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Nevin Van de Streek

A RESPONSE TO THE PROPOSED ESTABLISHMENT OF AN ADMINISTRATIVE AGENCY TO CREATE AND ENFORCE RULES REGULATING POLICE CONDUCT

NEVIN VAN DE STREEK*

Dear Professor Lockney:

I thought you would not mind a few gratuitous reflections on your essay concerning the fourth amendment and the exclusionary rule, which appeared in the most recent issue of the *North Dakota Law Review*.[1]

I understand your central thesis to be that it might be possible to devise an administrative mechanism that would accomplish very much the same goals sought to be accomplished through the application of the exclusionary rule, thus permitting the exclusionary rule to be dismantled.[2] True enough, you speak of the exclusionary rule as being modified rather than being abolished.[3] But if the administrative agency that you envision is able to accomplish the three tasks you assigned to it (to formulate, to teach, and to enforce administrative rules regulating the conduct of law enforcement officials in making arrests, searches, and seizures),[4] then under your own reasoning the rule would be abolished as a practical matter, unless you intend to retain it under some

*A.B. Stanford University, 1967; J.D. University of Michigan, 1970 (cum laude); partner in Eaton, Van de Streek & Ward, Minot, North Dakota.

1. *See* Lockney, *An Open Letter to the North Dakota Attorney General Concerning Search and Seizure Law and the Exclusionary Rule*, 62 N.D.L. REV. 17 (1986).

2. *See id.* at 27-33.

3. *See id.* at 27-28.

4. *See id.* at 28.

circumstances not mentioned in your essay, such as when the wrongful police conduct is flagrant and deliberate.

To the extent that the exclusionary rule is intended to deter future official disregard of the values embodied in the fourth amendment, I concur that the proposed administrative agency may function as well as, or even much better than, the exclusionary rule. My concurrence follows from the view that the agency could discipline law enforcement officials directly, by the imposition of a fine or a suspension without pay, and it could do so in situations in which the exclusionary rule is never invoked because there is no criminal prosecution.

The proposed administrative agency is a very good idea for those reasons alone, without regard to whatever effect its existence might have on the exclusionary rule. But you claim greater merit for the agency than that which I have just acknowledged. You state that the agency rules governing arrests, searches, and seizures would be "clearer and more detailed" and easier to administer than the rules that courts have evolved in deciding cases arising under the fourth amendment.[5] This statement so startled and bemused me that I could not resist writing this letter. Why is there any reason whatsoever in human experience to believe that any administrative agency can adopt regulations that are plainly expressed and easily understood? If you can cite but one example of such an agency, and the regulations which it produced, can it also fairly be claimed that the subject matter of those regulations was as inherently complex and confusing as the established doctrines relating to fourth amendment jurisprudence? Is there somewhere an untapped pool of legal talent ready to join this administrative agency — a talent pool that contains individuals who are able to simplify and rationalize doctrines that have confused and confounded extremely able lawyers, judges, legal commentators, and law school professors such as yourself?

If your rejoinder is that the rules established by the administrative agency do not have to address all the subtleties and nuances that are implicated in a typical fourth amendment court decision, then what do the rules address? Can you give an example or a skeleton outline of the rules?

In your essay you pose a very interesting hypothetical case, gleaned from the facts of three different North Dakota Supreme Court cases.[6] Under the hypothetical the following issues arise: (1)

5. *See id.* at 30-31.
6. *See id.* at 21-22.

whether probable cause existed for the issuance of a search warrant; (2) whether the officers executing the warrant properly announced their presence and purpose; and (3) whether the officers improperly exceeded the scope of the search authorized by the warrant.[7] You use the hypothetical quite adeptly to illustrate the convoluted nature of the court-fashioned rules that seek to resolve those issues, and correspondingly, how difficult it is to teach, to learn, and to enforce the rules. But how would the administrative rules you contemplate apply to your hypothetical, that is, how would they guide the behavior of the officers? You are silent on that point.

Indeed, it is difficult to see how the "clear" rules to be established by the proposed administrative agency would be of much practical assistance to the law enforcement officers involved in your hypothetical case. Presumably the administrative agency would agree that probable cause is required to conduct a search even if the agency would (and constitutionally could) dispense with the warrant requirement. But when is probable cause established? This is typically the most difficult question presented in any fourth amendment case. It is difficult not because the various verbal formulas that are used to explain what constitutes probable cause are intrinsically unclear when stated in the abstract. Rather these various expressions of the probable cause test become unclear when they must be applied to concrete factual situations. But surely this phenomenon is not confined to fourth amendment jurisprudence. The rule of law that one must drive an automobile with due care in view of the surrounding circumstances is easy to state and to understand in the abstract, but applying it to a given set of factual circumstances can cause a jury much agony and indecision. I really can not perceive, and you do not tell us, how the administrative agency's rules will simplify probable cause determinations, and that is at least half the ballgame.

Most of the other issues raised in the hypothetical relate to limitations on the proper scope of a search, assuming that the search is lawful in the first instance.[8] The court rules that address the "knock or no knock" issues posed in your hypothetical are not necessarily unclear, although one could argue that they are unsound as a matter of public policy. I think your suggestion that, in the ordinary case, law officers might have difficulty in determining the actual "entrance" to a dwelling is a little far-fetched.[9] If there is a recurring problem in that regard, how will it be resolved by the administrative rules?

7. *See id.* at 23-26.
8. *See id.* at 24.
9. *See id.*

The court rules relating to the "plain view" issues embedded in the hypothetical are admittedly much more confusing. With respect to these issues the administrative agency has a very fair chance of writing simpler and clearer rules than those derived from court opinions on the subject. But I feel it is revealing to examine why the plain view cases are so muddled, because the resulting analysis discloses an important problem that you recognize, but which you tend to gloss over.

The confusion that abounds in the particular context of the plain view doctrine (and in the general context of fourth amendment law) results not solely because the courts are bending over backwards to ensnare criminal defendants, but also because the courts are swaying the other way to protect privacy rights. If the courts had no concern about privacy rights they could eliminate most issues arising under the plain view doctrine by simply holding that the search and seizure of any object in the course of executing a search warrant is lawful provided the officer does not pry into an area in which it would be objectively unreasonable for him to expect to find those items that are the object of the search. Thus an officer armed with a warrant to search for and to seize a stolen twenty-one inch television set could not look into a shoe box. To the extent that courts have been hesitant to adopt the rule just suggested, they are motivated by privacy concerns rather than by concerns that the exclusionary rule is improperly protecting criminals. In an effort to protect the privacy of the citizenry in general, courts have developed limitations on the plain view doctrine; for example, the discovery of evidence not contemplated within the warrant must be inadvertent.[10] Unfortunately, as you note, this fine tuning of the doctrine makes the entire concept complicated and confusing.

All of this indicates that, whether an administrative agency or the courts make the rules, the rules will be unclear, complex, and contradictory as long as a sincere effort is made to balance privacy interests against the desire to capture and punish criminals. The only way I see out of this dilemma is if the administrative agency decided that it would not attempt to hold the balance true, as the courts now endeavor to do, but instead decided to tip the scales either in favor of law enforcement goals or in favor of the preservation of privacy interests. If it did the first, then it would be difficult to argue that the federal courts should limit or abolish the

10. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971) (the plain view doctrine is limited by the principle that the discovery of evidence must be inadvertent).

exclusionary rule in North Dakota, for surely you intend that the rules pay deference to the fourth amendment. If the agency chose the second course of action, favoring privacy interests over law enforcement goals, it would probably be killed by the legislature even before it could be added to the federal list of endangered species.

I do not contend that greater simplicity and clarity in fourth amendment law is undesirable and unattainable. To the contrary, I maintain that three recent developments mark a trend toward the simplification of fourth amendment jurisprudence. This trend is not attributable, however, to any administrative action. Rather, the praise or blame for the trend must be directed to the courts themselves. You mention some or all of these developments in your essay, yet you fail to give them proper emphasis; for if the trend of which they are a part is developed sufficiently, the exclusionary rule will become nearly obsolete. These developments are: (1) the dilution of probable cause standards; (2) the forgiveness of "good faith" violations of the fourth amendment; and (3) the creation of "bright line" parameters defining the scope of an authorized search.

According to *Illinois v. Gates*,[11] a search warrant may be issued if there is a *substantial chance* that the search will produce evidence of criminal wrongdoing.[12] I emphasize the words "substantial chance" because those are the words of the Court at one point in the opinion.[13] I think it is but a short step from the "substantial chance" standard to a standard of probable cause which states, in effect, that as long as the law enforcement officers are not searching at random or on a whim the fourth amendment is satisfied. The reasoning would be that if a search is conducted on some random selection basis, or upon a hunch, then there is not a substantial chance that evidence of criminal activity will be discovered. Conversely, if the officer can demonstrate to the magistrate's satisfaction that the selection of a particular property for a search is based on something other than random selection or whim, then it follows that the substantial chance test is met. In other words, *Gates* may instruct us that it is old fashioned to think of separate concepts of "reasonable suspicion" and "probable cause," and that the latter is being merged into the former.

Not only has the United States Supreme Court seriously

11. 462 U.S. 213 (1983).
12. Illinois v. Gates, 462 U.S. 213, 243 n.13 (1984) (emphasis added).
13. *Id.* In the words of the Court: "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.*

diluted the probable cause test, but the Court has gone on to hold that even if the magistrate makes an error in judgment under the *Gates* standard of probable cause, the evidence seized pursuant to the magistrate's authorization may be used in criminal proceedings provided the officer executing the warrant had an objective, good faith belief that the magistrate acted properly in issuing the warrant.[14] The Court has not yet decided whether the "good faith exception" to the exclusionary rule should be extended to warrantless searches, but Mr. Justice White's concurring opinion in *Gates* indicates that he is willing to take that step.[15] He seems to believe that the fruits of a warrantless search should not necessarily be excluded merely because the officer mistakenly believed that there was probable cause to make the warrantless search, but rather he would trigger the exclusionary rule only if the officer was *unreasonably* mistaken in believing that probable cause to conduct a warrantless search existed.[16]

Finally, *New York v. Belton*[17] and *United States v. Ross*[18] both seem to foreshadow an ultimate holding by the Supreme Court that

14. *See* United States v. Leon, 468 U.S. 897, 926 (1984).

15. *See Gates*, 462 U.S. 213, 246 (White, J., concurring).

16. *See id.* at 259, n.14. Justice White, in Gates, stated as follows:

> But the question of exclusion must be viewed through a different lens when a Fourth Amendment violation occurs because the police have reasonably erred in assessing the facts, mistakenly conducted a search under a presumably valid statute, or relied in good faith upon a warrant not supported by probable cause.

Id.

17. 453 U.S. 454 (1981). The defendant in *Belton* had been a passenger in an automobile stopped by police for speeding. United States v. Belton, 453 U.S. 454, 455 (1981). The defendant, and other passengers, were removed from the automobile and placed under arrest for possession of marijuana. *Id.* at 456. Thereafter the arresting officer searched the passenger compartment of the automobile. *Id.* In the course of the search, the officer discovered cocaine in the zipped pocket of the defendant's jacket, which was laying in the back seat of the car. *Id.* The defendant moved to suppress the seized cocaine, arguing that it was obtained in violation of the fourth and fourteenth amendments. *Id.* The trial court denied the defendant's motion. *Id.* On appeal, the United States Supreme Court upheld the validity of the search concluding that the search of the automobile was a legitimate search incident to arrest. *Id.* at 460. Since the search of the automobile was legitimate, the Court concluded that "[i]t follows . . . that the police may also examine the contents of any containers found within the passenger compartment."

18. 456 U.S. 798 (1982). The defendant in *Ross* had been arrested after police stopped his automobile and discovered a bullet and gun in the car's interior. United States v. Ross, 456 U.S. 798, 801 (1982). The police also suspected that the defendant was selling drugs. *See id.* at 800. After placing the defendant under arrest, the police opened the car's trunk. *Id.* at 801. Inside they observed a brown paper bag. *Id.* The police opened the bag and "discovered a number of glassine bags containing a white powder." *Id.* The powder proved to be heroin. *Id.* Prior to his trial, Ross moved to suppress the heroin found in the paper bag. *Id.* The trial court denied his motion and Ross was convicted. *Id.* On appeal, the United States Supreme Court upheld the warrantless search and seizure of the container found in the trunk of Ross' automobile. *See id.* at 825. In reaching this conclusion, the Court stated as follows:

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.

Id. at 824.

the scope of a search, whether based upon a warrant or not, is limited only by the principle that law enforcement officers may not look into a thing or a place that obviously could not contain the object of the search. Such a holding would eliminate the "inadvertence" component of the plain view doctrine because police could seize all evidence in plain view provided the evidence was "discovered" while searching containers that could have contained the object of the search.

The foregoing developments support my assertion that it is possible to make simpler rules in the fourth amendment context, but only at the price of paying much greater homage to law enforcement concerns, or to privacy concerns, but not to both. Because the Supreme Court has apparently decided to make privacy subservient to law enforcement, the occasions for invoking the exclusionary rule may become fewer and fewer. Consequently, it is my conclusion that if there is a case to be made in favor of the administrative agency you propose, it must rest, to a very large extent, on grounds other than dissatisfaction with the operation and effect of the exclusionary rule.