The Evolution and Impact of the Exclusionary Rule

by

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Abstract

The exclusionary rule of the Fourth Amendment is a constitutional rule of evidence which excludes, or renders inadmissible in a criminal proceeding, evidence which has been illegally seized by law enforcement officers, federal or state. The rule has had great impact on many areas, particularly in Constitutional interpretation. It is the subject of a great deal of controversy. The most vital aspect of this controversy is the question of constitutionality. Exclusion has been closely tied to the protection of Fourth Amendment rights for almost six hundred years. This fact tends to present a constitutional nexus between the concept of exclusion and traditional Fourth Amendment rights. The broad scope of the rule and the Fourth Amendment, as interpreted and delineated by the Warren Court, appears to be in accord with the intent of the Framers.

* Style: American Political Science Review

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Finally, I would like to thank Mary Wolters, Hal Scofield, and Dr. Mary Jo Hoffman for listening to my ideas and proofing the various drafts of this paper.

Dedication

To My Family

Introduction:

The exclusionary rule is a major topic of American Constitutional Law which has been vehemently debated in almost every state court, in the Supreme Court, in Presidential elections, and in intellectual circles. It is replete with polemics involving history, civil rights, federal-state relations, etc. Most importantly, it is salient to and contiguous with the rights of every American. In this introduction, I will define "exclusionary rule" as it is used in this paper, examine the reasons why such a paper is important, and delineate the structure of the paper.

An exclusionary rule is "a rule of evidence which excludes, or renders inadmissible in a criminal proceeding, evidence which is obtained by. . .law enforcement officials. . ." in an illegal manner.[1] There are several such rules explicitly and impliedly stated in the Constitution. These rules call for the suppression of evidence obtained in violation of constitutional rights, and they are applicable to both federal and state governments. Constitutional exclusionary rules are involved when one of the following rights is violated:

1) Prohibition against "unreasonable search and seizure."

2) Confessions obtained in violation of the Fifth and Sixth Amendments.

3) Securing identification testimony in violation of the Fifth and Sixth Amendments.

4) Police methods which "shock the conscience."[2]

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[1] Steven R. Schlesinger, Exclusionary Injustice (N.Y.: Marcel Dekker, Inc., 1977), p. 1.

[2] Ibid., pp. 1-2.

This paper considers the exclusionary rule pertaining to the Fourth Amendment prohibition against "unreasonable searches and seizures."

The exclusionary is invoked by defense counsel "on a motion to suppress evidence."[3] This motion is usually made during pre-trial proceedings, but it can be made in the course of the trial sequence if "the facts supporting the motion did not come to the attention of the defense or could not reasonably have been discovered until after the commencement of the trial."[4]

Once the defendant has raised the issue in a motion to suppress, the prosecution bears the burden of convincing the court either of the following: 1) that the warrant was valid, 2) that the search or a seizure without a warrant was a valid exception to the warrant requirements of the Fourth Amendment.[5]

If the motion is granted, then the evidence illegally seized and any derivative evidence is suppressed. If the motion is denied, then the defendant may appeal the denial on the grounds that the use of the illegally seized evidence violated his Fourth Amendment rights. The

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[3] Ibid., p. 2.

[4] Allen, "The Exclusionary Rule in the American Law of Search and Seizure," 52 University of Chicago Law Review 246, 249 (1961).

[5] 1) "Once it becomes. . .the issue in the case. . ., the government bears the burden of convincing the court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights." U.S. v. Schipan, 289 F. Supp. 43 E.D.N.Y. 1968); 2) "The search without a warrant. . .can survive constitutional inhibition only upon a showing that the surrounding circumstances brought it within one of the exceptions to the rule that a search must rest upon a search warrant." Stoner v. Cal., 376 US. 483, 486 (1964)

prosecution may not appeal the decision on the motion.[6]

I first became interested in the exclusionary rule during an undergraduate course in Constitutional Law. As my interest increased, I began to examine a broad range of germane literature. Several things were apparent: 1) the rule is a major topic of controversy, 2) it subsumes a plethora of topics in Constitutional Law and other related fields, 3) it is a subject which has not been extensively analyzed.

As noted supra, the exclusionary rule is a vital and controversial topic. In Criminal Procedure in a Nutshell: Constitutional Limitations, Jerold Israel and Wayne LaFave note:

> Although the exclusionary rule is well established in Supreme Court precedent, its use outside the Fifth Amendment area has remained a subject of considerable conrroversy.[7]

Elder Witt of the Houston Post observes:

> Few issues provoke as much debate from year to year within the legal profession as the exclusionary rule. . .Although the rule is 66 years old, it remains highly controversial.[8]

A major reason for the longevity and intensity of the controversy is the breadth of topics and controversies involved in the exclusionary rule. Related topics include the following: 1) topics in Constitutional Law, such as "incorporation"; 2) the proper role of the Supreme Court as an institution; 3) judicial decision-making; 4) fundamental civil rights, such as the right of privacy; 5) the nature of federal-state

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[6] Allen, op. cit., p. 249.

[7] Jerold Israel and Wayne LaFave, Criminal Procedure in a Nutshell: Constitutional Limitations (St. Paul: West Publ. Co., 1975), p. 29.

[8] Elder Witt, "Exclusionary Rule Still Controversial 66 Years After Creation by High Court," Houston Post, 11 March 1980, p. 2, sec. C.

relations; 6) the administration of justice. The rule represents an extremely rare combination of underlying topics which makes comprehensive study a useful educational tool in Constitutional Law.

It is apparent that there is a great need for a comprehensive and objective analysis of the evolution and impact of the exclusionary rule. Current literature in this field tends to be myopic in that it tends to concentrate on particular arguments for and against the rule rather than analyzing the variegated competing arguments en bloc.

This paper considers the following areas:

1) The controversy surrounding the rule.

2) The derivation of the Fourth Amendment and its relationship to the exclusionary rule.

3) The legal evolution of the rule.

This research is intended to make contributions to constitutional interpretation, understanding the exclusionary rule, and the study of Constitutional Law.

I. CONTROVERSY

The exclusionary rule has been the object of continuous, intense, and broad ranged controversy since it was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The controversy consists of the following basic questions:

1) Is there a valid constitutional basis for the exclusionary rule?

2) What is the scope of the rule's application?

3) Is the rule consistent with accepted legal principles and traditions?

4) Is the impact of the rule such that it should be amended or replaced?

Each of the above questions subsumes a wide range of arguments for and against the rule and the Court's actions in creating and sustaining it. In the discussion which follows, these questions and the major arguments related to them are enumerated and examined.

It is apparent that the legal evolution of the rule, specifically the Mapp decision, does not clearly or consistently state the basis of the rule. This has led to a great deal of confusion and controversy over the rule's basis.

A major reason for the controversy over the constitutional basis is the fact that it is vital in determining the scope of the application of the rule. The rule does not have to be in the Constitution to exist, but it must be in the Constitution to be applied to the states.[1]

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[1] The U.S. Congress could apply the rule to the states through section five of the Fourteenth Amendment which states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This is a highly unlikely prospect in light of the widely held belief that the American public opposes the rule.

One basis which has been suggested for the rule is that the Court could create it under the policy-making powers which are granted to it by the Constitution and Congress.

> The Supreme Court is. . .authorized by statute to promulgate rules for the supervision of federal law enfrocement. Rules which it hands down based on this statutory authority apply only in the federal courts.[2]

The Supreme Court also has the power to create rules of evidence in its role as "supervisor of the federal court system" Professor Martin Shapiro and R. J. Tresolini state: "Although the Supreme Court has the authority to fashion procedural rules, such as rules of evidence, for the lower federal courts, it has no such authority over the state courts.[3] It follows that the Supreme Court could only apply the exclusionary rule to the states if it were a constitutional rule of evidence.

There are several constitutional bases which have been proposed to justify the rule. A constitutional basis does not per se guarantee that the rule applies to the states; Professor Chase and Ducat explain this statement:

> In 1834, when it first encountered the argument that the Bill of Rights applied to limit the acts of the state as well as the national government, the Supreme Court emphatically rejected the overature. Speaking for a unanimous Court in Barron v. The Mayor and City Council of Baltimore. . ., Chief Justice Marshall held that it was clear from the wording and intent in the passage of the amendments that their provisions were directed against infringement by the national government

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[2] H. R. Chase and C. R. Ducat, Constitutional Interpretation: Cases, Essays, and Materials (St. Paul: West Publishing Co., 1974), p. 1048.

[3] Martin Shapiro and R.J. Tresolini, American Constitutional Law, 4th ed. (N.Y.: McMillan Publishing Co., 1975), pp. 628-629.

> only. . .Moreover, this position remained unchallenged until the ratification of the Fourteenth Amendment in 1868 reopened the possibility of circumscribing the reserve powers of the states with minimal constitutional guarantee. . .[4]

The process of determining if rights granted in the Bill of Rights apply to the states is called "incorporation." This process itself has been the subject of great controversy and has variegated interpretations. As will be evident in the discussion infra, the method of incorporation is vital in determining the scope of the rule's application.

There are two basic approaches to incorporation: 1) selective incorporation and 2) total incorporation. The former has become the approach generally adopted by the Court. The latter was primarily advocated by Justice Hugo Black who asserted the Fourteenth Amendment was intended to "totally incorporate" the first eight amendments and thereby make them applicable to the states. Professors Chase and Ducat observe:

> The total incorporation approach was taken up. . . by Justice Hugo Black, notably in his dissenting opinion. . .in Adamson v. California, 332 U.S. 46, (1947). . .In this now-classic opinion, Black reacted sharply to what he saw as the unbridled discretion and resulting arbitrariness inherent in the case-by-case fairness approach. To bolster the argument for total and literal incorporation of the Bill of Rights. . ., Black, in an appendix to his opinion, examined extensively numerous historical materials with the aim of showing that it was the intention of the Framers of the Fourteenth Amendment to so incorporate the first eight amendments and apply them to the states.[5]

Many advocates of this approach submit that if the Fourth Amendment is incorporated, then the exclusionary rule is incorporated if it is a

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[4] Chase and Ducat, op. cit., p. 912.

[5] Ibid., p. 914.

part of the amendment; otherwise the rule would not be a constitutional rule of evidence. Justice Black himself felt there was no such relation between the rule and the Fourth Amendment, but he did support the rule on the constitutional basis that it is commanded by the collision of the Fourth and Fifth Amendments.[6]

In contrast, selective incorporation is an "electic" approach.[7] This means that the due process clause of the Fourteenth Amendment does not "totally incorporate" all of the rights in the first eight amendments; each of these rights must pass certain tests before it can be said to be within the meaning of the due process clause. Thus the criteria for incorporation demand more than the simple fact of inclusion in the first eight amendments. This approach was first advocated by Justice Cardoza in Palko v. Connecticut (1937) in which he attempted to resolve "the conflict between nationalized protection of specific individual rights and the federal system."[8] Justice Cardoze set forth the basic tests for determining if a given right is within the meaning of the due process clause of the Fourteenth Amendment:

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[6] Justice Black observed: "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could probably be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection. . .has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies, but acutally requires the exclusionary rule. Mapp v. Ohio, 267 U.S. 643, 661-662 (1961).

[7] Chase and Ducat, op. cit., p. 914.

[8] Ibid., p. 914.

1) Is the right "implicit in the concept of ordered liberty"?[9]

2) Is the right "of the very essence of ordered liberty"?[10]

3) Is the right "so rooted in the traditions and conscience of our people as to be ranked fundamental"?[11]

The Court has decided that there are certain adminicular devices -- like the exclusionary -- which are so closely associated with a specific right that they must be considered as part of that right; thus the accoutrement, as well as the right itself, would be within the meaning of the due process clause.

As noted supra, selective incorporation does not limit the meaning of the due process clause to the rights enumerated in the Bill of Rights, nor does inclusion indicate that a right is automatically within the meaning of the clause. This assertion is evinced by the fact that several rights in the Bill of Rights have been found to be excluded from the meaning of the due process clause.[12] These are as follows:

1) Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

2) Third Amendment: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

3) Fifth Amendment: "No person shall be held to answer for a capital, or other infamous crime, unless on a

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[9] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[10] Ibid., p. 325.

[11] Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105.

[12] M. Glenn Abernathy, Civil Liberties Under the Constitution, 3rd ed. (N. Y. Harper and Row Publishing, Inc., 1977), p. 44.

> presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of war or public danger. . ."
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> 4) Seventh Amendment: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[13]

Selective incorproration also permits the incorporation of "penumbral" rights, such as the right of privacy.[14]

The selective incorporation approach represents a compromise between extreme methods of due process interpretation. According to Professors Chase and Ducat

> Absorption of those rights implicit in national citizenship through the due process clause. . .had the advantage over total incorporation of guaranteeing fundamental personal rights such as free speech without imposing on the states frivolous requirements. . ., and it confined the sweeping discretion inherent in the case-by-case fairness approach by permanently incorporating whole fundamental rights and imposing them alike at both the national and state levels.[15]

This compromise has been the object of controversy from many

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[13] Chase and Ducat, op. cit., pp. 1386-1387.

[14] In the majority opinion in Griswold v. Connecticut, 381 U.S. 479, 479-480 (1965), Justice Douglas stated: "[Previous] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substances." These penumbras "lie around the guarantees of the First, Fourth, and Fifth Amendments as 'protection against all governmental invasion of the sanctity of a man's home.' Douglas also mentioned briefly the Ninth Amendment, with its stipulation protecting those rights of the people not specifically enumerated in the first eight amendments, as contributing to a constitutional right of privacy, a right presumably now projected as a limitation upon the states through the instrumentality of the Fourteenth Amendment." Alfred Kelly and W. W. Harbison, The American Constitution: Its Origins and Development, 5th ed., (N.Y. W. W. Norton and Co., Inc., 1976), p. 963.

[15] Chase and Ducat, op. cit., p. 917.

different points of view. Professors Chase and Ducat elaborate: "Such a pragmatic approach, however, lacked any historical justification and was alternately assailed for its imprecesion and rigidity."[16]

Many opponents of the exclusionary rule argue that the Court's actions in Mapp constitute "judicial legislating" which violates the fundamental principles of democracy that underlie the Constitution. Professor Craig R. Ducat refers to this controversy as "the central dilemma of constitutional interpretation in the American system: squaring the power of constitutional interpretation in the hands of appointed, life-tenured judges, on the one side, with democratic values, on the other."[17] Many argue that the "separation of powers" doctrine forbids the judiciarly from exercising the powers granted only to the executive and the legislative brahch.[18]

The Mapp decision is particularly repugnant to many because it applied the rule to the states. Opponents argue that the Court thereby interferred with constitutionally reserved powers, particularly the police power, and thus represents a threat to the harmony of the federal system. According to Professors Shapiro and Tresolini,

> The American constitutional system is based on a division of powers between the national government and the states; under our federal system, the powers of the national government are enumerated in the body of the Constitution, whereas those powers not delegated to the national government are reserved to the states or to the people. The Tenth Amendment was designed

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[16] Ibid., p. 915.

[17] Craig R. Ducat, Modes of Constitutional Analysis (St. Paul: West Publishing Co.,1977), p. 3

[18] Ibid., pp. 2-3.

to make the principle of federalism secure.[19]

The framers used three major concepts in devising our federal system:

1) The states were preserved as separate sources of authority as organs of administration.

2) The states were given important powers in connection with the composition and selection of national governments.

3) The powers of government were distributed between the national government and the states.[20]

The important powers which reside in the state governments are delineated as follows:

> Among others, the states have the power to establish schools, establish local government units, and borrow money. In addition, a broad and generally undefined 'police power' enables the states to take action to protect and promote the health, safety, and general welfare of their inhabitants.[21]

Professor Allen describes the relationship of federalism to the exclusionary rule as follows:

> The rule involves questions of the proper exercise of judicial power in the federal system. There (are) undoubtedly many how. . .contend that the Court has invaded areas of discretion and self-determination reserved to the states.[22]

Opponents offer the concomitant argument that the exclusionary rule

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[19] Shapiro and Tresolini, op. cit., p. 115. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Chase and Ducat, op. cit., p. 1387.

[20] Ibid., p. 116.

[21] Ibid., p. 117.

[22] Allen, "The Exclusionary Rule in the American Law of Search and Seizure," 52 University of Chicago Law Review 246, 249 (1961).

is simply not practical in every state and hinders the states from tailoring the criminal justice system to fit the needs of their own communities. It is also argued that the rule impedes both the federal and state governments from developing alternative devices to give effect to Fourth Amendment rights. However, it must be noted that the rule itself does not preclude the use of other methods.

These questions of federalism were a fundamental part of the vitriolic controversy surrounding the Warren Court (1953 to 1969). This controversy had an enormous political impact which was manifested in various calls for impeachment of Chief Justice Earl Warren and particularly in the presidential election of 1968. Critics of the Warren Court "came to assail the Court for decisions which 'handcuffed the police'. . . making crime easy and convictions hard."[23] In The Brethren: Inside the the Supreme Court, Bob Woodward and Scott Armstrong observe:

> Throughout the 1968 presidential campaign, Nixon had run against Warren and his Court as much as he had run against his democratic rival, Senator Hubert H. Humphrey. Playing on prejudice and rage, particularly in the South, Nixon. . .promised that his appointees to the Supreme Court would be different.[24]

According to Alfred H. Kelly and Winfred A. Harbson,

> It was already evident that the President-elect intended to use his appointive power to remodel the Supreme Court in the image of his own conservative value system. On several occasions during the campaign he had severely criticized the Warren Court, which he charged with "seriously hamstringing the peace forces in our society and strengthening the criminal forces."[25]

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[23] Chase and Ducat, op. cit., p. 1047.

[24] Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (N.Y.:Simon and Schuster, 1979), pp. 10-11.

[25] Kelly and Harbson, op. cit., p. 981.

Nixon's campaign and later his policy emphasized "law and order." The President sought to appoint Justices who shared his "strict constructionist" approach to the Constitution, but he also wanted something more.

> 'Well,' Warren said, 'Ike was no lawyer. . .' But Richard Nixon was, and he had campaign promises to fulfill. He must have learned from Eisenhower's experience. He would choose a man with clearly defined views, an experienced judge who had been tested publicly on the issues. The President would look for a reliable, predictable man who was committed to Nixon's own philosophy.[26]

Nixon succeeded in altering the philosophical make-up of the Court to some degree, but the task proved to be unexpectedly difficult. He was twice humiliated by Congress in his attempts to appoint a Southerner as Chief Justice.[27] Justice Hugo Black saw the administration's moves as "Nixon's payoff to the South. . .part of the so-called 'Southern Strategy' that had helped Nixon win the presidential election."[28]

It appears that Nixon, like Eisenhower, was not entirely successful in predicting the behavior and influence of his appointees. Chief Justice Burger, appointed by Nixon in 1969, has not proven to be the conservative activist whom Nixon felt he was appointing. The Court in general has not chosen to revolutionize the civil rights decisions of the Warren Court. Burger himself appears to feel that reform, particularly administrative reform, is the answer, "not Supreme Court decisions."[29] Professors Shapiro and Tresolini observe that "a gigantic rollback of

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[26] Woodward and Armstrong, op. cit., pp. 10-11.

[27] Kelly and Harbson, op. cit., pp. 982-983.

[28] Woodward and Armstrong, op. cit., pp. 67-68.

[29] Ibid., pp. 67-68.

Warren Court decisions has not occurred in the search and seizure field."[30]

The Burger Court (1969-) has retained the basic notion of the exclusionary rule while tailoring certain aspects of it. The Court has declared that the rule's raison' d' etre is the ability to "deter" police misconduct. Many proponents of the rule feel that this is simply setting up a "straw man."[31]

The Chief Justice has been the main opponent of the rule on the Court.

> On the central issue of the exclusionary rule, the Chief Justice has announced his total opposition to the Mapp decision. However, he has indicated that change in the rule should come from Congress not the Court. . .The Chief Justice's basic position is that Mapp sought to deter police misconduct at the cost of letting criminals go, that this cost is too high, that the evidence suggests that the police have continued in their misconduct since Mapp, and that the solution is to get rid of the exclusionary rule and to invent new ways of protecting individuals from police misconduct.[32]

Associate Justices Blackmun, Powell, and Rhenquist are of the opinion that "the Fourth Amendment supports no exclusionary rule."[33]

In Bivens v. Six Named Agents, 403 U.S. 388 (1971), Chief Justice Burger iterates several popular arguments against the seeming

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[30] Shapiro and Tresolini, op. cit., p. 636.

[31] "Straw Man: a weak arguement or opposing view set up by a politician, debator, etc. so that he may attack it and gain an easy, showy victory. . ., used to disguise. . .intentions." Webster's New Twentieth Century Dictionary: Unabridged, 2d. ed., s.v. "straw man." This term implies that the Court has co-opted the one basis for the rule which is reasiest to attack.

[32] Shapiro and Tresolini, op. cit., p. 636.

[33] Ibid., p. 636.

irrationality, inflexibility, and unworkability of the rule:

1) The rule fails to adequately consider "good faith" police errors.

2) The rule offers no protection to the rights of the innocent.

3) The rule fails to deter police misconduct.

4) The cost of keeping the rule supercedes its efficacy.

5) The rule is absurd.[34]

In a 1964 lecture at American University, Chief Justice Burger stated:

> We can ponder whether any community is entitled to call itself an "organized society" if it can find no way to solve this problem except by suppression of truth in search for truth.[35]

This statement alludes to what many believe to be the "absurdity of the rule. It also denotes one of the basic arguments against the constitutional basis of the rule. This argument states that the evidence seized in search and seizure is in no way rendered "unreliable" as in the case, of coerced confessions; thus the exclusionary rule is inconsistent with and in contradistinction to other constitutional exclusionary rules. It is argued that this difference in the nature of evidence in search and seizure cases was on the minds of the framers and thus resulted in the intentional absence of an explicitly stated exclusionary rule in the Fourth Amendment.[36]

Professor Steven Schlesinger observes that there are two aspects of the absurdity of the rule:

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[34] Chase and Ducat, op. cit., pp. 1060-1064.

[35] Woodward and Armstrong, op. cit., p. 115.

[36] Jerold Israel and Wayne LaFave, Criminal Procedure in a Nutshell (St. Paul: West Publishing Co., 1975), pp. 26-27.

> To put the matter in clearest form, present policy determines that in any case where a criminal court must deal with a possibly guilty criminal and the clearly errant officer who apprehended him, it should acquit its responsibilities by punishing neither.[37]

Professor Monrad G. Paulsen further elaborates on this dichotomy:

> The aim is to deter law enforcement officers from violating individual rights; however, the rule does not impose money damages or loss of liberty upon the offending officers, nor does it provide compensation for persons injured by official overreaching.[38]

The comments of Professors Schlesinger and Paulsen indicate two aspects of the absurdity of the rule: 1) the absurdity of suppressing of the truth and 2) the absurdity of failing to directly punish police misconduct. This dichotomy corresponds to the two types of opponents: 1) those who oppose the rule because it "handcuffs the police" and 2) those who oppose the rule because it does not give enough effect to the promises of the Fourth Amendment. In short, some oppose the rule for what it does, and others oppose the rule for what it does not do. The latter are not primarily concerned with the complete destruction of the rule; instead, they desire additions to the rule which will provide greater protection of Fourth Amendment rights. The former feel that the exclusionary rule, like private litigation, has not worked and should be replaced; they feel the rule is irrational, ineffective, and the cost of continuing it is too great.

Both types of opponents argue that the rule fails to give effect

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[37] Steven R. Schlesinger, Exclusionary Injustice (N.Y.: Marcel Dekker, Inc., 1977), p. 4.

[38] Monrad G. Paulsen, "The Exclusionary Rule and Misconduct by the Police," 52 University of Chicago Law Review 255, 256 (1961).

to the Fourth Amendment prohibition against "unreasonable seizure" of persons (false arrest). Professor Paulsen notes:

> Illegal searches are not less frequent than illegal arrests in the jurisdictions which embrace the rule, yet an illegal search does forbid the use of evidence, but the illegal arrest does not affect the Court's power to try the defendant.[39]

Proponents of the exclusionary rule argue that the Constitution demands it. Several bases suggested to justify both the rule's existence and its application to the states are summarized below:

1) The rule is an implied clause of the Fourth Amendment.

2) The rule is the only device which can adequately give effect to the rights conveyed by the Fourth Amendment.

3) There is a tradition of exclusionary rules in American and English jurisprudence.

4) The rule is demanded by the collision of the Fourth and Fifth Amendments.

5) The rule upholds the integrity of the judiciary in particular and the government in general.[40]

Proponents of the rule argue that there would be greater damage to federalism if the rule were abondoned than if it were continued. They submit that the inconsistencies that would exist between the practices of individual states and those of the federal government would create an unnecessary tension in the fabric of our federal system. Professors H. Pollack and Alexander Smith state:

> There was, moreover, considerable protest both within and outside the Supreme Court against the notion that

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[39] Ibid., p. 257.

[40] Mapp v. Ohio, 367 U.S. 1961 643, 648, 653, 661.

> the states were free to do what was forbidden to the Federal government. Many commentators felt that standards of due process must be comparable for state and federal authorities.[41]

To support this argument, proponents of the rule adduce the circumstances prior to the Supreme Court rulings on the "silver platter" doctrine.[42] In the majority opinion in Mapp, Justice Tom Clarke considered the situation prior to that case:

> Presently a federal prosecutor may make no use of evidence unlawfully seized, but a State's attorney across the street may, although he supposedly is operating under the same Amendment. Thus the state, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. . .In non-exclusionary states, federal officers, being human, were by it invited to and did. . .step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment.[43]

Justice Clarke added:

> Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.[44]

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[41] H. Pollack and Alexander Smith, Civil Liberties and Civil Rights in the United States (St. Paul: West Publ. Co., 1978), p. 147.

[42] In Elkins v. United States, 364 U.S. 223 (1960), the Supreme Court denied the "silver platter doctrine" which allowed the use in federal courts of evidence which had been illegally seized by state law enforcement officers. The Court states: "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures. . ., is inadmissible over the defendant's timely objection in a federal criminal trial." Id. at 243. "It should be noted that this decision was reached prior to the Mapp decision." Lloyd L. Weinreb, Criminal Process: Cases, Comments, Questions (Mineola, N.Y.: The Foundation Press, Inc., 1974), f.n. 15, p. 59.

[43] Mapp v. Ohio, PP. 657-658.

[44] Ibid., p. 658.

Proponents rebut those arguments which portray the rule as being absurd with ethical and moral arguments. Professor Paulsen observes:

> Surely a trial has a purpose other than to lay reality bare. A trial is a part of the government's teaching apparatus. Social values of the greatest importance receive expression in the court room. To reach a decision in accordance with the truth is only one value which in some circumstances may have to bow before others.[45]

This is similar to the views Justice Brandeis eloquently stated in his dissent in Olmstead v. U.S. (1928):

> Our government is the potent, the omnipresent teacher. . . For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law;. . . it invites anarchy. To declare that in the administration of the criminal law the end justifies the means --to declare that government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution.[46]

In another dissent to the same decision, Justice Oliver Wendall Holmes said, "I think it a less evil that some criminal should escape than the government should play an ignoble part."[47]

Proponents of the rule submit that it is more absurd to "promise rights in theory" and "deny them in practice."[48] In 1938, Senator Robert F. Wagner of New York captured the essence of this argument:

> To guarantee civil rights in theory and permit constituted authority to deny them in practice, no matter how justifiable the ends may be or may seem, is to imperil the very foundation on which our Democracy rests.[49]

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[45] Paulsen, op. cit., p. 263.

[46] Olmstead v. U.S., 277 U.S. 438, 470 (1928).

[47] Ibid., p. 470.

[48] Paulsen, op. cit., p. 259.

[49] Ibid., p. 259.

Proponents bulwark their ethical and moral arguments by submitting that trust in government would be damaged if the rule were to be discontinued. This is a very salient argument in post-Watergate America. Professor Paulsen states:

> The moral point rests not only upon an ethical judgement that government hypocrisy is an evil to be avoided for its own sake, but also it takes into account the serious undermining of trust in government which is an unavoidable consequence of any scheme permitting the state to benefit from unlawful conduct.[50]

Opponents rebut these ethical and moral arguments by stating that "the rule destroys respect for government because it provides the spectacle of the courts letting the guilty go free." (emphasis added)[51]

With regard to the argument that the rule "handcuffs the police," proponents adduce:

> The federal courts themselves have operated under the exclusionary rule of Weeks for almost half a century; yet it has not been suggested that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.[52]

The controversy surrounding the exclusionary rule has been exacerbated by the nature of the rights which are at stake. This question is the subject of the discussion which follows.

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[50] Ibid., p. 258.

[51] Ibid., p. 256.

[52] Ibid., p. 263.

II. THE FOURTH AMENDMENT

The Supreme Court has stated that the exclusionary rule is intended to give effect to the rights embodied in the Fourth Amendment. In the following discussion, the background and legal interpretation of the Fourth Amendment will be analyzed to determine the nature of its relationship to the rule.

There are many basic rights which are directly stated in the Fourth Amendment and many to which it is contiguous. Primarily the amendment serves a prophylactic function in that it prohibits "unreasonable search and seizure" as a means of protecting the right of privacy. As Professor Pollack observes, it is a *sine qua non* for protection of several other fundamental civil and political rights: "To say that the individual enjoys freedom of speech or freedom of religion when he may be arbitrarily arrested for exercising either freedom is a contradiction of terms."[1] Pollack further elaborates:

> Many activities which are political in nature, such as street assemblies, picketing, and mass demonstrations of all kinds, also fall afoul of the criminal law, and it is essential for political freedom that standards for the enforcement of the criminal law be strict and even handed.[2]

Thus the Fourth Amendment is an irreplaceable gaurd at the door of a *cul-de-sac* which leads to arbitrary governement; the exclusionary rule is the means which makes this guard effective.

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[1] H. Pollack and Alexander Smith, *Civil Liberties and Civil Rights in the United States* (St. Paul: West Publishing Co., 1978), p. 147.

[2] *Ibid.*, p. 142.

The Fourth Amendment states:

> The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrents shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. (emphasis added).[3]

The amendment represents the culmination of constitutional development since King John signed the Magna Carta in 1215. It is divided into three parts: 1) scope, 2) reasonableness requirements, 3) warrant requirements.

The scope of the amendment is generally broader than its historical antecedents. It guarantees the security of "persons, houses, papers, and effects." As will be examined infra, the development of "personal" rights, particularly the right of privacy, illustrates how the amendment has been expanded by judicial interpretation.[4]

One of the primary principles of the Fourth Amendment is the maxim "a man's house is his castle." In History and Development of the Fourth Amendment to the United States Constitution, Professor Harold Lasson states:

> The peculiar immunity that the law has thrown around the dwelling house of a man, pithily expressed in the maxim, "a man's house is his castle," was not an invention of English jurisprudence. Even in ancient times there were evidences of that same concept in custom and law, partly as a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients

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[3] H.R. Chase and C.R. Ducat, Constitutional Interpretation: Cases, Essays, and Materials (St. Paul: West Publishing Co., 1974) p. 1386.

[4] Warren v. Hayden, 387 U.S. 294, (1967).

> upon the home as a place of hospitality, shelter, and protection.[5]

The sacrosanct nature of the home was an especially dominant view of the Roman Empire which invaded England in 54 B.C. and greatly influenced its laws and institutions. According to Professor Lasson, the Romans believed "the house was not only an asylum but was under the special protection of the household gods, who dwelt and were worshipped there."[6]

The Romans also developed procedures with regard to search and seizure which were very similar to those later used in England and embodied in the Fourth Amendment.[7] Under the Roman legal system, most prosecutions were private. The courts required "substantial and probable cause for the complaint," but they "provided that all papers and documents relating to the case were at the disposal of the prosecutor."[8] In the search for stolen goods, the rules of procedure were more protective of the accused; they provided that "before one could institute a search in the house of a suspect, one had to describe with particularity, the goods he was seeking."[9]

> The next step was the procedure called lance et licio . . . This was a ceremony which, although outwardly a mere form reveals an underlying practical purpose. Clad only in an apron (licio), and bearing a platter in his hand (lance), the person whose goods had been stolen entered and searched, in the presence of witnesses, in the house where the goods were suspected to be.[10]

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[5] Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (Baltimore: John Hopkins University Press, 1937), p. 13.

[6] Ibid., p. 15.

[7] Ibid., p. 18.

[8] Ibid., pp. 15-17.

[9] Ibid., pp. 17.

[10] Ibid., pp. 25, 38.

Even though the English were influenced by these procedures, there was a long period of abusive search and seizure practices prior to the seventeenth-century. During this period, broad search and seizure laws were used in a vast range of areas such as printing, censorship of the press, religion, seditious libel and treason, and statutes in regulation of trade.[11]

After the mid-seventeen hundreds, public consciousness of the arbitrariness of such practices, such as the infamous Court of Star Chamber,[12] began to increase, and the concept that search and seizure practice must be in concordat with "modern lines of conceptions of liberty and justice" began to fructify. The principle of "reasonable searches and seizures" was a logical dictate of this new consciousness.

> The principle that search and seizure must be reasonable, that there must be a balancing of the problem of the administration of justice with those of the freedom of the individual, was emerging slowly and was assuming more and more the character of an underlying concept of jurispurdence (the idea that a man's house was his castle had always continued to play a part in English legal thought). However, before this principle could definitely and finally impress and establish itself in the public mind as a fundamental right of constitutional importance, the more spectacular situations present in the Eighteenth Century were necessary.[13]

Chief Justice Hale, the most prominant legal figure of the period, led the crusade for change in search and seizure practice.

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[11] Ibid., pp. 25, 38.

[12] The Court of the Star Chamber was a royal perogative court which utilized wide discretion and sometimes torture in the course of its proceedings.

[13] Lasson, op. cit., p. 34.

> In a contemporaneous seventeenth-century treatise on the history of the pleas of the crown by Chief Justice Hale, one of the greatest jurists in English history, the chief limitations upon the exercise of search and seizure now embodied in such constitutional provisions as the Fourth Amendment are already found presented either as law or as recommendations of the better practice, which later hardened into law.[14]

Hale enunciated the following aspects of the Fourth Amendment in his opinions and treatises:

> Warrants to search . . . should be restricted to search in a particular place suspected, after a showing, upon oath, of the suspicion and the "probable cause" thereof, to the satisfaction of the magistrate (emphasis added).[15]

The acceptance of Hale's proposals were personified in the impeachment of Chief Justice Skaggs in 1680.

> When Scroggs was impeached, one of the articles of impeachment was based on his issuance of "general warrants" for attaching the persons and seizing the goods of his majesty's subjects, not named or described particularly, in the said warrants; by means whereof, many . . . have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law. Here was a legislative recognition of the idea that general warrants were an arbitrary exercise of governmental authority against which the public had a right to be safeguarded.[16]

Even though search and seizure procedure was changing, the practice of the secretary of state issuing general warrants in "seditious libel" and similar cases continued. The tension between the ideal and reality increased rapidly; as time passed, the continued abuses under the secretary of state's power became visible; this subjected them to further ridicule and eventually extinction. Professor Lasson states that the continued

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[14] Ibid., p. 38.

[15] Ibid., pp. 35-36.

[16] Ibid., p. 38.

use of general warrants led to "the final establishment of the principle of reasonable search and seizure upon a constitutional footing in England and to constitute at the same time one of the main factors in the history of such provisions in American bill of rights" (emphasis added).[17]

With regard to the "nature and scope of permissible government actions intended by the framers of the Fourth Amendment under the terms 'unreasonable searches and seizures,'" American jurists usually refer to the opinoins of Lord Cambden in a series of actions called the North Briton Cases and the related case of Entick v. Carrington and Three Other King's Messengers, (1765). In Boyd, v. U.S., Justice Bradley referred to Lord Cambden's opinion in Entick "as one of the permanent monuments of the British Constitution."[19]

The North Briton Cases involved the granting and execution of a general warrant for the seizure of the publishers and authors of an iconoclastic pamphlet called North Briton, No. 45.

> Here was a warrent, general as to the persons to be arrested and the places to be searched and the papers to be seized. Of course, probable cause upon oath could necessarily have no place in it since the very questions as to whom the messengers should arrest, where they should search, and what they should seize, were given over into their absolute discretion. Under this "roving commission," they proceeded to arrest upon suspicion no less than forty-nine persons in three days, even taking some from their beds at night.[20]

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[17] Ibid., pp. 42-43.

[18] Steven R. Schlesinger, Exclusionary Injustice (N.Y., Marcel Dekker, Inc., 1977), p. 15.

[19] U.S. v. Boyd, 6 S. Ct. 524, 626 (1886).

[20] Lasson, op. cit., p. 43.

In his opinion, Chief Justice Pratt stated: "To enter a man's house by virtue of a nameless warrant . . ., in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."[21]

Entick v. Carrington arose from the execution of a general warrant for John Wilkes, author of the Monitor and the British Freeholder, to seize him and his papers. "This warrant was specific as to person but general as to papers."[22] Entick eventually brought a successful trespass action against the messengers. In 1765, the case was argued before the Court of Common Pleas on which sat Chief Justice Pratt. "Pratt, now Lord Cambden, delivered the opinion of the court, an opinion which has since been denominated a landmark of English liberty by the Supreme Court of the United States."[23]

In both the North Briton Cases and Entick, the Court found the warrants to be illegal. The importance of the interposition of a third party magistrate with regard to the issuing of such warrants was noted by the Court at King's Bench in the Leach Case:[24]

> It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer.[25]

There are several reasons why these cases are important. Primarily, they are significant because of their probable influence on the founding fathers of the Fourth Amendment. In Brady, Justice Bradley observed:

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[21] Ibid., p. 44.

[22] Ibid., p. 47.

[23] Ibid. p. 47.

[24] One of the North Briton Cases.

[25] Lasson, Op. cit. p.

> As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of British freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.[26]

Secondly, these opinions are significant in that they recognize the confluence of several developing concepts in the search and seizure field: 1) probable cause, 2) reasonable searches and seizures, 3) third party magistrate, and 4) specificity or particularity.

In short, Lord Cambden enunciated a legal method of dealing with general warrants. This was particularly salient to the American colonists who had been subjected to the loathed Writs of Assistance.[27] The importance of these writs in American history is observed by Professor Lasson:

> Contemporaries generally accepted it as a fact, and historians agree, that the controversy on this question which took place in Massachusetts in 1761, the first serious friction between the British customhouse officers and the colonists, was the "first in the chain of events which led directly and inexorably to the revolution and independence."[28]

John Adams stated with regard to the Writs of Assistance that "then and

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[26] Ibid., p. 47.

[27] U.S. v. Boyd, op. cit., p. 530.

[28] Writs of Assistance: "General search warrants issued by colonial courts to customs officers." Michael Martin and Leonard Gelber, ed. A.W. Littlefield, Dictionary of American History (Totowa, New Jersey: Littlefield, Adams, and Co., 1968), p. 688. This writ was used by customs for detection of smuggled goods. Lasson, op. cit., p. 51. It should be noted that this Writ had a "more dangerous element" than the general warrants in the North Briton Cases and Entick, for "it was liscense and authority during the entire lifetime of the reigning sovereign. The discretion delegated to the official was therefore practically absolute and unlimited." Ibid. p. 54.

there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of independence was born."[29]

The actual conflict in the colonies over the Writs began after their re-issue in 1761, ten years after their first use in the colonies. This re-issue was challenged by James Otis who asserted that the use of such Writs was unconstitutional, but his "opposition was unsuccessful." The revival of Writs of Assistance in "the Townsend Revenue Act of 1767 produced the first major controversy concerning their legality, and by 1772, the courts of eight colonies . . . had refused to issue . . ." them.[30]

Eventually it became clear that the English had abolished general warrants in a series of cases in the 1660's and 1670's while continuing them in the colonies. As Professor Lasson notes, this hypocrisy was carefully obfuscated, "from obvious motives of prudence and expedience," so that "these opinions, which in effect held illegal every search and seizure ever made in the Colonies under a writ of assistance, should never reach the public ear."[31]

The combination of colonial and English experience in legal practice in searches and seizures led to the development of the concept of constitutionality. James Otis had tested the writs of assistance on these grounds and the colonial courts came to deny the issuance of such writs on the same grounds. This concept, when mixed with the "spirit of defiance and revolution" that was "in the air," led to its inclusion in

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[29] U.S. v. Boyd, op. cit., p. 829.

[30] Martin and Gerber, footnote 28, supra, p. 688.

[31] Lasson, op. cit., p. 65.

the Declaration of Independence and eventually the Bill of Rights of the U.S. Constitution.[32]

Professor Harold Lasson states that there are several writers who incorrectly submit that the Declaration of Independence was a precursor to the Fourth Amendment.[33] He asserts that examination of the Declaration "fails to disclose any direct reference to general warrants, writs of assistance, or the principle of freedom from unreasonable search (emphasis added).[34] But there does not have to be "direct reference" for the concept to be a part of the essence of the Declaration. The document states:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with inalienable rights; among these are life, liberty, and the pursuit of happiness . . . emphasis added).[35]

As has been noted previously, there is no right or prohibition which is so closely tied to the very existence of inalienable rights such as "liberty and the pursuit of happiness" as is the prohibition against unreasonable searches and seizures. No man would long be able to pursue happiness if the government were allowed to freely enter his home, rummage through his papers, ferret his person, seize his possessions, and then use the fruit of such actions against him. What truth could be more "self-evident"? Such action was the very essence of what Jefferson was referring to in the Declaration when he stated:

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[32] Ibid., p. 79.

[33] Ibid., p. 80.

[34] Ibid., p. 80.

[35] Garry Wills, Inventing America: Jefferson's Declaration of Independence (N.Y.: Vintage Books, Random House Publishing Co., 1978), p. 374.

> The history of the present king of Great Britain is a history of injuries and usurptations, in direct object the establishment of an absolute tyranny over these states.[36]

It is ironic that the "first American precedent of a constitutional character to the Fourth Amendment was the famous Virginia Bill of Rights" which was ratified June 12, 1776.[37] Lasson observes that following "the Virginia Bill of Rights . . . some provision with regard to search and seizure was assured a place in every state declaration or bill of rights."[38] These early declarations dealt primarily with a prohibition of general warrants only.[39] But on September 28, 1776, Pennsylvania ratified a declaration that "was the first precedent which closely approximated what is now the Fourth Amendment . . ."[40] Professor Lasson elucidates the significance of this development:

> It (Section 10 of the declaration) contained all the elements of the Fourth Amendment, in that it was not merely a condemnation of general warrants like the Virginia clause but also stated the broader principle, that is, freedom from unreasonable search and seizure (emphasis added).[41]

This dual concept of the freedom from arbitrary search and seizure is evident in the final form of the Fourth Amendment.

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[36] Ibid., p. 375.

[37] Lasson, op. cit. p. 79.

[38] Ibid., p. 80.

[39] Ibid., f.n. 10, p. 80.

[40] Ibid., p. 81.

[41] Ibid., p. 81.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the person or things to be seized.[42]

The Fourth Amendment is divided into two clauses: 1) prohibition of "unreasonable searches and seizures" and 2) requirements for a valid warrant.[43] The former represents the source of the amendment's broad scope. It notes that "not all searches and seizures are prohibited; it is only those which are unreasonable that are barred." Eventually the Court was required to interpret which searches and seizures were reasonable. The most obvious reasonable "search and seizure" is one which is conducted with a warrant that satisfies the following criteria set forth in the latter clause: 1) probable cause and 2) particularity or specificity.[44] In addition, the warrant must be issued by a "non-police officer in order to guarantee a somewhat more detached and neutral view of the matter."[45]

Searches conducted without a warrant "are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions."[46] The Supreme Court has recognized the following exception to the warrant requirement with regard to arrests:

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[42] Chase and Ducat, op. cit., p. 1386.

[43] Lasson, op. cit., pp. 102-103.

[44] "The . . . requirement . . . of particularity . . . was a response to the 'despised writs of assistance' under which the British made general searches during the colonial period." M. Glenn Abernathy, Civil Liberties Under the Constitution (N.Y.: Harper and Row Publishers, 1977) p. 108.

[45] Ibid., p. 108.

[46] Katz v. U.S., 389 U.S. 347, 357 (1967).

> The general rule today is that an officer may arrest without a warrant for all offenses committed in the presence of the officer and may arrest a person for a felony without a warrant if the officer had reasonable cause to believe that such person has committed it.[47]

There are two primary exception to the warrant requirement for searches.

> The first is a search conducted as an incident to a lawful arrest, and the second is a search of a moveable vehicle based upon "probable cause" sufficient to have justified issuance of a warrant had it been requested. In these two situations a search without a warrant is not ipso facto unreasonable, although the officers may by various improper procedures turn it into an unreasonable search.[48]

From the beginning of search and seizure practice in England, there was a distinction as to what types of items might be seized. The English practice was adopted by the American legal system along with the Fourth Amendment. The distinction of evidence determined whether the government was authorized to search for and seize particular types of evidence. This authority was based on the concept of property.[49] This concept held that the property rights of the individual only could be superseded by the state when laws to such effect were passed thereby giving the state the power to protect the interests of the whole of the society. There were two basic ways in which the property concept was applied: 1) where the government "trespassed" without authorization and 2) where the government seized particular types of evidence in which it had a property interest in seizing. Thus, the search was restricted by "trespass" actions, and the seizure of goods was limited to those types of evidence

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[47] Abernathy, op. cit., p. 108.

[48] Ibid., p. 112.

[49] Boyd v. U.S., op. cit., 530-531.

in which the government held a superior property interest.[50] It is important to note that these are common law principles of property law.[51] It is from these civil law concepts that the exclusionary rule of evidence was first effected. Obviously, if the government did not have a right to search and seize, then it could not hold the evidence for trial.

A comparison of the application of this property rationale used with regard to fruits and instrumentalities of crime and the application of the rationale with regard to electronic surveillance elucidates how this dual process functions. In the former case, the law outlines certain areas of superior governmental property interest; in the latter, the search itself constituted trespass and unauthorized possession of the evidence.

The common law authorized the seizure and possession of stolen or forfeited goods.[52] The government was also entitled to seize and possess "articles and things which it is unlawful for a person to have in his possession for the purpose of issue or distribution. . ."[53] The seizure

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[50] Common law is made up of several different types of law such as torts and property. The common law of torts and property make up what is referred to as "civil law" in the United States today.

[51] There are two primary concepts of trespass which relate to the property rationale: 1) trespass quare clausum fregit: "trespass 'whereby he broke the close'; where the defendant enters upon the land of the plaintiff, he is subject to damages for such entrance under the common law." Steven H. Gifis, Law Dictionary (Woodbury, N.Y. Barron's Educational Series, Chicago, 1975), s.v., 2) trespass vi et armis: "trespass with force and arms, or by an unlawful means. . ." Ibid., s.v., "trespass." With regard to the recovery of the property, the victim of the illegal search and seizure would usually file an action of tover which is "an early common law tort action to recover damages for a wrongful conversion of personal property or to recover actual possession of such property. . ." Ibid., s.v. "tover."

[52] Boyd v. U.S., op. cit., pp. 530-531.

[53] Ibid., pp. 528-529.

of "implements of the crime" was well established in common law on the basis that it was assumed such goods were forfeited as a result of their participation in a crime.[54]

The property rationale often resulted in anomalies such as Olmstead v. U.S. in which the Court declared that a telephone wire-tap was not forbidden by the Fourth Amendment. In the majority opinion, Chief Justice Taft stated:

> The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will. . .The amendment itself shows that the search is to be of material things--the person, the house, his papers, or his effects. The descriptions of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized. . .The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or office of the defendants. . .The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched. (emphasis added).[55]

As the Court encountered the rapidly developing field of investigatory electronics, they drew on Olmstead to establish a "trespass doctrine."[56]

> If the surveillance were done without trespassing on private premises--for instance, by a detectophone placed against an outside wall. . .or by wiring an

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[54] Warden v. Hayden, 387 U.S. 291, 291 (1967).

[55] Chase and Ducat, op. cit., p. 1099.

[56] Martin Shapiro and R.J. Tresolini, American Constitutional Law, 4th ed. (N.Y. Macmillan Publishing Co., Inc., 1975), p. 634.

> informant who was invited on the premises. . .--then there was no unreasonable search and seizure. Where trespass occurred, then the search and seizure--at least if there were no search warrant--was unlawful.[57]

The absurdity of this approach was evident in Silverman v. United States, 365 U.S. 505 (1961),

> . . .the Court unanimously struck down the admission of evidence gained by a "spike mike" stuck into the wall, while refusing to overrule Goldman where the mike had been stuck onto a wall.[58]

Finally, in Berger v. New York, 388 U.S. 41 (1967), "the Court repudiated Olmstead and held that conversation was protected by the Fourth Amendment and that the use of electronic devices to capture it was a search.[59] That same year the Court repudiated the property distinction in Katz v. U.S.

The property concept was closely tied to the common law principle that searches "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . ."[60] In Boyd, the U.S. Supreme Court enunciated the synthesis of the property concept and the "purpose principle" when it stated that searches "may be resorted to only when a primary right to such search and seizure may be found. . ."[61]

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[57] Ibid., p. 634.

[58] Ibid., pp. 634-635.

[59] Ibid., p. 635.

[60] Gouled v. U.S., 255 U.S. 298, 309.

[61] Warren v. Hayden, op. cit. pp. 291-292.

Also in Boyd, the Court extensively analyzed another aspect of the rationale.

> In the course of the majority opinion for the Court, it was pointed out that while it would be proper to authorize seizure of stolen goods or implements of the crime or contraband, it would violate the Fourth and Fifth Amendments to seize "mere evidence" in the form of private papers in order to establish a criminal charge against the owner. This would be a seizure in order to compel "self-incrimination.[62]

The distinction of "mere evidence" led to a great deal of confusion as to "just what kinds of inculpatory evidence taken from the person are contemplated in the term 'self-incrimination.'" In Schmerber v. California, the Court held that seizure of evidence of a "testimonial" or "communicative nature" violated the privilege against "self-incrimination."[63]

The "mere evidence" distinction is yet another aspect of the property rationale; here the government is prohibited by the law from seizing and possessing evidence which tends to have the same effect as a coerced confession. In this case the law has designated a specific type of evidence in which the government does not have superior interest; therefore it cannot seize, possess, or use this type of evidence.

In Boyd, Justice Bradley extensively quoted the opinion of Lord Cambden in Entick which expressed the essence of the property rationale and its philosophical basis.

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set

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[62] Abernathy, op. cit., p. 108.

[63] Schmerber v. California, 384 U.S. 757 (1966), 757-758.

> aside by law are various. . .wherein every man by common consent gives up that right for the sake of justice and the general good. No man can set his foot upon my ground without my liscense, but he is liable to an action, though the damage be nothing. . .If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against defendant, and the plaintiff must have judgement. According to this reasoning, it is now incumbent upon the defendant to show the law by which this seizure is warranted.[64]

The social contract theory of John Locke appears to be the basis of Lord Cambden's explanation of the property rationale. Locke spoke of the right of property as being a model for other rights. With regard to the right of property itself, he thought it was "created by the union of man's labor with the fruits of nature, and was therefore absolutely inalienable; even government restrictions upon the usage in the light of the general welfare must be narrowly circumscribed."[65]

During the 1960's, the Warren Court handed down a series of decisions which ended the property rationale with regard to search and seizure. The formal overturning of the rationale came in Warden v. Hayden (1967), but--as Justice Brennan notes in the majority opinion of that case--the decision was the logical dictate of a number of Warren Court decisions with regard to the right of privacy, the application of the exclusionary rule to the states, the inclusion of electronic surveillance under the purview of the Fourth Amendment, and the limiting of the scope of

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[64] Boyd v. U.S., op. cit., pp. 530-531.

[65] Alfred H. Kelly and Winfred A. Harbeson, The American Constitution: Its Origins and Development (N.Y.: W.W. Norton, Inc., 1976), p. 38.

searches incident to arrest. The Court recognized in these decisions that the "great end for which men enter into society" is not solely their property."[66]

The Warren Court demonstrated the right to privacy and found it applicable to the states in Griswold v. Connecticut, 381 U.S. 479 (1965). In Katz v. U.S., the Court found that a person's right of privacy does not depend upon property rights.

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . .But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected (emphasis added).[67]

Katz also presented the end of the Olmstead "trespass" doctrine. In the majority opinion, Justice Stewart stated:

> We conclude that the underpinings of Olmstead and Goldman (v. U.S., 316 U.S. 129. . .) have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording petitioner's words violated the privacy upon which he justifiably relied. . .and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional consequence.[68]

The application of the exclusionary rule to the states in Mapp was also a major contribution to the downfall of the property rationale. As noted supra, the property rationale was a civil concept which indirectly led to exclusion. The fact that the government in some cases did not have the right to possess certain types of property meant that

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[66] Ibid., p. 38.

[67] Katz v. U.S., 389 U.S. 351 (1967).

[68] Chase and Ducat, op. cit., p. 1111.

it could not use certain types of evidence. With the development of criminal law, the property distinction became an anachronism; its philosophy and scope were simply not suited to the goals and the abuses of the criminal justice system. As the scope of the Fourth Amendment and the activities and tools of law enforcement officials increased, there was a need for a protection which went beyond mere property right.

As noted supra, Justice Brennan summarizes the downfall of the property rationale in the majority opinion in Warden v. Hayden.

> The premise that property interests control the right of the government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized the principle object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. The premise. . .the Government may not seize evidence simply for the purpose of proving the crime has. . .been discredited. The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction, obscuring the reality that Government has an interest in solving crime. (emphasis added).[69]

Justice Brennan added:

> The requirement of the Fourth Amendment can secure the same protection of privacy whether the search is for mere evidence or for fruits, instrumentalities or contraband. . . There must be a nexus. . .between the item to be seized and the criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. (emphasis added).[70]

Many have assailed the Court for radically altering the Constitution in its drive to expand the rights of the accused. Conservatives have

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[69] Warden v. Hayden, op. cit., pp. 292-293.

[70] Ibid., p. 294.

accused the Court of violating the intent of the framers in destroying the property rationale. In light of the evidence presented in Garry Wills' Inventing America: Jefferson's Declaration of Independence, it appears that the Court was not violating the intent of the framers but was in fact adhering to and implementing the intent of the framers.

Wills asserts that it was not the philosophy of John Locke that predominated the colonial mind, particularly the mind of Thomas Jefferson; the dominant influence, according to Wills, came from the Scottish moral-sense theorists: Thomas Reid, Francis Hutcheson, Adam Smith, David Hume, et. al. Wills cites a cornucopia of evidence which suggests that the works of Locke, particularly the Second Treatise were not utilized to any significant degree by colonial Americans, particularly in education. He asseverates that "this is hardly the omnipresent Locke of our National Myth."[71]

Wills suggests that it was in fact the political philosophy of the moral-sense theorists of the Scottish Enlightenment which prevaded the

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[71] Wills, op. cit., p. 172. Wills states: ". . .Locke was even less known and studied in America than in England during the first half of the eighteenth century. Here too Mr. Locke was the Locke of the Essay. . . There is no similar epiphany traceable to the day when an American picked up the Second Treatse." Ibid., p. 170. "There is no evidence that the Two Treatises figured in the set curriculum of any American college before the revolution. . .It never held the unimpeachable eminence of Grotius or Pufendorf. . .The book was of no great popularity before 1750, and the tradition of political behavior was already highly articulated by this date. It was only one among a large group of other works which expounded the Whig theory of Revolution, and its prominence within this group of other works is not noticeable until well after the general outline of the interpretation had become consolidated." (emphasis added). pp. 170-171.

colonial experience. Both Jefferson and Madison, respectively the "father of the Declaration" and the "father of the Constitution," and many other founding fathers were educated by men who were assiduous students and exponents of the Scottish Enlightenment.[72]

The significance of Wills' conclusions lies in the difference between the respective theories of the right of property of the Scottish moral-sense theorists and John Locke. The two philosophies differ on this theory in both the definition of the terms and the implications of those definitions.

Locke spoke of the right of property as being a model for other rights. As noted supra, he thought it was created by the"union of man's labor with the fruits of nature, and was therefore absolutely inalienable; even government restrictions upon the usage in light of the general welfare must be narrowly circumscribed."[73]

In contrast, the Scottish moral-sense philosophers thought that life and liberty were the "principle" rights.[74] With regard to the major

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[72] Ibid., pp. 184, 289. Wills notes: "The Americans had in general gone to school with the Scots. At Princeton, Dr. Witherspoon was teaching his Presbyterian students. . .and an odd Anglican outsider, James Madison, from the ethics of Francis Hutcheson. . .At the College of Philadelphia, that tempestuous Scot William Smith aimed his curriculum toward the culminating study of the same philosopher, and Francis Allison drilled five future signers of the Declaration of Independence in Hutcheson texts. Even at the established church's King's College in New York, the moral philosophy of Hutchenson. . .took up the final two years of study. . .Ben Franklin's scientific ties with Scotland were very close, as were those of men like Ezra Stiles. . .What was true of America in general had particular import for Virginia, where a Scot educated at Marischal College in Aberdeen had founded the College of William and Mary in the seventeenth century." (emphasis added). p. 180.

[73] Kelly and Harbison, op. cit., p. 38.

[74] Wills, op. cit., pp. 216-217.

Scottish exponent on the theory of rights, Wills notes:

> Hutcheson embraced a right to property, but it was subordinate to life and liberty, not the foundation and model of all rights. . .They (life and liberty) are also the principle duties. He does not, like those who treat rights as a form of property, think duties arise correlative to rights in some negotiating give-and-take that sets up a social contract. . . (emphasis added).[75]

The influence of this theory on Jefferson and others is evident in the Declaration of Independence which states:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed with inalienable rights; that among these are life, liberty, and the pursuit of happiness. . .(emphasis added).[76]

There is simply no direct reference to the right of property. This fact tends to belie its supposed supremacy over other rights. This is particularly significant in light of the connection of the Declaration and the Fourth Amendment noted supra. It would be impossible for a person to have life and liberty and be able to pursue happiness if he/she were not free from "unreasonable searches and seizures" of any kind at any time or place.

In light of the conclusions of Wills as to the philosophical background of the framers, it appears that the Warren Court in fact implemented and reiterated the intent of the founding fathers whose concept of search and seizures included broad protection of "persons, houses, papers, and effects," not just property rights.

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[75] Ibid., p. 217.

[76] Ibid., p. 374.

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