CRIMINAL PROCEDURE—SEARCH AND SEIZURE—"REDACTION" ADOPTED TO PRESERVE VALID EVIDENCE SEIZED UNDER PARTIALLY INVALID SEARCH WARRANT—*United States v. Christine*, 687 F.2d 749 (3d Cir. 1982).

In an effort to further the goal of impartial truth-finding,[1] federal courts have sought to reconcile law enforcement methods with the demands of the fourth amendment[2] for nearly a century.[3] The traditional response to a search which does not comport with the fourth amendment is the exclusion of all evidence seized.[4] To ameliorate this dour result[5] the United States Court of Appeals for the Third Circuit recently embraced redaction of search warrants as an alternative to total exclusion of evidence in *United States v. Christine*.[6]

On November 29, 1979, a postal inspector searched the office of Landmark Builders, Inc.[7] and seized "'virtually all of the business records of the corporation over a four year period.'"[8] On the previous day, the Government, seeking a search warrant, presented the affidavit of a federal investigator to a United States Magistrate in the

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[1] For an interesting discussion emphasizing that the terms impartial and truthfinding are essentially incompatible, see Zupančič, *Truth and Impartiality in Criminal Process*, 7 J. CONTEMP. L. 39, 59-85 (1982).

[2] U.S. CONST. amend. IV reads:

> The right of the people to be secure in their persons, houses, 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 persons or things to be seized.

*Id.*

[3] *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886) (compulsory production of business invoice pursuant to statutory authority viewed as functional equivalent of search and seizure); *see also* McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L. J. 55 (1977).

[4] Weeks v. United States, 232 U.S. 383 (1914) (exclusionary rule announced to protect defendant's privilege against self-incrimination). The "exclusionary rule" has been both vigorously defended and scathingly criticized by commentators and jurists alike. For an interesting review of the ongoing debate, *compare* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978) and Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'an Empty Blessing,'* 62 JUDICATURE 33 (1979) *with* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978) *and* Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979) [hereinafter cited as Wilkey, *A Call for Alternatives*].

[5] Wilkey, *A Call for Alternatives*, *supra* note 4, at 356.

[6] 687 F.2d 749 (3d Cir. 1982).

[7] *Id.* at 751.

[8] *Id.* at 752 (quoting United States v. Christine, Crim. No. 80-416, slip op. at 3 (D.N.J. May 13, 1981)).

District of New Jersey.[9] The affidavit summarized information provided by named informants who had reported that the owners of Landmark Builders, Howard Christine and Perry Grabosky, had bribed a loan officer,[10] fraudulently procured loans, and conspired to destroy the corporation by depleting its assets.[11] Relying on this affidavit, the magistrate issued a warrant to search and seize property located in Landmark's offices.[12]

Christine and Grabosky subsequently were indicted by a federal grand jury on December 10, 1980 and charged with conspiracy to violate, and violating 18 U.S.C. § 657.[13] Before the commencement of trial, however, the defendants moved to suppress all of the property seized during the search.[14] Finding that the scope of authorization under the warrant was "impermissibly broad" when compared with the affidavit's showing of probable cause, the district court concluded that the fourth amendment's requirement of particularity had not been satisfied.[15] The court granted the defendant's motion and sup-

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[9] *Id.* at 751. Richard Scott was investigating allegations of fraud in the Title I Home Insurance Program for the Inspector General's Office of the Department of Housing and Urban Development (HUD). *Id.*

[10] *Id.* Glenwood Rapf was named as the loan officer of Collective Federal Savings and Loan Association who participated in the alleged scheme. *Id.*

[11] *Id.*

[12] *Id.* The warrant described the following property to be seized;

(a) all folders and all documents contained therein and all other documents relating to home improvements and home improvement contracts pursuant to the HUD Title I Insured Home Improvement Loan program;

(b) all checks, check stubs and bank statements, deposit slips and withdrawal slips, reflecting the receipt and disbursement of funds through Landmark Builders, Inc. for the period January 1, 1977 to the present;

(c) all general ledgers, general journals, cash receipt disbursement ledgers and journals for the period January 1, 1977 to the present;

(d) all correspondence to and from and submissions to Collective Federal Savings and Loan; and

(e) all other documents, papers, instrumentalities and fruits of the crime of submission of false statements in connection with the HUD Title I Insured Home Improvement Loan program as well as any evidence of a scheme to defraud HUD or Collective Federal Savings and Loan or any other creditor by use of the United States mails.

*Id.*

[13] *Id.* 18 U.S.C. § 657 (1976) provides in pertinent part:

Whoever, being an officer, agent or employee of . . . any lending, mortgage, insurance, credit or savings and loan corporation . . . and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.

*Id.*

[14] 687 F.2d at 752.

[15] *Id.* See *infra* note 25.

pressed the material seized under the search warrant.[16] The United State's motion for reconsideration was denied and it appealed the order.[17]

In *United States v. Christine*, the United States Court of Appeals for the Third Circuit addressed for the first time an alternative to suppressing evidence *in toto*.[18] Judge Becker suggested that a search warrant may be sufficiently particular in some respects but not in others,[19] thus by "redacting,"[20] i.e., striking the severable portions of a warrant which are either general or unsupported by probable cause, a reviewing court may preserve evidence seized under the valid remainder of the warrant.[21] Noting that the absence of a clear rule in the Third Circuit justified the district court's failure to consider redaction,[22] the court of appeals concluded that the case presented an opportunity to apply the redaction principle and remanded it to the district court for further proceedings.[23]

Judge Becker analyzed at length the issues underlying the redaction principle by first determining whether the warrant was a "general warrant"[24] violative of the fourth amendment.[25] He concluded that because the warrant in question "[did] not vest the executing officers with unbridled discretion to conduct an exploratory rummaging through appellees' papers in search of criminal evidence," it was not a general warrant.[26] He further explained that the warrant had been couched "in both specific and inclusive generic terms."[27] With this conclusion in mind, Judge Becker reviewed the lower court decision.

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[16] 687 F.2d at 752.

[17] *Id.*

[18] *Id.* at 753-54.

[19] *Id.* at 754.

[20] The term redact is defined as follows: 1. to lower in condition or quality: REDUCE . . . 2a: to put in writing: make a draft of: COMPOSE, FRAME . . . b: to select or adopt for publication: EDIT, REVISE. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1900 (1963).

[21] 687 F.2d at 754.

[22] *Id.*

[23] *Id.* at 759.

[24] *Id.* at 752. A general warrant is an authorization for "a general explanatory [sic] rummaging in a person's belonging." *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)).

[25] *Id.* at 752. To clarify the fourth amendment's requirement of particularity in warrants, Judge Becker relied on Marron v. United States, 275 U.S. 192 (1927). 687 F.2d at 752. In that case, the Supreme Court announced the requirement that warrants leave nothing "to the discretion of the officer executing the warrant." 275 U.S. at 196; see also Payton v. New York, 445 U.S. 573, 583 (1980); Andresen v. Maryland, 427 U.S. 463, 479 (1976).

[26] 687 F.2d at 753.

[27] *Id.*

While the district court did not apply a general warrant analysis, it nevertheless invalidated the entire warrant on the grounds "that the sum of the evidence authorized to be seized exceeded the underlying probable cause justification."[28] The court of appeals suggested that had redaction been considered by the district court, the result might not have been total invalidation of the warrant.[29] Judge Becker then described the court's method of redaction which requires an examination of the search *authorized* by the warrant.[30] Each part of the authorization is evaluated to determine if it is general or unsupported by probable cause.[31] In this manner, a court will preserve items seized under the valid parts of the warrant, and suppress or "sever" items seized pursuant to the invalid parts.[32] The court of appeals warned, however, that "meaningful severability" is a *conditio sine qua non* for redaction.[33]

The court of appeals briefly mentioned two federal appellate courts[34] and several state courts[35] which had preferred redaction to complete suppression of evidence.[36] More importantly, it faced a

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[28] *Id.*; *see* 2 W. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.6 at 97 (1978); *see also* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979); VonderAHE v. Howland, 508 F.2d 364, 369 (9th Cir. 1974).

[29] 687 F.2d at 753.

[30] *Id.* at 754.

[31] *Id.*

[32] *Id.*

[33] *Id.* In this regard, Judge Becker quoted the leading case on the redaction principle, Aday v. Superior Court of Alameda County, 55 Cal. 2d 789, 13 Cal. Rptr. 415, 362 P.2d 47 (1961). In *Aday*, the California Supreme Court recognized that the warrant procedure would be intolerably abused if a broad seizure could be made on the basis of minor items of particularity in an essentially general warrant. *Id.* at 52.

[34] United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982) (total suppression granted where no portion of warrant was sufficiently particularized); United States v. Cook, 657 F.2d 730 (5th Cir. 1981) (invalid portion of warrant severed to preserve particularly described items).

[35] Aday v. Superior Ct. of Alameda County, 55 Cal. 2d 789, 13 Cal. Rptr. 415, 362 P.2d 47 (1961) (see *supra* note 33); People v. Russell, 45 Ill. App. 2d 961, 360 N.E.2d 515 (App. Ct. 1977) (valid portion of search warrant may be severed); People v. Mangialino, 75 Misc. 2d 698, 348 N.Y.S.2d 327 (Monroe County Ct. 1973) (severability alternate available if tainted part of warrant does not contaminate whole warrant); State v. Sagner, 12 Or. App. 459, 506 P.2d 510 (Ct. App. 1973) (partial suppression upheld despite general invalid authorization); Walthall v. State, 594 S.W.2d 74 (Tex. Crim. App. 1980) (validity of one clause of warrant upheld despite invalidity of remaining three clauses); State v. Halverson, 21 Wash. App. 35, 584 P.2d 408 (Ct. App. 1978) (one of two items in search warrant suppressed for lack of probable cause).

[36] 687 F.2d at 754. Judge Becker noted that an earlier Ninth Circuit case, VonderAHE v. Howland, 508 F.2d 364 (9th Cir. 1974) presented a procedure which, because of some similarity might be confused with redaction. 687 F.2d at 754. The court observed that in *VonderAHE* subsequent to finding the warrant invalid, the Ninth Circuit panel evaluated the scope of probable cause that the underlying affidavit established and used this scope as an index to test the validity of the items seized. *Id.* This procedure differs from redaction, Judge Becker maintained,

Third Circuit conflict between two incompatible district court decisions. Although the district court opinions expressed opposite views on the propriety of utilizing the redaction method, they had both been affirmed by judgment order in the court of appeals.[37] In *United States v. Burch*,[38] Judge Stapleton chided the Government for requesting redaction. He saw the procedure as a fiction which treated the warrant as authorizing a legal search for some items and an illegal search for others.[39] This treatment, he concluded, did not further the interests of the fourth amendment.[40] An antithetical result was reached by Judge Coolahan in *United States v. Giresi*.[41] He observed that severance is valid, provided the warrant is not obviously general.[42] The *Giresi* court distinguished *Burch* as a case which involved a warrant "dangerously akin to a general warrant."[43]

In an effort to resolve the inconsistency presented by *Burch* and *Giresi*, the court of appeals reviewed the purposes served by the fourth amendment's warrant clause and its means of effectuation.[44] Noting that abhorrence toward the colonial writs of assistance—authorizing indiscriminate searches and seizures—was the motivating force behind the drafting of the fourth amendment,[45] the court viewed the warrant requirement as a balancing of interests between the need for law enforcement and the desire of the citizenry to be free from general searches and seizures.[46]

Judge Becker noted five primary functions of the warrant clause.[47] First, the requirement of an antecedent probable cause justification allows a counterpoising of the respective interests of private

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because the *VonderAHE* warrant was not tailored to the affidavit's scope of probable cause prior to matching the seized items to individual clauses of the warrant. *Id.*

[37] 687 F.2d at 755.

[38] 432 F. Supp. 961 (D. Del. 1977), *aff'd without opinion*, 577 F.2d 729 (3d Cir. 1978).

[39] *Id.* at 964.

[40] *Id.*

[41] 488 F. Supp. 445 (D.N.J. 1980), *aff'd mem.*, 642 F.2d 444 (3d Cir.), *cert. denied*, 452 U.S. 939 (1981).

[42] *Id.* at 459.

[43] *Id.* at 460.

[44] 687 F.2d at 755.

[45] *See* Payton v. New York, 445 U.S. 573, 583-85 (1980); Boyd v. United States, 116 U.S. 616, 624-27 (1886). *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-78 (1970); Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy*, 73 DICK. L. REV. 1, 2 (1968); McKenna, *supra* note 3, at 69.

[46] 687 F.2d at 756.

[47] *Id.*

society and government.[48] Second, the interposition of a neutral magistrate to determine probable cause protects an individual's privacy from capricious law enforcement activities.[49] Third, the scope of the search authorized is limited by the terms of the warrant.[50] Fourth, the warrant serves as an announcement that a judicial determination has been made which requires the individual to yield a certain measure of privacy to law enforcement efforts.[51] Fifth, the warrant procedure establishes a reviewable record of the information available to the magistrate at the time of the warrant's issuance.[52]

Following the court's acknowledgment of the tutelary functions of the warrant clause, Judge Becker indicated that when the fourth amendment is violated, an individual's rights are principally secured through the use of the exclusionary rule.[53] While the court recognized that the exclusionary rule's primary justification is its ability to deter unconstitutional police conduct,[54] it also noted that a conviction based on "illegally seized evidence could 'compromise the integrity of the

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[48] *Id.* In Brinegar v. United States, 338 U.S. 160 (1949), the Court stated that the probable cause requirement affords the best compromise between these competing interests. *Id.* at 176; *cf.* Henry v. United States, 361 U.S. 98, 102 (1959) (emphasizing that requirement of probable cause protects police as well as citizens).

[49] 687 F.2d at 756; *see* Johnson v. United States, 333 U.S. 10, 13-14 (1948); *see also* Coolidge v. New Hamphsire, 403 U.S. 443, 454-55 (1971) ("'searches conducted . . . without prior approval . . . are per se unreasonable'") (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); McDonald v. United States, 335 U.S. 451, 455 (1948) (magistrate serves function of imparting objectivity to decision); *cf.* United States v. Chadwick, 433 U.S. 1, 7 (1977) (warrant clause protects people from unreasonable intrusion into legitimate expectation of privacy).

[50] 687 F.2d at 756; *e.g.*, Walter v. United States, 447 U.S. 649, 656 (1980); *see also* Marron v. United States, 275 U.S. 192, 196 (1927) (particular description prevents seizure of items not listed in warrant); *supra* note 25 and accompanying text. United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (limiting items to be seized tends to limit search).

[51] 687 F.2d at 756; *see* United States v. Chadwick, 433 U.S. 1, 9 (1977) (citing Camara v. Municipal Court, 387 U.S. 523, 532 (1967)). In *In re* Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979), the Court of Appeals for the First Circuit noted that a warrant informs the individual subject to the search what the executing officers are authorized to seize. *Id.* at 5.

[52] 687 F.2d at 757; *see* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 57 (1980). Professor Saltzburg emphasizes that the "'[o]ath or affirmation'" of an applicant for a warrant simultaneously commits the proffered information to the public record. This insures that following a search "there is no confusion between the ex-post and ex-ante positions of the applicant." *Id.*

[53] 687 F.2d at 757. In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court explicitly stated that the exclusionary rule was a judicial creation, aimed at effectuating the fourth amendment. *Id.* at 482.

[54] Stone v. Powell, 428 U.S. 465, 486 (1976) (rather than redressing injury to individual's privacy, rule exists to deter police from violating fourth amendment rights); *accord* United States v. Calandra, 414 U.S. 338, 348 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960); *cf.* Terry v. Ohio, 392 U.S. 1, 12 (1968) (exclusionary rule is "a principle mode of discouraging lawless police conduct").

courts.'"[55] Judge Becker observed that application of the exclusionary rule "turns upon a 'pragmatic analysis of [its] usefulness,'" which entails a balancing of the individual's interests protected by the exclusion of evidence against the public's interest in admitting the evidence.[56] He maintained that when a valid warrant is used to obtain some items not authorized to be seized, "[t]he heavy cost to society of excluding evidence which was legally seized" outweighs the deterrence objective sought to be attained by complete suppression.[57]

The court of appeals concluded that a warrant, the components of which are individually valid and severable clauses or phrases, may be properly redacted without offending the fourth amendment's purposes and in fact is consistent with the purposes of the warrant requirement.[58] Particularly, Judge Becker explained that probable cause to believe the action will serve society's desire for law enforcement justifies the intrusion into the individual's privacy; that a magistrate renders the determination; that the terms of a warrant's authorization limit the scope of the search to securing evidence particularly described; that notification to the party being searched is given; and that a reviewable record of events is generated.[59]

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[55] 687 F.2d at 757 (quoting Dunaway v. New York, 442 U.S. 200, 218 (1979)). In *Dunaway*, the Supreme Court observed that the use of illegally seized evidence is more likely to compromise the court's integrity when there is a close causal nexus between the seizure and a confession. *Id.*; *see also* Elkins v. United States, 364 U.S. 206, 222 (1960) (stressing the need to consider "the imperative of judicial integrity"). In Olmstead v. United States, 277 U.S. 438 (1927), Justice Brandeis recognized this principle in a dissenting opinion wherein he cogently observed that "[i]f the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.* at 485 (Brandeis, J., dissenting).

In United States v. Cook, 657 F.2d 730 (5th Cir. 1981), the court of appeals identified a third purpose served by excluding illegally seized evidence; it maintained that by applying the exclusionary rule, "the court prohibits the Government from benefiting from its own wrong by using the illegally seized evidence to convict." *Id.* at 734.

[56] 687 F.2d at 757 (quoting Stone v. Powell, 428 U.S. 465, 488-89 (1976)). This is essentially the position taken by the Supreme Court in Stone v. Powell. The *Stone* Court surveyed United States v. Calandra, 414 U.S. 338 (1974) to find support for the pragmatic analysis approach. 428 U.S. at 486-88. In *Stone*, the Court pointed to *Calandra's* refusal to apply the exclusionary rule to the grand jury setting as an example of the balancing process at work. *Id.* at 487. Employing a cost/benefit analysis, the Court found that application of the rule "deflects the truthfinding process," and noted that "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant . . . is contrary to the idea of proportionality that is essential to the concept of justice." *Id.* at 490.

[57] 687 F.2d at 757. Judge Becker intimated that complete suppression would be proper only if the general nature of the search was that of an exploration for evidence unrelated to the warrant. *Id.* at 758 (citing United States v. Russo, 250 F. Supp. 55, 58 (E.D. Pa. 1966)); *cf.* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325-26 (1979) (denial of motion to suppress reversed based on open ended nature of warrant).

[58] 687 F.2d at 758.

[59] *Id.*; *see supra* notes 47-52 and accompanying text.

Evaluating redaction through a pragmatic analysis led the court to conclude that law enforcement goals and the requirements of the warrant clause were adequately served.[60] The court stressed that redaction should be applied so that "the social cost of unnecessarily excluding validly seized evidence" may be avoided.[61] It analogized redaction to the treatment of evidence obtained outside the scope of a warrant's authorization,[62] in which case, only evidence seized under valid authorization may be admitted.[63]

After establishing that redaction was a valid practice, the court of appeals addressed the criticism which the district court in *Burch* had lodged against the procedure.[64] Judge Becker observed that the gravamen of *Burch* would require either suppressing all evidence, thereby ignoring "the pragmatic foundations of the exclusionary rule," or admitting of all evidence regardless of the illegal parts of a warrant.[65] Asserting that an intermediate approach between the two alternatives was required, Judge Becker reaffirmed his conviction that redaction offered the proper compromise.[66] The concerns raised by *Burch*, Judge Becker maintained, were more applicable to the approach that the Ninth Circuit had taken in *VonderAHE v. Howland*.[67] Judge Becker stressed that the *VonderAHE* method of matching the seized items to the affidavit's showing of probable cause[68] ignored the terms of the warrant and regarded the magistrate's role as "a mere formality."[69] In further distinguishing redaction

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[60] 687 F.2d at 758.

[61] *Id.*; *see* Stone v. Powell, 428 U.S. 465, 489-90 (1976); *see also* Terry v. Ohio, 392 U.S. 1, 15 (1968) (stressing high cost of rigid application of exclusionary rule); VonderAHE v. Howland, 508 F.2d 364, 372 (9th Cir. 1975) (balancing Government's allegedly unlawful seizure against plaintiff's allegedly unlawful concealment of records).

[62] 687 F.2d at 758; *see* United States v. Cook, 657 F.2d 730, 735 n.5 (1st Cir. 1981); United States v. Giresi, 488 F. Supp. 445, 460 n.18 (D.N.J. 1980); People v. Mangialino, 75 Misc. 2d 698, 706-08, 348 N.Y.S.2d 327, 331-32 (Monroe County Ct. 1973).

In United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982), the Court of Appeals for the Ninth Circuit read Andresen v. Maryland, 427 U.S. 463 (1976) as an approval of redaction or "severance." 680 F.2d at 78. The *Andresen* Court had agreed with the voluntary return and suppression of items seized which were not within the scope of the warrant. 427 U.S. at 482 n.11. In *Christine*, however, Judge Becker discounted the *Cardwell* court's assertion that redaction had been approved by the Supreme Court. 687 F.2d at 754 n.5.

[63] 687 F.2d at 758. Judge Becker elaborated that valid authorization must be "supported by particularized probable cause." *Id.*

[64] *Id.* at 758-59. The *Burch* court criticized severance as analogous to a judicial review of two searches, one legal and one illegal. *See supra* note 39 and accompanying text.

[65] 687 F.2d at 759.

[66] *Id.*

[67] 508 F.2d 364 (9th Cir. 1974); 687 F.2d at 759.

[68] *See supra* note 36.

[69] 687 F.2d at 759.

from the *VonderAHE* approach, Judge Becker found that the notice function of the warrant clause[70] was offended under *VonderAHE* because there the admission of evidence, which was seized under an entirely invalid warrant, would depend on the contents of an affidavit never seen by the individual subjected to the search.[71]

In its conclusion that redaction is a viable alternative to complete suppression, the court addressed several factors that the district court should evaluate upon reconsideration of the motion to suppress.[72] The court suggested that on review of the warrant, only those severable clauses that were unsupported by probable cause should be removed.[73] The court also concluded that redaction required a measure of flexibility, suggesting that the degree of precision with which it is applied may well depend on the nature of the case at hand.[74]

In a succinct concurring opinion, Judge Gibbons disagreed with the majority's analysis of the exclusionary rule's deterrence rationale.[75] He found this rationale "completely illogical" when a warrant has been authorized by the judiciary and executed in accordance with its terms.[76] Under these circumstances, deterring the officers' misconduct cannot be the justification for using the exclusionary rule. For Judge Gibbons, a court reviews the performance of the issuing magistrate, not that of the executing officer, when it suppresses evidence obtained on the basis of an insufficiently particularized warrant or an inadequate affidavit.[77] He maintained that when a court is provided with evidence which under the fourth amendment should not have been seized, the use of such evidence "is itself a violation of the fourth

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[70] *See supra* note 51 and accompanying text.

[71] 687 F.2d at 759. In contradistinction to the *VonderAHE* method, several circuit courts have approved of the use of an affidavit to cure the defects of a general warrant, provided the affidavit accompanies the warrant and is included by reference. United States v. Johnson, 690 F.2d 60, 64 (3d Cir. 1982); *see In re* Lafayette Academy, Inc., 610 F.2d 1, 4 (1st Cir. 1979); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); *see also* Mascolo, *supra* note 45, at 11-12.

[72] 687 F.2d at 759-60.

[73] *Id.* at 760.

[74] *Id.* Judge Becker cited Andresen v. Maryland, 427 U.S. 463 (1976) to illustrate the point that cases involving intricate schemes require a flexible approach when scrutinizing the available evidence. 687 F.2d at 760; *see Andresen*, 427 U.S. at 480 n.10.

[75] 687 F.2d at 760 (Gibbons, J., concurring). *See generally* Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295 (1972).

[76] 687 F.2d at 761 (Gibbons, J., concurring). Judge Gibbons said of the executing officers, "[t]hey did all that could be reasonably expected of them." *Id.*; *see* Gibbons, *supra* note 78 at 305, 311-12.

[77] 687 F.2d at 761 (Gibbons, J., concurring).

amendment."[78] That position, he believed, was consistent with the court's adoption of redaction.[79] He suggested that on remand, beyond matching the seized evidence to the affidavit's showing of probable cause, the district court should examine whether the plain view doctrine justified the seizure of any of the evidence.[80]

In *Christine*, the court of appeals justified the adoption of redaction by stressing the warrant's conformity to the fourth amendment,[81] but it bypassed an important analytical step when it failed to announce the standard by which the validity of generic terms ought to be tested. Although other courts have similarly endorsed generic terms in warrants,[82] this does not *eo ipso* obviate the need to scrutinize those terms in determining whether a general warrant exists. The issuance of a warrant apparently eliminates the element of discretion on the part of the executing officers,[83] but the use of generic terms may itself increase the probability of conducting an unconstitutional "general rummaging" in an effort to secure *all* of the evidence.[84] Actually, it is likely that such a general search would be the inevitable consequence of the warrant's execution.[85] Indeed, at least one circuit court has observed that a warrant is general when it uses generic terms to describe items of which authorities are aware "with a high degree of specificity."[86]

The court conspicuously avoided another issue, to wit, what degree of severability might be deemed "meaningful."[87] It is not

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[78] *Id.*

[79] *Id.*

[80] *Id.*; *cf.* Mascolo, *supra* note 45, at 16-18 (suggesting that evidence bearing reasonable relation to purpose of search may be seized if not listed in warrant).

[81] 687 F.2d at 753. Judge Becker emphasized that by instructing the officers to seize "*all* of these items," the question of officers' discretion was not at issue. *Id.* (emphasis in original).

[82] *See* United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982); United States v. Cook, 657 F.2d 730, 733 (5th Cir. 1981); *see also* United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980) (generic classifications acceptable when more precise description is not possible); United States v. Abrams, 539 F. Supp. 378, 387 (S.D.N.Y. 1982) (use of generic terms was necessary given nature of offense-wire fraud).

[83] *See supra* note 81.

[84] *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (one objective of warrant requirement is to prevent general rummaging); United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (invasion of privacy consisting of rummaging among man's effects is "the real evil aimed at by the Fourth Amendment").

[85] *Cf.* Terry v. Ohio, 392 U.S. 1, 17-18 (1968) (initially reasonable search may violate fourth amendment by intolerable intensity and scope).

[86] *Vonder AHE*, 508 F.2d at 366; *cf.* United States v. Cardwell, 680 F.2d 75, 78-79 (9th Cir. 1982) (redaction rejected when overbroad warrant was issued despite officers' specific knowledge of place and things subject to search and seizure).

[87] 687 F.2d at 754.

surprising that the court refrained from further elaboration. To require "meaningfulness" is a nontest which invites a frustrating inquiry into the meaning of the term. Thus, reviewing courts must embark on a preliminary determination of how much may be properly severed, and they must do so without the benefit of an articulate and relevant standard. In addition, the piecemeal approach subsumed by redaction is strikingly similar to the government's request in *Burch* for admission of an individually valid item listed in an otherwise invalid warrant.[88] In *Burch*, the court construed the government's position as an attempt to view the search as two separate searches, a legal one for the valid item and an illegal one for the other items.[89] The court found the warrant general, rejected redaction, and ordered complete suppression when it determined that a portion of the items listed was invalid.[90] By contrast, the court in *Christine* ruled out a general warrant by relying on the inclusive nature of some terms and the specificity of other terms, as well as on compliance with the Constitution's requirement of judicial interposition.[91] Judge Becker emphasized (1) that redaction required a careful application, (2) that it was improper where "meaningful" severability was impossible, and (3) that particularity as to minor items alone did not prevent the warrant procedure from being abused.[92] Despite the court's awareness of the potential for misapplication, the issue of abuse was discussed more as an observation than as a problem to which relevant standards apply.[93]

One explanation for the court's avoidance of the issues discussed above is the importance impliedly given to the fact that the warrant was divided into individually lettered clauses.[94] This unjustifiably broad focus on clauses supported generally by probable cause expands the permissible scope of seizable items contained in those clauses and abandons due respect for the fourth amendment's requirements of

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[88] 432 F. Supp. at 964. The warrant in *Burch* authorized, *inter alia*, a search for automobile tires and stolen property. The court found that the specificity of the tires did not afford protection for the defendant's fourth amendment right to be free from an unreasonable general search. *Id.*

[89] *Id.* The Burch court concluded that only one search occurred—an illegal search—the products of which must be suppressed. *Id.*

[90] *Id.*

[91] 687 F.2d at 753; *see supra* note 81.

[92] *Id.* at 754. Judge Becker quoted a lengthy caveat from Aday v. Superior Court of Alameda County, 55 Cal. 2d 789, 13 Cal. Rptr. 415, 362 P.2d 47 (1961) on the inherent dangers of the procedure. See *supra* note 33 and accompanying text.

[93] *See* 687 F.2d at 754.

[94] *See* 687 F.2d at 754. This observation is apparent from the court's obsessive emphasis on "severable phrases and clauses." *See id.*

probable cause and particular description. Other courts applying the redaction principle, however, have severed individual items—not clauses— from the warrant.[95] This focus on specificity provides for a more efficient result, and comports to a greater degree with settled constitutional safeguards (i.e., requirements of probable cause and the exclusionary rule). The *Christine* test for general clauses, however, allows skillful drafting in order to maximize the permissible scope of seizures. Moreover, a focus on individual items facilitates a reviewing court's decision as to whether certain descriptions of items are insufficient to support the warrant's validity.[96] Simply because the *Christine* court made the implicit assumption that grouping items into lettered clauses rendered the warrant more redactable, this categorical organization should not be a signal for automatic redaction.

The court of appeals in *Christine* extensively discussed the functions of the warrant clause, and the redaction principle's compatibility with those functions.[97] This, when considered in terms of the warrant's valid clauses, is beyond reproach. It is precisely when the invalid clauses are taken into account, that the warrant, as originally issued, is found to be fully inconsistent with the first four warrant clause functions examined by the court. Consider, for example, the following arguments with respect to the first four recognized functions of the warrant clause. First, the warrant as issued and executed was not justified by an antecedent showing of probable cause, and therefore, the citizen's interest in being free from governmental intrusion into his privacy was not fairly exchanged for the probability that evidence of criminal activity would be found. Second, the judicial officer responsible for issuing the warrant either did not perform his task neutrally and objectively or did so while measuring the competing interests with an inaccurate scale (i.e., the constable blundered),[98] thus at least the potential for subjecting the individual's privacy to the

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[95] *See, e.g., VonderAHE*, 508 F.2d at 372 (all fiscal and business records from dental practice were suppressed, except for yellow sheets and green cards); United States v. Giresi, 488 F. Supp. 445, 461 (D.N.J. 1980) (items, U.S. currency, and stolen guns listed in one of the warrants' three categories were suppressed); Aday v. Superior Court of Alameda County, 55 Cal. 2d 789, 13 Cal. Rptr. 415, 362 P.2d 47, 51-52 (1961) (copies of federal and state income tax returns were held invalid and severable from remainder of warrant).

[96] *See supra* note 33; *cf.* People v. Mangialino, 75 Misc. 2d 698, 706, 348 N.Y.S. 2d 327, 337 (Monroe County Ct. 1973) (suggesting that severability may also depend on factual scenario of warrant's execution).

[97] 687 F.2d at 756, 758; *see supra* notes 47-52, 58 & 59 and accompanying text.

[98] *But see* People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (phrase used by Judge Holmes who believed that even if constable blundered, accused should not benefit from this error).

whims of the executing officers was occasioned. Third, the presence of one or more general terms in the warrant negated the unbridled scope of the search otherwise sustained by the use of particular and specific terms. Hence the execution of a general search and the seizure of unauthorized items was by no means "impossible." Fourth, the warrant and its contents, when presented to the individual, did not provide notice of a lawful search. It follows that the individual was never notified of the legal limits of the search and in the absence of the underlying affidavit, the need to search. By relying on a redacted warrant's fulfillment of the warrant clause criteria to justify the seizure of valid items, the theoretical distance between the court's application of the fourth amendment and the dual search concept criticized by *Burch*[99] wanes.

The court's criticism of *Burch* focused on the "unacceptable" alternatives to redaction that the case presented.[100] Judge Becker's aversion to the first alternative—suppression of all items seized under a partially invalid warrant—was ingenuous. According to Judge Becker, this simply discarded the exclusionary rule's pragmatic basis,[101] the very justification that *Christine* relied on for accepting redaction. The majority's unquestioning acceptance of the deterrence rationale for the exclusionary rule[102] raises a fundamental issue regarding the purpose served by excluding evidence. This point is illustrated by Judge Gibbons' rejection of the deterrence rationale, although he limited his dissatisfaction to the search warrant context.[103]

The use of evidence resulting from an unreasonable search and seizure is equivalent to compelling one to be a witness against oneself.[104] If the exclusion of evidence obtained by violating the individ-

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[99] *See supra* notes 88-90 and accompanying text.

[100] *See supra* notes 64-66 and accompanying text.

[101] *See supra* note 56 and accompanying text.

[102] 687 F.2d at 757.

[103] *Id.* at 760-761 (Gibbons, J., concurring); *see* Gibbons, *supra* note 75, 299-306; *see also notes 75-80.*

[104] *See* Boyd v. United States, 116 U.S. 616, 633 (1886). In *Boyd*, Justice Bradley recognized the relationship that the fourth and fifth amendments share. *Id.* In that case, during a forfeiture proceeding, a judicial order to produce an invoice was issued to the owners of goods seized for import duty violations. The order was held to violate the fourth amendment by effecting an unreasonable search and seizure, and consequently the fifth amendment by using the evidence against the defendant. *Id.* at 634-35; see Entick v. Carrington, 2 Eng. Rep. 275 (C.P. 1765), *reprinted in* 19 Complete Collection of State Trials 1029 (T. Howell comp. 1813) (considered to be first case recognizing that self-incrimination results from use of evidence seized under general warrant); *see also* Andresen v. Maryland, 427 U.S. 463, 486-92 (1976) (Brennan, J., dissenting) (search of office and seizure of business records is compulsory production of testimonial evidence within meaning of fifth amendment); Warden v. Hayden, 387 U.S. 294, 319-20 (1967) (Douglas, J., dissenting) ("mere evidence" rule founded on fifth amendment privilege against self-incrimi-

ual's fourth amendment rights means that such evidence will be kept away from the trier of fact, the individual's fifth amendment privilege against self-incrimination has been honored.[105] Thus, a violation of the fourth amendment will lead to a violation of the fifth amendment unless the privilege against self-incrimination—by the exclusion of the fruits of the illegal search and seizure—is allowed to operate.[106] The inevitable conclusion is that without the exclusionary rule, there can be no privilege against self-incrimination.[107] It follows that the primary justification for the exclusionary rule is the defendant's privilege to not be made an unwilling source of evidence against himself. The preservation of judicial integrity is the natural consequence of respecting that privilege, and the deterrence of future fourth amendment violations, if functional, is a gratuitous and incidental product of a pre-eminent constitutional right.[108]

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nation); Rochin v. California, 342 U.S. 165, 175 (1952) (Black, J., concurring) (use of evidence obtained through forced stomach pumping equivalent to compulsory self-incrimination); Gouled v. United States, 255 U.S. 298, 304-06 (1921) (admission of papers in evidence against defendant which were obtained by stealthy search held to violate fifth and fourth amendment rights); *VonderAHE*, 508 F.2d at 377 (Ely, J., concurring and dissenting) (seizure of dentist's books and records pursuant to overbroad search warrant amounted to testimonial compulsion in violation of fifth amendment). *See generally* McKenna, *supra* note 3, at 59.

[105] *See* Zupančič, *The Privilege Against Self-Incrimination*, 1981 ARIZ. ST. L.J. 1, 19 n.65. Zupančič asserts that such evidence indeed must be kept from the adjudicator's ear if the defendant's privilege against self-incrimination is to have any effect. His argument emphasizes that the exclusionary rule is a prescriptive rule, rather than one whose validity depends on a pragmatic analysis of the costs and benefits of its operation. *Id.*; *cf.* Hill v. Philpott, 445 F.2d 144, 149 (7th Cir. 1971) (entries in books and records of defendant when received by jury are as damaging as defendant's own words against himself).

[106] *See* Mapp v. Ohio, 367 U.S. 643 (1967) (Black, J., concurring). In *Mapp*, Justice Black stated that the fourth amendment alone was an insufficient basis for the exclusionary rule, but when combined with the fifth amendment's privilege against self-incrimination, a constitutional foundation from which the rule may be deduced became apparent. *Id.* at 661-62. Justice Black offered the case of Rochin v. California, 342 U.S. 165 (1952) *exempli gratia* to show that even though the Court avoided mentioning the fifth amendment by name, the principle it represents and its relationship to the fourth amendment were implicitly recognized. *Id.* at 664; *see also* Coolidge v. New Hampshire, 403 U.S. 443, 498 (1971) (Black, J., concurring); *cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (essence of fourth amendment's ban on unreasonable searches and seizures is that evidence seized therefrom shall be excluded from any use). *But see* Bender, *The Retroactive Effect Of An Overruling Constitutional Decision:* Mapp v. Ohio, 110 U. PA. L. REV. 650, 662-68 (1962).

[107] *See* Zupančič, *supra* note 105; *cf.* Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349, 433 (1974). Professor Amsterdam believes that although the exclusionary rule is not explicitly dictated by the Constitution, it serves as the only assurance that the orderly administration of justice—which is a constitutional mandate—will be honored. *Id.* at 433.

[108] *See* Zupančič, *supra* note 105, at 21-22. *But see* Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964); Bender, *supra* note 106, at 662-68; McGowan, *Rule-Making and The Police*, 70 MICH. L. REV. 659, 689-92 (1972). These commen-

It is in this perspective that the fourth and fifth amendments mutually reinforce one another. The fourth amendment identifies the warrant requirements of probable cause and particularity which make a search reasonable. The fifth amendment places a restriction on the state's use of the individual as a witness. Conversely, the fifth amendment's categorical proscription on compelled self-incrimination is qualified by the fourth amendment's recognition and tolerance of reasonable searches and seizures subject to constitutionally valid warrants.[109]

Consistent with this perspective is the idea that a pragmatic analysis of the exclusionary rule—which blatantly compromises constitutional standards—should play no part in judicial resolutions of fourth amendment violations.[110] Uniform adherence to the commands of the Constitution not only furthers reliability in the administration of justice, it also minimizes the risk of error inherent in the speculative assessment of social costs and benefits. Another problem with the enforcement of the exclusionary rule is the irrationality implicit in excluding material which clearly facilitates the truth-finding function of criminal process. This undoubtedly exerts substantial pressure to admit illegally obtained evidence—irrespective of its origin. To the extent that the police may rely on an attitude of "everything to gain . . . nothing to lose," a heightened incentive to secure evidence illegally cannot be disputed.[111]

The court in *Christine* did not consider the signals it will send to the law enforcement community, nor did it address the issue of self-incrimination. If it had, the court might have affirmed the district court's decision to suppress all of the seized evidence. Since a flat rejection of the redaction alternative might have created an intercircuit conflict of sufficient proportion to provoke a subsequent Supreme Court resolution, such a decision would undoubtedly have had a

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tators reject the incidental importance of the deterrence rationale in favor of according it primary status.

[109] Zupančič has focused on the probable cause requirement of the fourth amendment as a constitutional compromise, balancing the individual's right to privacy against the society's right to invade that privacy which "represents a corrective to the self-incrimination clause of the fifth amendment." Zupančič, *supra* note 105, at 14-15. *Cf.* Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (balancing need to search against level of invasion is necessary to determine reasonableness of police conduct). Although not explicitly mentioned, the fourth amendment's particularity requirement would appear to represent an important element in Professor Zupančič's probable cause analysis.

[110] Stone v. Powell, 428 U.S. 465, 506-11 (1976) (Brennan, J., dissenting). *See generally* Zupančič, *supra* note 105, at 21-24.

[111] Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198, 1219 (1971).

profound effect on the application of the exclusionary rule in other federal courts. The court in *Christine*, however, argued that redaction is a constitutionally sound practice. It considered the law enforcement utility of evidence seized pursuant to individually tested warrant clauses.[112] *Christine's* adoption of redaction for use within the Third Circuit overruled the approach announced by the district court in *Burch*. Subsequent applications of the procedure within the circuit will depend on how closely courts which are called upon to review challenged warrants will read the *Christine* opinion. To find support for this observation, one need go no further than to the concurring opinion of Judge Gibbons.[113] Despite the extended discussion in the majority opinion, which emphatically distinguished the *Christine* method of redaction (reviewing the probable cause support for each clause of the warrant) from the *VonderAHE* method of severance (matching the seized evidence against the underlying probable cause), Judge Gibbons' concurring opinion explicitly referred to the latter procedure when it addressed the district court's tasks upon remand.[114] Apparently, Judge Gibbons misread the opinion as an endorsement for the *procedure* followed by *VonderAHE*. If this is true, let the error speak for itself.

The Third Circuit's adoption of redaction, as expressed by the *Christine* opinion, leaves room for courts to question the validity of the exclusionary rule. The path is far from clear. Trial attorneys, issuing magistrates and reviewing courts alike will inevitably face the uncertainty concomitant to redaction. Future cases will undoubtedly test the redaction principle with respect to clauseless warrants. The direction of *Christine* clearly illustrates the fact that the missing teeth of the exclusionary rule owe their absence to a federal judiciary reeling from the clamor of society's demand for law and order.

*Steven Carras*

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[112] 687 F.2d at 758.

[113] *Id.* at 760-61 (Gibbons, J., concurring).

[114] *Id.* at 761. (Gibbons, J., concurring).