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# Fourth Amendment Remedies in Civil Proceedings

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If *Landry* is allowed to stand, it would mean that municipal and parish governing bodies have a power possessed by no other officer or administrative body, and may disregard the express mandate of the 1970 amendment to section 3306. As interpreted by the court, the challenged statutory procedure permits a municipal or parish council to command the levying of a special assessment when, in its own opinion, there is the requisite benefit to the adjoining property owners. By sanctioning the order allowing the levying of the special assessment, the court, in effect, approved action taken without hearing, without evidence, without oral argument, and without opportunity to learn the basis thereof. Since such ex parte action was not deemed an abuse of the Parish Council's power, some question arises over what the court would deem an abuse of discretion or how this could be established in the absence of a hearing or the opportunity to present evidence. The infirmities of this holding become even more apparent upon realization that the administrative body's findings are not subject to general judicial review. The administrator's opinion is final upon this fundamental question of requisite benefits unless what the court denominates "manifest and palpable abuse of power" can be shown to exist. Absent such a showing, the administrative body may alone be cognizant of the reasoning behind its final opinion to levy a special or local assessment. Such authority, however beneficently exercised in one case, could amount to a finding by administrative fiat in another. Certainly, such authority is inconsistent with rational justice and invites the arbitrary exercise of power.

*James Marshall Jones, Jr.*

## FOURTH AMENDMENT REMEDIES IN CIVIL PROCEEDINGS

On June 2, 1975, two detectives of the Jefferson Parish Sheriff's Office visited the defendant adult book store to obtain information to support a request for a search warrant. An affidavit signed by the officers described by name various sexual activities depicted in the books and movies displayed by the store. However, the search warrant which was subsequently issued lacked the specificity necessary to give sufficient gui-

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review of administrative determinations could be predicated upon expanded notions of manifest error rather than the substantial evidence or the "arbitrary and capricious" standards. Where an administrative agency is not within the Act, reliance may only be placed upon the limits of procedural due process. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

dance to the officers conducting the seizure regarding which books and movies were legally considered to be "pornographic."[1] This resulted in the officers themselves making ad hoc obscenity determinations during the seizure in deciding which of the materials on display were included within the scope of the warrant.[2] Over one year after the seizure, the Parish of Jefferson filed a civil injunction suit to abate the nuisance of obscenity alleged to exist at the store. The defendant's motion to suppress the evidence was denied by both the trial court and the court of appeal. The Louisiana Supreme Court held that the evidence should be suppressed because the seizure of printed matter violated first amendment freedoms and was therefore "unreasonable" under fourth amendment standards.[3] *Parish of Jefferson v. Bayou Landing Limited, Inc.*, 350 So. 2d 158 (La. 1977).

When confronted with the question of the constitutionality of police procedures used to procure evidence in the course of an obscenity prosecution, courts should scrutinize such conduct in light of its effect upon the value of freedom of expression protected by the first amendment.[4] Methods used to regulate obscenity include seizures for evidence in the context of both criminal and civil proceedings.[5] In order lawfully to

1. The search warrant described the objects intended for seizure as " 'pornographic material to wit: Magazines, movies . . . .' " Parish of Jefferson v. Bayou Landing Limited, Inc., 350 So. 2d 158, 160 (La. 1977). The issuing magistrate had failed to examine any of the publications before signing the warrant but relied on the "conclusory assertions" of the detectives that the publications were obscene. This was the fatal attribute of the warrant condemned in *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Missouri*, 367 U.S. 717, 732 (1961).

2. In addition to other miscellaneous items, some two hundred books and seventeen movies were seized. Parish of Jefferson v. Bayou Landing Limited, Inc., 350 So. 2d 158, 161 (La. 1977). Consequently, the first amendment was violated by removing large quantities of printed materials from public circulation before the obscenity issue had been litigated. *See* A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).

3. Even after deciding that the evidence should have been suppressed the court saw fit to determine the constitutional validity of the injunction as amended by the court of appeal. The court found that it did not comport with constitutional requirements of specificity and thus operated as a "prohibited prior restraint upon the right of free speech." Parish of Jefferson v. Bayou Landing Limited, Inc., 350 So. 2d 158, 165 (La. 1977). In effect, both the injunction and the procedure used to obtain the injunction were overturned.

4. *See* Roaden v. Kentucky, 413 U.S. 504 (1973); United States v. Santiago, 424 F.2d 1047, 1048 (1st Cir. 1970); Burnett, *Obscenity: Search and Seizure and the First Amendment*, 51 DENVER L.J. 41 (1974).

5. Both *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Missouri*, 367 U.S. 717 (1961) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964), concerned statutes in the nature of in rem proceedings which directed the police to seize obscene material for destruction by burning or otherwise. *Roaden v. Kentucky*, 413 U.S. 504 (1973) and *Heller v. New York*, 413 U.S. 483 (1973), concerned seizures for evi-

wield the search and seizure power when the object of the seizure is a book, movie, or other medium of human expression potentially within the parameters of the first amendment, the state must guarantee that the seizure does not effect a restraint upon constitutionally protected (*i.e.*, non-obscene) material.[6] Whether the state should be required to forego the use of evidence obtained through an abuse of the seizure power has been a continuing source of controversy among fourth amendment scholars.[7]

In circumscribing the search and seizure power, the fourth amendment does not provide for the imposition of a specific sanction or remedy in the event of a violation.[8] Suppression of the evidence as a tool for effectuating the guarantees of the fourth amendment had its genesis in the landmark case of *Boyd v. United States*[9] in 1886, but it was not until *Mapp v. Ohio*[10] in 1961 that the so-called exclusionary rule remedy was deemed to be inherent in the constitutional framework of search and seizure. However, application of such a drastic remedy has been tempered by the refusal of the current United States Supreme Court to make exclusion of the evidence the automatic result of all illegal searches and seizures.[11] Recent decisions indicate that the litigation must involve the

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dence incident to arrests for violation of a criminal obscenity statute. In the instant case, the seizure for evidence preceded a civil action for injunctive relief. *See also* Kingsley Books, Inc., v. Brown, 354 U.S. 436, 441 (1957).

6. In *Roth v. United States*, 354 U.S. 476 (1957), the Court held that obscenity is not within the area of constitutionally protected freedom of speech or press.

7. As Justice Blackmun observed in *United States v. Janis*, 428 U.S. 433, 446 (1976), "[t]he debate within the Court on the exclusionary rule has always been a warm one." *See* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L. Q. 621; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

8. "While the existence of a constitutional guarantee against unreasonable searches and seizures is beyond question, the Constitution is silent concerning remedies in the event of a breach." Note, *Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. REV. 139, 140 (1977). Historically, the admissibility of the evidence was not affected by the fact that it was unlawfully seized. Relief in the form of a civil action for trespass was available against the officials committing the impropriety. Only later did exclusion of the evidence emerge as the preferred remedy in criminal cases.

9. 116 U.S. 616 (1886).

10. 367 U.S. 643 (1961). *See* Note, *Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. REV. 139 (1977).

11. In construing the reach of the fourth amendment, some earlier United States Supreme Court cases made the claim that fourth amendment "protection reached all alike, whether accused of crime or not." Weeks v. United States, 232 U.S. 383, 392 (1914). *See also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). However, the

potential for a criminal penalty, or something equivalent thereto in the context of a civil proceeding, in order to justify invoking the rule.[12] In *One Plymouth Sedan v. Pennsylvania*,[13] the state asserted that a fourth amendment violation in the course of securing evidence for a civil forfeiture proceeding did not warrant suppression of that evidence at trial. The Court saw little difference between depriving an accused of his property or subjecting him to a fine or incarceration and for this reason characterized a forfeiture as essentially "criminal in nature" before insisting upon the applicability of the exclusionary remedy. Thus the Court sought to classify the proceeding and determine the necessity for exclusion by analyzing the actual consequences of an adverse judgment upon the accused.[14]

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exclusionary rule was never explicitly referred to as the universal means by which this fourth amendment protection would be realized. Until 1976, the Court had not considered the issue of exclusionary rule applicability to civil cases (see notes 17-19 and accompanying text, *infra*). *See* Note, *Application of the Fourth Amendment's Searches and Seizures Clause in Civil Actions*, 8 N.E.L. REV. 67 (1972).

12. The most recent and significant statement of the current Court's view of the exclusionary rule is *United States v. Calandra*, 414 U.S. 338 (1974). The majority opinion declared that "[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the government seeks to use such evidence to incriminate the victim of the unlawful search [citations omitted]. This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest when the government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Id.* at 347-48.

13. 380 U.S. 693 (1965).

14. Justice Goldberg stated that "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700. One could argue that the same observation could be made about the injunction suit of the instant case pursuant to Title 13, Section 4711 of the Louisiana Revised Statutes (1960). An injunction restraining the defendant book store from conducting business would be equally onerous. However, this logic would seem to be implicitly rejected in *United States v. Janis*, 428 U.S. 433 (1976) (see text at note 17, *infra*). In *Janis*, the defendant's motion to suppress illegally seized evidence in a civil tax proceeding was denied; an adverse judgment at trial would have subjected him to a $90,000 penalty. In both *Janis* and *United States v. Calandra*, 414 U.S. 338 (1974) (see note 12, *supra*), the Court attached special significance to the fact that the proceeding did not concern the imposition of a criminal sanction. Presumably, this means incarceration, for the size of the penalty in *Janis* would seem to exclude any other interpretation. It can not be seriously doubted, however, that depending upon the life of the injunction or the size of the fine, either could be viewed as being commensurate with a criminal penalty. It seems anoma-

Many lower courts have freely extrapolated from the *Mapp* decision the concept of applying the exclusionary rule to the fruits of all search and seizure violations,[15] while others have restricted its use to circumstances identical to those of *Mapp*—a criminal prosecution where the government was responsible for the illegal seizure.[16] In 1976, the Court addressed the question whether suppressing evidence was appropriate in some civil proceedings. In *United States v. Janis*,[17] the Los Angeles police seized certain wagering records and cash from a suspected bookmaker. The motion to suppress the evidence in the criminal prosecution was granted because of the warrant's constitutional defects. The wagering records were then supplied to the Internal Revenue Service which levied upon the cash seized in partial satisfaction of federal wagering excise taxes. Since the assessment was based upon evidence procured through an infringement of fourth amendment rights, the lower courts ordered the evidence suppressed in the civil proceeding.[18] The Supreme Court reversed, with Justice Blackmun observing that "[i]n the complex and turbulent history of the rule, the Court never has applied it to ex-

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lous to use this reasoning in order to extend the reach of the exclusionary rule from criminal cases to civil forfeiture cases, and then to ignore it when the victim of a massive civil penalty contends that the evidence should have been suppressed. *See also* Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975).

15. *See* Del Presto v. Del Presto, 92 N.J. Super. 305, 223 A.2d 217 (1966); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (1966). For civil cases with criminal aspects, *see* United States v. Bland, 261 F. Supp. 180 (N.D. Ohio, 1966); Carson v. State, 221 Ga. 299, 144 S.E.2d 384 (1965); Kassner v. Fremont Mutual Insurance Co., 47 Mich. App. 264, 209 N.W.2d 490 (1973).

16. *See* Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975); NLRB v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970); Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481 (1964). In *Honeycutt*, the defendant insurance company sought to introduce evidence obtained by fire department officials in warrantless searches of the plaintiff's house after a recent fire. The defendant refused to pay the insurance claim in the belief that Honeycutt had set the fires himself, a supposition substantiated by the results of the fire department investigation. Honeycutt contended that the fruits of the unlawful intrusion were inadmissible, but the court ruled otherwise while acknowledging the dearth of precedent upon which to rely. The court reasoned a fortiori from *United States v. Calandra*, 414 U.S. 338 (1973), where the exclusionary rule was held inapplicable to grand jury proceedings, and *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), where it was deemed necessary to classify a civil forfeiture proceeding as criminal to permit the exclusionary rule to be invoked. *See also* Note, *The Applicability of the Exclusionary Rule to Civil Cases*, 19 BAYLOR L. REV. 263 (1967).

17. 428 U.S. 433 (1976).

18. *Janis v. United States*, 73-1 CCH U.S. Tax Cas., ¶ 16,083, at 81, 392 (1973), *aff'd*, U.S. Ct. of App. (9th Cir.) (by unpublished memorandum).

clude evidence from a civil proceeding, federal or state."[19] Nevertheless, the Court confined its holding in *Janis* to the situation where the sovereign attempting to introduce the evidence at trial was not the sovereign who had obtained the evidence through an abuse of the seizure power. The validity of this distinction between intersovereign and intrasovereign violations may appear to be superficial from the viewpoint of the defendant, yet the Court believed it to be a pivotal factor in assessing the necessity for the exclusionary remedy. Since the purpose of the exclusionary rule is to deter those responsible for upholding the law from acting outside of the law in the process, the punishment of exclusion should operate only against the agents of the sovereign committing the violation. The deterrent effect is thus attenuated in an intersovereign situation such as *Janis* and the attenuation is further augmented where the proceeding is one to enforce merely the civil law of the other sovereign. There is a balancing process therefore inherent in the application of the rule. The detriment to law enforcement and society in general resulting from exclusion of reliable evidence must be considered in light of the probability of deterrence and nature of the sanction to be imposed upon the defendant. It is unclear whether this rationale will support exclusion under the circumstances of the instant case where the sovereign guilty of a fourth amendment breach seeks to use the evidence in a civil proceeding.

The chief Supreme Court cases dealing with state regulation of obscenity include both civil and criminal prosecutions. In two civil forfeiture proceedings, *Marcus v. Search Warrants of Property*[20] and *A Quantity of Copies of Books v. Kansas*,[21] the constitutional analysis turned upon findings of a fourteenth amendment due process violation in the event that first amendment rights had in any way been impaired by the methods used to seize the allegedly obscene material.[22] The

19. 428 U.S. at 447.

20. Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Missouri, 367 U.S. 717 (1961).

21. 378 U.S. 205 (1964).

22. In *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Missouri*, 367 U.S. 717 (1961), the issuing magistrate did not scrutinize the material and issued an overly broad warrant which allowed the seizing officers to make spontaneous obscenity determinations during the seizure. Justice Brennan eloquently expounded upon the history of governmental search and seizure abuses but never referred to the fourth amendment as the controlling principle for condemning the procedure employed by Missouri. The thrust of the Court's rationale was directed toward the protection of free speech assured against state abridgement by the due process clause of the fourteenth amendment. The Court iterated that for search and seizure purposes printed material must be treated differently from other objects of seizure since the added concern is to avoid suppression of

Court did not consider the seizures in terms of their evidentiary ramifications and an exclusionary remedy via the *Mapp* rationale,[23] for in neither *Marcus* nor *Quantity* was there a discussion of fourth amendment violations and applicable remedies.[24] Instead, the Court expressed concern that the seizure for evidence in the forfeiture action was so massive that it operated as an ex parte judgment which took printed matter out of circulation without a previous adversary hearing on its alleged obscenity. Thus, the statutory procedure as applied "lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled."[25] As a result, the lower court judgments based on the illegal seizure were vacated.

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non-obscene publications entitled to constitutional immunity. The Court then recognized that Missouri's use of the search and seizure power to suppress obscene publications "involved abuses inimical to protected expression". *Id.* at 730. The actual holding of *Marcus* was clearly framed in terms of the fourteenth amendment in that the court declared that the due process violation—non-obscene material had not received the constitutional protection to which entitled—had "infected the proceedings." *Id.* at 738. A "strikingly similar" statute was involved in *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964). However, in an attempt to comply with *Marcus*, the district attorney showed several books to the issuing magistrate and the warrant itself was limited to thirty-one named titles. Nevertheless, over seventeen hundred books were seized before an adversary hearing was held on the obscenity question. Justice Brennan, again writing for the majority, stated that "[a] seizure of all copies of named titles is indeed more repressive than an injunction prohibiting further sale of the books." *Id.* at 210.

23. See notes 8-10 *supra*, and accompanying text. A concurring opinion in *Marcus* by Justices Black and Douglas, however, pointed out that a similar result could be reached under the newly formulated exclusionary rule, 367 U.S. 717, 738 (1961). Obviously, their broad conception of the rule was not held by the majority who chose to base their decision to vacate the judgment on the due process violation. In *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), a civil forfeiture proceeding like *Marcus* and *Quantity*, the exclusionary rule was held applicable because the judgment's functional effect would have been similar to a criminal sanction. If this argument had been forwarded in *Marcus*, decided the same day as *Mapp*, the exclusionary rule would conceivably have been utilized. This clearly would have signified that the rule was intended to apply in criminal or civil proceedings whenever the government attempted to deprive an individual of liberty or property after violating his fourth amendment rights.

24. In *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964), the Court explicitly stated that it did not find it necessary to pass on the defendant's contention that his right against unreasonable search and seizure had been violated. *Id.* at 209 n.2. In an effort to maintain continuity with the decision in *Marcus*, the Court ruled that a due process violation had "infected the proceeding." *Id.* at 213. Simply stated, the Court declared that it would not condone the trammeling of first amendment rights by state officials zealous to act against obscene material.

25. Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Missouri, 367 U.S. 717, 731 (1961).

In *Roaden v. Kentucky*,[26] the Court had occasion to examine more explicitly the applicability of fourth amendment search and seizure doctrine to obscenity cases, but in the context of a criminal prosecution. Chief Justice Burger explained the process for judging the constitutional validity of a seizure of printed matter as incorporating first amendment requirements in satisfaction of fourth amendment standards of reasonableness. Any seizure that failed to "hurdle" the reasonableness standard was likely to render the evidence inadmissible.[27] Resort to the fourth amendment rather than the fourteenth and the allusions to admissibility of the evidence was appropriate here because the criminal law of search and seizure is based squarely upon fourth amendment principles rather than due process grounds. The only unique feature of *Roaden* was that the object of the seizure was conceivably within the penumbra of first amendment protection.

In the instant case the Louisiana Supreme Court's decision to suppress unconstitutionally seized evidence in a civil injunction proceeding presents a curious mixture of the rationales of these past cases. Justice Dixon began the inquiry by asking: "(1) Are the constitutional prohibitions against unreasonable search and seizure applicable to this proceeding, and (2) If so, did the seizure of the materials pursuant to the warrant comport with constitutional requirements."[28] Thus, the initial portion of the opinion is devoted to establishing the fact that the circumstances gave rise to a fourth amendment question. The court relied on *Camara v. Municipal Court*[29] and *See v. City of Seattle*,[30] along with *Marcus* and *Quantity*, to support the proposition that the type of proceeding is not dispositive of fourth amendment rights. However, *Camara* and *See* do not deal with the admissibility of evidence even though they may extend the reach of the fourth amendment to some civil proceedings (*i.e.*, where the government is a party to the search).[31] Their importance lies in their treatment of the fourth amendment as the delimiter of governmental interference with individual privacy regardless of the purpose of the inves-

26. 413 U.S. 504 (1973).

27. *See* Lee Art Theater v. Virginia, 392 U.S. 636 (1968).

28. 350 So. 2d at 161.

29. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967).

30. 387 U.S. 541 (1967).

31. The plaintiffs in *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), sought to enjoin criminal prosecution against them for refusal to permit warrantless entry of city health inspectors. The cases are not precedent for suppression of the evidence in a civil proceeding.

tigation.[32] After citing *Marcus* and *Camara* for the premise of fourth amendment applicability to civil proceedings, the court analogized from the fourth amendment analyses of other obscenity cases similar to *Marcus*, particularly *Roaden* despite its criminal law context, to conclude that the defendant's remedy was suppression of the evidence. Reliance on these cases thus led the court to grant the same remedy for a fourth amendment violation in an injunction suit as in a criminal prosecution.

The court did not employ exclusionary rule language or reasoning from exclusionary rule cases. The opinion nevertheless embraces a fourth amendment exclusionary remedy instead of concluding that the seizure had violated due process of law in its denial of constitutional protection to non-obscene material. Although the fourth amendment clearly applies to some civil proceedings,[33] the fact remains that the United States Supreme Court has never suppressed the evidence in a civil case as a result of a fourth amendment violation. The decisions in both *Marcus* and *Quantity*, as in *Roaden*, noted the peculiar first amendment ramifications of a seizure of printed matter. Notwithstanding the fact that a seizure was involved in each, the concern of the first two cases was to assure that the procedure employed to regulate obscenity comported with constitutional requirements of due process. Essentially, the Court struck down seizures of printed matter before the issue of its constitutional protection under the first amendment had been fairly determined. The Court obviously realized that it could reach a result similar to exclusion in civil proceedings under due process grounds without having to broaden the exclusionary remedy to include all situations involving an illegal seizure. In *Roaden* the identical issues were decided on different grounds, the Court preferring to base its opinion on classical fourth amendment doctrine relating to the reasonableness of the seizure.[34]

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32. In *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), the Court stated: "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasion by government officials." *Id.* at 528. *See also* Mapp v. Ohio, 367 U.S. 643, 650-57 (1961); Wolf v. Colorado, 338 U.S. 25, 27 (1949); Note, 30 WASH. & LEE L. REV. 133 (1973). The Louisiana Supreme Court's discussion of the fourth amendment in *Bayou Landing* did not distinguish between governmental and non-governmental searches and seizures.

33. See notes 28-32, *supra*, and accompanying text.

34. In *Heller v. New York*, 413 U.S. 483 (1973), the defendant, in reliance on *Quantity* and *Marcus*, contended that the seizure of a film without a prior adversary hearing violated the fourteenth amendment. The fourth amendment approach of *Roaden* was not employed since the defendant in *Heller* had neglected to file a motion to suppress the evi-

The only relevance of *Roaden* to the circumstances of the instant case is its discussion of the first amendment protection to be accorded printed matter. The court in *Bayou Landing* apparently adopted *Roaden*'s fourth amendment approach and in so doing endorsed a fourth amendment remedy whose applicability to civil proceedings is open to question. Justice Dixon's inquiry to determine whether the seizure was unreasonable by established constitutional standards included a succinct examination of the interplay of fourth and first amendment rights. The seizure was found unreasonable because it amounted to a restraint of printed matter not yet judicially determined to be obscene. However, the court failed to consider the problem of which remedies were then available, and as a matter of reflex suppressed the evidence. Thus, the dual reliance on *Camara* and *Marcus* for fourth amendment precedent in the area of civil proceedings and on *Roaden* for gauging the unreasonableness of the seizure and, presumably, the admissibility of the evidence, enabled the court to reach its conclusion. The entire issue of fourth amendment remedies was avoided by suppressing the evidence immediately upon finding a deviation from fourth amendment principles.

It may well be the view of the current Louisiana Supreme Court that exclusion should be the remedy for any fourth amendment violation involving agents of the government. The policy of deterrence would be thus served without resort to an arbitrary distinction between civil and criminal proceedings. Where the ultimate effect upon the defendant, be it incarceration or enjoining him from conducting his livelihood, is severe enough to balance the scales in favor of exclusion, there should be no hesitancy to invoke the remedy. However, since the opinion does not afford any guidelines, there is the danger that it will be cited as precedent for excluding evidence whenever there is an illegal seizure without any consideration of government involvement or nature and severity of the penalty resulting from a judgment adverse to the aggrieved party.[35] To

dence. The Court by its extensive discussion recognized the legitimacy of a due process claim separate and apart from any fourth amendment issue that the defendant had failed to raise. Under *Heller* and *Roaden*, then, it appears that a criminal defendant may oppose a seizure on either fourth amendment or due process grounds. A remedy is available in each case if there has been unconstitutional state action. However, in civil litigation, under the authority of *United States v. Janis*, 428 U.S. 433 (1976), a plea for relief under the fourth amendment, as in *Bayou Landing*, may be met with procedural and substantive obstacles that a due process claim would avoid.

35. It is important to note the inconsistency between *Janis* and *Calandra* on the one hand, and *One Plymouth Sedan* on the other. The Warren Court in *One Plymouth Sedan* emphasized the actual penalty to be suffered by the defendant irrespective of any technical

this extent, clarification in this area of the law is essential.

*Mark B. Meyers*

## MATERNAL PREFERENCE AND THE DOUBLE BURDEN: BEST INTEREST OF WHOM?

Three years after the plaintiff and the defendant were married, the plaintiff was granted a separation from bed and board based on abandonment. He agreed to an award of custody of his eighteen-month-old daughter to the defendant. After a year and sixty days from the judgment of separation, the defendant was awarded a divorce, but was denied custody of her child after a showing that she had been living with another man in the presence of the child for four months. Three months later, after the defendant married her lover, she brought suit and was granted custody by the trial court. The Third Circuit Court of Appeal affirmed, and *held* that the mother was not required to meet the "double burden" rule and that under the maternal preference rule she was entitled to custody. *Bushnell v. Bushnell*, 348 So. 2d 1315 (La. App. 3d Cir. 1977).

Louisiana Civil Code articles 146 and 157 respectively control child custody awards pending suit for separation or divorce[1] and after suit for separation or divorce.[2] Article 146 dictates that provisional custody

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labeling of the proceeding as civil or criminal. A lynchpin of the *Janis* and *Calandra* decisions of the Burger Court was that the purpose of deterrence for which the exclusionary rule was formulated is not sufficiently enhanced to overcome the need to permit the introduction of otherwise trustworthy evidence where the government's abuse of the seizure power against a defendant would result merely in a civil penalty. On the whole, the view espoused in *One Plymouth Sedan* is far less predictable but exceedingly more just. See note 14, *supra*.

1. LA. CIV. CODE art. 146:
   If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the wife, whether plaintiff or defendant; unless there should be strong reasons to deprive her of it, either in whole or in part, the decision whereof is left to the discretion of the judge.
2. LA. CIV. CODE art. 157 (as it appeared prior to its amendment by Act 48 of 1977):
   In all cases of separation and of divorce the children shall be placed under the care of the party who shall have obtained the separation or divorce unless the judge shall, for the greater advantage of the children, order that some or all of them shall be entrusted