this case was not an appropriate one "for re-examining *Wolf*."²⁷⁷ Beyond this, Justice Harlan also provided several arguments against the decision on its merits. Not only did the state courts appear to rely heavily upon *Wolf*, but the frequency with which petitions challenging state searches and seizures were being filed with the Court indicated that "the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf*, and that were we determined to re-examine that doctrine we would not lack future opportunity."²⁷⁸

Harlan defended *Wolf* as announcing a sounder constitutional doctrine than the one propounded in *Mapp*, but of particular interest is his argument that the Court was disregarding special and varying law enforcement problems faced by the different states:

For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.²⁷⁹

incrimination is implicated in the use of evidence wrongfully seized from a defendant was, of course, present in *Boyd v. United States*, 116 U.S. 616 (1886), and was stated in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), which was decided before the fourth and fifth amendments were adopted. However, a reading of the *Weeks* opinion does not seem to indicate that the exclusionary rule depends upon the interaction between the fourth and fifth amendments as perceived in *Boyd*. Rather, the need for a deterrent to unconstitutional police practices and the imperative of judicial integrity seemed foremost in the Court's mind. See 232 U.S. at 392-94.

Unlike Justice Black's concurrence, Justice Douglas' concurring opinion said nothing which would render *Mapp* directly vulnerable to any subsequent refusal to recognize the fourth-fifth amendment interrelationship. However, his opinion did stress the kind of evil with which the court was dealing here—"the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person." 367 U.S. at 671. Justice Douglas' reference to the police outrage that transpired in *Mapp* raises the question of whether the exclusionary sanction of the fourteenth amendment announced in *Rochin* would not be sufficient to deal with the illegality at issue here. Highly critical of *Wolf*, Justice Douglas did not even mention *Rochin*. Indeed, the flagrantly illegal, forcible police entry of Ms. Mapp's home and the forcible seizure of evidence from her person would seem to be precisely the kind of activity that would render evidence inadmissible under *Wolf* and *Rochin*.

277. 367 U.S. at 672 (Harlan, J., dissenting).

278. *Id.* at 676 (Harlan, J., dissenting).

279. *Id.* at 681.

Harlan's warning about the undue consequences of *Mapp* was merely the first in a series of observations he was to make about the difficulties caused by this decision.

Harlan noted that in *Wolf*, the Court did not hold that the fourth amendment itself was enforceable against the states; instead, it was held that the fourteenth amendment applied only to the "principal of privacy" at the core of the fourth amendment. It would indeed be a disservice to the fourteenth amendment if the Court were merely stretching the general principle of individual privacy to fit "a Procrustean bed of federal precedent under the Fourth Amendment."²⁸⁰ Harlan contended that *Mapp* did not reverse a determination of constitutionality—the state assumed that the search was unconstitutional. Instead, the Court was imposing a "federal remedy for violations of the standard."²⁸¹

In conclusion, Harlan stated that there was no true majority behind the Court's opinion.

[I]t should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling *Wolf*, and not for the basic rationale by which four members of the majority have reached that result. For my Brother Black is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, . . . but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth . . .²⁸²

Two years later, in *Ker v. California*,²⁸³ the Court declared that fourth amendment standards of reasonableness govern state searches and seizures. Justice Harlan again emphasized the difference between federal and local law enforcement problems, stating that the states "should not be put in a constitutional strait jacket."²⁸⁴ He went on to warn that if the Court is prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system—unless the Fourth Amendment is to mean one thing for the States and something else for the Federal Government.²⁸⁵

Harlan repeated this warning over the years and professed to see it come true.²⁸⁶

280. *Id.* at 679.

281. *Id.* at 680.

282. *Id.* at 685 (footnote omitted).

283. 374 U.S. 23 (1963).

284. *Id.* at 45 (Harlan, J., concurring).

285. *Id.* at 45-46.

286. See *Coolidge v. New Hampshire*, 403 U.S. 443, 490-92 (1971) (Harlan, J., concurring); *Chimel v. California*, 395 U.S. 752, 769-70 (1969) (Harlan, J., concurring). In

G. The Fourth Amendment Reborn

Mapp marked the beginning of a new era in the Court's interpretation of the fourth amendment. The same Term that *Mapp* was decided, the Court took a step toward freeing the amendment from the technical property law concepts of trespass and possessory right in the items seized. In *Silverman v. United States*,²⁸⁷ an electronic surveillance case, the Court declared that a federal court should not admit evidence obtained by a listening device driven into a wall from an adjoining building. Distinguishing an earlier case²⁸⁸ on the ground that there had been no actual physical invasion of the premises, the Court found it unnecessary "to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."²⁸⁹ Six years later, in *Katz v. United States*,²⁹⁰ the Court held that the amendment protected personal privacy rights from government intrusion regardless of place or circumstances.²⁹¹ *Katz's* implications went far beyond the electronic surveillance context,²⁹² and

Coolidge, Justice Harlan concluded that "in order to leave some room for the States to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well." 403 U.S. at 491.

287. 365 U.S. 505 (1961).

288. *Goldman v. United States*, 316 U.S. 129 (1942). In *Goldman*, a majority of the Court was unwilling to overrule *Olmstead v. United States*, 277 U.S. 438 (1928), and hold that the placing of a detectaphone against the wall of a private office was not a trespass and, therefore, not a search. The *Silverman* Court distinguished, for fourth amendment purposes, between the intrusion via means of the spike mike in the case before it and the usage of the detectaphone in *Goldman*, labelling the former "an unauthorized physical encroachment within a constitutionally protected area." 365 U.S. at 510. This strained distinction was later obliterated in *Katz v. United States*, 389 U.S. 347, 353 (1967).

289. 365 U.S. at 511 (footnote omitted). This language by Justice Stewart clearly foreshadowed his opinion for the Court in *Katz v. United States*.

290. 389 U.S. 347 (1967).

291. In his definitive article on the fourth amendment, Professor Anthony G. Amsterdam attributed great importance to the *Katz* decision, characterizing it as "a watershed in fourth amendment jurisprudence." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382 (1974). However, Amsterdam concludes, *Katz* has lost its spirit and much of its substance by general judicial acceptance of the formula that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Id.* at 383 quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968). As Amsterdam points out, the phrase "reasonable expectation of privacy" was excerpted from Justice Harlan's concurrence in *Katz*, 389 U.S. at 360 (Harlan, J., concurring), a formulation about which Justice Harlan himself later expressed reservations. See *United States v. White*, 401 U.S. 745, 786 (1971). The true meaning of *Katz*, Amsterdam suggests, is not that we have some malleable, subjective expectation of privacy, but irreducible interests or rights that the fourth amendment protects. See Amsterdam, *supra*, at 385.

292. While *Katz* may have fallen short of the potential Amsterdam envisioned, it has

lower courts were given altogether different criteria for determining whether government surveillance or search activity had violated the fourth amendment.

Overruling *Olmstead*, the *Katz* Court, with only Justice Black dissenting, held that the fourth amendment was violated by the FBI's use of a bug attached to the outside of a public telephone booth which enabled an agent to pick up a gambler's telephone calls:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.²⁹³

The Court declared that not only was the amendment freed from property law concepts, it was also freed from any interpretation that would limit it to the kinds of abuses in the minds of the people who wrote and adopted it. The amendment was a standard of protection which would apply to any form of government surveillance or intrusion violating the interest protected by it.

In the years immediately preceding and following *Katz*, the Court was also struggling to give some content to the term "probable cause"—a search requirement that had been assumed in many of the Court's decisions but which had received relatively little considered analysis. In a series of cases involving both state and federal officers, the Court formulated a fairly stringent "two-prong" test for the reliability and sufficiency of information obtained from informers.²⁹⁴ This test was spelled out elaborately in Justice Harlan's opinion for a five-justice majority in *Spinelli v. United States*.²⁹⁵ In *Spinelli*, the Court reversed a holding by the *en banc* Court of Appeals for the Eighth Circuit that a detailed affidavit by an FBI agent about a gambling suspect's activities had furnished probable cause for a search warrant.²⁹⁶ The *Spinelli* deci-

dramatically altered and expanded the concept of what constitutes a government search and what is therefore subject to the fourth amendment. Literally hundreds of state and lower court decisions have scrutinized a wide variety of governmental search or surveillance techniques under the *Katz* standard, however watered-down it may have become.

293. 389 U.S. at 351-52 (citation omitted).

294. The leading cases on this point were *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964). See also *Beck v. Ohio*, 379 U.S. 89 (1964).

295. 393 U.S. 410 (1969).

296. 382 F.2d 871 (8th Cir. 1967). The five-three *Spinelli* majority in the Supreme Court was a tenuous one, resting as it did on Justice White's rather unusual concurrence. After explaining exhaustively the reasons for his belief that the reasoning of the Court's opinion in *Spinelli* was inconsistent with *Draper v. United States*, 358 U.S. 307 (1959), he joined

sion stressed that intrusions upon the interest specified in *Katz* were not to be made lightly; the term "probable cause" was a demanding standard, not to be supported by such flimsy considerations as the word of an informer of unproven reliability, the suspect's reputation, or a recounting, however detailed, of activity as consistent with innocence as with guilt.

A strong sense of the fourth amendment's purpose underlay the Court's later decision in *Chimel v. California*²⁹⁷ which plugged the gaping hole in the warrant requirement left exposed by *Rabinowitz*. Justice Stewart's opinion for the *Chimel* majority was significant in three respects. First, the facts of that case—a roving search of an entire house "incident" to a defendant's arrest in the living room—was a good indication of how broad the most commonly invoked exception to the warrant requirement had become. Second, the Court explicitly eschewed an opportunity merely to distinguish *Rabinowitz*²⁹⁸ and *Harris* on their facts; it held that the permissible range for such a search was limited to the area immediately surrounding the arrested person, into which he might be able to reach to obtain a weapon or conceal or destroy evidence.²⁹⁹ Third, the term "reasonable" was rescued from its usage in *Rabinowitz*, which was described by Stewart as "little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests."³⁰⁰ Stewart maintained that the term "reasonable" must be tied to "some criterion of reason . . . ; the test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response."³⁰¹

The Court's new dedication to privacy interests was also reflected in several other opinions concerning such issues as the need for health and fire inspectors to obtain consent or a warrant of some kind before searching a home or business,³⁰² the constitutional limitations on the

"the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court." 393 U.S. 410, 429 (White, J., concurring).

297. 395 U.S. 752 (1969).

298. The California Supreme Court's *Chimel* opinion did not actually cite *Rabinowitz*, but upheld this search under an amorphous line of reasoning that the search was "reasonable" and incident to a valid arrest. See *People v. Chimel*, 67 Cal. Rptr. 421, 424, 439 P.2d 333, 337 (1968).

299. 395 U.S. at 766 (1969).

300. *Id.* at 764-65.

301. *Id.* at 765, quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

302. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).

power of state and federal officials to engage in electronic surveillance,³⁰³ and the existence of a civil cause of action against federal officers for allegedly violating a plaintiff's fourth amendment rights.³⁰⁴ A particularly significant decision during this period was *Davis v. Mississippi*³⁰⁵ in which the Court held that the fourth amendment's proscription against unreasonable seizures is violated by "investigatory arrest" seizures and detention of individuals without probable cause. Reversing the Mississippi rape conviction of a young black who, along with virtually every other young black male in the community, was fingerprinted while detained without probable cause, the Court warned:

Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."³⁰⁶

The Court did acknowledge, however, that detention for fingerprinting may, because of the nature and reliability of fingerprinting as a method of identification, "constitute a much less serious intrusion upon personal security than other types of police searches and detentions."³⁰⁷

H. *Mapp's Legacy—The New Accommodation*

While it was breathing new life into the fourth amendment, the Court also was taking the amendment into new territory. *Mapp v. Ohio* made it necessary to consider search and seizure activities peculiar to state and local law enforcement officers whose interests and needs differ from those of their federal counterparts. As the cases reviewed here indicate, the law enforcement practices that the Court had reviewed in federal cases followed certain rather well-defined patterns: the search and seizure typically came at the climax of an investigation, the intrusive activity was usually planned, or at least could be anticipated ahead of time, and, to an extent varying from case to case, the government had some control over the circumstances of the search or seizure. These cases reflect the type of law enforcement responsibilities borne by federal agents. Entrusted with the apprehension of a limited number of sus-

303. See *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

304. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

305. 394 U.S. 721 (1969).

306. *Id.* at 726-27.

307. *Id.* at 727. The Court did leave open the door to a possible approval of limited detentions for the purpose of fingerprinting suspects for whom there is not probable cause to arrest, a substantial accommodation with law enforcement interests. *Id.* at 728.

pects who violate certain specific statutes outlawing specified kinds of conduct, they operate with a degree of relative leisure. Since the kinds of criminal activity they investigate are frequently ongoing and organized, they generally have anywhere from a few hours to several months to prepare for a given arrest or search.

No such generalizations can be made about state or local law enforcement officials. The cases decided by the Court in the wake of the *Mapp* decision exemplify the wide range of situations in which officers at these levels must operate.³⁰⁸ Some state agencies and some specialized big-city units may resemble federal agencies in their operations, but even these agencies are apt to deal with different types of crimes than their federal counterparts, confronting criminal activity on a different scale, with much less opportunity for planned investigations. Their resources must be spread thinner, and the volume of crime with which they must deal is greater. In short, they are more likely to engage in "reactive" law enforcement.

"Reactive" law enforcement describes the type of activities performed by the vast majority of local law enforcement officers, whether New York City patrolmen or deputy sheriffs patrolling the wilds of San Bernardino County. A local officer sees suspicious activity or receives a bulletin about a crime that has just been committed nearby, and must respond at once, without time for reflection or consultation. For fourth amendment purposes, there is a world of difference between this type of reactive activity and the typical federal investigation. Prior to *Mapp*, the Court's interpretations of the fourth amendment needed only to accommodate one kind of law enforcement intrusion—that which is the result of a fairly structured investigation. When the Court held that state and local practices were also governed by the exclusionary rule, it thus applied constitutional standards developed for one type of government conduct to endlessly various and altogether different forms of law enforcement. The Court removed the fourth amendment from the garden to the jungle; the Harlan prophecy was not long in coming true.

The stresses and strains that Justice Harlan had foreseen in *Mapp* and *Ker* were evident. The Court attempted to resolve the tensions between police practices and the reinvigorated fourth amendment demands with the same sensitivity to fourth amendment values it demonstrated in decisions such as *Katz*, *Spinelli*, and *Chimel*. At the same time, however, the Court found it necessary to modify traditional requirements of the amendment to accommodate what it perceived to be reasonable police needs. In so doing, it weakened several limitations on government search

308. See generally, D. HOROWITZ, *THE COURTS AND SOCIAL POLICY*, at 227-37 (1977).

and seizure authority. In each of those decisions, a majority of the Court found it necessary to breach what had previously been a solid fourth amendment wall. For example, in *Schmerber v. California*,³⁰⁹ the Court was called upon to consider the application of the fourth amendment and its exclusionary rule to a type of law enforcement activity exclusively within the province of state and local police—the withdrawal of blood from a motorist in order to determine his blood alcohol content. Although this type of intrusion is clearly within the fourth amendment's prohibition, Justice Brennan, writing for the Court, held this practice permissible.³¹⁰ The officer who directed the physician to withdraw the blood sample did so incident to the defendant's arrest for drunken driving. The arrest was based on probable cause, and the evidence sought would have disappeared within a very short period of time. The intrusion and blood withdrawal were performed according to prescribed medical procedures. The Court also held that neither the defendant's right to counsel nor his privilege against self-incrimination, which had just been applied to police interrogations in *Miranda v. Arizona*,³¹¹ was implicated in this case.³¹²

Schmerber is significant to our analysis in the following respects. First, the Court approved a law enforcement search that had as its sole purpose the gathering of evidence for use in a criminal prosecution. While the searches and seizures considered by the Court over the years following *Weeks* were also motivated by a desire to gather evidence, the evidence sought was generally contraband, the fruits or instrumentalities of the crime, or items in which the government had a possessory right superior to that of the defendant. The mere evidence rule doubtless was partly responsible for this common pattern, but so also was the nature of federal police work—enforcement of laws which were either essentially regulatory in nature or aimed at the proceeds of thefts or robberies with federal implications. State prosecutions were much more likely to raise questions about the search for and seizure of evidence in which the governmental interest was purely for use in a prosecution. Second, the Court's holding that fifth amendment interests were not implicated in the compelled production of non-testimonial evidence to be used against a person marked the beginning of the Court's departure from the fourth-fifth amendment interrelationship view of *Boyd v. United States*,³¹³ and

309. 384 U.S. 757 (1966).

310. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), a pre-*Mapp* case, the Court had held that a similar police-requested extraction of blood did not offend the fourteenth amendment's due process clause.

311. 384 U.S. 436 (1966).

312. 384 U.S. at 765-66.

313. The *Schmerber* majority acknowledged that the "values protected by the Fourth

this distinction provoked vigorous dissents from four members of the Court.³¹⁴ Third, and most significantly, it appears that the Court's reasoning in *Schmerber* was influenced heavily by its concern with the demands of reactive police activity peculiar to state and local law enforcement.³¹⁵

Further changes in the fourth amendment announced in the context of state searches and seizures came the next term in *Warden v. Hayden*,³¹⁶ another opinion written by Justice Brennan. In *Hayden*, the Court upheld a Baltimore police officer's warrantless entry of a private home in pursuit of a fleeing armed robbery suspect.³¹⁷ The Court also upheld the officer's search of certain places inside the home—the washing machine, the flush tank of a commode, and two places in the bedroom where they found the suspect feigning sleep. These searches occurred either before or at about the same time the suspect was apprehended. The washing machine yielded clothes meeting the description of clothes worn by the robber. A sawed-off shotgun and a pistol were found in the flush tank, and ammunition was discovered in the bedroom. Holding that all of this evidence was admissible in Hayden's state prosecution, the Court made two significant changes in fourth amendment law. First, it abolished the prohibition, announced in *Gouled*, against prosecutorial use of mere evidence obtained in a government search or seizure.³¹⁸ Second, it created a new "hot pursuit" exception to the fourth amendment's warrant requirement.³¹⁹

The Court's decision to abolish the distinction between mere evidence and contraband or fruits and instrumentalities of crime was a sound one.

Amendment thus substantially overlap those the Fifth Amendment helps to protect." *Id.* at 767. But the majority stated that the overlap did not extend to the administration of a blood test.

314. *Id.* at 772 (Warren, C.J., dissenting); *id.* at 773 (Black, J., dissenting); *id.* at 778 (Douglas, J., dissenting); *id.* at 779 (Fortas, J., dissenting).

315. These considerations were developed by Justice Brennan, who along with Justice Marshall, has dissented in virtually every Court decision over the past five years which can be counted as "rolling back" fourth amendment rights. As noted by one commentator, Justice Brennan has now taken the lead in calling for the state courts to impose more stringent standards under the state constitutions than are required by the Supreme Court under the Federal Constitution. See Howard, *State Courts and Constitutional Rights in the Days of the Burger Court*, 62 VA. L. REV. 874-875 (1976). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

316. 387 U.S. 294 (1967).

317. The defendant had the bad judgment to hold up a Yellow Cab dispatch office and then flee the scene of his crime on foot. His progress was discreetly monitored by a pair of Yellow Cabs, then by several police cars.

318. *Id.* at 310. Significantly, the Court found its holding here foreshadowed by *Schmerber*. *Id.* at 306-07.

319. *Id.* at 298-300. The term "hot pursuit" was not actually used by Justice Brennan, but the exception to the warrant requirement carved out here has come to be known as the

Not only was the distinction unsupported by the language of the fourth amendment;³²⁰ it had become irrational. As originally formulated in *Gouled*, it rested on the property law concept of the defendant's superior right to property in which the government had no interest except for use as evidence. The *Hayden* opinion noted that "[t]he premise that property interests control the right of the Government to search and seize has been discredited,"³²¹ and warned that the government's superior common law property right would not preclude a finding that a given search or seizure was unreasonable. Anticipating the Court's decision the following term in *Katz v. United States*, Justice Brennan emphasized the Court's recognition, enunciated in *Jones v. United States*³²² and *Silverman v. United States*,³²³ that "the principal object of the Fourth Amendment is the protection of privacy rather than property."³²⁴ Privacy interests are not really protected by the mere evidence rule, for privacy may be more seriously invaded by a search for evidence described as an instrumentality of crime than by a search for items characterized as mere evidence. Moreover, the mere evidence rule is no longer necessary to protect fourth amendment rights since other protections such as the remedy of suppression, the freeing of the availability of this remedy from property law concepts, and the extension of the remedy to intangible evidence now adequately serve this purpose.

In *Hayden*, the Court also recognized a new exception to the warrant requirement in order to accommodate reactive law enforcement inter-

"hot pursuit" exception in subsequent cases. See, e.g., *United States v. Santana*, 427 U.S. 383 (1976).

320. The "right of the people" to be secure against unreasonable searches and seizures "is certainly unrelated to the 'mere evidence' limitation," Justice Brennan emphasized, 387 U.S. at 301; "Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband." *Id.* at 301-02. This observation is true as far as it goes. However, it does not answer the question whether the mere evidence rule might have provided the people with additional protection by serving as a check on the number of improper law enforcement searches. In other words, might not agents be less likely to search at all for papers or effects that constitute mere evidence if they knew these items, and other evidence discovered as a result of their seizure, would be inadmissible in a subsequent prosecution? To this extent, see the opinion of Justice Fortas in *Warden v. Hayden*, 387 U.S. 294, 311-12 (1967) (Fortas, J., concurring), emphasizing the rule's value as a deterrent against general searches. He would have expanded exceptions to the rule rather than "drive an enormous and dangerous hole in the Fourth Amendment." *Id.* at 312.

321. *Id.* at 304. It might be asked, however, whether recognition of a person's property rights in items other than contraband or fruits and instrumentalities does not afford the people a bulwark against governmental intrusion in addition to the privacy rights or expectations described by Justice Brennan here and later by Justice Stewart in *Katz v. United States*, 389 U.S. 347, 350-53 (1967).

322. 362 U.S. 257 (1960).

323. 365 U.S. 505 (1961).

324. 387 U.S. at 304.

ests: the right of the police in pursuit of a fleeing felony suspect to enter a dwelling without a warrant and to conduct warrantless searches, "the permissible scope" of which must "at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape."³²⁵ The Court expressly refrained from relying on what was then the very broad incident-to-arrest exception to the warrant requirement recognized in *Rabinowitz* and other fairly recent decisions, but stated that the police could conduct searches for weapons in places where a suspect obviously could not be hiding.³²⁶

Further accommodation between state law enforcement needs and fourth amendment rights emerged from the Court's famous "stop and frisk" decision in *Terry v. Ohio*,³²⁷ announced the following Term. This was the Court's first attempt to reconcile the broad language of the fourth amendment with a form of everyday, "low visibility" police activity that was then peculiar to law enforcement at the local level.³²⁸ The police practice of stopping a suspicious person on the street and subjecting him to a patdown for weapons was new to the federal courts.³²⁹

325. *Id.* at 299.

326. *Id.* at 299-300. Justice Brennan found it clear from the record that the defendant had been captured at the time the weapons were found. *See id.* at 300 n.5.

327. 392 U.S. 1 (1968). *Terry* was accompanied by a companion case, *Sibron v. New York*, 392 U.S. 40 (1968), in which the Court held that heroin seized from Sibron by a police officer who had observed him speaking with several known addicts was inadmissible, because the officer had no reason to believe Sibron was armed and dangerous, and had not "patted down" Sibron for weapons before he took the heroin from Sibron's pocket. In *Peters v. New York*, 392 U.S. 40 (1968), a case merged for decision with *Sibron*, the Court held that a search was legal and the fruits of that search admissible as evidence at trial. The search took place when an off-duty officer, aroused by Peters' furtive activities in the officer's apartment building, stopped Peters, frisked him for weapons, and discovered burglar's tools.

328. For a pre-*Terry* discussion of "stop and frisk" activity, see Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspicious Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386, 389-92 (1960). *See also* Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?* 51 J. CRIM. L.C. & P.S. 402, 403-05 (1960); Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L.C. & P.S. 395, 397-99 (1960). Several other states had enacted "stop and frisk" laws authorizing officers to do essentially what the officers did in *Terry*. *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1971); R.I. GEN. LAWS § 12-7-1 (1956); N.H. REV. STAT. ANN. ch. 594, § 2 (1955); DEL. CODE tit. 11 § 1902 (1953). *See also* Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942). Perhaps these laws were a legislative response to *Mapp*. *See* D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

329. *See* *United States v. Mitchell*, 179 F. Supp. 636 (D.D.C. 1959), a pre-*Mapp* federal case arising out of a District of Columbia policeman's detention of a theft suspect. (Felony prosecutions for local offenses were then prosecuted in federal court in the District of Columbia). The court held that this detention was an arrest, and invalid for

Confronted on one hand with state arguments that this "stop and frisk" was not covered by the fourth amendment at all,³³⁰ and, on the other, by assertions of civil libertarians that this practice was inevitably illegal because it was unsupported by probable cause,³³¹ the Court played Solomon. In fact, Chief Justice Warren went Solomon one better and followed through by actually bifurcating the fourth amendment.³³² One part was what the Court termed the "warrant clause" and the other the "reasonableness" requirement. The "warrant clause," the Court said, sets standards that must be satisfied in full-fledged searches and seizures (the only kind recognized by the Court up until that time). Such a search must be supported by probable cause, as the warrant clause expressly demands. But a stop and frisk is not this type of search; it need only satisfy the more flexible "reasonableness" requirement.

To determine whether a search or seizure satisfies the reasonableness requirement, the Court developed a "balancing" test; the degree of government intrusion must be balanced against the legitimate government interest it serves—in this case, the investigation of crime and the protection of the officer and the public.³³³ The degree of cause necessary for such a search is not the stringent probable cause standard, but is substantially less in light of the limited purpose and degree of the intrusion. Thus was born the reasonable or articulable suspicion standard for determining the validity of a stop and frisk.³³⁴

Chief Justice Warren was frank in admitting the reason for this bifurcation of the amendment, which Justice Douglas scored as a step without precedent and at odds with fourth amendment history.³³⁵ The exclusionary rule, the Chief Justice explained,

has its limitations . . . as a tool of judicial control. . . . [i]t is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or

want of probable cause. *But see* *United States v. Bonnano*, 180 F. Supp. 71 (S.D.N.Y. 1960), in which Judge Kaufman of the Southern District of New York came to the opposite conclusion about a joint state-federal roadblock at the famed 1957 "mob" meeting in Apalachin, New York. This case presented a fact situation which, unlike the District of Columbia case, can hardly be described as a "typical" stop and frisk.

330. 392 U.S. at 10-11.

331. *Id.* at 11-12. *See also* *Amsterdam*, *supra* note 291, at 394-95.

332. The Court rejected the notion that the fourth amendment did not cover situations, such as the one presented, in which a "full blown" search had not occurred. 392 U.S. at 19. At the same time, it recognized the necessity for swift police action in hot pursuit situations. *Id.* at 20.

333. *Id.* at 20-27.

334. The actual phrase "articulable suspicion less than probable cause" was coined by Justice Harlan in his concurrence. *See id.* at 33 (Harlan, J., concurring).

335. *See id.* at 35-39 (Douglas, J., dissenting).

are willing to forego successful prosecution in the interest of serving some other goal.

Proper adjudication of the cases in which the exclusionary rule is invoked demands a constant awareness of these limitations.³³⁶

Central to this observation was a shift in the Court's perception of the exclusionary rule. In *Linkletter v. Walker*,³³⁷ the Court had grappled with the problem of whether *Mapp* should apply retroactively. In holding that *Mapp* would only apply prospectively, the Court explained that the primary purpose of *Mapp* was the deterrence of future police lawlessness. In *Terry*, the Court reiterated the exclusionary rule's importance as necessary to preserve judicial integrity,³³⁸ but described "its major thrust" as "a deterrent one."³³⁹

The Court's discussion of the exclusionary rule's inadequacy as a deterrent against certain kinds of police tactics dealt with the type of conduct which, unlike the aims of federal officers, has a law enforcement aim other than the simple procurement of a conviction. Indeed, the Court's rationale for recognizing a limited authority to search and seize on less than probable cause was spawned by the needs of the officer on the street rather than the federal agent or special unit officer involved in specialized crime investigations. The Court's effort to accommodate the interests of the local officer led it to phrase the issue as "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."³⁴⁰ Chief Justice Warren had already noted that "[n]o judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us."³⁴¹ Here, the Court could do no more than decide whether "it was reasonable for officer McFadden to have interfered with petitioner's personal security as he did"³⁴² at the time the search occurred.

Thus, the way was cleared for courts to evaluate similar law enforcement intrusions in light of a "reasonableness" test which, by its very

336. *Id.* at 13-14.

337. 381 U.S. 618 (1965).

338. 392 U.S. at 12.

339. *Id.*

340. *Id.* at 19. Throughout the opinion the Court stressed that it was accommodating the law enforcement need to react to more or less unexpected, rapidly unfolding events on the street. See, for example, the Court's description of the kinds of conduct for which the exclusionary rule has limited value, *id.* at 13-15; and its reference to "necessarily swift action predicated upon the on-the-spot observations of the officer in the heat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.* at 20.

341. *Id.* at 15.

342. *Id.* at 19.

terms, could not be precisely formulated or limited in its application. Such a test would be applied regardless of the intruding officer's initial motivation or source of information, or the nature of the crime being investigated.³⁴³ Furthermore, the sliding-scale balancing test for evaluating the reasonableness of a police intrusion has led to approval of lesser intrusions on the basis of a considerably lesser degree of suspicion than *McFadden's*.³⁴⁴ All of this may make sense as applied to officers who are engaged in preventive police work. Whether it makes sense in the setting of aggressive federal investigative practices is another matter. Unfortunately, despite Warren's preoccupation in *Terry* with police activity in a street context, nothing in the opinion limits "stop and frisk" authority to the street context, or prevents its use in far different types of law enforcement practices, federal as well as state.

Schmerber, *Hayden*, and *Terry* are milestones in the development of the fourth amendment. In both *Schmerber* and *Hayden*, the Court eliminated barriers that it had earlier erected against federal practices found intolerable under the fourth amendment. In *Hayden*, the Court also carved out a new exception to the warrant requirement,³⁴⁵ and although the "hot pursuit" exception was a limited one, the Court's formulation of it was not. In the years since, state and lower federal courts have felt free to recognize variations to the "hot pursuit" theme, so that today there exists a broad and amorphous "emergency" exception to the general requirement that a warrant must be obtained before officials can enter a home for the purpose of crime prevention or evidence-gathering.³⁴⁶ Of these three cases, *Terry* was the most obvious effort by the Court to refine the fourth amendment in order to accommodate state interests. Nevertheless, all three cases indicated that the Court was concerned with the need to accommodate state and local law enforce-

343. See, e.g., *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973), in which an FBI agent stopped an automobile to question an occupant about certain suspected federal fugitives, then seized evidence of a Draft Act violation that came to his attention during the detention. See also *United States v. Lockett*, 484 F.2d 89 (9th Cir. 1973); *United States v. Fisch*, 474 F.2d 1071 (9th Cir.), cert. denied, 412 U.S. 921 (1973); *United States v. Catalano*, 450 F.2d 985 (7th Cir. 1971), cert. denied sub nom. *Moscattello v. United States*, 405 U.S. 928; *White v. United States*, 448 F.2d 250 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972); *People v. Cruz*, 186 Colo. 295, 526 P.2d 1315 (1974); notes 350-52 & accompanying text *infra*.

344. See *People v. DeBour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976). In *Lawson v. Commonwealth*, 217 Va. 354, 228 S.E.2d 685 (1976), the Virginia Supreme Court permitted a simple stop without a frisk (which in *DeBour* promptly followed the stop) upon less than the degree of suspicion demanded by *Terry* and *Adams*.

345. 387 U.S. at 298-300.

346. See, e.g., *United States v. Curran*, 498 F.2d 30 (9th Cir. 1974); *United States v. Davis*, 461 F.2d 1026 (3d Cir. 1972); *United States v. Doyle*, 456 F.2d 1246 (5th Cir. 1972); *United States v. Pino*, 431 F.2d 1043 (2d Cir. 1970), cert. denied, 402 U.S. 989 (1971).

ment interests, and each case expanded the permissible range of certain law enforcement conduct.

These accommodations were made without any distinction between what is permitted state officers and federal agents—indeed, such a distinction may have been foreclosed when the Court stated in *Ker v. California* that federal and state officials were governed by the same fourth amendment standards.³⁴⁷ Accordingly, the techniques which the Court sanctioned in these cases, all of which were employed in response to unanticipated situations, were now available to all law enforcement agents, whatever their mission and however they may have arrived at the point where their situation was superficially similar to those described in *Schmerber*, *Hayden*, or *Terry*. State and federal agents involved in aggressive, specialized crime investigation, especially drug agents, have not hesitated to take advantage of these and subsequent decisions. Two types of cases illustrate this point. One is the warrantless entry of a home or search of an immobilized automobile to seize drugs.³⁴⁸ This type of search is conducted not in response to an unanticipated emergency, but as the climax of an extended investigation, usually performed with the help of informers and undercover agents. The agents' excuse for dispensing with a warrant in these cases is that when they learn the location of the drugs and decide to make their move, they do not have the opportunity to obtain a warrant without delaying the search and risking the disappearance of the contraband.³⁴⁹

A second technique which appears to be utilized most frequently by Drug Enforcement Administration Agents is the "airport stop."³⁵⁰ This is a kind of bootstrap operation, whereby agents can parlay their initial suspicion in a deplaning passenger into searches of the person, his

347. See 374 U.S. 23 (1962).

348. See note 346 *supra*; see also *United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 945 (1977); *United States v. Sigal*, 500 F.2d 1118 (10th Cir.), *cert. denied*, 419 U.S. 954 (1974); *United States v. Soriano*, 497 F.2d 147 (5th Cir. 1974).

349. This practice has been condemned when a court has decided that there was ample time to obtain the warrant. See, e.g., *United States v. Scheffer*, 463 F.2d 567 (5th Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States v. Niro*, 388 F.2d 535 (1st Cir. 1968). *But see United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 945 (1977); *United States v. Curran*, 498 F.2d 30 (9th Cir. 1974).

350. Most of these cases have come from the Eastern District of Michigan and involve Drug Enforcement Administration Agents' use of a "drug courier profile" (inspired by the "hijacker profiles" utilized by airlines and federal officials to combat the hijacking rash of the early 1970's). See, e.g., *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Chamblis*, 425 F. Supp. 1330 (E. D. Mich. 1977); *United States v. Floyd*, 418 F. Supp. 724 (E. D. Mich. 1976). However, similar methods are apparently used elsewhere, see, e.g., *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977).

luggage, and even a car waiting outside the airport. The agents scrutinize flights from cities that are known to be drug distribution centers. An agent approaches a passenger whom he suspects of being a drug courier but does not have probable cause to arrest. The agent's source of information may be rather strong, possibly including a host of details about this person's travel pattern, associates, and criminal record.³⁵¹ On the other hand, the agent may act merely because the suspect meets the DEA's "drug courier" profile and acts in a nervous manner which arouses the agent's suspicion. The agent will approach the person, ask for identification, and wait for the person to answer or react in a manner which transforms his suspicion into what a court is later willing to recognize as probable cause.³⁵²

It seems beyond argument that police officers suddenly and unexpectedly confronted with the need to act without a warrant in order to save lives, apprehend a dangerous felon, or neutralize a potentially dangerous suspect should not be hamstrung by the fourth amendment's exclusionary rule. Although it may be difficult to assert that investigative agents confronted with such exigent circumstances should be treated any differently under the fourth amendment, it must be remembered that the two situations are not the same. A police failure to respond in *Schmerber* would have meant that the case would have been irretrievably lost. A failure to respond at once in *Hayden* or *Terry* could have proved catastrophic; in each case there was a great and immediate threat of violent criminal conduct. No such threat of immediate and irreparable threat to individuals or the public exists, however, when drug agents delay a search in order to get a warrant. In each of these cases, the agents have an alternative open to them—further surveillance until a warrant can be obtained.³⁵³ The risk of a loss of contraband or the temporary escape of the suspect is precisely the type of risk that the fourth amendment has traditionally required. And it should be kept in mind that the cases described here put the exclusionary rule in its least favorable light—the protection of the guilty. Cases arising out of criminal prosecutions tell us nothing about intrusive law enforcement conduct directed at the innocent.

What might be described as fourth amendment slippage—the weakening of the amendment resulting from the Court's initial efforts to accommodate state interests—is not, of course, confined to lower court deci-

351. See *United States v. Van Lewis*, 409 F. Supp. 535 (E. D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977).

352. See *id.* at 538-40.

353. Compare the cases cited in notes 346-349 *supra* with *United States v. Johnson*, 561 F.2d 832 (D.C. Cir. 1977).

sions countenancing aggressive law enforcement techniques. Many of the Supreme Court's decisions over the past five terms have weakened the amendment even more than the lower federal courts and some states have been willing to do. Although the *Adams*, *Miller*, *Santana*, and *Bustamonte* decisions, follow logically from the Court's opinions in *Schmerber*, *Hayden*, and *Terry*, it is clear that the majority opinions in these more recent cases do not reflect the high degree of sensitivity to fourth amendment values which animated the majority opinions in *Schmerber*, *Hayden*, and *Terry*.³⁵⁴ In light of the course taken in these cases, the question is not whether the fourth amendment must be diluted in order to accommodate state interests, but how much it is to be diluted.

IV. THE FUTURE OF THE FOURTH AMENDMENT: A MODEST SUGGESTION

It is possible to analyze all the Court's fourth amendment decisions on a continuum, much like a pendulum swinging between periods of restrictive and broad interpretation of the amendment. Each decision since *Boyd* can be observed as one part of a recurring pattern in the age-old struggle between individual and governmental interests. Whenever confronted with a new or increasingly aggressive form of intrusive law enforcement activity, the Court has responded with a landmark decision broadly applying the fourth amendment either to limit or to end that activity. Later, over a period of decades, it will modify that strong stand by refining away much of the force of its initial pronouncements as it gives greater weight to asserted governmental interests served by that activity. Then, as the government takes greater advantage of the Court's late-blossoming effort accomodation or develops new kinds of intrusive practices, the Court will again interpret the amendment in a broad manner to halt the government's overarching law enforcement efforts.

The Court's original strong stand was taken in 1886 in *Boyd v. United States*³⁵⁵ and was followed by a period of accomodation that lasted until the Court's adoption of the exclusionary rule in *Weeks v. United States*³⁵⁶ in 1914. *Weeks* and two other cases decided in the ensuing seven years, *Silverthorne Lumber Co. v. United States*³⁵⁷ and *Gouled v. United States*,³⁵⁸ marked the second high point in the fourth amendment's history. These cases were followed by a long period of accomodation and, eventually, capitulation to governmental interests in the late

354. See, e.g., Justice Marshall's dissenting opinions in *United States v. Robinson*, 414 U.S. 218, 238 (1972) and *Adams v. Williams*, 407 U.S. 143, 153 (1972).

355. 116 U.S. 616 (1886).

356. 232 U.S. 383 (1914).

357. 251 U.S. 385 (1920).

358. 255 U.S. 298 (1921).

1940's and early 1950's.³⁵⁹ Finally, the 1960's brought the amendment's third high point, with the broad pronouncements in such decisions as *Mapp v. Ohio*,³⁶⁰ *Katz v. United States*,³⁶¹ and *Chimel v. California*.³⁶² And although the fourth amendment has lately fallen upon hard times, it is possible to extrapolate that it will be only a matter of time before the next broad pronouncement will issue forth from the Court.

Unfortunately, this pendulum theory has its weak points. The present period of accommodation appears to differ markedly from those periods following *Boyd* and *Weeks*. The frequency with which search and seizure decisions are considered by the Court is far greater today than it was during either of the earlier periods. More significant is the fact that almost every recent case has arisen out of intrusive conduct by state or local law enforcement officials rather than federal agents. The reason for this should be apparent; the Court perceives, correctly or incorrectly, that the "reactive" state and local law enforcement agencies cannot effectively coexist with strong fourth amendment protections, and the inseparability of federal protections from state protection, as mandated in *Mapp v. Ohio*, has led to a substantial weakening of all fourth amendment protections, despite the fact that such a dilution is totally unnecessary in the federal context. As Justice Harlan foresaw, *Mapp* has led to virtually irresolvable tensions between state law enforcement needs and sound fourth amendment principles. *Mapp* placed the Court at a crossroads in the development of the fourth amendment. Faced with the choice between placing the states in a constitutional straitjacket and accommodating the states at the expense of sound fourth amendment principles, the Court has chosen the path of accommodation. The consequences of this choice may be dismaying, but accepting the fact that the Court has chosen this particular course, the question now becomes: "What choices remain open to the Court?"

The first, of course, is to continue down the present path. The Court has already significantly limited existing protections afforded by the fourth amendment. It has effectively eliminated lower federal court review of state search and seizure practices.³⁶³ It could further weaken the standards that law enforcement officials must satisfy in order to avoid the exclusionary rule. Chief Justice Burger and Justice White, of course, would like to substantially limit the exclusionary rule.

359. For a discussion of the trend during this period, see pp. 43-50 *supra*.

360. 367 U.S. 643 (1961).

361. 389 U.S. 347 (1967).

362. 395 U.S. 752 (1969).

363. *Stone v. Powell*, 428 U.S. 465 (1976).

On the other hand—and this is extremely unlikely in the near future—the Court could reverse its present direction. It could march back up the path it has taken, knocking down its own recent precedents and reestablish sound fourth amendment principles, albeit at the expense of local law enforcement interests. The consequences of such a choice are obvious: public outcry about penalizing the police and coddling criminals, increased incentives for police perjury, state court recalcitrance, and a great degree of judicial confusion. Or the Court could take a less disruptive approach in attempting to reestablish a sound fourth amendment by opting for a regulatory view of the fourth amendment and the exclusionary rule.³⁶⁴ For example, Professor Anthony Amsterdam envisions a three-part rule:

(1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment. (2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made. (3) The legislation or rules must, of course, be conformable with all additional requirements imposed by the fourth amendment upon searches and seizures of the sorts that they authorize.³⁶⁵

Amsterdam's approach is attractive, but is not without its difficulties, the foremost of which is the recurring problem that state and local law enforcement needs are far different from federal concerns and far less amenable to a single, vigorous standard of judicial review.

A third alternative for the Court, takes the federal/state distinction into account: the overruling of *Mapp* itself. At first blush this proposal sounds drastic, and such a step would doubtless produce its own set of difficult consequences. But it is far less drastic than the modification of the *Weeks* exclusionary rule, which appears to be an increasingly distinct possibility. More important, the negative consequences of such a ruling should be more than offset by the opportunity it would afford the Court to return to sound fourth amendment principles. Most objections to the overruling of *Mapp* can be easily answered. One objection is likely to be *stare decisis*—*Mapp* is there, it has been decided, and the constitutional doctrine on which it is based should not be subjected to tampering. A second related argument is one of continuity. *Mapp* is a landmark decision upon which a generation of constitutional development rests and it is essential to the uniform, rational further development of the

364. See Amsterdam, *supra* note 291, at 416-29.

365. *Id.* at 416-17.

fourth amendment; furthermore, it is the leading case in the development of the incorporation doctrine, by virtue of which a host of other federal constitutional rights have been applied to state criminal justice systems.³⁶⁶ But these arguments are rendered less persuasive by several competing considerations. First, the interests protected by the fourth amendment were held to be a part of the fourteenth amendment due process clause in *Wolf v. Colorado*.³⁶⁷ *Wolf* would not be affected by the demise of *Mapp*. The due process clause should still compel state courts to look to the fourth amendment for applicable search and seizure standards. Even as they frequently did in the years prior to *Mapp* and *Wolf*, the state courts will look to the Supreme Court for guidance in determining what those standards are. After all, it was only the exclusionary rule and not the fourth amendment which *Mapp* made applicable to the states.³⁶⁸

It should also be noted that the *Mapp* holding rests on less than firm footing. Only four justices joined unequivocally in Justice Clark's opinion for the Court. Clark's plurality and Justice Black's crucial concurrence relied heavily on a view of the interrelationship of the fourth and fifth amendments which was weakened by *Schmerber v. California* and *Warden v. Hayden* and expressly repudiated by the Court last year.³⁶⁹ Black made it clear that he did not consider the rule constitutionally mandated and later called for its abolition.³⁷⁰ *Mapp*'s pragmatic orientation also renders it particularly vulnerable to reconsideration. Justice Clark's opinion rested more on practical considerations and the desire to produce certain results than it did on a developing line of constitutional doctrine.³⁷¹ Insofar as *Mapp* has not produced these intended results, and has even led to undesirable consequences, the reasons for its continued vitality have been substantially weakened.

The argument that the overruling of the exclusionary rule would reintroduce chaos to the law of search and seizure overlooks the confusion that has long attended the Court's attempts to deal with fourth amend-

366. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel applies to the states through the fourteenth amendment); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment prohibition against cruel and unusual punishment applicable to states through fourteenth amendment). From the *Gideon* decision until the end of the Court's 1968-69 Term, most of the other protections contained in the Bill of Rights were applied against the states. Fittingly enough, on the last day of Chief Justice Warren's tenure, the prohibition against "double jeopardy" was incorporated into the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784 (1969).

367. 338 U.S. 25 (1949).

368. See Amsterdam, *supra* note 291, at 2133.

369. See text accompanying notes 309-26 *supra*.

370. See *Coolidge v. New Hampshire*, 403 U.S. 443, 493-500 (1971) (Black, J., dissenting).

371. See text accompanying notes 259-76 *supra*.

ment issues. *Mapp* has only aggravated these difficulties; the Court's own inability to apply consistent lines of reasoning in search and seizure cases, especially in recent years, has left the state and lower federal courts with no clear rationale to apply.³⁷² Lower courts are now free to pick and choose among conflicting doctrines.³⁷³

Although *Mapp* was intended to restore a measure of judicial conformity by tying the states to the federal exclusionary rule, a relatively new phenomenon threatens to propel the law of search and seizure into a state of total confusion. While the United States Supreme Court has been narrowly interpreting federal constitutional protections, a growing number of state supreme courts have looked to their own state constitutions to impose stricter limitations on governmental authority than those now required under the Bill of Rights. This trend, called the "new federalism,"³⁷⁴ has been most pronounced with respect to constitutional protections involving police activities, particularly searches and seizures. Among these decisions are holdings by the California and Hawaii Supreme Courts that officers may not take advantage of the search incident to arrest authority for minor offenses, granted by the United States Supreme Court in *United States v. Robinson* and *Gustafson v. Florida*.³⁷⁵ Furthermore, the New Jersey Supreme Court has refused to follow *Schneekloth v. Bustamonte* by holding that prosecutors may not use the "totality of the circumstances" test for determining the voluntar-

372. In *Chimel v. California*, 395 U.S. 752 (1969), Justice Stewart recounted the Court's difficulties with the search incident to arrest doctrine. The Court experienced similar, if less pronounced difficulties with the vehicle searches. See Miles & Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105 (1972).

373. See, e.g., the complaint of the Massachusetts Supreme Judicial Court several years ago about the hapless confusion engendered by the Court's automobile search cases. *Commonwealth v. Haefeli*, 361 Mass. 271, 279 N.E.2d 915 (1972). This confusion seemed to have cleared when the First Circuit considered this case on federal habeas corpus review two years later. In light of *Cardwell v. Lewis*, 417 U.S. 583 (1974), the rule for warrantless vehicle searches was seen as more lenient. *Haefeli v. Chernoff*, 526 F.2d 1314 (1st Cir. 1975).

374. See HOROWITZ, *supra* note 328, at 220-54. See also Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). For a more critical view of this phenomenon, see Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976).

Justice Brennan has become an outspoken advocate of state courts' exercise of their prerogatives under their respective state constitutions. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

375. See *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099 (1975); *State v. Kaluna*, 55 Hawaii 361, 520 P.2d 51 (1974). See also *People v. Kelly*, 77 Misc.2d 284, 353 N.Y.S.2d 111 (Crim. Ct. N.Y.), modified, 79 Misc. 2d 534, 361 N.Y.S.2d 135 (App. Div. 1974).

iness of consents to search.³⁷⁶ Most ironically, the South Dakota Supreme Court, following remand of the *Opperman* case, invoked the South Dakota Constitution's search and seizure provision and refused to permit its police the automobile inventory latitude allowed by the United States Supreme Court's *Opperman* decision.³⁷⁷ The result of all this is that some of the state law enforcement officers whose interests the United States Supreme Court has tried to accommodate now may not take advantage of these decisions, while their federal brethren remain free to do so. *Mapp*'s objective of high and uniformly enforced national search and seizure standards has not been achieved. In fact, the ultimate result produced by *Mapp* has been precisely the opposite.³⁷⁸

Moreover, the overruling of *Mapp* will not necessarily invite fresh police abuses which state courts will be either unwilling or unable to control.³⁷⁹ Not only does *Stone v. Powell* already give the state courts the exclusive right to apply the exclusionary rule to searches and seizures, but it must be remembered that the most abusive forms of local police conduct are deterred little, if at all, by the operation of the exclusionary rule.³⁸⁰ Chief Justice Warren recognized this in *Terry v. Ohio*.³⁸¹ The rule simply does not reach police brutality and harassment, and it undoubtedly encourages police perjury.³⁸² There is no legitimate reason to presuppose a lack of sensitivity on the part of state supreme courts to fourth amendment interests. Given the choices of adopting, retaining, or rejecting exclusionary rules of their own, the state supreme courts undoubtedly would respond with a variety of decisions.³⁸³ There is no indication that, once freed from the exclusionary rule, the state courts would make a headlong rush to irresponsibility. As already noted, several state supreme courts have already reacted to the Supreme Court's loosening of fourth amendment standards by tightening their own search and seizure provisions. And if any state were tempted to stray far afield

376. *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975).

377. *State v. Opperman*, — S.D. — ; 247 N.W.2d 673 (1976).

378. It should also be noted that the standardization of fourth amendment principles was aided considerably by federal habeas corpus review of state convictions. While the standardizing force of this device may have been weakened by the Supreme Court's recent penchant for reversing federal court decisions granting state prisoners habeas corpus relief on fourth amendment grounds, it was destroyed in *Stone v. Powell*. Any oversight of state court interpretations of the fourth amendment must now come from the Supreme Court itself, which is simply incapable of considering more than a handful of fourth amendment cases a year.

379. See *Amsterdam*, *supra* note 291, at 416-25.

380. See *HOROWITZ*, *supra* note 328, at 223-24.

381. 392 U.S. at 14-15.

382. See *HOROWITZ*, *supra* note 328, at 234.

383. See *Wolf v. Colorado*, 338 U.S. 25 (1949).

from the search and seizure standards currently in force, the Court would still have the due process clause sanction as applied in *Rochin v. California*.

Moreover, the due process rationale of *Wolf* will remain. The due process clause bars the use of evidence in a state trial that is seized in violation of that standard. However, that standard need not be as rigid for the states as it is for federal officers who are under the direct command of the fourth amendment. Thus, while conduct like that of the officers in *Mapp* and *Rochin* would lead to the exclusion of evidence from a state trial, the conduct of Detective McFadden in *Terry v. Ohio* would yield admissible evidence. On the other hand, Detective McFadden's technique might not be available to federal drug agents who would have to answer to a higher standard. There would be no need to sever the fourth amendment's reasonableness clause from its probable cause requirement insofar as the amendment applies to federal officers.³⁸⁴

Overruling *Mapp* admittedly would entail its own problems. Perhaps the most obvious would arise out of cooperation between federal and state officers. Officers from different jurisdictions frequently cooperate, either formally or informally. A question would certainly arise as to evidence seized by a state officer which led to a federal prosecution. Similar problems would arise in connection with evidence obtained in a federal investigation which would prove a state crime or evidence obtained as a result of a joint state-federal investigation. *Elkins v. United States* presumably would forbid the introduction in a federal trial of evidence obtained in a search by state officers that did not satisfy fourth amendment standards.³⁸⁵ Whether evidence unconstitutionally obtained by or in conjunction with federal officers could be used in a state trial would remain an open question. Certainly it could not if the search and seizure were so obviously illegal as to raise due process considerations. The admissibility in a state trial of evidence federally seized in a less objectionable but nevertheless unconstitutional course of conduct would be another question, which eventually would require adjudication by the Supreme Court.

Another possible objection to the modification of *Mapp* might rest on the effect that such a decision could have on the host of post-*Mapp* decisions applying other Bill of Rights provisions to state prosecutions.

384. Federal law enforcement officers engaged in vigorous crime investigation for at least 50 years prior to *Terry v. Ohio* without receiving any general judicial sanction for searches or seizures of any kind on less than probable cause. See note 328 *supra*. The *Terry* opinion clearly was designed to accommodate local law enforcement interests. See text accompanying notes 327-42 *supra*.

385. 364 U.S. 206 (1960).

But, as the Supreme Court itself has noted, these other protections rest on independent grounds, many of them more compelling than the basis for the exclusionary rule.³⁸⁶ Most focus on assuring the defendant a fair trial or protecting him from official harassment at a point well past the arrest and evidence-gathering stage of a case.³⁸⁷ The protections that go to a suspect's treatment at the hands of the police are enforced by exclusionary rules developed independently of the fourth amendment.³⁸⁸

The benefits of tinkering with *Mapp* in this fashion are major. Of utmost importance is that the Court would be free from the pressure to adjust fourth amendment standards downward to accommodate the perceived need of state and local law enforcement officials. The Court could again apply the full force of the amendment to federal law enforcement officers, whose needs are much more amenable to the broad and liberal interpretation the amendment should receive.³⁸⁹ Modifying *Mapp* would be a major break with the recent past. It would, however, be a far more modest step than a modification of the exclusionary rule announced in *Weeks*. The roots of that rule go back beyond *Weeks*, to *Boyd* itself. The Supreme Court has never approved the use of illegally seized evidence in a federal criminal trial for any purpose other than impeachment. Those who would decry modifying *Mapp* as a step toward weakening the fourth amendment might well consider the effect of a modification of the exclusionary rule itself. The modification of this rule would surely tear the fabric of the fourth amendment. The alternative suggested here would not only recognize the differences between federal and non-federal law enforcement needs but would leave the fourth amendment essentially intact. In the words of Justice Clark, this alternative could serve to afford to the individual "no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."³⁹⁰

386. See *Stone v. Powell*, 428 U.S. 465 (1976).

387. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (protection against double jeopardy); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (prohibition against cruel and unusual punishment).

388. *Mapp v. Ohio* played no significant part in the Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

389. There would be some significant discrepancies here. The District of Columbia Metropolitan Police and the United States Park Police, whose missions are similar to local law enforcement officers throughout the states, would still be bound by the fourth amendment exclusionary rule. Also, the FBI at times engages in law enforcement that is more reactive than investigatory in nature.

390. 367 U.S. at 660.