THE FOURTH AMENDMENT AS A DEVICE FOR PROTECTING THE INNOCENT

*Arnold H. Loewy**

The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."[1] The thesis of this Article is that the primary purpose of this provision is to protect the innocent. By "innocent," I do not mean totally innocent. (How many of us are?) I mean innocent of the crime charged or not in possession of the evidence sought.[2]

Implicit in this thesis are two interrelated (if not identical) propositions: (1) It is not unreasonable for the police to search for and seize evidence of crime; and (2) there is no fourth amendment right to secrete such evidence, *i.e.,* the right of the people to be secure in their persons, houses, papers, and effects does not include the right to be secure from the government's finding evidence of a crime.

If these propositions are correct, why has the Court invalidated so many searches and seizures that have produced evidence of crime? In many cases, the answer is that at the time of the search there was an insufficient probability of finding the evidence to justify the risk that an innocent person may be subject to the search. In legal jargon, the Court says that the police lacked probable cause.[3] In other cases, the potential bias of the decisionmaker, be it a policeman[4] or an attorney general,[5] has caused the Court to invalidate a

* Professor of Law, University of North Carolina School of Law. B.S. 1961, J.D. 1963, Boston University; L.L.M. 1964, Harvard — Ed. The author is grateful to Lowell Ball, Robert Port, and especially Frederick S. Barbour, who provided helpful research assistance in the preparation of this Article.

1. ". . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

2. These two groups may not always be analytically identical. Nonsuspects who possess evidence of a crime arguably should receive more protection than a suspect who possesses such evidence. Although such a dichotomy was rejected by Zurcher v. Stanford Daily, 436 U.S. 549 (1978), one might hope that that case may not be the last word on the subject. *Cf.* The Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (Supp. IV 1980) (generally prohibiting searches of newspaper offices in favor of subpoenas, except where the government demonstrates the likely failure of a subpoena in producing the evidence).

3. *E.g.,* Spinelli v. United States, 393 U.S. 410, 419 (1969).

4. United States v. Chadwick, 433 U.S. 1, 9 (1977)

5. Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971).

search or seizure. The Court has reasoned that unless a neutral and detached magistrate makes the judgment to allow the search or seizure, there is an unjustifiably high risk that one "engaged in the often competitive enterprise of ferreting out crime"[6] will subject an innocent person to a search or seizure.

Under this theory of the fourth amendment, a guilty person, lacking the right to secrete evidence, is essentially an incidental beneficiary of a rule designed to benefit somebody else — an innocent person who is not before the court.[7] Consequently, in construing the fourth amendment, the Court's primary focus should be on the effect of its pronouncements on the innocent. In fact, the Court's focus frequently has been on the rights of the guilty, though rarely as flagrantly as in *United States v. White*[8] where it said: "If the law gives no protection to the *wrongdoer* whose trusted accomplice is or becomes a police agent, neither should it protect him when that same

6. Johnson v. United States, 333 U.S. 10, 14 (1948).

7. Although the fourth amendment functions primarily as a device for protecting the innocent, there are a few instances where a search for evidence of crime might be unreasonable. In these exceptional circumstances, the guilty would be "protected" by the restrictions the fourth amendment places on official search and seizure.

A major consideration here is the relevance of the evidence sought to the alleged criminal conduct. For example, if the authorities have probable cause to suspect a law professor of tax fraud, could a warrant be issued to seize tax casebooks and other academic materials as "evidence" of the professor's capability to defraud? Clearly, a threshold test of relevancy is needed or too many items would be subject to seizure as evidence of crime. The Court alluded to this problem in Warden v. Hayden, 387 U.S. 294 (1967), in which the Court abandoned the "mere evidence rule" *(see* Part I *infra*), but cautioned that "[t]here must, of course, be a nexus . . . between the item to be seized and criminal behavior." 387 U.S. at 307. *See also* United States v. Highfill, 334 F. Supp. 700 (E.D. Ark. 1971) (once the items described in the warrant are discovered, search must cease). This concept, however, has not been developed in subsequent opinions.

Another related issue is the type of search necessary to uncover evidence of certain criminal activities. Searches for documentary evidence, for example, require a broad and thorough search through nonevidentiary material before the seizable item is found. Such a search offers no protection for one's privacy interest in the nonevidentiary documents examined. *Cf.* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of student newspaper's office for photographs of demonstrators who had assaulted police upheld); Andresen v. Maryland, 427 U.S. 463, 479-82 (1976) (warrant held sufficiently specific despite presence of phrase authorizing seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown").

A third instance in which the guilty may be shielded by the protections of the fourth amendment occurs when the method used in obtaining evidence of crime is itself unreasonable. *Compare* Rochin v. California, 342 U.S. 165, 172 (1952) (inducing petitioner to regurgitate evidence "shocks the conscience" and violates due process), *with* Schmerber v. California, 384 U.S. 757, 771-72 (1966) (particular manner and method of warrantless seizure of blood sample found reasonable).

Finally, the guilty might be "protected" if a search and seizure would implicate first amendment values. *See, e.g.,* Stanford v. Texas, 379 U.S. 476, 485 (1965) (pursuant to a general warrant, officers seized more than 2,000 items, including petitioner's books, pamphlets and papers; constitutional prohibition of warrants that do not describe with particularity the things to be seized "is to be accorded the most scrupulous exactitude" when the first amendment is involved). These issues are of course beyond the scope of this Article.

8. 401 U.S. 745 (1971).

agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case."[9]

Part I of this Article establishes that the government has a right to search for and seize evidence of crime. Part II develops the corollary proposition that the fourth amendment does not protect the right to secrete evidence of crime. Part III explores the impact of the reasonable expectation of privacy concept on the innocent. Part IV evaluates consent searches and their effect on the innocent. Finally, Part V considers the exclusionary rule as a device for protecting the innocent.

I. The Government Has the Right to Search For and Seize Evidence of Crime

One could establish this premise simply by citing *Warden v. Hayden*.[10] (Those readers who are satisfied with that can turn to Part II.) This premise is so important to my thesis, however, that it seems desirable if not critical to establish the correctness of that decision. The Court described the search, seizure, and accompanying incidents as follows:

> About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of "holdup," followed the man to 2111 Cocoa Lane. One Driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to the police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.
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> The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush

9. 401 U.S. at 752 (emphasis added).

10. 387 U.S. 294 (1967). Although I believe this premise should be obvious to the point of banality, some Justices *(e.g.,* Douglas in *Hayden*) and commentators (*e.g.,* White, *Some Forgotten Points in the "Exclusionary Rule" Debate,* 81 MICH. L. REV. 201 (1983)), maintain that the government may search for and seize evidence of crime only if it can assert a superior proprietary interest. In their view, it is the proprietary rather than the evidential character of the government's interest which justifies the search and seizure.

> tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent at his trial.[11]

After holding the search to be justified under "the exigencies of the situation,"[12] the Court turned to Hayden's principal argument which was that the items of clothing were inadmissible because the government could assert no proprietary interest in the items seized: the clothing was neither contraband (which by definition Hayden had no right to possess); the fruit of a crime *(e.g.*, stolen goods in which the government acting on behalf of the owner could assert a superior proprietary interest); or an instrumentality of crime (which at common law forfeited to the state).[13] Hayden contended that absent any governmental proprietary interest, the government interest in his clothing was as "mere evidence," and therefore the seizure was per se unreasonable.

The Court (per Justice Brennan) rejected this argument, describing the need for a proprietary interest as "a fiction, obscuring the reality that government has an interest in solving crime."[14] Justice Douglas, on the other hand, was taken by the argument. In a lone dissent, he argued that the fourth amendment creates "two faces of privacy:"

> (1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants.
> (2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause.[15]

Thus, Justice Douglas squarely aligned himself with the proprietary argument.

In my view, no reasonable method of constitutional adjudication supports Justice Douglas' conclusion. To establish this proposition, I shall analyze the question by examining the relevant constitutional text, policy, history, and precedent.

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11. 387 U.S. at 297-98 (footnotes ommitted).

12. 387 U.S. at 298 (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)).

13. *See, e.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974) (statutory forfeiture scheme compared to common law by which the instrumentalities of crimes were forfeited to the sovereign).

14. 387 U.S. at 306.

15. 387 U.S. at 313 (Douglas, J., dissenting).

A. *Text*

As is usually the case with expansively worded amendments, the text alone is not very enlightening. The word "unreasonable," however, is unique in the Bill of Rights, a document otherwise couched in absolute language. It is only through interpretation that guarantees such as freedom of speech,[16] the right to counsel,[17] the right to a speedy trial,[18] and freedom from double jeopardy,[19] have been held to be less than absolute. But the fourth amendment, unlike these other provisions, implicitly tells us that some searches and seizures are reasonable.

Perhaps the starkest textual contrast is with the third amendment. Like the fourth, it protects the right of the people to be secure in their homes. Unlike the fourth, however, it is absolute (except in time of war): "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."[20] If Douglas' reading of the fourth were correct, one might asume that it would have contained a dichotomy similar to the time of peace/time of war dichotomy in the third. For example, it might have read:

> The right of the people to be secure in their persons, houses, papers, and effects shall not be violated, and there shall be no searches for nor seizures of evidence of crime unless the Government claims ownership of the property which it is seeking, in which case its search must not be unreasonable, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

I do not suggest that the difference between the actual wording of the amendment and my suggested pro-Douglas wording is dispositive. It is always easy to say that if the framers had meant to support a view with which one disagrees, they would have written the Constitution differently. Nevertheless, the conditional wording of the fourth amendment, when contrasted to the absolute language of the rest of the Bill of Rights and partially absolute/partially relative language of the third amendment, militates against the Douglas dissent.

B. *Policy*

To the extent that policy considerations are relevant in constitu-

16. *E.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919).
17. *E.g.*, Scott v. Illinois, 440 U.S. 367 (1979).
18. *E.g.*, Barker v. Wingo, 407 U.S. 514 (1972).
19. *E.g.*, Illinois v. Somerville, 410 U.S. 458 (1973).
20. U.S. Const. amend. III.

tional adjudication,[21] there is little to commend the Douglas result. The importance of solving crime cannot be gainsaid. It is one of the most critical functions that a government can perform. Indeed, failure to perform that function can do as much if not more to destroy the people's right to be secure in their persons, houses, papers, and effects than the misguided efforts of a few overzealous policemen. Furthermore, there can be little doubt that an inability to obtain evidence of crime would significantly impede obtaining convictions.[22] Thus, one must conclude that the government's interest in seizing evidence of crime is nothing short of compelling.[23]

Conversely, the government's interest in obtaining instrumentalities of crime is often attenuated. To be sure, at common law, certain instrumentalities were seizable. An extreme example of this was sanctioned in *Calero-Toledo v. Pearson Yacht Leasing Co.*[24] in which the Court upheld the seizure of a yacht, aboard which a lessee possessed one marijuana cigarette.[25] The yacht owner's lack of knowledge or reason to know of the "crime," as well as the provision in the

21. Professor Grey has argued that courts constitutionally apply policy considerations not articulated in the text of the Constitution in the course of judicial review. According to Professor Grey, the courts have a role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressly attributable to the Constitution. *See* Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

Professor Grey's view is not universally shared. At the other end of the spectrum, Justice Black, Professors Ely and Wechsler, and others, have urged that the key to constitutional adjudication is fidelity to the constitutional text in judicial review. For a strong attack on judicial consideration of the wisdom of governmental policy, *see, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting); *see also*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

22. The Douglas result would create such an inability unless "instrumentalities" were defined to include almost all material associated with criminal activity. *See* notes 31 & 66 *infra*.

23. Professor White appears to contend that taking one's property for the purpose of convicting him is not a taking for a public purpose within the meaning of the fifth amendment. White, *supra* note 10, at n.21. Rather than accepting this unsupported assertion, I support Justice Black's precious remarks in Kaufman v. United States, 394 U.S. 217, 240-41 (1969) (Black, J. dissenting):

> It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable, other things being equal. One commentator [Professor Amsterdam]. . . thought it necessary to point out that there is a "strong public interest in convicting the guilty." Indeed the day may soon come when the ever-cautious law reviews will actually be forced to offer the timid and uncertain contention, recently suggested satirically, that "crime may be thought socially undesirable, and its control a 'valid governmental objective' to which the criminal law is 'rationally related.' "

(footnotes omitted). I might add that the fourth amendment's implicit approval of reasonable searches and seizures is also rationally related to redressing the socially undesirable phenomenon known as crime.

24. 416 U.S. 663 (1974).

25. "[S]o far as we know only one marihuana cigarette was found on the yacht." 416 U.S. at 693 (Douglas, J., dissenting in part).

lease forbidding criminal activity by the lessee, were held to be irrelevant.

Even if one approves of the *Pearson Yacht Leasing Co.* result,[26] it strains credulity to suggest that the government's interest in seizing that "instrumentality of crime" is more compelling (or in fourth amendment terms, more reasonable) than its interest in seizing Hayden's jacket or other evidence of crime.[27] Yet, were Justice Douglas' position to prevail, the proverbial twenty bishops could swear that Hayden's jacket was in the washing machine, and still no magistrate would be empowered to issue a warrant to search for it; while on the other side of town, the government could commandeer a yacht for no better reason than that a lessee over the owner's objection possessed a marijuana cigarette on board.[28]

Perhaps the strongest argument in favor of the mere evidence rule is that by imposing some limit on what can be seized, it will tend to limit the scope of the search thereby maximizing privacy.[29] In his *Hayden* dissent Justice Douglas quoted Learned Hand:

> [I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself . . . .[30]

Several difficulties inhere in this position. First, the mere evidence rule is an extraordinarily imprecise device for protecting privacy. While precluding the seizure of so innocuous an item as Hayden's jacket,[31] it sometimes permits even books and records to

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26. To say the least, there are serious questions about its justice.

27. I assume, of course, that the Court which treated the yacht as an instrumentality of crime would not accord similar treatment to Hayden's jacket. *See* notes 31 & 66 *infra*.

28. Justice Douglas' dissent in *Pearson* recognized that reliance on a proprietary theory of forfeiture could produce anomalous results:

> We deal here with trivia where harsh judge-made law should be tempered with justice. I realize that the ancient law is founded on the fiction that the inanimate object itself is guilty of wrongdoing. . . . But that traditional forfeiture doctrine cannot at times be reconciled with the requirements of the Fifth Amendment.

416 U.S. at 693 (Douglas, J., dissenting in part).

29. An interest which Justice Douglas has consistently sought to maximize. *See, e.g.,* Griswold v. Connecticut, 382 U.S. 479 (1965).

30. 387 U.S at 320-21 (quoting United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930)).

31. The argument could be made that Hayden's jacket and other clothing were instrumentalities of crime, for without them the robbery would have been committed in the nude. *See, e.g.,* United States v. Guido, 251 F.2d 1 (7th Cir.), *cert. denied*, 356 U.S. 950 (1958), in which the court held that shoes worn by the defendant were instrumentalities because they "would facilitate a robber's getaway and would not attract as much public attention as a robber fleeing

be seized as insrtumentalities of crime.[32] Second, as applied to Hayden, the search itself was clearly legitimate. Consequently, the mere evidence rule would not have narrowed the scope of the search.[33] Finally as Douglas and Hand themselves tell us: "[T]here can be no sound policy in protecting what does [incriminate]."

C. *History*

Research has disclosed no direct evidence supporting the proposition that the framers favored or even thought about the mere evidence rule.[34] As Justice Douglas tells us: "The debates concerning the Bill of Rights did not focus on the precise point with which we here deal."[35] Virtually every significant prerevolutionary search or seizure involved a nonspecific or arbitrarily obtained warrant. Such things as warrants that did not name the person to be searched,[36] did

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barefooted from the scene of the holdup." 251 F.2d at 4. Such an expansive definition of instrumentalities would of course swallow the rule. *See also* note 66 *infra*.

32. *See, e.g.,* Marron v. United States, 275 U.S. 192, 199 (1927) (business ledger and bills for gas, electric, water and telephone seizable as instrumentalities since "they were convenient, if not in fact necessary, for the keeping of the account [for the illegal business]; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on"); United States v. Poller, 43 F.2d 911, 913 (2d Cir. 1930) (papers related to illegal transaction subject to seizure as instrumentalities). *See generally* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 59-71 (1969). Arguably, personal papers, such as diaries, may not be seizable with or without the mere evidence rule. *See* Fisher v. United States, 425 U.S. 391 (1976) (fourth amendment); United States v. Boyette, 299 F.2d 92 (4th Cir. 1962) (fifth amendment).

33. Although the rule would not have limited the search in *Hayden,* conceivably it might narrow the scope of a search authorized by a warrant. Even there it would not be limited in any way reasonably related to balancing the right of the innocent person on the one hand and the need to solve crime on the other.

34. Much of what historical support there is for the mere evidence rule is collected in White, *supra* note 10.

35. Warden v. Hayden, 387 U.S. at 315 (Douglas, J., dissenting).

36. *See* Money v. Leach, 97 Eng. Rep. 1075 (K.B. 1765); Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763).

These cases arose from the Crown's search for the source of a pamphlet critical of the king, *The North Briton Number 45*, published April 23, 1763. A general warrant was issued by Lord Halifax, the Secretary of State, directing four of his messengers "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper entitled *The North Briton, No. 45,* . . . and them, or any of them, having found, to apprehend and seize, together with their papers." N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43 (1937). Armed with this general warrant, the messengers exercised their absolute discretion as to whom or what they could search and seize. Within three days they arrested as many as 49 persons on suspicion. The messengers eventually apprehended the publisher and printer of *Number 45* and from them learned that John Wilkes, a member of Parliament, was the author. *Id.* at 43-44.

Orders were given to apprehend Wilkes under the authority of the general warrant. Upon examining the warrant, Wilkes declared it to be "a ridiculous warrant against the whole English nation," and refused to obey it. Wilkes was brought before Lord Halifax, while an undersecretary of state, Wood, supervised the execution of the warrant. At Wilkes' home, the messengers seized all of his private papers (including his will and pocketbook) after a blacksmith had opened the drawers of Wilkes' cabinets. *Id.* at 44.

not precisely describe the items to be seized,[37] or that could be issued on conjecture or suspicion,[38] were foremost in the framers' minds. Consequently, the amendment provided that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Justice Douglas is unquestionably correct in his assertion that the framers intended to protect against more than improperly issued warrants. He notes that a proposed amendment which protected only against improper warrants was rejected in favor of one which forbade both unreasonable searches and seizures and improperly issued warrants.[39] This conclusion, however, only raises the question of what constitutes an unreasonable search and seizure; it does not answer it.

To support his two-faced theory of the fourth amendment, Justice Douglas cites the Complaints of the Bostonians[40] and a statement made by Patrick Henry during the Bill of Rights debate in

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37. *See, e.g.,* Entick v. Carrington, 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (K.B. 1765).

The *Entick* case arose out of a warrant issued by Lord Halifax in November 1762 to search for John Entick, the author of THE MONITOR OR BRITISH FREEHOLDER and seize him along with his books and papers. Unlike the warrants in the *Wilkes* cases, *see* note 36 *supra*, this warrant was specific as to the person, but general as to the papers subject to seizure.

After a jury awarded damages in an action for trespass against Halifax's messengers, the case was brought before the Court of Common Pleas, where Lord Camden presided. In an opinion that our Supreme Court later called "one of the landmarks of English liberty" (Boyd v. United States, 116 U.S. 616, 626 (1886)), Lord Camden found the warrant to be "wholly illegal and void." 95 Eng. Rep. at 818. *See* N. LASSON, *supra* note 36, at 47-48.

38. *See, e.g.,* John Adams' "abstract" of the argument of James Otis in Paxton's Case, Quincy Mass. Bay Rep. 51 (1761): "Custom-house officers may enter our houses when they please — we are commanded to permit their entry — their menial servants may enter — may break locks, bars and every thing in their way — and whether they break through malice or revenge, no man, no court can inquire — bare suspicion without oath is sufficient." M. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978) (quoting Adams in the *Massachusetts Spy* of Apr. 29, 1773).

Otis' argument in Paxton's Case "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppression of the mother country." Boyd v. United States, 116 U.S. 616, 625 (1886). *See also* M. SMITH, *supra*, at 7 n.9; N. LASSON, *supra* note 36, at 56-61.

39. Warden v. Hayden, 387 U.S. 294, 316-17 (1967) (Douglas, J., dissenting). The text of the original House draft of the fourth amendment was: "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 ANNALS OF CONG. 754 (J. Gales ed. 1789).

40. "The Bostonians complained that 'our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants.' " 387 U.S. at 315 (Douglas, J., dissenting) (quoting R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 25 (1955)).

Virginia.[41] Neither of these sources remotely supports his theory.[42] He does find some support in the following four paragraphs from Lord Camden's famous *Entick v. Carrington* opinion:

> There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.
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> In the criminal law such a proceeding was never heard of; and yet there were some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.
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> Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.
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> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.[43]

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41. "They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds." 387 U.S. at 316 (Douglas, J., dissenting) (quoting 3 ELLIOTS' DEBATES ON THE FEDERAL CONSTITUTION 448-49 (1836)).

42. If anything, the complaint of the Bostonians decries the arbitrariness and unbridled power associated with the issuance of a writ of assistance. There is no support in this short passage for Justice Douglas' assertion that the fourth amendment was promulgated to create certain "personal sanctuaries" into which the law could never reach. Rather, colonial contempt for the writ of assistance was related to the lack of proper safeguards on its issuance and execution. For example, consider the following excerpt from the January 4, 1762, *Boston Gazette*, of an article probably written by James Otis:

> IT is granted that upon *some occasions,* even a *british* freeholder's house may be forceably opened; but as this violence is upon a presumption of his having forfeited his security, it ought never to be done, and it never is done, but in the cases of the most urgent necessity and importance; and this necessity and importance always is, and always ought to be determin'd by *adequate* and *proper* judges: Shall so tender a point as this is, be left to the discretion of ANY person, to whomsoever this writ may be given— shall the *jealousies* and mere *imaginations* of a custom house officer, as *imperious* perhaps as injudicious, be counted a sufficient reason for his breaking into a freeman's house. . . .

If one examines the entire statement of Patrick Henry from which Douglas quotes, it is clear that Henry's statement does not support a dual aspect of the fourth amendment. In the material immediately preceding the quotation, Henry states that

> In the present Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, with out evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred. . . .

3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 448 (1836). This clearly gives an indication of what Henry meant when he demanded that excisemen "ought to be restrained within proper bounds."

43. Warden v. Hayden, 387 U.S. 294, 314 (1967) (Douglas, J., dissenting) (quoting Entick v. Carrington, 19 Howell's State Trials 1029, 1073, 95 Eng. Rep. 807 (K.B. 1765)).

Justice Douglas then concluded that "Lord Camden decided two things: (1) that searches for evidence violated the principle against self-incrimination; and (2) that general warrants were void."[44] In fact, the language of the last quoted paragraph more naturally reads that both self-incrimination and searches for evidence confound the innocent with the guilty, rather than that a search for evidence is itself a violation of the privilege against self-incrimination.[45]

Thus, a fair reading of Lord Camden's opinion suggests that a search for evidence of crime is forbidden only when there is an unjustifiably high risk that "the innocent would be confounded with the guilty."[46] This reading is supported by the fact that the warrants at issue permitted search on suspicion, and named no individuals. Furthermore, the *Entick* search itself failed to uncover any evidence of crime. Additionally, both before and after *Entick*, a seizure of evidence as incident to a valid arrest was permitted.[47] Finally, in explaining why the warrant to search for and seize stolen goods was issued, Lord Camden explained that the absence of the precautions which existed for the stolen goods warrant "is an undeniable argument against the legality of the thing."[48]

If my reading of history is correct, it is necessary to rationalize the two clauses of the fourth amendment. The single theme running through the entire history of the fourth amendment is arbitrariness.[49]

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44. 387 U.S. at 314 (Douglas, J., dissenting).

45. T. TAYLOR, *supra* note 32, at 53. *see also* 8 J. WIGMORE, EVIDENCE § 2264 n.4 (McNaughton rev. ed. 1961) ("This language, it should be noted, . . . states merely that both [the rule against self-incrimination and the rule against unreasonable searches] whatever they may proscribe, do so to protect the innocent from cruelty and injustice.").

46. Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (1765).

47. Telford Taylor states that

> [t]here is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself. That there are very few traces of the matter in the early records is as true as it is natural, given a practice which was taken for granted.

T. TAYLOR, *supra* note 32, at 28. The court in Weeks v. United States, 232 U.S. 383 (1914), observed that there existed "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits *or evidences* of crime." 232 U.S. at 392 (emphasis added). *See also* United States v. Robinson, 414 U.S. 218, 230-33 (1973).

48. Entick v. Carrington, 19 Howell's State Trials 1030, 1067 (K.B. 1765):

> Observe . . . the caution with which the law proceeds [in the search for stolen goods]. There must be a full charge upon oath of a theft committed. — The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description. — And, lastly the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will always be a ready and convenient witness against him.

49. *See, e.g.,* John Adams' "abstract" of James Otis' argument against the Writ of Assistance in Paxton's Case, Quincy Mass. Bay Rep. 51 (1761):

> It appears to me . . . [the writ of assistance is] the worst instrument of arbitrary power, the most distrustive of English liberty, and the fundamental principles of the constitution, that

Thus, the grand criterion of the fourth amendment is that there shall be no arbitrary, *i.e.,* unreasonable, searches and seizures.[50] On this score it did not matter whether the search was unreasonable because of an improper warrant or otherwise. Indeed, since unreasonable searches frequently occur without a warrant, it was prudent of the framers to protect against them.

Because the police frequently claimed to justify their search by an oppressive warrant, however, the framers especially felt the need to keep the issuance of warrants within bounds via a separate clause. Thus the government could not claim that a warrant rendered its search reasonable unless the necessary criteria were met. As Professor Telford Taylor put it:

> The power to search and seize must be kept within reasonable bounds. Warrants have been used to authorize dangerous and oppressive arrests and searches, and therefore we will confine their issuance in line with specified requirements, developed for the common-law stolen-goods warrant with which we are all familiar and which have never given any trouble.[51]

Accordingly, the fourth amendment constrains both searches and seizures and the issuance of warrants.

D. *Precedent*

On only one occasion, *Gouled v. United States*,[52] has the Court invalidated a seizure exclusively on the ground that the items seized were mere evidence.[53] Relying on *Boyd v. United States*[54] and

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ever was found in an English law-book. . . . Every man prompted by revenge, ill humour or wantonness to inspect the inside of his neighbour's house, may get a writ of assistance; others will ask it from self defense. One arbitrary exertion will provoke another until society will be involved in tumult and in blood.

M. SMITH, *supra* note 38, at 552-54 (1978) (quoting Adams in the *Massachusetts Spy* of Apr. 29, 1773).

50. My use of "arbitrary" is broad enough to encompass that which Professor Amsterdam calls "unjustified" as well as "arbitrary" searches and seizures. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974).

51. T. TAYLOR, *supra* note 32, at 43-44 (footnote omitted).

52. 255 U.S. 298 (1921).

53. *Cf.* People v. Thayer, 63 Cal. 2d 635, 641, 408 P.2d 108, 112, 47 Cal. Rptr. 780, 784 (1965) (Traynor, C.J.), *cert. denied*, 384 U.S. 908 (1966) ("Although the [mere evidence] rule was never expressly repudiated, evidence was never suppressed because of it.")

In this regard, United States v. Lefkowitz, 285 U.S. 452 (1932), should be examined. In *Lefkowitz*, federal agents executing an arrest warrant seized a number of business documents, utility bills and other matters relating to illegal liquor sales. The Court excluded evidence because: a) the search was too exploratory and general to be justified as a search incident to arrest; and b) the items seized were mere evidence of crime. On similar facts, the Court in Marron v. United States, 275 U.S. 192 (1927), had held that a business ledger and utility bills seized incident to a lawful arrest were admissible in evidence as instrumentalities of crime.

In *Thayer*, Traynor concluded that the mere evidence rule was not the controlling rationale of *Lefkowitz*:

Weeks v. United States[55] the Court found it "clear" that search warrants

> 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 a search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[56]

Clearly, *Weeks* does not support this result.[57] *Weeks* involved a search and seizure of personal papers without a warrant and presumably without probable cause. Under those circumstances the Court said:

> The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the *accused*.[58]

The clear inference is that if the officer had a warrant and probable cause based on sworn information, the search and seizure would have been lawful.

The enigmatic *Boyd* case, on the other hand, does support

> The difference [between *Marron* and *Lefkowitz*] was that in *Lefkowitz* the officers did not limit themselves to seizing items plainly visible, but made a thorough search of the drawers, cabinets and waste-baskets. The court suppressed the evidence because the search was too broad, and because the items seized were mere evidence. The manner in which Marron v. United States was distinguished, however, hardly served to reinforce the *Gouled* rule. In *Marron*, the court said, the search was reasonable and the items were held to be instruments of the crime. Since the items seized and the offense charged were almost precisely the same in both cases, the distinction between the two cases was only the scope of the search. When the search was so broad as to be exploratory in nature, the mere evidence rule was resurrected as an alternative (and superfluous) ground for exclusion. When the search was otherwise reasonable, the same items became instruments of crime.

63 Cal. 2d at 641, 408 P.2d at 111-12, 47 Cal. Rptr. at 783-84.

54. Boyd v. United States, 116 U.S. 616 (1886).

55. 232 U.S. 383 (1914).

56. 255 U.S. at 309 (citing *Boyd*, 116 U.S. at 623-24).

57. Indeed, some commentators ignore *Weeks* entirely when discussing the *Gouled* rationale. *See* W. LAFAVE, 2 SEARCH AND SEIZURE § 4.1(b) (1978).

58. 232 U.S. at 393-94.

Gouled. This once venerable decision has been so thoroughly discredited in recent years,[59] that further attack seems like the proverbial beating of a dead horse. Yet an understanding of why *Boyd* is at once revered and condemned is helpful to understanding the ultimate demise of the mere evidence rule.

Boyd abounds with grandiose pronouncements.[60] While those of us who write from ivory towers perhaps should not condemn grandiosity, even the grandest decision must fine-tune its pronouncements to the facts of the case if it is to remain viable. *Boyd* did not do this. Rather, it relied heavily on inapplicable quotations from *Entick*[61] to forge the rule that "any forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgement."[62] Ironically, just one year later, a British court clearly rejected such an expansive reading of *Entick*, holding that it was designed to combat the evils of general warrants issued on suspicion.[63]

Gouled, on the other hand, expanded *Boyd* and *Entick* to exclude

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59. *See, e.g.,* Andresen v. Maryland, 427 U.S. 463, 471-72 (1976); Fisher v. United States, 425 U.S. 391, 405-09 (1976); Bellis v. United States, 417 U.S. 85, 87-92 & 95 n.2 (1974); Couch v. United States, 409 U.S. 322, 330-31 (1973); T. Taylor, *supra* note 32, at 52-71.

60. *E.g.*:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person or property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.

116 U.S. at 635.

61. *See* 116 U.S. at 627-29. As the concurring opinion in *Boyd* notes, the case did not involve an actual search and seizure; rather, the case turned on the validity of a subpoena-like process used to procure incriminating evidence. 116 U.S. at 639 (Miller, J., concurring). In this respect *Entick* is not at all applicable, as that case developed from a forcible exploratory search of Entick's home under a general warrant. Therefore, the Court's use of Lord Camden's discussion of the trespass remedy and his consideration of the stolen goods warrant was clearly not pertinent to the question at hand, except in a very general sense. *See also* note 45 *supra*.

62. 116 U.S. at 630.

63. Dillion v. O'Brien, 16 Cox Crim. Cases 245, 251 (1887). Although *Dillon* upheld a search incident to valid arrest during which evidence of crime was found, the court did not limit its holding to search incident situations:

> [The] purpose and object [of the seizure and detention of evidentary material is] derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law.

16 Cox Crim Cases at 249-50.

In finding that *Entick v. Carrington* did not support the concept of a "mere evidence" rule, the court reasoned that:

all mere evidence and not just private papers.[64] *Gouled*'s progeny is even shakier than its ancestry. The Supreme Court has never excluded evidence on the basis of *Gouled* that it would not have otherwise excluded.[65] Lower courts have distinguished *Gouled* in ways more illusory than real.[66] It has never been applied to searches incident to an arrest.[67] At times, the Supreme Court has flatly ignored

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> The right here claimed is not to take all the plaintiff's papers, but only those which are evidence of his guilt; and the claim is based, not as in *Entick* . . ., upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt, and a lawful apprehension of the guilty person. If (by the law, as then understood) the right to seize evidences of guilt in the possession of the person charged was confined to cases of treason and felony, the judgment would have been rested on that simple ground, the care which was taken to show that the warrant embraced all papers would have been thrown away, and the whole of the elaborate judgment of Lord Camden would have been unnecessary. For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.

16 Cox Crim Cases at 251.

64. 255 U.S. at 309. After *Hayden* abolished the mere evidence rule, it remained possible that the fifth amendment might protect documents from seizure. This avenue was foreclosed by Andresen v. Maryland, 427 U.S. 463 (1976). *But cf.* note 32 *supra*.

65. *See* note 53 *supra*.

66. *See, e.g.*, United States v. Guido, 251 F.2d 1, 3-4 (7th Cir 1958) (shoes worn by defendant during commission of robbery found to be instrumentalities and admissible as evidence), *cert. denied*, 356 U.S. 950 (1958); United States v. Stern, 225 F. Supp. 187, 192 (S.D.N.Y. 1964) (handwritten sheets containing figures on the taxpayer's cost of living were seizable as instrumentalities since they "played a *significant* role in the commission of the crime alleged" (tax fraud) (emphasis in orginal)); United States v. Currency in the Total Amount of $2,223.40, 157 F. Supp. 300, 304 (N.D.N.Y. 1957) (money seized in a raid on a gambling establishment found to be instrumentality because "[a] sufficient amount of cash . . . appears to [be] a necessary and closely related implement or facility of the wagering business as transacted here").

67. *See* note 47 *supra* and accompanying text. The nonapplicability of the *Gouled* rule to searches incident to an arrest undercuts the often-used fifth amendment rationale behind the rule. For example, the Court in *Boyd* reasoned:

> [T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

116 U.S. at 633.

If, however, it was the accepted common law practice to use any evidence uncovered during a search incident to a valid arrest, *see* note 47 *supra*, then there seems to be no reason why "mere evidence" uncovered during the execution of a valid search warrant could not be used. If the fifth amendment's prohibition against self-incrimination was not implicated in the search incident situation, it would not be implicated in the search warrant situation.

By following *Boyd*'s dicta, the *Gouled* Court further confused "[t]he fact . . . that there is *no* 'intimate relation' between the Fourth and the Fifth Amendments . . . . '[T]he principles of the Fourth and the Fifth Amendments are complementary to each other; what the one covers, the other leaves untouched.' " J. WIGMORE, EVIDENCE § 2264 at 383 n.4 (McNaughton rev. ed. 1961).

> Whereas the Fifth Amendment forbids the use of any force whatever to compel a person to testify or to produce evidence of his wrong, the Fourth permits the use of all the strength of government to extract from a man's possession things which will convict him . . . In short, while the Fifth Amendment shields the person of the individual in unqualified terms, the Fourth Amendment affords no such protection for his possessions or even his person if he resists the search, but rather, recognizing that possessions may be seized

it.[68] In short, when *Hayden* officially buried the *Gouled* rule, it merely rendered offical what had been the law *sub rosa* for years.

Thus, by any method of constitutional adjudication, *Hayden* was clearly correct in announcing that the government has the right to search for evidence of crime.

II. The Fourth Amendment Does Not Protect the Right to Secrete Evidence of Crime

If the fourth amendment permits the government to search for and seize evidence of crime, it should follow that an individual has no inherent right to secrete such evidence. Consequently, the fourth amendment should be understood as a device to separate the wheat (evidence of crime) from the chaff (that which individuals may possess free from government prying). In a Utopian society,[69] each policeman would be equipped with an evidence-detecting divining rod. He would walk up and down the streets and whenever the divining rod detected evidence of crime, it would locate the evidence. First, it would single out the house, then it would point to the room, then the drawer, and finally the evidence itself. Thus, all evidence of crime would be uncovered in the most efficient possible manner, and no innocent person would be subject to a search. In a real society (such as ours), the fourth amendment serves as an imperfect divining rod.

Consider the following hypothetical: Principal *X* of *Y* High School, because of a hunch that students *A*, *B*, and *C* each have marijuana in their respective lockers, opens the lockers with a passkey. In *A*'s locker, he finds marijuana, which is subsequently given to the police and used to convict *A* of possession of marijuana, for which *A* receives a year's imprisonment. In *B*'s locker he finds a picture of his (Principal *X*'s) head attached to the rear end of a horse with the caption: "*X* is a Horse's Ass." In *C*'s locker, he finds a picture of *C*'s mother with the caption: "Mom."

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by might seeks to spell out limitations which will strike a fair balance between a man's privacy in his things and the duty of government to protect all citizens from criminal conduct.

State v. Bisacci, 45 N.J. 504, 509, 213 A.2d 185, 187-88 (1965).

68. *See, e.g.,* Schmerber v. California, 384 U.S. 757 (1960), in which the Court upheld a warrantless seizure of petitioner's blood, which was later introduced in evidence leading to petitioner's conviction for driving while intoxicated. This search and seizure was clearly for the purpose of gathering evidence only.

It should be noted that although *Schmerber* involved a search incident to arrest, most courts would require a warrant or other procedural safeguard before sanctioning a bodily intrusion. *See, e.g.,* United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (upholding trial court order that a bullet be surgically removed from defendant's arm).

69. Ignoring for the moment that nobody commits crime in a Utopia.

Assuming that these searches were unlawful,[70] conventional wisdom suggests that *A*'s rights were violated more than the others since only he suffered a criminal conviction by virtue of the search.[71] Yet *B*'s and *C*'s legitimate privacy interests were more seriously intruded upon. *B* had a fourth (and probably a first) amendment[72] right to keep his opinion of the principal to himself. His belief that the principal's prying eyes would not see his crude, but arguably cute, caricature is a reasonable one which ought to be protected.[73] Similarly, *C*'s hanging his mother's picture in his locker (though along with apple pie and the flag, the paradigmatic affirmation of true-blue American values) could be a source of embarrassment if made known to the public.

Let us now vary the hypothetical. Assume that instead of searching the three lockers, *X* decides to confirm his suspicions by having a marijuana-sniffing dog sniff the three lockers. The dog determines that marijuana is present in *A*'s locker, but is not present in either *B*'s or *C*'s locker. *X* then goes before a magistrate, who issues a search warrant to search *A*'s locker for marijuana, which of course is found.

In this situation, neither *B* nor *C* has had his fourth amendment rights violated. Neither's privacy has been invaded. They have not been compelled to share secrets with others. The government has learned nothing about them except that they do not possess marijuana. Any interest they may have in keeping the authorities from learning of their innocence is surely too trivial to protect.

Have *A*'s rights been violated?[74] He would of course like to keep

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70. In the hypothetical there was no probable cause. Assuming that school officials do not have a special privilege to search under the doctrine of *in loco parentis*, that students enjoy full fourth amendment protection *(cf.* Ingraham v. Wright, 430 U.S. 651 (1977) (holding that the cruel and unusual punishments clause does not apply to corporal punishment in the public schools)), and that the principal is considered a state official (making the search state action), then the search would be unconstitutional. It is beyond the scope of this Article to discuss the validity of these assumptions. For a thorough discussion of searches in public schools, see Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974); Gardner, *Sniffing for Drugs in the Classroom — Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803 (1980).

71. *Cf.* Frank v. Maryland, 359 U.S. 360, 365-67 (1959) (upholding warrantless administrative search because it was not aimed at a criminal prosecution). Although *Frank* was overruled by Camara v. Municipal Court, 387 U.S. 523 (1967), the overruling opinion emphasized the potential criminal liability that could result from an administrative search. 387 U.S. at 531.

72. *Cf.* Talley v. California, 362 U.S. 60 (1960) (holding that handbiller's right to anonymity is protected by the first amendment).

73. *Cf.* Katz v. United States, 389 U.S. 347 (1967) (holding that the fourth amendment protects an individual's reasonable expectation of privacy when he enters a public phone booth, closes the door, and places a private call).

74. Courts have usually, but not always, upheld the constitutionality of random dog-sniffs. *Compare* People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977) (random dog-sniffs

to himself the evidence of his crime. But his claim is not a powerful one. Indeed, in this case, an accurate dog[75] approaches the hypothetical divining rod by separating the innocent from the guilty.

Many students and colleagues with whom I have discussed the divining rod theory have objected to it because of its "1984" overtones.[76] There is a major difference, however, between "Big Brother"[77] watching *everything* and government being able to detect *only* evidence of crime.

I am not contending that any use of any device that in some ways resembles a divining rod is per se reasonable. For example, so innocuous a device as a magnetometer cannot distinguish permissible metals (coins, keys, etc.) from impermissible ones (guns, knives, etc.).[78] Furthermore, most magnetometers, such as the one in the United States Supreme Court Building, require that innocent people be herded like cattle and marched single file through the device. On the other hand, if a device could be invented that accurately detected weapons and did not disrupt the normal movement of people, there could be no fourth amendment objection to its use.[79]

Nor do I suggest carte blanche use of marijuana-sniffing dogs. To the extent that the dog is less than perfectly accurate, innocent people run the risk of being searched.[80] Additionally, the very act of

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constitute unreasonable search), *with* United States v. Race, 529 F.2d 12 (1st Cir. 1976) (random dog-sniff of baggage in airline warehouse does not constitute a search).

75. Obviously an inaccurate dog would present different problems. *See* Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981). *See* note 80 *infra*.

76. *See* G. ORWELL, NINETEEN EIGHTY-FOUR (1st Am. ed. 1949).

77. *Id.*

78. Indeed, so innocent a person as the author of this Article was compelled to empty from his pockets metal-framed glasses, coins and keys in full view of his students after activating the magnetometer at the United States Supreme Court.

79. This is not to say the use of a magnetometer is impermissible; rather, that it is only permissible when the interest in using it outweighs the offensiveness of the instrusion involved. Those that object to the use of a magnetometer point out that there is a substantial intrusion because they are herded like cattle through the chute. In United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974), it was held that the use of a magnetometer in the airport boarding procedure constituted a search but was reasonable under the circumstances given the minimal intrusion and the serious danger of airline hijacking. In People v. Hyde, 12 Cal. 3d 158, 165-66, 524 P.2d 830, 834-35, 11 Cal. Rptr. 358, 362-63 (1974), the predeparture screening was justified by analogy to administrative searches. The search of one attempting to board a plane in United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973), was justified on the theory that the search was a condition to boarding that did not unreasonably burden the right to travel, and therefore, by presenting himself at the boarding gate the passenger essentially consented to the search. For an excellent analysis of the *Davis*-type rationale, see Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657 (1974). *See also* Abramovsky, *The Constitutionality of the Anti-Hijacking Security System*, 22 BUFFALO L. REV. 123 (1973).

80. For example, in Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), a drug-sniffing dog had "alerted" to a 13-year-old junior high school girl during a school-wide "sniff" of all

being subjected to a body sniff by a German Shepherd may be offensive at best or harrowing at worst to the innocent sniffee.[81]

Another concern expressed about marijuana-sniffing dogs (and presumably other divining rods) is Professor Gardner's contention that people have a right to be free from unwarranted suspicion.[82] Thus, in our hypothetical locker search, *A*, *B*, and *C* could all argue that they had the right to be free from unwarranted suspicion. *B* and *C*, however, were benefited by the dog (divining rod) because it was the dog that freed them from the unwarranted suspicion which otherwise would have continued in the principal's mind.[83]

Student *A* might have an argument that he, along with students *B* and *C*, was singled out for special treatment. If he could introduce additional factors, for example, that half of the students were believed to have marijuana in their lockers and that *A*, *B*, and *C* were the only blacks in an otherwise all-white school, he might have a serious constitutional contention.[84] Apart from this equal protection problem, however, there is no constitutional basis for holding that a person has a right to be free from unjustifiable suspicion.[85]

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the students. The dog continued to "alert" to her even after she emptied her pockets. Diane Doe was then subjected to a nude search by two women who examined her clothing and lifted her hair to look for drugs. No drugs were found but it was later discovered that she had been playing that morning with her dog, which was in heat. 475 F. Supp. at 1017.

To further highlight the inaccuracy of these particular dogs, they "alerted" to some fifty students, only seventeen of whom were found to be in possession of drugs. 475 F. Supp. at 1017.

81. In Doe v. Renfrow, 475 F. Supp. at 1017, the Highland Town School District Board, the Superintendent of Schools (Omer Renfrow), members of the Highland Police Department and Patricia Little (owner of a dog training school) devised a plan to combat what they feared was a growing drug problem in the Highland Junior and Senior High Schools wherein all 2,780 students were required to remain seated at their desks while a dog sniffed at them as the dog and his trainer walked up and down the aisles. 475 F. Supp. at 1015-17. Thus approximately 2,763 innocent students were subjected to this potentially frightening and definitely degrading experience, and some 33 students were wrongly suspected of possessing contraband by the dogs' false alerts.

82. Gardner, *supra* note 70, at 844-47.

83. *See* text at notes 133-35 *infra*. *Cf.* Florida v. Royer, 51 U.S.L.W. 4293, 4297 (U.S. Mar. 23, 1983) (Plurality opinion per White, J.):

> If it [a dog sniff] had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.

84. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

85. Gardner cites no authority to support a constitutional basis for "the right to be free from unjust suspicion." Furthermore, if there were such a rule, neither the principal nor the police could ask questions about students suspected of criminal activity as long as there were no probable cause (or at least no reasonable suspicion) for arrest or search. The result would be a catch-22 in which police could not search because they did not have probable cause and could not investigate in order to establish probable cause because suspicion would thereby be cast on the individual unjustly.

Indeed, as noted, the beauty of the canine sniff is the ability to free one from unjustifiable suspicion.[86]

In sum, the fourth amendment exists to protect the innocent and may normally be invoked by the guilty only when necessary to protect the innocent.

III. Reasonable Expectation of Privacy and the Innocent

Unless the government's method of seeking or obtaining evidence contravenes a reasonable expectation of privacy, the usual requirements of probable cause and a warrant are unnecessary because there is no search or seizure within the meaning of the fourth amendment.[87] So long as reasonable expectation of privacy means

86. A final objection to the divining rod theory is that if we had a device that would detect evidence of crimes whenever it existed, it would possibly precipitate enforcement of laws that we do not really want enforced. The following quote by Thurman W. Arnold expresses the idea sharply: "Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." Arnold, *Law Enforcement — An Attempt at Social Dissection,* 42 YALE L.J. 1, 14 (1932). Arguably certain drug laws (*e.g.*, possession of marijuana) are examples of such laws. If so, the better course of action is for the legislatures and perhaps the courts to rethink the propriety of marijuana laws. If the employment of crime-detecting devices such as marijuana-sniffing dogs causes us to rethink that which we outlaw, it is an argument in favor of, and not against, such a use.

Certain states have already reconsidered their drug laws with respect to marijuana. *See, e.g.,* ALASKA STAT. § 17.12.100(e) (1975) (public possession of one ounce or less of marijuana or private possession of any amount for personal use punishable by civil fine not to exceed $100); ME. REV. STAT. ANN. tit. 22, § 2383 (1980) (possession of a usable amount of marijuana is a civil violation punishable by fine not to exceed $200). The private possession of marijuana in Alaska was held to be protected (and thus legal) by that state's constitutional guarantee of privacy in Ravin v. State, 537 P.2d 494 (Alaska 1975). For a review of state marijuana legislation, see Bonnie, *Decriminalizing the Marijuana User: A Drafter's Guide*, 11 U. MICH. J. L. REF. 3 (1977).

Professor White argues in response to my thesis:

> Many of those most vociferously opposed to the writs of assistance were guilty of systematic violations of the customs laws; for them and their friends the objection to those writs was not that they interfered with the rights of innocent people, but that they permitted the enforcement of certain laws they regarded as evil.

White, *supra* note 10, star note. Surely this does not establish that the fourth amendment was adopted to protect those who break unjust laws. If that were the intent, an amendment which forbids any unreasonable searches rather than all searches seems like an extraordinarily imprecise implementing device. At most, Professor White's evidence suggests that some supporters of the fourth amendment who had engaged in criminal activity hoped to be incidental beneficiaries of a rule not designed for their benefit. *See* text at note 7 *supra*.

87. In Katz v. United States, 389 U.S. 347, 353 (1967), the court held that the warrantless bugging of a public telephone booth to overhear petitioner's conversations was a fourth amendment violation:

> [O]nce it is recognized that the Fourth Amendment protects people — and not simply "area" — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure . . . . The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

that expectation which should be accorded to an innocent person, it is consistent with the proposed thesis. Unfortunately, such has not always been the case.[88]

Although the Court did not use these precise words, the result and much of the rationale of *Lewis v. United States*[89] paradigmatically illustrates the reasonable expection of privacy theory protecting the innocent. A government agent telephoned Lewis, falsely represented his identity, and told Lewis that a mutual friend suggested that Lewis would supply the caller with marijuana. Pursuant to this representation, Lewis invited the caller to his home to purchase marijuana. Lewis was prosecuted for selling marijuana from his home to the government agent.

Had the agent engaged in conduct which was likely to induce an otherwise innocent person to sell marijuana, Lewis could have raised the defense of entrapment.[90] Instead the agent merely gave a predisposed marijuana peddler the opportunity to sell his wares. The

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In attempting to flesh out what the majority meant by "justifiable reliance," Justice Harlan, concurring, formulated what came to be considered the *Katz* rule: "My understanding of the rule that has emerged from prior decision is that there is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). (*See also* Terry v. Ohio, 392 U.S. 1, 91 (1968) (stating that the *Katz* rule protects reasonable "expectation[s] of privacy"). For a critique of the Court's post-*Katz* formulations and applications of the *Katz* rule, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383-86 (1974).

In Smith v. Maryland, 442 U.S. 735, 740-41 n.5 (1979), however, the Court noted that it might not require even a subjective expectation of privacy in certain circumstances:

> For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of fourth amendment protection was.

422 U.S. at 740 n.5.

There have been several cases in which the Court has found no fourth amendment violation because there was no legitimate expectation of privacy. *See, e.g.,* United States v. Mara, 410 U.S. 19 (1973) (compelled production of handwriting exemplars upheld: no reasonable expectation of privacy exists in the physical characteristics of one's handwriting); United States v. Dionisio, 410 U.S. 1 (1973) (compelled production of voice exemplars for identification purposes upheld). For a general exposition of the *Katz* rule, see 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1 (1978 & Supp. 1982).

88. *See* text accompanying notes 104-27 *infra*.

89. 385 U.S. 206 (1966).

90. At least if Lewis were not predisposed to sell marijuana. Under the subjective approach to entrapment, if the defendant himself was predisposed to commit the crime, there is no entrapment. The Supreme Court has endorsed the subjective approach for federal criminal uses. United States v. Russell, 411 U.S. 423, 433-35 (1973); Sherman v. United States, 287 U.S. 435, 451 (1932). Under the alternative objective approach, if the government's conduct were such as to entice an otherwise law-abiding hypothetical individual to commit a crime, the defense is available regardless of the defendant's actual predisposition. Thus, the subjective approach focuses on the particular defendant's state of mind while the objective approach looks to the

agent's role was analogous to a marijuana-sniffing dog.[91] Both the dog and the agent could learn only that the object of their interest did or did not have marijuana.[92] The agent in *Lewis* was more likely than the dog to find a false negative, *i.e.,* he may have found Lewis or someone like him who possessed and sold marijuana to be unwilling to deal with him.[93] He could not, however, have found a false positive, *i.e.*, a nonpossessor of marijuana who would have extended an invitation to purchase.[94] Consequently, the government's procedure in *Lewis* presents no risk to the innocent and was rightly sustained.[95]

Somewhat more difficult is *Lewis'* companion case, *Hoffa v. United States*,[96] which upheld a conviction based on testimony by a government informer who, through his friendship with Hoffa, was able to spend several days in his company and testify to Hoffa's incriminating statements uttered in the informer's presence.[97] The Court rejected Hoffa's fourth amendment claim, holding that "[t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak."[98]

Unlike *Lewis*, the innocent person in the *Hoffa* situation does run

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specific government conduct involved. *See generally* Park, *The Entrapment Controversy,* 60 MINN. L. REV. 163, 171-84 (1976).

91. *See* Part II *supra*.

92. One could argue that an agent is more intrusive than a dog, in that the agent may witness the suspect in activities other than drug sales, whereas the dog is only cognizant of the presence of drugs. This does not present a significant threat to the innocent. *See* text at notes 96-102 *infra*.

93. A narcotics pusher might be unwilling to deal with a new or unfamiliar customer out of caution or fear of just such an undercover operation.

94. Unless, of course, the dealer intended to "sting" the customer by taking his money and delivering fake goods.

95. That is not to suggest, however, that any further search or unlawful conduct by an officer would be appropriate. *Cf.* Gouled v. United States, 255 U.S. 298, 305-06 (1921) (an unreasonable search and seizure is committed when a representative of the government "by stealth, or through social acquaintance, or in the guise of a business call," gains entrance to the house or office of a person suspected of a crime, and searches without consent).

96. 385 U.S. 293 (1966).

97. There was a question raised over whether the informer actually was a government planted agent or whether he was a private citizen acting on his own behalf. The district court found that he was not a government agent. *See* 385 U.S. at 299, n.4. The Supreme Court proceeded on the assumption that he was planted by the government. 385 U.S. at 299.

The controversy sprang from the fact that Partin had been released on bail from prison and criminal proceedings against him had been postponed while he served as an informer. Furthermore, after Hoffa's conviction, the charges against Partin were dropped and his wife received four payments of $300. 385 U.S. at 297-98.

98. 385 U.S. at 303 (quoting Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)).

some risk. Any innocent statement he makes may be reported to the police chief whether he wants the chief to hear it or not; *e.g.*: (1) "The police chief is a horse's ass"; (2) "I'm a Communist sympathizer";[99] or (3) "I hope the Yankees win the pennant."[100] Yet the Court was surely correct in holding that one must run the risk that any person will repeat any statement to whomever he chooses. The question is whether he must also run the risk that the person has been planted by the government. Since a person can choose his confidants and knows that he is risking unauthorized repetition of his statements, the additional risk to an innocent person that he might be dealing with a government agent does not seem very great.[101] When this minimal additional risk is balanced against the need for informants to help solve crime,[102] the *Hoffa* result seems defensible.[103]

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99. The decisions of the Supreme Court make it clear that simple association with the Communist Party without sharing its unlawful aims or without active advocacy of them is protected by the first amendment. *See, e.g.,* Elfbrandt v. Russell, 384 U.S. 11 (1966); Noto v. United States, 367 U.S. 290 (1961).

100. From my perspective, the last of these statements is especially repulsive. Probably, most people also would prefer not to have the first two reported to the police.

101. There are three considerations that minimize this additional risk. First, the informant is unlikely to report nonincriminating statements to the police. He is, after all, employed only to provide evidence of crime. Second, the informant's words are not completely reliable. If the informant tells the police chief that the innocent suspect thinks he is a horse's ass, the innocent suspect can deny that he ever made the statement. Finally, the only additional risk that *Hoffa* imposes on an innocent person is that he may not know the identity of his confidant's employer. The innocent person knows that he is speaking to another person. He knows that that person may repeat his words to others. All that he does not know is that the person's employer is the police, rather than, for example, IBM. This additional risk is not sufficiently great to justify denying police access to information about crime.

102. The court has recognized the key role that informants play in modern crime detection. For example, in McCray v. Illinois, 386 U.S. 300 (1967), the Court upheld an Illinois procedure that allowed the police in a preliminary hearing to establish probable cause for arrest and search, to withhold the identity and address of their informant so long as they disclosed information tending to show the basis for the informant's knowledge and the informant's record or reliability.

The Court noted:

> A genuine privilege, . . . must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. . . . [An informer] will usually condition his cooperation on an assurance of anonymity — to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in non-disclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

386 U.S. at 308-09 (emphasis in original) (footnotes omitted) (quoting 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. ed. 1961)).

103. Other commentators reach the opposite result, arguing that people should not have to assume the risk that their friends are actually government agents who have promised to report back to the police. *See, e.g.,* Kitch, Katz v. United States: *The Limits of the Fourth Amend-*

Although focusing on the interest of the guilty rather than the innocent did not create a bad result in *Lewis* and probably did not in *Hoffa*, it certainly did in *United States v. White*,[104] in which the Court sanctioned an unwarranted police installation of a transmitting device hidden upon the person of a police informant. The device instantaneously transmitted White's statements, intended only for the informant's ears, to the police. Recordings of these statements formed part of the government's case against White.

After citing *Hoffa* and *Lewis* with approval, the Court analyzed the problem strictly in terms of a wrongdoer's risk:

> If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. See *Lopez v. United States* 373 U.S. 427 (1963).[105]. . .
>
> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. . . . An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.[106]

From this perspective, the Court's logic is impeccable. A guilty person has no legitimate interest in a less reliable version of the facts. Furthermore, a recording reduces the probability of erroneous informant testimony being believed, thus ensuring a more accurate verdict.[107] Indeed, if one's focus is on the rights of the criminal, it is

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ment, 1968 SUP. CT. REV. 133, 151-52. Another commentator argues that *Hoffa* totally "disregard[s] . . . the value of friendship as an aspect of privacy." Note, 76 YALE L.J. 994, 1013 (1967).

104. 401 U.S. 745 (1971).

105. (This footnote is the author's.) *Lopez* involved a situation in which an informant carried a pocket tape recorder under his clothing and recorded his conversation with the defendant.

106. United States v. White, 401 U.S. 745, 752-53 (1963).

107. For example, under the circumstances in *Hoffa*, text accompanying notes 96-98 *supra*,

hard to accept *Hoffa* and reject *White*.[108]

As applied to the innocent, however, the risk is entirely different. Viewing myself as a hypothetical innocent person, it is one thing for a third party to tell the police chief that I think he is a horse's ass or that I said I am a Communist sympathizer.[109] It is quite another for the police chief to hear it from my own mouth.[110] Furthermore, if the police have an unauthorized recording of my voice, they have the ability to use it for parlor games, practical jokes, or harassment.[111]

The justification for this intrusion upon the innocent is miniscule. In recent cases in which the Supreme Court has been asked to approve electronic recording or transmitting by a government agent, the government appears to have had probable cause,[112] but not a search warrant.[113] Given the intrusiveness of an electronic recording or transmitting device, it is hard to make a case for dispensing with probable cause.[114] The usual rationale for requiring a warrant is the unjustifiably high risk that those "engaged in the often competitive enterprise of ferreting out crime"[115] will assume probable cause where none exists. Consequently, the fourth amendment contemplates a warrant issued by a neutral and detached magistrate.[116] The

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there probably is a greater than average possibility that Partin was lying. Therefore, if Hoffa were indeed innocent, a recording makes it less likely that he might be wrongfully brought to trial. On the other hand, if Hoffa were in fact guilty, the recording would be more accurate and reliable and probably would weigh more heavily with the jury than would Partin's testimony. *See* 385 U.S. at 317-21 (Warren, C.J., dissenting).

108. Chief Justice Warren, concurring in the result of Lopez v. United States, 373 U.S. 427, 441 (1963), advocated permitting the use of hidden electronic devices by field agents for inter-agency purpose — such as protecting the credibility of an IRS agent against charges of bribery — while prohibiting use of such recordings as evidence in criminal trials. 373 U.S. at 445-46. Chief Justice Warren's proposal is unacceptable because it would preclude the use of valuable evidence that was lawfully, not unlawfully, obtained. Only by accepting the Warren view could one focusing on the rights of the criminal accept *Hoffa* and reject *White*.

109. In case any police chiefs are reading this Article, please understand these statements are purely hypothetical.

110. Coming from my own mouth, the impact of the words may be greater; at the very least, I cannot deny that I made the statements.

111. I assume that it will be impossible to control unauthorized use of these recordings. Given that they were obtained without a warrant, and suspects have no idea that the tapes exist, adequate controls seem unlikely. For one example of uncontrolled clandestine surveillance, see D. GARROW, THE FBI AND MARTIN LUTHER KING, JR. (1981).

112. *See* United States v. White, 401 U.S. 745 (1971); Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); note 117 *infra*.

113. Of the recent cases cited in note 112 *supra*, only *Osborn* involved a situation in which the police did obtain a warrant before using electronic surveilance.

114. The Supreme Court decisions have done just that. After *White*, the police could bug an informant sent by the police to talk to me — the hypothetically innocent person — and could record or listen in on that conversation.

115. Johnson v. United States, 333 U.S. 10, 14 (1948).

116. 333 U.S. at 14. The Court has reached some interesting results in trying to identify exactly who qualifies as a "neutral and detached" magistrate. *Compare* Shadwick v. City of

decision to transmit or record is seldom made instantaneously. Rather, it is usually the product of much deliberation.[117] Therefore, it seems hard to justify the absence of a warrant in cases such as *White*.[118]

If the suggestions proposed in this Article had been the law when the government sought to transmit and record White's conversations, transmission and recording could have been permissible. The government could have presented its case to a magistrate who would have issued a warrant for the recording. Meanwhile, any of the rest of us could have expressed an opinion of the police chief, secure in the knowledge that his agent was not then and there recording or transmitting it.

No case illustrates the lack of concern for the innocent better than *Smith v. Maryland*,[119] in which the Court held that the installa-

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Tampa, 407 U.S. 345 (1972) (appointed municipal court clerk is neutral and detached), *with* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (state attorney general is not sufficiently neutral and detached).

117. For example, *White* involved a series of at least eight prearranged meetings, between the informant and defendant during a two-month period, for the purpose of purchasing and selling illegal drugs. Before each scheduled encounter, police agents, without a warrant, equipped the informant with a hidden microphone and transmitter. *See* United States v. White, 405 F.2d 838, 840-42 (7th Cir. 1969) (recitation of facts by Court of Appeals). In fact, the Court of Appeals specifically noted that "the Government did not argue that the evidence would have been lost due to the delay of obtaining a warrant, nor do the facts suggest that such an argument could have been made." 405 F.2d at 844 n.6.

In *Lopez*, the defendant innkeeper was convicted of attempting to bribe an IRS agent who was investigating possible evasion of a cabaret tax. After a series of preliminary meetings, Lopez offered the agent $420 cash plus indefinite future benefits to drop the investigation. Another meeting was then scheduled for three days later. After the agent reported the attempted bribe and turned over the money to his superiors, he was equipped with both a tape recorder and a transmitter before the next meeting at which further bribery payments were made. Lopez v. United States, 373 U.S. 427, 428-32 (1963). Here again, no warrant for the bugging was obtained despite the fact that the IRS agents had three days' prior notice of the meeting.

Osborn involved a conviction of Jimmy Hoffa's attorney for attempted jury tampering. In that case, informant Robert Vick met several times with federal agents, indicated he intended to apply for a job with Hoffa's attorney, and agreed to report any illegal activities he observed. Vick then got a job investigating the backgrounds of potential jurors in the Hoffa case. After the attorney discovered that Vick's cousin was in the jury pool, preliminary discussions about a bribe were held. Only then did Vick tell federal agents. In this case, unlike *White* and *Lopez*, the agents did obtain a warrant before concealing a tape recorder on Vick to record further discussions of the possible bribe. Osborn v. United States, 385 U.S. 323, 325-29 (1966).

118. At one time, it might have been doubtful that a warrant would have been issued for electronic surveillance, but that is no longer true. *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967) (recognizing that agents might well have had probable cause to eavesdrop, but reversing conviction because no prior warrant obtained); Berger v. New York, 388 U.S. 41, 63 (1967) (invalidating as overbroad a New York statute providing for sweeping warrants to eavesdrop, but recognizing that "this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices"); Osborn v. United States, 385 U.S. 323 (1966) (upholding electronic surveillance when carried out pursuant to narrowly drawn warrant).

119. 442 U.S. 735 (1979).

tion of a pen register[120] on an individual's telephone was not a search within the meaning of the fourth amendment. Consequently, government officials are perfectly free to learn every telephone number that any persons dials, subject only to the cooperation of the telephone company.[121]

Three Justices — Stewart, Marshall, and Brennan — dissented because of the intolerable impact of this practice on the innocent.[122] Justice Stewart (whose unfortunate majority vote in *White* helped establish the underpinning for *Smith*) noted:

> Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.[123]

Even more pointedly, Justice Marshall observed:

> Privacy in placing calls is of value not only to those engaged in crimi-

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120. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977). *See generally* Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108 (1970); Note, *The Legal Constraints upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028 (1975).

121. The telephone company probably can be compelled to cooperate. *Cf.* United States v. Miller, 425 U.S. 435 (1976), in which the Court upheld the subpoena of microfilm records held by defendant's bank. Defendant was convicted on various charges relating to the operation of an illegal still. In upholding the conviction, the court held that an individual has no legitimate expectation of privacy in records of his financial transactions kept by a bank as required by federal law:

> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained . . . contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. . . . The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.

425 U.S. at 442-43 (citation omitted).

The *Miller* decision rested heavily on the court's prior decision in California Bankers Assn. v. Shultz, 416 U.S. 21 (1974). In *Shultz* the Court held that the recordkeeping and reporting requirements of the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970), constituted a valid exercise of the power of Congress to regulate interstate and foreign commerce and did not violate the fourth amendment rights of the banks. At that time, however, the Court refused to rule on whether the fourth amendment rights of individual depositors were abridged because none of the individual plaintiffs in that case had standing. 416 U.S. at 59-70.

Taken together, *Miller* and *Shultz* make it clear that the federal government can, on the one hand, compel the maintenance of business records by banks and, on the other hand, avoid any fourth amendment problem by subpoenaing the records from the bank rather than from the individual himself.

122. Justices Stewart and Marshall each filed a dissent. Justice Brennan joined each one.

123. 442 U.S. at 748 (Stewart, J., dissenting).

> nal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts.[124]

Perhaps the reason that views such as these[125] are not taken seriously is the nature of the cases; *White* involved a drug peddler, while *Smith* involved a robber who continued to harass his victim by threatening and obscene phone calls. Furthermore, the police may have had probable cause to believe that Smith was making the phone call.[126] Consequently, the Court may have viewed the danger to the innocent as irrelevant to the case before it. Yet so long as fourth amendment standards are forged in cases involving not very nice people, the Court must be concerned about the negative impact its decisions have on those of us who are nice.[127]

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124. 442 U.S. at 751 (Marshall, J., dissenting).

125. The dissents of Justices Stewart and Marshall in *Smith* echo the dissenting opinion of Justice Harlan in United States v. White, 401 U.S. 745 (1971). In *White*, Harlan emphasized that a rule requiring a warrant for electronic surveillance would be aimed at protecting the innocent, not the guilty:

> By casting its "risk analysis" solely in terms of the expectation and risks that "wrongdoers" or "one contemplating illegal activities" ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk. . . . Abolition of *On Lee* would not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause . . . and had tested their version of the facts before a detached judicial officer. The interest *On Lee* fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation. Interposition of a warrant requirement is designed not to shield "wrongdoers," but to secure a measure of privacy and a sense of personal security through our society.

401 U.S. at 789-90. (In *On Lee v. United States*, 343 U.S. 747 (1952), decided under trespass doctrine, the Court held that the fourth amendment was inapplicable where an informer that was "bugged" transmitted a conversation with a suspect to an agent who subsequently testified to statements made.) For one example of uncontrolled clandestine surveillance, see D. GARROW, THE FBI AND MARTIN LUTHER KING, JR. (1981).

126. The Court stated the facts as follows:

> On March 5, 1976, in Baltimore, Md., Patricia McDonough was robbed. She gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. After the robbery, McDonough began receiving threatening and obscene phone calls from a man identifying himself as the robber. On one occasion, the caller asked that she step out on her front porch; she did so, and saw the 1975 Monte Carlo she had earlier described to police moving slowly past her home. On March 16, police spotted a man who met McDonough's description driving a 1975 Monte Carlo in her neighborhood. By tracing the license plate number, police learned that the car was registered in the name of the petitioner, Michael Lee Smith.

442 U.S. at 737(citations omitted). On the basis of these facts, police had the telephone company install a pen register to monitor Smith's home phone.

127. Justice Frankfurter, dissenting in United States v. Rabinowitz, 339 U.S. 56 (1950),

IV. CONSENT AND THE INNOCENT PERSON

Consent searches are another area in which analysis has been directed principally to the impact on the guilty rather than the innocent. In *Schneckloth v. Bustamonte*,[128] the issue was whether a valid consent presupposed that the searchee had knowledge of the right to withhold consent. In holding that such knowledge was not required, the Court obviously was concerned with the impact of such a rule on the guilty: "Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent."[129]

In *Bustamonte*, six men were driving down the highway with a burned-out headlight and license plate light at 1:30 a.m. A policeman stopped the car, and after only one of the six occupants produced identification, asked all six to leave the car. Subsequently two reinforcements arrived. Only then did the policemen "ask" for and receive permission to search the car.

Let us hypothesize innocent people (disregarding traffic violations) in this situation. Six people have been stopped, asked (ordered?) to leave the car, seen two reinforcement police cars arrive, and then "asked" if the police may search their car. Surely, most people in that situation would believe that not allowing the search would create more problems than allowing it, assuming (which is not likely) that they even believe they have a choice. Yet the search may turn out to be destructive,[130] time-consuming, or both. The real

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recognized the danger of allowing constitutional doctrines to be shaped by emotional reactions to particular unsympathetic defendants:

> The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implication of the generalization of which the case gives rise. . . . It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment.

339 U.S. at 68-69 (Frankfurther, J., dissenting).

In *Smith* and *White*, the police may have had probable cause sufficient to obtain a warrant. If the Court felt compelled to uphold the search in those cases, it would have been better to formulate a rule allowing introduction of seized evidence where there is probable cause but no warrant than to characterize the intrusion as not a search at all. At least, such an approach would not validate such intrusions without probable cause. This approach would require creating another exception to the warrant requirement — an exception that would be hard to formulate. *Cf.* United States v. Ross, 102 S. Ct. 2157 (1982) (warrantless search of automobile allowed when officers had probable cause to believe contraband concealed somewhere in car).

128. 412 U.S. at 218 (1973).

129. 412 U.S. at 230. That danger arises, of course, only if one assumes it would be impracticable simply to tell the individual that he has the right to refuse.

130. In *Bustamonte*, the rear seat apparently was removed to search beneath it. *See also*

question is the justification for saddling innocent people with that choice.

In *Bustamonte,* the Court spoke of the need for consent searches:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial.[131]

The implication of this rhetoric is that the the police must have a method to legitimate a search without probable cause lest valuable evidence be lost and innocent people wrongly accused. If we could take this seriously, we ought to allow searches based on less than probable cause — perhaps reasonable, or even unreasonable, suspicion could be the standard. We don't allow such searches, however, because probable cause has been determined to be an appropriate balance between the government's need to obtain evidence and the innocent person's right to be free from an intrusive search.[132]

Carroll v. United States, 267 U.S. 132 (1925) (prohibition agents destroyed rear seat cushion and upholstery during search of automobile for illegal liquor); Martinez v. United States, 333 F.2d 405 (9th Cir. 1964) (illegal drugs found and removed from automobile air vents).

It should be noted also that an individual might not be able to withdraw his consent once it is given, even though the search becomes destructive. *See, e.g,* People v. Kennard, 175 Colo. 479, 488 P.2d 563 (1971) (once given, consent cannot be withdrawn); Smith v. Commonwealth, 197 Ky. 192, 246 S.W. 449 (1923) (same); Note, *Consent Searches: A Reappraisal after Miranda v. Arizona*, 67 COLUM. L. REV. 130, 157 & n.121 (1967). *Cf.* United States v. DeAngelo, 584 F.2d 46 (4th Cir. 1978) (once defendant presented himself for boarding and subjected his briefcase to X-ray search, he could not then withdraw "consent" and terminate search by choosing not to take flight).

Other authorities maintain that a consent to search can be revoked at any time. *See, e.g.,* Masson v. Pulliam, 557 F.2d 426 (5th Cir. 1977); United States v. Bily, 406 F. Supp. 726 (E.D. Pa. 1975); 2 W. LAFAVE, SEARCH AND SEIZURE § 8.1 at 633-35 (1978). *See also* Model Code of Prearraignment Procedure § 240.3(3) (Proposed Official Draft 1975). *Cf.* United States v. Griffin, 530 F.2d 739 (7th Cir. 1976) (limitations on scope of search may be made at any time). The Supreme Court has yet to resolve this question.

131. 412 U.S. at 227-28 (footnote omitted).

132. Despite the vast number of cases that have addressed the issue of whether probable cause to search existed, it is difficult to formulate a concrete rule to govern individual situations. As the court in United States v. Davis, 458 F.2d 819 (D.C. Cir. 1972) noted: "It is a plastic concept whose existence depends on the facts and circumstances of the particular case." 458 F.2d at 821 (quoting Bailey v. United States, 389 F.2d 305, 308 (D.C. Cir. 1967)). Nevertheless, the Supreme Court has dealt with a number of representative situations; those cases offer some guidance in determining whether probable cause exists.

In Brinegar v. United States, 338 U.S. 160 (1949), defendant was convicted of illegally importing liquor into Oklahoma. Defendant claimed that liquor found during a search of his car was inadmissible because the police had no probable cause to search. The Court found probable cause based on information within the personal knowledge of the officer: (1) the

From the perspective of the innocent, the Court in *Bustamonte* noted that "a search pursuant to consent may result in considerably less inconvenience for the subject of the search . . . ."[133] Such a situation could occur when an individual is stopped by the police because his vehicle meets a generalized description of a vehicle believed to contain contraband. For example, if a policeman has information that a large yellow truck is carrying one hundred pounds of marijuana over a particular highway, he may be justified in stopping a yellow truck and questioning its driver.[134] Assuming, however,

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arresting officer had arrested defendant five months earlier for illegally transporting liquor, (2) the officer had seen the defendant loading liquor into his car at least twice during the prior six months, (3) at the time of the arrest and search, defendant's car appeared to be "heavily loaded," (4) the defendant was traveling along a known bootlegging route, and (5) when pursued by the police car, defendant increased his speed and tried to outrun the officer.

In United States v. Ventresca, 380 U.S. 102 (1965), the Court held that probable cause to obtain a search warrant may be established by hearsay evidence, provided the affiant recites specific underlying circumstance showing the hearsay is reliable.

In Spinelli v. United States, 393 U.S. 410 (1969), defendant's conviction on interstate gambling charges was overturned on grounds that the FBI's search warrant was issued without probable cause. In *Spinelli*, the FBI had relied on a tip from "a confidential reliable informant" that defendant was accepting wagers by telephone in the apartment sought to be searched. 393 U.S. at 422 (appendix to opinion of the Court). The Court found that "[though] the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of his conclusion." 393 U.S. at 416.

In United States v. Harris, 403 U.S. 573 (1971), the Court ruled that when an informant's tip specified that the informant had himself purchased bootleg liquor from defendant, the tip did demonstrate a sufficient basis for the informant's knowledge. Furthermore, the tax investigator's own knowledge of defendant's background as a bootlegger, together with the fact that the tip was a declaration against the informant's penal interest, provided sufficient reason to think the informant was truthful. 403 U.S. at 579-80.

133. 412 U.S. at 228.

134. Under Delaware v. Prouse, 440 U.S. 648 (1979), a police officer must have "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law" before he may stop an individual automobile. 440 U.S. at 663. Very little has been settled, however, as to what constitutes "reasonable suspicion." The Supreme Court has held that "application of [a Texas Penal statute] to detain appellant and require him to identify himself to police officers violated the fourth amendment because the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct." Brown v. Texas, 443 U.S. 47, 52 (1979). In *Brown*, the officer had testified that the situation wherein defendant was walking away from another in an alley known to be frequented by drug traffickers " 'looked suspicious,' but he was unable to point to any facts supporting that conclusion." 443 U.S. at 52.

See also People v. Sobotker, 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978): " '[R]easonable suspicion' has been aptly defined as 'the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand . . . . The requisite knowledge must be more than subjective; it should have at least some demonstrable roots. Mere 'hunch' or 'gut reaction' will not do." In *Sobotker*, the court found no reasonable suspicion when police stopped defendants' car after the occupants had slowed down and glanced at a bar while driving in a high-crime neighborhood. *Cf.* Adams v. Williams, 407 U.S. 143 (1972). In *Adams*, a police officer, acting on a tip from an informant that he knew personally and who had provided information previously, conducted a search. The Court held that when an officer makes a reasonable investigatory stop he may conduct a limited, protective search for weapons when he has reason to believe the suspect is armed and dangerous.

that this information does not amount to probable cause, the policeman could not search the truck without the driver's consent. Under these circumstances, it may well be in the driver's best interest to consent to the search and remove the suspicion which the policeman would otherwise have about him. Certainly there is nothing in the fourth amendment designed to discourage citizens from aiding police.[135]

The *Bustamonte* rule of no notice to the searchee of his right to refuse consent is not necessary in this situation. The truck driver should be informed that he may or may not consent as he sees fit. If he does not consent, he will be suspect and watched very closely. If he does consent and no marijuana is found, he will no longer be under suspicion. Under these circumstances, many, if not most, innocent drivers would consent. Moreover, they would not feel that they have been bullied by the police. Those who did not consent would simply be exercising their right to refuse to be searched even at the cost of remaining a suspect, a right which is at the core of the fourth amendment.[136]

A guilty person, *i.e.,* one with marijuana, almost certainly would turn down the invitation to have his truck searched. But the police are not powerless. They could follow him, take his license number, and radio for more information about him through other channels. Indeed, this might ultimately lead to probable cause, at which point he could be stopped and searched.[137] If not, he would receive no more benefit than the fourth amendment allows him.

One senses that the Court in *Bustamonte* viewed convicting Bustamonte as more important than taking the fourth amendment seri-

135. "[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Bustamonte*, 412 U.S. at 243 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).

136. This search should be distinguished from the dog-sniffing discussed in Part II, *supra*, because of its potential impact on the innocent. Neither student B nor C may "refuse to be searched even at the cost of remaining a suspect" because the sniff will reveal *only* evidence of crime. In contrast, the consent search of the car will reveal all of the contents of the car, whether criminal or not.

137. For example, in the recent case of United States v. Ross, 102 S. Ct. 2157 (1982), police received an informant's tip that a man called "Bandit" was selling narcotics kept in the truck of a maroon-colored Chevrolet Malibu on Ridge Street in the District of Columbia. The informant gave a detailed description of the man involved. Police officers then drove to the neighborhood and spotted a maroon Malibu parked at 439 Ridge Street. Before approaching the car or looking for the driver, they radioed police headquarters and found that the car was owned by a man who fit the description and who sometimes went by the alias "Bandit." When the officers saw a man fitting the description drive the car away, they stopped him and searched the car. The court held that by verifying the informant's tip via the radio call, the police had established probable cause to stop and search the car.

ously.[138] The Ninth Circuit Court of Appeals in an earlier case put it even more starkly:

> While it may not be "in accord with common experience" for a guilty person to consent to a search which, if successful, may help to prove his guilt, it may nevertheless occur. Happily, not all criminals are highly intelligent and use the most effective tactics in their contacts with the police. Again happily, sometimes their contacts with the police confuse them, and they say and do things which, after deliberation, they regret. To whatever extent stupidity or confusion on the part of the guilty person contributes to the prompt acquisition by the police of evidence of crime, so that the police can get back to work on the numerous cases which may remain unsolved, society is the gainer and nobody is the loser of anything to which he is constitutionally entitled.[139]

The complete answer to this is contained in a single sentence of *Escobedo v. Illinois:* "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[140] Even more significantly, the innocent should not be placed in a position where they feel obliged to consent so that the guilty are more likely to "voluntarily" allow the police to find evidence.

The threat to the innocent posed by *Bustamonte* is mild compared to the most pernicious of its progeny, *United States v. Mendenhall.*[141] While changing planes in Detroit, Sylvia Mendenhall, a twenty-two-year-old black woman who matched the "drug courier profile,"[142] was stopped and questioned by Agent Anderson of the Drug Enforcement Agency (D.E.A.). Without probable cause,[143]

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138. It should be noted that Bustamonte attacked his state court conviction by a petition for habeas corpus in federal district court. Four Justices would have denied the petition on the ground that principles of finality preclude raising a fourth amendment claim via habeas corpus. 412 U.S. at 250-75 (Powell, J., concurring) (joined by Burger, C.J., and Rehniquist, J.) and 412 U.S. at 249 (Blackmun, J., concurring) (Justice Blackmun said he refrained from joining the concurrence of Justice Powell because it was not necessary to determine the habeas corpus/finality issue in deciding the case.). Three years after *Bustamonte*, the Supreme Court held that the legality of a search or seizure could not be raised via habeas corpus so long as the state courts had fully and fairly adjudicated the fourth amendment claim. Stone v. Powell, 428 U.S. 465 (1976). Thus, the Court may have allowed its view on finality or judicial economy to influence its approach to the fourth amendment question.

139. Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964) (footnote omitted) (quoting United States v. Gregory, 204 F. Supp. 884, 885 (S.D.N.Y. 1962)).

140. 378 U.S. 478, 490 (1964).

141. 446 U.S. 544 (1980).

142. The profile is "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs." Mendenhall fit the profile in at least four respects: she (1) came to Detroit from Los Angeles, a major source for heroin brought to Detroit; (2) was the last person off the plane, acted nervous, and carefully scanned the whole area where the agents stood; (3) did not have any baggage checked through to Detroit; and (4) purchased a return ticket on a different airline. 446 U.S. at 547 n.1.

143. It is perhaps arguable that simply matching the drug courier profile might establish

Anderson asked Mendenhall to accompany him to the D.E.A. office, a request to which she acquiesced. While in the D.E.A. office, Anderson asked her for permission to search her handbag and her person, informing her that she could decline. After the handbag search proved fruitless, a policewoman who ascertained that Mendenhall consented to be searched informed her for the the first time that the search was to be a strip search. In response to Mendenhall's protest that she had a plane to catch, the policewoman told her that if no narcotics were found she could catch the plane. At that point, Mendenhall unbuttoned her clothing, reached into her undergarments, and "voluntarily" handed the heroin to the police. The Court upheld this "consent" search.[144]

Let us posit an innocent person in Mendenhall's situation. A twenty-two-year-old black woman is asked by an older white male D.E.A. agent to accompany him to the agency office. Given that Mendenhall, who had drugs, acquiesced, it seems unlikely that the one without drugs would refuse to go.[145] If Mendenhall had refused,

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probable cause to search or at least reasonable suspicion to stop and question an individual. The enforcement system using courier profiles boasts impressive figures for accuracy. The Court in *Mendenhall* noted that during the first eighteen months of the program in Detroit, 77 of 96 encounters uncovered controlled substances; 122 of 141 persons intercepted were arrested. 446 U.S. at 562 (Powell, J., concurring). The issue of whether this accuracy percentage established probable cause was not raised in *Mendenhall*, however. Instead, the government never contended it had probable cause to search, and each court assumed that probable cause did not exist.

Despite its percentage accuracy, the profile does not alone establish probable cause. For example, if it were demonstrated that eighty percent of all dormitory rooms at a certain university contained illegal drugs of some type, there ought not to be probable cause to search them all. For a critical look at the use of drug courier profiles, see J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPEMENTS 1979-1980, 134-35 (1981); Note, *United States v. Mendenhall: DEA Airport Search and Seizure,* 16 NEW ENG. L. REV. 597 (1981). *See also* note 147 *infra*.

144. Justices Stewart and Rehnquist concluded that the initial stop for questioning in the airport concourse did not constitute a "seizure" within the meaning of the fourth amendment because a "reasonable person" would have thought she was free to leave. This view was espoused notwithstanding the D.E.A. agent's testimony that she would not have been allowed to leave had she requested to do so. Since the initial stop was not viewed as a seizure, and since the subsequent consent to search was deemed voluntary, Justices Stewart and Rehnquist held the seized narcotics admissible.

Justices Powell, Blackmun, and Chief Justice Burger assumed that the initial stop did constitute a seizure but held that the agents had a reasonable suspicion of criminal activity; therefore the stop for routine questioning was justified. Then, because she "consented" to further questions and a search, the evidence was admissible.

The four dissenters — Justices White, Brennan, Marshall and Stevens — thought that the initial stop was a seizure and that there was no reasonable suspicion to justify it. In any event, the government did not carry its burden of proving that defendant's consent to further questioning and to a search was voluntary. Therefore, the search was tainted and the seized evidence should have been excluded.

The recent case of Florida v. Royer, 51 U.S.L.W. 4293 (U.S. Mar. 23, 1983), again produced a badly splintered Court on a similar, though not identical, fact pattern.

145. See the discussion of the pressures inherent to any police-citizen encounter in J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 143, at 140-41.

Agent Anderson testified that he would have forcibly detained her.[146] Once there, would the innocent person "voluntarily consent" to the strip search? If she wanted to catch the plane, she would. Officer Anderson testified that although Mendenhall did not have to consent to the search, he would not have released her until she did.[147]

Why must innocent people be subjected to this? Justice Powell is surely correct in noting that "[t]he jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures."[148] Just as surely, that is the function of "probable cause."[149] When the D.E.A. agent has probable cause, he can stop and search a citizen.[150] If the citizen is innocent, his inconvenience and humiliations are part of the price he pays for living in an ordered society. When the police lack probable cause, the price is too high, and a properly construed fourth amendment should forbid it.

V. THE EXCLUSIONARY RULE

One could argue that the Court's growing distaste for the exclusionary rule[151] has contributed to the results of many of the cases criticized in this Article. When drug pushers (Mendenhall, White), robbers (Smith), and other thieves (Bustamonte) are caught red-

146. 446 U.S. at 575 n.12 (White, J., dissenting).

147. 446 U.S. at 575 n.13. In United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd.*, 556 F.2d 385 (6th Cir. 1977), the court reviewed the consent statistics for the D.E.A. drug courier enforcement program:

> Of the 77 searches in which illegal drugs were found, the agents identified 26 consent searches. Forty-three searches were non-consensual. [The court does not explain the situation in the other eight searches.] Illegal contraband was seized in all cases in which consent was not given and a search was made. In 15 to 25 consent searches, agents did not uncover any contraband drugs.

409 F. Supp. at 539.

148. 446 U.S. at 565.

149. *See* note 132 *supra*.

150. *Compare* United States v. Van Lewis, 409 F. Supp. 535, in which the defendant met the drug courier profile, used an alias, had been arrested once before for possession of heroin, and was currently renting an apartment (aside from his residence) which was under surveillance by the Detroit police for alleged narcotics traffic (probable cause), *with* United States v. Hughes, (decided with *Van Lewis*) in which defendant "looked like" a person previously convicted of possession of four pounds of heroin, walked fast through the airport, claimed no luggage and looked nervous, and whose driver's license and airline ticket bore different names (no probable cause).

151. The doctrine that evidence obtained in violation of the fourth amendment is inadmissible in a criminal prosecution is known as the "exclusionary rule." *See, e.g.,* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

handed, it is difficult to applaud decisions that turn them loose.[152] Given that these criminals are only incidental beneficiaries of a rule designed to protect the innocent,[153] would it be wise to jettison the exclusionary rule in favor of suits by the innocent, who are, after all, the intended beneficiaries of the fourth amendment? Although the solution has been suggested,[154] it would almost certainly be detrimental to the innocent.

While one is tempted to blame the exclusionary rule for cases like *White, Smith, Bustamonte,* and *Mendenhall*, all four cases were in fact decided on the ground that the fourth amendment was followed, not that the exclusionary rule was an inappropriate remedy for its violation. Furthermore, innocent people would not have been adequate plaintiffs in those cases. An innocent person whose conversation was transmitted or whose telephone calls were recorded by a pen register would probably never learn of the violation.[155] An innocent person who consented to a search would be unlikely to sue because of the same desire for noninvolvement that caused him to consent in the first place. Furthermore, one who had consented would be in a poor position to seek substantial damages even if the consent did not constitute a waiver.[156]

More generally, one could argue that the exclusionary rule, which directly aids only the guilty, is a poor means of enforcing a right designed to benefit the innocent.[157] It has been attacked as disproportionately costly,[158] inferior to other remedies,[159] and incapa-

152. *See, e.g.,* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 218-20 (1978).

153. *See* parts I & II *supra*.

154. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420-24 (1971) (Burger, C.J., dissenting).

155. Of course, the innocent person might learn of the violation if police used the information extrajudicially. For example, police might use a tape of the innocent person's conversation to harass him, or to play a joke.

156. *See, e.g.,* Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule,* 69 GEO. L.J. 1361, 1388-89 (1981) (claimant must risk reprisal by police; juries historically have sided with police). In addition, even if a jury decides in favor of the innocent victim, damages may be so minimal as to discourage legal action by innocent persons. Consider a hypothetical based on the facts of *Bustamonte*, *see* text at notes 127-139 *supra*. Suppose Bustamonte had been innocent, and the search of the car turned up nothing. To what would he be entitled? Damages based on the annoyance of a squeaky back seat in the car of which he has use, resulting from the police search under the seat? *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 GEO. L.J. 365, 407-08 (1981).

157. *See, e.g.,* Wilkey, *supra* note 152, at 228.

158. *E.g,* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 418-20 (1971) (Burger, C.J., dissenting).

159. *E.g.,* 403 U.S. at 421-24 (Burger, C.J., dissenting); Wilkey, *supra* note 152, at 227-32;

ble of enforcing an innocent person's rights.[160] None of these attacks has enough merit to warrant discarding the rule.

An elegant, albeit inaccurate, statement of the exclusionary rule's high cost is Judge Cardozo's oft-quoted *bon mot*: "the criminal is to go free because the constable has blundered."[161] More than a decade ago, I described its inaccuracy:

> When the police make an exploratory search without probable cause, it is indeed true that under the exclusionary rule any evidence they may find will be excluded and that the criminal will go free if there is no other evidence. . . . If [however] the police had not "blundered" by committing the unreasonable search, the criminal never would have been brought to trial in the first place since there would have been no evidence to justify it. Therefore, in these instances the criminal does not go free because the constable had blundered, but because he would have gone free if the constable had not blundered.[162]

Even when the criminal does go free because of the constable's blunder (such as when the constable had ample probable cause but "forgot" to get a warrant), the cost is not disproportionate. Warrants are required because of the unjustifiably high risk that a police officer will subject an innocent person to a search.[163] If sanctions were unavailable so long as the search were fruitful, a policemen who sincerely believed his own judgment to be correct would have little incentive to follow the fourth amendment and seek a warrant.

Indeed, far from being disproportionately costly, the exclusionary remedy is remarkably proportionate to the wrong. When the Government has evidence of crime that it should not have under the fourth amendment, the exclusionary rule puts the Government where the fourth amendment says it should be — without the evidence.

No other remedy is this proportionate.[164] Juries may not take seriously tort or criminal remedies against offending policemen.[165]

Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 756-57 (1970).

160. *E.g.*, 403 U.S. at 415-16 (Burger, C.J., dissenting); Oaks, *supra* note 159, at 736-37.

161. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

162. Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe that the Court is Oblivious to the Needs of Law Enforcement,* 37 GEO. WASH. L. REV. 1218, 1236 (1969).

163. *See* text at note 6 *supra*.

164. Criminal prosecutions of police officers who have violated the fourth amendment are unlikely to occur, and merit little attention. *See* Schroeder, *supra* note 156, at 1396-98.

165. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 385-91 (1939); Schroeder, *supra* note 156, at 1388-89.

When they are taken seriously, the deterrent effect may be too great. For example, a policeman might not wish to make any search for a relatively minor crime, such as the theft of a child's bicycle, if he knows that any "blunder" will cost him a thousand dollars in damages or thirty days in jail.[166]

Chief Justice Burger's suggestion of government liability with liquidated damages for fourth amendment violations[167] allows the Government to buy its way around the fourth amendment. For example, if the Government wants evidence of a crime badly enough, it can decide to ransack a house for a thousand dollars.[168] From the individual policeman's perspective, the credit he would get from solving a murder would make it worth the demerits for an unlawful search. Conversely, as with individual liability, the prospect of demerits for an unlawful search for a stolen bicycle may deter even lawful searches on the assumption that the potential gains would not be worth the risk of being wrong. None of this suggests that remedies other than the exclusionary rule should be entirely discarded, only that these other remedies are not so proportionate as the exclusionary rule.

The exclusionary rule protects innocent people by eliminating the incentive to search and seize unreasonably.[169] So long as a policeman knows that any evidence he obtains in violation of the fourth amendment will not help secure a conviction he has less reason to violate the amendment and more reason to try to understand

166. Recognizing a good faith defense for damage actions to mitigate overdeterrence would incur the same difficulties as the recognition of such a defense in the suppression context. *See* notes 172-175 *infra* and accompanying text. A good faith defense to a tort suit is appropriate, however, so long as good faith is rejected when the more proportionate exclusionary rule is invoked. *See* note 174 *infra*.

167. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting).

168. Judge Posner finds no difficulty in allowing the government to buy its way around the fourth amendment. As he views it, if a particular search causes one hundred dollars worth of inconvenience and does ten thousand dollars worth of good, the government ought to conduct the search and pay the damages. Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49, 55. Because I do not believe constitutional rights are for sale whenever the government unilaterally decides to purchase them, I cannot accept his thesis.

169. At least so long as the officer involved is seeking evidence that can be used to secure a conviction. The rule would not work if the officer is after something else. For example, in a *Mendenhall* situation, an agent who is confronted with a subject who refused to consent may choose to harass the suspected drug carrier by subjecting her to an illegal search. The agent might reason that, given the unlikelihood of securing admissible evidence without the subject's consent, it would be preferable to conduct a consentless search than to let her go. If the agent discovered drugs pursuant to such a search, he could confiscate the contraband, thereby at least increasing the cost of drug trafficking. *Cf.* the search involving Paula Hughes in United States v. Van Lewis, 409 F. Supp. 535, 540 (E.D. Mich. 1976), *aff'd.*, 556 F.2d 385 (6th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978) (motion to suppress granted to subject who refused to consent).

it. While there is some evidence that for various reasons the exclusionary rule does not work perfectly,[170] there is no evidence that it does not work at all.[171] Indeed, it defies logic to believe that a policeman's willingness to search without probable cause or a warrant (and thereby possibly subject an innocent person to an unjustifiable intrusion of privacy) is unrelated to whether he can gain any admissible evidence from conducting the search.

It has been suggested that the exclusionary rule be limited to bad faith violations.[172] Under this view, any intentional violation of an already-declared right would be subject to the exclusionary rule; other fourth amendment violations would not be. The difficulty with adoption of this "good faith exception" to the exclusionary rule, as Wasserstrom and Mertens recently observed, is that the development of fourth amendment law would be retarded.[173] Indeed, with the

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170. *E.g.*, Oaks, *supra* note 159, at 755 (there is little empirical evidence that the rule acts as a deterrent on law enforcement aimed at prosecution; the rule creates incentive for lying by police officers); *cf.* J. HIRSHEL, FOURTH AMENDMENT RIGHTS 84-86 (1979) (Hirshel surveyed police officers, district attorneys and defense attorneys, concluding that the exclusionary rule is an ineffective deterrent). *But see* Mertens & Wasserstrom, *supra* note 156, at 395 n.138 (Hirshel's data belie his conclusion).

171. *See* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?* 62 JUDICATURE 398 (1979); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

Consider United States v. Payner, 447 U.S. 727 (1980). The district court found, and the reviewing courts accepted, that the government affirmatively instructed its agents to take advantage of the standing requirement by stealing the evidence while it was in the possession of a third party in contravention of the third party's fourth amendment rights. *See* 447 U.S. 727, 743 (Marshall, J., dissenting). What better evidence could there be that the threat of suppression influences government conduct?

That the government instructs its officers in fourth amendment law to avoid the exclusion of evidence is also relevant for the proposed good faith exception to the exclusionary rule. The current compulsory suppression rule penalizes police ignorance of the law; the good faith exception would *reward* ignorance of fourth amendment jurisprudence. The good faith exception would be well-tailored for desensitizing the police to the constitutional rules constraining search and seizure.

172. *See* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981); Stone v. Powell, 428 U.S. 465, 538-42 (1976) (White, J., dissenting); Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51 (1980). Fortunately, the Supreme Court has heretofore refused to take this suggestion seriously. *See* Taylor v. Alabama, 102 S. Ct. 2664, 2669 (1982). *Cf.* note 174 *infra* and accompanying text. It has however, ordered Illinois v. Gates, 103 S. Ct. 436 (1982), reargued and requested the parties

> to address the question whether the rule requiring the exclusion at a criminal trial at evidence obtained in violation of the Fourth Amendment (citations omitted) should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

1035 Ct. at 436. The case was reargued Mar. 1, 1983. *See* 51 U.S.L.W. 3643 (summary of oral argument).

173. Mertens & Wasserstrom, *supra* note 156, at 451-52, 463. *See also* United States v Peltier, 422 U.S. 531, 555-58 (1975) (Brennan, J., dissenting). *Cf.* note 184 *infra* and accompanying text.

exclusionary rule available as a vehicle for developing fourth amendment jurisprudence, it is reasonable to retain the good faith defense in tort suits where the remedy is not so proportionate to the wrong.[174] To the extent that totally new search and seizure rules could not have been anticipated, the Court's retroactivity rules substantially blunt any negative impact of police reliance on the old rules.[175] Therefore, the good faith defense is neither desirable nor necessary in exclusionary rule cases.

Three justifications are usually given for the exclusionary rule: (1) vindication of the personal rights of the defendant before the court, (2) deterrence of future violations, and (3) preservation of judicial integrity.[176] In recent years, the Court has required both the first and second justification as a predicate for the exclusionary rule.[177] It has refused to exclude the evidence unless exclusion would significantly deter police misconduct even though the party

174. Since the decision of Monroe v. Pape, 365 U.S. 167 (1961), 42 U.S.C. § 1983 has become the classic civil rights statute. It reads as follows:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In actions under this statute, a defendant's culpability should be a factor in determining damages. It is reasonable and desirable that damages resulting from flagrant abuses of power be paid for by those that inflicted them. But to hold the wrongdoer personally responsible under all circumstances would render law enforcement impossible in any "borderline" situation. Few police officers would be willing to risk having to pay damages for making an arrest which they believed in good faith to be lawful. In contrast to the exclusionary rule, an action under 42 U.S.C. § 1983 could result in a small claim against a police officer, or it could leave him bankrupt, without a good faith defense to protect the individual violator who has acted in the belief he is upholding the law. Our desire to see civil rights abusers punished would be vindicated, but at the expense of unjustly punishing police officers.

175. A good faith defense would prohibit damages or suppression for a fourth amendment violation, unless the facts in a case were nearly identical to a previously decided case. Otherwise, the police officer would not know that his or her action violated the fourth amendment. Since the officer would not be liable anyway, a court would have no reason to reach the question of whether in fact the officer's actions did violate the fourth amendment. *Cf.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (Constitutionality of law permitting a police officer to use deadly force in effectuating an arrest was moot since even if the law were unconstitutional, the police officer relied in good faith upon the law which theretofore had not been declared unconstitutional.); Mertens & Wasserstrom, *supra* note 156, at 430 n.348. A good faith defense to a tort suit is appropriate, however, so long as the exclusionary rule is retained. *See* note 174 and accompanying text, *supra*. When a new fourth amendment rule is announced, it is prospective only. United States v. Peltier, 422 U.S. 531 (1975). When a fourth amendment decision does not change a rule, but resolves a previously unsettled question, the decision will apply to cases for which direct review is still pending, but not to cases which have been finally adjudicated. *See* United States v. Johnson, 102 S. Ct. 2579 (1982).

176. *See, e.g.,* Mertens & Wasserstrom, *supra* note 156, at 377-78; Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of The Fourth Amendment?*, 62 JUDICATURE 66, 67 (1978); Wilkey, *supra* note 152, at 200.

177. Preservation of judicial integrity, if not entirely out of judicial favor, is little more than a makeweight argument. Recent references to it generally have been in dissenting opin-

seeking exclusion was personally the victim of an unlawful search and seizure.[178] On the other hand, it has also refused to exclude evidence when the defendant was not personally victimized by the unlawful search and seizure even though failure to exclude invited more unlawful searches.[179]

Since the primary purpose of the fourth amendment ought to be protection of the innocent, the Court's principal focus should be on the deterrent value of the exclusionary rule.[180] From this perspective, it should not matter whether the "incidental beneficiary" seeks vindication for his personal fourth amendment rights or seeks to exclude evidence wrongfully obtained from another, perhaps innocent, person. Thus far, only California has accepted this proposition.[181] Perhaps if the Supreme Court were to view the fourth amendment from the perspective of the innocent, it would be more willing to follow California.[182]

Under the Supreme Court's personal-vindication rule, the Government can use evidence obtained against third persons from an electronic eavesdropping device unlawfully installed in my house.[183] The police can search my house without a warrant or probable cause, secure in the knowledge that any evidence they find against a third party will be admissible.[184] Even if the police deliberately subject an innocent person to a search because of their knowledge that the evidence will be admissible against their target subject, the evi-

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ions. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 355-60 (1974) (Brennan, J., dissenting).

178. *See* United States v. Ceccolini, 435 U.S. 268, 280 (1978) (cost of excluding testimony of a witness said to be too high when deterrent effect on police conduct was speculative and unlikely); United States v. Calandra, 414 U.S. at 348-52 (exclusionary rule may not be invoked by a grand jury witness; application of the rule to grand jury proceedings would not "significantly further" goal of deterrence of police misconduct).

179. *See* United States v. Payner, 447 U.S. 727 (1980) (defendant's fourth amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party; respondent had no privacy interest in documents seized from the briefcase of a bank officer); Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in car, neither drivers nor owners and having no interest in the property seized, had no legitimate expectation of privacy in the glove compartment or in the area under the seat; did not have standing to challenge a search of the car); Alderman v. United States, 394 U.S. 165 (1969) (codefendants and coconspirators have no special standing and cannot prevent the admission against them of information obtained through electronic surveillance that is illegal against another codefendant or coconspirator).

180. Vindication of personal rights and judicial integrity should be viewed as incidental, but not unimportant, functions of the exclusionary rule.

181. *See* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

182. *Cf.* Rawlings v. Kentucky, 448 U.S. 98, 120-21 (1980) (Marshall, J., dissenting).

183. Under the *Alderman* rule, the government could use information against a third person in this hypothetical, assuming the third person were not a party to the conversation being monitored. Alderman v. United States, 394 U.S. 165 (1969).

184. *See, e.g.,* United States v. Salvucci, 448 U.S. 83 (1980).

dence will not be excluded.[185]

From the perspective of the innocent, this rule is positively perverse. Assume that the police suspect that *X* has either hidden a gun in his home or in *Y*'s home. If the police search *X*'s home without a warrant, they know that the gun will be inadmissible. But they can search *Y*'s home without a warrant, secure in the knowledge that if they find the gun it will be admissible against *X*.[186] In the above situation, if the police had probable cause to believe that *X*'s gun was hidden either in *X*'s house or *Y*'s house, they probably could not get a warrant to search either house because of their inability to specify in which house it was.[187] The Supreme Court's rule allows them to resolve the dilemma by searching innocent *Y*'s house first. If they find the gun, it is admissible against *X*; if they don't, they now have probable cause and can get a warrant to search *X*'s house. Adoption of the California rule would prevent this perversity.[188]

The Supreme Court's current trend has increased the opportunity for police to prey on the innocent. For example, prior to 1980 in the above hypothetical, if *X* owned the gun, he could object to its unlawful seizure from *Y*'s house[189] because as the owner of the property seized, he was a personal victim of the fourth amendment violation.[190] In 1980, the Court in *Rawlings v. Kentucky*[191] held that an

185. *See* United States v. Payner, 447 U.S. 727 (1980).

186. *X*'s ownership of the gun probably would not give him standing. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980).

187. There is little case law defining the fourth amendment's warrant criterion of "particularly describing the place to be searched." U.S. CONST. amend. IV. Where police seek to search two or more different places not owned or occupied by the same individual, one court has said that separate warrants would be required. *See* Williams v. State, 95 Okla. Crim. 131, 134, 240 P.2d 1132, 1137 (1952). It would seem that in such a case, probable cause for issuance of separate warrants would not exist unless the information possessed by the police singled out the place to be searched. *Cf.* Wong Sun v. United States, 371 U.S. 471, 480-81 (1963) (arrest of an individual not lawful where there was no showing by police that they had information narrowing the scope of their search to that particular person); Mallory v. United States, 354 U.S. 449, 456 (1957) (police may not make "at large" arrests of several subjects and use the interrogating process to determine for which subject they have "probable cause" to arrest).

188. Even from the perspective of the guilty, the rule requiring personal injury does not work well. The current rule is not related to any standard of guilt. Let us vary the hypothetical in the text by assuming that *Y* is the ringleader in a conspiracy and *X* is a coconspirator. If the police illegally search *Y*'s house and seize the conspiracy plans which implicate *X*, then *X* can be successfully prosecuted. *Y*, however, can successfully challenge the illegal search and evade conviction. *X* goes to jail while *Y*, the big boss, is free to plan another spree. *See* Kelley v. United States, 61 F.2d 843 (8th Cir. 1932); Bilodeau v. United States, 14 F.2d 582, 585 (9th Cir.), *cert. denied*, 273 U.S. 737 (1926).

189. *X* could not, however, object to *Y* turning in the gun to the police. *See* Coolidge v. New Hampshire, 403 U.S. 443, 484-90 (1971). Nor could *X* object to *Y* consenting to a search. *See* United States v. Matlock, 415 U.S. 164, 169-72 (1974).

190. *See* United States v. Jeffers, 342 U.S. 48 (1951).

191. 448 U.S. 98 (1980).

owner of narcotics could not challenge their seizure pursuant to an unlawful search of a companion's purse. The Court reasoned that because Rawlings had no reasonable expectation of privacy in his companion's purse, his ownership of the seized property was insufficient to allow him to challenge the constitutionality of the search. Obviously, *Rawlings* encourages more speculative searches since evidence not owned by the victim of the search will be admissible, even when the owner and victim are sitting side by side (as they were in *Rawlings*).

Rawlings was foreshadowed by the unfortunate case of *Rakas v. Illinois,*[192] in which the Court held that passengers in an automobile who were stopped, searched, ordered out of the car at gunpoint,[193] and deprived of transportation during the unconstitutional search of the automobile[194] were not persons aggrieved by the unlawful search. The message to police is simple: "Stop any car you wish with multiple occupants. Any evidence that you find will be admissible against all but the owner or driver."[195] Had *Rakas* been the law when *Schneckloth v. Bustamonte*[196] was decided, none of the analysis of that case would have been necessary. Bustamonte would have had no legitimate expectation of privacy in the car and the search would not have been unlawful as to him.

Hostility toward the exclusionary rule no doubt motivated the Court in *Rakas*. It said: "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of fourth amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected."[197] The decision, however, altered the right, not merely the remedy. An innocent per-

192. 439 U.S. 128 (1978).

193. Appendix at 18, Rakas v. Illinois, 439 U.S. 128 (1978).

194. Since Rakas was denied standing, the constitutionality of the search was never determined. However, it is difficult to conceive that the police had probable cause to search the car under the facts in *Rakas*: police were looking for a 1970 blue Plymouth Roadrunner used as a getaway car after the robbery. The car was described as having a white racing stripe and damage to the front. The license was said to be SA, numbers unknown. The fleeing robbers were described as two white males, one wearing a blue shirt and dark jacket. Police stopped and searched at gunpoint a 1970 purple Roadrunner with no stripe or damage to the front. The car's license plate was RT-6237. The car had four occupants in it, two men and two women. One of the men was wearing a blue shirt. Just before the car was stopped, it was described as traveling at an unusually slow pace. *See* Appendix at 4-24, Rakas v. Illinois, 439 U.S. 128 (1978). However, before the car was stopped, the real getaway car had already been recovered. Brief for Petitioners at 6, *id.* Assuming that one could stretch to view these facts as giving rise to a reasonable suspicion sufficient to allow the police to stop the vehicle, it is unimaginable that the police had probable cause for their gunpoint search.

195. It is not clear whether a nonowner driver has standing, since the defendants in *Rakas* were neither owners nor drivers.

196. 412 U.S. 218 (1973); *see* text at notes 128-140 *supra*.

197. 439 U.S. at 137.

son in Rakas' position would have no cause of action against the officer for any of the indignities to which he was subjected other than the search of his person. He could not sue for the inconvenience of the stop, the forced exit, or the time consumed during the search of the automobile.[198] Such is the unfortunate byproduct of treating the fourth amendment from the perspective of the guilty rather than the innocent.

CONCLUSION

The fourth amendment is designed to protect innocent people, *i.e.,* people who have not committed a crime or who do not possess sought-after evidence. Criminals or those who possess evidence of crime are allowed to object to the manner in which such evidence was obtained only because the search or seizure may have created an unjustifiably high risk of an intrusion upon an innocent person's privacy. Therefore, devices such as marijuana-sniffing dogs which can only detect contraband and do not intrude upon the innocent ought to be allowed regardless of probable cause or a warrant.[199] Many substantive fourth amendment decisions, particularly those dealing with expectations of privacy[200] and consent,[201] have focused on the rights of the guilty to such an extent that their impact on the innocent has been lost. Finally, the Court has failed to recognize the value of the exclusionary rule as a device for protecting the innocent. Consequently the rule has been restricted so much that it fails to offer innocent citizens the protection to which they should be entitled under the fourth amendment.[202]

Unless the Court frankly recognizes that fourth amendment protections are for the innocent, it is unlikely that the problems identified in this Article will be rectified.

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198. In his concurring opinion in *Rakas*, Justice Powell states: "The petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle." 439 U.S. at 150-51. Justice Powell's attempt to construe the issue narrowly as being whether the search after the petitioners had left the car violated their fourth amendment rights is not responsive to their argument.

The petitioners' brief to the Supreme Court stated that they sought "an order which would require the state court to decide the ultimate question of whether the search was lawful." Brief for Petitioners at 8, *id.* The petitioners originally challenged the search of the car in which they were passengers in a suppression hearing in the Illinois state court system. In their motion to suppress, petitioners challenged the search on a number of grounds, among which were that police lacked probable cause to stop the car, that the passengers were ordered out of the car at gunpoint and that the subsequent search was not made incident to any lawful arrest. Appendix at 5, *id.*

199. *See* Part II *supra*.

200. *See* Part III *supra*.

201. *See* Part IV *supra*.

202. *See* Part V *supra*.