

Example Outline Search and Seizure

I. The Fourth Amendment in Historical Perspective: Before the Warren Court

A. The Fourth Amendment does not purport to outlaw all search and seizure, only those that are unreasonable. Reasonable is then measured by the concept of probable cause. Search and seizure, within the meaning of the Fourth Amendment, is therefore only a violation of the Constitution where it is undertaken without probable cause.

B. Defining the property interest which is protected has been at the heart of English Common Law and Early United States Supreme Court cases.

1. The Amendment protected private property interests pursuant to the common law.

2. In the Common law case of *Entwick v. Carrington*, 95 Eng. Rep. 807, 817-818 (1765)-the British courts made clear that the common law understanding was that men enter into society to secure their property. In order for that right to be secure in their property to be abridged, there must be a public law for the good of the whole which establishes under what circumstances that right may be intruded upon. Jayson 1041-1046

3. Any infringement of man's property right is a trespass, regardless of whether there is damage. Thus a search of private property by the government is unreasonable unless it is authorized by a valid search warrant. Jayson 1041 -1046.

C. Early United States Supreme Court decisions accepted protection of property rights as the basis for the Fourth Amendment. Jayson 1041 - 1046.

1. In the first search and seizure case to be heard by the United States Supreme Court, *Boyd v. United States*, the United States Supreme Court struck a liberal note in the application and meaning of the Fourth Amendment. The Court found that a Court order to produce a receipt from goods alleged to be stolen was an invasion of private property protected by the Fourth Amendment. McWhirter, pages 12-14

2. But the predominant trend in the Supreme Court's decisions was reflected in the cases from the first half of the Twentieth Century the Court found that the Fourth Amendment did not apply to wiretapping because there was no actual physical invasion of the defendant's premises. *Olmstead v. United States*, 277 U.S. 438(1928) and *Goldman v. United States*, 316 U.S.129(1942) Jayson 1041-1046

3. Where there was any technical physical trespass, the Fourth Amendment was found to apply. In *Silverman v. United States*, 365 U.S. 505(1961), a spike mike was pushed through a party wall until it hit a heating duct and the Court found the intrusion, however technical and small, was enough to invoke the Fourth Amendment. Jayson, 1041-1046.

II. The Warren Court and the Fourth Amendment: 1953-1969 Swindler / Cray

A. Under the Warren Court, the United States Supreme Court shifted the emphasis from seeing the Fourth Amendment as a protection of property to a view that the Amendment "protects people, not places." *Katz v. United States*, 389 U.S.347,353~1967) Jayson 10461047

1. The Warren Court asked whether there was an expectation of privacy upon the part of the individual and therefore whether the individual could rely on that expectation. Swindler / Graham 39-45

2. A individual or entity entitled to the protection of the Fourth Amendment "depends not on a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion.

B. Remedies under the Warren Court moved to the exclusion of evidence from criminal trials for violation of the Fourth Amendment.

1. In 1914 the United States Supreme Court first used the concept of the exclusion of evidence. In *Weeks v. United States*, the Kansas City police arrested Mr. Weeks at Union Station. Officers simultaneously searched Mt. Weeks home without a search warrant. The Supreme Court found that the evidence taken from Mr. weeks home could not be used against him that it was to be excluded - and that the conviction which had used the wrongfully seized evidence must be overturned. McWhirter 14-15 / Jayson 1076-1077 / Swindler 193

2. The exclusionary rule was not imposed on the states as a requirement of the Fourth Amendment until 1961 in the case of *Mapp v. Ohio*. Graham 37-48

3. Justices Clark, Black, Brennan, Douglas and Chief Justice Warren provided the first majority to establish that the Fourteenth Amendment applied to all law enforcement officer, including state officers, to prevent the use of illegally obtained evidence. Graham 46-48

4. *Mapp v. Ohio* constituted a revolution in the application of the Constitution to the States. The Supreme Court's opinion resulted in "detailed constitutional restrictions on the actions of the state's law enforcement officials in their handling of their 99.6 percent of the criminal offenses." Graham 48.

5. The decision in *Mapp v. Ohio* incorporated the Fourth Amendment through the Fourteenth Amendment into the meaning of due process that was to be applied to the States, and thus the United States Supreme Court for the first time gained direct control of the standards by which state law enforcement would be conducted. Cray 373-374

6. The Court handed down the *Mapp* opinion on a 5-4 vote, knowing that their application of the Fourth Amendment to the States was a monumental turn in the Court's view of that Amendment and that it would have farreaching effects on the operation of state law enforcement. Cray 374-376. Chief Justice Warren described *Mapp* to his son by saying "it's hard to say its a case. It's like a huge cloud from which a lot of things are raining." Cray, 375.

C. The movement of the Supreme Court to supervise State law enforcement through the application of Fourteenth Amendment resulted in constant controversy throughout the ever expanding exclusionary rule established by the Supreme Court as a remedy in such cases.

III. After Warren: The Supreme Court backs down on the exclusionary rule and increases the ability to sue the police for illegal search and seizure.

A. In *Franks v. Delaware*, the Burger Court established that when a police officer purposely falsified a warrant, his conduct may be subject to a civil rights suit. Avery 2/37-2138

B. The Burger and Rehnquist Courts reduced the use of the exclusionary rule. The public outcry after the Warren years was loud and created a foundation for justified concern about the Court's application of the exclusionary rule.

McWhirter, 103. In 1984, in *United States v. Leon*, the Burger Court established that the purpose of the exclusionary rule was to deter police from violating constitutional rights. The police in *Leon* had a warrant. The question was asked, "What benefit did society gain from throwing out this warrant and allowing these criminals to go free?" McWhirter, 103. The Court in *Leon* ruled that as a general rule evidence is not subject to the exclusionary rule if it is obtained subject to a warrant, unless the police lied in the affidavit to obtain the warrant. McWhirter, 104.

C. The *Leon* case served to begin a period where the Court thought twice before applying the exclusionary rule. At the same time, the Court began a long period of increasing the situations in which the police are subject to civil liability for unreasonable search and seizure.

IV. Conclusion

A. Is society better off to convict criminals with tainted evidence and leave the police open to civil suit.

B. Police trade information is replete with articles warning officers of potential liability.

C. It is impossible to judge the chilling effect potential civil liability may have on legitimate law enforcement officer actions