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THE HISTORICAL AND PHILOSOPHICAL FOUNDATIONS OF THE EXCLUSIONARY RULE

EDITOR'S NOTE: Recent decisions by the United States Supreme Court have systematically limited the traditional role of the exclusionary rule in implementing fourth amendment protections. The continuation of this trend by the Court in Stone v. Powell and Janis v. United States has raised a number of questions concerning the current scope of the rule and the criteria which should be used in determining its application. The questions raised by these decisions have provided a basis for the trilogy of student commentary which follows. In the first article, the historical origins of the exclusionary rule are critically examined, suggesting some support for the majority views in Stone and Janis. The second contribution to the trilogy focuses more directly on the reasoning expressed in Stone, and to a lesser extent Janis, in an attempt to delineate the rationale utilized by the various members of the Court in deciding whether to apply the exclusionary rule. Finally, the third article represents a critical inquiry into the Court's reasoning in Janis by analyzing the conceptual foundations for the exclusionary rule in the context of the silver platter doctrine.

INTRODUCTION

The exclusionary rule,[1] which has recently been thrust to the forefront of judicial inquiry in *United States v. Janis*[2] and *Stone v. Powell*,[3] has its roots firmly implanted in history. While development of the rule itself is a peculiarly American phenomenon,[4] the principle it

1. The most comprehensive definition of the exclusionary rule is found in Mapp v. Ohio, 367 U.S. 643 (1961), wherein the United States Supreme Court noted that any evidence obtained through an illegal search or seizure in violation of the fourth amendment must be excluded as evidence against the defendant in any subsequent criminal prosecution. *Id.* at 648, 660. *See generally* 8 WIGMORE, EVIDENCE § 2264 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

2. 96 S. Ct. 3021 (1976).

3. 96 S. Ct. 3037 (1976).

4. Of all the major civil and common law countries, the United States is the only nation that has developed a comprehensive exclusionary rule. Other common law jurisdictions have generally followed the traditional English view of admitting all evidence, regardless of whether it has been obtained in an illegal search and seizure. For a comprehensive analysis of the methods by which other countries deal with illegally sized evidence, *see generally* Symposium, *The Exclusionary Rule Under Foreign Law,*

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protects and the justifications for its existence extend to the very origins of Western civilization. To fully understand the emergence of the exclusionary rule as propounded in *Boyd v. United States*,[5] it is necessary to comprehensively examine the philosophical underpinnings of law as developed in England and the United States.

Essentially, two differing philosophies can be delineated as providing the justification and derivation of all law in England and the United States. These philosophies, "positive law"[6] and "natural law"[7] base the derivation of law on completely different foundations. The positive law presents the view that man is the creator of law, while the natural law concept is premised upon the position that all law has always existed, with man merely the discoverer of law rather than its creator. Ordinarily, such discovery is made by governing bodies. In this important aspect of derivation, the development of the exclusionary rule represents an example of the conflict between these varying philosophies. Although the concepts of positive and natural law originated with the Greeks and Romans,[8] their effects are readily observable upon the evolvement of the exclusionary rule.

THE HISTORICAL BASIS OF THE EXCLUSIONARY RULE

While the genesis of the exclusionary rule itself came in the Supreme Court decision in *Boyd*, the theoretical basis for the rule extends to antiquity and the well-documented belief in the need for privacy and personal security from unwelcome and unwarranted intrusion.[9] Al-

52 J. CRIM. L.C. & P.S. 271 (1961); Parker, *The Extraordinary Power to Search and Seize and the Writ of Assistance*, 1 U. BRIT. COLUM. L. REV. 688 (1959).

5. 116 U.S. 616 (1886).

6. Positive law is a concept which emphasizes man's role in the development of law; law that can be altered or amended as the need may arise. The authority for the enactment of positive law lies with law-makers, the governing authorities. *See* T. HOLLAND, THE ELEMENTS OF JURISPRUDENCE 32-40 (1896).

7. The natural law philosophy varies from the positive law theory both in origin and application. Natural law is said to exist as an immutable law governing human rights, transcending any particular governmental or political system. The rights governed by natural law are deemed to have always existed and their implementation occurs only when the law is "discovered" by man, usually in the guise of governmental leaders. Natural law applies indiscriminately to all men and cannot be legitimately contradicted by the positive law enactments of a particular governing system. *See generally* F. POLLECK, ESSAYS IN THE LAW 31-79 (1969); E. GERHART, AMERICAN LIBERTY AND "NATURAL LAW" 23-31 (1953) [hereinafter cited as GERHART]; GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500 to 1800, at 38 (1934).

8. *See* C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 23-66 (Rev. ed. 1947) [hereinafter cited as MCILWAIN].

9. The belief in the need for privacy and security from unwarranted invasions can be traced to the Greeks and Romans. Cicero was one of the first writers to expound

though this need for security was recognized early in history, it received no official governmental endorsement until 1215 A.D. when English barons forced the Magna Carta upon King John.[10] Prior to this development, earlier kings had failed to recognize this right existed because of their reliance upon the higher natural order thesis, wherein only the monarch was the discoverer of law.[11]

The first royal recognition of the positive law theory came with the Magna Carta.[12] King John's capitulation is viewed by some authorities as the first real limitation on sovereign power.[13] Other experts disagree, arguing that this view gives undue emphasis to the Magna Carta's chapter 39.[14] Regardless of the view taken, this chapter has been widely interpreted as the first feeble effort to give written expression to a limited right to privacy and protection from unwarranted intrusion by the sovereign.[15]

With the ascent to power of the Tudors and Stuarts,[16] the concept of limitations on royal leadership flourished in England, although the principle of security from governmental intrusion did not. Henry VII,

on the rights of the governed and the need for privacy when he stated: "What is more inviolable, what better defended by religion than the house of a citizen . . . . This place of refuge is so sacred to all men, that to be dragged from thence is unlawful." N. LASSON, THE HISTORY OF THE FOURTH AMENDMENT 15 (1970) [hereinafter cited as LASSON].

10. For a comprehensive analysis of Magna Carta, its background and importance, *see generally* A. HOWARD, MAGNA CARTA, TEXT AND COMMENTARY 5-8 (1964) [hereinafter cited as HOWARD, MAGNA CARTA]; W. MCKECHNIE, MAGNA CARTA 376 (2d ed. 1914) [hereinafter cited as MCKECHNIE].

11. *See generally* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 176 (2nd ed. 1968); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 168 (1928) [hereinafter cited as Corwin].

12. Prior to Magna Carta, there had been no royal acknowledgment of the rights of anyone but the king to "discover", or indeed, make law. The underlying importance of Magna Carta is that King John was forced to recognize the authority of English barons to engage in positive law-making activities as exemplified in the various sections of the Magna Carta. HOWARD, MAGNA CARTA, *supra* note 10, at 22-23.

13. In particular, this position was endorsed by Lord Coke in INSTITUTES, PART II 1-79 (1662).

14. Chapter 39 states: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgement of his peers and by the law of the land." HOWARD, MAGNA CARTA, *supra* note 10, at 43. Those who feel too much emphasis is given to this particular chapter rely on later acts of Parliament and the civil war of 1688 as the major basis for current English views. While conceding Magna Carta's importance as a whole, they point out that it was a document drawn with specific practical ends in mind and that any construction beyond these ends was not within the draftsmens' intent. *Id.* *See* MCKECHNIE, *supra* note 10, at 375-76.

15. MCKECHNIE, *supra* note 10, at 382.

16. The Tudors reigned from 1485 to 1603 and the Stuarts from 1603 to 1714. R. FRIES & P. HUGHES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND 11,143 (1959) [hereinafter cited as FRIES & HUGHES].

the first of the Tudor kings, had no legitimate claim to the throne; to establish his authority and dominance, he sought the aid of Parliament which responded by passing a series of acts restricting the rights of English citizens.[17] Of these acts, the most damaging to individual security was the Star Chamber Act, which established a secret court to mete out "justice" to enemies, both real and imagined, of the throne.[18] The Act's principle effect was to divide civil and criminal jurisdiction and invest broad powers of repression in state officers, including the authority to invade the privacy and security of suspected criminals.[19]

Although royal authority to make law had been diminished by the limitations of Magna Carta and Henry VII's reliance upon Parliament to establish his authority, kings continued to "discover" law through devices like the Star Chamber. The natural law and positive law philosophies vied for acceptance, with the positive law concept gaining wider recognition among the governed, and the natural higher order theory maintaining predominance among the ruling figures.[20]

The excesses of power exhibited by the Star Chamber reached their height at the time of transition between the Tudors and Stuarts in 1603.[21] During its existence, the Star Chamber's warrants were feared because persons and places in them were not specified, papers and effects were indiscriminantly taken, and all discretion regarding the warrant's implementation was left in the hands of the bearer of the warrant.[22]

17. These included the Act of Succession, the Star Chamber Act, Poynings Law, and the Treasons Act. *Id.* at 12.

18. Created in 1477, this court determined guilt through private hearings by special judges appointed by the king who were not restricted to following common law procedures. This court, tyrannical by its nature, could never rid itself of political bias and acted in each case as a self-serving "judicial" body motivated primarily by presenting the king with the decision he wanted. *Id.* at 13. *See also* 25 SELDEN SOCIETY, SELECT CASES IN THE STAR CHAMBER A.D. 1509-1544 ix-xii (1911); 16 SELDEN SOCIETY, SELECT CASES IN THE STAR CHAMBER A.D. 1477-1509 ix-xi (1902).

19. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 182-84 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

20. With the ascension of King James to the throne, the theory of "divine right" flourished. In practical application, this concept reflected adherence to natural law principles with the king as the "discoverer" of law. This notion of an all-powerful sovereign was shaken by the concessions of Henry VII and Henry VIII. By 1640, during the reign of Charles I, rebellion was already brewing at the time of the Long Parliament. The Parliamentary discontent indicated a movement toward more widespread adoption of positive law concepts wherein Parliament would "assist" the sovereign by its own enactments of positive laws. FRIES & HUGHES, *supra* note 1, at 189-94; E. DELDERFIELD, KINGS AND QUEENS OF ENGLAND 86 (Rev. ed. 1972) [hereinafter cited as DELDERFIELD].

21. *See* 25 ENCYCLOPEDIA AMERICANA 489 (1958).

22. As an example of the lack of specificity required and the great discretion given

Realizing the need for individual security and attempting to protect it by limiting the monarch's power, Parliament rejected the arbitrary treatment fostered by these warrants and, through legislation, ended the Star Chamber's existence,[23] impeaching its chief judge. In one of its articles of impeachment, Parliament specificially mentioned the invasion of security with general warrants as a crime. This was the first *legislative* recognition that private citizens had a right to protection from arbitrary governmental exercises of authority: in particular, the right to be free from abuses of the general warrants.[24] However, the prohibition against general warrants was gradually relaxed and by 1760 the warrants were again in use.[25] By the mid-eighteenth century, the continuing issuance of these warrants by the king, as well as by other members of government, began to attract public criticism.[26]

In an attempt to quell public unrest, King George III decreed that publishing without a royal license was a crime and licenses were refused or withdrawn from publishers who fell into disfavor.[27] The strategy behind this move was simply that if the public was not exposed to essays critical of the general warrants, dissention would gradually dissipate. However, this action prompted further criticism from publishers, newspapermen, and members of Parliament and was soon tested in the courts in the cases of *Wilkes v. Wood*[28] and *Entick v. Carrington*.[29] These cases, which were almost factually identical, were brought within a few years of each other and both decisions reaffirmed the principles of individual security earlier recognized in the Magna Carta and Parliament's actions in abolishing the Star Chamber.

In both cases, the defendants were anonymous authors of pamphlets critical of the general warrants. Through the use of these general warrants, Wilkes was arrested and his papers seized by several of the king's messengers, including an agent of the Secretary of State. In the

the bearer of the warrant, a 1596 Privy Council warrant issued for a printer allowed for the seizure of any articles " 'which image touche' his allegiance with authority to search for and to seize 'all bookes, papers, writinges and other things whatsoever you shall find in his house to be kept unlawfully and offensively, that same maie serve to discover the offence wherewith he is charged.' " LASSON, *supra* note 9, at 26-27.

23. The specific Parliamentary legislation was entitled "An Act Abolishing the Arbitrary Courts." This was one of a series of acts which served to reduce the power of the monarchy generally and the Star Chamber Court specifically. FRIES & HUGHES, *supra* note 16, at 210-11.

24. LASSON, *supra* note 9, at 38-39.

25. FRIES & HUGHES, *supra* note 16, at 305.

26. *See* discussion in Boyd v. United States, 116 U.S. 616, 625 (1886).

27. LASSON, *supra* note 9, at 38-39.

28. 3 Geo. 3, 98 Eng. Rep. 489 (1763).

29. 2 K.B. 275, 95 Eng. Rep. 807 (1765).

ensuing decision, an English court found the general warrants to be illegal, thereby negating the power of the Secretary of State to direct intrusions into individual privacy and security.[30] The opinion held that the Secretary of State's power was in contradiction to the principles of individual security expressed in the English Constitution.[31] In effect, the decision provided additional support for the concept that the rights invaded had their origin in natural law; therefore, they could not be destroyed by the positive law actions reflected in the royal proclamations used to justify the search and seizure of Wilkes' property.

The subsequent *Entick* case produced a similar result. The decision by Lord Camden of the King's Bench Court has been considered one of the cornerstones of the British Constitution.[32] His opinion restated the natural law viewpoint, implicit in *Wilkes*, that there is no power that can lawfully infringe upon the right of individual security.[33] As in *Wilkes*, the *Entick* decision reflected a reaffirmation of higher natural law as the controlling legal authority governing individual security, with the judiciary the "re-discoverers" of this right.[34] This notion contradicted the traditional theory of natural law discovery, which contemplated that ordinarily the "discoverers" were the governing authorities. This confusion of derivation authority occurred again at the inception of the exclusionary rule in *Boyd*.

DEVELOPMENT OF THE EXCLUSIONARY RULE

English developments in protecting individuals from unwarranted invasions of privacy and security had a profound effect upon the percep-

30. 3 Geo. at 18, 98 Eng. Rep. at 498.

31. The *Wilkes* opinion noted that not only was the Secretary of State's exercise of power an outrage against Wilkes himself, but against the English Constitution as well. *Id.* at 2, 98 Eng. Rep. at 490.

32. In *Boyd*, the Supreme Court noted that the *Entick* decision was one of the "permanent monuments" of the British Constitution. 116 U.S. at 626. The other documents frequently cited as "cornerstones" are Magna Carta, Petition of Right, Bill of Rights, and the Act of Settlement. HOWARD, MAGNA CARTA, *supra* note 10, at 28.

33. Specifically, Lord Camden noted: "The defendants have no right to avail themselves of the usage of these warrants since the [Glorious] Revolution . . . we can safely say there is no law in this country to justify the defendants in what they have done . . . ." 2 K.B. at 291, 95 Eng. Rep. at 817.

34. Although the language in *Entick* is somewhat obscure and confusing as to what the court itself thought it was doing, it is readily apparent that, in practical effect, the judiciary was serving the function of rediscoverer of common law principles based upon natural law rights. The confusion on this point is obvious when one reviews the language of *Entick* itself. *See* 2 K.B. at 292, 95 Eng. Rep. at 818. *See also* the Supreme Court's interpretation of *Entick* in Boyd v. United States, 116 U.S. 616, 627 (1886).

tion of American colonists as to their rights, *vis à vis* England, concerning invasions of personal freedoms. Due to this background, the colonists were keenly aware of any infringement upon such liberties.

A substantial limitation upon these rights occurred with a Parliamentary enactment authorizing general warrants known as the writs of assistance.[35] These writs were, in essence, "John Doe" search warrants, permitting the bearer to search virtually any premises at any time. English customs officials in the colonies used these warrants primarily to search warehouses, ships, and private dwellings for contraband.[36] The writs themselves required no oath of affirmation and little specificity regarding the objects of the search.[37]

The implementation of the indiscriminate general warrants prompted a public outcry by the colonists similar to that which occurred earlier in England. Of particular importance was the opposition expressed by James Otis[38] in his forceful arguments against the re-issuance of the writs in 1760.[39] In support of his contention that the writs not be reissued, Otis relied on the natural law principles supporting the English Constitution; in particular, he utilized the concept of judicial review of positive law espoused in Lord Coke's decision in *Dr. Bonham's Case*,[40] where Coke noted that a positive law enactment could be judicially negated when it contradicted a natural law right as expressed in the common law.[41] Specifically, Otis stated that "[a]n Act against the [English] Constitution is void: an Act against natural Equity is void . . . . The executive courts must pass such Acts into disuse."[42] This statement suggested that courts were empowered to change positive

35. The history of the writ in England dates back to 1662. Because of its specialized and limited use as a means of enforcing the customs' laws, however, it did not prompt the adverse reaction in England that it did in the American colonies. New Englanders were especially unreceptive to it because it hampered the smuggling they had undertaken as a result of the Navigation Acts' high taxes. A. HOWARD, THE ROAD FROM RUNNYMEDE 134 (1968) [hereinafter cited as HOWARD, RUNNYMEDE].

36. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 47 (1948).

37. HOWARD, RUNNYMEDE, *supra* note 35, at 133.

38. James Otis, a famous Boston lawyer and participant in the constitutional conventions, represented colonial merchants when the decision whether to re-issue the writs of assistance was being considered by England's representatives in the colonies. *Id.* at 134-35.

39. Otis was especially concerned because he felt that devices such as the writs of assistance placed "the liberty of everyman in the hands of every petty officer." 2 THE LEGAL PAPERS OF JOHN ADAMS 140-42 (Wroth and Zobel ed. 1965) [hereinafter cited as ADAMS].

40. 8 Co. Rep. 107a, 113b, 77 Eng. Rep. 638, 646 (1610).

41. *Id.* at 118a, 77 Eng. Rep. at 652.

42. ADAMS, *supra* note 39, at 127-28.

law that adversely affected natural law rights, which implied that courts had the right to decide what was natural law. However, these arguments were not persuasive and the writs were reissued. At the Constitutional Convention, the memory of the abuses accompanying the implementation of these writs spurred Otis to include language within the fourth amendment protecting against similar invasions.[43] Essentially, the fourth amendment is based on natural law principles;[44] it is not clearly indicated, however, which law derivations may be used for its practical implementation.

Early cases which dealt with the fourth amendment revealed judicial restraint in "discovering" any additional natural law rights protected by this amendment.[45] The courts created only positive law to support the natural law rights delineated in the fourth amendment. The first and most important of these cases was *Commonwealth v. Dana*[46] wherein the defendant was arrested for illegal possession of lottery tickets. Some of the tickets used as evidence by the prosecution were obtained in a search of the defendant's office which, Dana contended, violated his rights.[47] After an analysis of the history of the fourth amendment, the Massachusetts Supreme Court held that only "unreasonable" searches were prohibited by article 14 of the Massachusetts Constitution, which contained language identical to that of the fourth amendment to the United States Constitution. Since the search involved illegal contraband, the court concluded it was not "unreasonable." under article 14.[48]

This decision indicated a relatively strict reading of the article and

43. HOWARD, RUNNYMEDE, *supra* note 35, at 136-37.

44. This view is cogently presented in GERHART, *supra* note 7, at 101-04.

45. *See, e.g., Ex Parte* Jackson, 96 U.S. 727 (1877); Murray v. Hoboken Land Co., 59 U.S. 272 (1855).

46. 43 Mass. (2 Met) 329 (1841). This case was important for two reasons. First, the wording of article 14 of the Massachusetts Constitution had the same basic wording as the fourth amendment to the Federal Constitution:

> XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. art. 14. Secondly, *Dana* was the first case to interpret this language.

47. 43 Mass. (2 Met.) at 334.

48. Specifically, the court noted that article 14 "does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.'" 43 Mass. (2 Met.) at 336.

suggested judicial reliance on positive law beliefs. This conclusion appears inescapable in view of the court's holding that positive law enactments could be used to outline reasonable searches which didn't contradict the express language of the article.[49]

Subsequent to *Dana*, the next major judicial discussion of fourth amendment guarantees occurred in *Boyd*. Events leading up to this decision developed from the passage of an Act in 1863 to control fraud upon the customs department. This Act, passed at a time of national unrest and eventually declared unconstitutional,[50] attained its final form in 1874.[51] Essentially, it mandated the production of suspected smugglers' records and assumed guilt upon the failure to produce them. The Act represented an over-extension of the positive law concept to the point where it conflicted with the natural law guarantees of the fourth amendment. It was this conflict the court examined in *Boyd*.

Factually, *Boyd* presented a situation where the defendant was forced to produce invoices which incriminated him by revealing that he had smuggled glass into the country without paying the required tariff charges. Boyd revealed the invoices and then challenged the constitutionality of the Act on the basis of the fourth and fifth amendments.[52] In addressing the defendant's contention, the Court first concluded that although the problem it confronted involved both the fourth and fifth

49. *Id.*

50. 116 U.S. at 638. See note 51 *infra*.

51. The original Act of March 3, 1863, ch. 76, 12 Stat. 737 contained a section which stated, in pertinent part, that where fraud on the revenue had been attempted or actually committed

> [a district court] judge shall forthwith issue his warrant, directed to the collector of the port at which the merchandise in respect to which said alleged frauds have been committed or attempted has been imported or entered, directing said officer, or his duly authorized agents or assistants, to enter any place or premises where any invoices, books, or papers relating to such merchandise or fraud are deposited, and to take and carry the same away to be inspected; and any invoices, books, or papers so received or taken shall be retained by the officer receiving the same, for the use of the United States, so long as the retention thereof may be necessary, subject to the control and direction of the Solicitor of the Treasury.

12 Stat. at 740. Section 8 of this same Act stated:

> That if any person shall wilfully conceal or destroy any invoice, book, or paper relating to any merchandise liable to duty . . . or shall at any time conceal or destroy any such invoice, book or paper, for the purpose of supressing any evidence of fraud therein contained, such person shall be deemed guilty of a misdemeanor . . . .

Id. Finally, Congress passed the Act of June 22, 1874, ch. 391, 18 Stat. 186. Section 5 of the Act stated that "if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure to produce the same shall be explained to the satisfaction of the court." 18 Stat. at 187.

52. 116 U.S. at 621.

amendments,[53] it was primarily a fourth amendment controversy.[54] The Court reasoned that to force the accused to produce incriminating documents was analogous to compelling him to be a witness against himself and therefore was equivalent to an unreasonable search and seizure.[55] The Court then concluded that any such unreasonable search was void because it contradicted natural law concepts of individual freedom;[56] hence, any unreasonable search was also unconstitutional.[57] Finally, the Court noted that any materials found through the unreasonable search were both unconstitutionally acquired and defective as evidence.

The *Boyd* Court based its decision on the principles of natural law as it thought they had been interpreted by the draftsmen of the Constitution and the fourth amendment.[58] Relying upon what it believed to be a well-known principle,[59] the Court construed the meaning of "unreasonable" as based on natural law. The term "unreasonable" was of constitutional dimensions, according to the Court, because of its inclusion in the language of the fourth amendment.[60]

In effect, the Supreme Court held that any unreasonable search was unconstitutional because it contravened the natural law right of personal security outlined in the fourth amendment. In implementing this holding, the Court simply utilized the exclusionary rule as the

53. In expressing this conclusion, the Supreme Court stated its perception of the nexus between the fourth and fifth amendments:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. *In this regard the Fourth and Fifth Amendments run almost into each other.*

116 U.S. at 630 (emphasis added).

54. *Id.* at 622.

55. *Id.* at 633-35.

56. *Id.* at 630, 632, 635.

57. *Id.* at 635.

58. In reference to this point, the Court focused upon Lord Camden's decision in *Entick* and how it believed the founding fathers had considered *Entick* in drafting the Constitution.

> Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden 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?

Id. at 630. Since Lord Camden's opinion may be interpreted as providing strong support for the natural law position that certain rights exist which cannot be destroyed or curtailed by positive law enactments, it is reasonable to conclude that the Court in *Boyd* believed that such concepts had also been considered in the adoption of the American Constitution. *See* notes 32-34 *supra* and accompanying text.

59. 116 U.S. at 626.

60. *Id.*

mechanism to protect citizens against unreasonable searches. However, in developing this mechanism, the Court established the rule as one also founded in natural law, that is, the Constitution.

To justify this conclusion, the Court had to rest the rule on the same natural law principle that underlies the fourth amendment. That principle was that any invasion of a man's personal security was a violation of the natural law as propagated by the Constitution's founding fathers.[61] With this reasoning, it was logical for the Court to assume that any rule protecting a constitutional or natural law right would also have as its basis the same constitutional or natural law basis as the right it was shielding.[62] In this matter, the Court reached the conclusion that the exclusionary rule had its basis in natural law as expressed in the Constitution.

Two judicial philosophies held by the Court aided it in reaching its decision. The Court noted that language in the Constitution should be liberally construed to avoid encroachment upon individual liberties and its belief that it was the Court's duty to be vigilant in guarding the constitutional rights of citizens.[63] By claiming both the right and the duty to protect the natural law rights outlined in the fourth amendment, the Court further supported its creation of the exclusionary rule.

Although the Court's reasoning had some logical appeal, it was not the sole path available for resolving the issue presented it. It is possible to understand how the Court reached the conclusion that an unreasonable search was unconstitutional; however, it is more difficult to follow its reasoning for creating a constitutionally based exclusionary rule. If the Court had adhered to the well-recognized Supreme Court tradition of deciding issues on as narrow a basis as possible, the Court could not have logically based the exclusionary rule on natural law constitutional grounds, because the Court's decision that the search was unreasonable in the *Boyd* situation would have obviated the need to have found any further basis for the decision. It is evident that plausible alternatives existed in resolving the *Boyd* issues.

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61. *Id.*
62. *Id.* at 633.
63. In explaining this portion of the opinion, the Court noted:
> [C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id. at 635.

One realistic alternative to the *Boyd* decision was presented in the concurring opinion of Justice Miller in *Boyd*. Justice Miller concluded that the Act was void solely on the basis of the fifth amendment protections against self-incrimination. He noted that the act itself did not authorize any search and seizure actions but was directed only at requiring the defendant to produce the incriminating documents himself.[64] Had the majority adhered to this position, it would have avoided the development of any wide-reaching exclusionary rules and could have decided the case more narrowly.

The other cogent possibility was to base the exclusionary rule on the narrower and more flexible positive law thesis, rather than on a broad natural law constitutional basis. This approach has several philosophical and practical advantages which the natural law theory does not possess.

One of the fundamental advantages concerns the manner by which positive law changes can be harmonized with constitutional protections as expressed in the fourth amendment. The reasonableness of this conclusion can be seen when one considers the nature and origin of fourth amendment protections. There is no language in the fourth amendment which expressly mandates development of an exclusionary rule of constitutional proportions. The amendment itself does not suggest there is a natural law granting all citizens an inalienable right to have evidence seized in an "unreasonable" search excluded in any subsequent criminal proceedings. Thus, the argument that the exclusionary rule had a constitutional basis was somewhat presumptive and arguably erroneous.[65] Moreover, to raise the rule to a constitutional level accords it a status which mandates its application in *every* case; a status that results in a loss of judicial discretion available under a more flexible rule.

64. *Id.* at 639.

65. It is clear that in other situations the Court has found that certain rights have a constitutional basis even though not expressly stated in the Constitution. Such rights have been developed as "penumbras" of specific, expressed constitutional rights. This has been particularly true in the privacy area. For a comprehensive discussion of these penumbral rights, *see Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). The logical conclusions in *Griswold* suggest that such penumbral rights could have been inferred to exist in *Boyd* in the guise of the exclusionary rule. Normally, however, penumbral rights are found where no alternative method by which to protect the interests involved exists. In *Boyd*, non-constitutionally-based alternatives existed in the form of possible positive law enactments, such as making the exclusionary rule an evidentiary rule only to be applied with discretion by the trial judge, or leaving resolution of the matter to the legislature.

The *Boyd* Court could have provided a meaningful method by which to protect fourth amendment guarantees through less drastic positive law means than a comprehensive exclusionary rule. One primary method would have been to accord the exclusionary rule the status of an evidentiary rule. Lower federal courts could then apply the rule with some degree of discretion under general guidelines provided by the Supreme Court under its supervisory powers.[66] This procedure, in accord with positive law theories, would have provided protection for fourth amendment violations while avoiding the creation of a situation wherein the protective mechanism (the constitutionally-based exclusionary rule) would be indiscriminately applied without regard to the facts of a particular case.

A second positive law method would have been to merely outline the constitutional problem involved, deferring to the legislature for its protective law enactment to complement the natural law right. The Court in *Boyd* recognized this as an alternative but refused to acquiesce to the legislature.[67] Following either of these positive law alternatives would have provided the Court with a better *logical* basis upon which to develop ancillary protective measures to guard against unreasonable searches and seizures.

CONCLUSION

The fourth amendment has its historical origins in natural law. A fundamental misreading of the development of protections against un-

66. The Supreme Court may effectuate protections for constitutional rights without creating constitutionally-based auxilliary rights. The Court may enact protective mechanisms to govern lower federal court procedures under its supervisory powers. This authority is clearly expressed in McNabb v. United States, 318 U.S. 332 (1943) wherein Justice Frankfurter stated:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. . . .
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.

Id. at 340-41. Arguably, the Court in *Boyd* could have exercised this supervisory power and created non-constitutional procedural and evidentiary rules for lower federal courts to apply to protect against the utilization at trial of evidence obtained in an unreasonable search and seizure.

67. Regarding this point, the Court in *Boyd* concluded that due to the "vast accumulation" of its business, the legislature would not have a sufficient opportunity to enact timely legislation to deal with the issue presented in *Boyd* and, therefore, the Court had to resolve the controversy. 116 U.S. at 635.

reasonable search and seizure resulted in the *Boyd* Court's conclusion that the exclusionary rule was also premised upon the natural law as reflected in the Constitution and the Bill of Rights. This confusion over the derivation of the rule and its proper application has plagued the Court in subsequent efforts to define the appropriate scope of the rule. Problems implicit in the exclusionary rule will persist until the Court finally determines the philosophical basis on which the rule is premised and how it may equitably be applied to satisfy fourth amendment guarantees against unreasonable search and seizure.

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