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THE BURGER COURT: DISCORD IN SEARCH AND SEIZURE

Robert S. Irons

I.

...[T]he States, more likely than not, will be placed in an atmosphere of uncertainty since this Court's decisions in the realm of search and seizure are hardly notable for their predictability.

Mr. Justice Harlan, concurring in *Ker v. California.*

The accession of Mr. Chief Justice Burger to the Supreme Court of the United States was expected to signal the limitation of constitutional doctrines by which the Court had enhanced the rights of the criminal defendant. The fulfillment of this expectation has been generally marked by decisions which have been readily and quickly comprehensible. For example, the prosecution was prohibited by the Warren Court from employing any products of the defendant's custodial interrogation in the absence of a warning of his right to counsel and his right to remain silent; the statement so procured is still barred in the case in chief but can be used to impeach the defendant's trial testimony. Post-indictment confrontation by an identifying witness was established as a critical stage at which the suspect was absolutely entitled to the assistance of counsel; the Burger Court has not extended this right to counsel to confrontations before institution of criminal proceedings nor to post-indictment photographic identification.

With respect to the fourth amendment's proscription of unreasonable searches and seizures, however, the course of decisions has been

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* Special Assistant, Supreme Court of Virginia, 1970-; Assistant United States Attorney, Western District of Virginia, 1966-1970; J.D., Washington and Lee University, 1949. The opinions expressed herein are solely those of the author, and specifically they are not intended to represent the views of the Supreme Court of Virginia.

less predictable. In the application of particular rules inherited from the Warren Court, the Burger Court has fragmented completely; this is illustrated particularly by the exigent circumstances which may justify a warrantless search and the search warrant affiant's disclosure of the reliability of his informant. In other cases, where friction among the Justices might not have been so clearly anticipated, there has been a marked change in the trend of decisions, notably with regard to the standards to determine voluntary consent, the attempted invocation of the fourth amendment in grand jury hearings, and the scope of search of the arrestee's person.

It has been argued that the unpredictability of opinions in the search and seizure opinions results from ad hoc solutions of specific problems which are inevitable where the constitutional standard is one of "reasonableness." It is the theme of this article that the dissension elicited by particular fourth amendment questions is instead indicative of profound cleavages in fundamental concepts among the Justices.

The essential principle of the law of search and seizure is the exclusionary rule of Weeks v. United States, which for sixty years has prohibited the introduction in federal prosecutions of evidence procured in violation of the fourth amendment. In Mapp v. Ohio the Warren Court incorporated the exclusionary rule in the fourteenth amendment to the end that the products of an unreasonable search and seizure were inadmissible in state courts. Ker v. California required that the reasonableness of a search and seizure be determined by the same standard in both federal and state courts. Newly delineated fourth amendment rights were limited to prospective application, but search and seizure claims were held

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16. Linkletter v. Walker, 381 U.S. 618 (1965). The precise holding of Linkletter was that
cognizable in federal collateral attack as in direct review.\(^1\)

II.

It is often difficult to disentangle controversy concerning the exclusionary rule itself from arguments in support of particular positions on prospectivity or collateral attack. However, at the risk of repetition it is well to begin with the criticism of the exclusionary rule as the basic premise in fourth amendment analysis.

This criticism was first manifested in the Burger Court by Mr. Justice Black's dissent from the decision of *Whiteley v. Warden*\(^18\) that there was insufficient cause for arrest and incidental search. To the dissenting Justice this holding was "a distortion" of the fourth amendment, which "does not expressly command that the evidence obtained by its infraction should always be excluded from proof."\(^19\) The Chief Justice joined this dissent, and Mr. Justice Blackmun agreed "with much that is said by Mr. Justice Black."\(^20\)

Mr. Justice White announced the judgment of the Court in *United States v. White*,\(^21\) which sustained electronic eavesdropping by a transmitter worn by the informant. In the course of a plurality opinion,\(^22\) he stated that the Court should be reluctant to "erect constitutional barriers to relevant and probative evidence which is also accurate and reliable."\(^23\) Although there was an abundance of other opinions,\(^24\) that particular declaration passed unchallenged.

The first major assault upon the exclusionary rule was Mr. Chief Justice Burger's dissent in *Bivens v. Six Unknown Named Agents*.\(^25\) A majority of the Court concluded that, even in the absence of legislation, violation of the fourth amendment by a federal agent

\(^{18}\) *Mapp v. Ohio* was inapplicable to judgments which had become final before its rendition. Subsequent fourth amendment decisions, commencing with *Desist v. United States*, 394 U.S. 244 (1969), employed as the critical date for prospectivity the date of seizure rather than the date of judgment.
\(^{19}\) *Id.* at 572.
\(^{20}\) *Id.* at 575.
\(^{21}\) 401 U.S. 560 (1971).
\(^{22}\) Mr. Justice White was joined by Burger, C.J., Stewart and Blackmun, JJ.
\(^{23}\) 401 U.S. at 753.
\(^{24}\) There were separate concurrences by Black and Brennan, JJ., and separate dissents by Douglas, Harlan, and Marshall, JJ.
created a cause of action for damages, and all other opinions, except for the Burger dissent, were directed to this relatively narrow issue. To the Chief Justice, however, the holding of the Court served "the useful purpose of exposing the fundamental weaknesses of the suppression doctrine,"\textsuperscript{26} and the remainder of his dissent elaborated that criticism.

The Chief Justice summarily rejected as justifications for the exclusionary rule the propositions that the government should not be allowed to profit from its illegal acts and that suppression is required by the relationship between the fourth and fifth amendments.\textsuperscript{27} Rather, the rule is founded on the theory that law enforcement officers are deterred from unlawful searches and seizures if the evidence so seized is suppressed and they are deprived of any gain from their unlawful conduct. The Chief Justice excoriates this reasoning as "a wistful dream . . . both conceptually sterile and practically ineffective. . . ."\textsuperscript{28} There is no "empirical evidence" that the rule is in fact a deterrent; instead it has set the guilty criminal free and has not reduced errors in judgment by the police.\textsuperscript{29} Admittedly motivated by his resentment of the decision in \textit{Coolidge v. New Hampshire},\textsuperscript{30} the Chief Justice castigated the "inflexible" and "monolithic" rigidity of "an anomalous and ineffective mechanism" which requires suppression of evidence, whether gained through inadvertent errors in police judgment or deliberate violation of constitutional rights.\textsuperscript{31}

Even in this scathing censure of present doctrine Mr. Chief Justice Burger did not advocate that \textit{Weeks v. United States} and \textit{Mapp v. Ohio}\textsuperscript{32} be immediately overruled; the police should not be given the impression that all restraints have been removed and that "an open season on 'criminals' had been declared."\textsuperscript{33} Instead he en-

\textsuperscript{26} Id. at 418.
\textsuperscript{27} Id. at 414. The "fair play" argument would be met by the availability of an effective alternative remedy. That exclusion is required by the privilege against self-incrimination—a favorite theory of Mr. Justice Black, note 38 infra—was rebutted by the reasoning that the fifth amendment privilege does not protect against production of evidence but against compulsion to perform the production.
\textsuperscript{28} Id. at 415.
\textsuperscript{29} Id. at 416-18.
\textsuperscript{30} 403 U.S. 443 (1971).
\textsuperscript{31} 403 U.S. 388, 418-20 (1971).
\textsuperscript{32} See notes 13 and 14 supra.
\textsuperscript{33} 403 U.S. 388, 421 (1971).
endorsed a statutory remedy, analogous to the Federal Tort Claims Act, as a complete substitute for the exclusion of evidence procured in violation of the fourth amendment. The Chief Justice assumed that the states would initiate remedial systems patterned after his proposed federal model, and he strongly hinted that they proceed without awaiting congressional action.

Coolidge v. New Hampshire exemplified the fragmentation of the Burger Court upon particular rules which were legacies from the Warren Court. The plurality opinion by Mr. Justice Stewart held that the search warrant was invalid because it had not been issued by a neutral magistrate and that the search and seizure could not be justified as a search incident to arrest, an automobile search, or a "plain view" seizure. Regarding the exclusionary rule, the principal significance of Coolidge is the dissent of Mr. Justice Black, who tenaciously repeated his contention that the exclusionary rule is commanded by the fifth amendment and not the fourth. To him the Court had erred grievously in reading into the fourth amendment "the exclusionary rule as a judge-made rule of evidence designed and utilized to enforce the majority's own notions of proper police conduct."

The Chief Justice and Mr. Justice Blackmun joined in much of Mr. Justice Black's dissent, but each stipulated that, while he agreed that the exclusionary rule was not required by the fourth amendment, he could not accept the contention that it was required by the fifth amendment privilege against self-incrimination. The Chief Justice, consistent with his dissent in Bivens, lamented Coolidge as an illustration of "the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves."

Following Coolidge, controversy respecting the exclusionary rule

34. Id. at 421-23.
35. Id. at 423-24.
37. Mr. Justice Stewart was joined in full only by Douglas, Brennan, and Marshall, JJ.
38. 403 U.S. 443, 496-98 (1971). This proposition, which the Chief Justice had made a particular effort to rebut in Bivens, note 27 supra, is derived from Mr. Justice Black's construction of a concurring opinion in Boyd v. United States, 116 U.S. 616, 638 (1886), twenty-eight years before Weeks.
39. Id. at 499.
40. Id. at 492-93, 510.
41. Id. at 493. See notes 25-35 supra and accompanying text.
became quiescent.\(^2\) In *United States v. Robinson* and *Gustafson v. Florida*,\(^3\) six of the nine Justices agreed that an arrest upon probable cause authorized a complete search of the suspect's person by the arresting officer. The majority opinion of Mr. Justice Rehnquist contains no challenge to the exclusionary rule per se. On the contrary, he proceeds from the premise that the unqualified right to search the person of the arrestee was well settled when the exclusionary rule was adopted in *Weeks v. United States*\(^4\) and that right has been preserved in fourth amendment decisions since that date.\(^5\)

Only a month after *Robinson*, however, serious misgivings over the perpetuation of the exclusionary rule returned to the forefront. In *United States v. Calandra*\(^6\) the Court held that a grand jury witness could be compelled to answer questions based on evidence obtained from an unlawful search and seizure. Though the majority, through Mr. Justice Powell, disavowed any intent "to consider this extent of the [exclusionary] rule's efficacy in criminal trials," it noted the fact of disagreement as to the rule's effectiveness and the lack of relevant empirical data.\(^7\) The opinion emphasized that the purpose of the rule was not redress of injury to the privacy of the victim but deterrence of unlawful police conduct.\(^8\) In sum, the rule is a judicially-created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a person constitutional right of the party aggrieved.\(^9\)

\(^42\) See, however, the concurrence by Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973); see note 88 infra.

There is also a passage in the dissenting opinion of Mr. Justice Douglas in *Cupp v. Murphy*, 412 U.S. 291, 303 (1973), in which he refers to *Boyd v. United States*, 116 U.S. 616 (1886), as the source of the proposition that the fourth amendment is closely related to the self-incrimination clause of the fifth. Close examination reveals, however, that he is not reaffirming the thesis of Mr. Justice Black that the exclusionary rule is entirely dependent upon the privilege against self-incrimination. Instead he protests that a warrantless search, which he fears was founded only on suspicion, was used to extract evidence from the suspect's person which, to Mr. Justice Douglas, could only be obtained in violation of the privilege against self-incrimination.

\(^43\) 94 S.Ct. 467 (1973); 94 S.Ct. 488 (1973).

\(^44\) 232 U.S. 383 (1914).

\(^45\) 94 S.Ct. at 472; 94 S.Ct. at 491.

\(^46\) 94 S.Ct. 613 (1974).

\(^47\) Id. at 620 n.5.

\(^48\) Id. at 619, citing *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), the foundation case refusing retrospectively to fourth amendment rights. See note 16 supra.

\(^49\) Id. at 620.
Though suppression of unlawfully seized evidence at trial "is thought to be an important method of effectuating" the guarantees of the fourth amendment, it does not follow that every deterrent to police misconduct is constitutionally required. The incentive to disregard the fourth amendment in the procurement of evidence for the grand jury "is substantially negated" by the inadmissibility of such evidence at trial.\textsuperscript{50}

Mr. Justice Brennan, in a dissenting opinion joined by Douglas and Marshall, JJ., bitterly assailed the majority's pronouncement that the exclusionary rule was merely a "judicially-created remedy" which operated as a general deterrent against proscribed conduct.\textsuperscript{51} The "downgrading" of the rule to dependency upon the ambit of deterrence\textsuperscript{52} was, to the dissenters, based upon a profound misconception. Curtailment of official misconduct may be a beneficial consequence, but the true motivation should be "the imperative of judicial integrity."\textsuperscript{53} Although admittedly the deterrent factor was a cause for limitation of the exclusionary rule to prospective effect, it cannot become the sole criterion for the rule's general application.\textsuperscript{54} Even though Calandra had been granted transactional immunity from prosecution, the compulsion that he testify necessarily "entangle[d] the courts in the illegal acts of Government agents."\textsuperscript{55}

To the dissenting Justices the real import of Calandra was that the demise of the exclusionary rule might be close at hand.

I thus fear that when next we confront a case of a conviction rested on illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case also that "it is unrealistic to assume" that application of the rule at trial would "significantly further" the goal of deterrence—though, if the police are presently undeterred, it

\textsuperscript{50} Id. at 621.
\textsuperscript{51} Id., at 625.
\textsuperscript{52} Id. at 624.
\textsuperscript{53} Id. at 625-26, quoting Elkins v. United States, 364 U.S. 206, 222 (1960).
\textsuperscript{54} 94 S.Ct. at 625. The retrospectivity decisions seem to indicate without qualification that fourth amendment rights be accorded only prospective effect because their prime justification is the necessity for an "effective deterrent to lawless police action." Linkletter v. Walker, 381 U.S. 618, 636 (1965). There is "no likelihood of unreliability or coercion," and the exclusionary rule is merely a "procedural weapon that has no bearing on guilt" or "the fairness of the trial." Desist v. United States, 394 U.S. 244, 250 (1969), quoting Linkletter v. Walker, 381 U.S. 618, 638-39 (1965).
\textsuperscript{55} Id. at 628, quoting Gelbard v. United States, 408 U.S. 41, 51 (1972).
is difficult to see how removal of the sanction of exclusion will induce more lawful official conduct.36

III.

In contrast to the disputes regarding the exclusionary rule, there has been relatively little debate over its enforcement against the states.57 Mr. Justice Harlan dissented in Mapp,58 and, though concurring in the result of Ker, he refused to join in the Court's opinion that state searches were to be judged by federal standards.59 Nevertheless, writing for the majority in Whiteley v. Warden,60 in which a state prisoner was granted habeas corpus relief, he merely mentioned Mapp and Ker in a footnote61 and apparently accepted them as precedents for the Whiteley decision. Even Mr. Chief Justice Burger's criticism of the exclusionary rule in his dissent in Bivens v. Six Unknown Named Agents62 refused to recommend that either Mapp v. Ohio or Weeks v. United States be overruled until the legislature created a sufficient alternative remedy.63

The threshold issue in Coolidge v. New Hampshire64 was the validity of a state statute which sanctioned the issuance of a search warrant by a law enforcement officer. That this type of statute was one of the "workable rules" preserved for development by the states in Ker v. California,65 was expressly rejected by a majority of the Court66 in a reversion to the criterion of Wolf v. Colorado:67 "[T]he security of one's privacy against arbitrary intrusion by the police—

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36. 94 S.Ct. at 628. The majority had noted that, even without the exclusionary rule, the grand jury witness might redress the injury to his privacy by the institution of an action for damages. Id. at 623 n.10, citing Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971). This occasioned the dissent's most caustic rebuke, "In other words, officialdom may profit from its lawlessness if it is willing to pay a price." Id. at 628.
60. 401 U.S. 560 (1971).
61. Id. at 564 n.6.
63. Id. at 421.
64. 403 U.S. 443 (1971).
which is at the core of the Fourth Amendment—is basic to a free society."

Insofar as it had refused to extend the *Weeks* rule to state courts, *Wolf* was overruled by *Mapp*. That it has not, however, been relegated to antiquarian interest is demonstrated, not only by the opinion of Mr. Justice Stewart in *Coolidge*, but by the concurring opinion of Mr. Justice Harlan. He began with the blunt statement that the law of search and seizure "is due for an overhauling," which should begin with the overruling of *Mapp* and *Ker*. Because the states were compelled to conform to the federal requirements, there was no new opportunity to observe contrasting procedures nor to obtain current data to prove or disprove the "deterrent value" of the exclusionary rule. To allow any tolerance for the diversity of the states' problems "the basic constitutional mistakes of *Mapp* and *Ker*" necessitated a relaxation of the federal standards of search and seizure. But for the command that *Coolidge* be decided by federal standards, Mr. Justice Harlan would have voted to sustain the conviction because the action by the state did not offend the values "at the core of the Fourth Amendment."

Since the Harlan concurrence in *Coolidge* no member of the Court has expressly sought a reconsideration of *Mapp* or *Ker*. One can only speculate that the renewed opposition to the *Weeks* exclusionary rule itself has diverted attention from the decisions which enlarge *Weeks* as a barrier against state actions.

IV.

The general rule stemming from *Linkletter v. Walker* is that fourth amendment rights shall not be accorded retrospective appli-
cation. The majority of the Court has adhered to this concept with a unity which is remarkable in search and seizure cases. The retroactivity decisions are more significant for present purposes to illuminate the contrasting perspectives of the Justices toward other fourth amendment principles.

The Court in *Williams v. United States* voted for prospective application of *Chimel v. California*. Mr. Justice White, writing for a plurality of the Court, stated that the new doctrine raised no question of the defendant's guilt but excluded otherwise relevant evidence "to deter official invasions of individual privacy protected by the Fourth Amendment." The deterrent purpose would be "only marginally furthered" by granting retroactivity to this extension of the exclusionary rule.

Concurring in *Williams*, Mr. Justice Brennan agreed that evidence seized in violation of the fourth amendment is suppressed to deter other unconstitutional searches and to preserve the right of privacy. Because exclusion does not improve "the factfinding process at trial" the new constitutional standards should not be retroactively applied. His separation from the plurality arose on the issue of the defendant's probable guilt, with Mr. Justice Brennan vigorously denying that the Court had the right to consider guilt or innocence as a determinant of retrospectivity.

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75. Of the present Court, Burger, C.J., and Brennan, Stewart, White, and Blackmun, JJ., have consistently voted for prospectivity under the fourth amendment. *Hill v. California*, 401 U.S. 797 (1971); *United States v. White*, 401 U.S. 745 (1971); *Williams v. United States*, 401 U.S. 646 (1971). Mr. Justice Marshall has joined the majority as to cases on collateral review, *Williams v. United States*, 401 U.S. at 665-66. Only Mr. Justice Douglas has uniformly voted for retroactive application. No fourth amendment retroactivity cases have been decided since the accession of Powell and Rehnquist, JJ.

76. 401 U.S. 646 (1971).

77. 395 U.S. 752 (1969), which, in brief, reduced the permissible area of search incident to arrest.

78. 401 U.S. 646, 653 (1971).

79. *Id.* at 654-55.

80. This can be contrasted to Mr. Justice Brennan's *Calandra* dissent, 94 S.Ct. 613, 625 (1974).

81. 401 U.S. 646, 663 (1971).


Mr. Justice Black, who pursued a highly individualistic course through all the search and seizure cases, concurred specially to preserve his adherence to absolute retrospectivity and
Kaufman v. United States,\textsuperscript{83} one of the last search and seizure decisions by the Warren Court, established that fourth amendment claims were cognizable in federal habeas corpus review of federal or state convictions.\textsuperscript{84} Mr. Justice Black, dissenting, repeated the recurring theme that the "one primary and overriding purpose" of the exclusionary rule is the deterrence of police misconduct,\textsuperscript{85} and he argued that guilt or innocence must be an essential determinant in the availability of collateral relief.\textsuperscript{86} Mr. Justice Harlan and Mr. Justice Stewart, also dissenting, expressly disassociated themselves from Mr. Justice Black's thesis that availability of habeas corpus relief should depend upon the substantiality of the prisoner's allegation of innocence.\textsuperscript{87}


The equally independent philosophy of Mr. Justice Harlan is illustrated by his dissent in Williams v. United States, reported sub nom. Mackey v. United States, 401 U.S. 667, 675 (1971). The new rule should be applied to all cases upon direct review. Id. at 681. Improvement of the factfinding process at trial should be discarded as the standard for retrospective relief upon collateral review. Id. at 694. Habeas corpus relief would be granted for failure to observe those procedures which are "'implicit in the concept of ordered liberty.'" Id. at 693. The adoption of this language from Palko v. Connecticut, 302 U.S. 319, 325 (1937), would seemingly indicate that search and seizure on habeas corpus should revert to Wolf v. Colorado, 338 U.S. 25 (1949).


84. That a defendant convicted in a state court had standing to seek federal habeas relief on this ground had been tacitly accepted for several years before Kaufman, but only one state prisoner had been successful in the Supreme Court on the merits of his claim, Mancusi v. DeForte, 392 U.S. 364 (1968). It is much simpler to equate, for present purposes, the federal and state prisoners on federal habeas corpus.


86. Id. at 235.

87. Id. at 242. Mr. Justice Black, dissenting in Whiteley v. Warden, 401 U.S. 560, 574-75 (1971), reiterated that the petitioner should be denied habeas corpus relief unless "he can currently show that he was innocent." The Chief Justice fully concurred with Mr. Justice Black, and Mr. Justice Blackmun concurred to an unspecified extent.

Mr. Justice Stewart confirmed the sentiment of his separate dissent in Kaufman, that fourth amendment violations simply did not warrant federal collateral relief, by his special concurrences in Chambers v. Maroney, 339 U.S. 42, 54 (1970), and Williams v. United States, 401 U.S. 646, 660 (1971).

Mr. Justice Harlan, dissenting in Williams v. United States, sub nom. Mackey v. United States, 401 U.S. 667, 675 (1971), considered that adherence to Kaufman compelled the conclusion that it was not the purpose of the habeas writ to determine whether the petitioner was in fact guilty or innocent. Id. at 694. He ended with an expression of regret that Linkletter v. Walker, 381 U.S. 618 (1965) had not been decided upon the theory that federal habeas
In *Schneckloth v. Bustamonte*, the Supreme Court held that knowledge of the right to refuse is not an essential element of voluntary consent to search. However, this decision afforded Mr. Justice Powell, concurring, the opportunity to criticize, first, the decision in *Kaufman v. United States* and, second, the exclusionary rule itself. The broadened scope of habeas corpus may be justified when the petitioner presents a constitutional argument relevant to his innocence, but the prisoner who advances a fourth amendment claim is ordinarily "quite justly detained," and there is rarely doubt as to his guilt. This argument is an intentional reaffirmation of Mr. Justice Black's dissent in *Kaufman*.

The "oft-asserted reason" for the exclusionary rule is deterrence of police misconduct, and, like the Chief Justice in his *Bivens* dissent, Mr. Justice Powell does not advocate the rule's "total abandonment (certainly not in the absence of some other deterrent to deviant police conduct)." Nevertheless, any merit which the rule may have at trial and on direct appeal is "anemic" in a collateral attack. As recognized by the Court in *Linkletter v. Walker*, the police misconduct has occurred and cannot be corrected by release of the prisoner, nor can "the ruptured privacy" of the victim be

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89. It was, however, necessary that Mr. Justice Stewart, for the majority, distinguish the "trial rights," which may legitimately be waived only with full knowledge of their consequences, from the fourth amendment rights, which "are of a wholly different order, . . . [which] have nothing whatever to do with promoting a fair ascertainment of truth at a criminal trial," 412 U.S. 218, 242, but which serve rather as protection against "arbitrary intrusion by the police." Id. at 242, quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). There was "no likelihood of unreliability" in the result of unreasonable search and seizure, and, as was demonstrated in the retrospectivity cases, the protections of the fourth amendment are unrelated to the "integrity of the fact-finding process" at trial. Id. at 242, quoting *Linkletter v. Walker*, 381 U.S. 618, 638, 639 (1965). *See* text at notes 76-82, *supra*.
90. 412 U.S. 218, 250. Mr. Justice Powell would limit collateral review of fourth amendment claims to the question of whether the prisoner had a fair opportunity for their consideration in state court. However, the circumstances of the "fair opportunity" for state adjudication are not developed.
91. Id. at 265.
92. Id. at 258.
95. Id. at 269.
96. 381 U.S. 618, 637 (1965).
restored. The question on habeas is too rarely the petitioner's innocence

and too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied without due regard to whether it has the slightest likelihood of achieving its avowed prophylactic purpose.

CONCLUSION

The stormy course of the fourth amendment in the Burger Court cannot be merely attributed to ad hoc responses to particular challenges. It is instead the product of fundamental antipathy over basic principles. While this remains undiminished, the discord over the fourth amendment will continue.

98. Id. at 275. Burger, C.J., and Rehnquist, J., joined in the Powell opinion in Schneckloth. Id. at 250. Blackmun, J., expressed substantial agreement but felt that it was not yet necessary to reconsider Kaufman. Id. at 249.

A similar voting pattern emerged in Cupp v. Murphy, 412 U.S. 291, 300 (1973). Although Mr. Justice Stewart had twice reaffirmed his Kaufman dissent, see note 87 supra, he did not join in the Powell concurrences in Schneckloth and in Cupp, but he was indeed the author of the Court's opinions in these cases. It is plausible that he disapproved of the revival of Mr. Justice Black's argument that the availability of habeas corpus should depend upon a substantial allegation of innocence. Kaufman v. United States, 394 U.S. 219, 242 (1969). In any event, Mr. Justice Stewart in his Schneckloth opinion expressly refrained from consideration of the issue raised by Mr. Justice Powell's concurring opinion. 412 U.S. 218, 249 n.38 (1973). The dissents by Douglas, Brennan, and Marshall, JJ., also avoided that question.