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INTRODUCTION: TRENDS AND DEVELOPMENTS WITH RESPECT TO THAT AMENDMENT "CENTRAL TO ENJOYMENT OF OTHER GUARANTEES OF THE BILL OF RIGHTS"*

Yale Kamisar**

Seventy years ago, in the famous *Weeks* case,[1] the Supreme Court evoked a storm of controversy by promulgating the federal exclusionary rule. When, a half-century later, in the landmark *Mapp* case,[2] the Court extended the *Weeks* rule to state criminal proceedings, at least one experienced observer assumed that the controversy "today finds its end."[3] But as we all know now, *Mapp* only intensified the controversy. Indeed, in recent years spirited debates over proposals to modify the exclusionary rule or to scrap it entirely have filled the air — and the law reviews.[4]

In the hue and cry over the exclusionary rule, however, not a few may have overlooked that, as Justice Potter Stewart pointed out shortly after stepping down from the Supreme Court, limiting or reducing the situations in which exclusion of unconstitutionally obtained evidence is required is only one way to reduce the impact of the exclusionary rule. The other way to do so — and in a sense the focus of this symposium — is by relaxing the requirements of the fourth amendment

* Harris v. United States, 331 U.S. 145, 163 (1947) (Frankfurter, J., joined by Murphy and Rutledge, JJ., dissenting). Continued Justice Frankfurter: "How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your home and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up?" *Id. See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377-78 (1974).

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1. Weeks v. United States, 232 U.S. 383 (1914).
2. Mapp v. Ohio, 367 U.S. 643 (1961).
3. *Id.* at 670 (Douglas, J., concurring).
4. *Compare, e.g.*, Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 8 (1978); Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 CRIM. JUST. ETHICS 35 (Summer/Fall 1982); Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); and Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978) *with, e.g.*, Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); Mertens & Wasserstrom, *Foreword: The Good Faith Exception*

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itself or by shrinking its scope.[5]

In the first article in the symposium,[6] Professor Wayne R. LaFave addresses a number of issues that, as he says, have "a critical bearing upon the effectiveness of our law enforcement processes and the extent of our protected liberty and privacy":[7] What police-citizen contacts constitute "seizures" of a person within the meaning of the fourth amendment? What is the quantum of evidence needed to justify a particular "seizure"? And what "seizures" may be made without a warrant? This article shows LaFave at his best (which is the way he almost always is). Need one say more?

Although Professor LaFave is too modest to say so, the view, first advanced by Justice Stewart in 1980 and now supported by a majority of the Court, that certain police-citizen "encounters" or "confrontations" (such as a drug agent approaching a person at the airport, identifying himself, and asking to see the traveller's driver's license and airline ticket) should not be regarded as "seizures" at all for fourth amendment purposes,[8] is essentially the approach suggested by LaFave himself in his 1978 treatise.[9] Indeed, at least one commentator has called

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to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 GEO. L.J. 365 (1981); and Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 CRIM. JUST. ETHICS 28 (Summer/Fall 1982).

There is a considerable literature — and considerable disagreement among empiricists — regarding the "costs" and "benefits" of the exclusionary rule and the significance of the available data. *Compare, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) and Schlesinger, *The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police*? 62 JUDICATURE 404 (1979) *with, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY 220-54 (1977) and Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police*?, 62 JUDICATURE 398 (1979). For a recent comprehensive and, in my judgment, outstanding article on the general subject, see Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611.

After the articles making up this symposium were written, a 6-3 majority of the Court, per White, J., adopted a so called "good faith" exception — actually a "reasonable mistake" exception — to the exclusionary rule, at least in search warrant cases. United States v. Leon, 104 S. Ct. 3405 (1984). I would like to think, but I find it very hard to believe, that the new exception will be confined to the warrant setting. Running through Justice White's opinion for the Court in *Leon* is a strong skepticism that the "extreme sanction of exclusion," as the Court twice called it, *id.* at 3418, 3423, can "pay its way" as an effective deterrent unless the underlying fourth amendment violations are deliberate or at least substantial. See also Justice White's dissenting opinion in INS v. Lopez-Mendoza, 104 S. Ct. 3479, 3493, 3495 (1984) (decided the same day as *Leon*) (indicating that *Leon* stands for the general proposition that unless the evidence was obtained by "deliberate violations" of the fourth amendment or by conduct "a reasonably competent officer would know is contrary to the Constitution" the exclusionary rule should not be applied).

5. Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1397 (1983).

6. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417 (1984).

7. *Id.* at 419.

8. *See id.* at 420-26.

9. *See* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(g),

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it "the LaFave-Stewart approach."[10]

I take nothing away from the other able contributors to this symposium when I say that it seems only fitting and proper that the leadoff article should belong to LaFave. The search and seizure literature is quite rich, but there cannot be any doubt that LaFave has written more outstanding articles on the subject than anyone else. And, although published only six years ago, his monumental treatise on the fourth amendment[11] has already become, and deservedly so, one of the most frequently quoted and cited works of all time.

The second contributor to the symposium, Professor Joseph D. Grano, is a commentator who is hard to classify (which is the way he likes it). Two years ago, for example, Grano sharply criticized the Court for failing to give appropriate respect to the fourth amendment warrant requirement and made a powerful argument that only a reexamination of basic premises could bring harmony and coherence to search warrant law.[12] In his current article,[13] however, he presents a strong defense of the much-criticized *Gates* case.[14]

Gates at least partially dismantled the prevailing analytical structure for determining probable cause — the so-called "two-pronged test."[15] According to this test, an informer's tip, standing alone, furnishes probable cause for issuance of a warrant only when an officer states the reasons that led him to conclude that the informant (a) was generally trustworthy (the "veracity" prong) *and* (b) had obtained his information in a reliable way (the "basis of knowledge" prong).

As for the view of *Gates*'s critics that the two-pronged test provided a useful structure within which police and magistrates alike could meaningfully operate and that a "common-sense decision" on probable cause necessitates attention to both "prongs" — "to treat a strong showing of one as curing a deficiency in the other makes a mockery of the Fourth Amendment's probable cause requirement"[16] — Grano

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at 53-55 (1978).

10. Kamisar, *The Fourth Amendment*, in J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-80 141 (1981).

11. W. LAFAVE, *supra* note 9. By the time this symposium appears in print LaFave will have co-authored another three-volume treatise: W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE (1984).

12. *See* Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982). See also his strong criticism of the Court in Grano, *Foreword: Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425 (1978).

13. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REF. 465 (1984).

14. Illinois v. Gates, 103 S. Ct. 2317 (1983).

15. Because *Gates* involved the validity of a search warrant and the opinion contains some langugage indicating that the decision is, or should be, limited to such cases, a plausible argument can be made that *Gates* is, or will be, confined to the search warrant context. But as I have indicated elsewhere, I very much doubt that the case is, or will be, so limited. *See* Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 581-84 (1984).

16. 1 W. LAFAVE, *supra* note 9, at 138 (Supp. 1984). To the same effect is LaFave, *Fourth*

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responds: "[I]t is [the two-pronged test's] rigidity, not *Gates*'s flexibility, that defies common sense and thereby 'makes a mockery of [the] probable cause requirement.' "[17] As for the view of *Gates*'s critics that the case unduly softens the probable cause standard, Grano responds, persuasively and at considerable length, that both the English common law and the early American views were that probable cause required only "reasonable suspicion" or "a focused suspicion"[18] and the historical view of probable cause as a relatively undemanding concept "comports with sound policy and common sense."[19]

Having joined in the criticism of *Gates*,[20] I started reading Grano's article without much enthusiasm. But as I read along I did so with growing, albeit begrudging, admiration. Grano makes a better case for the results reached in *Gates* than I thought possible — certainly a better one, if I may say so, than the Court itself did. And the arguments of *Gates*'s critics are fairly stated and fully explored. One may, of course, dispute Grano's conclusions, but even those who do so should recognize that his article is a notable achievement. "All voices are heard, and we are told why Reason chooses to follow one set of arguments rather than another."[21]

At several points along the way, Professor Grano strikes at the king himself, Wayne LaFave, and I have to say that he lands some solid blows. A decade and a half ago, Grano earned his LL.M. under the direct supervision of LaFave and, although one would gain little inkling of it from his current article, Grano is a good friend and admirer of his former mentor. But when Grano does battle in the law reviews *he has no* friends or idols. This is the way it should be — and the only way LaFave would want it.

Professor John M. Burkoff, an unabashed critic of the "Burger Court,"[22] is the third contributor to the symposium. In his article on

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Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew), 74 J. CRIM. L. & CRIMINOLOGY 1171, 1194 (1983), an article that grew out of various parts of the 1984 Supplement to the LaFave Treatise but was published after Professor Grano's article went to press.

17. Grano, *supra* note 13, at 519.

18. *See id.* at 479-91.

19. *Id.* at 469.

20. *See* Kamisar, *supra* note 15; LaFave, *supra* note 16, at 1186-99; Loewy, *Protecting Citizens from Cops and Crooks; An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C.L. REV. 329, 336-45 (1984) (criticizing the Court's handling of "probable cause," but not its abandonment of the "two-pronged test"); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 274-75, 329- 40 (1984) (same); *cf.* Moylan, Illinois v. Gates*: What It Did and Did Not Do,* 20 CRIM. L. BULL. 93 (1984) (criticizing the Court's "rhetoric" but maintaining that, on its facts, *Gates* is an exceedingly narrow holding).

21. *Cf.* Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L. REF. 103, 107 (1965) (praising Judge Roger Traynor's opinion in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), adopting the exclusionary rule as a matter of state law).

22. *See especially* Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph*

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"pretext searches" and "pretext arrests"[23] (e.g., a traffic arrest as a pretext to conduct a search for drugs), Professor Burkoff demonstrates why he is widely regarded as one of the scrappiest and most forceful search and seizure commentators around. He must realize (and he is not alone) that he is swimming against an increasingly strong current, but undaunted he carries on.

As Burkoff notes "the Court has made it increasingly difficult to establish [pretext searches]"; indeed one recent decision appears to mandate "objective" fourth amendment analysis, "declaring irrelevant to such inquiry the subjective intent of searching police officers."[24] As Burkoff forcefully argues however, "objective" analysis is not enough:

> Not only is fourth amendment doctrine threatened, the whole fabric of the law is threatened, when the law permits — even encourages — the State to legitimize its otherwise unconstitutional acquisition of evidence on the basis of a lie. That is why a defendant must also be offered the opportunity to demonstrate pretext subjectively, where the objective evidence is otherwise unilluminating.[25]

In recent years, the "deterrence" rationale of the exclusionary rule and its concomitant "interest-balancing" have come to center stage.[26] But the "deterrence" rationale seems to be a one-way street — a basis for narrowing the thrust of the exclusionary rule but never, apparently, for expanding it.[27] "[A]t a time when the exclusionary rule is regularly

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of an Inconsistent Exclusionary Doctrine, 58 OR. L. REV. 151 (1979).

23. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984).

24. *Id.* at 523-24.

25. *Id.* at 549.

26. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974). *See generally* Kamisar, *supra* note 4, at 627-67; Mertens & Wasserstrom, *supra* note 4, at 375-89; Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10 (1975); Schrock & Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

27. Consider, for example, the doctrine that a defendant lacks "standing" to object to evidence seized in violation of a third party's constitutional rights. The original basis for this doctrine seems to be either the joint foundation of the fourth amendment and the self-incrimination clause or the notion that the exclusionary rule provides a remedy for a wrong done to the defendant — thus, if a defendant has not been wronged he is entitled to no remedy. *See* Kamisar, *supra* note 4, at 634 and the authorities referred to therein. The "standing" requirement seems inconsistent with the deterrence theory of the exclusionary rule. *See id.* at 634- 35. Nevertheless, despite the ascendancy of the deterrence rationale, we have witnessed a significant "stiffening" of the "standing" limitation in recent years. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

Consider, too, INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984), holding that the exclusionary rule does not apply in civil deportation proceedings. This conclusion was reached despite the government's concession that INS agents conduct searches for and seizures of illegal aliens in

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limited in application by a majority of the Supreme Court to those situations where deterrence is seen as incrementally maximized, what more optimal setting for its application," asks Burkoff, "than one where a searching officer's clear and confessed 'bad faith' is established on the record?"[28] Yet "the Supreme Court can be seen as intimating . . . that fourth amendment restraints upon law enforcement officers' exercise of discretionary authority to search for (or seize) evidence are nonexistent as long as a lawful-sounding 'cover story' for a given search or arrest can be concocted . . . ."[29]

In the final article in the symposium,[30] Professor William J. Mertens underscores, and explores, the *two* basic functions of the fourth amendment: "interest balancing" (the amendment requires a sufficiently weighty public interest before the police may be permitted to conduct a search or seizure) and "discretion control" (even when the governmental interest is sufficiently strong that it might otherwise justify a search or seizure, the governmental intrusion may still be illegal if allowing it would confer too great a discretionary authority on the police). Co-author of one of the most exhaustively researched, most insightful, and most powerfully written search and seizure articles of our time,[31] Professor Mertens' first solo performance in the search and seizure field is a highly impressive one. Indeed, it seems a remarkable feat for one who has only been in law teaching two years, but it becomes more understandable when one learns that Mertens spent six eventful years in the District of Columbia public defender's office before entering academe.

Among other things, Professor Mertens very ably discusses the current expansion of *Terry v. Ohio*[32] (and its companion "stop-and-frisk" cases)[33] well beyond their facts — an expansion that "threatens to hand the police new search and seizure powers with little protection against discretionary abuse."[34] And his long, hard look back at the 1968 "stop-

order to bring about their deportation and despite the Court's acknowledgment that "the arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding" and that "the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action." *Id.* at 3486. Dissenting Justice White argued quite persuasively, however, that because "the conduct challenged here falls within the 'offending officer's zone of primary interest' " and "because civil deportation proceedings are to INS agents what criminal trials are to police officers," there exists "no principled basis for distinguishing between the deterrent effect of the [exclusionary] rule in criminal cases and in civil deportation proceedings." *Id.* at 3492.

28. Burkoff, *supra* note 23, at 550.

29. *Id.* at 524.

30. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551 (1984).

31. Mertens & Wasserstrom, *supra* note 4.

32. 392 U.S. 1 (1968).

33. Sibron v. New York and Peters v. New York, 392 U.S. 40 (1968).

34. Mertens, *supra* note 30, at 617. For another very able discussion of what he calls "the *Terry*-expansion cases," see Wasserstrom, *supra* note 20, at 355-74.

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and-frisk cases themselves is outstanding. Indeed, I would rank it as one of the two best discussions of these troublesome decisions ever to appear in the literature.[35]

In a recent short essay on the Warren and Burger Courts and police practices, I went so far as to say that if resolution of the stop-and-frisk cases had been delayed a few years longer, and if the Burger Court, say in 1971, rather than the Warren Court in 1968, had written the same opinions as those actually written by Chief Justice Warren, "the decisions would have been deemed solid evidence of the changing philosophy of the 'emerging Nixon majority,' " and the opinions of the Court "would have been denounced by admirers of the Warren Court for "leav[ing] the lower courts without guidance' " and for " 'gross negligence concerning the state of the record and the controlling precedents.' "[36] In the course of his masterly dissection of the "stop-and-frisk" cases I think Mertens, in effect, spells out, better than I could, why this is so.

There is much meat in this symposium for students of constitutional-criminal procedure. But generalists need not, and should not, turn away. The articles that follow are valuable not only because the subject matter is so significant and the authors so knowledgeable about their chosen topics, but because each provides important insights about the Court as an institution. The non-criminal procedure specialist will not find these insights hard to absorb, I am confident, because each contributor to the symposium writes (and reads) easily, writes clearly, and writes with power and style.

A final word. A decade ago, a young ex-Supreme Court clerk suggested that criminal procedure may be "the part of the Court's work most susceptible to swings of the pendulum after a change of personnel."[37] At the time he said that, a time when the Court seemed to be stalking the fourth amendment exclusionary rule and laying the groundwork to overrule *Miranda*,[38] I agreed emphatically with him. In succeeding years, however, I began to entertain serious doubts. The fears (or hopes) that the Warren Court's work in criminal procedure would be dismantled did not materialize — indeed the new Court's hostility to its predecessor's police rulings subsided appreciably — or so it seemed to me.[39]

The past two Terms, however, have produced mounting evidence

35. As every fourth amendment buff knows, the classic discussion of the subject is LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 39 (1968), *reprinted in* POLICE PRACTICES AND THE LAW 135 (F. Allen ed. 1982).

36. Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62, 65 (V. Blasi ed. 1983).

37. J. WILKINSON, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW 146 (1974).

38. *See* Kamisar, *supra* note 36, at 68.

39. *See id.* at 68, 78-81, 86-91; *See also* Israel, *Criminal Procedure, the Burger Court, and*

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that, after the passage of a number of years in which prosecuting attorneys have enjoyed mixed success, the so-called Burger Court has hit its stride and may yet dramatically illustrate that ex-law clerk's point. (Not a few would maintain that it has already done so.) How pronounced the swing of the pendulum will ultimately turn out to be — especially in the search and seizure area, where most of the action has occurred and continues to take place — is still anybody's "educated guess." But Court watchers of all stripes will be able to make a much more informed guess, I submit, if they peruse the articles in this symposium.

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the Legacy of the Warren Court, 75 MICH. L. REV. 1320 (1977), *reprinted in* POLICE PRACTICES AND THE LAW 69 (F. Allen ed. 1982); Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980). *But see* Arenella, *Foreword: Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983). See also the comments of Paul Bender and David Rudovsky in OUR ENDANGERED RIGHTS (Dorsen ed. 1984), at 203-18, 243-46.

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