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# UNREASONABLE SEARCHES AND SEIZURES: A "FOURTH AMENDMENT" FOR CANADA?

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Résumé de l'article

Plusieurs projets récents de modification de la Constitution canadienne proposent l'enchâssement d'une règle prohibant les « fouilles, perquisitions et saisies abusives » semblable à celle du Quatrième Amendement de la Constitution américaine. On peut s'inspirer de l'expérience américaine pour anticiper les développements et problèmes que provoquerait l'application d'une telle règle au Canada même si son évolution juridique aux États-Unis s'est produite dans le cadre très différent d'un système présidentiel où la Cour suprême joue un rôle plus actif et jouit d'un statut constitutionnel autonome. Dans ce contexte, les mandats de main-forte furent interdits dans l'application des lois de juridiction fédérale dès 1791. De même, en application des Quatrième et Cinquième Amendements, les preuves illégalement obtenues furent déclarées irrecevables dès 1914 lors de poursuites en vertu de lois fédérales (arrêt *Weeks*) et depuis 1961 lors de poursuites en vertu des lois d'un état (arrêt *Mapp*).

À la lecture du « Quatrième Amendement canadien » dont la formulation proposée diffère sensiblement de son pendant américain, il n'est pas certain que le recours aux mandats de main-forte actuellement émis en matière de douanes, d'accise, de stupéfiants et d'aliments et drogues serait dorénavant interdit. De même, il n'est pas certain que l'amendement proposé aurait pour conséquence de rendre irrecevables devant les tribunaux canadiens des preuves illégalement obtenues. D'après le juge Hall, maintenant à la retraite, une formulation plus explicite serait nécessaire pour obtenir cet effet « américain » et son confrère le juge Pigeon, également à la retraite, a rappelé que la Cour suprême du Canada n'aborde pas les questions constitutionnelles de la même façon que la Cour suprême des États-Unis.

On se doit d'envisager l'impact que produirait sur l'ensemble de notre système politique l'enchâssement d'une Charte des droits soutenue par l'autorité d'un tribunal constitutionnel. Cela ne risque-t-il pas d'entraîner graduellement l'instauration d'un système de type présidentiel ? Si tel est le cas, n'y a-t-il pas lieu de prévoir des mécanismes de contrôle (« checks and balances ») comme il en existe aux États-Unis ? L'auteur conclut néanmoins qu'en dépit de ses limites, l'établissement d'une nouvelle règle concernant les fouilles, perquisitions et saisies abusives procurerait un moyen additionnel pour protéger les droits individuels.

# UNREASONABLE SEARCHES AND SEIZURES: A "FOURTH AMENDMENT" FOR CANADA?

par W.H. McCONNELL*

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## SUMMARY

*"Quis Custodiet Ipsos Custodes?"*
Roman Maxim

## INTRODUCTION

In 1761 the distinguished Boston lawyer James Otis resigned his position as advocate general of the vice admiralty court to oppose the issuance of writs of assistance by the superior court of Massachusetts. Arbitrary search warrants, describing or naming no offender or place to be searched, but enabling the holder to discover and apprehend persons at his discretion, and to invade the privacy of individuals and premises without restriction, the writs had long been a source of colonial grievance. Under the prevailing mercantilist theory, the writs were used to protect the legally privileged trading position of Great Britain in the colonies, a feature of which was the monopoly of the carrying trade enjoyed by English vessels. In return for restrictions on colonial manufacturing and trade regulations favouring the mother country, American goods were often given a monopoly, or a preferential tariff position, in the English market. Although the mutual benefits of the system were arguable, it was detested by the colonists and was a significant cause of the American Revolution. The writs of assistance empowered customs officers to enter vessels and dwelling places, to break down doors and to open containers and receptacles in their search for contraband and smuggled goods.

It was the sweeping and arbitrary nature of the warrants, enabling overzealous customs officers to engage in the most indiscriminate searches without legal hindrance that particularly enraged Otis. In a ringing declamation, he thundered that by its very nature such a writ was a violation of fundamental law; such writs were contrary even to the law of nature: "No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void." Because of its encompassing nature, it allowed its possessors to enter houses, shops and places of business at will, to "...break locks, bars and every thing in their way"; bare suspicion without oath was sufficient, and it might even be assigned by the official presently holding it to a successor, so that it was impossible to say whether an eventual holder might be a fit and judicious person to exercise the

vast powers it conferred. Such writs were not specific and temporary, moreover, but were general and permanent: "...these live forever; no one can be called to account. Thus reason and the constitution are both against this writ."[1]

Otis lost his case, but in losing with such eloquence against such an iniquitous practice, his reasoning was to have a profound effect on the Virginia Declaration of Rights and on the Fourth Amendment of the Bill of Rights incorporated into the American Constitution in 1791. The tenth article of the 1776 Virginia Declaration of Rights proclaimed:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[2]

and the Fourth Amendment later prohibited the issuance of writs of assistance:

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

In the Bill of Rights as finally adopted there are, broadly speaking, two categories of rights. There are substantive rights such as the First Amendment guarantees of freedom of speech, the press, religion and assembly, and there are procedural rights, or rights of "due process" which extend to an individual subjected to legal process the rights associated with an impartial and independent court and a fair trial. An aim of the latter rights is to ensure that the not inconsiderable advantages possessed by the state in terms of prosecutorial and financial resources will not result in a process where the parties, already unequal, are rendered even further unequal with the state enjoying an overpowering advantage. The case against an individual must be presented fairly, according to admissible evidence legally obtained, and in criminal prosecutions

1. "James Otis Speech Against the Writs of Assistance, February 24, 1761," in COMMAGER, *Documents of American History,* New York, 1948, 47, see also, SMITH, *The Writs of Assistance Case,* Berkeley, 1978, cc. 15 and 16.

2. See "Appendix A" of RUTLAND, *The Birth of the Bill of Rights, 1776-1791,* New York, 1962, 236.

3. *Ibid.,* "Appendix B," 239.

guilt must be established "beyond a reasonable doubt." Despite the taxonomic convenience of dividing rights into substantive and procedural categories, it would be incorrect to assume that they exist in remote isolation from each other. They are actually closely interrelated. As Irving Brant, a leading authority on the U.S. Bill of Rights, has said:

> Suppression of religious freedom in past ages, suppression of free speech and freedom of the press in past and present, has led and invariably leads to unlawful searches and seizures, to arbitrary arrest without probable cause, to tragi-farcical trials before prejudiced judges and juries, and to vindictive punishments. Such periods are usually marked by appellate decisions in which some judges either share or bow to the prevalent passions, while others win the execration of the many and the praise of the few by endeavouring to maintain the shattered constitutional rights of the victims.[4]

As Mr. Brant says, in times of political hysteria, the prevailing climate of opinion may so erode support for civil liberties that only the valiant or the foolhardy dare to resist the tide. During Woodrow Wilson's second term, Attorney-General A. Mitchell Palmer initiated the notorious "Palmer Raids", rounding up 3,000 allegedly subversive aliens for deportation, with only a small number later being deported.[5] There were also numerous invasions of individual rights during Senator McCarthy's witchhunts in the early fifties.[6]

In Canada, there were investigative excesses by the police during the Gouzenko espionage round-up after the Second World War,[7] during the F.L.Q. affair in Quebec in October, 1970,[8] as well as opening of first-class mail by the R.C.M.P. without legal authority for a fifty-year period, and an estimated 400 break-ins by police without warrant,[9] the legality of which was highly dubious. As a result of allegations concerning legally unsanctioned R.C.M.P. activity, three governmental commissions were set up in the late seventies, the McDonald, Keable and Laycraft enquiries. Former

4. BRANT, *The Bill of Rights: Its Origin and Meaning,* Indianapolis, 1965, 77.
5. MURRAY, *Red Scare, A Study in National Hysteria, 1919-1920,* New York, 1955.
6. Cf. MURPHY, *The Constitution in Crisis Times, 1918-1969,* New York, 1972, 315-16.
7. STEWART, *Parliament and Executive in Wartime Canada, 1939-45* (unpublished Ph.D. dissertation at Columbia University), Ann Arbor, 1971, 175 ff.
8. See e.g., *Globe and Mail* (Toronto), Tuesday, Nov. 1, 1977, 1.
9. *Ibid.,* Wednesday, April 26, 1978, 1.

Solicitor-General Warren Allmand surprised the McDonald Commission, according to a newspaper report, by saying he thought it was legal for R.C.M.P. to prowl around private homes and offices without warrants:[10] "It has been a cornerstone of British justice for centuries that this is wrong. As Lord Mansfield, a British chief justice, put it in a 1761 judgment: 'This would be worse than the Spanish Inquisition: for ransacking a man's secret drawers and boxes to come at evidence against him is like racking his body to come at his secret thoughts.' "[11]

The arbitrary writs of assistance against which James Otis argued so eloquently and unsuccessfully in 1761, and which were prohibited by the U.S. Fourth Amendment thirty years later, still exist in Canada. Provisions in the *Narcotics Control Act,*[12] the *Food and Drug Act,*[13] the *Customs Act,*[14] and the *Excise Act*[15] facilitate the most extensive searches of private premises without the requirement of a formal application being made in individual cases to a court. The sweeping and arbitrary powers thereby made available to the police have been characterized as follows by the General Counsel of the Canadian Civil Liberties Association:

> Under these laws, there can be forcible searches without specific judicial warrants, even of private dwelling houses. Such invasions are made possible by writs of assistance, which are general search warrants carried by certain R.C.M.P. officers. While the officers who possess them need to have a reasonable belief that the homes they enter, in fact, contain evidence of drug, customs or excise violations, they need not demonstrate this to a judge in advance. Prior to the search they need to persuade only themselves.[16]

The broad powers made available to the police by such writs have been defended on the ground that the evidence required by the courts to secure a conviction in such cases is such that it is easily concealed or disposed of, and that fugitive criminals would otherwise simply get rid of the evidence before apprehension was possible. It is contended, for instance, that drugs can be flushed

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10. *The Star-Phoenix* (Saskatoon) Saturday, April 7, 1979, 4.
11. *Ibid, loc. cit.*
12. R.S.C. 1970, Chapter N-1, s. 10(1) and (3).
13. R.S.C. 1970, Chapter F-27, s. 37(1) and (3).
14. R.S.C. 1970, Chapter C-40, ss. 139 and 145.
15. R.S.C. 1970, Chapter E-13, ss. 76 and 78.
16. BOROVOY, "The Powers of the Police and the Freedom of the Citizen," in Macdonald and Humphrey, editors, *The Practice of Freedom,* Toronto, 1979, 427.

down toilets or burnt in furnaces.[17] Critics of the writs have pointed to the United States, however, where the prohibition against them, or against "unreasonable searches and seizures" in the Fourth Amendment, has not notably restricted state or federal police agencies in their investigative activities vis-à-vis their Canadian counterparts. It is also obvious that the evidence in drug and customs offences is not essentially different from evidence in many other cases where specific authorization for a warrant is necessary under the *Criminal Code*.[18] As one authority has observed: "...customs, excise and drug offences have no monopoly on disposable evidence. Consider, for example, the number of thefts, robberies, counterfeits or even murders which involve disposable things like documents, dollar bills and jewels."[19]

In a democratic state, a delicate balance must be drawn between the rights of an accused and the impressive resources of police and prosecutors attempting to secure a conviction. What are the essential ingredients of due process or fair hearing? There must be adequate police powers to combat crime, but an accused confronted by the awesome panoply of state power must be guaranteed at least minimum due process if the quality of liberty is not to suffer. The misuse of 'process' is most discernible in totalitarian states, either on the right or on the left. Unlike the situation in Canada, the Americans have defined the prohibition against writs of assistance and "unreasonable searches and seizures" as fundamental. Recent Canadian constitutional proposals have urged the entrenchment of basic civil liberties, including a prohibition like that in the Fourth Amendment in a refurbished Canadian Constitution.[20] The American jurisprudence affords an instructive comparison of both the advantages and the problems of such a possible extension of basic rights and must now be considered. As the reader will appreciate, the course of judicial protection of accused and others under the Fourth Amendment has been uneven. The Amendment is not an absolute nor a panacea, but it may be a valuable resource.

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17. *Ibid.*, 428.

18. S. 443.

19. BOROVOY, *supra*, fn. 16 at 428.

20. See, "The Rights to be Secure Against Unreasonable Searches and Seizures," in s. 7 of Prime Minister Trudeau's *Bill C-60*, June 1978; see also, the proposal to include in a revised constitution "The Right Not to be Subjected to Unreasonable Searches and Seizures" in Committee on the Constitution, Canadian Bar Association, *Towards a New Canada*, Montreal, 1978, 14, 19, and see S.8 of Prime Minister Trudeau's, "Joint Resolution" as amended in January 1981, "Everyone has the right tobe secure against unreasonable search and seizure".

## PART I:

## THE AMERICAN EXPERIENCE

The Fourteenth Amendment which was added to the U.S. Constitution in 1868 in order to confer the rights of citizenship on Blacks after the Civil War, has also had a profound 'due process' impact in gradually extending the requirements of a fair trial to citizens of the various states. In *Barron* v. *Baltimore*[21] the U.S. Supreme Court held in 1833 that the 'Bill of Rights' limited only the national and not the state governments. At that time there was no provision making the civil liberties guarantees in the first eight amendments applicable to the states. Perhaps the prudent gentry who framed the Constitution and the Bill of Rights had basically local loyalties and were more apprehensive of the encroachments on civil liberties of the national than the state governments. If the Civil War helped to forge a more centralized nation, it also promoted a more widespread application of civil liberties by creating a legal mechanism through which the various rights provisions in the Constitution could be made obligatory in state courts.

The main provisions in the Fourteenth Amendment forbid a state from depriving any person of life, liberty or property without due process of law, or from denying any person the equal protection of the laws. By a slow process, the American judiciary has through time applied many of the libertarian guarantees in the Bill of Rights to state laws, striking some of them down for repugnancy to the Constitution. In the area of 'due process', this evolution has been marked by the gradual extension to states of the prohibition against 'unreasonable searches and seizures' in the Fourth Amendment, the privilege against 'self-incrimination' in the Fifth, and the 'right to counsel' along with other rights of the accused in the Sixth.

The reason for what some critics regard as the glacially slow advance of civil liberties provisions to the states is at least in part a clash in judicial philosophies on the U.S. Supreme Court bench. Judicial apostles of 'activism' (which is allied to 'absolutism' in some cases) and of 'selective incorporation' (adopted by proponents of self-restraint) have sat together in deliberation on the bench where this cleavage has become apparent. The paradigm cases or 'models' can be represented by Justices Cardozo and Black, the former of the 'selective incorporation' and the latter of the

21. 7 Peters 243 (1833).

'absolutist' tendency. In *Palko* v. *Connecticut*[22] Cardozo set forth the elements of the former approach. The accused had been convicted of 'non capital' second degree murder in a state court whereupon, pursuant to statute, the state appealed. On appeal, a new trial was directed. The accused was then retried, convicted and sentenced to death. When the accused appealed his second conviction, the issue before the U.S. Supreme Court was whether the Fifth Amendment prohibition against double jeopardy applied to a state by reason of the Fourteenth Amendment's ban against 'denial of life and liberty without due process of law.' The prohibition unquestionably applied to the federal government but did it apply to a state? Cardozo held not, setting out the 'selective incorporation' rule. Not all of the rights embraced in the first eight amendments were of the same importance, he said. Some were, however, "of the very essence of a scheme of ordered liberty,"[23] and it was only these provisions which a court should apply to state law when an appellant invoked the Fourteenth Amendment. The implication of this technique of judicial interpretation is that any officious or overzealous supervision by federal courts of state laws is incompatible with a balanced federal system. If there is a clear conflict between a state law and a genuinely basic right, the latter must prevail, but it must be apparent that without the judicial affirmation of the asserted right, liberty or justice would be sacrificed. While holding that it was basic that the accused be tried in a process free from substantial legal error, Cordozo also held that the double jeopardy rule was on a lower plane: its infraction under state law did not violate "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[24]

Conversely, Black used a "far-reaching abolutist" interpretation. In *Adamson* v. *California,* for example, he argued in dissent that the Fourteenth Amendment incorporated against the states *all* the guarantees in the Bill of Rights.[25] If one adopts an 'absolutist' approach to the Bill of Rights, of course, the "equal protection of the laws" provision in the Fourteenth Amendment is tremendously enhanced as a forensic weapon against the arbitrary application of state laws. As William F. Swindler has said: "...in the latter years of the Warren Court the equal-protection clause became an even more

22. 302 U.S. 319 (1937).

23. *Ibid.*, 326; *Palko* was overruled in 1969 in *Benton* v. *Maryland,* 395 U.S. 789.

24. 302 U.S. 319 (1937) at 328.

25. 332 U.S. 46, 68 (1947).

persuasive avenue of incorporation, as the court became increasingly disposed to declare certain rights to be absolute or universal and hence logically to be extended to all persons."[26]

Depending, accordingly, on which judicial approach individual judges from time to time followed, the tenor of their judgments might incline either towards the 'absolutist' or the 'selective incorporation' stance. If, as Swindler indicates, the Warren court in many cases tended to adopt the former view its successor is inclined more towards the latter. Interpretation of the "search and seizure" clause since the adoption of the Fourteenth Amendment in 1968 has been particularly erratic, as the following survey will reveal.

*The Leading Cases:* It would be misleading to regard the Fourth Amendment as existing in isolation from the Fifth; in certain contexts the two form a "system".

The first detailed examination of the prohibition against "unreasonable searches and seizures" was made by U.S. Supreme Court in *Boyd* v. *U.S.*,[27] decided in 1886, almost two decades after the adoption of the Fourteenth Amendment. In *Boyd* there was a quasi-criminal proceeding under a customs law[28] making it an offence for importers of commodities to issue false invoices or other documents with an intent to defraud the revenue. Defendants, who where charged under the law, had imported thirty-five cases of plate glass. By the statute they were required to produce any document which might "tend to prove any allegation made by the United States."[29] Non-production was to be regarded as tantemount to a confession of the allegation the documents were intended to prove. Speaking for a unanimous court, Mr. Justice Bradley found the impugned statutory provision violative both of the Fourth and Fifth Amendments. For the violation of the standards of the Fourth Amendment, of course, there must either be a "search" or a "seizure". In *Boyd,* while there was no actual "search", there was a statutory requirement for a compulsory production of documents which was likened to a "seizure."[30] (The Fifth Amendment was breached because the mentioned statute compelled a defendant to be a witness against himself.) Bradley's opinion cited Lord Camden's 1765 landmark

26. SWINDLER, *Court and Constitution in the 20th Century, The Modern Interpretation,* Indianapolis, 1974, 231.

27. 116 U.S. 616 (1886).

28. Act of June 22, 1874, 18 Stat. 186.

29. *Ibid.*, s. 5.

30. 116 U.S. 616, 630.

judgment in *Entick* v. *Carrington*[31] that seizure of items to be used as evidence only is impermissible:

> ...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 would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.

"It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence," said Mr. Justice Bradley, "but it is the invasion of his indefeasible right of personal security, personal liberty, and private property... Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment [i.e. *Entick* v. *Carrington,* supra]. In this regard the Fourth and Fifth Amendments run almost into each other."[32] In this judgment, the lineaments of a whole system of "due process" begin to appear. The production of the documents in *Boyd* would amount to at least *potential* self-incrimination, hence the impermissible seizure of private papers violative of the Fourth Amendment could entail breaching the Fifth. Upholding the mentioned statute would be constitutionally repugnant on both grounds.

The opinion in *Boyd* led eventually to the abandonment of the common law rule that evidence, however acquired, is admissible, and the development of the "exclusionary" rule that illegally gotten evidence (or "poison fruit") must not be used in federal proceedings against an accused. As late as 1904, the rule was the same as that propounded in Canada in the *Wray* case,[33] that evidence was admissible however acquired. In *Weeks* v. *U.S.*,[34] however the Supreme Court decided in 1914 that illegally obtained evidence should be excluded in prosecutions for federal offences. Weeks was subjected to two searches of his home without the production of a search warrant and some of the evidence seized consisted of private papers similar to those found objectionable on Fourth Amendment

31. (1765) 95 E.R. 807.

32. 116 U.S. 616, 630.

33. *Wray* v. *R.*, [1976] C.C.C. 1 (S.C.C.).

34. 232 U.S. 383 (1914).

grounds in *Boyd*. The court unanimously held that such evidence should be excluded by a trial court:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be striken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavour..."[35]

The prohibition in *Weeks* was followed by *Amos* v. *U.S.*[36] in 1921 which held that Fourth Amendment standards applied even to premises opened to the authorities voluntarily where no warrant was produced.

While it was *Boyd* and *Weeks* which set the trend of interpretation, a ruling in *Ex Parte Jackson*[37] eight years before *Boyd* is especially interesting in Canada because of recent revelations that the R.C.M.P. has been opening first class mail without formal legal authority for at least fifty years. The accused was convicted in federal circuit court for unlawfully using the mails to conduct a lottery forbidden by federal statute.[38] Prosecution evidence was that a letter sent by petitioner through the U.S. mails and opened without legal authority by federal agents contained a circular concerning a forbidden lottery. "Liberty of circulating," said Mr. Justice Field, "is as essential to that [i.e. "press"][39] freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."[40] The court held that "letters and sealed packages subject to letter postage", should be safeguarded from inspection without a warrant in conformity with the prohibition against "unreasonable searches and seizures":

> ...all regulations adopted as to mail matter of this kind must be in subordination to the great principle contained in the fourth amendment of the Constitution.[41]

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35. *Ibid.*, 393.

36. 255 U.S. 313 (1921).

37. 96 U.S. 727 (1878).

38. Act of July 12, 1876, 19 Stat. 90, as am.

39. Cf, First Amendment, U.S. Constitution.

40. 96 U.S. 727, 733.

41. *Ibid.*, loc cit.

The employment of electronic surveillance in the prohibition era[42] to obtain evidence against suspected "moonshiners" confronted the U.S. Supreme Court with the issue of whether police "wiretaps" of telephone conversations by accused violated the Fourth Amendment. The wiretapping was done by federal agents outside accused's residence, where orders for the shipment and sale of illicit liquor was taken over the telephone. There had been no physical trespass, and nothing tangible seized. Chief Justice Taft held that there was no "search" or "seizure" in this case, and no unauthorized entry of defendant's premises, with the challenged evidence being secured solely by technological aids to the sense of hearing. Moreover, if one required too high an ethical standard of government agents procuring evidence, criminals would obtain even more immunity from prosecution than previously.[43] Six years after *Olmstead*[43a] Congress passed a law providing that "... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person."[44] Pursuant to the foregoing statute, the Supreme Court held in *Nardone* v. *U.S.*[45] that the interception and divulgence in court of wiretapped conversations was illegal, although the information so obtained could be used internally by the government agency for non-judicial purposes without violating the statute. The statutory provision bound the state as well as the federal government, since it was held to apply to both intrastate and interstate transmissions.[46] In so-called "nontelephonic" electronic surveillance or "bugging" as distinguished from wiretap, the court found no Fourth Amendment violation where a sensitive device was placed against a party wall to pick up conversations in the next room.[47] A violation occurred, however, when federal officers drove a "spike-mike" into a party wall so that it impinged on a heating duct system enabling them to hear conversations. Such a practice

42. National prohibition, enforced by federal law was initiated by the Nineteenth Amendment in 1919 and terminated by the Twenty-First Amendment in 1933, which repealed it.

43. *Olmstead* v. *U.S.*, 277 U.S. 438 (1928).

43a. *Ibid.*

44. 48 Stat. 1103 (1934), s. 605.

45. 302 U.S. 379 (1937).

46. *Weiss* v. *U.S.*, 308 U.S. 321 (1939).

47. *Goldman* v. *U.S.*, 316 U.S. 129 (1942).

represented, it was held, a "physical intrusion into a constitutionally protected area."[48] Although the Court did not address the matter directly, in this case it implicitly overruled the holding in *Olmstead* that conversations, not being "tangible", could not be seized.

The foregoing finding was confirmed in *Berger* v. *N.Y.*[49] six years later when the Supreme Court struck down a state eavesdropping statute permitting the issuance of warrants to police officers to install listening devices on private premises without requiring a reasonable ground to believe that any *particular* offence has been or is being committed. The Fourth Amendment's "probable cause" requirement had been contrived to keep the police out of "constitutionally-protected" areas unless there was some reason to believe that a crime was being committed. In *Katz* v. *U.S.*[50] federal agents attached a listening device to the outside wall of a telephone booth, activating it whenever the accused entered so that they could hear only his conversations. There was no physical trespass into the booth. Nevertheless, the Court found that the Fourth Amendment protected "people, not places"[51] and physical intrusion was not conclusive as to unconstitutionality. Without prior authorization by a magistrate, such telephonic surveillance was constitutionally invalid: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected... The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear."[52] In this case, the rejection of the Olmstead precedent was explicit.[53] In the older case of *Hester* v. *U.S.*[54] the Court had held that a warrantless search of "open fields" without probable cause was

48. *Silverman* v. *U.S.*, 365 U.S. 505 (1961).

49. 388 U.S. 41 (1967); in the interim in 1961 *Mapp* v. *Ohio*, 367 U.S. 643 (1961) had applied the "exclusionary" rule to the states.

50. 389 U.S. 347 (1967).

51. *Ibid.*, 351.

52. *Ibid.*, 351-52.

53. *Ibid.*, 352.

54. 265 U.S. 57 (1924).

permissible, implying that such areas were not protected places. This rationale seems to have eroded or even extinguished by *Katz* with its finding that the Fourth Amendment protected "people, not places." Another qualification of the exclusionary evidence rule, developed in the case of the late labour leader James Hoffa was that the Fourth Amendment offers no protection against untrustworthy associates, such as undercover police agents to whom one unwittingly divulges information.[55]

A series of cases from *Wolf* v. *Colorado*[56] in 1949 to *Mapp* v. *Ohio*[57] in 1961 finally applied Fourth Amendment criteria to the states by deciding that the due process clause required the application of the "exclusionary" rule to state prosecutions where tainted evidence was being used. A case decided almost contemporaneously held that neither state nor federal prosecutors could make use of evidence illegally seized by the other in criminal prosecutions.[58] They could, however, use such evidence in civil suits.[59] In *Wolf,* a Colorado surgeon had been convicted of conspiring to commit abortion in a state trial on the basis of office diaries taken without a warrant, but the conviction was nonetheless upheld, as the *Weeks* rule was held not to apply to the states: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if constitutionally enforced, would be equally effective..."[60] In 1952 in *Rochin* v. *California,*[61] three deputy sheriffs entered the defendant's home without a warrant, forcing their way into his bedroom and apprehending him in the act of swallowing two capsules of

55. *Hoffa* v. *U.S.,* 385 U.S. 293 (1966).

56. 338 U.S. 25 (1949).

57. 367 U.S. 643 (1961).

58. *Elkins* v. *U.S.,* 364 U.S. 216 (1960).

59. *U.S.* v. Janis, 428 U.S. 433 (1976).

60. 338 U.S. 25, at 31; alternative methods might involve, for example, criminal indictment of the delinquent police officers; disciplinary action by a police review board or a tort action for trespass and conversion by the persons whose property was illegally taken. See, however, the criticism of this reasoning in AMSTERDAM, "Perspectives on the Fourth Amendment," in (1974) 58 *Minn. L. Rev.* 349 at 432, and in McMILLAN, "Is There Anything Left of the Fourth Amendment?" (1979) 24 *St. Louis U.L.J.* 1 at 9.

61. 342 U.S. 172 (1952), Mr. Justice Frankfurter adopted Cardozo's "Selective Incorporation" technique in this case.

morphine. He was then rushed to a hospital where a physician using a "stomach pump" forced him to vomit up critical evidence. Justice Frankfurter likened the procedure to a coerced confession which "shocks the conscience", offending even hardened sensibilities. Such evidence must be excluded, in such an extreme case, as a transgression of the due process clause of the Fourteenth Amendment. In *Irvine* v. *California,*[62] however, and in *Breithaupt* v. *Abram,*[63] the Court, essentially, returned to the *Wolf* rule, holding that the installation of secret listening devices inside a suspected bookmaker's home, enabling the state police to listen to his conversations for an entire month, or the forcible taking of a blood sample from the body of an unconscious truck driver who was involved in an accident in which three persons were killed, were not, apparently, circumstances which so "shocked the conscience" that state convictions based upon them should be set aside. The Court in these two latter cases was engaged in a "balancing" process in which the state interest in combatting organized underworld gambling and carnage on the highways by intoxicated motorists outweighed the means by which incriminating evidence was obtained. Finally, in 1961, in the *Mapp* case, the *Wolf* precedent was overruled with the result that the exclusionary rule was imposed on all American courts, federal and state. A number of states had by that date voluntarily adopted the rule on their own initiative. The result was that illegally-gotten evidence was excluded in criminal prosecutions in both federal and state courts.

In *U.S.* v. *U.S. District Court*[64] the federal government obtained wiretap evidence implicating one Plamondon, during the Vietnam War, with the bombing of a C.I.A. office in Ann Arbor, Michigan. The Government argued that pursuant to the *Crime Control Act of 1968,*[65] eavesdropping authorized by the President without a warrant was legally valid where national security was involved, even in a purely domestic context.[66] The Court dit not enquire

62. 347 U.S. 128 (1952).

63. 352 U.S. 432 (1957).

64. 407 U.S. 297 (1972).

65. 18 U.S.C., ss. 2510-2520.

66. Cf., "The Government relies on s. 2511 (3) [*vide supra,* fn.65]. It argues that 'in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval,' .... The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case," see the case cited in fn.64 at 303.

directly into the validity of the federal statute, confining itself to a ruling that in the absence of specific statutory or constitutional authority there was no legal basis for the wiretapping or bugging supposedly authorized by the President. In the absence of express legal support for security surveillance by the Executive, Mr. Justice Powell "balanced" the government's interest in conducting such searches against the societal and individual interests in protecting personal privacy. The balance struck was in favour of the latter interest, with a warrantless wiretap conducted on presidential authority alone being held to infringe Fourth Amendment safeguards. Prior judicial approval would be necessary to conduct such a "search" and there did not appear to be any authorizing congressional legislation for that purpose. Again, *Olmstead* was overruled. One constitutional authority commented on the result of the *U.S. District Court* case, in the light of the *Mapp* decision, in these words: "The overruling of *Olmstead* in the present case... means that the Fourth Amendment now applies to wiretapping. Hence, with the present case, wiretap evidence could be used in a state court if it met the warrant requirements of the Fourth Amendment, but it could not be used in a federal court because federal law did not permit wiretapping even with a warrant."[67]

## Search and Seizure Incident to a Lawful Arrest:

The constitutional theory underlying the Fourth Amendment rests on the desirability in a democratic system of the separation of judicial and executive powers. Privacy within one's own home is a protected interest, the invasion of which by the police should be permitted, ordinarily, only when a court has determined that there is "probable cause" to issue a search warrant. It is advisable, moreover, that those who exercise this exceptional power should not themselves determine whether "probable cause" exists, but "cause" should be determined by a magistrate whom the police must first convince that the appropriate circumstances exist. The magistrate issuing the warrant is presumed to be independent, objective and neutral, examining the request in detachment from the actual circumstances of the investigation by the police, and not in any sense collaborating with them in their investigative function. His task is to ascertain legal sufficiency, whereas theirs is to enforce the law.

67. CUSHMAN, *Cases in Constitutional Law*, 5th ed., Englewood Cliffs, N.J., 1979, 323-24.

Where, however, the circumstances are "exigent", and perhaps an actual or "hot pursuit" is in progress, search and seizure is permissible under the Fourth Amendment, even without a warrant, when an arrest is made for "probable cause". In such a case, the arrest is not arbitrary, nor is the search unreasonable.[68] The Fourth Amendment thus reflects the position under English and Canadian law where an arrest without warrant of someone committing a felony or breach of the peace (or similar offences) is allowed.[69]

The conditions under which a search and seizure without warrant are constitutionally permissible are, however, limited. Where police are pursuing a speeding vehicle and fear that evidence may be concealed or destroyed, they can intercept and search it, even though "probable cause" is established after the actual stopping of the vehicle.[70] The common law doctrine was that a policeman, without a warrant, could frisk a subject incidental to a lawful arrest, since such a person might have weapons concealed on his person, or evidence which he might dispose of. In *Agnello* v. *U.S.*[71] the house of a conspirator who allegedly had broken a narcotics law was searched without warrant, and drugs therein found were seized, although the house was situated several blocks from where the arrest was made. It was decided that there was no justification here for a search without warrant, the seizure not being confined to the place where the arrest was made, but some distance from it. There is, however, little consistency in the decisions. In *Harris* v. *U.S.*[72] the petitioner was arrested without warrant in his living room on a charge of forging cheques. Subsequently, during a search of his bedroom a sealed envelope was found marked "George Harris, personal papers." In this envelope were discovered several altered draft cards, possession of which was illegal by federal law, but which indicated criminal activity entirely unrelated to the offence for which Harris was arrested. Nevertheless, the Court held that although the petitioner was arrested in the living room, the seizure of the evidence was valid since the whole premises was "...under his immediate control." Search of the bedroom was therefore justified. A year later in *Trupiano* v. *U.S.*,[73] a new court

68. Cf. Chief Justice Marshall's opinion in *Ex Parte Burford*, 3 Cr. (7 U.S.) 448 (1806), and *Giordenello* v. *U.S.*, 357 U.S. 480, 485-86 (1958).

69. STEPHEN, *A History of the Criminal Law of England*, London, 1883, 193.

70. *Carroll* v. *U.S.*, 354 U.S. 394 (1957); *Brinegar* v. *U.S.*, 338 U.S. 160 (1949).

71. 269 U.S. 20 (1925).

72. 331 U.S. 145 (1947).

73. 334 U.S. 699 (1948).

majority went in the other direction, seemingly overruling Chief Justice Vinson's 5-4 majority in *Harris* by holding that where revenue agents had been watching the building of an illegal still for some weeks, the mere fact that the operator was in the building rather than in the yard did not justify a warrantless search, since the agents had had sufficient time to obtain a warrant. Yet another reconstituted majority held two years later, conversely, that the operative principle "is not whether it is reasonable to procure a search warrant, but whether a search was reasonable."[74] This depends on a close examination of the facts of the particular case. Some twenty years later in *Chimel* v. *California,*[75] the Supreme Court overruled *Harris* and *Rabinowitz,* holding that the Fourth Amendment allowed a search of the person arrested and the area within his immediate control, but forbade more extensive searches: "The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no warrant shall issue, but upon probable cause' plays a crucial part."[76] Wherever possible, it was held, the police must obtain a warrant prior to embarking on a search or seizure. Any exceptions are in the nature of a curtailment of individual rights and should be strictly limited.

Two significant cases on the "search incident" doctrine were decided in the mid-sixties. In *Preston* v. *U.S.*[77] the court held repugnant the later search of an automobile towed away to a garage after accused's arrest, but in *Cooper* v. *California*[78] it was held that the vehicle could be searched if the purpose were "closely related" to the warrantless arrest. Narcotics was found in both vehicles, but where Preston was arrested for vagrancy, Cooper was arrested on a narcotics charge. In *Coolidge* v. *N.H.,*[79] the warrant used by the police to search the car of a murder suspect was invalid, not having been issued by a "neutral" magistrate, but by the Attorney-General himself. (The Attorney-General had personally taken charge of all police activities relating to the murder in question, and was later to

74. *U.S.* v. *Rabinowitz,* 339 U.S. 56 at 66 (1950).

75. 395 U.S. 752 (1969).

76. *Ibid.,* 761.

77. 376 U.S. 364 (1964).

78. 386 U.S. 58 (1967).

79. 403 U.S. 443 (1970).

act as chief prosecutor at the trial.) The warrant being invalid, it was argued by the Government that a warrantless search was appropriate because of "exigent" circumstances. The court held, however, that a subsequent search of the car, after the suspect was arrested in his house, was illegal since there was "probable cause" but not exigent circumstances, and a warrant should have been obtained.[80]

In *U.S.* v. *Edwards*[81] the defendant had jimmied the window of a post office, chipping away some paint, and on the morning subsequent to his arrest for burglary he was given a change of clothes, with a search of his discarded garments revealing incriminating paint chips. The court ruled in a narrow 5-4 decision that a full "custodial" arrest justified a search without warrant of his clothing. He might have been so searched on the night of the suspected offence, the court declared, and it would not be unreasonable, in the circumstances, to wait until the next morning when a change of clothes was readily available. In *Cardwell* v. *Lewis,*[82] after defendant's arrest a warrantless search was made of the outside of his car for paint chips and tire prints that might connect the vehicle with the scene of a murder. The car was found in a parking lot after the defendant was placed in custody. The court held that an external examination of the vehicle did not really constitute a breach of privacy, and cars were, in any event, not on the same level as other "places" as far as exacting Fourth Amendment warrant requirements were concerned. In *Gustafson* v. *Florida,*[83] the petitioner was arrested for driving without a valid automobile license, with a police search disclosing a cigarette box containing marijuana cigarettes. The search being incident to a lawful arrest, the court held the marijuana could be used as evidence for an offence distinct from the one for which he was arrested. Similarly, in *U.S.* v. *Robinson*[84] accused was arrested for driving after his license was revoked, and on being searched was found to have a cigarette package containing 14 capsules of heroin. The Court of Appeals held that only a limited frisk of outer clothing was permissible to detect whether the detainee had weapons, and a search for evidence wholly unrelated to the "probable cause" for

80. *Ibid.*, 464.

81. 415 U.S. 800 (1974).

82. 419 U.S. 583 (1974).

83. 414 U.S. 260 (1973).

84. 414 U.S. 218 (1973).

arrest was not justified.[85] In reversing the above judgment, however, the Supreme Court said: "... Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the arresting officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that the respondent was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct. *Harris* v. *United States...*"[86]

In *South Dakota* v. *Opperman,*[87] consistently with their customary practice, investigating police made an inventory of the contents of a car which was towed away for a parking violation. On finding a small amount of marijuana in the glove compartment, the owner was charged with a drug offence. The Supreme Court held that evidence taken in a routine inventory search for an unrelated offence was admissible for the prosecution without a warrant or probable cause. In another expansion of the definition of legal search, the Court held in *U.S.* v. *Martinez-Fuerte*[88] that a roving border patrol authorized by federal law to stop and search vehicles within 100 miles of the Mexican border could conduct a search of an automobile at a checkpoint within the zone without a warrant or probable cause. There was a figurative extension of the international boundary.

In cases where a police investigation was hampered in the past because probable cause, either for a search or an arrest, was lacking, it was often the practice for police lacking a warrant simply to ask a suspect for permission to search the premises, without advising him of his right to refuse. "Consent," it was held, waived Fourth Amendment procedural requirements. In 1973 this practice was sanctioned, and even extended, by the court holding that the prosecution need not establish any knowledge on the suspect's part of his constitutional right to refuse consent.[89] Before *Rakas* v. *Illinois,*[90] it was thought an individual enjoyed standing to contest

85. Cf. *Terry* v. *Ohio,* 392 U.S. 1 (1968).

86. 414 U.S. 218 at 236 (1973).

87. 428 U.S. 364 (1976).

88. 428 U.S. 543 (1976).

89. *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973); cf. *People* v. *Myers,* 494 P. 2d. 684 (1972).

90. 439 U.S. 128 (1978).

an illegal search if he was legally on another's premises when evidence was wrongly taken. In *Rakas,* petitioner was in someone else's car suspected to be a get away car after a bank robbery. On being searched, the car was found to have a sawed-off shotgun and shells beneath a seat. The court denied the petitioner standing to contest the search, requiring petitioners to prove proprietary or possessory rights before standing became available.[91]

Another extension of police investigating authority was the 1977 holding that after a mere traffic violation an officer could order a driver to get out of his car and if he observed anything suspicious, such as a bulge in the driver's pocket, he could subject the driver to a warrantless search by frisking him.[92] In *Zurcher* v. *Stanford Daily*[93] the police desired to search the newsroom of the Stanford University student paper to obtain evidence of possibly illegal activities by Vietnam War protesters. The protesters had no connection with the newspaper, but police believed that evidence implicating them was on the premises. The paper argued that a warrant alone was not sufficient to authorize the search, but that a *subpoena* giving it the opportunity to contest the search in advance was required. It considered that the ability of the news media to gather and publish the news without official repression, flowing from the First Amendment, was in issue. Despite past authority that premises of innocent third parties could be searched only if fruits or instrumentalities of crime were reasonably believed to be concealed there, the court extented the right of search to cases where *mere evidence* pointing to criminals might be found, significantly increasing police powers and correspondingly restricting First Amendment rights in the area of freedom of the press.[94]

A further extension of investigatory powers has occurred in purely administrative, as contrasted with criminal, searches. In 1967 the Court had barred as unconstitutional an administrative search without a warrant of a private residence to detect the

91. Cf. *Mancusi* v. *DeForte,* 392 U.S. 364, 369 (1968) where it was held that a labour union official might reasonably expect privacy in an office he shared with others, although he owned neither the premises nor the papers seized.

92. *Pennsylvania* v. *Mimms,* 434 U.S. 106 (1977).

93. 436 U.S. 547 (1978).

94. See, however, Justice William J. BRENNAN'S reasoned defence of the supposed curtailment of freedom of the press in recent cases in "Why Protect the Press?" in *Columbia Journalism Review,* January/February, 1980, 59.

violation of local building code regulations.[95] In *Wyman* v. *James*,[96] however, it was held that a welfare recipient could not refuse a warrantless visit to her home by a social worker without risking the loss of her welfare payments. The dual purposes of such a visit were to ascertain the mother's financial resources, and hence her entitlement to welfare benefits, and to ensure that children under her care were not mistreated or neglected. The court distinguished between the homes of welfare recipients and others by citing the higher statistical incidence of child abuse and neglect in "welfare" homes.[97] Administrative "searches", moreover, to ensure compliance with regulatory schemes relating to alcohol and firearms have been authorized simply by statute and are exempt from Fourth Amendment warrant requirements; here, it was held, the federal interest was "urgent" and the threat to privacy comparatively unimpressive.[98]

The menace of hijacking to contemporary air travellers has subjected all passengers to pre-flight screening at airports by the aid of magnetometers, x-rays or sometimes personal searches. The power of search allowed here is so broad that some courts have required that individuals, at their option, be allowed to terminate the inspection process, abandon their flights, and leave the terminal.[99] Others have suggested that before a personal search is instituted passengers who had activated a magnetometer be given a second chance to pass inspection after removing metallic objects from their pockets.[100] Various rationales have been suggested for the wide powers of search at airports to detect possible hijackers. Some courts have assimilated such cases to administrative searches involving the sanitary inspections of homes,[101] while others have likened an airport to an international border search,[102] or a pat search,[103] or contended that even without probable cause or reasonable suspicion

95. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

96. 400 U.S. 309 (1971).

97. *Ibid.*, 392-93.

98. *Colonnade Catering Corp.* v. *U.S.*, 397 U.S. 72 (1970) and *U.S.* v. *Biswell*, 406 U.S. 311 (1972).

99. *U.S.* v. *Davis*, 482 F. 2d. 893 (1973).

100. *U.S.* v. *Albarado*, 495 F. 2d. 799 (1974).

101. See U.S. v. *Davis*, *supra* fn. 99.

102. U.S. v. *Skipworth*, 482 F. 2d. 1272 (1973).

103. *U.S.* v. *Homberg*, 546 F. 2d. 1350 (1976), cf. *Terry* v. *Ohio*, *supra* fn. 85.

such a search is, in any event, "reasonable" and so permissible under the Fourth Amendment[104] or that "consent" to the search is implied by posting notices of the search requirement along with the alternative (i.e. not travelling or checking all baggage).[105]

The proliferation of urban crime has also created Fourth Amendment problems. In April, 1974, San Francisco was terrorized by a series of horrible and savage murders by an unknown assailant. There were few clues, although the police had determined the type of pistol used, that the suspect was black while the victims were white, and had developed a description and composite sketch of the attacker. In desperation, in mid-April the police initiated extensive "stop and search" procedures of a large number of black males who conformed generally to a police "profile". More than 600 suspects falling within the "profile" were stopped in a nine-day period with many being frisked. The court found, however, that the "profile" was so general that if the investigation were not limited numberless black suspects would be stopped and frisked. Amongst unsavoury innuendos of racism, the procedures were found unconstitutional because a profile of such generality and indeterminateness could not constitute "reasonable suspicion" within the terms of the Fourth Amendment. It simply caught too many suspects on too broad criteria.[106]

On August 30, 1979, the U.S. District Court for the Northern District of Indiana held in *Doe* v. *Renfrow*,[107] that warrantless mass detentions and searches of all students at certain Indiana high schools met Fourth Amendment requirements. All students were confined to their classrooms during regular school hours while police officers used German Shepherds and Doberman Pinschers who went from student to student sniffing for marijuana. Police and school officials claimed that the magnitude of the local drug problem justified the searches. A lawsuit was brought by plaintiff who was subjected to a "strip" search by police. The case was based on the mass detention and deprivation of freedom of movement, the concomitant "sniffing" by police dogs, and the accompanying examination, interrogation, pat down, and search of possessions, on a collective basis without reasonable suspicion or probable cause, which was claimed to be an infringement of the Fourth Amendment.

104. *People* v. *Hyde*, 12 Cal. 3d. 158, 170 (1974).

105. *U.S.* v. *Doran*, 482 F. 2d. 884 (1973).

106. *Williams* v. *Alioto*, 549 F. 2d. 136 (1977).

107. No. H. 79. 233 (N.D. Ind. August 30, 1979).

The court, however, found that the investigation was justified by the *in loco parentis* rule, and that in the case of juveniles a warrant was not necessary.[108]

*Recapitulation:* Originating as an entrenched guarantee against the virtually unlimited search powers of colonial customs officials brandishing "general warrants," the Fourth Amendment has been progressively adapted to what the courts perceive to be the much more complex "crime control" needs of our contemporary society. This evolution has required the judiciary to apply a constitutional provision designed to ensure a degree of privacy to the citizenry, and to deter overzealous investigators, to circumstances of urban crime, interception of conversations by modern electronic surveillance, hot pursuit of high-speed vehicles and aircraft hijacking. The perceived requirements of "crime control" have induced the U.S. Supreme Court and other tribunals to substantially curtail the ambit of the Fourth Amendment, according to some legal scholars.[109] The erosion of rights has been both extensive and general.

There was a sparsity of authorities on the Fourth Amendment in the nineteenth century, but the seminal *Boyd* case in 1886 held that an "unreasonable seizure" of property or things contravening the Fourth Amendment rendered such items inadmissible in evidence against the person from whom they were taken, pursuant to the Fifth Amendment. Their admission, in effect, would require that person to be a witness against himself. Prior to *Boyd* it had been assumed that actual physical intrusion was necessary to infringe the amendment.

Search warrants must only be issued on "probable cause," moreover, and the definition of that term is necessarily empirical, dependent on the facts and circumstances of the particular case.

In "exigent" circumstances searches can be made without a warrant. Other exceptions to the warrant requirement include

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108. See HELFER, "Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?" in (1979) 24 *St. Louis U.L.J.*, 119 at 134, where the writer challenges the validity of the foregoing decision, arguing on the basis of *In re Gault*, 387 U.S. 1 (1967) that the Fourteenth Amendment and the Bill of Rights protects minors as well as adults.

109. Cf., e.g., AMSTERDAM, "Perspectives on the Fourth Amendment," (1979) 58 *Minn. L. Rev.* 349; GILLIGAN, "Continuing Evisceration of the Fourth Amendment," (1977) 14 *San Diego L. Rev.* 823; MILES, "Decline of the Fourth Amendment, Time to Overrule *Mapp* v. *Ohio?*", (1977) 27 *Cath U.L. Rev.* 9; McMILLIAN, "Is There Anything Left of the Fourth Amendment?" in (1979) 24 *Saint Lous U.L.R.* 1.

visual searches of objects in plain view, searches where consent has been given, and searches by a police officer where an individual behaves in such a way as to arouse suspicion, inducing the officer to infer, for "reasonable cause," that he is about to commit a crime and may be armed. This search (based on the *Terry* case) was originally limited to "pat and frisk" in order to detect concealed weapons. Recent cases, however, have extended its ambit so that if evidence of unrelated crimes is found, such evidence can be used in a subsequent prosecution despite the formerly more narrow rationale of the search.

In the case of electronic surveillance, the *Katz* decision, overruling *Olmstead,* held that the Fourth Amendment applied to the interception of conversations even where there was no physical trespass, and that the intangibility of such conversations did not preclude them from being seized. It was people, not places, that were protected. Prior authorization by a magistrate acting under statutory authority was necessary for the electronic interception by the police of such conversations, since this amounted to a "seizure". The President, moreover, had no generalized authority to sanction warrantless wiretapping in a purely domestic context, in the absence of legal or constitutional authority, in furtherance of a vague purpose of promoting "national security."

It would seem since the *Mapp* decision in 1961 that illegally-gotten evidence seized by state authorities would also be affected by the exclusionary' rule (applied federally since 1914) and that such evidence is not admissible in state courts. Accordingly, if the circumstances in *Wolf* recurred, the evidence would not now be admissible. Illegally-obtained evidence is therefore inadmissible in both state and federal proceedings.

A series of decisions has much broadened the types of searches incident to warrantless arrests reconcilable with the Fourth Amendment. The common law doctrine that the "immediate area" of the arrest might be searched was first broadened and then reduced again to the area within the immediate control of the arrested person. A vehicle can be later searched if the purpose were "closely related" to the warrantless arrest. The time requirements for a search were considerably extended in *Cardwell* where it was held that an external examination of a car without a warrant to obtain evidence implicating it in a murder did not contravene the Amendment. Also, evidence for a different offence found during a lawful search of a vehicle incident to arrest, or during a later inventory search, can give rise to a prosecution for such a distinct offence. The scope of searches by border patrols has been broadened

to include a zone extending into the interior. Officers have also acquired frisking authority where a violator has been stopped for a mere traffic violation, and there has been no indication of "criminal" activity. The rules governing "standing" have recently been much restricted. Intensive electronic and other scrutiny of air travellers to prevent hijacking has been upheld on a number of theories, despite the Fourth Amendment. On the other hand, a wide "dragnet" search on the basis of a too generalized police "profile" of the accused was held to be unconstitutional.

In *Zurcher* it was held that with a warrant police could search a newsroom for "mere evidence" implicating outsiders, where no "fruits or instrumentalities" of crime were on the premises, and that no *subpoena* enabling the subjects of the warrant to mount a prior judicial contestation was necessary.

In purely administrative cases it has been held, for example, that social workers, at least in some circumstances, can make a warrantless search of a welfare recipient's residence, to ascertain the recipient's income and to see whether children were being neglected. Civil cases were thereby brought within the boundaries of exceptions to the Amendment. Inspection of premises was also allowed to enforce liquor and firearm regulations. A lower federal court has recently held that, without a warrant, school children can be compulsorily restrained in their classrooms while police dogs sniff them and the premises to discover marijuana, because of the *in loco parentis* rule.

## PART II:

## THE CANADIAN EXPERIENCE

*Search and Seizure in Canada:* Almost two centuries after the constitutional prohibition of writs of assistance by the Fourth Amendment, such writs not only continue to exist but are used extensively in Canada. Apparently James Otis's eloquence did not reverberate with much force north of the forty-ninth parallel.

One of the most criticized episodes associated with the writs was the vaginal and rectal searches of 35 women patrons for concealed heroin and other drugs in the Landmark Motel at Fort Erie on May 11, 1974. "Despite all of the searching, stripping and inspecting," said A. Alan Borovoy, "the police found nothing more incriminating than a few grains of marijuana. And most of those few grains not on articles of clothing or within body orifices, but rather on the floor

and tables of the lounge."[110] The search was made possible by s. 10(1)(a) of the *Narcotic Control Act* allowing a "search of any person" without warrant in "any place other than a dwelling house," or pursuant to a writ of assistance in a "dwelling-house." According to the above subsection there must be a "reasonable belief" of a breach of the statute for *entry* into the premises, but there is doubt concerning whether "reasonable belief" is necessary for the "searches" of persons in the next subsection, for there is no qualifying phrase to that effect there. So extensive were the searches by two policewomen in the motel's washrooms, on such insubstantial pretexts, and with such inconsequential results that the Province established a Royal Commission to investigate all the circumstances. In his report,[111] the Commissioner recommended that where persons were found in a place other than a dwelling house and there was no "reasonable cause" for believing them to possess narcotics, such persons "should not be subject to search when the only basis for the search is their legitimate presence in such place." The Lieutenant-Governor in Council, moreover, should recommend to the Government of Canada, which had legislative jurisdiction over the *Act,* that section 10(1)(b) be amended to read that the peace officer was empowered to "detain for the purpose of searching any person found in such place whom he *reasonably believes* has possession of such narcotic."[112] Some five years later, no amendment of the mentioned section has been made by the federal government.

Writs of assistance or search warrants were not necessary to conduct a search of the "public area" of the *Landmark,* and as for the rented accomodation: "Acting Inspector Parkhouse was advised by the R.C.M.P. that it was not necessary to get a warrant to search the motel units as they would use their Writs of Assistance if anyone found at the motel was occupying a motel unit."[113] Accordingly, as with related statutes empowering peace officers to act under such authority, writs of assistance themselves were needed only to enter certain premises of a private and relatively secure character, with "search and seizure" in adjacent public places being possible under

110. BOROVOY, *supra* fn. 16 at 425.

111. *Report of the Royal Commission on the Conduct of the Police Forces at Fort Erie on the 11th of May, 1974,* by John A. PRINGLE Commissioner, (Ontario, Queen's Printer, January, 1975).

112. *Ibid.,* 70; emphasis mine.

113. *Ibid.,* 12.

the statute without a warrant of any description. If, in such cases, the arbitrary and general investigations made possible by the writs seemed to call for a closer examination of improved means of supervision and control of the police, or even a reappraisal of the very necessity of such writs, *a fortiori* the warrantless searches which formed a "system" with the writs would also bear further scrutiny.

In addition to the above example drawn from the narcotics area, writs of assistance may be used in connection with customs, excise, and food and drug offences. Section 139 of the *Customs Act* would be readily intelligible to James Otis, for in terminology and effect this provision was closely parallel to the practices against which the American colonists protested.[114] This section enabled customs officers wielding a writ of assistance to "enter at any time in the day or night into any building or other place within the jurisdiction of the court from which such writ issues, and may search for and seize and secure any goods that he has reasonable grounds to believe are liable to forfeiture under this Act, and, in case of necessity, may break open any doors or any chests or other packages for that purpose." The longevity of the writs is attested to by s. 145 which declares "...such writ shall remain in force as long as the person therein remains an officer, whether in the same capacity or not."[115] The purpose of writs of assistance under the *Food and Drugs Act*[116] is to combat offences in relation to "controlled drugs."[117] It is not without irony that the four statutes referred to above perpetuate in Canada a power detested by the colonists in Boston and elsewhere which was a contributing cause of the American Revolution, and the cure for which was found in the Fourth Amendment. Does this provide any insight into the Canadian character?

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114. Compare s. 139 with the terms of a customs officer's commission in mid-eighteenth century America, where the holder had:

> power to enter ... into any House Shop Warehouse Hostery or other place whatsoever ... to make diligent search into any Trunk Chest Pack Case Truss or any other parcel or package whatsoever for any Goods Wares or Merchandize prohibited to be imported or exported or whereof the Customes or other Duties have not been paid, and the same to seize...

See SMITH, *op. cit.* fn. 1 at 116.

115. The provision in s. 78 of the *Excise Act* is virtually identical, with forfeiture also being the penalty for infractions.

116. Section 37(1) and (3).

117. *Ibid.*, s. 33.

In an examination of writs of assistance[118] Professor G. E. Parker traced the Canadian writ back to an English law of 1662,[119] which with its successor statutes,[120] would seemingly apply in Canada from the time of English settlement, and in Quebec, probably, from the *Royal Proclamation of 1763,* which referred to the establishment of courts of criminal jurisdiction to hear causes "as near as may be agreeable to the law of England."[121] Section II of the *Quebec Act, 1774,* moreover, explicitly continued in effect the "Criminal Law of England" in the Province.[122] The earliest express Canadian reference to writs of assistance is in a statute of the Province of Canada of 1847,[123] but this is in a consolidating statute and there is no question that the writ existed locally earlier. Professor Parker referred to the many hundreds of such writs annually in force, observing, "one cannot help but have a feeling of foreboding in these circumstances. It is fully realized that part of the power and efficacy of the writ is the fact that it is a 'secret weapon' against law breakers. Nevertheless, it seems unfortunate that it is not possible to learn more about the mechanics of its issue and execution."[124]

In *Re Writs of Assistance,*[125] Harris C.J.N.S. concluded that, because of its mandatory terms, a provincial temperance statute[126] left the court with no discretion to refuse the Attorney-General's application to have designated "prohibition" inspectors receive writs of assistance. In a concurring opinion Chisholm J. concluded that the "fitness" of such officers was "committed by the statute to His Majesty's Attorney-General."[127] Commenting on the purely mechanical function of the courts in such a context, Mellish J. said "The functions of the Judges are not legislative and they should not

118. PARKER, "The Extraordinary Power to Search and Seize and the Writ of Assistance," in (1963) 6 *U.B.C. Law Rev.* 688.

119. 13 and 14, Charles II, c. 11.

120. See PARKER, *op. cit.* fn. 118 at 709-11.

121. HOUSTON, *Constitutional Documents of Canada,* Freeport, N.Y., 1970, 69.

122. *Ibid.,* 94.

123. 10 and 11 Vic., c. 31.

124. PARKER, *op. cit.* fn. 118 at 715.

125. [1930] 2 D.L.R. 499 (N.S.S.C.).

126. See s. 7, N.S.S, 1926, c. 49 amending the *Temperance Act,* R.S.N.S. 1923, c. 158 by adding s. 66A providing for the issuance of writs of assistance on the application of the Attorney-General.

127. [1930] 2 D.L.R. 499 at 503.

in my opinion be invoked to bring such legislation into effect."[128] But are not the functions assumed by the Attorney-General, then, in such a case, judicial? Is he not as an executive officer overseeing the enforcement of the law really determining the conditions under which the writ shall issue. Is the court in this, and similar cases, not a mere "conduit" when compared with American courts? In the American system the constitutional requirement of "probable cause" is determined, imperatively under the Fourth Amendment, by a magistrate, and the executive and police, consistently with the separation of powers must apply to court, or at least to an independent agency, for a search warrant.[129] The executive cannot itself determine the conditions under which a writ is to be issued. The executive possesses neither the detachment nor independence needed for such a task, and executive and judicial powers must remain separated. The very generality of writs of assistance, indeed, when compared with the American jurisprudence, leaves the determination of whether "reasonable grounds" of suspicion, or "probable cause" of the commission of an offence exist in an individual case up to the police. Any enquiry into the sufficiency, of the grounds for such a determination must be decided by the courts, or by Royal Commissions,[130] after the fact, when the rights of subjects of search and seizure may already have been crassly violated. Judicial repugnance against the sweeping and arbitrary character of writs of assistance has occasionally been manifested, as in a Manitoba judgment which declared that without express authority such writs coult not be delegated to subordinate officers like pieces of office furniture.[131]

Either at common law,[132] or under statute, such as section 443 of the *Criminal Code* which codifies in Canada the conditions under which *ordinary* search warrants are issued, "reasonable ground" is necessary for issuance. Search warrants must be executed by day unless, exceptionally, execution by night is expressly authorized,[133]

128. *Ibid.*, at 507.

129. See *Coolidge* v. *N.H.*, *supra* fn. 79.

130. *Vide supra*, fn.111.

131. *R ex rel Kelly* v. *Hobinsky*, [1929] 1W.W.R. 313 at 318-19 per Simpson, C.C.J.; see also *R.* v. *Ollasoff*, [1930] 1 D.L.R. 830 (Sask. Dist. C.) which, however, was overruled in *R.* v. *Kostachuk*, [1930] 2 W.W.R. 464 (Sask. C.A.) where it was held that a writ of assistance under the *Excise Act* was not restricted to any time of the day or night or to any particular building.

132. *Jones* v. *German*, 1897 1 Q.B. 374 (C.A.).

133. *Criminal Code*, s. 444.

and things not specified in the search warrant may also be seized if the holder of the warrant "on reasonable grounds" believes they have been involved in the commission of an offence.[134] It is of some interest that in cases like *Gustafson*[135] and *Robinson*[136] in searches in the United States incident to a lawful arrest although without a warrant unrelated evidence was seized which was subsequently admitted in court in prosecutions.

There must be sufficient specificity in the search warrant so that the discretion of the executing officer is not overly broad[137] and if "reasonable grounds" are absent, which is question of sufficiency of evidence for the issuing justice of the peace, the warrant will be quashed.[138] The warrant must not authorize a "fishing expedition," and the description of the materials must be sufficiently definite that the holder can identify them.[139] Moreover, it is the judicial officer and not the informant, in the case, at least, of an ordinary warrant, who entertains "reasonable grounds" on the basis of the facts, for the issuing of the warrant.[140] One of the more bizarre cases involving search warrants was *Re Laporte* and *R.*[141] where the police obtained a search warrant pursuant to s. 443 to have a 38-calibre slug surgically removed from a suspect's chest in order to determine if he had participated, as suspected, in a gun fight a year previously. While the court rejected appellant's contention that such surgery would be "cruel and unusual treatment or punishment," contrary to s. 2(b) of the *Canadian Bill of Rights,* or "self crimination" contrary to s. 2(d), it held that the warrant was invalid since the human body was neither a "receptable" nor a "place" within the terms of s. 443. It is interesting to speculate on whether Mr. Justice Frankfurter, if he were confronted by the *Laporte* case, would not have made an analogy, as in his *Rochin* judgment,[142] to a "coerced confession", perhaps holding the proposed surgery indeed contrary to s. 2(d) of the *Canadian Bill of Rights.*

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134. *Criminal Code,* s. 445.

135. *Supra,* fn.83.

136. *Supra,* fn.89.

137. *Shumiatcher* v. *A-G Sask,* (1960) 129 C.C.C. 267 (Sask. Q.B.).

138. *R.* v. *Colvin,* (1970) 1 C.C.C. (2d) 8 (Ont. H.C.J.).

139. *Purdy* v. *R.,* (1972) 8 C.C.C. (2d) 52 (N.B.C.A.).

140. *Ibid.*

141. (1972) 8 C.C.C. (2d) 343.

142. *Supra* fn.61.

In his celebrated treatise on the history of English Law,[143] Sir James Fitzjames Stephen deals with the powers of seizure at common law incident to a lawful arrest. While powers of seizure have largely been codified in the Criminal Code,[144] it may be surmised that where the area covered by the common law has not been so codified the latter continues.[145] At common law, an arrest may be made without a warrant of anyone whom a policeman believes with "reasonable cause" has committed or is about to commit an offence.[146] Such a person, as well as the area immediately under his control, can be searched for weapons or evidence of the crime. As far as private premises are concerned, it has been held that the right to search is an extraordinary remedy derogating from common law rights and detracting from the right of ownership. The right must, accordingly, be conferred by statute in clear language, and the statute should be interpreted so as to respect vested rights.[147] The constitutional limitation imposed on ordinary statutes by the Fourth Amendment not being present in Canada, the definition of "place" within which seizures is permissible, as in such U.S. authorities as *Agnello,*[148] *Harris,*[149] *Trupiano*[150] and *Chimel*[151] has not been much canvassed.

*Electronic Surveillance:* The common law position on electronic surveillance in England and Canada was similar to that enunciated by Chief Justice Taft in the *Olmstead* case.[152] The mere overhearing or interception of a conversation by a third party was not in itself an offence. If there was an independent trespass, of course, that might give rise to an independent cause of action in tort. The common law position was set out in a 1947 English case[153] by Lord Goddard C.J.

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143. *Supra* fn.69.

144. See, e.g., ss. 103, 105, 181, 285, 443, 445 and 446, *Criminal Code.*

145. Section 7(3), *Criminal Code.*

146. These common law powers have now been codified in Canada in s. 450 of the *Criminal Code.* A "citizen's arrest" which is somewhat more limited in scope is dealt with in s. 449; see also SALHANY, *Canadian Criminal Procedure,* 2nd. ed., Toronto, 1972, 24-37.

147. R. v. *Richardson,* [1924] 1 W.W.R. 920.

148. *Supra,* fn.71.

149. *Supra,* fn.72.

150. *Supra,* fn.73.

151. *Supra,* fn.75.

152. *Supra,* fn.43.

153. *R.* v. *County of London Quarter Sessions Appeals Committee,* (1948) 1 K.B. 670.

when he said of eavesdropping "...so far as I am aware no instance can be found on the books of any indictment being preferred for this offence at comman law. It follows, therefore, that nobody can be convicted of eavesdropping..."[154] Lord Goddard's *dicta* was later approved by the Supreme Court of Canada where it was held that in the absence of statute eavesdropping was not an offence.[155] In *Silvestro* v. *R.*,[156] the Supreme Court of Canada held that wiretap evidence was admissible by the prosecution to prove that a bookmaker received a substantial number of telephone messages for the placing of bets at various race tracks within a specific frame of time. The unauthorized wiretap found legally innocuous by Taft C.J. in *Olmstead,*[157] would not give rise to the same legal problem now in Canada since the *Criminal Code* was amended in 1974 to require specific authorization for wiretaps in respect of serious offences.[158] In the application to a judge of a superior court, the public officer deposing must state why the authorization should be given "together with particulars of the offence,"[159] and the judge must be satisfied that other investigative procedures have failed or would be unlikely to succeed, and that the matter is "urgent."[160] The terms of the authorization are limited as to offence, type of private communication involved, and the identity of the persons subject to the wiretap, with the authorization being valid for a period of up to thirty days, and subject to such other terms as the judge considers "advisable in the public interest."[161]

A related problem arose in Saskatchewan in May, 1980. A private provincial telecable company receiving its signals over cables rented from a provincial Crown Corporation attempted to broadcast parliamentary debates which it received not by cable but by means of its own special antenna. With the encouragement of the provincial government, the Corporation then jammed the signal with the debates being cut off in mid-program. There were allegations by the government that the telecable company was in breach of its contract. On the analogy of the Fourth Amendment,

154. *Ibid.*, 675.

155. *Frey* v. *Fedoruk*, [1950] 3 D.L.R. 513 at 551.

156. [1965] S.C.R. 155 at 158.

157. *Supra*, fn.43.

158. See the offences listed in s. 178.1, *Criminal Code.*

159. Section 178.12, *Criminal Code.*

160. *Ibid.*, s. 178.13 (1).

161. *Ibid.*, s. 178.13 (2).

where it has been held in some cases that despite their intangibility electronically recorded signals could be "seized",[162] might it not be argued in a case like this, by the telecable company, that the signal to its private antenna had been seized by the provincial government?

*Possible Application of the Amendment to Provincial Law:* Much of the above discussion has suggested that the main impact of a Canadian constitutional amendment on "unreasonable searches and seizures" would be in the federal criminal law area, and this is indubitably so. It is only because most criminal law in the United States is state law that the *Mapp*[163] case applying the Fourth Amendment to the states was of such great importance.

In line with the evolution of the cases in the United States, however, it is very possible that the interpretation of such an amendment in Canada could have an impact on "searches" in certain civil areas under provincial jurisdiction, such as compliance by home owners with sanitary conditions or building codes; the entitlement of welfare recipient's to further social assistance and inspecting the conditions under which their children are being kept, and possibly the ascertainment of whether schoolchildren were using marijuana, which would at least in part concern the administration of schools.[164] The search power might also arise in relation to provincial quasi-criminal offences relating to a wide range of matters.[165]

*The Exclusionary Rule:* The rule that illegally-obtained evidence should be excluded in prosecutions for federal offences originated in the United States as a judge-made rule in 1914,[166] and does not inevitably flow from the Fourth Amendment itself. The rule was applied to the states in the *Mapp* case[167] only in 1961. In Canada, illegally-gotten evidence is still admissible.[168] A clear affirmation of the Canadian rule was given in *Hogan* v. *R.*[168a] in which the accused was convicted, pursuant to s. 236 of the *Criminal*

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162. See, e.g., *Silverman* v. *U.S.*, *supra* fn.48.

163. *Supra*, fn.57.

164. S. 93, *B.N.A. Act*, 1867, and see *supra*, fn. 107.

165. S. 92 (15), *B.N.A. Act*, 1867.

166. *Weeks* v. *U.S.*, *supra*, fn. 34.

167. *Supra*, fn. 57.

168. *Supra*, fn. 33.

168a. *Hogan* v. *R.*, [1975] 48 D.L.R. (3d) 427 (S.C.C.).

*Code,* of unlawfully having control of a motor vehicle when his alcohol level was greater than the permissible limit. When taken to the police station, he had requested the police officer to allow him to speak to his lawyer before he took the test, but was refused. The officer then told him that if he refused to provide a breath sample, he would be charged. As a result, the accused took the test, was convicted, and appealed on the basis that evidence obtained in violation of section 2(c)(ii) of the *Canadian Bill of Rights* ("the right to retain and instruct counsel") was inadmissible. In a 7-2 decision, with Laskin and Spence JJ. dissenting, Ritchie J. expressly rejected the argument that evidence obtained after denial of a *Bill of Rights* claim was inadmissible, affirming that the American rule was not observed in Canada: "...I cannot agree that wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of "absolute exclusion" on the American model which is in derogation of the common law rule long accepted in this country," he declared.[168b] That Prime Minister Trudeau's proposal to entrench a safeguard against "unreasonable searches and seizures in s. 7 of his proposed *Canadian Charter of Rights and Freedoms*[169] would not necessarily involve an "exclusionary rule" was recognized by former Mr. Justice Emmett M. Hall in his 1978 *Cronkite Memorial Lectures* when he suggested:

> ...there should be added to Section 6 of the proposed Charter of Rights and Freedoms after the words, "the right, as an individual who has been charged with an offence, to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal," the words, *"on evidence lawfully obtained."* This addition is essential in order to negate the judge made law respecting the admission of evidence unlawfully obtained as propounded by the Supreme Court of Canada in *Regina* v. *Wray*, 1971, S.C.R. 272.[170]

One of the reasons for the existence of the exclusionary rule in the United States is to deter improper conduct by the police, which may often occur if evidence is admissible however obtained — whether legally or not. The *Wray* case has attracted musch criticism. One of its critics is Arthur Maloney, Q.C., the former Ontario Ombudsman. In the *Wray* case, John Wray, a murder suspect, told the police that he threw the murder weapon, a rifle, into a swamp, afterwards

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168b. *Ibid.*, 434.

169. *Supra*, fn.20.

170. Hon. Emmett M. HALL, "The Supreme Court in the New Canada," in Dean Emeritus F.C. Cronkite, Q.C., Memorial Lectures, November, 1978, Saskatoon, 17.

personally directing them to the locality where the weapon was found. Wray's confession was ruled inadmissible by the trial judge because it was extorted by trickery, duress and improper inducements, with the judge refusing to allow the prosecution to adduce evidence concerning the accused's participation in finding the murder weapon. Mr. Maloney approved of the Ontario Court of Appeal's determination that, while "...strictly, as a matter of law, the evidence of the accused's involvement in the discovery of the murder weapon was admissible, the trial judge had a discretion to reject evidence, even of substantial weight, if he considered that its admission would be unjust or unfair to the accused, or calculated to bring the administration of justice into disrepute."[171] The ultimate decision of the Supreme Court had the opposite tendency, eliminating as a factor respecting the admissibility of evidence any pre-trial unfairness to the accused, and resulting in the doctrine that "...the only ground for exclusion by discretion, where the evidence is probative, is where there is doubt as to its truth."[172]

The exclusionary rule is not an essential constitutive element of a constitutional guarantee against "unreasonable searches and seizures," but has been grafted onto the guarantee by the American judiciary to discourage unethical behaviour by the police leading to the admission of illegally-obtained evidence resulting, often, from unreasonable searches or seizures. It would be open to the Canadian judiciary, given such a constitutional amendment, to infer from it the same rule, but the creation of such a rule by the judiciary is unlikely. The Canadian judiciary is seldom that innovative.

The reason for many of the restrictions placed upon the Fourth Amendment by the Burger Court in recent years, which have so aroused the commentators,[173] is the perception that the police are engaged virtually in a state-of-war with urban criminals.[174] In such a confrontation "due process" may be subordinated somewhat to efficiency of crime control. In Canada, Mr. Justice Louis-Philippe Pigeon has stated the opposing values trenchantly, "Is the highest priority to have criminals against whom there is conclusive

171. Arthur MALONEY, "The Supreme Court and Civil Liberties," in (1975-76) 18 *Criminal Law Quarterly*, 202 at 204, and see the lower court judgment, *Wray* v. *R.*, [1970] 3 C.C.C. 122; see also G. Arthur MARTIN, "The Exclusionary Rule Under Foreign Law: Canada," (1961) *J. of Criminal Law, Criminology and Police Science*, 271.

172. MALONEY, *supra*, fn. 171, 205.

173. *Supra*, fn.109.

174. See esp. *Williams* v. *Aliota, supra*, fn. 106.

evidence convicted, or is the highest priority to control police methods? Now really the decisions in *Wray* and *Rourke* stand for the proposition that the handling of criminal cases is not the method desired to enable the courts to control police methods. It is left to the government, to the ministers who are responsible to the electorate, not to the judges....to stand for the proper control of police."[175]

In a liberal democratic society where civil liberties are respected, there is bound to be some tension between efficiency and due process. Crime control could be achieved efficiently by repressive police terror but at what cost — a totalitarian state? The rule propounded in *Wray* that any evidence, however gotten, is admissible by the Crown, provided it is relevant and probative is too sweeping and potentially unfair to the accused. As recent episodes concerning abuse of powers by the R.C.M.P.[176] and the Fort Erie raid discussed above illustrate, Canadian police enjoy powers probably as extensive as any police force in the Western World. The adoption of the exclusionery rule, as Mr. Justice Hall recommends, would ensure due process and a higher standard of ethical conduct by the police through discouraging the collection of evidence by illegal methods. The police already have extensive investigating means at their disposal, and the existence of the rule in the United States has not notably hampered police investigations, Before 1961, in fact, when *Mapp* made the rule constitutionally mandatory for the states, many states had voluntarily adopted it.

## CONCLUSION

One of the significant omissions from Prime Minister Diefenbaker's *Canadian Bill of Rights, 1960,* a guarantee against "unreasonable searches and seizures" will probably be incorporated in a new Canadian Constitution. Both Prime Minister Trudeau in his Bill C-60 and the Canadian Bar Association favour such a proposal.[177]

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175. Valedictory interview in the *Financial Post,* March 22, 1980, 25; In *Rourke* v. *R.,* [1976] 76 D.L.R. (3d) 193, to which Mr. Justice Pigeon refers, although there was a two-year delay in prosecuting a defendant, making it impossible for him to produce a critical witness, the Supreme Court held there was no general discretion to stay proceedings, even where the prosecution is considered oppressive.

176. See, e.g., "H.Q. in Ottawa gave go-ahead on break-in to obtain P.Q. Membership Lists," *Globe and Mail,* Toronto, Friday, January 20, 1978, 1.

177. *Supra,* fn.20.

The entrenchment of such a provision in the Constitution could have a substantial impact in eliminating writs of assistance, which seem to be a historical anachronism, and in establishing a constitutional standard to which all statutes, provincial and federal, would have to conform. It could affect civil as well as criminal processes. The American experience, however, indicates that there might be wildly erratic fluctuations in case law as new majorities emerged on the Vinson, Warren, Burger and other courts. The mere adoption of such a guarantee of "due process" or fair trial gives no assurance that the standard imposed by the court will be a high one from a libertarian standpoint. The courts may perceive in "crime control" a countervailing value which would qualify the interpretation of a Canadian "Fourth Amendment." As suggested above, perhaps there must be some sacrifice of efficiency in controlling crime if the values of a democratic society are to be nurtured. Where exactly the balance is to be struck involves a question of judicial statesmanship of a high order. With the entrenchment of civil liberties the Court would become much more policy oriented.

The proposed guarantee would be no panacea; it could be a valuable constitutional instrument. But we must not cast our hopes too high. Canadian courts have not been notably solicitous in fostering a legal climate in which civil liberties will flourish. As one jurist has said of the *Canadian Bill of Rights*, "In the space of three years from *Drybones* to *Lavell* the Bill of Rights went from a high point of great expectancy to near oblivion."[178] In the great traditions of Coke, Blackstone and the coutume de Paris, perhaps our jurists tend to favour unwritten over written principles, and to interpret codified principles narrowly in a positivistic and literal spirit. Change, when it comes, will come slowly, but perhaps the adoption of a safeguarding provision against "unreasonable searches and seizures" in a new Constitution will tend at least to make us more sensitive to urgent social and legal issues.

On the basis of the above comparison of the relevant law of search and seizure in the United States and Canada, some comments should be made and some questions asked on the entrenchment within a new Canadian Constitution of a prohibition against "unreasonable searches and seizures."

Almost from its inception the United States Supreme Court has been a policy-making forum engaged in balancing competing

178. Hon. Emmett M. HALL, *op. cit.*, f.n. 170, 16.

interests against one another in the process of deciding issues of fundamental law. Never having adopted the rule of precedent, it has often reversed itself. Since 1791 the *Bill of Rights* has bound the national government, and the adoption in 1868 of the Fourteenth Amendment signified that most of its provisions bound the states. By 1980, either on the "selective incorporation" or "absolutist" theory the process was well advanced. The very climate in which the American Court has lived for decades has been one in which the harmonization of federal or state law with the entrenched guarantees of the *Bill of Rights* has been a forceful mandate. Indeed, it can be as compelling for legislative draftsmen as for courts.

In the case of Canada, of course, no legal instrument similar to the Fourteenth Amendment would be necessary to apply the provisions of a "Canadian Charter of Rights and Freedoms" to the provinces. They would be applied from the start. No *Mapp* decision would be needed here. Our courts, however, have never been superior policy-making bodies. In a parliamentary system, as Mr. Justice Pigeon observes, that function is usually confided to the executive or to legislative bodies. Without an informed and vigilant public opinion, or prior experience in weighting and balancing competing legislative interests with fundamental rights, how effective would Canadian judges be in developing the latter? The fate of the unentrenched *Canadian Bill of Rights, 1960,* is not auspicious for libertarians who so eagerly await a new charter of basic rights. The heritage of precedent and positivism which hangs over our courts would not inspire them, perhaps, to invoke "higher law" norms to strike down illiberal Acts of Parliament or of the legislatures. A whole new disposition on the part of the judiciary would be essential. Even in the United States, where such an attitude exists, judicial leadership can be a critical variable. The Warren Court was resolved to develop an effective Bill of Rights; the Burger Court is not. *"Unreasonable* searches and seizures," mean vastly different things, respectively, to these courts with their different majorities and Chiefs, as the foregoing survey shows.

Another imponderable would be the degree of the inevitable collision of a presumably entrenched policy-making Supreme Court of Canada, wielding an entrenched charter of fundamental rights as a powerful weapon, with Parliament itself. The American presidential system with its constellation of three separated powers enshrines conflict in the very concept and mechanics of the Constitution. Day-to-day confrontation is expected. The President vetoes Acts of Congress (and can be overridden by a two-thirds majority of both houses), or he "impounds" monies voted by

Congress for legislative purposes with which he disagrees. The Senate can refuse to confirm senior judicial and executive appointments. Congress, which enjoys "the power of the purse", may decline to allocate monies for presidential programs which it regards unfavorably, or pass resolutions critical of executive action, or even sometimes ask its Judiciary Committee to study whether grounds for the impeachment of the President exist. (In Canada, with "responsible government", many such initiatives by the legislature would entail the fall of the government, but in the United States a president does not need a legislative majority to remain in power. Truman, Eisenhower, Nixon and Ford have all, at various times, lacked such a majority.) Moreover, the Courts led by Chief Justices Marshall, Chase, Hughes and Warren were sometimes in violent confrontation with Presidents Jefferson, Jackson, Grant, Roosevelt and Eisenhower. The argument, simply put, is that harmony rather than confrontation or conflict has been the theoretical assumption of the parliamentary system, and to some extent an entrenched Canadian supreme tribunal and bill of rights would tend to produce a regime of more separated (if even "de facto") powers, and engender more conflict. Should we not examine the whole system carefully before we incorporate certain measures piecemeal? While an entrenched Charter of basic freedoms has very beneficial features, the political model from which it is drawn is a presidential one which operates very differently from ours.

And how would the standards of a Canadian "Fourth Amendment" be interpreted? There is the express prohibition of writs of assistance in the American parallel, along with the injunction that no search warrants will issue "but on probable cause" which are not present in the more concise proposals of Prime Minister Trudeau or the Canadian Bar Association. Perhaps the Canadian Amendment could be so interpreted that some writs of assistance might be reconciled with it, and obviously some searches would not require a warrant, but how many and under what conditions? The American experience has been complex and contradictory. The very collocation of the due process requirements in the Fourth, Fifth and Sixth Amendments has induced American courts to interpret them as an integral system, the parts of which are inter-related. The same arrangement is discernible in s. 7 of *Bill C-60,* but were it to be adopted would Canadian courts perceive the relationship between the clauses in the same way? A survey of the American jurisprudence discloses many exceptions, in both the criminal and civil law areas, to the requirement of the procurement of a warrant prior to search. A cynic might wonder whether a Canadian amendment

would make much difference. However, it would make *some* difference, and it could make a substantial difference. Through time more exacting standards might be evolved which would prohibit some of the abuses of police and executive powers which have occurred in Canada in the past.