SJR

18

#1

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: SJR 18 Date on Bill: 2/8/83
Title: Search & Seizure
Sponsor: Ray, Pettyjohn
Requestor:

1. Estimated fiscal impacts on:

a. Expenditures: -0-

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86	
Capital							
Operating							
Total			-0-	-0-	-0-	-0-	

b. Revenues:

Revenue							

2. Source of funds to offset fiscal impact of bill:

N/A

3. Assumptions:

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor.

Prepared By: John Haywood Phone: 465-2180
Division: Risk Management Date: 3/4/83

Approved by Commissioner: Lisa Rudd Date:
Department: Administration

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

7//BDGSF1

SENATE STATE AFFAIRS COMMITTEE

Date received _____

Bill Number _____ Title _____

Fiscal Note	Positir Paper	Date requested	From	Amount	Date Rec'd Note	Date Rec'd Paper

CONTACTS

Backup list

Walter Share
Dana False
Nancy Hrdlicka

HEARING INFORMATION

NOTES:

FINAL ACTION _____ DATE _____

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM January 23, 1984

SJR 9

SUBJECT: "Good faith" exception to the exclusionary rule (Work Order No. 13-1801)

TO: Senator Vic Fischer
Chairman, Senate State Affairs Committee

FROM: Edward H. Hein SHA
Legislative Counsel

You have asked for a brief summary of the issues raised in two cases now before the United States Supreme Court dealing with the so-called "good faith" exception to the exclusionary rule.

The Fourth Amendment to the United States Constitution protects the privacy of persons by prohibiting unreasonable searches and seizures of their persons or property by the police. The essential requirement of the Fourth Amendment is that, except in certain emergency situations, searches may be made only pursuant to a warrant issued by an independent magistrate or judge and supported by a finding that there is "probable cause" to believe that the place to be searched contains evidence of a crime. The warrant must describe with particularity the place to be searched and the items to be seized. The police seeking the warrant must swear that their knowledge is based on personal observation or on information supplied by a credible and reliable informant. But under a ruling handed down by the Supreme Court last term, a magistrate must consider the "totality of circumstances" and make a "practical, common-sense decision" on whether to issue a warrant.

Despite all these safeguards, and despite the best efforts of police to comply, defective warrants are frequently issued. Evidence seized under the authority of such warrants is obtained in violation of the Fourth Amendment and, under the "exclusionary rule", is routinely suppressed at trial.

The result is that otherwise strong cases are often lost because crucial evidence cannot be introduced.

The exclusionary rule has applied in federal criminal cases since 1914 and in all state criminal trials since 1961. The primary rationale for the rule is that by suppressing evidence that is illegally seized it is thought that police will be deterred from making unreasonable searches and will have more respect for citizens' privacy. At issue in the cases now before the Supreme Court is whether the rule can have any deterrent effect on police who act reasonably and in good faith, and who do everything that could be expected of them, including obtaining a search warrant. The question is whether the exclusionary rule should be applied mechanically and absolutely, or whether a "good faith" exception should be created.

The arguments for creating the exception are that the cost of excluding relevant evidence in criminal trials is too high, that too many criminals are going free on "technicalities", and that the rule cannot serve any deterrent effect when the police are not guilty of any misconduct. The arguments against creating the exception are that the rule really does make the police and the judges and magistrates who issue warrants more careful, that it keeps the police from casually invading citizens' reasonable expectations of privacy in their homes and elsewhere, and that relatively few cases are actually dismissed because of application of the rule.

Both of the cases that were argued before the Supreme Court last week involved police searches based on defective warrants. In Massachusetts v. Sheppard, a magistrate signed and the police used a form warrant for drug searches to obtain evidence from a murder suspect's home. The suspect was convicted on the basis of the evidence, but the state's highest court overturned the conviction, saying that the evidence should have been suppressed because the warrant did not properly describe the items to be seized. A new trial was ordered.

In the companion case, United States v. Leon, a federal trial judge in California suppressed evidence of drugs seized by police who obtained a warrant from a state judge on the basis of information from a caller's tip. The judge ruled that the warrant was not based on adequate "probable cause". The Ninth Circuit Court of Appeals agreed.

EHH:ojb
J2/063

SJR 9 TITLE & SPONSOR SUMMARY 09:37 3/05/84 PAGE 1 OF 2

AMENDED TITLE:
RATIFYING AN AMENDMENT TO THE UNITED STATES CONSTITUTION
TO PROVIDE FOR REPRESENTATION OF THE DISTRICT OF
COLUMBIA IN THE CONGRESS

PRIME SPONSOR: FISCHER,V. .
CO-SPONSORS:
CURRENT STATUS: 1/21/83 IN (S) JUDICIARY

SJR 9 SENATE ACTION 09:37 3/05/84 PAGE 2 OF 2

DATE	SEQ	PAGE	LEGISLATIVE ACTION
01/21/83	01	0050	FIRST READING -- COMMITTEE REPORTS JUDICIARY RULES

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building of space station

Defense Secretary Caspar Weinberger and CIA Directer William Casey have opposed any major commitment to space-station funding because they fear it could draw money from their own space programs, officials said.

Military and intelligence agencies are concerned that they would have to share the space station with civilian agencies such as NASA and sometimes with the astronauts of other countries. The Pentagon would prefer to operate on its own in space.

Officials on both sides of the argument say that, from the point of view of space-hardware development, a manned space station is the next logical step. Other major steps to follow, such as establishing a base on the moon or sending a man to Mars, are usually seen as taking off from a space station rather than from Earth.

A recent study by the Office of Technology Assessment, the technical arm of Congress, provided another motive for building the station. That report said the Soviet Union is embarked on an ambitious space-station program, and the Soviets are slowly but methodically pulling ahead of the United States in creating a permanent human presence in space. The report pointed out that the United States lacks such a national goal for space.

Beggs said initial funding for the space station could amount to $100 million in the fiscal 1985 budget, but the funding would increase rapidly.

The Associated Press

veside services for her husband, hot dow. in Honduras near the n and Robert Schwab. The burial

Supreme Court seeks to clarify evidence rule

By SPENCER SHERMAN
United Press International

WASHINGTON — The Supreme Court renewed its quest Tuesday to clarify the so-called exclusionary rule, which bans use of evidence that is illegally obtained by police, and to decide if it should make "good faith" exceptions.

The Reagan administration long has urged the nation's highest court to review and relax the court-made rule of evidence, which prosecutors complain lets the guilty go free on technicalities. Prosecutors want the justices to make exceptions for cases in which police acted in "good faith" — thinking they were within the law.

The so-called "good faith" exception, however, has been decried by civil libertarians who contend it would reward illegal conduct by police, allowing them to illegally search for evidence and plead ignorance of the law as an excuse.

The court looked into the issue last session but was unable to reach a decision.

It heard arguments on two cases Tuesday — both involving searches made by police who thought they had valid search warrants but later saw the warrants declared improper. Rulings on the issue are expected by early summer.

Massachusetts Assistant Attorney General Barbara Smith called the exclusionary rule "inflexible" and "mechanistic," arguing it should not apply to officers who acted "in reasonable good faith" when they execute search warrants.

She was backed by U.S. Solicitor General Rex Lee.

But lawyer Barry Tarlow, arguing in favor of the rule in a California drug case, rejected claims it had a major impact on crime fighting and said less than 1 percent of all criminal cases in California are affected by the rule.

In the California case, an appeals court ruled that a judge who issued a warrant to search the Burbank home of Alberto Leon did not have sufficient "probable cause" to believe a crime had occurred.

The state argued that evidence gathered in the search should not be subjected to the exclusionary rule because the judge had issued a warrant without sufficient evidence to do so.

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interview

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smoked a cigarette," Rongey added.

The gum won't get rid of the desire for a cigarette, but it is intended to help people who give up cigarettes abruptly, or "cold turkey."

Both the FDA and the company said that an organized program may consist of a physician's prescribing the gum for one patient and monitoring that smoker's progress.

The FDA's labeling on the drug said smokers with a high physical type of dependence on nicotine are the ones

Dear Susanne.

This should assist ... Did you get the briefs in Tarlow's case? It was recently argued to the Supreme Court. in U.S. v. Leon Supreme Ct Case # 82-1771a. Hope all goes well... Walt.

(Mr Tarlow is to be found at 9119 Sunset Blvd L.A. Ca 90069

IN DEFENSE OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

*by John Wesley Hall, Jr.**

A REPLY TO ATTORNEY GENERAL SMITH

The Reagan Administration has mounted a legislative, judicial, and public relations attack on the Fourth Amendment exclusionary rule. The Administration earnestly seeks implementation of a "good faith exception" to the exclusionary rule which, if adopted, would make criminal evidence apparently illegally seized in violation of the Fourth Amendment admissible into evidence in a criminal trial if the seizing officer was acting in a good faith belief he was following the law and his violation was merely a technical one.

On the legislative front, the Administration proposes a new section to the federal criminal code which adopts a subjective good faith exception.[1]

On the judicial front, the Administration, buoyed by its success in the former Fifth Circuit *en banc* in *United States v. Williams*,[2] is now seeking to establish good faith exception beachheads on the exclusionary rule at every turn in the courts. It participated as *amicus curiae* both in briefs and oral argument in the abortive good faith exception case of the 1982 Term, *Illinois v. Gates*,[3] where the Supreme Court wisely realized that, factually and legally, *Gates* was not the case to decide whether a blanket good faith exception should be adopted.[4]

Now, the Administration has moved to the public relations front to promote the good faith exception with Attorney General William French Smith as its chief spokesman.[5] The Attorney General has

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** Mr. Hall is a sole practitioner in Little Rock, Arkansas. He is the author of Search and Seizure published in 1982 by Lawyers Cooperative Publishing Co. He is a Fellow in the American Board of Criminal Lawyers and is certified as a Criminal Trial Advocate by the National Board of Trial Advocacy. He is a Sustaining Member of NACDL.*

[1] Proposed 18 U.S.C.§ 3505 *quoted* in the text following note 54, *infra.*

[2] 622 F.2d 830 (5th Cir. 1980), *cert. den.* 449 U.S. 1127.

[3] 103 S.Ct. 2317 (1983). In inexplicably ordering reargument, the Supreme Court directed the parties to brief the issue of whether the "good faith exception" should be adopted. *Illinois v. Gates*, 103 S.Ct. 436 (1982).

[4] *Illinois v. Gates, supra*, 103 S.Ct. at 2321. The Court has, however, recently granted certiorari in four good faith cases: *Michigan v. Clifford*, 32 Cr.L. 4169 (No. 82-357, Jan. 24, 1983); *Massachusetts v. Sheppard*, 33 Cr.L. 4093 (No. 82-963, June 27, 1983); *Colorado v. Quintero*, 33 Cr.L. 4094 (No. 82-1711, June 27, 1983); *United States v. Leon*, 33 Cr.L. 4094 (No. 82-1771, June 27, 1983).

[5] FBI Director William Webster also has publicly appeared as a spokesman with Attorney General Smith.

spoken on this on nationwide television, and he has been making speeches around the country decrying the alleged societal evils of the Fourth Amendment exclusionary rule. In an effort to persuade lawyers, his speech has now begun appearing in bar journals under the title "The Exlcusionary Rule 'BE DAMNED.'"

It is not legal argument. It is, rather, the latest chapter of the running debate on the Politics of Crime, circa 1980's. The Attorney General goes to great lengths to accuse the Fourth Amendment exclusionary rule of contributing to the imbalance between the lawless and the rights of society. He concludes by touting the Reagan Administration's proposed legislation to create a "good faith exception" to the exclusionary rule where good faith technical violations of the Fourth Amendment do not require evidentiary exclusion. As is typical of this Administration, Attorney General Smith, its chief law enforcement officer, makes sweeping generalizations about the exclusionary rule and the good faith exception with simple solutions to the so-called "problems." In generalizing, however, the Attorney General makes some glaring legal errors and unsupported factual assumptions about the exclusionary rule and the good faith exception and even the practical necessity of a broad good faith exception under existing law.

I read the Attorney General's remarks in my own bar journal,[6] and I was concerned that the nation's chief law enforcement officer could make such legally specious comments with impunity. I feel constrained to respond and enter the fray. After considering different avenues to pursue this response, I settled on a point-by-point rebuttal which, I believe, makes the Attorney General's position constitutionally suspect at best and legally fortifies the exclusionary rule as a part of our constitutional jurisprudence.

A summary of the Administration's position

In this speech, Attorney General Smith first states that the public believes that the courts are not doing their part to curb the growth of crime. He adds that our historic concern for the rights of the accused have "overwhelm[ed] the even more historic first principle of government: Providing for the defense of society." Further, he notes that "more and more Americans recognize that an imbalance has arisen in the struggle between law and the lawless," and one weight in that imbalance is the exclusionary rule.

Historically, he notes that the exclusionary rule is a "judicially created rule of law" not even mentioned in the Fourth Amendment to the United States Constitution or anywhere else in the Constitution, the Bill of Rights, or the federal criminal code. Since it was recognized by the Supreme Court in 1914 in *Weeks v. United States,*[7] it "has been criticized from its inception." The Attorney General does not mention that *Weeks* recognized the exclusionary rule as a *personal right.*[8] He says that the states were not fully convinced of the value of the exclusionary rule because, by the time the Court first decided that the Fourth Amendment was not incorporated into the due process clause of the Fourteenth Amendment in *Wolf v. Colorado*[9] in 1949, only sixteen states adopted the exclusionary rule while thirty-one refused to adopt it.[10] The Supreme Court finally made the exclusionary rule binding on the states in *Mapp v. Ohio*[11] in 1961. He says that the effect of the exclusionary rule is that, quoting Justice Cardozo, when Cardozo was a judge on the New York Court of Appeals, "The criminal is to go free because the constable has blundered."[12] No matter how technical a violation of the Fourth Amendment, the evidence is suppressed. "There is no weighing by the court of the seriousness of the crime or the significance of the evidence. Even a good faith attempt by a law enforcement officer to ensure the legality of the search will not – if a technical flaw is uncovered – save the evidence of crime."

How does the Attorney General propose to protect the citizenry from the criminal hiding behind a badge who is not to be deterred by anything?

The Attorney General pays lip service to two of the arguments in favor of the exclusionary rule, deterrence of unlawful police conduct and the preservation of judicial integrity. No mention is made of the personal right rationale of the exclusionary rule. He flatly states that the deterrence rationale has no "empirical evidence" to support it. The judicial integrity rationale is turned inside out by his stating that there is no judicial integrity when the guilty go free.

In support of his position, the Attorney General states that "[t]he rule is invoked upon the most technical of violations – even when the officer could not reasonably have been expected to do otherwise." In support of this proposition, he cites, with some justification, the bizarre judicial circumlocution of *Robbins v. California*[13] and *Belton v. New York*[14] in 1981 where the Supreme Court held on somewhat similar probable cause that the trunk search in *Robbins* should be suppressed and the search incident of the passenger compartment in *Belton* should be sustained, while in 1982 the Court overruled

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[6] Smith, *The Exclusionary Rule "BE DAMNED,"* 17 Ark. Law. 112 (1983).

[7] 232 U.S. 383 (1914).
The exclusionary rule actually was first applied in the state courts in *State v. Slamon,* 50 A. 1097 (Vt. 1901), and *State v. Sheridan,* 96 N.W. 730 (Iowa 1903).

[8] *Weeks v. United States, supra,* 232 U.S. at 392-94 & 398. *See* text accompanying notes 45-50, *infra.*

[9] 338 U.S. 25 (1949), *overruled in Mapp v. Ohio,* 367 U.S. 643 (1961).

[10] *See Wolf v. Colorado, supra,* at 33-39.

[11] 367 U.S. 643 (1961).

[12] *People v. Defore,* 242 N.Y. 13, 150 N.E. 585, 587 (1926), *cert. den.* 270 U.S. 657 (denying suppression of the evidence).

[13] 453 U.S. 420 (1981), *overruled in United States v. Ross,* 456 U.S. 798 (1982).

[14] 453 U.S. 454 (1981).

Robbins in *United States v. Ross*[15] holding that probable cause to search a vehicle extends throughout the vehicle wherever the probable cause might take the officer.

The Attorney General recognizes the 1979 report of the General Accounting Office of the U.S. Congress which found that the exclusionary rule was judicially invoked in only 1.3% of federal criminal cases and figured in the declining of prosecution in only 0.4% of federal criminal cases. He says, however, that these figures are misleading because the percentages are higher in some larger districts unstudied by GAO. Also, he says the prosecutorial and judicial (trial and appellate) workload is unnecessarily high because of Fourth Amendment issues.

He finds an effective civil remedy under the civil rights acts[16] as a result of the broadening of this civil remedy by the Supreme Court.[17]

Finally, he says that the Administration has a remedy for the "absurd consequence [of the exclusionary rule] of releasing the guilty" – its proposed good faith exception legislation[18] which is already the law in the Fifth and Eleventh Circuits as a result of *United States v. Williams*.[19] This proposal, he says, when added to other unidentified Administration proposals, "would . . . greatly strengthen the ability of government to protect the law abiding – without impairing our Constitutional liberties."

What is the Fourth Amendment?

The Fourth Amendment states as follows: "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."[20]

The history of the Fourth Amendment shows that the first clause provides a general protection against unreasonable searches and seizures and the second clause dictates the requirements of search warrants.[21]

The quantity and complexity of Fourth Amendment litigation has become mind boggling. Nowhere in the law have so few words generated so much litigation and confusion. After over twenty years of intense litigation since *Mapp v. Ohio*[22] made the exclusionary rule binding on the states, much of the body of Fourth Amendment law is now settled. While there are still several areas of the law of search and seizure uncharted by the Supreme Court, the settled principles of search and seizure law have made the Supreme Court's decisions over the last several years somewhat predictable, at least to Fourth Amendment lawyers.

The Fourth Amendment was intended to protect ALL citizens, both law-abiding and the lawless, from governmental intrusions.

Why do we have a prohibition against unreasonable searches and seizures?

The history of the Fourth Amendment is fascinating. It is rooted in free speech, taxation, smuggling, corruption, litigation, and politics.[23]

In England, the power to search developed soon after the invention of the printing press made it possible for malcontents to subject the Crown to widespread criticism. General warrants and writs of assistance were issued by the Crown to all sorts of people (not even police officers) to search private property to seize allegedly libelous and seditious publications. The infamous Star Chamber issued and enforced general warrants. Somewhat later, the power of search and seizure was used to enforce the tax laws and collect import duties.

The general warrant and writ of assistance came to the colonies to restrict American foreign trade. It turned out, however, that they were used more vigorously here than in England.

The general warrant first succumbed to a judicial attack in England in 1765 in *Entick v. Carrington*[24] which held invalid a general search warrant to seize papers. Meanwhile, the various states adopted their own protections against unreasonable searches and seizures just before and after the Declaration of Independence. The Constitutional Convention omitted a Bill of Rights, but there was an understanding one would be shortly referred to the states. This contributed to the delay in adoption of the Constitution. The Bill of Rights was finally sent to the states and adopted in 1792.

The Attorney General seems to attribute the Bill of Rights to "our historical concern for the rights of the accused" and that "we have needlessly allowed [this concern] to overwhelm the even more historic first principle of government:

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[15] 456 U.S. 798 (1982).

[16] *See* 42 U.S.C. § 1983.

[17] *Citing Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *See also Owen v. City of Independence*, 445 U.S. 622 (1980).

[18] *Quoted* in the text following note 54, *infra*.

[19] *See* note 2, *supra*.

[20] The Attorney General makes a Freudian slip in his speech – he omits the probable cause and warrant clause when he quotes us the Fourth Amendment in this speech. The significance of this omission will be apparent below in understanding the Administration's proposed "good faith exception" which could very well be unconstitutional.

[21] Lasson, note 23, *infra*, at 102-03.

[22] 367 U.S. 643 (1961).

[23] This brief account of the history of the Fourth Amendment is summarized from Hall, Search and Seizure §§ 1:11-1:15 (1982) which summarized the two significant works on the history of the Fourth Amendment: Lasson, The History and Development of the Fourth Amendment to the Constitution of the United States ch. 1-3 (1937); Landynski, Search and Seizure and the Supreme Court ch. 1 (1966). *See also Marcus v. Search Warrants of Property*, 367 U.S. 717, 724-29 (1961); Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather Than An "Imperial Proposition"?*, 16 Creighton L. Rev. 565, 571-79 (1983).
I apologize to the reader for occasionally citing myself – it is easier to do so than restate propositions and recite many other authorities.

[24] 19 Howell's St. Tr. 1029 (1765).

Providing for the defense of society." The Fourth Amendment, however, was intended to protect all citizens, both the law-abiding and the lawless, from governmental intrusions.[25] After all, it does refer to "The right of the *people* to be secure . . ."; not just the criminal element. Indeed, the entire body of the law of administrative searches and inspections developed from a need to enforce civil law rather than the criminal law.

The Attorney General cannot so easily dismiss our right to be free from unreasonable searches and seizures as a mere protection for the criminal accused. It protects all of us.

The exclusionary rule as a remedy for a Fourth Amendment violation

The Attorney General observes that "[t]he exclusionary rule is a judicially created rule of law" that is "not to be found anywhere in the Constitution, the Bill of Rights, or the federal criminal code. It was also not inherited from English law."

True. But the entire common law and the law of equity is based on judicially created remedies. The exclusionary rule had not been found necessary by the time the Fourth Amendment was ratified because an after-the-fact remedy was not yet required.[26] How else do we enforce fundamental constitutional rights in our present system of justice so the Fourth Amendment will not become a mere "form of words?"[27] After all, it is no longer the Eighteenth Century. The *Weeks* court made this absolutely clear nearly seventy years ago:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great priniciples established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land . . . In *Adams v. New York*, 192 U.S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. *Boyd Case*, 116 U.S. 616. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[28]

What is a "reasonable, good faith belief?

As I read Blackstone, I submit that he would have approved of the exclusionary rule had it been thought of in his time.[29]

Many alternatives to the exclusionary rule have been proposed in the last twenty years, the most notable and influential being in Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics.*[30] *Bivens* held there was a federal cause of action against federal officers for Fourth Amendment violations. Chief Justice Burger used *Bivens* as a forum to restate his longstanding views[31] that the exclusionary rule should be reformulated or replaced outright.[32] He generally stated five alternatives: (a) waiver of sovereign immunity for search and seizure torts; (b) creation of a cause of action for search and seizure torts; (c) creation of a tribunal to hear search and seizure tort claims; (d) a statutory remedy in lieu of evidentiary exclusion; (e) general provisions prohibiting the exclusion of evidence.[33] He also spoke approvingly of the then proposed ALI Model Code of Pre-arraignment Procedure "Substantiality Test."[34] The ALI Substantiality Test is a form of the good faith exception which requires that the violation of the right against unreasonable searches be "substantial [*i.e.*, "gross, willful, and prejudicial to the accused"] or . . . otherwise required by the Constitution. . . ."[35] Nevertheless, Chief Justice Burger did concede "the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful

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[25] *See, e.g., Weeks v. United States*, 232 U.S. 383, 395 (1914); *Agnello v. United States*, 269 U.S. 20, 32 (1925); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948); *Miller v. United States*, 357 U.S. 301, 314 (1958); *Ker v. California*, 374 U.S. 23, 33 (1963).

[26] Kamisar, note 23, *supra*, at 571-79.

[27] *Mapp v. Ohio*, *supra*, at 655.

[28] *Weeks v. United States*, *supra*, at 394-95.

[29] *See* 1 Blackstone, Commentaries *244-45: "For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies." (emphasis in original).

[30] 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

[31] *See* Burger, *Who Will Watch the Watchman?*, 14 Am. U.L. Rev. 1 (1964).

[32] *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, *supra*, at 413-19 (Burger, C.J., dissenting).

[33] *Id.* at 422-23 (Burger, C.J., dissenting).

[34] *Id.* at 419 (Burger, C.J., dissenting). *See* ALI Model Code of Pre-arraignment Procedure § SS 290.2 (Official Draft 1975).

[35] ALI Model Code of Pre-arraignment Procedure § SS 290.2(3) (Official Draft 1975).

conduct by government officials."[36]

The exclusionary rule does not always free the guilty

The Attorney General states almost as fact that the guilty go free when evidence is excluded because the exclusionary rule is invoked. This is not always so.

Evidence illegally seized can be, of course, powerful evidence of guilt. Its evidentiary reliability is usually unquestioned. When illegally seized evidence is excluded, the case proceeds from there. In possessory offenses, such as drug, gambling, and weapons cases, suppression of the evidence could very well result in a dismissal of charges. In other types of cases, however, the result of the criminal case could very well be unchanged. Take, for example, *Coolidge v. New Hampshire*,[37] mentioned by the Attorney General for another proposition in his speech. *Coolidge* involved probably the most heinous murder in New Hampshire history. After Coolidge's conviction, evidence seized from his house and car was suppressed by the Supreme Court as a result of illegal searches, and his conviction was reversed. On retrial, Coolidge was convicted without the illegally seized evidence. Consider also *Mincey v. Arizona*[38] which involved the killing of a police officer during a drug raid. Notwithstanding eyewitnesses to the occurrence, the police felt compelled to subject the defendant's house to an intensive four-day search, and the evidence so obtained was used against him. The Court suppressed the search, and Mincey stood trial again and was convicted.[39]

The Attorney General makes note of the General Accounting Office report that the exclusionary rule was actually invoked in only 1.3% of filed federal criminal cases and that only 0.4% of declined cases were declined for prosecution because of Fourth Amendment problems. He finds this "exceedingly weak support for the exclusionary rule's continuation." He further counters this statistic by challenging its true effect because 33% of all defendants *going to trial* file suppression motions (which account for 55% of all motions filed) which waste the time of courts and prosecutors and because suppression motions are made in 20% of all cases in some larger districts. He also notes that a 1971 state court study in three branches of the Chicago Circuit Court reported that Fourth Amendment suppression motions *in only possessory offenses* were successful 30% of the time.

The most usual failures of the police to comply with the requirements of the Fourth Amendment are in possessory offenses. It is here that the exclusionary rule has its greatest impact because the entire case may very well turn on the legality of a search and seizure or an arrest or both.

The Reagan Administration is seeking to establish good faith exception beachheads on the exclusionary rule at every turn in the courts.

But, Mr. Attorney General, let's not ignore the fact that a large number of street encounters result in illegal searches and arrests where there is no pretext of a successful prosecution. The police succeed in removing a small quantity of drugs or a gun from circulation. And who is there to complain; the dope dealer illegally stripped of his cache of drugs? Hardly. Only when the police get serious and decide to prosecute do they usually have to justify their allegedly illegal conduct.

Finally, it should not be lost on anyone what the Attorney General's figures really mean: In urban areas the police are more likely to have violated the Fourth Amendment, and he is tacitly admitting that the police are not going to comply with the Fourth Amendment in a substantial number of cases. The fact that some classes of people are more likely to be subjected to an illegal search and many police will invariably violate civil liberties should be a compelling reason to retain the exclusionary rule, not discard it. The Attorney General's argument just does not follow.

Judicial economy is no ground to modify the exclusionary rule

The Goddess of Justice is not a Cost Accountant. The criminal courts exist to resolve disputes between government and its citizens over whether criminal laws were violated and whether the Constitution was violated in getting the defendant before the bar of the court. The fact that the Administration seriously argues that the courts have better things to do than determine whether the government has violated the rights of its citizens is incredible.

The deterrence rationale is not a failure

The Supreme Court now considers whether the police will be deterred from Fourth Amendment violations in determining whether to order exclusion in a particular case. In *United States v. Calandra*,[40] Justice Powell wrote for six members of the Court:

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

"'[T]he ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late.' *Linkletter v. Walker*, 381 U.S. 618, 637 (1965). Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

"'The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.' *Elkins v. United States*, 364 U.S. 206, 217 (1960).

"... In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a

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[36] *Bivens, supra*, at 415 (Burger, C.J., dissenting).

[37] 403 U.S. 443 (1971).

[38] 437 U.S. 385 (1978).

[39] *See State v. Mincey*, 130 Ariz. 389, 636 P.2d 637 (1981), *cert. den.* 102 S.Ct. 1638 (1982).

[40] 414 U.S. 338 (1974).

personal constitutional right of the party aggrieved.

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement."[41]

There is a justifiable belief that the deterrence rationale was not even considered when the exclusionary rule was fashioned in *Weeks*.[42]

Without even getting into the argument over the true purpose of the exclusionary rule,[43] one cannot logically say that the exclusionary rule does not ever deter unlawful police conduct. A professional police officer strives to make sound cases in order to make convictions. If he has too many invalid arrests or searches, his personnel record will show it and promotions may not follow. If he develops a reputation as a liar or one who "plays fast and loose" with the Fourth Amendment, judges will not believe him at suppression hearings or even court trials on the merits of a criminal case. If he is more concerned with clearing outstanding cases by arrest and has no concern whether he convicts anyone, then the deterrence rationale simply will not be effective as to him. And what if he simply chooses not to be deterred at all?

I, for one, refuse to believe that professional law enforcement officers *as a group* are so devious or stupid that the deterrence rationale cannot have an effect on the way they do their job. It is human nature to succeed in one's profession and do well.

But, some want to do well at the expense of others. They measure success by arrests and not convictions. They blame the courts for being lenient when their constitutional errors must be accounted for. Those of us in the search and seizure bar have all encountered law enforcement officers who will go to any length to make a case against someone who they believe deserves to be convicted. Even the threat of a perjury conviction does not deter them. Obviously, the exclusionary rule does not deter these officers either. How, then, Mr. Attorney General, do you propose to protect the citizenry from the criminal hiding behind a badge who is not to be deterred by anything? The only protection is evidentiary exclusion.

It has been said that the empirical data on the administration of the exclusionary rule does not support the conclusion that the rule deters unlawful police conduct.[44] Ideally, the Fourth Amendment itself should deter Fourth Amendment violations, but it doesn't, and the courts have done a lot to promote Fourth Amendment violations by not taking suppression motions seriously. The Fourth Amendment is violated every day in every major jurisdiction. What other remedy of the exclusionary rule is effective to limit police conduct *before it occurs?* I don't see one yet.

The rights of the accused have "overwhelmed the even more historic first principle of government: providing for the defense of society."
– Attorney General Smith

What about the personal right rationale?

Weeks considered exclusion of evidence because of a Fourth Amendment violation to be a matter of personal right.[45] While the present Supreme Court has ignored this rationale for exclusion in favor of the deterrence rationale,[46] it has been forcefully argued by some influential commentators that *Weeks'* original understanding still has currency and constitutional validity.[47]

These commentators find the *Weeks'* personal right theory as "simply another name for judicial review" of executive action[48] under *Marberry v. Madison*.[49]

The personal right rationale eliminates the need to consider the sometimes imponderable question of whether invoking the rule in a particular case would serve to deter the police from future violations of the Fourth Amendment.

The time is ripe for a reemergence of the personal right rationale. Indeed, on June 29 the Oregon Supreme Court applied the personal right theory in excluding evidence.[50]

A civil remedy is ineffective

The Attorney General urges aggrieved criminal defendants to instead pursue the allegedly expanded civil remedies provided for under 42 U.S.C. § 1983.[51] It is folly to think that a potential civil action by a defendant convicted on illegally obtained evidence has any deterrent or even remedial value at all. As the Attorney General must recognize, the brunt of the civil action will fall on the governmental entity employing the officer, not the officer himself, both in the costs of defense and in paying judgments. Also, the increased use of insurance shifts the cost away from the officer and his employer. Finally, and by no means lastly, it has not been lost on the police that a person they can label "criminal" in a civil trial makes a miserably poor plaintiff. Anyone who has tried

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[41] *Id.* at 347-48 (footnote omitted).

[42] *Id.* at 356-58 (Brennan, J., dissenting).

[43] *See* the following section.

[44] Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).
But see generally Kamisar, note 23, *supra.*

[45] *See* text accompanying note 28, *supra.*

[46] *See United States v. Calandra*, note 41, *supra.*

[47] Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251 (1974); Kamisar, note 23, *supra.*

[48] Shrock & Welsch, note 47, *supra*, at 324-26, 335-66; Kamisar, note 23, *supra*, at 590-97.

[49] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

[50] *State v. Davis*, Ore.S.Ct. (No. 28881, June 29, 1983) (NLJ, 7-18-83).

[51] *See* cases cited in note 17, *supra.*

a § 1983 illegal search action where evidence of crime was found can vouch for that. The police attitude to civil actions can best be summed up in an exchange I had with a police officer[52]: "If you don't like it, sue me. You can't get somethin' from nothin'." To this I replied, "Besides, you're insured, right?" He just smiled.

So, Mr. Attorney General, how does a civil action provide any deterrence or any effective remedy?

The Administration's proposed good faith exception

The Attorney General proposes in his speech that the exclusionary rule be eliminated[53] in favor of a good faith exception which would allow the admission of evidence whenever an officer conducts a search with a warrant or, in the case of warrantless searches, with a reasonable good faith belief he was acting in accordance with the Fourth Amendment.

The good faith exception is almost unworkable in its practical application and it has some serious constitutional problems if not properly administered. As a practical matter, these problems must be resolved on a case-by-case basis before a broad good faith exception can be adopted by statute or judicial decision.

The good faith exception takes two forms: subjective good faith and objective good faith. One cannot tell exactly which one the Attorney General espouses. What has been said publicly does not always square with the language of the proposal. At times, the Administration confuses the two, and the distinction is crucial as to how the exception will be administered and applied.

The Administration's proposal is said to adopt the result in *United States v. Williams*.[54] *Williams* is clear as to its holding, but the Administration's proposal is as inscrutable as the Fourth Amendment itself. Proposed 18 U.S.C. § 3505 provides:

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation." What is a "reasonable, good faith belief?" Reasonable by what standard and according to whom? How will the good faith exception be administered? Is it constitutional?

Except as specifically provided by statute, evidence which is obtained as a result of search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

—Proposed 18 U.S.C. 3505

The good faith exception is unworkable

Professor LaFave has identified four adverse consequences which will result from the good faith exception applicable to the Administration's proposal.[55]

First, the good faith exception, to quote Justice Brennan, will stop development of Fourth Amendment doctrine dead in its tracks because, without clear precedent, no officer would not be acting in good faith.[56]

Second, the suppression judge will have to "probe the subjective knowledge" of the searching officers.[57] That is nearly impossible. Also, the government's case will be the officer's "self-serving and generally uncontradicted testimony."

I would add a further comment: the good faith exception is an open invitation to police perjury. To a good many police officers, the end justifies the means, in this "often competitive enterprise of ferreting out crime."[58] They could fabricate their good faith belief in fact or law from whole cloth, and no one could contradict it. After all, isn't a little perjury preferable to letting a criminal loose on the streets, especially if you can't get caught at it?[59]

Third, adoption of the good faith exception "would likely result in a distinct pro-police (or, if you prefer, anti-Fourth Amendment) bias in suppression rulings."[60] "'[W]hat it means in practice is that appellate courts defer to the trial courts and

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[52] This was during the course of a search and seizure of a client's business property, and I suggested that a later, more convenient production of the items sought would not leave the obvious appearance that the officers were trying to harm the client's business.

[53] Sometimes he says "modified."

[54] *See* text accompanying note 71, *infra*.

[55] LaFave, *The Fourth Amendment In an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. Pitt. L. Rev. 307, 354-59 (1982). This article contains an excellent discussion of the good faith exception. *Id.* at 333-59.

[56] *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).

[57] *Id.* at 553 (Brennan, J., dissenting).

[58] *Johnson v. United States*, 333 U.S. 10, 14 (1948).

[59] Then who is the bigger criminal?
In "Prince of the City," a story about police corruption in a special narcotics investigation unit, the U.S. Attorney's Office is questioning Det. Ralph Alvarez about whether or not he ever perjured himself to secure a drug conviction. Alvarez said, "Yeah. I've committed perjury about twenty times. You guys don't understand the system. You want a conviction, but you got these stupid search and seizure laws."

[60] LaFave, note 55, *supra*, at 357.

trial courts defer to the police.' "[61]

Fourth, application of the good faith exception legalizes the challenged conduct in the future.[62] The police will also then "'push to the limit' any authority they are given by the courts."[63]

Litigating the officer's subjective state of mind is nearly impossible. The Supreme Court rejected that very argument in declining to adopt target standing in *Rakas v. Illinois*[64] because of the "administrative burdens" in determining who the officer considered a "target."[65]

Can you imagine how far afield a suppression hearing could go if the officer's state of mind would suddenly be relevant? Would the *officer's* overall suppression and conviction record then become relevant to his claim he acted in good faith when he violates the Fourth Amendment? (How about the magistrate's record or the officer's knowledge that the magistrate has a bad record in Fourth Amendment cases?) The one hour suppression hearing may become an all day affair.

In 1982 in *State v. White,*[66] the Washington Supreme Court found the good faith exception unworkable because of this subjectivity problem which imposed an unnecessary and unworkable burden on the courts.[67]

Some of the proposed good faith exception statutes require a finding of good faith if the magistrate issued a warrant. What about the subjective good faith of the magistrate? What if the magistrate is not "neutral and detached," but is a mere "rubber-stamp" for the police? Can any lazy or incompetent judge turn a bad search into a good one by giving it his or her blessing?[68] Can a judge make a good search bad by issuing a defective warrant?[69] (Warrants are usually written and provided by the police. Surely the courts and legislatures know that.)

The good faith exception is an open invitation to police perjury.

The good faith exception is undefinable

In its broad sense, the good faith exception is undefinable. For any form of good faith exception to be recognized and reasonably administered, it must be on a case-by-case basis on the facts of the cases being decided. If there will be no deterrence in a particular situation, we can analyze it and see how and why. To adopt a good faith exception by shotgunning the exclusionary rule, we have no way of knowing whether deterrence is involved in any particular type of situation until it arises and the officer testifies about the occurrence.[70]

An objective good faith exception developed realistically on a case-by-case basis has some limited appeal. Then, it would conceptually make sense. The former Fifth Circuit's objective good faith formulation in *United States v. Williams* requires that the officer's good faith conduct "must be grounded in an objective reasonableness" and "must therefore be based on articulatable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully."[71] This may be narrow enough to satisfy the deterrence rationale.[72] The Administration's proposal ignores this important requirement. Under its proposal, however, the officer's own belief (and, hence, his state of mind) is determinative. LaFave notes, however, that existing

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[61] *Id. quoting* Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 394 (1974). Generally, factual determinations of the suppression judge are not reversed unless clearly erroneous. If there is a conflict in the facts, the judge's findings are seldom overturned.

[62] *See Terry v. Ohio,* 392 U.S. 1, 13 (1968). *And see* note 80, *infra.*

[63] LaFave, note 55, *supra,* at 359 n. 285 *quoting Brineger v. United States,* 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

[64] 439 U.S. 128 (1978).

[65] *Id.* at 136-37. *See* Hall, Search and Seizure § 23:5, at 654 n. 6 (1982) & 23:2.1, at 287 (Supp. 1983), suggesting that *Rakas* must effectively be overruled if the Supreme Court chooses to adopt the good faith exception.

[66] 97 Wash. 2d 92, 640 P.2d 1061, 1069 & n. 6 (1982).
See also *Jennings v. Superior Court of San Francisco* 104 Cal. App. 3d 50, 163 Cal. Rptr. 391, 395-396 (1980) (good faith exception rejected as contrary to judicial integrity); *Commonwealth v. Sheppard* 387 Mass. 488, 441 N.E.2d 725, (1982), *cert. granted* 33 Cr.L. 4093 (No. 82-963, June 27, 1983) (good faith exception rejected as to magistrate's error even though police conduct proper).

[67] *State v. White, supra,* 640 P.2d at 1069 n. 6: "The officer's 'good faith' in *Michigan v. DeFillippo, supra,* required a showing only that he enforced a presumptively valid statute in the good faith belief it was valid. The incorporation of a subjective good faith test is unworkable in situations not directly addressed by Chief Justice Burger's opinion. For example, what if, as here, a similar statute was invalidated 10 years previously? How about 1 month before the arrest? What if fellow officers know of contrary case law, but the arresting officer does not? How do courts probe the minds of officers to see if their beliefs of validity are truly held? Can a criminal defendant ever successfully refute the officer's assertions of good faith? See Amsterdam, *Perspective on the Fourth Amendment,* 58 Minn. L. Rev. 349, 436-37 (1974). The good faith standard imposes yet another factual burden on the courts in the already complex Fourth Amendment area. *See United States v. Peltier,* 422 U.S. 531, 560-61 (1975) (Brennan, J., dissenting). We believe the objective probable cause standard is the only workable test in cases such as the one before us."

[68] *See* the last sentence of proposed 18 U.S.C. § 3505: "A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

[69] *Compare Commonwealth v. Sheppard,* 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted* 33 Cr.L. 4093 (No. 82-963, June 27, 1983), where the Massachusetts court refused to apply the good faith exception to a magistrate's Fourth Amendment error in the warrant where the police acted properly.

[70] To legislate in advance that the officer is not deterred pretty well answers the question for us, doesn't it?

[71] *United States v. Williams,* note 2, *supra,* 622 F.2d at 841 n. 4A.

[72] *See* LaFave, note 55 *supra,* at 347-48.

Fourth Amendment doctrine already sufficiently deals with that issue.[73] So what possible purpose would the Administration's proposal really serve?

The broad good faith exception is unnecessary

I submit that a good faith exception statute is unnecessary. The Supreme Court already recognizes the good faith exception on a case-by-case basis where good faith is evident and the deterrence rationale would not be served by suppression of the evidence.[74] Why, then, is it necessary to pass a statute with innumerable potential administrative problems? Even *Williams* dodged the crucial question of which side carries the burden of proof on demonstrating good faith or lack of good faith.[75]

In Conclusion

Our system of justice depends upon the rule of law and the premise that government should follow the law when enforcing it. The Fourth Amendment cannot be so hollow a constitutional guarantee that it is relegated to being an ineffective tort remedy when government agents choose to violate the law in the name of law and order.

The Attorney General's claim that our constitutional liberties will not be impaired if the exclusionary rule is done away with under the Administration's proposal just does not square with logic or any form of common understanding.

In a related vein in the ongoing Sixth Amendment good faith "Christian burial speech" case,[76] Circuit Judge Richard Sheppard Arnold of the Eighth Circuit wrote just this year in *Williams v. Nix*[77]:

"It will inevitably be remarked that our opinion focuses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced."[78]

The police often treat the Fourth Amendment like it is "a mere technicality" anyway.[79] If the courts start doing it too, the freedom of all of us has been seriously weakened. Wholesale adoption of the good faith exception will effectively grant the police the right to violate the Fourth Amendment with relative impunity.[80] The last seventy years under the exclusionary rule will be just so much history. If the Fourth Amendment can no longer be relied on as a basic limitation on government to protect us from unreasonable governmental intrusions, what will? I, for one, cannot imagine a society where personal liberty is at the whim of the good faith (real, imagined, or manufactured) of the police.[81] There, none of us will be safe.

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 Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the things or persons to be seized.

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[73] *Id.* at 348, 348-354.

[74] *See, e.g., Michigan v. Tucker*, 417 U.S. 433 (1974) (Fifth Amendment case; confession not excluded where officers violated *Miranda* in good faith); *United States v. Peltier*, 422 U.S. 531 (1975) (Fourth Amendment retroactivity case; search would not be suppressed where officers relief on consistent body of decisional law and administrative regulation later overturned); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (search incident to arrest under presumptively valid ordinance would not be suppressed even where ordinance was later declared invalid).

[75] *United States v. Williams*, note 2, *supra*, at 846-47.
Under existing law, however, the burden would seem to be with the prosecution in a warrantless search and with the defense in a search under a warrant. *See, e.g., United States v. Matlock*, 415 U.S. 164, 174 (1974) (warrantless search) *and Franks v. Delaware*, 438 U.S. 154, 171 (1978) (search under warrant). How the defense will be able to carry the burden when the officer's state of mind is an issue is hard to imagine. *See* text following note 65 *supra*.

[76] *See Brewer v. Williams*, 430 U.S. 387 (1977).

[77] 700 F.2d 1164 (8th Cir. 1983), *cert. granted* 103 S.Ct. 2427.

[78] *Id* 700 F.2d at 1174.

[79] *See* Justice Frankfurter dissenting in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting):
"It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd v. United States*. . . . in *Weeks v. United States* . . ., in *Silverthorne Lumber Co. v. United States* . . ., in *Gouled v. United States* . . ., or one appraoches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper."

[80] When the courts accept illegally seized evidence they induce further such violations of the Fourth Amendment. Amsterdam, note 61, *supra*, at 432.

[81] *See* Learned Hand, Spirit of Liberty 189: "I often wonder whether we do not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."

SJP 18

EP.

Introduction

Origins + purposes of ER.

16th Eng – general warrants / used to restrict freedom of the pubs

US – writs of assistance / utilized by customs officers to enter + search buildings for smuggled good.

1700

Constitutional Convention 1787 did not include a bill of Rts. in its draft.

Bill of Rts. – 4th amendment

unreasonable – not defined

Bill of Rt – limitation on fed govt. only.

1868 – 14th

Purposes – primary

other

LIB III a -
new pres for network

Karla Timpone
Network Admin / Legislative coordinator
temporary 1/2 employee - pd from $ raised thru
bake sales, etc.
not registered w/ APOC
Coordinat'g office of Network
24yrs - WICCA → Exec. Dir during embezzlement, Eva's friend
Ruth discovered w/ auditors assistance
Worked for Sally Smith
Duties - Bill / information
- set up meetings for Coren Pds.
- writing position papers

$1000 per month

Nat Coalition on Domestic Violence
Employee embezzled $ 200,000
(Exec Director)
Coren → 1st VP now acting treasurer
per diem / double and created
double pay / conveyed to Board
Closing W.D.C. office
IRS - $7,000 back taxes

handle checkbooks bookkeeping

Jerry Dubee & Sup.

Internal survey (2yrs ago)
of projected employees 2000 + request for
child care – plans:
1,600 sq. feet – indoor play area
toilets, kitchenette + outdoor
play area.
in process of negotiating w/ MOA for
priorities
Approval from Ct Sup Personnel

Legis – appropriated 9.9 million for planning +
design + renovation of old.
No funds for building

Pat Monro

SB63 - Consent of W.
SR1 ERA
SB86 - Revision of the Violent Crimes Comp.

Child support → High priority foreign judgment vs CSEA

Funding -
CDCSA - increased funding
More $ for prevention

Attgen.
PD
LS ?

Prioritize
no $
alot need

Anne Shumway

Nancy Groseck
Jana Venati
Wendy
Beth
Caren
Anna

filing fee for injunction - Villages
don't have $25.00

Need to find out

① How many cases in the state of Alaska have be thrown out due to unreasonable search and seizure.

102. S. Ct. 2157 (1982) doctrine of
remanded, certiorari. stare decisis.

1) You can already search if:
   a) if search is based on facts that would justify a warrant.

2) seperate acts of entry are lawful if they are required to complete the search.

3)

← Police need some incentive to get a warrant.

(7) " In choosing to search for a warrant on their own assessment of probable cause, police officers lose the protection that a warrant would provide them in an action for damages brought by the individual claiming that the search was unconstitutional.

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: SJR 18 Date on Bill: 2-11-83
Title: Proposing an amendment...to limit...exclusionary rule
Sponsor: Ray
Requestor: Senate State Affairs

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86
Capital				
Operating				
Total	-0-	-0-	-0-	-0-

b. Revenues:

Revenue	

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

No Fiscal Impact

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Francis C. Allan Phone: 269-5691
Division: Alaska State Troopers Date: 2-16-83
Approved by Commissioner: [signature] Date: 2/25/83
Department: Public Safety

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/15/83

SJR 18
POSITION PAPER

This bill does not have a program impact on the Division of Risk Management. The Department of Administration maintains a neutral position on the bill.

John D. Haywood
Director
Division of Risk Management

Lisa Rudd
Commissioner
Department of Administration

1) what is "good faith?"

2) memo liz asking info.

- exclusionary rule is force behind 4th amend.

Court created rule.

(1) Statistics on How many cases in GA have been dismissed because of enforcement of Exclusionary rule made vital evidence inadmissable in the State's case.

(2) Expert on Warrants, searches and seizures, exclusionary rule
   1) Request Duma Fabe, PD's.
   1) Police officer - / Judge
   1) Past D.A.

False imprisonment
False arrest

person to testify who has done this.

Exclusionary rule only protects the guilty in court. (our p[illegible]rts) all of us.

Sex offender Trtmt programs

- ACLU

- Getting department to hold

- People to go through personell files.

appropriate sample.

Judicature
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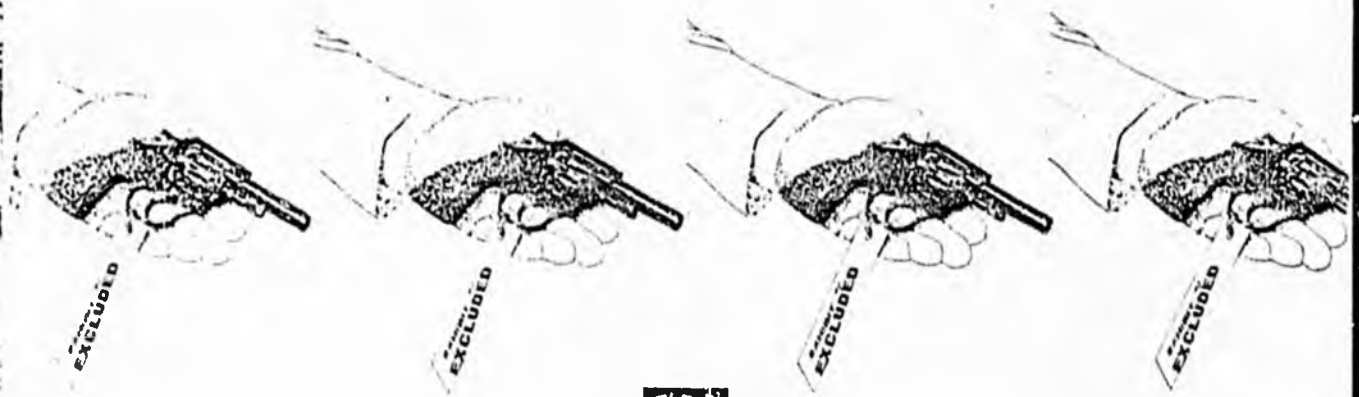

The Exclusionary Rule Debate

An introduction

It was one of the most controversial decisions that the Warren Court ever delivered. Eighteen years ago, the justices announced in Mapp v. Ohio that states must exclude evidence from a criminal trial if the police obtain it through an unconstitutional search. The case inspired a controversy that continues to this day.

During the past year, Judicature invited two authors who hold opposing views on the rule to debate the issue anew. First, Professor Yale Kamisar of the University of Michigan Law School defended the rule on grounds that it protects the integrity of the judiciary "from the taint of partnership in official lawlessness" and prevents government from profiting from its own lawlessness.

In response, U.S. Circuit Judge Malcolm Wilkey said that the rule does not remedy the injustice of an illegal search; it only compounds that injustice. He recommended that all the evidence be admitted at the trial, but that police be punished for their misconduct.

Later two social scientists discussed the question of whether the rule deters police misconduct. Bradley Canon, a professor of political science at the University of Kentucky, said studies so far have not been conclusive. But Steven Schlesinger, an assistant professor of politics at Catholic University, argued that most studies question the rule's effectiveness.

Incidentally, this debate stirred greater reader interest than any other article or series in Judicature in recent years. In fact, continuing interest in the rule and many requests for reprints led us to collect all eight articles in this 80-page volume. We hope you find it useful.

Additional copies are available at $2 each from the American Judicature Society, 200 W. Monroe, Suite 1606, Chicago Illinois 60606. Order # 8560.

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THE DEBATE

CLOSING ARGUMENTS

AN EMPIRICAL FOOTNOTE

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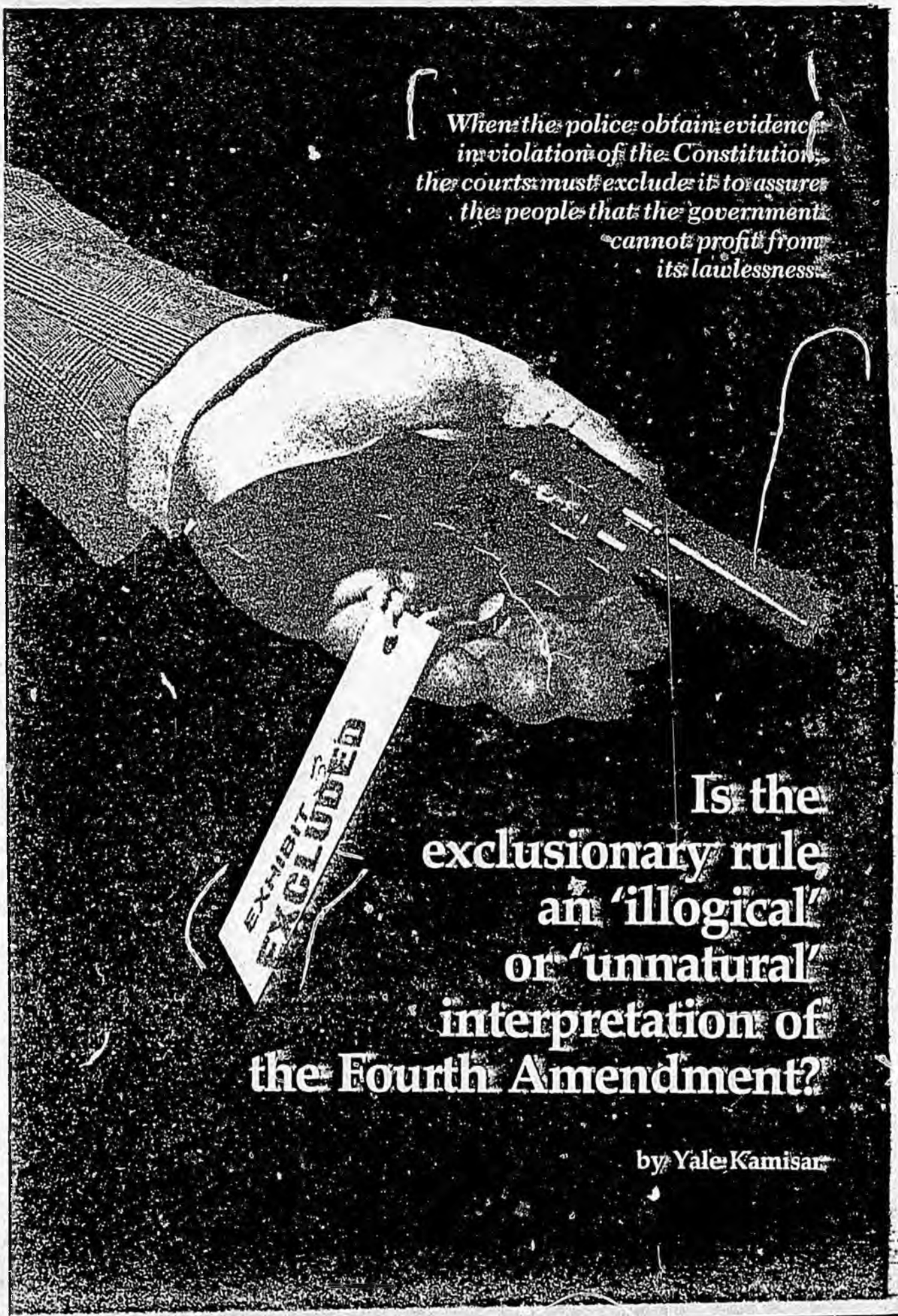
COVER DESIGN
BY MARTHA STEVENS



When the police obtain evidence in violation of the Constitution, the courts must exclude it to assure the people that the government cannot profit from its lawlessness.

Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?

by Yale Kamisar

Editor's note: *Over the years, critics of the exclusionary rule have called it, among other things, an "illogical," "irrational," and "unnatural" interpretation of the Fourth and Fourteenth Amendments.*

Last fall, for example, U.S. Court of Appeals Judge Malcolm Wilkey, writing in the Wall Street Journal, said the rule "is not required by the Constitution. . . . The exclusionary rule is a judge-made rule of evidence which bars 'the use of evidence secured through an illegal search and seizure.' . . . The only excuse offered for this irrational rule is that there is 'no effective alternative' to make the police obey the law."

In an effort to explore this controversial question further, Judicature invited Judge Wilkey and a defender of the rule, Yale Kamisar, to express their views. Judge Wilkey will explain his opposition and suggest alternatives to the rule in a later issue.

More than 50 years have passed since the Supreme Court decided the *Weeks* case,[1] barring the use in federal prosecutions of evidence obtained in violation of the Fourth Amendment, and the *Silverthorne* case,[2] invoking what has come to be known as the "fruit of the poisonous tree" doctrine.[3] The justices who decided those cases would, I think, be quite surprised to learn that some day the value of the exclusionary rule would be measured by—and the very life of the rule might depend on—an empirical evaluation of its efficacy in deterring police misconduct.[4]

These justices were engaged in a less ambitious venture, albeit a most important one. They were interpreting the Fourth Amendment as best they could. As they saw it, the rule—now known as the federal exclusionary rule—rested on "a principled basis rather than an empirical proposition."[5]

The dissenters in *United States v. Calandra* were, I think, plainly right when they maintained that "uppermost in the minds of the framers of the [exclusionary] rule" was not "the rule's possible deterrent effect," but "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people [that] the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[6] The main purpose of this article, then, is to trace, explain and justify the original grounding of the exclusionary rule—what has come to be known as "the imperative of judicial intergrity."[7]

The *Weeks* opinion

As Professor Francis Allen recently reminded us, the *Weeks* opinion "contains no language that expressly justifies the rule by reference to a supposed deterrent effect on

1. Weeks v. United States, 232 U.S. 383 (1914).

2. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)

3. Nardone v. United States, 308 U.S. 338 (1939), refusing to allow the prosecution to avoid an inquiry into its use of information gained by illegal wiretapping, first used the phrase "fruit of the poisonous tree." *See generally* Pitler, *'The Fruit of the Poisonous Tree' Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968).

4. Space does not permit an extensive evaluation of the recent "empirical studies" of the exclusionary rule's effects (if any) on police behavior. But see "Does the exclusionary rule affect police behavior?" on page 70 of this issue.

5. *Cf.* Allen, *The Judicial Quest for Penal Justice. The Warren Court and the Criminal Cases*, 1975 U. ILL.L.F. 518, 536–37 (pointing out that, unlike the Court's understanding in the formative phases of the exclusionary rule's history, in recent years the deterrent function has prevailed as its predominant justification, and that "until the rule rests on [returns to?] a principled basis rather than an empirical proposition," *Mapp* "will remain in a state of unstable equilibrium").

6. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., joined by Douglas and Marshall, JJ., dissenting). *Calandra* held that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from him by violating the Fourth Amendment. *See also*, Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

7. Elkins v. United States, 364 U.S. 206, 222 (1960) (Stewart, J.) (overturning the "silver platter" doctrine), quoted with approval in Mapp v. Ohio, 367 U.S. 643, 656 (1961) (Clark, J.) (imposing the exclusionary rule as to unconstitutionally seized materials on state courts as a matter of Fourteenth Amendment Due Process). *See also* United States v. Calandra, *supra* n. 6.

police officials."[8] Indeed, in the United States Supreme Court, some 35 years were to pass, as Professor Robert McKay has noted, before *Wolf v. Colorado*[9] "introduced the notion of deterrence of official illegality to the debate concerning the wisdom of the exclusionary rule."[10]

As the *Weeks* justices saw it, if a court could not "sanction" a search or seizure before the event—because, for example, the police lacked sufficient cause to make the search or were unable to describe the item(s) they sought with the requisite particularity—then a court could not, or at least should not, "affirm" or "sanction" the search or seizure after the event.

The courts, after all, are the specific addressees of the constitutional command that "no Warrants shall issue, but upon" certain prescribed conditions. If "not even an order of court would have justified" the police action, as it would not have had in *Weeks*, then "much less was it within [the officers'] authority" to proceed on their own "to bring further proof [of guilt] to the aid of the Government." And if the government's agents *did* proceed on their own, "without sanction of law," then the government should not be permitted to use what their agents obtained. The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it; "the efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles." Is any of this really so hard to follow?

Since so many commentators lately have emphasized the efficacy (or inefficacy) of the exclusionary rule in preventing illegal searches and seizures,[11] it may be profitable to take a fresh look at the key passages in the old *Weeks* case:

> . . . The tendency of those who execute the criminal laws [to] obtain convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> . . . The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . . The United States Marshall acted without sanction of law . . . and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[12]

Ratifying illegal searches

Although the Fourth Amendment constitutes a guarantee against unreasonable searches and seizures, it does not, of course, *explicitly* state what the consequences of a violation of the guarantee should be. This "specific" of the Bill of Rights turns out, as is so often the case,[13] not to be specific about the issue which confronted the *Weeks* Court and is the subject of today's debate.

This only means that here as elsewhere—almost *everywhere*—the Court "cannot escape the demands of judging or of making . . . difficult appraisals."[14] But what is wrong with the *Weeks* Court's appraisal? Does its reading of the Fourth Amendment do violence to the language or purpose of the guarantee against unreasonable search and seizure? Does its interpretation of this constitutional provision require an active imagination? Is the interpretation strained, illogical or implausible?

It is plain that Holmes and Brandeis thought not. In the *Silverthorne* case, Holmes, joined by Brandeis and five other justices, observed:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not

8. *Id.* at 536 n. 90.

9. 338 U.S. 25 (1949), overruled, Mapp v. Ohio, 367 U.S. 643 (1961).

10. McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZONA L. REV. 327, 330 (1973).

11. See notes 5, 6 and 7 *supra*.

12. 232 U.S. at 392–94.

13. *See, e.g.*, Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 937, 954 (1965); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 337–39 (1957); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17–18 (1959).

14. Haynes v. Washington, 373 U.S. 503, 515 (1973) (Goldberg, J.). *See also* Friendly, *supra* n. 13, at 137–38.

> 'If the government becomes a lawbreaker, it breeds contempt for law.'
>
> —*Justice Louis Brandeis*

merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.[15]

The *Olmstead* case[16] involved two questions, both answered in the negative by a 5-4 majority: (1) Are telephone messages within the protection against unreasonable search and seizure? (2) Even if they are not, should the evidence nevertheless be excluded because the federal agents who tapped the phones thereby violated a state statute?

On the second issue, Chief Justice William Taft, writing for the majority, did not challenge the *Weeks* rule, but insisted that "the exclusion of evidence should be confined to cases [such as *Weeks*] where *rights under the Constitution* would be violated by *admitting it*."[17] In dissent, Holmes and Brandeis argued that "apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act."[18] Their arguments as to why the exclusionary rule should apply to illegal, as well as unconstitutional, police action are essentially restatements, although more famous and most eloquent ones, of the reasoning in *Weeks*.

First, Holmes:[19]

> If [the government] pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government would play an ignoble part.
>
> For those who agree with me, no distinction can be taken between the government as prosecution and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed. . . . I am aware of the often repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks* [and] the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

Then Brandeis:[20]

> When these unlawful acts were committed, they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought . . . to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. . . . And if this court should permit the government by means of its officers' crimes, to effect its purpose of punishing the defendant, there would seem to be present all the elements of a ratification. . . .
>
> Will this court by sustaining the judgment below sanction such conduct on the part of the Executive?
>
> . . . The Court's aid is denied . . . in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .
>
> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Police reaction to Mapp

I never fully appreciated the force of the

15. 251 U.S. at 392.
16. Olmstead v. United States, 277 U.S. 438 (1928).
17. *Id.* at 468.
18. *Id.* at 469–70 (dissenting opinion).
19. *Id.* at 470–71 (dissenting opinion).
20. *Id.* at 483–85 (dissenting opinion).

Weeks opinion, and the Holmes-Brandeis dissents in *Olmstead*, until some 15 years ago when an incident occurred in Minnesota where I was then teaching. It helped me see the implications of the rule more clearly.

Until 1961, the Minnesota courts, as well as the courts of about half the states, had permitted the use of unconstitutionally seized evidence. But when the Court decided *Mapp* v. *Ohio* in 1961,[21] and imposed the exclusionary rule on Minnesota and other "admissibility states" as a matter of federal constitutional law, it caused much grumbling in police ranks.

This led Minnesota's young attorney general, Walter Mondale, to remind the police that "the language of the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution" and that "*Mapp* did not alter one word of either the state or national constitutions."[22] The *Mapp* case, stressed Mondale, had "not reduce[d] [lawful] police powers one iota"—"what was a reasonable search

21. 367 U.S. 643 (1961).

22. Mondale, *The Problem of Search and Seizure*, 19 BENCH & B. OF MINN. 15, 16 (Feb. 1962). *See also* Kamisar, *Mondale on Mapp*, Feb./Mar. 1977 CIV. LIB. REV. 62.

Does the exclusionary rule affect police behavior?

When Professor Dallin Oaks wrote his "empirical challenge" to the exclusionary rule, it was undeniably an important contribution to this debate. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI.L.REV. 665 (1970). *See also*, Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 245–48 (1973) in many respects a continuation of the Oaks study, but a less scholarly effort.

But more recent and more comprehensive studies and analyses have cast grave doubt on his conclusions about the rule's inefficacy in affecting police behavior. And these analyses have highlighted the insufficiency and inappropriateness of the Oaks' data.

See generally, Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62

John Collier for Black Star

before, still is."[23]

At a subsequent panel discussion on the law of search and seizure in which I participated, proponents of the exclusionary rule quoted Mondale's remarks and made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner would now be excluded by the courts, the police must have been violating the guarantee against unreasonable search and seizure all along. This evoked illuminating responses from the two law enforcement panelists, responses which I think underscore the need for the "exclusionary rule" and its great symbolic value.

Minneapolis City Attorney Keith Stedd:

> I don't think it [is] proper for us to [say that prior to *Mapp* the police were violating the law all along] when the courts of our state were telling the police all along that the [exclusionary rule] didn't apply in Minnesota.

St. Paul Detective Ken Anderson:

> No officer lied upon the witness stand. If you were asked how you got your evidence, you told the truth. You had broken down a door or pried a window open . . . often we picked locks. . . . The Supreme Court of Minnesota sustained this time after time after time. [The] judiciary okayed it;

23. Mondale, *supra* n. 22, at 16.

Ky. L.J. 681, 697–717, 725–27 (1974). *See also*, Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 Am. Politics Q. 57, 71–75 (1977); D. Horowitz, The Courts and Social Policy 220–54. Washington, D.C.: The Brookings Institute, 1976; S. Wasby, Small Town Police and the Supreme Court 25–34, 81–117, 217–29. Lexington, Massachusetts: D.C. Heath, 1976 (study of southern Illinois and western Massachusetts police); cf. *Critique*, 69 Nw. U. L. Rev. 740 (1974) a devastating criticism of the Spiotto study, *supra*.

For example, Oaks and Spiotto rely on the high frequency with which motions to suppress are granted in Chicago gambling, narcotics and weapons cases to conclude that, long after adoption of the exclusionary rule, illegal searches and seizures were commonplace in the enforcement of these offenses by the Chicago police.

Canon points out that "counting successful motions is an imperfect indicator of the rule's effectiveness for several reasons," 62 Ky. L.J. at 718. He concludes that, in any event, Chicago is "a gross exception to the national norm of granting suppression motions," *id.* at 721. Canon's study of 65 cities indicates that in 60 per cent of them motions to suppress were granted one-tenth of the time or less and in 91 per cent of the cities such motions were granted one fourth of the time or less. *Id.* at 722.

Moreover, comments Canon, "judges in Chicago have long been noted for their willingness to grant motions to suppress evidence" and "it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful." *Id.* at 720. As Wasby explains, *supra* at 108–17, 217–23, some judges granted a substantial number of motions to suppress "during the educational process" immediately following adoption of the exclusionary rule, but "police improvement and accommodation to the rules" meant that after this transitional period few motions were granted.

To take another example (there are many in the Canon article), Oaks' study of arrest before and after *Mapp* focused on *one* city, Cincinnati. He concluded that the adoption of the exclusionary rule had had virtually no effect on the number of arrests for narcotics, weapons and gambling there. See 37 U. Chi.L.Rev. at 707. But Canon gathered similar data for 14 cities (including Cincinnati) and found that only four others had the "rather minimal response pattern that Cincinnati has." See 62 Ky. L.J. at 706.

At the other end of the spectrum, the Baltimore decreases in arrests following *Mapp* "were both dramatically sudden and truly spectacular," *id.* at 704. "Baltimore is probably an extreme case and is illustrated to counter Oaks' generalizations about the efficacy of the exclusionary rule from the presentation of Cincinnati's arrest figures. Buffalo is less extreme, but not necessarily

they knew what the facts were.[24]

There is no reason to think that the Minnesota experience is unique. The heads of several police departments also reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure *had just been written.*

For example, shortly after California adopted the exclusionary rule,[25] William Parker, then Los Angeles chief of police, warned that his department's ability to prevent the commission of crime had been greatly diminished because henceforth his officers would be unable to take "affirmative action" unless and until they possessed "sufficient information to constitute probable cause."[26] He did promise, however, that "[a]*s long as the Exclusionary Rule is the law of California,* your police will respect it and operate to the best of their ability within the *framework of limitations imposed by that rule.*"[27]

Similarly, former New York City Police Commissioner Michael Murphy recalled how, when *Mapp* v. *Ohio* imposed the exclusionary rule on New York and other "admissibility states," he "was immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending and creating new policies and new instructions for the implementation of *Mapp.* Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function."[28]

Commissioner Murphy, no less than

24. Quoted in Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts,* 49 CORNELL L.Q. 436, 442–43 (1964).

25. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

26. W. Parker, POLICE 117, Springfield, Illinois: C. C. Thomas, (Wilson ed. 1957).

27. *Id.* at 131. (Emphasis added).

28. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments,* 44 TEXAS L. REV. 939, 941 (1966).

typical. Indeed, it is not at all clear that there is a typical response to the exclusionary rule." *Id.* at 705.

Canon also noted that political scientist Michael Ban had concluded, after an in-depth study of *Mapp's* impact in Boston and Cincinnati, that "the Cincinnati political milieu . . . permitted widespread disregard if not defiance of the Supreme Court's ruling" and that in a number of respects there was "a discernably lesser propensity for compliance in Cincinnati than in Boston." *Id.* at 689, 698 (Canon's characterization of Ban's findings, which, though unpublished, have been widely circulated among political scientists).

At the present time, there is much to be said for lawyer-political scientist Donald Horowitz's analysis of *Mapp* and police behavior, Horowitz, *supra* at 224–25, 230–31, 250:

> Much of the empirical support for the proposition that *Mapp* does not deter the police from violating the Fourth Amendment has been quite crude. . . . [T]hat illegal searches are still conducted to obtain evidence of certain kinds of crimes does not mean that they are still conducted with the same frequency for evidence of other kinds of crimes. That illegal searches are common in some cities does not mean that they are equally common in all cities. Deterrence cannot be viewed as 'a monolithic governmental enterprise.'
>
> Gradually, the rudiments of a more discriminating approach have begun to emerge. What it suggests is that the extent to which police behavior is modified by *Mapp* depends on a complex set of local conditions, including . . . the type of offense involved, the particular police unit responsible for specific enforcement tasks, and the way in which local courts and law[illegible] handle search-and-seizure matters. . . .
>
> . . . [T]he fragments indicate it is a mistake to think that police behavior is never conditioned by the sanction of excluding evidence that might lead to conviction. . . . [I]n the case of serious crimes the policeman starts thinking fairly early of what is required to convict, and some of the things he thinks of are the restrictive rules of arrest and search.
>
> . . . [C]oncern with conviction is very much a function of locale, offense, stage of investigation, and sometimes police unit involved. Receptivity to the judicial sanction varies accordingly.

In closing, these brief remarks, I cannot resist pointing out that at the same time some critics of the exclusionary rule are urging its elimination or substantial modifi-

Chief Parker, seemed to think that "the framework of limitations" restraining the police had been put there by the exclusionary rule, not the state and federal constitutional guarantees against unreasonble search and seizure. "Flowing from the *Mapp* case," he said, "is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure."[29]

I. Criticisms of the rule

I think it may forcefully be argued that it is not the exclusionary rule which is illogical or misdirected, but much of the criticism it has generated. As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention:

> All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
>
> It seems to me, inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform.[30]

Cooley said of the Fourth Amendment 110 years ago that "it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity."[31] Why is it no less true when the accused's premises *have been* invaded or his constitutional rights

29. *Id.* at 943.

30. 1 New York Constitutional Convention, Revised Record 560 (1938), reprinted in J. Michael and H. Wechsler, CRIMINAL LAW AND ITS ADMINISTRATION 1191-92. Mineola, New York: Foundation Press, 1940. *See also* Traynor, J., in People v. Cahan, 44 Cal. 2d 434, 450, 282 P.2d 905 (1955).

31. T. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 306. Boston: Little, Brown, 1st ed. 1868.

cation on the ground, *inter alia*, that it has had little if any effect on police behavior and little if any impact on the amount of pre-*Mapp* illegality, other critics are calling for the rule's repeal or revision on the ground, *inter alia*, that in recent years the police have attained *such a high incidence of compliance with Fourth Amendment requirements* that "the absolute sanctions of the Exclusionary Rule are no longer necessary to 'police' them." Brief of Americans for Effective Law Enforcement (A.E.L.E.) and the International Association of Chiefs of Police (I.A.C.P.) as Amici Curiai in Support of Petitioner at 12, *California v. Krivda*, 409 U.S. 33 (1972), discussed in Comment, 65 J. CRIM. L. & C. 373, 383 (1974).

In their *amicus* brief, the A.E.L.E. and the I.A.C.P. presented the Court with the results of a study they had conducted of warrantless searches and seizures (such searches and seizures were chosen because these are the ones "in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions," Brief at 16).

According to this study, of more than 1000 cases involving warrantless searches and seizures decided by appellate courts nationwide during the 27-month period of January, 1970 through March, 1972, 84 per cent (1,157 of 1,371) were found to be proper—"an extraordinarily high degree of police professionalism." Brief at 17.

The *amicus* brief denies that this study evidences any beneficial exclusionary rule influence upon law enforcement, *id.* at 18, but I doubt that many will find the denial convincing. "[T]his excellent record of successful police compliance with the rules of search and seizure," *id.*, is attributed to "police professionalism"—an attempt by most police to learn "at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions." *id.* at 19. But what stimulated the attempt by most officers to familiarize themselves, at least in a general way, with the law of search and seizure?

Y.K.

otherwise violated? If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it violated the Constitution?[32] And why does it generate so much popular hostility to disallow the government to reap an advantage that it secured, and might only have been able to secure, by violating the Constitution?

No one, I think, has given a better explanation than Professor John Kaplan, one of the sharpest critics of the rule:

> From a public relations point of view, [the exclusionary rule] is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes. . . . [But the] fact is that any rule which actually enforced the demands of the Fourth Amendment (whatever they may be) would prevent the conviction of those who would be caught through evidence obtained in violation of the Fourth Amendment. The problem with the exclusionary rule is that it works after the fact, so that by then we know who the criminal is, the evidence against him, and the other circumstances of the case. If there were some way to make the police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.[33]

The 'time lag' argument

The federal exclusionary rule has been disparaged on the ground that "it was not adopted by the United States Supreme Court until 1914" and that despite the possibility that "an interpretation first made 125 years [actually 123] after a constitutional provision might nonetheless be an appropriate one, the time lag between the adoption of the fourth amendment and the first appearance of the exclusionary rule is at least some indication that it was hardly basic to the constitutional purpose."[34] This does not strike me as much of an argument.

Some 160 years after the adoption of the First Amendment, the "prevention and punishment" of "the lewd and obscene, the profane [and] the libelous" were still thought to raise no constitutional problems.[35] Indeed, 128 years passed between the adoption of the First Amendment and the first articulation of the "clear and present danger" test[36]—what may fairly be called "the

32. *See* Allen, *Federalism and The Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 34; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 25 (1925). True, in a goodly number of cases the government might still have obtained a conviction even if it *had obeyed* the Constitution, but critics of the exclusionary rule would allow the conviction to stand even if it could have been secured *only* by violating the Constitution.

33. J. Kaplan, CRIMINAL JUSTICE 215–16, Mineola, New York: The Foundation Press, 2d ed. 1978.

34. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030–31 (1974). As Dean Griswold has pointed out in SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 2, Lincoln: University of Nebraska Press, 1975, "except for the *Boyd* case [Boyd v. U.S., 116 U.S. 616 (1886), virtually no search and seizure cases were decided by the Supreme Court in the first 140 years of our existence under the Constitution."

The view that illegally seized evidence should be excluded was first laid down by way of dictum in *Boyd*, which went to great lengths to assert a connection between the Fourth Amendment and the privilege against self-incrimination, though the case could have been decided on the self-incrimination clause alone. *Adams v. New York*, 192 U.S. 585 (1903), appeared, by dictum, to repudiate the *Boyd* dictum. Thus the exclusionary rule was adopted in *Weeks* "following an earlier and seemingly inconsistent start." Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND.L.J. 259, 306–07 (1950). *See generally* Atkinson, *supra* n. 32, at 13–17; Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L.REV. 361, 366–72 (1921); Notes, 56 YALE L.J. 1076, 1077–78 n. 11 (1947); 58 YALE L.J. 144, 148–51 (1948).

Professor Kaplan also observes, 26 STAN. L.REV. at 1031, that "the exclusionary rule was not imposed upon the states until 1961, and then by a divided Supreme Court." But the Supreme Court never addressed the issue until 1949 in *Wolf* and that decision was also by a divided Court (6-3). Over the years, of course, *Weeks* and *Mapp* have caught heavy criticism but so, it should be remembered, did *Wolf*. *See* A. Bersel, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 55–59, Boston: Boston University Press, 1955; Allen, *The Wolf Case: Search and Seizure, Federalism, and Civil Liberties*, 45 ILL.L.REV. 1 (1950); Frank, *The United States Supreme Court: 1948–49*, 17 U.CHI.L.REV. 1, 32–34 (1950); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN.L.REV. 1083 (1959); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW.U.L. REV. 65, 72–76 (1957); Reynard, *supra* at 306–313. *See also* Pollak, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment*, 67 YALE L.J. 301, 320–21 & n. 105 (1957).

35. Beauharnais v. Illinois, 343 U.S. 250, 255 (1952) (Frankfurter, J.).

36. Schenck v. United States, 249 U.S. 47, (1919); *cf.* Debs v. United States, 249 U.S. 211, (1919).

start of the law of the first amendment."[37] And, of course, the development of the important "void for vagueness" and "overbreadth" doctrines in this area—"judge-made" or "judicially-created" remedies *fortissimo*—did not come until still later.[38]

The time lag between the adoption of the Fifth Amendment and the applicability of the privilege against self-incrimination to the proceedings in the police station as well as those in the courtroom was 175 years.[39] As for the Sixth Amendment right to counsel, it was not until 1938[40]—fairly early in the development of constitutional-criminal procedure but still a quarter of a century later than *Weeks*—that "the right to counsel in federal courts meant no more than that a lawyer would be permitted to appear for the defendant if the defendant could afford to hire one."[41]

The federal exclusionary rule has also been disparaged as not derived from "the explicit requirements of the Fourth Amendment," but only "a matter of judicial implication."[42] This does not strike me as much of a point either—not, at least, unless somebody can cite even one Supreme Court case interpreting the Constitution which is not "a matter of judicial implication."

The most celebrated constitutional-criminal procedure cases of our times are *Johnson v. Zerbst*[43] and *Gideon v. Wainwright*,[44] requiring appointment of counsel in all federal and state prosecutions respectively when a defendant is unable to pay for the services of an attorney. But one searches the language of the Sixth and Fourteenth Amendments in vain for any mention of indigent defendants or the assignment or appointment of counsel at trial—let alone at preliminary hearings,[45] at lineups,[46] in the police station[47] or on appeal[48] or in juvenile court proceedings.[49]

The right to counsel has well been called "the most pervasive right" of an accused,[50] but all the Constitution has to say about it is that "in all criminal prosecutions the accused shall . . . have the Assistance of Counsel."[51] That's all. The considerable body of constitutional law which has emerged in this important area has all been "a matter of judicial implication."[52]

'Involuntary' confessions

And what is the source of the rule—first applied in 1936,[53] but shaped and reshaped in the course of the following three decades[54]—barring the use of involuntary confessions as a matter of Fourteenth Amendment Due Process? Talk about judge-made or judicially-created rules! The Constitution has nothing to say about "confessions" or "admissions," neither "involuntary" nor any other kind.

It will not do to point to the constitutional prohibition against compelling a person to

37. Kalven, *Ernst Freund and the First Amendment Tradition*, 40 U.CHI.L.REV. 235, 236 (1973).

38. *See* W. Lockhart, Y. Kamisar & J. Choper, CONSTITUTIONAL LAW 815–22, St. Paul, Minnesota: West, 4th ed. 1975.

39. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH.L.REV. 59, 65, 77–83 (1966).

40. Johnson v. Zerbst, 304 U.S. 458 (1938).

41. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV.L.REV. 1, 2 (1956).

42. Wolf v. Colorado, 338 U.S. 25, 28 (1949). The point has been made more strongly. *See* McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J.Crim.L., C.&P.S. 266, 269 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM 99, 103, Chicago, Aldine, Sowle ed. 1961 (*Weeks* "is a piece of pure judicial legislation").

43. *See* n. 40 *supra*.

44. 372 U.S. 335 (1963).

45. *See* Coleman v. Alabama, 399 U.S. 1 (1970).

46. Compare United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) with Kirby v. Illinois, 406 U.S. 682 (1972).

47. Compare Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) with Oregon v. Mathiason, 429 U.S. 492 (1977).

48. Compare Douglas v. California, 372 U.S. 353 (1963) with Ross v. Moffit, 417 U.S. 600 (1974).

49. *See* In re Gault, 387 U.S. 1 (1967).

50. *See* Schaefer, *supra* n. 41, at 8.

51. U.S. Const. Amend. VI.

52. By "implication," too, the courts have developed limitations on the exclusionary rule, e.g., standing, the attenuation of taint from illegal searches, and the use of illegally seized evidence in grand jury proceedings or for impeachment purposes.

These limitations are said to undermine the "judicial integrity" rationale of the exclusionary rule. *See Stone v. Powell*, 428 U.S. 465, 485 (1976), discussed in Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1110-12 (1977). The limitations also make the rule "not 'look' like a constitutional doctrine," according to Kaplan, *supra* n. 34, at 1030.

53. Brown v. Mississippi, 297 U.S. 278 (1936).

54. *See* Kamisar, *What Is an "Involuntary" Confession?*, 17 RUTGERS L.REV. 728 (1963).

Bright

Defendants most often insist that the evidence was seized illegally in cases involving narcotics. Many defense attorneys routinely make a motion to suppress such evidence.

be "a witness against himself" in "any criminal case."[55] The privilege was not deemed applicable to the states until 1964[56] and by that time the U.S. Supreme Court had decided some 30 state confession cases. Moreover, as noted earlier, even if the privilege against self-incrimination had been deemed applicable to the states, the law pertaining to "coerced" or "involuntary" confessions still would have developed without it.

Until *Miranda*,[57] the prevailing view was that because police officers lacked legal authority to compel statements, there was no legal obligation to answer to which a privilege could apply, and thus the privilege did not extend to the police station.[58] As late as 1966, Chief Justice Roger Traynor pointed out that although "the Fifth Amendment has long been the life of the party in judicial or legislative proceedings, . . . it has had no life it could call its own in the prearraignment stage."[59]

Nor is it a sufficient answer to say that Fourteenth Amendment Due Process bars convictions based on inherently untrustworthy evidence (long a universally accepted view, but, incidentally, not an *explicit* requirement of the due process clause either). This does not explain why the question of the admissibility of an involuntary confession must be "answered with complete disregard of whether or not petitioner in fact spoke the truth"[60] and why "a legal standard which took into account the circumstance of probable truth or falsity . . . is not a permissible standard under the Due Process Clause."[61] It does not explain why involuntary confessions "are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true."[62]

Nor does it explain the "rule of automatic reversal"—the rule formulated by the Stone and Vinson Courts and reaffirmed by the Warren Court that the introduction of an

55. U.S. Const. Amend. V.

56. Malloy v. Hogan, 378 U.S. 1 (1964). "In extending the privilege against self-incrimination to the states and at the same time indicating that the privilege has been the unseen governing principle of the confession cases, *Malloy* forcefully brought the Fifth Amendment to bear on the interrogation problem," W. Schaefer, THE SUSPECT AND SOCIETY 16. Evanston: Northwestern University Press, 1967. The "intertwined doctrines" (the "voluntariness standard" and the privilege against self-incrimination), noted Justice Schaefer in a postscript to his 1966 Rosenthal Lectures, "were fused in *Miranda*." *Id.* at 85 n. 21.

57. Miranda v. Arizona, 384 U.S. 436 (1966).

58. See the discussion in Kamisar, *supra* n. 39, at 65, 77–84.

59. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U.CHI.L.REV. 657, 669 (1966).

60. Rogers v. Richmond, 365 U.S. 534, 544 (1961).

61. *Id.* at 543.

62. Rochin v. California, 342 U.S. 165, 173 (1952) (relying in large part on rationale of coerced confession cases to exclude evidence produced by "stomach pumping").

involuntary statement at the trial necessitates reversal, regardless of how much untainted evidence remains to support the conviction.[63]

Are confessions different?

Critics of the search and seizure exclusionary rule try to distinguish away the coerced confession cases,[64] and for good reason. For once it becomes clear that the rationale of the coerced confession cases "has been expanded beyond protect[ing] the individual from conviction on unreliable or untrustworthy evidence" to "strik[ing] down police procedures which in their general application appear to the prevailing justices as imperiling basic individual immunities,"[65] as Professor Francis Allen pointed out a quarter of a century ago, then it becomes most difficult to distinguish the problem of the admission of unconstitutionally seized "real" evidence from that of involuntary confessions. For "[i]n both situations the perils arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetence of the evidence so acquired."[66]

Although those unhappy with the exclusionary rule still make the claim that the admissibility of unconstitutionally seized "real" evidence and "involuntary" confessions "raise entirely different questions,"[67] the argument comes about 30 years too late.[68]

It is interesting to note that at one point Chief Justice Warren's opinion for the Court in the famous *Spano* case reads like a restatement of the reasoning in *Weeks* and the Holmes-Brandeis dissents in *Olmstead:*

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.[69]

63. *See* Lyons v. Oklahoma, 322 U.S. 596, 597 n.1 (1944); Malinski v. New York, 324 U.S. 401, 404 (1945); Haley v. Ohio, 332 U.S. 596, 599 (1948); Stroble v. California, 343 U.S. 181, 190 (1952); Payne v. Arkansas, 356 U.S. 560, 567–68 (1958); Spano v. New York, 360 U.S. 315, 324 (1959); Culombe v. Connecticut, 367 U.S. 568, 621 (1961); Haynes v. Washington, 373 U.S. 503, 518–19 (1963).

Apparently the "rule of automatic reversal" still applies to "coerced" or "involuntary" confessions, *see* Chapman v. California, 386 U.S. 18, 23 & n.8 (1967), but not to *Massiah* (Massiah v. United States, 377 U.S. 201 (1964)) or *Miranda* violations. *See* Milton v. Wainwright, 407 U.S. 371 (1972); United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); United States v. Jackson, 429 F.2d 1368 (7th Cir. 1970) (D.C. Cir. 1970). *See also*, Meltzer, *Involuntary Confessions, The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 348 (1954).

64. Thus, in criticizing the exclusionary rule as to unconstitutionally seized materials, Professor Charles Alan Wright notes, Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 737 (1972): "[W]e are talking only of what lawyers call 'real' evidence. Involuntary confessions and other evidence of that kind raise entirely different questions. Innocent men may give false confessions if sufficient pressure is put upon them by the police. The murder weapon, the envelope of narcotics, the gambling slips, however, speak for themselves." (Don't murder weapons and narcotics obtained *as a result of* involuntary confessions "speak for themselves" too?)

See also Wilkey, *Why Suppress Valid Evidence?*, 13 THE PROSECUTOR 121 (1977): "In exclusionary rule cases involving material evidence there is never any question of reliability. Reliability is in question, for example, with a coerced confession. . . . Exclusion of evidence is then proper because the evidence is inherently unreliable."

65. Allen, *The Wolf Case, Search and Seizure, Federalism and the Civil Liberties*, 45 ILL. L. REV. 1, 29 (1950).

66. *Id.*

67. *See n.* 64 *supra.*

68. *See* Watts v. Indiana, 338 U.S. 49 (1949), and companion cases, reversing convictions based on "involuntary" confessions despite dissenting Justice Jackson's undisputed assertions that "[c]hecked with external evidence, [the confessions in each case] are inherently believable, and were not shaken as to the truth by anything that occurred at the trial." 338 U.S. 57, 58.

See also Rochin v. California, 342 U.S. 165, 172–173 (1952): "It has long ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the state may not base convictions upon confessions, however much verified, obtained by coercion. . . . To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions."

See generally A. Beisel, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 70–86. Boston: Boston University Press, 1955; Allen, *supra* n. 65, at 26–29; Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U. L. REV. 16, 20–25 (1953); Meltzer, *supra* n. 63, at 326–29, 343, 347–49; Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 417–23 (1954).

69. Spano v. New York, 360 U.S. 315, 320–21 (1959).

One of Justice Frankfurter's last opinions on the subject—and I confess that I find it rather mystifying that the author of *Wolf* would write this in the same term he dissented in *Mapp*—perhaps best suggests the close affinity between the *Weeks* rule and the coerced confession rationale. Speaking for a 7-2 majority, in *Rogers v. Richmond*, Frankfurter observed:

> Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system. . . .
>
> To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. . . .
>
> Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.[70]

If a conviction rests in part on an independently corroborated and concededly truthful confession (albeit one found to be the product of constitutionally impermissible methods), why cannot the conviction stand? Why not remand those who have made such confessions, together with those who managed to remain silent in the face of impermissible interrogations, "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford"?[71] Though the exclusion of involuntary but verified confessions may be an effective way of deterring objectionable interrogation methods, why must the court "condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods [to deter such conduct] which, if consistently enforced, would be equally effective"?[72]

Moreover, if the impermissible police methods which produce involuntary confessions are typically more offensive to the dignity of the individual and more often characterized by violence than are unconstitutional searches and seizures, are not these objectionable interrogation methods more likely to attract the interest of the press, more likely to arouse community opinion, more likely to excite the sympathy of jurors? Why, then, is the court unwilling to rely on tort actions, criminal prosecutions and internal police discipline to check impermissible police interrogation practices? Why does the "command" of the Due Process Clause "compel" the court to reverse the conviction?[73] Why can't the conviction stand?[74]

The reason is that to uphold a conviction resting in part on an involuntary confession, however much verified, would be to "sanction" the objectionable methods which produced it and to afford these methods "the cloak of law,"[75] the very insight which the *Weeks* Court and Holmes and Brandeis expressed long ago.

II. The role of the Court

It is not surprising that a majority of the Court would conclude in 1949, as it did in *Wolf v. Colorado*,[76] that the Fourteenth Amendment did not prevent a state court from admitting evidence obtained by an

70. 365 U.S. 534, 540–41 (1961).

71. *Cf.* Wolf v. Colorado, 338 U.S. 25, 31 (1949).

72. *Cf.* Wolf v. Colorado, *supra* n. 71.

73. *Cf.* Rogers v. Richmond, quoted in text at n. 70 *supra*.

74. *Id. See also* McNabb v. United States, 318 U.S. 332, 339 (1943), where, before putting aside constitutional issues and invoking its supervisory powers over federal criminal justice, the Court noted, per Frankfurter, J.: "It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. Boyd v. United States; Weeks v. United States. . . ."

75. *Cf.* Rochin v. California, 342 U.S. 165, 173–74 (1952): "Coerced confessions offend the community's sense of fair play and decency. So here, to sanction [the 'stomach pumping' which produced the morphine capsules] . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby brutalize the temper of a society."

76. 338 U.S. 25 (1949).

unreasonable search and seizure, and that Justice Frankfurter would write the opinion of the Court. Frankfurter's, and his brethren's, "notions of the obligations of federalism were a strongly limiting influence on [their] role in the criminal cases during the years before the Warren tenure."[77] The *Wolf* case "provided an important demonstration of the Court's essential fidelity to the assumptions of a federal system at a time when [the Court] was being subjected to extreme and irresponsible charges of usurpation of power."[78]

Nevertheless, one is, or ought to be, taken aback by Frankfurter's reasoning in *Wolf*: The protection against unreasonable search and seizure is "basic to a free society," is "enforceable against the States through the Due Process Clause," but a conviction resting on evidence obtained in disregard of this fundamental and constitutionally protected right can stand—that, if I may be permitted to quote what I said about the *Wolf* case 19 years ago, "this is an instance where one may be . . . imprisoned on evidence obtained in violation of due process and yet not be deprived of life or liberty without due process of law after all."[79]

Frankfurter, no less than Justice Day in *Weeks*, has assumed elsewhere that permitting evidence obtained in violation of a law to be made the basis of a conviction would "stultify the policy" manifested by the law.[80] And perhaps no jurist since Holmes and Brandeis has balked as much as Frankfurter at the courts becoming "accomplices" in police lawlessness by sustaining a conviction resting on evidence obtained by violation of law. The cases discussed above involving "involuntary" confessions which bear the stamp of verity illustrate this point, at least implicitly.

But Frankfurter has been more explicit. In the famous *McNabb* case, he observed for a 7-1 majority:

> A statute [providing that arrestees promptly be taken before the nearest judicial officer] is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.
>
> . . . Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured [no more than did the draftsmen of the Fourth Amendment]. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.
>
> . . . We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation.[81]

Court inconsistencies

It will not do to dismiss *McNabb* as an instance of the Court's exercise of its supervisory powers over federal criminal justice. Either courts which permit illegally obtained evidence to be used or allow convictions resting on such evidence to stand "become instruments" of such law enforcement or they do not. Either the courts' duty "as agencies of justice and custodians of liberty" forbids that persons should be convicted upon evidence secured in violation of law *or* it does not.

If a federal court cannot allow a convic-

77. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U.ILL.L.F. 518, 526.

78. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 5.

79. Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN.L.REV. 1083, 1108 (1959).

A decade later, Justice Frankfurter protested that *Wolf* did not mean that the substantive scope of the Fourth Amendment as such applies to the states via Fourteenth Amendment Due Process, that *Wolf* did not mean that every search and seizure violative of the Fourth Amendment would make the same conduct on the part of the state officials a violation of the Fourteenth. See his dissent in Elkins v. United States, 364 U.S. 206, 233, 237–40 (1960).

But most members of the Court did read *Wolf* this way. See Justice Stewart's opinion for the Court in *Elkins*, 364 U.S. at 212–217, and Justice Clark's opinion for the Court in Mapp v. Ohio, 367 U.S. 643, 650–51, 654–56 (1961). For reasons spelled out in Kamisar, *supra* at 1101–08, I think the *Mapp* and *Elkins* Courts properly read *Wolf* as equating the substantive scope of the Fourth and Fourteenth Amendments.

80. *See* McNabb v. United States, quoted in text at n. 81 *infra*.

81. McNabb v. United States, 318 U.S. 332, 341–47 (1943).

tion resting on a federal *statutory* violation to stand without making itself an "accomplice" in the police lawlessness, then how can any court allow a conviction resting on a federal *constitutional* violation to stand? If permitting the use of evidence secured in disregard of statutory law would "stultify the policy which Congress has enacted into law," then how can it be maintained that permitting the use of evidence obtained by violating the Fourth and Fourteenth Amendments does not "stultify the policy" which the Constitution has enacted into law?

Nor, as I see it, can the reasoning of the court, by Frankfurter, in *Wolf*, be squared with its reasoning, by Frankfurter, in *Rochin*[82] —or with Frankfurter's dissent in *Irvine*.[83]

In striking down a conviction resting on evidence produced by "stomach pumping" —and certainly the morphine capsules taken from Rochin's stomach were no less trustworthy than the materials seized from Wolf's office—the *Rochin* Court, through Frankfurter, reminded us that "due process of law" means at least that "convictions cannot be brought about by methods that offend 'a sense of justice.'"[84] But don't all convictions brought about by methods that offend due process offend "a sense of justice"?

California did not "affirmatively sanction" the police misconduct in *Rochin* anymore than did Colorado in *Wolf*. The "stomach pumping," no doubt, was a tort and a crime. Moreover, as the *Rochin* Court pointed out, the brutal conduct "naturally enough was condemned by the court whose judgment is before us."[85] Why, then, would sustaining the conviction amount to "sanctioning" the police misconduct and "affording" it "the cloak of law"? And if it would, why we'd it not in *Wolf*?

Nor did the *Irvine* Court "affirmatively sanction" the repeated illegal entries into petitioner's home. Justice Jackson, who wrote the principal opinion in this case, took pains to note that "there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler,"[86] Indeed, Jackson went so far as to direct the clerk of court "to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States."[87]

Why, then, did Frankfurter dissent in *Irvine*? Why *did* he protest that the Court cannot

> . . . dispose of this case by satisfying ourselves that the defendant's guilt was proven by trustworthy evidence and then finding, or devising other means whereby the police may be discouraged from using illegal methods to acquire such evidence.
>
> . . . If, as in *Rochin*, '[o]n the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause' [wasn't this true of *Wolf*?], it is no answer to say that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct.
>
> That the prosecution in this case, with the sanction of the courts, flouted a legislatively declared philosophy against such miscreant conduct and made it a policy merely on paper, does not make the conduct any the less a disregard of due process.
>
> Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. . . . But . . . [a] sturdy, self-respecting democratic

82. Rochin v. California, 342 U.S. 165 (1952).

83. Irvine v. California, 347 U.S. 128, 142 (1954). The Court affirmed Irvine's conviction for horserace bookmaking and related offenses though based on incriminating conversations heard through a concealed microphone illegally installed in petitioner's home. Justice Jackson wrote the four-man plurality opinion. Justice Clark concurred in the result, noting that if he had been on the Court when *Wolf* was decided, he would have applied the federal exclusionary rule to the states. 347 U.S. at 138. Justice Black, joined by Douglas, J., and Justice Frankfurter, joined by Burton, J., filed separate dissents.

84. 342 U.S. at 173.

85. *Id.*

86. 347 U.S. at 137.

87. *Id.* at 138. Only Chief Justice Warren joined Justice Jackson in this regard. The chief justice was "new on the job"; indeed, his nomination had not yet been confirmed. In later years he was to recognize that the admission of unconstitutionally seized evidence "has the necessary effect of legitimizing the conduct which produced the evidence." See text at n. 106 *infra*.

Incidentally, nothing came of the federal investigation suggested by Justice Jackson, in large part because the transgressing officers were acting under orders of the chief of police and with the full knowledge of the local prosecutor. See Comment, 7 STAN. L.REV. 76, 94 n.75 (1954).

community should not put up with lawless police and prosecutors."[87]

Reconciling the differences

I can think of only three possible ways to reconcile *Wolf* with the majority opinion in *Rochin*, the dissents in *Irvine* and the rationale of the involuntary confession cases. None of them is satisfactory:

1. Not all violations of the Fourth Amendment offend due process; only certain "outrageous" or "aggravated" types of unreasonable searches and seizures do so.

Although even before *Mapp v. Ohio* and *Ker v. California*[89] I argued at considerable length to the contrary,[90] the *Wolf* opinion could conceivably have stood for, or have come to stand for, this limited proposition.[91] But today it is plain that it does not. Although some justices have balked at "incorporating" a specific provision of the Bill of Rights into the Fourteenth "jot-for-jot" and "bag and baggage," especially in the jury trial cases, it is now clear that the Court did not apply a "watered-down" version of the Fourth Amendment to the states, but rather one which applies to the same extent it has been interpreted to apply to the federal government.[92]

2. Evidence, verbal or real, which is the product of police violence or brutality should be excluded, but not evidence which is obtained by other types of police misconduct.

This is the distinction that Justice Jackson drew in *Irvine*—and one which he sought to make even among involuntary confessions.[93] But the court has long recognized that involuntariness or coercion need not be based upon physical violence or the threat of it.[94] Why, then, should such violence or the threat of it be a prerequisite for excluding other unconstitutionally seized evidence?

Moreover, today virtually everybody would reject a rule, as did Frankfurter and the other *Irvine* dissenters, whether it be a rule for "real" evidence or for verbal, that "even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials."[95]

3. *Obtaining* evidence by searches or seizures that would have violated the Fourth Amendment if conducted by federal officers *does* violate Fourteenth Amendment Due Process when made by state officers. But the *use* of such evidence in state courts does *not* offend due process unless the police methods involved constitute an "aggravated" or "outrageous" or "shocking" violation of the Fourth Amendment.

This, it seems to me, is the doctrine which emerges from Frankfurter's majority opinions in *Wolf* and *Rochin* and his dissent in *Irvine*. I find it a difficult proposition—a most curious one. Only one step is needed for "involuntary" confessions—the use of any confession obtained in violation of due process offends due process. But two steps are required for unreasonable searches and seizures: (1) Did the police violate the Fourth and Fourteenth Amendments? (2) If so, by how much? Was it a "gross" violation or only "mild"? "Flagrant" or "routine"?

The degree of violation

Where does this "two-plimsoll mark due process" test come from?[96] Talk about judicially created rules of evidence! Where is

88. 347 U.S. at 118–119 & n.1 (Emphasis added).

89. 374 U.S. 23 (1963) ("standard of reasonableness is the same under the Fourth and Fourteenth Amendments"). *See also* Aguilar v. Texas, 378 U.S. 108 (1964) (reading *Ker* as holding that standard for obtaining a search warrant is the same).

90. See n. 79 *supra*.

91. *Id.*

92. *See generally*, Y. Kamisar, J. Grano & I. Haddad, CRIMINAL PROCEDURE 12–15 (Los Angeles, Center for Creative Educational Services, 1977); W. Lockhart, Y. Kamisar & J. Choper, CONSTITUTIONAL LAW 577–84 (St. Paul, West, 4th ed. 1975).

93. *See* Stein v. New York, 346 U.S. 156, 182 (1953); Watts v. Indiana, 338 U.S. 49, 59–60 (1949) (concurring opinion). *See also* the comments on Justice Jackson's views in Paulsen, *supra* n. 68, at 428.

94. Thus, the Court threw out the confession in Fikes v. Alabama, 352 U.S. 191 (1957), although "concededly, there was no brutality or physical coercion" and "psychological coercion is by no means manifest." *Id.* at 200 (Harlan, J., dissenting). *See also* Leyra v. Denno, 347 U.S. 556 (1954); Spano v. New York, 360 U.S. 315 (1959).

95. 374 U.S. at 146.

96. *Cf.* Frankfurter, J., concurring in Fikes v. Alabama, 352 U.S. 191, 191 (1957): "I cannot escape the conclusion . . . that in combination [these circumstances] bring the result below the Plimsoll line of 'due process.'"

See Field, *Frankfurter, J., Concurring*, 71 HARV. L. REV. 77 (1957); Kamisar, *supra* n. 79, at 112–29.

this written or even implied in the Constitution? Next to this test, surely, the *Weeks* Court's reading of the Fourth Amendment and the *Mapp* Court's reading of the Fourth and Fourteenth seem like pretty straightforward interpretations of the Constitution.

To say that police conduct is unconstitutional, that it violates the minimal standards of due process, is as bad a label as one can put on police misconduct. How then can it be said that still more is required for exclusion? Why then must the police be found to have violated *sub-minimal* standards?

How does one "barely" or "mildly" violate what is "basic to a free society" or "implicit in the concept of ordered liberty"[97]? If police action which violates due process is not gross or aggravated police misconduct *per se*, then why is it a violation of due process?

My purpose in comparing the reasoning in *Wolf* with that in *McNabb*, *Rochin* and other cases, and with what might be called the "imperative of judicial integrity" consideration in the confession area,[98] is not to demonstrate that the Court, or Frankfurter in particular, has been inconsistent. That is to be expected, indeed, it is almost inevitable. After all, Justice Frankfurter sat on the Supreme Court for more than 20 years and few judges who have served half as long have not been inconsistent.

My purpose rather is to provide "education in the obvious":[99] Almost no sensitive judge can take seriously the implications of *Wolf*. Almost no sensitive judge can live with those implications. *At some point* he will not care about or even think about "alternatives" to the remedy of exclusion—he will exclude the evidence however logically relevant and verifiable it be or, if the court below admitted it, he simply will not let the conviction stand. At some point he will be unable to do otherwise.

When that point is reached, he will do what a majority did in *Rochin* and some would have done in *Irvine*—he will refuse "to have a hand in such dirty business."[100] This is why the *Weeks* Court's interpretation of the Fourth Amendment, Wigmore's famous criticism to the contrary notwithstanding[101], is, if not perfectly logical, quite understandable—even quite natural.

The *Weeks* Court believed this point was reached when the police violated the Fourth Amendment; the *Rochin* Court and the *Irvine* dissenters believed that it was reached when the police violated some sub-minimal standard. But the response was the same: We don't care about possible tort actions or other possible "alternative remedies"! The government obtained the conviction by "indefensible means."[102] We the judges cannot sanction this. We the judges cannot afford it "the cloak of law."[103]

A judge's threshold

To say that most judges have what might be called a threshold for excluding trustworthy evidence is not to deny that the threshold varies considerably among them—or even that over the years it may shift significantly in the mind or heart of an individual judge.

In his decade and a half as Chief Justice of the United States, for example, Earl Warren's threshold for exclusion lowered quite a bit. In his first year on the Court, he joined in Justice Jackson's principal opinion in *Irvine*, upholding a conviction based on "incredible" police misconduct but assuring us that "admission of the evidence does not exonerate the officers . . . if they have violat-

97. *See* Allen, *supra* n. 78, at 9. *See also* Kamisar, *supra* n. 79, at 1121-24.

98. *Cf.* Elkins v. United States, *supra* n. 7.

99. Holmes, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292. New York: Harcourt, 1920.

100. Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438, 470 (1928). As I read Holmes' dissent, he did not, as many seem to think, regard wiretapping as inherently "ignoble" or "immoral," but only wiretapping—or for that matter, any other means of obtaining evidence by the government—which constituted a specific violation of the law. *This* was the "dirty business."

101. *See* 8 J. Wigmore, EVIDENCE §2184 at 35, 40 (3d ed. 1940).

102. See text at n. 88 *supra*. Are not all unconstitutional means of obtaining evidence to secure a conviction "indefensible"? And if not, why are they unconstitutional?

103. See text at n. 88 *supra*. If alternative means of punishing or discouraging governmental lawlessness are available (at least theoretically), as they were in *Rochin* and *Irvine*, why does admitting the evidence constitute "put[ting] up with lawless police and prosecutors"? And if it does, why did the Court put up with the governmental lawlessness in *Wolf*?

ed defendant's constitutional rights"[104]—"there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting [the] conviction."[105]

Seven years later, however, the Chief Justice joined in the opinion for the Court in *Mapp*. And another seven years later, very close to the end of his career, he observed for the Court in the "stop and frisk" cases:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.
>
> . . . When [unconstitutional] conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.[106]

Holmes and Brandeis seem to have had a consistently low threshold for exclusion. In Fourteenth Amendment Due Process cases at least, Justice Jackson appears to have had a consistently high one. For him unconstitutional police conduct was not enough, not even serious or aggravated unconstitutional conduct. It had to involve physical violence or brutality as well.

That a judge is more likely to give short shrift to alternatives to the remedy of exclusion in a shocking case of police misconduct than in a routine one is hardly surprising. But is it logical? If police misconduct is ever going to attract the interest of the press, arouse community opinion and excite the sympathy of jurors, it is going to do so in the sensational or shocking case (such as *Rochin* and *Irvine*)—*not* the "routine" or "mild" unconstitutional search and seizure case (such as *Wolf*).

This is why—although his reasoning must seem curious to many of us who have grown up with *Wolf*, *Rochin* and *Irvine*—a leading proponent of the exclusionary rule maintained, some 50 years ago, that infringements of the Fourth Amendment which generate the *least* public outcry pose the *strongest* case for exclusion.[107] "The more violent and obvious infringement," he was willing to concede, "may be curtailed through civil or criminal actions against the guilty officers."[108]

It would be hard to deny that a court's refusal to permit the use of evidence obtained by "obvious" or "shocking" police misconduct is, at least in some measure, symbolic. It signifies to the police officer and to the general public alike the court's unwillingness to tolerate the underlying police lawlessness. But if this is true in a case where the alternative remedies of tort actions, criminal prosecutions and internal discipline are most likely to be effective, how can it be any less so when the court allows the evidence to be used in a not-so-shocking case of unconstitutional police conduct—and thus one where alternatives to the remedy of exclusion are unlikely, or at least less likely, to amount to anything?

III. Drawing the 'bottom line'

A court which admits the evidence in such a case manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"?[109] Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the "flagrant" or "willful" case does not allow the court to do so?

A court which admits the evidence in a case involving a "run of the mill" Fourth Amendment violation demonstrates an in-

104. 347 U.S. at 137.
105. *Id.*
106. Terry v. Ohio, 392 U.S. 1, 13, 15 (1968).
107. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L.REV. 11, 24 (1925).
108. *Id.*
109. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 258 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM 87, 90. Chicago: Aldine, Sowle ed. 1962.

sufficient commitment to the guarantee against unreasonable search and seizure. It demonstrates "the contrast between morality professed by society and immorality practiced on its behalf."[110] It signifies that government officials need not always "be subjected to the same rules of conduct that are commands to the citizens."[111]

Where should the threshold for exclusion be put? At what point should a judge say that the police misconduct is so indefensible or offensive as to warrant throwing out the evidence it produced? To say that this point is not reached until the police have resorted to violence or brutality or that it is not reached unless they have perpetrated some "gross" or "serious" or "aggravated" violation of the Constitution seems neither a principled nor a manageable way to go about it.

If the line must be drawn somewhere, I can think of no more logical and fitting place to draw it than at unconstitutional police conduct, however "mild," "honest" or "inadvertant" some may label it.[112] Frankfurter argued that the Court should reverse in *Irvine*, although it affirmed the conviction in *Wolf*, because the *Irvine* police misconduct was more shocking and offensive. But Jackson responded: "Actually, the search [in *Wolf*] was offensive to the law in the same respect, if not the same degree, as here."[113]

I think Jackson was right (but for the wrong reason). Once the Court identifies the police action as unconstitutional, that ought to be the end of the matter. There should be no "degrees" of "offensiveness" among different varieties of *unconstitutional* police conduct. A violation of the Constitution ought to be the "bottom line." This is where the *Weeks* and *Mapp* Courts drew the line. This is where it ought to stay. □

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110. Frankfurter, J., dissenting in On Lee v. United States, 343 U.S. 747, 759 (1952).

111. Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 471, 485 (1928).

112. *See Stone v. Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting) (evidence should not be excluded when seized by "an officer 'acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this [good-faith] belief'"); *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part) (distinguishing between "flagrantly abusive" Fourth Amendment violations and "technical" or "good faith" violations).

Also, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting) ("inadvertent" or "honest mistakes" by police should not be treated in the same way as "deliberate and flagrant *Leon*-type violations of the Fourth Amendment"); *United States v. Sonka*, 594 F.2d 443, 451-52, 2d Cir. 1968) (Friendly, J., dissenting) (officer's error "so minuscule and pardonable" as to render exclusion of evidence inappropriate).

See also A Model Code of Pre-Arraignment Procedure § SS 290.2 (Official Draft, 1975) (evidence shall be excluded only if violation upon which it was based was "substantial"; all violations shall be deemed substantial if "gross, willful and prejudicial to accused"; otherwise court shall consider, inter alia, "the extent of deviation from lawful conduct" and "the extent to which the violation was willful"); E. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 58 (1975) (officer should be supported if he "acted decently" and "did what you would expect a good, careful, conscientious police officer to do under the circumstances").

If the officer, as Dean Griswold described it, acted in the manner that "a good, careful, conscientious police officer" is expected to act, or if, as Judge Friendly maintained in *Sonka*, *supra*, the officer's error was "so minuscule and pardonable as to render the drastic sanction of exclusion . . . almost grotesquely inappropriate," then the error should not render the search or seizure "unreasonable" within the meaning of the Fourth Amendment—as the Second Circuit held on rehearing *en banc* in *Sonka*, 394 F.2d 452. After all, probable cause is supposed to turn on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Brinegar v. United States*, 338 U.S. 160, 175 (1949), and affidavits are supposed to be interpreted in a "commonsense" rather than a "hypertechnical" manner, *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

In light of existing law, the proposals or suggestions to modify the exclusionary rule must mean that the challenged evidence should be admissible even when the officer acted *unreasonably*, i.e., *negligently*, so long as his misconduct was not deliberate or reckless, but "inadvertent." On this issue (although I disagree with him on a number of other points) I share Professor Kaplan's concern:

- Such a modification of the rule "would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him," Kaplan, *supra* n. 34 at 1044;
- "Would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area," *id.* at 1045;
- So long as so many trial judges remain hostile to the exclusionary rule, "the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level," *id.*

See also Proceedings of 48th Annual Meeting of ALI 374-98 (1971) (debate on Model Pre-Arraignment Code proposal, *supra*, to exclude illegally obtained evidence only when underlying violation was "substantial").

113. 347 U.S. at 133.

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letters

Distorting the rules

It was indeed shocking and disturbing to read Judge Wilkey's article ("A call for alternatives to the exclusionary rule: let Congress and the trial courts speak," February), and the letters of Judges Staples and Scott in the same issue. All three suggested that the exclusionary rule made hypocrites of judges and that judges deliberately avoided applying it.

I always thought that trial judges were obligated to apply the rules of evidence in a case, regardless of whether they comported with the judge's own conception of justice. I have always believed that the jury and not the judge determines the guilt or innocence of a defendant after a trial in which the rules of evidence are observed and the constitutional rights of a defendant carefully protected.

The exclusionary rule is not the only rule of evidence that makes it difficult to prosecute and convict a wrongdoer. I hope we will not also learn that some trial judges are distorting the hearsay rule so that the police can use inadmissible statements as evidence.

What damages the cause of justice is not the exclusion of evidence under a rule promulgated by the the highest court in the land and so far, at least, upheld against attack, but police that blatantly evade and avoid the law and judges that aid and abet them.

Hugh H. Bownes
Judge
U.S. Court of Appeals for the First Circuit
Concord, New Hampshire

A stimulating debate

Thank you for the lively exclusionary rule debate between Professor Kamisar and Judge Wilkey in recent issues of the journal. It has stimulated ideas in Southern Arizona; in fact, the material helped, in a recent case, to exclude the evidence procured by an employer against an employee.

Maurice Portley
Sierra Vista, Arizona

Retain the exclusionary rule

Having read "Closing arguments in the debate over the exclusionary rule" (February), I conclude that it is better law to retain the exclusionary rule as the best deterrent against erring law enforcement officials.

When one examines the cases closely, it is not clear that acquittals occur solely because of tainted evidence. Moreover, the rule does improve police work by forcing the officers to build a case on other reliable evidence rather than relying entirely on something taken illegally from the defendant.

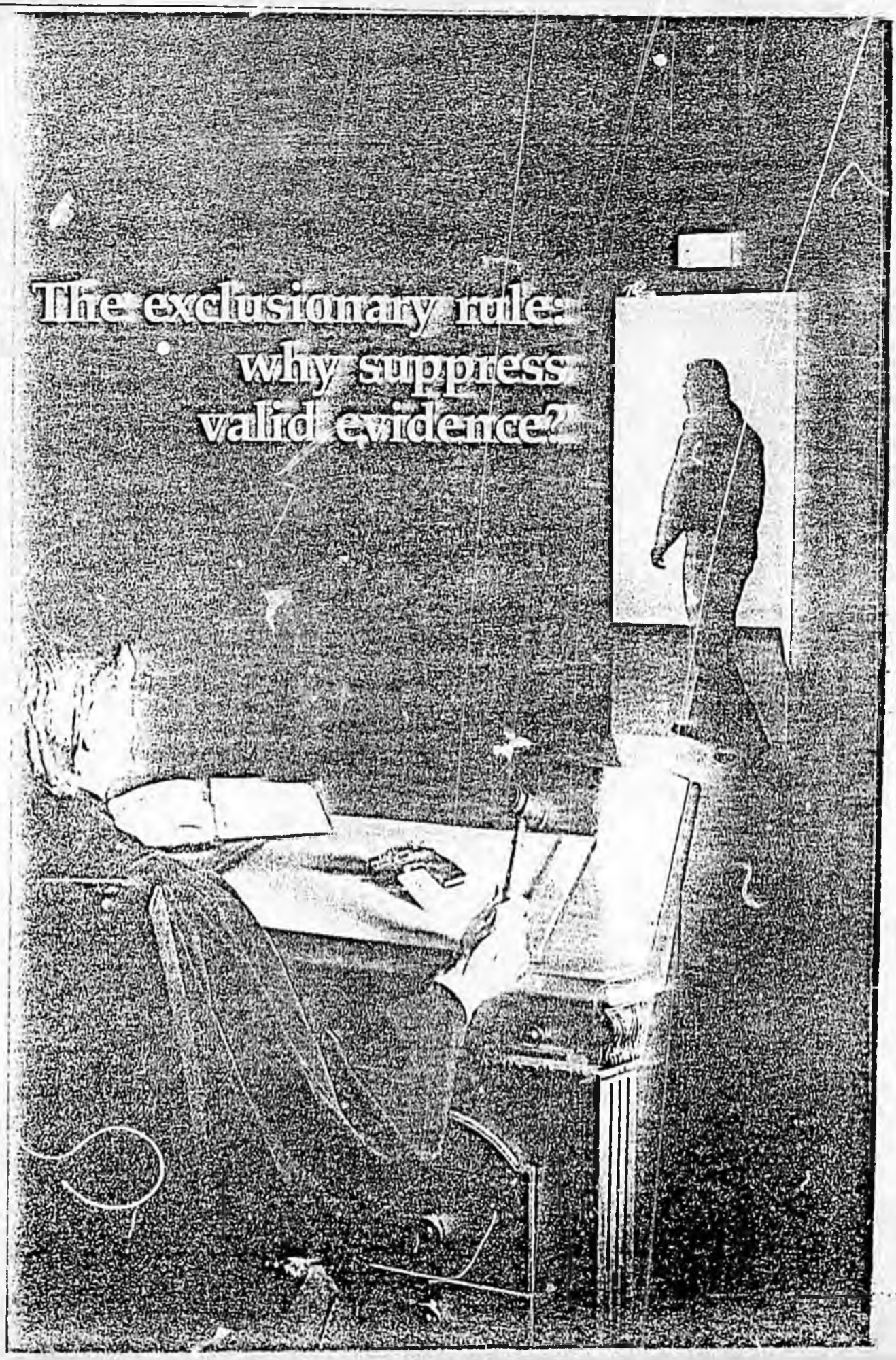
The alternative of admitting the evidence and then punishing the offending officer and permitting civil suit against him would be ineffective. It would be difficult to impose such sanctions when the officer was successful in apprehending the criminal and thought to be only doing his duty. The illegalities of the defendant's conduct and that of the arresting officer would be compared.

Police administrators would also be reluctant to punish because they, too, would compare the officer's misconduct with the criminal's. And even the possibility of imprisonment, fines and judgments or administrative action might deter the recruitment and retention of dedicated policemen.

Incidentally, the public did *not* accept summary search and seizure, as Judge Wilkey argues, when they accepted detection devices at airports or at some government buildings. In these situations, people are forewarned that these electronic devices have been installed and personal examinations will take place; they are not under suspicion of committing an illegal act; and the purpose of surveillance is public safety, a benefit shared by all, including the person searched.

I support the privacy of the individual against warrantless or unjustified searches.

Frederick M. Ostensoe
Judge
Yellow Medicine County
Granite Falls, Minnesota


The exclusionary rule:
why suppress
valid evidence?

If we want to reduce crime, we ought to admit all the evidence into the trial—and punish the police later if they obtained any of it illegally.

by Malcolm Richard Wilkey

Editor's note: Last August, Judicature published Yale Kamisar's reply to critics of the exclusionary rule entitled "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?". Kamisar maintained that the rule is necessary to ensure the constitutional guarantee against unreasonable searches and seizures.

This month, Judge Malcolm Wilkey argues that the rule should be abolished. He contends that it is simply a judge-made rule of evidence, that it unjustly frees many criminals, and that courts could find other ways to deter police from violating Fourth Amendment rights.

America is now ready to confront frankly and to examine realistically both the achievements and social costs of the policies which have been so hopefully enacted in the past 40 years. That reappraisal has made the most headlines in regard to economic and fiscal matters. It is imperative that this honest reappraisal include the huge social costs which American society—alone in the civilized world—pays as a result of our unique exclusionary rule of evidence in criminal cases.

We can see that huge social cost most clearly in the distressing rate of street crimes—assaults and robberies with deadly weapons, narcotics trafficking, gambling and prostitution—which flourish in no small degree simply because of the exclusionary rule of evidence. To this high price we can rightfully add specific, pernicious police conduct and lack of discipline—the very opposite of the objectives of the rule itself.

The questionable justification for such a rule is all the more apparent when we realize that it represents, not a constitutional mandate, but a policy choice by our Supreme Court. The wisdom of this policy has caused sharp and fundamental disagreement among the Justices: most of the decisions since *Mapp* in 1961 have been decided by only one or two votes.[1] Usually the people's representatives decide issues of public policy, especially when those decisions require a balancing of social values and the justices so sharply disagree, but the choice of the exclusionary rule as the only remedy for Fourth Amendment violations has shut out all consideration of alternatives, not only by the federal government but also by the 50 states.[2]

Though scholars have been shedding

Some of the ideas that the author expresses here were part of an earlier article he wrote for *The Wall Street Journal* entitled "Why Suppress Valid Evidence?" (October 7, 1977).

1. *Mapp v. Ohio, 367 U.S. 643, (1961).*

2. *See* "Time for a reappraisal" on page 221 of this issue.

more and more light on this problem,[3] few people have considered the enormous social cost of the exclusionary rule, and fewer still have thought about possible alternatives to the rule. I propose to do both those things in this article.

3. Chief Justice Burger's classic eloquent dissenting opinion in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971); Erwin N. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT (1975); Carl McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659 (1972); G. Marcus, POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, PART II. THE EXCLUSIONARY RULE. Chicago: Aldine 1962; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

Also, Albert M. and Julia Carlson Rosenblatt, *A Legal House of Cards*, HARPER'S, July 1977; Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); James E. Spiotto, *The Search and Seizure Problem-Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973); Law Reform Commission of Canada, REPORT ON EVIDENCE (1975), and the editorial pages of THE WALL STREET JOURNAL, July 12, 1971 and October 7, 1977; THE WASHINGTON STAR, July 7, 1975; and THE HOUSTON POST, November 15, 1977.

The rule's mystique

What is the exclusionary rule? It is a judge-made rule of evidence, originated in 1914 by the Supreme Court in *Weeks* v. *United States*,[4] which bars "the use of evidence secured through an illegal search and seizure."[5] It is not a rule required by the Constitution. No Supreme Court has ever held that it was. As Justice Black once said,

> [T]he Fourth Amendment does not itself contain

4. 232 U.S. 383 (1914). For clarity of analysis, I prefer to omit Boyd v. United States, 116 U.S. 616 (1886), which had its origin in statutory compulsory self-incrimination, a violation of the Fifth Amendment, and in which there was no actual search and seizure by government agents. *Weeks* is a clear search and seizure violation of the Fourth Amendment, with a holding of exclusion of the evidence as a result.

5. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

Do other countries exclude illegally-seized evidence?

To my mind, one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it. If there were merit in any of the grounds advanced in support of the rule, at least one other country somewhere would have emulated our 65-year-old example. All have shunned it.

As Chief Justice Burger pointed out: "This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule."[1] As Justice Frankfurter found 30 years ago: "Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which passed on the question, none has held evidence obtained by an illegal search and seizure as inadmissible."[2]

The leading case in the British Commonwealth is *Kuruma* v. *The Queen*, which arose from Kenya.[3] In appealing the death sentence, it was argued that the search, which uncovered a knife and ammunition, was illegal. In dismissing the appeal, the Privy Council held, in the words of Lord Goddard, C.J., that

> In their Lordships' opinion, the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.[4]

A century earlier an English judge put it more laconically, "It matters not how you get it; if you steal it, it will still be admissible in evidence."[5]

1. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. at 415.

2. Wolf v. Colorado, 338 U.S. at 30.

3. Kuruma v. The Queen, [1955] A.C. 197, 1 All E.R. 236.

4. *Id.* at 239.

5. Crompton, J., in R. Leatham [1861] 8 Cox C.C. 498 at 501.

any provision expressly precluding the use of such evidence and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.[6]

The greatest obstacle to replacing the exclusionary rule with a rational process, which will both protect the citizenry by controlling the police and avoid rewarding the criminal, is the powerful, unthinking emotional attachment to the rule. The mystique and misunderstanding of the rule causes not only many ordinary citizens but also judges and lawyers to feel (not think) that the exclusionary rule was enshrined in the Constitution by the Founding Fathers, and that to abolish it would do violence to the whole sacred Bill of Rights.[7] They appear totally unaware that the rule was not employed in U.S. courts during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule. (See "Do other countries exclude illegally seized evidence?" below.)

Realistically, the exclusionary rule can probably never be abolished until both the public and the Supreme Court are satisfied that there is available in our legal system a reasonably workable alternative. Unfortunately, the converse may also be true—we

6. Mapp v. Ohio, 367 U.S. 643, 661–662 (1961) (concurring opinion).

7. "Among some of its defenders, however, the exclusionary rule assumes the status of dogma, of constitutional holy writ, so much so that they sometimes talk as if there were no decent alternative. Yet the ancient alternative, sanctioned by most state criminal codes until 1961, was the common law practice, still in force in England and most other English speaking jurisdictions. Under common law it was not deemed the duty of the court to look into the provenance of evidence—only to weigh its relevance and accuracy." THE WASHINGTON STAR, editorial, p. 16, July 7, 1975.

The text on evidence most universally used throughout the British Commonwealth recognizes that evidence from confessions will be excluded, but other evidence will be allowed.

It may therefore be concluded that, under English law, illegally obtained evidence is admissible, provided it does not involve a reference to an inadmissible confession of guilt, and subject to the overall exclusionary discretion enjoyed by the judge at a criminal trial.[6]

The rule in other countries—in England, Canada, Germany and Israel, for example—is that material evidence, if it is probative and authentic, comes in without regard to whether it was obtained legally or illegally. Two examples often cited in Anglo-American legal writings are illustrative.

German law does not exclude illegally obtained evidence, except if in the judge's opinion it has been obtained by a serious violation of fundamental rights. The nature of the illegality which is alleged to have been committed is thus evaluated.[7] Israeli law considers the exclusionary rule as useless and unjustified. As a more workable alternative, if an illegal search occurs, the court can charge the responsible individual, convict him immediately, or send him to another judge for trial, in a proceeding roughly comparable to our contempt actions.[8]

Although the law as declared by the Supreme Court of Canada is binding on all courts in Canada, decisions of the English House of Lords will ordinarily be followed by the Supreme Court of Canada, and hence the British rule in *Kuruma* represents the Canadian law. The rule of *Kuruma* was reaffirmed by the Canadian Supreme Court in *Regina v. Wray*.[9]

The Court made it clear . . . that the trial judge's discretion does not extend to excluding evidence obtained by unfair means where the probative value of such evidence is unimpeachable; and that exclusion of evidence because unfairly

6. Cross on Evidence (3d Ed., 1967), p. 267. See discussion generally pp. 266–270. ". . . [T]he English authorities on the admissibility of evidence procured in consequence of an illegal search or other unlawful act . . . are uniformly in favor of its reception although there are not many of them." *Id.* at 266.

7. Clemens, *The Exclusionary Rule Under Foreign Law: Germany* (1961) 52 J. CRIM. L. C. & P. S. 277.

8. Cohn, *The Exclusionary Rule Under Foreign Law: Israel* (1961) 62 J. CRIM. L. C. & P. S. 282.

9. 11 C.R.N.S. 235, 248 (1970).

will never have any alternative in operation until the rule is abolished. So long as we keep the rule, the police are not going to investigate and discipline their own men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence.

How the rule works

The impact of the exclusionary rule may not be immediately apparent from the simple phrase of the *Wolf* decision that it bars "the use of evidence seized through an illegal search and seizure." It may help to consider three examples to see how the exclusionary rule needlessly frustrates police and prosecutors trying to do a very difficult job on the streets of our cities.

In *U.S. v. Montgomery*,[8] two police officers on auto patrol in a residential neighborhood at 6 p.m. on a winter day saw Montgomery driving his car in a way that suggested he was "sizing up" the area. When they stopped and identified him, they learned by radio that an arrest warrant was outstanding against him. Before taking him into custody, the officers searched him for weapons and found a .38 caliber bullet in his pants pocket, a magnum revolver loaded with six rounds and an unregistered, sawed-off shotgun with shells in the car.

A trial court convicted him of illegal possession of firearms, but the Court of Appeals (2-1) reversed, holding that no probable cause existed for stopping Montgomery in the first place, and that all evidence discovered thereafter was the product of an illegal search and seizure. Applying the exclusionary rule, the court suppressed as evidence the revolver and the sawed-off shotgun.

8. 561 F. 2d 875 (D.C. Cir. 1977).

obtained has nothing to do with securing a fair trial for the accused.[10]

The proposed Evidence Code of the Law Reform Commission of Canada contains a proposed section "Exclusion Because of Manner Evidence Obtained," which provides:

> 15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute. (2) In determing whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, . . .[11]

There follows an enumeration of the factors for the court. If adopted, this would in part, but in part only, change the rule of *Rocha v. Wray* toward what some consider the older English common law rule.

But the proposed Canadian change would be by no means an adoption of the U.S. exclusionary rule. The commentary on the proposed rule states flatly:

> Section 15: Rules of Evidence are unlikely to prove very effective in controlling police behavior. . . . The extent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule. . . .[12]

The general rule of Section 15 governs statements as well as material evidence. The following section of the proposed code excludes statements obtained in a manner which renders them unreliable. Where circumstances render a *statement* unreliable, but do not meet the strict standard of bringing 'the administration of justice in disrepute,' *real evidence* found as a result of this statement is not 'tainted,' and may not be suppressed at trial.

Proposed Section 16 would be a codification of present Canadian law and is directly contrary to the decision of the United States Supreme Court in *Brewer v. Williams*,[13] just as Section 15 as well as present Canadian law is directly contrary to *Coolidge v. New Hampshire*.[14]

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10. James Spiotto, *The Search and Seizure Problem—Two Approaches, The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & ADM. 43 (1973).

11. Law Reform Commission of Canada, REPORT ON EVIDENCE 22 (1975).

12. *Id.* at 61–63.

13. 430 U.S. 387 (1977).

14. 403 U.S. 443 (1971).

'Our way of supporting the Constitution is not to strike at the policeman who breaks it but to let off somebody else who broke something else.'

John H. Wigmore

which made it impossible to convict Montgomery or to retry the case.

Montgomery is an example of typical routine police work, which many citizens would think of as needed reasonable effort to prevent crime.[9] But now look at *U.S. v. Willie Robinson*,[10] a similar case with a different result. A policeman stopped Robinson for a minor traffic violation and discovered that license bureau records indicated his license was probably a forgery. Four days later, the same officer spotted Robinson about 2 a.m. and arrested him for driving with a forged credential.

Since police regulations required him to take Robinson into custody, the officer began a pat down or frisk for dangerous weapons. Close inspection of the cigarette package in the outer pocket of the man's jacket revealed heroin. Robinson was convicted of heroin possession but the Court of Appeals held 5-4 that, in light of the exclusionary rule, the search of Robinson was illegal and the heroin evidence must be suppressed. The Supreme Court reversed, holding that probable cause existed for the search, the evidence was legally obtained, and it could be offered in evidence. The High Court reinstated the original conviction.

This is one search and seizure case which turned out, in my view, correctly. But it took a U.S. District Court suppression hearing, a 2-1 panel decision in the Court of Appeals, a 5-4 decision in the court *en banc*, and a 6-3 decision of the Supreme Court to confirm the validity of the on-the-spot judgment of a lone police officer exercised at 2 a.m. on a Washington Street—five years and eight months earlier.

In *Coolidge v. New Hampshire*,[11] a 14-year old girl was found with her throat slit and a bullet in her head eight days after she had disappeared. Police contacted the wife of a suspect whose car was like one seen near the crime, and she gave them her husband's guns. Tests proved that one of the weapons had fired the fatal bullet.

Invoking his statutory authority, the attorney general of the state issued a warrant for the arrest of the suspect and the seizure of his car. Coolidge was captured and convicted. But the Supreme Court reversed the conviction on the grounds that the warrant was defective, the search of the auto unreasonable and vacuum sweepings from the auto (which matched the victim's clothing) were inadmissible. Why? Because the attorney general who issued the warrant had personally assumed direction of the investigation and thus was not a "neutral and detached magistrate."

Observe that here the conviction was reversed because of a defect in the warrant, not because of any blunder. Errors of law by either the attorney preparing the affidavit and application for the warrant or the magistrate in issuing the warrant frequently invalidate the entire search that the police officers make, relying in good faith on the

9. Compare former Solicitor General Griswold's principle on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good careful conscientious police officer to do under the circumstances, then he should be supported." Griswold, *supra* n. 3, at 57–58.

10. 414 U.S. 218 (1973), *reversing* 471 F.2d 1082 (1972). *See* comments by Griswold, *supra* n. 3, at 64–67.

11. 403 U.S. 443 (1971). *Compare Coolidge* with the more recent Brewer v. Williams, 430 U.S. 387 (1977), which was an exclusionary rule case under the Sixth Amendment right to counsel. The Supreme Court held 5-4 that the prisoner's Sixth Amendment right to counsel was violated, the confession was thus illegally obtained, the evidence of location of the murdered girl's body was thus tainted because it was derived from the illegal confession, and the exclusionary rule would exclude the evidence of the prisoner's statements and the location of the body.

warrant; those errors cause the suppression of the evidence and the reversal of the conviction. How does the exclusionary rule improve police conduct in such cases?

The Court's rationale

Deterrence: During the rule's development, the Supreme Court has offered three main reasons for the rule. The principal and almost sole theory today is that excluding the evidence will punish the police officers who made the illegal search and seizure or otherwise violated the constitutional rights of the defendant, and thus deter policemen from committing the same violation again.[12] The flaw in this theory is that there is absolutely no empirical data that excluding evidence against a defendant has anything to do with either punishing police officers or thereby deterring them from future violations.

Chief Justice Burger has flatly asserted ". . . there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials,"[13] and the Supreme Court has never sought to adduce such empirical evidence in support of the rule. Probably such a connection can never be proved, for as a matter of logical analysis "the exclusionary rule is well tailored to deter the prosecutor from illegal conduct. But the prosecutor is not the guilty party in an illegal arrest or search and seizure, and he rarely has any measure of control over the police who are responsible."[14]

Privacy: From *Weeks* (1914) to *Mapp* (1961) the rule was also justified as protecting the privacy of the individual against illegal searches and seizures as guaranteed by the Fourth Amendment.[15] The Supreme Court later downgraded the protection of privacy rationale,[16] perhaps because of the obvious defect that the rule purports to do nothing to recompense innocent victims of Fourth Amendment violations, and the gnawing doubt as to just what right of privacy guilty individuals have in illegal firearms, contraband narcotics and policy betting slips—the frequent objects of search and seizure![17]

Judicial integrity: A third theme of the Supreme Court's justifying rationale, now somewhat muted, is that the use of illegally obtained evidence brings the court system into disrepute. In *Mapp* Justice Clark referred to "that judicial integrity so necessary in the true administration of justice,"[18] which was reminiscent of Justice Brandeis dissenting in *Burdeau* v. *McDowell*," . . . respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."[19]

The impact of the rule

It is undeniable that, as a result of the rule, the most valid, conclusive, and irrefutable factual evidence is excluded from the knowledge of the jury or consideration by

12. "[T]he rule's prime purpose is to deter future unlawful police conduct," Justice Powell in United States v. Calandra, 414 U.S. 338, 347 (1974). "Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it," Justice Stewart in Elkins v. United States, 364 U.S. 206, 217 (1960); ". . . all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action," Justice Clark in Linkletter v. Walker, 381 U.S. 618, 636–37 (1965).

13. Chief Justice Burger, dissenting in Bivens, 403 U.S. at 416.

14. Oaks, *supra* n. 3, at 726.

15. "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the due process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the federal government." Justice Clark in Mapp, 367 U.S. at 655.

16. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: 'the ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." Justice Powell in United States v. Calandra, 414 U.S. 338, 347 (1974). No one suggests, of course, that the Fourth Amendment purpose of protecting privacy is itself downgraded; the downgrading is of the exclusionary rule as a method of protecting that privacy.

17. Schlesinger, *supra* n. 3, at 47–50.

18. Mapp, 367 U.S. at 660.

19. 256 U.S. 465, 477 (1921). Cf. Olmstead v. United States, 277 U.S. 438, 485 (1928). (Holmes, J., dissenting) ("[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.") Since Justice Holmes, an admirer of the common law, also said, "The life of the common law has not been logic, but experience," I have always wished he could review America's experience with the exclusionary rule since 1928, and tell us his updated opinion.

Time for a reappraisal

Citizens from many different quarters have recently begun to question anew the wisdom of the exclusionary rule.

"Surely a rule of such profound social dimensions should spring from something closer to social consensus than to judicial or legal dialectic," wrote Albert M. and Julia Carlson Rosenblatt in "A Legal House of Cards," *Harper's* (July 1977). "It is mistakenly assumed that these results are somehow mandated by the Constitution. The Fourth Amendment condemns unreasonable searches, but it does not decree that insult be added to injury, that the public be affronted first by the crime and then by the release of the acknowledged malefactor. Lacking an efficient legislative scheme by which citizens could be guaranteed their Fourth Amendment rights, the Supreme Court chose the exclusionary rule."

Only 10 years after *Mapp*, Mr. Justice Harlan called for a thorough-going reappraisal of the rule in a concurring opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490–91 (1971). "From the several opinions that have been filed in this case, it is apparent that the law of search and seizure is due for an overhauling. . . . I would begin this process of reevaluation by overruling *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and *Ker* v. *California*, 374 U.S. 23 (1963). . . . In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. . . . The states have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. (Oaks suggested) that the assumed 'deterrent value' of the exclusionary rule has never been adequately demonstrated or disproved, and point(ed) out that because of *Mapp* all comparative statistics are 10 years old and no new ones can be obtained."

Justice Harlan's disillusionment 10 years after *Mapp* was reflected in the *Wall Street Journal*. On June 21, 1961, at the close of the Supreme Court term, the *Journal* ran a lead editorial, "The Right to be Secure," generally praising the *Mapp* decision. Ten years later, on July 12, 1971, at the close of the Supreme Court term, the *Journal* ran a lead editorial, "An Alternative Needed," calling for a reexamination of the rule and endorsing Chief Justice Burger's dissents in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411 (1971), and *Coolidge* v. *New Hampshire*, *supra*, at 492. *M. R. W.*

the judge. As Justice Cardozo predicted in 1926, in describing the complete irrationality of the exclusionary rule:

> The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free.[20]

20. People v. DeFore, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587–588 (1926).

Fifty years later Justice Powell wrote for the Court:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: . . . the physical evidence sought to be excluded is typically reliable and often the most probative evidence bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police

officer and the windfall afforded the guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.[21]

I submit that justice is, or should be, a truth-seeking process. The court has a duty to the accused to see that he receives a fair trial; the court also has a duty to society to see that all the truth is brought out; only if all the truth is brought out can there be a fair trial.[22] The exclusionary rule results in a complete distortion of the truth. Undeniable facts, of the greatest importance, are forever barred—facts such as Robinson's heroin, Montgomery's sawed-off shotgun and pistol, the bullet fired from Coolidge's gun and the sweepings from his car which contained items from the dead girl's clothes.

If justice is a truth-seeking process, it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence, as the three examples illustrate. We rightly exclude evidence whenever its reliability is questionable—a coerced or induced confession,[23] for example, or a faulty line-up for identification of the suspect.[24] We exclude it because it is inherently unreliable, not because of the illegality of obtaining it.[25] An illegal search in no way reduces the reliability of the evidence.

There have been several empirical studies on the effects of the exclusionary rule in five major American cities—Boston, Chicago, Cincinnati, New York and Washington, D.C.—during the period from 1950 to 1971. These have been recently collected and analyzed, along with other aspects of the exclusionary rule and its alternatives, by Professor Steven Schlesinger in his book, *Exclusionary Injustice: The Problem of Illegally Obtained Evidence*.[26]

Three of these studies concluded that the exclusionary rule was a total failure in its primary task of deterring illegal police activity and that it also produced other highly undesirable side effects. The fourth study, which said the first three were too harsh in concluding that the rule was totally ineffective, still said: "Nonetheless, the inconclusiveness of our findings is real enough; they do not nail down an argument that the exclusionary rule has accomplished its task."[27]

Schlesinger and others regard the study by Dallin Oakes as perhaps the most comprehensive ever undertaken, both in terms of data and the breadth of analysis of the rule's effects. Oakes concluded:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. . . . The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.[28]

Spiotto made a comparative study of both the American exclusionary rule and the existing Canadian tort alternative, taking Chicago and Toronto as comparable metropolitan areas. He found that an

> empirical study [of narcotics and weapons cases] indicates that, over a 20-year period in Chicago, the proportion of cases in which there were motions to suppress evidence allegedly obtained illegally increased significantly. This is the oppo-

21. Stone v. Powell, 428 U.S. 465, 489–90 (1976) (footnotes omitted).

22. "In a free society, the government owes its citizens freedom from crime as well as freedom from governmental intrusion." Rosenblatt, *supra* n. 3.

23. Miranda v. Arizona, 384 U.S. 436 (1966).

24. U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California 388 U.S. 263 (1967).

25. One type case in which the evidence in some circumstances may be reliable, but where the exclusionary rule may be justified, is that exemplified by Rochin v. California, 342 U.S. 165 (1952), in which the police measures employed were said to shock the conscience. On the facts graphically described by Justice Frankfurter, application of the exclusionary rule was approved on the basis of these extraordinary circumstances.

While he did not draw the analogy, Justice Frankfurter, who wrote *Wolf*, which refused to apply the exclusionary rule to the states, dissented in *Elkins*, which abolished the Silver Platter doctrine, and joined in the dissent in *Mapp*, which reversed *Wolf*, probably approved *Rochin* on what is said to be the older English rationale giving judges the right in exceptional cases to exclude evidence which would tend to bring the administration of justice into disrepute. That discretion still exists in English law. Kuruma v. The Queen, [1955] A.C. 197, 1 All E.R. 236, but it is rarely exercised and then only in truly exceptional cases.

26. S. Schlesinger, *supra* n. 4.

27. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L. J. 681, 726 (1973-74).

28. Oakes, *supra* n. 3, at 755.

site result of what would be expected if the rule had been efficacious in deterring police misconduct.[29]

Three studies conducted between 1950 and 1971 show a substantial increase in motions to suppress in both narcotics and gun offenses.[30] The increase from 1950 to 1971 can fairly be attributed to the impact of *Mapp* (1961) on search and seizure in the state courts.

Criticisms of the rule

By this point, we should be able to see that the exclusionary rule actually produces many effects opposite from those that the Court intended to produce. No matter what rationale we consider, the rule in its indiscriminate workings does far more harm than good and, in many respects, it actually prevents us from dealing with the real problems of Fourth Amendment violations in the course of criminal investigations.

In the eyes of the Supreme Court, the first and primary rationale of the exclusionary rule is deterrence. I submit that all available facts and logic show that excluding the most reliable evidence does absolutely nothing to punish and thus deter the official wrongdoer,[31] but the inevitable and certain result is that the guilty criminal defendant goes free.

The second—now rather distant second—rationale in the eyes of the Court has been the protection of privacy. I submit a policy of excluding incriminating evidence can never protect an innocent victim of an illegal search against whom no incriminating evidence is discovered. The only persons protected by the rule are the guilty against whom the most serious reliable evidence should be offered. It cannot be separately argued that the innocent person is protected *in the future* by excluding evidence against the criminal *now*, for this is only the deterrent argument all over again.

The third rationale found in the past opinions of the Court is that the use of illegally obtained evidence brings our court system into disrepute. I submit that the exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system.

Ask any group of laymen if they can understand why a pistol found on a man when he is searched by an officer should not be received in evidence when the man is charged with illegal possession of a weapon, or why a heroin package found under similar circumstances should not be always received in evidence when he is prosecuted for a narcotics possession, and I believe you will receive a lecture that these are outrageous technicalities of the law which the American people should not tolerate.[32] If you put the same issue to a representative group of lawyers and judges, I predict you would receive a strong preponderance of opinions supporting the lay view, although from those heavily imbued with a mystique of the exclusionary rule as of almost divine origin you would doubtless hear some support.[33]

The rationale of protecting judicial integrity is also inconsistent with the behavior of the courts in other areas of the criminal law. For example, it is well settled that courts

29. Spiotto, *supra* n. 3, at 36, 37.

30. Schlesinger, *supra* n. 3, at 50–51.

31. "With supreme irony, those who pooh-pooh the deterrent effect of punishment on criminal activity are the first to extol it as a device to curb police misconduct. But if the fear of prison does not deter thieves, how may police misconduct be stemmed by such impersonal penalties as the judicial dismissal of cases? Both failures have a point in common: the sanction is either absent or blunted (in the case of the police) or, in the case of criminals, delayed, diminished, or denied." Rosenblatt, *supra* n. 3.

32. "Given the decisions this rule tends to produce and the obvious need to bolster public confidence that courts do dispense justice, it is scarcely unreasonable to ask that it be reexamined." THE WALL STREET JOURNAL, Editorial, p. 8, July 12, 1971.

". . . from the point of view of laymen unversed in refinements of constitutional theory, [the American exclusionary rule] is sometimes an outrage to common sense. It often results in the freeing of someone convicted of a vicious criminal act for what strikes the crime-conscious public as finicking or trivial reasons." THE WASHINGTON STAR, editorial, p. A16, July 7, 1975.

"Through a bizarre sense of achieving justice, we have come to free the criminal and harass the innocent, an absurdity that would likely be sensibly ordered in a more primitive society." THE HOUSTON POST, editorial, p. 2E, November 16, 1977.

33. Dean Wigmore was not a believer in the rule: "Our way of supporting the constitution is not to strike at the police officer who breaks it but to let off somebody else who broke something else," quoted in Rosenblatt, *supra* n. 3.

How the exclusionary rule hampers gun control

A striking feature of the motion to suppress for illegal search and seizure is that it is a defense weapon peculiarly suited to narcotic, gun, and gambling crimes, and only incidentally to other felony charges. Complete data on three branches of the circuit court in Chicago for three months in 1971 confirms that these kinds of cases are most likely to generate motions to suppress: narcotics—878 such motions; guns—335; gambling—255; and all other felony offenses—84.[1]

One of the best illustrations of the social cost of the exclusionary rule—and one that wasn't suggested until recently—is the relationship of the rule to effective gun control in these United States. There are varying degrees of gun control—complete ban, registration, registration of some weapons, or no restrictions at all—on which I take no position. The common, fatal flaw in every scheme of gun control about which I have read is that it is doomed to be totally ineffective in preventing the habitual use of weapons in street crimes so long as the exclusionary rule hampers the police in enforcing it.

Has it ever struck our national consciousness that the United States is unique in two ways—among the civilized nations, we have the most extraordinary crime rate involving firearms *and* a rule which excludes the most convincing evidence available, a rule which exists in no other country in the civilized world? These two unique features of our daily lives—crimes with firearms and a rule barring the use of perfectly valid evidence—are not unconnected.

No matter how rigid the gun control law, no matter how illegal the possession—whether sawed-off shotgun, automatic pistol, or submachine gun—if the officer does not have what the American law calls "probable cause" to make a reasonable search under the Fourth Amendment, if he goes ahead and makes the search, finds and confiscates the weapon, the evidence of that search and that weapon cannot be introduced as evidence at the trial.[2] The result is, of course, that the man *cannot* be convicted of carrying a weapon illegally. "The criminal is to go free because the constable has blundered."

Since criminals know the difficulties of the police in making a valid search which will stand up under challenge at trial, a further result is apparent—the criminals in

1. Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 51. 1977.

2. I am not suggesting that abolishing the rule will result in a wholesale abandonment of any standard of probable cause for a valid search. Not at all. The standard of probable cause required is a totally different issue, one that I do not specifically address in this article. Whatever the standard of probable cause, with an effective, alternative method of disciplining the police, they may well make fewer illegal searches and yet prosecutors may bring more prosecutions (and more successful prosecutions) for gun and narcotic violations than they do today.

Why fewer illegal searches? A strict disciplinary mechanism for police who violate Fourth Amendment rights should curtail the more flagrant violations. Why more prosecutions? Realistically, we must recognize that there will always be instances of police in good faith overstepping the line, making a search without probable cause. Without the exclusionary rule, prosecutors could introduce the evidence from such searches and convict more defendants.

One might argue that under an alternative mechanism, gun control laws would depend upon the illegal searches and seizures that we anticipate. But that argument shouldn't prevent us from abolishing the exclusionary rule, which itself produces an extraordinary number of illegal searches and seizures (some for pure harassment purposes). Rather, that argument should encourage us to draft better gun control laws and to improve police training so officers make only valid searches and seizures.

America *do* carry guns. Knowing that they will not be stopped on the street and searched unless they do something drastically suspicious—more suspicious than Montgomery or Robinson in the cases I described in the text—the criminal will carry a gun and laugh in the face of the officer who might wish to search him for it. So long as the criminal can avoid misbehavior which would give the officer the right to arrest him (as Willie Robinson did) the criminal can parade in the streets with a great bulge in his pocket or a submachine gun in a blanket under his arm.

Compare the results in other countries—in England neither the police nor the criminals carry guns. Why? The criminals know that the police have a right to search them on the slightest suspicion, and they know that if a weapon is found, they will be prosecuted.[3] Whenever a man is caught with a gun or narcotics in his possession in England or Canada, conviction is virtually automatic—there is no denying the fact of possession, there is no exclusion of the evidence, no matter how obtained.

The rule in other countries produces another salutary result: there is no widespread searching by the police. It is not necessary, so long as the police have *power* to do it, with resulting automatic conviction—and the criminals *know* the police have such power.

Under our unique exclusionary rule, the American people have the worst of it both ways: (1) criminals do carry guns—and use them; (2) police know this, so they engage in far more searches and seizures, some of which are blatantly illegal. Thus, the American people are harassed more by *both* criminals *and* police than in other civilized countries.[4]

M. R. W.

3. Of course, I do not exclude other causes for this difference, such as historical tradition, racial factors, geography and environment. But surely the factor I am discussing has a powerful effect in aggravating the problem.

4. Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36, 37 (1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Schlesinger, *supra* n. 1, at 50.

will try defendants who have been illegally seized and brought before them. In *Ker* v. *Illinois*,[34] a defendant kidnapped in Peru was brought by force to Illinois for trial; in *Mahon* v. *Justice*[35] the accused was forcibly abducted from West Virginia for trial in Kentucky; and in *Frisbie* v. *Collins*,[36] the defendant was forcibly seized in Illinois for trial in Michigan.

Said the *Frisbie* court:

> This court has never departed from the rule announced in *Ker* v. *Illinois* . . . that the power of the court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.'[37]

Why should there be an exclusionary rule for illegally seized evidence when there is no such exclusionary rule for illegally seized people? Why should a court be concerned about the circumstances under which the murder weapon has been obtained, while it remains unconcerned about the circumstances under which the murderer himself has been apprehended? It makes no sense to argue that the admission of illegally seized evidence somehow signals the judiciary's condonation of the violation of rights when the judiciary's trial of an illegally-seized *person* is not perceived as signaling such condonation.

Other defects of the rule

The rule does not simply fail to meet its declared objectives; it suffers from five other defects, too. One of those defects is that it uses an undiscriminating, meat-ax approach in the most sensitive areas of the administration of justice.[38] It totally fails to discrimi-

34. 119 U.S. 436 (1886).

35. 127 U.S. 700 (1888).

36. 342 U.S. 519 (1953).

37. *Id. See also* Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

38. Neither this criticism, nor the other objection to the undiscriminating manner in which the exclusionary rule operates, is intended to suggest that a more discriminating application of the exclusionary rule—as via some form of balancing—would be tolerable. Given the weakness of the rationale for any exclusionary rule whatsoever, the rule should be discarded. The textual discussion was intended merely to illustrate the exceedingly poor fit between the exclusionary rule and the values relevant to any Fourth Amendment remedial scheme.

nate between the degrees of culpability of the officer or the degrees of harm to the victim of the illegal search and seizure.

It does not matter whether the action of the officer was grossly willful and flagrant or whether he was conscientiously using his very best judgment under difficult circumstances; the result is the same: the evidence is out. The rule likewise fails to distinguish errors of judgment which cause no harm or inconvenience to the individual whose person or premises are searched, except for the discovery of valid incriminating evidence, from flagrant violations of the Fourth Amendment as in *Mapp* or *Rochin*.[39] Chief Justice Burger's point in *Bivens* is undeniable:

> . . . society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition.[40]

When police know that describing the search truthfully will taint the evidence, they may perjure themselves to convict the defendant.

Another defect is that the rule makes no distinction between minor offenses and more serious crimes. The teenage runner caught with policy slips in his pocket and the syndicate hit man accused of first degree murder are each automatically set free by operation of the exclusionary rule, without any consideration of the impact on the community. Customarily, however, we apply different standards to crimes which vary as to seriousness, both in granting bail before trial and in imposing sentence afterwards.

A third problem is that, strangely, a rule which is supposed to discipline and improve police conduct actually results in encouraging highly pernicious police behavior. A policeman is supposed to tell the truth, but when he knows that describing the search truthfully will taint the evidence and free the suspect, the policeman is apt to feel that he has a "higher duty" than the truth. He may perjure himself to convict the defendant.[41]

Similarly, knowing that evidence of gambling, narcotics or prostitution is hard to obtain under the present rules of search and seizure, the policeman may feel that he can best enforce the law by stepping up the incidence of searches and seizures, making them frequent enough to be harassing, with no idea of ultimate prosecution. Or, for those policemen inclined *ab initio* to corruption, the exclusionary rule provides a fine opportunity to make phony raids on establishments, deliberately violating the standards of the Fourth Amendment and immunizing the persons and premises raided—while making good newspaper headlines for active law enforcement.

Fourth, the rule discourages internal disciplinary action by the police themselves. Even if police officials know that an officer violated Fourth Amendment standards in a particular case, few of them will charge the erring officer with a Fourth Amendment violation: it would sabotage the case for the prosecution before it even begins. The prosecutor hopes the defendant will plea bargain and thus receive some punishment, even if the full rigor of the law cannot be imposed because of the dubious validity of the search. Even after the defendant has been

39. Schlesinger, *supra* n. 3, at 62.
40. Bivens, 403 U.S. at 419.

41. Judge Rosenblatt has written: "While intended to curb abuse of police power, the exclusionary rule has opened up a whole new field of police misconduct: perjury. Police officers who testify at suppression hearings have sometimes shown a remarkable facility for adjusting facts to fit the court's constitutional sensibilities. . . . Moreover, the rule has tarnished the reputation of the conscientious, honest policeman in the eyes of the public, while eroding self-respect within the profession. . . . Because the public does not fully understand the exclusionary rule, a victim will see only the outrageous release of his assailant, and may very well assume that someone was paid off." Rosenblatt, *supra* n. 3.

convicted or has pleaded guilty, it would be dangerous to discipline the officer—months or years later—because the offender might come back seeking one of the now popular post-conviction remedies.

Finally, the existence of the federally imposed exclusionary rule makes it virtually impossible for any state, not only the federal government, to experiment with any other methods of controlling police. One unfortunate consequence of *Mapp* was that it removed from the states both the incentive and the opportunity to deal with illegal search and seizure by means other than suppression.[42] Justice Harlan, in commenting on the evil impact of the federal imposition of the exclusionary rule on the states, observed:

> Another [state], though equally solicitous of constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with constitutional infractions by other means.[43]

Alternatives to the rule

The excuse given for the persistence of the exclusionary rule in this country is that there is no effective alternative to make the police obey the law in regard to unreasonable searches and seizures. If this excuse did not come from such respected sources, one would be tempted to term it an expression of intellectual bankruptcy.

"No effective alternative"? How do all the other civilized countries control their police? By disciplinary measures against the erring policeman, by effective civil damage action against both the policeman and the government—not by freeing the criminal. Judging by police conduct in England, Canada and other nations, these measures work very well. Why does the United States alone rely upon the irrational exclusionary rule?

It isn't necessary. Justice Frankfurter in *Wolf* (1949) noted that none of the 10 jurisdictions in the British Commonwealth had held evidence obtained by an illegal search and seizure inadmissible, and "the jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. . . ."[44] Justice Harlan in his dissent in *Mapp* noted the wisdom of allowing all evidence to be brought in and "dealing with constitutional infractions by other means."[45] Justice Black, concurring in *Mapp*, noted that the Fourth Amendment did not itself preclude the use of illegally obtained evidence.[46]

In his dissent in *Bivens*, Chief Justice Burger suggested that Congress provide that Fourth Amendment violations be made actionable under the Federal Tort Claims Act,[47] or something similar. Senator Lloyd Bentsen and other members of Congress have put forward proposals to abolish the rule and substitute the liability of the federal government toward the victims of illegal searches and seizures, both those innocent and those guilty of crimes.[48]

The purposes of an alternative

Before examining what mechanism we might adopt in place of the exclusionary rule as a tool for enforcing the rights guaranteed by the Fourth Amendment, let us see clearly what objectives we desire to achieve by such alternatives.

The *first* objective, in sequence and perhaps in the public consciousness of those who are aware of the shortcomings of the rule, is to prevent the unquestionably guilty from going free from all punishment for their crime—to put an end to the ridiculous situation that the murderer goes free because the constable has blundered. Let me reiterate: the exclusionary rule, as applied to tangible evidence, has never prevented an innocent person from being convicted.[49]

Second, the system should provide effective guidance to the police as to proper conduct under the Fourth Amendment. When appellate courts rule several years

42. Schlesinger, *supra* n. 3, at 85; Oaks, *supra* n. 3, at 753.

43. Mapp, 367 U.S. at 681 (Harlan, J., dissenting).

44. Wolf, 338 U.S. at 29–30.

45. Mapp, 367 U.S. at 680–81.

46. 367 U.S. at 661–62.

47. Bivens, 403 U.S. at 421–22.

48. S. 881, 93rd Cong., 1st Sess. (1973). *See* Schlesinger, *supra* n. 3, at 89.

49. This is in contrast to the exclusionary rule as applied to coerced confessions or faulty lineups, in which instances the evidence is properly excluded because of its inherent unreliability.

after the violation, their decisions are not only years too late, but usually far too obscure for the average policeman to understand. They are remote in both time and impact on the policeman at fault. Immediate guidance to the policeman as to his error, with an appropriate penalty, is obviously more effective, in contrast to simply rewarding the criminal.

Third sequentially, but first in value, the mechanism should protect citizens from Fourth Amendment violations by law enforcement officers. (I say sequentially, because it is necessary first to abolish the exclusionary rule and then to provide guidance to the police). If police receive immediate and meaningful rulings, accompanied by prompt disciplinary penalties, they will be effectively deterred from future wrongful action and citizens will thus be effectively protected.

Under the present rule, the guilty go free as a result of an illegal search, but the innocent are never compensated for the injuries they suffered.

Fourth, the procedure should provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures. This the present exclusionary rule totally fails to do. Only the guilty person who has suffered an illegal search and seizure receives some form of compensation—an acquittal, which is usually in gross disproportion to the injury inflicted on him by an illegal search and seizure. Thus, under the present irrational exclusionary rule system, the guilty are over-rewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered.

The magnitude of the offense

Fifth, it should be an objective of any substitute for the exclusionary rule to introduce comparative values into what is now a totally arbitrary process and inflexible penalty. Under the exclusionary rule, the "penalty" is the same irrespective of the offense. If an officer barely oversteps the line on probable cause and seizes five ounces of heroin from a peddler on the street corner, or an officer without a warrant and without probable cause barges into a home and seizes private papers, the result is automatic—the evidence is barred, the accused is freed, and this is all the "punishment" the officer receives.

Surely the societal values involved in the two incidents are of a totally different magnitude. The error of the officer in dealing with narcotics peddlers should not be overlooked, his misapprehension of the requirement of probable cause should be called to his attention quickly in a way which he will remember, but actual punishment should be relatively minimal. In the instance of an invalid seizure of private papers in the home, the officer should be severely punished for such a gross infraction of Fourth Amendment rights.

The exclusionary rule is applied automatically now when there is no illegal action by investigative officers and hence no possible deterrence to future police misconduct. For example, where government agents have dutifully applied to a judge or magistrate for a search warrant, and executed the warrant in strict conformity with its terms, a warrant which later proves defective will force the judge later to exclude the evidence illegally seized.[50] All that is involved in these instances is a legal error on the part of the judge, magistrate, or perhaps the attorney

50. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Aguilar v. Texas, 378 U.S. 108 (1964); Franks v. Delaware (No. 77-5176) (U.S. Sup. Ct. June 26, 1978), slip op. 617, dissent 5.

who drew the papers. It is absurd to say that the court subsequently is "punishing" or attempting to "deter" the judge, magistrate, or attorney who made the legal error by suppressing the evidence and letting the accused go free, but this is what happens now.

If these are valid objectives in seeking a substitute procedure for the exclusionary rule as a method of enforcing Fourth Amendment rights, there seem to be two general approaches which might well be combined in one statute—internal discipline by the law enforcement authorities themselves, and external control by the courts or an independent review board.

COMPIX

Do people object to airport searches?

The American people have accepted and supported the fairly rigorous search for dangerous weapons at airports. Several years ago hijackers made flying so dangerous that citizens acquiesced to an invasion of their right to privacy and non-molestation. They accepted logical measures of control over weapons, even though it was inconvenient.

Only a small percentage of Americans travels by air. But all of us use our streets, shopping centers, and other public places where armed robberies and assaults happen every day. If the people are willing to accept strong measures of gun control by more effective searches and seizures at the airports, I submit that they are not only willing but eager to see more effective searches and seizures of deadly weapons on the streets. It is apparent, if one reflects a moment, that the exclusionary rule prevents effective gun control. Abolishing the exclusionary rule and punishing those who carry deadly weapons would receive widespread acclaim.

It is significant that, whatever the original misgivings of a few civil libertarians, no court has ruled that the law enacted by Congress providing for airport searches authorized an unreasonable search and there-

Internal discipline

Disciplinary action against the offending law enforcement officer could be initiated by the law enforcement organization itself or by the person whose Fourth Amendment rights had been allegedly violated. The police could initiate action either within the regular command structure or by an overall disciplinary board outside the hierarchy of command. Many law enforcement organizations have such disciplinary boards now and they could be made mandatory by statute in all federal law enforcement agencies. Wherever they may be located, the organization would require action to be taken following the seizure of material evidence, if the criminal trial or an independent investigation showed a violation of the Fourth Amendment standards.

The person injured could also initiate action leading to internal discipline of the offending officer by complaint to the agency disciplinary board. Each enforcement agency or department could establish a process to hear and decide the complaint, providing both a penalty for the offending officer (if the violation were proved) and government compensation to the injured party.

This procedure would cover numerous cases in which citizens suffer violations of Fourth Amendment rights, but in which no court action results. The injured party could choose this administrative remedy in lieu of court action, but any award in the administrative proceedings would be taken into account by a court later if a citizen, dissatisfied with the award, instituted further legal action.

The penalty against the officer would be tailored to fit his own culpability; it might be a reprimand, a fine, a delay in promotion, a suspension, or discharge. Factors bearing upon the extent of the penalty would include the extent to which the violation was willful, the manner in which it deviated from approved conduct, the degree to which it invaded the privacy of the injured party, and the extent to which human dignity and societal values were breached.

Providing compensation to the injured party from the government is necessary, for it is simply realistic to make the government liable for the wrongful acts of its agent in order to make the prospect of compensation

fore was invalid under the Fourth Amendment. Some people mistakenly objected that the Constitution bars *all* searches but, in fact, the Fourth Amendment only bars "unreasonable" searches and seizures. What is an unreasonable search and seizure is certainly, in the first instance, the duty of Congress to declare.

The danger of armed hijacking of an airplane provided a perfectly reasonable basis in law to insist upon searches of possessions and persons as a condition to boarding an aircraft. Furthermore, police sometimes spotted people who, seeing the rigor of the check, turned back from the search at the gate.

It is undeniable that the rigorous search and seizure procedure at airports has been successful. In the calendar year 1977, no fewer than 2034 handguns and other firearms were seized from passengers boarding airplanes.[1] It is impossible to estimate the number of passengers who otherwise would have carried handguns on an aircraft, absent the effective search methods at U.S. airports, but surely it is much larger than the number of weapons actually found.

And the new procedures have drastically reduced successful airplane hijackings in the United States and even the number of attempts in the last seven years. In other words, effective search and seizure has been proved to reduce crime with handguns. In contrast, the exclusionary rule as a deterrent to police illegal searches is a demonstrated failure; the number of crimes and the number of searches ruled invalid are steadily increasing. *M. R. W.*

1. Federal Aviation Administration, SEMI-ANNUAL REPORT TO CONGRESS ON EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM (1978) (Exhibit 1D).

meaningful. Policemen traditionally are not wealthy and the government has a deep purse. Moreover, higher administrative officials and irate taxpayers may be expected to react adversely to losses resulting from the misconduct of policemen and to do something about their training and exercise of responsibilities.

External control

When a prosecutor tries a defendant in the wake of a violation of Fourth Amendment rights, the court could conduct a "mini-trial" of the offending officer after the violation is alleged and proof outlined in the principal criminal case. This mini trial would be similar to a hearing on a motion to suppress now, but it would be conducted after the main criminal case. The burden would be on the injured party to prove, by preponderance of the evidence, that the officer violated his Fourth Amendment rights. The policeman could submit his case to either the judge or the jury who heard the main criminal case.

By initiating the "trial" of the officer immediately following the criminal case in which he was charged with misconduct, the court could determine the question of his violation speedily and economically. Presumably both the judge and jury have been thoroughly familiarized with the facts of the main case and are able to put the conduct of the officer in perspective.

Such a mini-trial would provide an outside disciplinary force that the injured party could utilize in lieu of internal discipline by the agency. Any previous administrative action taken against the officer would be considered by the judge and jury, if a penalty were to be assessed as a result of the mini-trial. The same factors bearing on the penalty to the officer and compensation to the injured party as discussed under the administrative remedy would be relevant in the "mini-trial."

In those instances where police violate Fourth Amendment rights but the prosecutor does not bring charges against the suspect, the wronged party should be able to bring a statutory civil action against the government and the officer. Both would be named as defendants: the officer to defend against any individual penalty, the government to be able to respond adequately in damages to the injured party if such were found. Many instances of Fourth Amendment violation now go unnoticed because no criminal charge is brought and the injured party is not in position to bring a *Bivens*-type suit for the alleged constitutional violation. The burden of proof on the factors in regard to penalty and compensation would be the same as in a mini-trial following the principal criminal case, as discussed above.

Once the main trial is over, the court could conduct a second inquiry to discover whether the police had violated the defendant's rights.

The creation of this civil remedy could be accomplished by simple amendment to the present Federal Tort Claims Act. This is the procedure followed in many other countries, among them Canada.

> . . . the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages.[51]

Disciplinary punishment and civil penalties directly against the erring officer involved would certainly provide a far more effective deterrent than the Supreme Court has created in the exclusionary rule. The creation of a civil remedy for violations of privacy, whether or not the invasion resulted in a criminal prosecution, would provide a

51. Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L.C. AND P.S. 271 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, Part II, THE EXCLUSIONARY RULE, *supra* n. 3, at 105.

remedy for the innocent victims of Fourth Amendment violations which the exclusionary rule has never pretended to give. And the rationale that the "government should not 'profit' from its own agent's misconduct" would disappear completely if erring officers were punished and injured parties compensated when there was a Fourth Amendment violation.[52] If such a law and procedure were enforced, there would be no remaining objection to the subject of search and seizure still receiving his appropriate punishment for his crime.

Both judges who favor the rule and those who oppose it have said that the rule itself is not mandated by the Constitution.

Conclusion

All of the above was written before I read Professor Kamisar's "Reply to critics of the exclusionary rule" in the August issue [Yale Kamisar, "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?" 62 Judicature 66.] It is apparent that our respective positions are widely divergent. After pondering his statement, I believe it fair to say that he must attempt to defend his position on one of two grounds, and that on analysis neither is defensible.

First, if Professor Kamisar believes that the Fourth Amendment necessarily mandates the exclusionary rule, then he ought to cite Supreme Court authority for this position. Nowhere in his article does he do so. It is undeniable that at no time in the Court's history has a majority in any case ever so held, and I do not believe that any more than two individual justices in the court's history have so expressed themselves. In contrast, numerous justices, both favoring and opposing the rule, have stated that the rule itself is *not* mandated by the Fourth Amendment.

Second, if Professor Kamisar's article is intended only to say that under the Constitution we have a choice of methods to enforce the ban against "unreasonable searches and seizures," and that the exclusionary rule is a good choice only because of "the imperative of judicial integrity," then I submit both logic and experience in this country and all other countries refutes this. If the Supreme Court or the Congress has a choice of methods under the Constitution, then it simply will not do to rest the choice of the exclusionary rule solely on the high principle of "judicial integrity" and to ignore the pragmatic result, the failure to achieve the objective of enforcement and the other pernicious side effects discussed above, which themselves strongly discredit judicial integrity.

If we have a choice, to attempt to justify the continuation of the exclusionary rule on this basis is to be stubbornly blind to 65 years of experience. If we have a choice, to insist on continuing a method of enforcement with as many demonstrated faults as the exclusionary rule is to be blindly stubborn. If we have a choice, let us calmly and carefully consider the available alternatives, draw upon the experience of other nations with systems of justice similar to our own, and by abolishing the rule permit in the laboratories of our 51 jurisdictions the experimentation with various possible alternatives promising far more than the now discredited exclusionary rule. □

52. McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659, 692 (1972). "What Linkletter does appear to establish is that, at least when the cornerstone of deterrence is removed, the Fourth Amendment exclusionary rule does not rest upon an unshakeable foundation. . . . What does seem clear is that so ethereal a concept as the 'imperative of judicial integrity' does not, without more, mandate either admission or exclusion of reliable evidence improperly come by."

MALCOLM RICHARD WILKEY is a judge of the U.S. Court of Appeals for the District of Columbia Circuit.

letters

The costs of the Fourth Amendment

I commend your journal on the great public service you have performed in providing us with Yale Kamisar's and Malcolm Wilkey's dialogue on the value, the role, the constitutional necessity and the desirability of the exclusionary rule (August 1978; November 1978; February 1979).

It appears to me, however, that Judge Wilkey has missed the thrust of much of Professor Kamisar's argument and analysis. In particular, much of Wilkey's commentary focuses on the costs not of the exclusionary remedy but rather on the societal costs of possessing substantive fourth amendment law!

As the Supreme Court reaffirmed last term in the case of *Zurcher v. Stanford Daily*: "The Fourth Amendment has itself struck the balance between privacy and public need, and there is not occasion or justification for a court to revise the Amendment and strike a new balance..."

Again, the articles were most provocative and enlightening and I think they have served a most useful purpose in sharpening the exclusionary rule debate.

John M. Burkoff
Assistant Professor of Law
University of Pittsburgh

No satisfactory alternatives

The Constitution clearly commands that "The right of the people to be secure...against unreasonable searches and seizures shall not be violated." Judge Wilkey seems to think that the amendment contains an addendum: "but if this right is violated, don't worry about it" ("The exclusionary rule: Why suppress valid evidence?" November 1978).

Constitutional commands are not usually interpreted this way. If a President ran for a third term or a state passed an ex post facto law, would the courts ignore these violations of our basic charter?

And if the judge really expects other remedies to reduce the crime rate, then he must anticipate that these alternatives will not deter violations of the Fourth Amendment.

David L. Lee
Evanston, Illinois

Making judges hypocrites

I just read Judge Wilkey's article "The exclusionary rule: why suppress valid evidence?" (November 1978) and couldn't agree with him more.

While I do not claim to be an expert on the law of search and seizure (who is?), handling felony cases in a court of general jurisdiction on practically a daily basis does provide a passing acquaintance with the problems the rule poses. Speaking from the "pits" of the trial bench, I have a few pragmatic observations to add to Judge Wilkey's more philosophical ideas.

If this rule makes liars out of policemen, it also makes hypocrites out of judges. Most cases involving application of the rule require findings of fact by the trial judge on disputed testimony. I do not know many trial judges who would take the word of the defendant over the police officer where the issue is solely one of credibility. It is naive to believe that such findings are always the result of intellectual objectivity in weighing the evidence.

I suggest, too, that the time we spend on pretrial suppression hearings and postconviction relief petitions dissecting every word of a search warrant and every nuance of the officer's conduct might be better used in some other manner. In most cases involving a claimed illegal search, that issue is the one faint glimmer of hope on appeal, thus there is always an appeal. In view of the complexities of search and seizure law, none of these appeals can be considered frivolous.

But, although considerable time is spent, comparatively few searches are held to be illegal. Even then it is rarely unanimous. Surely a better way exists to handle the problem.

I think we should start a campaign to abolish the exclusionary rule and find some effective, viable alternative before the justifiably irate populace gets rid of us all. I nominate Judge Wilkey for chairman.

Fred R. Staples
Judge
Superior Court
Prosser, Washington

Closing arguments in the debate over the exclusionary rule

Last fall Judicature invited Yale Kamisar and Malcolm Wilkey to debate the merits of the exclusionary rule, first applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

Kamisar, a professor of law at the University of Michigan, defended the rule on the ground that it prevents government from profiting from its own misconduct ("Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?", August 1978).

Wilkey, a judge on the U.S. Court of Appeals for the District of Columbia Circuit, urged that the rule be abolished. He said trial courts should admit illegally-seized evidence but they should punish police officers who have wrongly seized it ("The exclusionary rule: why suppress valid evidence?", November 1978).

Here are the closing arguments in their debate. Next month, two social scientists, Bradley Canon and Steven Schlesinger, will discuss empirical studies of the rule's effect on police officers.

We invite your comments.

The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than 'an empty blessing'

by Yale Kamisar

In the 65 years since the Supreme Court adopted the exclusionary rule, few critics have attacked it with as much vigor and on as many fronts as did Judge Malcolm Wilkey in his recent *Judicature* article, "The exclusionary rule: why suppress valid evidence?" (November 1978).

According to Judge Wilkey, there is virtually nothing good about the rule and a great deal bad about it. He thinks the rule is partly to blame for "the distressing rate of street crimes" (page 215). He tells us that it "discourages internal disciplinary action by the police themselves" (page 226); "actually results in encouraging highly pernicious police behavior" (e.g., perjury, harassment and corruption) (page 226); "makes it virtually impossible for any state, not only the federal government, to experiment with any methods of controlling police" (page 227); and "undermines the reputation of and destroys the respect for the entire judicial system" (page 223).

Judge Wilkey claims, too, that the rule "dooms" "every scheme of gun control . . . to be totally ineffective in preventing the habitual use of weapons in street crimes" (page 224). Until we rid ourselves of this rule, he argues, "the criminal can parade in the streets with a great bulge in his pocket or a submachine gun in a blanket under his arm" and "laugh in the face of the officer who might wish to search him for it" (page 225).

Unthinking, emotional attachment?

Why, then, has the rule survived? "The greatest obstacle to replacing the exclusionary rule with a rational process," Judge Wilkey maintains, is "the powerful, unthinking emotional attachment" to the rule (page 217). If you put the issue to a representative group of lawyers and judges, he concedes, "you would doubtless hear some support" for the rule, but only from those "heavily imbued with a mystique of the exclusionary rule as of almost divine origin" (page 223).

It is hard to believe that nothing more substantial than "unthinking emotional at-

tachment" or mystical veneration accounts for support for the rule by Justices Holmes and Brandeis (which I discussed in my earlier article) and, more recently, by such battlescarred veterans as Roger Traynor, Earl Warren and Tom Clark.

In the beginning, Judge Traynor was not attached to the rule, emotionally or otherwise. Indeed, in 1942 he wrote the opinion of the California Supreme Court reaffirming the admissibility of illegally-seized evidence.[1] But by 1955, it became apparent to Traynor that illegally seized evidence "was being offered and admitted as a routine procedure" and "it became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure, subject to no effective deterrent."[2]

> [W]ithout fear of criminal punishment or other discipline, law enforcement officers . . . casually regard [illegal searches and seizures] as nothing more than the performance of their ordinary duties for which the City employs and pays them.[3]

In light of these circumstances, Traynor overruled the court's earlier decision.[4]

And consider Earl Warren. During the 24 years he spent in state law enforcement work in California (as deputy district attorney, district attorney and attorney general), California admitted illegally seized evidence. Indeed, Warren was the California Attorney General who successfully urged Judge Traynor and his brethren to reaffirm that rule in 1942. In 1954, during his first year as Chief Justice of the United States, he heard a case involving police misconduct so outrageous as to be "almost incredible if it were not admitted" (the infamous *Irvine* case), but he resisted the temptation to impose the exclu-

1. People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44 (1942).

2. Roger Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321, 322.

3. People v. Cahan, 44 Cal.2d. 434, 282 p.2d 905, 907 (1955) (Traynor, J.).

4. Roger Traynor, *Lawbreakers, Courts and Lawabiders*, 31 MO.L.REV. 181, 201 (1966). *See also* Monrad Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L.REV. 103, 107 (1965).

Why California adopted the rule

Roger Traynor was the chief justice of California in 1955 when the state supreme court adopted the exclusionary rule. He explains his position on the rule in this excerpt from his article, "Mapp v. Ohio at Large in the Fifty States" (1962 Duke L. J. 319, 322).

My misgivings about (the admissibility of illegally seized evidence) grew as I observed that time after time it was being offered and admitted as a routine procedure . . .It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States, as well as the state constitution.

Ah, but surely the guilty should still not go free? However grave the question, it seemed improperly directed at the exclusionary rule. The hard answer is in the United States Constitution as well as in state constitutions. They make it clear that the guilty would go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them.

It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine.

sionary rule on the states, even in such extreme cases.[5] It was not until 1961 that he joined in the opinion for the Court in *Mapp*, which imposed the rule on the states.

Chief Justice Warren knew the exclusionary rule's limitations as a tool of judicial control,[6] but at the end of an extraordinary public career—in which he had served more years as a prosecutor than any other person who has ascended to the Supreme Court—Warren observed:

> [I]n our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.[7]

The author of the *Mapp* opinion, Tom Clark, was, of course, U.S. Attorney General for four years before he became a Supreme Court justice and he was assistant attorney general in charge of the criminal division before that. Evidently, nothing in his experience gave Clark reason to believe that the rule had "handcuffed" federal officials or would cripple state law enforcement. And he never changed his views about the need for the exclusionary rule during his 18 years on the Court or the 10 years he spent in the administration of justice following his retirement.[8] Indeed, shortly before his death, he warmly defended *Mapp* and *Weeks*.[9]

Moreover, nothing in Justice Clark's career suggests that he endorsed *Mapp* out of "sentimentality" or in awe of the "divine origins" of the exclusionary rule. More likely, he was impressed with the failure of *Wolf* and *Irvine* to stimulate any meaningful alternative to the exclusionary rule in the more than 20 states that still admitted illegally seized evidence at the time of *Mapp*.[10]

I do not mean to suggest that Judge Wilkey's views on the exclusionary rule are aberrational among lawyers and judges; many members of the bench and bar share his deep distress with the rule. Indeed, when Judge Wilkey asks us to abolish the exclusionary rule now--without waiting for a meaningful alternative to emerge—he but follows the lead of Chief Justice Burger, who recently maintained:

> [T]he continued existence of the rule, as presently implemented, inhibits the development of rational alternatives . . . It can no longer be assumed that other branches of government will act while judges cling to this Draconian, discredited device in its present absolutist form.[11]

Because so many share Judge Wilkey's hostility to the exclusionary rule, it is important to examine and to evaluate Wilkey's arguments at some length.[12] Only then can we determine whether the rule is as irrational and pernicious as he and other critics maintain—and whether we can abolish it before we have developed an alternative.

Crime and the rule

A year before the California Supreme Court adopted the exclusionary rule on its own—and years before the "revolution" in American criminal procedure began—William H. Parker, the Chief of the Los Angeles Police Department, said:

> [O]ur most accurate crime statistics indicate that crime rates rise and fall on the tides of economic, social, and political cycles with embarrassingly little attention to the most determined efforts of our police.[13]

5. Irvine v. California, 347 U.S. 128, 132 (1954). Perhaps he was confident that at least in such a flagrant case the transgressing officers would be prosecuted or otherwise disciplined. If so, his confidence was misplaced. *See* Comment, 7 STAN. L.REV. 76, 94n. 75 (1954).

6. See his opinion for the Court in Terry v. Ohio, 392 U.S. 1 (1968), at 13-15.

7. *Id.* at 13.

8. *See* Larry Temple, *Mr. Justice Clark: A Tribute*, 5 AM. J. CRIM. L. 271, 272-73 (1977).

9. *See* Tom Clark, *Some Notes on the Continuing Life of the Fourth Amendment*, 5 AM. J. CRIM. L. 275 (1977).

10. *See* Elkins v. United States, 364 U.S. 205, 224-25 (1960) (App.)

11. *See* Stone v. Powell, 428 U.S. 465, 496, 500 (1976) (Burger, C.J., concurring), and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

12. Though I discussed the empirical challenge to the exclusionary rule in my first article, I do not examine Judge Wilkey's use of empirical data in this article because two political scientists—Bradley Canon and Steven Schlesinger—will discuss that issue in *Judicature* next month.

13. William Parker, *The Police Challenge in Our Great Cities*, Annals, Jan. 1954, pp. 5, 11-12.

Almost as soon as the California Supreme Court adopted the exclusionary rule, though, Chief Parker began blaming the rule for the high rate of crime in Los Angeles, calling it "catastrophic as far as efficient law enforcement is concerned," and insisting "that the imposition of the exclusionary rule has rendered the people powerless to adequately protect themselves against the criminal army."[14]

Such criticism of the *Cahan* rule[15] was only a preview of the attack on *Mapp*. Chief Justice Traynor, speaking about the debate following the *Mapp* decision, rightly observed that: "Articulate comment about [*Mapp*] . . . was drowned out in the din about handcuffing the police."[16]

Thus, it is not surprising that Judge Wilkey would claim on his very first page that "[w]e can see [the]huge social cost [of *Weeks* and *Mapp*] most clearly in the distressing rate of street crimes . . . which flourish in no small degree simply because of the exclusionary rule." Nevertheless, it is disappointing to hear a critic repeat this charge, because after 65 years of debate, there was reason to hope that this criticism, at least, would no longer be made. As Professor James Vorenberg pointed out, shortly after he completed his two years of service as Executive Director of the President's Commission on Law Enforcement and Administration of Justice:

> What the Supreme Court does has practically no effect on the amount of crime in this country, and what the police do has far less effect than is generally realized.[17]

Even Professor Dallin Oaks (now a university president), upon whose work Judge Wilkey relies so heavily, advised a decade ago:

> The whole argument about the exclusionary rule 'handcuffing' the police should be abandoned. If this is a negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as the means chosen for their enforcement.
>
> Police officials and prosecutors should stop claiming that the exclusionary rule prevents effective law enforcement. In doing so they attribute far greater effect to the exclusionary rule than the evidence warrants, and they are also in the untenable position of urging that the sanction be abolished so that they can continue to violate the [constitutional] rules with impunity.[18]

A weak link

Over the years, I have written about the impact of *Cahan*, *Mapp* and other decisions on crime rates and police-prosecution efficiency.[19] I will not restate my findings again, especially since Judge Wilkey has presented no statistical support for his assertion. I would, however, like to summarize a few points:

- Long before the exclusionary rule became law in the states—indeed, long before any of the procedural safeguards in the federal Constitution was held applicable to the states—invidious comparisons were made between the rate of crime in our nation and the incidence of crime in others.

Thus, in 1911, the distinguished ex-president of Cornell University, Andrew D. White, pointed out that, although London's population was two million larger than New York's, there were 10 times more murders in New York.[20] And in 1920, Edwin W. Sims, the first head of the Chicago Crime Commission, pointed out that "[d]uring 1919 there were more murders in Chicago (with a population of three million) than in the entire British Isles (with a population of forty

14. W. Parker, POLICE 117, 120–21, 114, 118 (O. Wilson ed. 1957).

15. See, e.g., ABA, Summary of Proceedings of Section of Criminal Law 54, 58 (1956).

16. Traynor, *supra* n. 4, at 198.

17. James Vorenberg, *Is the Court Handcuffing the Cops?*, N.Y. TIMES MAG., May 4, 1969, in CRIME AND CRIMINAL JUSTICE 82, Chicago: Quadrangle Books, D. Chessey ed. 1971.

18. Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.CHI.L.REV. 665, 754 (1970).

19. *See* Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. &P.S. 171 (1962); Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964); Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

See also Kamisar, *When the Cops Were Not "Handcuffed,"* N.Y. TIMES MAG., Nov. 7, 1965, reprinted in A. Niederhoffer & A. Blumberg, eds., THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE 319, Hinsdale, Ill: Dryden Press, 2d ed. 1976; and in CRIME AND CRIMINAL JUSTICE 46, Chicago: Quadrangle Books, D. Chessey ed. 1971.

20. See 2 J. CRIM L. & CRIMINOLOGY at 107 (1911).

million)."[21] This history ought to raise some doubts about the alleged causal link between the high rate of crime in America and the exclusionary rule.

• England and Wales have not experienced anything like the "revolution" in American criminal procedure which began at least as early as the 1961 *Mapp* case. Nevertheless, from 1955–65 (a decade which happened to be subjected to a most intensive study), the number of indictable offenses against the person in England and Wales increased 162 percent.[22] How do opponents of the exclusionary rule explain such increases in countries which did not suffer from the wounds the Warren Court supposedly inflicted upon America?

• In the decade before *Mapp*, Maryland admitted illegally seized evidence in all felony prosecutions; Virginia, in all cases. District of Columbia police, on the other hand, were subject to both the exclusionary rule and the *McNabb-Mallory* rule, a rule which "hampered" no other police department during this period.[23] Nevertheless, during this decade the felony rate per 100,000 population increased much more in the three Virginia and Maryland suburbs of the District (69 per cent) than in the District itself (a puny one per cent).[24]

• The predictions and descriptions of near-disaster in California law enforcement which greeted the 1955 *Cahan* decision find precious little empirical support. The percentage of narcotics convictions did drop almost 10 points (to 77 per cent), but only possession cases were significantly affected. Meanwhile, both the rate of arrests and felony complaints filed for narcotics offenses actually increased! Thus, in 1959–60, 20 per cent more persons were convicted of narcotics offenses in California superior courts than in the record conviction percentage years before *Cahan*.[25]

The overall felony conviction rate was 84.5 per cent for the three years before *Cahan*, 85.4 per cent for the *Cahan* year and 86.4 per cent in the three years after *Cahan* (even including the low narcotic percentages).[26] Conviction rates for murder, manslaughter, felony assault, rape, robbery and burglary remained almost the same, though the number of convicted felons rose steadily.[27]

The exclusionary rule, to be sure, does free some "guilty criminals" (as would an effective tort remedy that inhibited the police from making illegal searches and seizures in the first place), but very rarely are they robbers or murderers. Rather they are "offenders caught in the everyday world of police initiated vice and narcotics enforcement . . ."

Though critics of the exclusionary rule sometimes sound as though it constitutes the main loophole in the administration of justice, the fact is that it is only a minor escape route in a system that filters out far more offenders through police, prosecutorial, and judicial discretion than it tries, convicts and sentences . . .

Moreover, the critics' concentration on the formal issue of conviction tends to overlook the very real sanctions that are imposed even on defendants who 'escape' via the suppression of evidence [e.g., among the poor, most suffer at least several days of imprisonment, regardless of the ultimate verdict; many lose their jobs as a result and have a hard time finding another] . . .

When one considers that many convictions in the courts that deal with large numbers of motions to suppress often amount to small fines, suspended sentences, and probation, the distinction between conviction and escape becomes even more blurred.[28]

21. *See* 10 J. CRIM L. & CRIMINOLOGY at 327 (1919).

22. F.H. McClintock and N.H. Avison, CRIME IN ENGLAND AND WALES 37 (1968). Of course, much of the statistical increase in British crime may have been an increase in reported crime, not actual crime. But the same may be said for the statistical increase in American crime.

23. Mallory v. United States, 354 U.S. 449 (1957), reaffirming McNabb v. United States, 318 U.S. 332 (1943), excluded from federal prosecutions all confessions or admissions obtained during prolonged pre-commitment detention, regardless of whether they were "voluntarily" made, so far as the record showed.

24. *See* Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM L. C. & P.S. 171, 185 (1962).

During this same decade the national crime rate for the seven major offenses rose 66 per cent and the overall national crime rate soared 98 per cent. *See id.* at 184 & n. 100.

25. *See* Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 463 (1964).

26. *Id.* at 464.

27. *See* Kamisar, *supra* n. 24 at 180.

28. Critique, 69 NW. U.L. REV. 740, 774–76 (1975).

Guns and the exclusionary rule

Judge Wilkey does advance what so far as I know is a new argument: that gun control will be totally ineffective "so long as the exclusionary rule hampers the police in enforcing it." "Since [American] criminals know the difficulties of the police in making a valid search," he observes, "the criminals in America do carry guns," unlike criminals in England and other countries.

Why, then, did so many criminals carry guns in New York and more than 20 other states that admitted illegally seized evidence until 1961? New York, for example, passed the Sullivan Act in 1911, making the ownership and carrying of pistols subject to a police permit. But a British gun control expert said recently that, if we compare New York with London in the 10 years after passage of the Sullivan Act, we would probably find

> that New York, with its strict controls on the private ownership of pistols, suffered infinitely more from the criminal use of firearms of all types than did London in a period when all firearms were freely available.[29]

Evidently, short of abolishing the exclusionary rule across the board, Judge Wilkey would welcome an amendment to the Fourth Amendment that read something like this:

> The guaranty against unreasonable search and seizure shall not be construed to bar from evidence in any criminal proceeding any dangerous weapon seized by a peace officer outside the curtilage of any dwelling house.

It may be surprising, but the 1963 Michigan Constitution (as well as its predecessor) contained just such a provision. Whenever it was challenged after *Mapp*, the Michigan Supreme Court managed to avoid invalidating it by finding that the search in question had been reasonably conducted.[30] In the 1966 *Blessing* case, only two of the seven state court justices said the proviso violated the U.S. Constitution.[31] Most state judges thought that, despite *Mapp*, the *Blessing* case had upheld the "anti-exclusionary" proviso[32]; as late as 1969, a unanimous panel of the court of appeals acted on this basis.[33]

Thus, for nine years after *Mapp* the police of Michigan were free to search suspects for weapons for almost any reason. What happened? In six years, starting in 1964, criminal homicides in Detroit more than tripled, rising from 138 to 488.[34] Why? Judge (and former Detroit Police Commissioner) George Edwards quotes the head of the Detroit Police Department's Homicide Bureau:

> There are more homicides in the city because there are more handguns in the city. The relationship is that clear. You can't go by the increase in [gun] registration either. The bulk of handguns used in violent crime are not registered.[35]

The National Commission on the Causes and Prevention of Violence likewise determined that handguns had caused the upsurge in crime:

> Between 1965 and 1968, homicides in Detroit committed with firearms increased 400 per cent while homicides committed with other weapons increased only 30 per cent; firearms robberies increased twice as fast as robberies committed without firearms. (These rates of increase are much higher than for the nation as a whole).[36]

29. Colin Greenwood, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 3-4 (Introduction). London: Routledge & Kegan Paul Ltd., 1972.

30. *See* Edward Wise, *Criminal Law and Procedure, 1971 Annual Survey of Michigan Law*, 17 WAYNE L.REV. 381-83 (1971).

31. People v. Blessing, 378 Mich. 51, 142 N.W.2d 709 (1966). *See also* Wise, *Criminal Law and Evidence, 1966 Annual Survey of Michigan Law*, 13 WAYNE L.REV. 114, 133-36 (1966).

32. See Wise, *supra* n. 30 at 382-83.

33. People v. Pennington, 17 Mich. App. 398, N.W. 2d (1969), rev'd 383 Mich. 611, N.W.2d (1970).

34. *See* Edwards, *Commentary: Murder and Gun Control*, 13 WAYNE L. REV. 1335, 1341 (1972).

35. *Id.* at 1341. "[A] sample of 113 handguns confiscated by police during shootings in the City of Detroit during 1968 showed that only 25 per cent of the confiscated weapons had been recorded previously in connection with a gun permit application." G. Newton and Franklin Zimring, Staff Report to the National Commission on the Causes and Prevention of Violence in America, FIREARMS AND VIOLENCE IN AMERICAN LIFE 51 (1969).

36. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 171 (1969).

An undemonstrated connection

The availability of handguns clearly increases crime rates, but do changes in the rules of evidence? Judge Wilkey hints darkly that there is a "connection" between America's high crime rate and its "unique" exclusionary rule. So far as I am aware, no one has been able to demonstrate such a connection on the basis of the annual *Uniform Crime Reports* or any other statistical data. In Michigan, for example, the rate of violent crime seems to have fluctuated without regard to the life and death of the state's "anti-exclusionary" proviso.

From 1960–64, the robbery rate increased only slightly in the Detroit Metropolitan Statistical Area but it quadrupled from 1964 to 1970 (from 152.5 per 100,000 to 648.5).[37] When the Michigan Supreme Court struck down the state's "anti-exclusionary" proviso in 1970,[38] the robbery rate fell (to 470.3 per 100,000 in 1973), climbed (to 604.2 in 1975), then dropped again (to 454.3 in 1977, the lowest it has been since the 1960's).

From 1960–64, the murder and nonnegligent manslaughter rate remained almost the same in the Detroit area, but it rose extraordinarily the next six years (5.0 in 1964 to 14.7 in 1970). In the next four years it continued to climb (but less sharply) to 20.2 in 1974. Then it dropped to 14.1 in 1977, the lowest it has been since the 1960's.

Finally, I must take issue with Judge Wilkey's case of the criminal who "parade[s] in the streets with a great bulge in his pocket or a submachine gun in a blanket under his arm," "laugh[ing] in the face of the officer who might wish to search him for it" (page 225). If American criminals "know the difficulties of the police in making a valid search," as Judge Wilkey tells us, they know, too, that the exclusionary rule has "virtually no applicability" in "large areas of police activity which do not result in criminal prosecutions"[39] and that confiscation of weapons is one of them.[40] (The criminal might get back his blanket, but not the submachine gun).

Moreover, it is not at all clear that an officer who notices a "great bulge" in a person's pocket or, as in the recent *Mimms* case,[41] a "large bulge" under a person's sports jacket, lacks lawful authority to conduct a limited search for weapons. Indeed, *Mimms* seems to say that a policeman *does* have the authority under such circumstances.[42] Even if I am wrong, however, even if the Fourth Amendment does not permit an officer to make such a limited search for weapons, *abolishing the exclusionary rule wouldn't change that.* If an officer now lacks the lawful authority to conduct a "frisk" under these circumstances, he would still lack the lawful authority to do so if the rule were abolished. This is a basic point, one that I shall focus on in the next section.

A basic confusion

In my earlier *Judicature* article, I pointed out how police and prosecutors have treated the exclusionary rule as if it were itself the guaranty against unreasonable search and seizure (which is one good reason for retaining the rule). At several places Judge Wilkey's article reflects the same confusion.

He complains, for example, that if a search or frisk turns up a deadly weapon, that weapon cannot be used in evidence if the officer lacked the constitutionally required cause for making the search or frisk in the first place (page 224). But this is really an attack on the constitutional guaranty itself, not the exclusionary rule. Prohibiting the use of illegally seized evidence may be poor

37. All the data in this paragraph and the next are based on the FBI UNIFORM CRIME REPORTS for the years 1960 through 1977 (the latest year available).

The FBI reports crime nationally, by region, by state and by "standard metropolitan statistical area." The Detroit area includes five adjoining counties. From 1960-1977, the statewide homicide and robbery fluctuations were consistent with the Detroit area's.

38. People v. Pennington, 383 Mich. 611, 178 N.W. 2d 471 (1970).

39. Burger, C.J., dissenting in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 418 (1971).

40. See Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 220. London: John Wiley & Sons, 2d ed. 1975. *Cf.* F. Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 247–48 (confiscation of automobiles). Boston: Little, Brown & Co., F. Remington ed. 1969.

41. Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (per curiam). *See also* Terry v. Ohio, 392 U.S. 1 (1968).

42. Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (per curiam).

"public relations" because by then we know who the criminal is,[43] but an *after-the-fact* prohibition

> prevents convictions in no greater degree than would effective prior direction to police to search only by legal means . . . [T]he maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary.[44]

If we replace the exclusionary rule with "disciplinary punishment and civil penalties directly against the erring officer involved," as Judge Wilkey proposes (page 231), and if these alternatives "would certainly provide a far more effective deterrent than . . . the exclusionary rule," as the judge assures us (page 231), the weapon still would not be brought in as evidence in the case he poses because the officer would not *make* the search or frisk if he lacked the requisite cause to do so.

Judge Wilkey points enviously to England, where "the criminals know that the police have a right to search them *on the slightest suspicion*, and they know that if a weapon is found they will be prosecuted" (page 225, emphasis added). But what is the relevance of this point in an article discussing the exclusionary rule and its alternatives? Abolishing the rule would not confer *a right* on our police to search "on the slightest suspicion"; it would not affect lawful police practices in any way. Only a change in the substantive law of search and seizure can do that. (See the accompanying insert, "Liberalizing the law of search and seizure: a separate issue.") And replacing the exclusionary rule with a statutory remedy against the government would not bring about an increase in unlawful police activity if the alternative were equally effective—and Judge Wilkey expects it to be "a far more effective deterrent."

I venture to say that Judge Wilkey has confused the *content* of the law of search seizure (which proponents of the exclusionary rule need not, and have not always, defended, as the accompanying insert shows) with the *exclusionary rule*—which "merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers."[45] The confusion was pointed out more than 50 years ago by one who had the temerity to reply to the great Wigmore's famous criticism of the rule.[46] Every student of the problem knows Wigmore's views on this subject, but very few are familiar with Connor Hall's reply. It is worth recalling:

> When it is proposed to secure the citizen his constitutional rights by the direct punishment of the violating officer, we must assume that the proposer is honest, and that he would have such consistent prosecution and such heavy punishment of the offending officer as would cause violations to cease and thus put a stop to the seizure of papers and other tangible evidence through unlawful search.
>
> If this, then, is to be the result, no evidence in any appreciable number of cases would be obtained through unlawful searches, and the result would be the same, so far as the conviction of criminals goes, as if the constitutional right was enforced by a return of the evidence.
>
> Then why such anger in celestial breasts? Justice can be rendered inefficient and the criminal classes coddled by the rule laid down in *Weeks* only upon the assumption that the officer will not be directly punished, but that the court will receive the fruits of his lawful acts, will do no more than denounce and threaten him with jail or the penitentiary and, at the same time, with its tongue in its cheek, give him to understand how fearful a thing it is to violate the Constitution. This has been the result previous to the rule adopted by the Supreme Court, and that is what the courts are asked to continue.
>
> . . . If punishment of the officer is effective to prevent unlawful searches, then equally by this is justice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.[47]

43. See J. Kaplan, CRIMINAL JUSTICE 215-16. Mineola, New York: The Foundation Press, 2d ed. 1978.

44. Note, 58 YALE L.J. 161-62 (1948). (Emphasis added.) *See also* Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 22, 25-26, in POLICE POWER AND INDIVIDUAL FREEDOM 87-88. Chicago: Aldine, Sowle ed. 1962.

45. Paulsen, *supra* n. 44, at 87.

46. John Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

47. C. Hall, *Evidence and the Fourth Amendment*, 8 A.B.A.J. 645 (1922). *See also* insert at p. 338, *supra*; Francis Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties*, 45 ILL. L. REV. 1, 19-20; Paulsen, *supra* n. 4, at 88.

Waiting for alternatives

Judge Wilkey makes plain his agreement with Chief Justice Burger that "the continued existence of [the exclusionary rule] . . . inhibits the development of rational alternatives" and that "incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form."[48]

48. Stone v. Powell, 428 U.S. 465, 496, 500 (1976) (Burger, C.J., concurring). Earlier, the Chief Justice had balked at abandoning the exclusionary rule "until some meaningful alternative can be developed" because "a flat overruling" of *Weeks* and *Mapp*, "might give law enforcement officials 'the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared.'" Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411, 420-21 (1971) (dissenting).

Thus, Judge Wilkey warns that "we will never have any alternative in operation until the rule is abolished. So long as we keep the rule, the police are not going to investigate and discipline their men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence . . ." (pages 217-18). He argues that *Mapp* "removed from the states both the incentive and the opportunity to deal with illegal search and seizure by means other than suppression" (page 227). And he concludes his first article with these words:

> [L]et us . . . by abolishing the rule permit in the laboratories of our fifty-one jurisdictions the experimentation with the various possible alternatives promising far more than the now discredited exclusionary rule.

Liberalizing the law of search and seizure: a separate issue

As Professor (now Dean) Monrad Paulsen has noted, and as his own writings illustrate, supporters of the exclusionary rule need not, and have not always, defended the *content* of the law of search and seizure. Thus, more than 20 years ago, Paulsen maintained that in several respects the law of search and seizure was "too restrictive of police work and ought to be liberalized."[1] I share his view that if the substantive rules of search and seizure "make sense in the light of a policeman's task, we will be in a stronger position to insist that he obey them."[2]

In the early 1960's, Professor Fred Inbau criticized the Court for handing down *Mapp v. Ohio*, warning state prosecutors "You'll experience some real jolts" if such federal doctrines as the ban against seizing items of "evidentiary value only" (first articulated in *Gouled v. United States*, 255 U.S. 298, 309-11 [1921]) "are applied to your own cases."[3] In my response, I said that the *Gouled* rule (which put objects of "evidentiary value only" beyond the reach of the police even when they act on the basis of "probable cause" or pursuant to an otherwise valid warrant) "is unsound and undesirable . . . [It] is wrong because it departs from the fundamental principles pervading search and seizure law."[4]

If the Fourth Amendment had indeed carved out a "zone" that the police could never enter, abolition of the exclusionary rule, either across the board or along this particular front, would not have authorized the police to enter the zone. The proper response, if criticism of the *Gouled* rule was valid (and it was), was not to overrule *Mapp* or *Weeks* but to abolish the *Gouled* rule—which the Court subsequently did.[5] □

—Y.K.

1. Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 66 (1957).

2. *Id.*

3. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand* 53 J. CRIM. L.C. & P.S. 85, 87 (1962) (keynote address at 1961 annual meeting of National District Attorney's Association).

4. Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171, 177 (1962).

5. See Warden v. Hayden, 387 U.S. 294 (1967) (Brennan, J.) (Distinction between "mere evidence" and instrumentalities, fruits of crime or contraband finds no support in Fourth Amendment). *See also* Berger v. New York, 388 U.S. 41, 44 & n. 2 (1967).

In light of our history, these comments (both the Chief Justice's and Judge Wilkey's) are simply baffling. First, the fear of "sabotaging" prosecutions has never inhibited law enforcement administrators from disciplining officers for committing the "many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."[49]

Second, both defenders of the rule and its critics recognize that

> there are large areas of police activity which do not result in criminal prosecutions [e.g., arrest or confiscation as a punitive sanction, (common in gambling and liquor law violations), illegal detentions which do not result in the acquisition of evidence, unnecessary destruction of property]—hence the rule has virtually no applicability and no effect in such situations.[50]

Whatever the reason for the failure to discipline officers for "mistakes" in these "large areas of police activities," it cannot be the existence of the exclusionary rule.

Finally, and most importantly, *for many decades* a majority of the states had no exclusionary rule but *none of them* developed any meaningful alternative. Thirty-five years passed between the time the federal courts adopted the exclusionary rule and the time *Wolf* was decided in 1949, but none of the 31 states which still admitted illegally seized evidence[51] had established an alternative method of controlling the police. Twelve more years passed before *Mapp* imposed the rule on the state courts, but none of the 24 states which still rejected the exclusionary rule[52] had instituted an alternative remedy. This half-century of post-*Weeks* "freedom to experiment" did not produce any meaningful alternative to the exclusionary rule anywhere.

Disparity between fact and theory

Of course, few critics of the exclusionary rule have failed to suggest alternative remedies that *might be devised* or that *warranted study*. None of them has become a reality.

In 1922, for example, Dean Wigmore maintained that "the natural way to do justice" would be to enforce the Fourth Amendment directly "by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a 30-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."[53] Nothing ever came of that proposal. Another critic of the rule suggested that a civil rights office be established, independent of the regular prosecutor, "charged solely with the responsibility of investigating and prosecuting alleged violations of the Constitution by law-enforcement officials."[54] Nothing came of that proposal either.

Judge Wilkey recognizes that "policemen traditionally are not wealthy," but "[t]he government has a deep purse." Thus, as did Chief Justice Burger in his *Bivens* dissent,[55] Judge Wilkey proposes that in lieu of the exclusion of illegally seized evidence there be a statutory remedy against the government itself to afford meaningful compensation and restitution for the victims of police illegality. Two leading commentators, Caleb Foote and Edward Barrett, Jr. made the same suggestion 20 years ago,[56] but none of the many states that admitted illegally seized evidence at the time seemed interested in experimenting along these lines.

Indeed, the need for, and the desirability

49. Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., joined by Frankfurter and Murphy, JJ. dissenting) (self-styled prologue). But *cf.* Jackson, J., in Irvine v. California, 347 U.S. 128, 135–37 (1954).

50. See note 39 *supra* and accompanying text.

51. See Wolf v. Colorado, 338 U.S. 25, 29, 38 (1949).

52. See Elkins v. United States, 364 U.S. 205, 224–25 (1960).

53. Wigmore, *supra* n. 46, at 484. To the same effect is 8 Wigmore, EVIDENCE §2184, at 40 (3d ed. 1940). But *see* Hall, *supra* n. 47, at 647, doubting "whether the marshal would ever be compelled to live upon jail fare."

54. Peterson, *Restrictions in the Law of Search and Seizure*, 52 N. U.L.REV. 46, 62 (1957). The disadvantages of this proposal are discussed in Paulsen, *supra* n. 44, at 94.

55. Bivens vs. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411, 422–23 (1971).

56. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN.L.REV. 493 (1955). Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L.REV. 565, 592–95 (1955).

of, a statutory remedy against the government itself was pointed out at least as long ago as 1936. In a famous article published that year, Jerome Hall noted that the prospects of satisfying a judgment against a police officer were so poor that the tort remedy in the books "collapses at its initial application to fact." Said Hall:

> [W]here there is liability (as in the case of the policeman), the fact of financial irresponsibility is operative and, presumably, conclusive; while, where financial responsibility exists (as in the case of a city), there is no liability.[57]

"This disparity between theory and fact, between an empty shell of relief and substantial compensation," observed Professor Hall—43 years ago—"could not remain unnoticed."[58]

This disparity—no longer unnoticed, but still uncorrected—has troubled even the strongest critics of the rule. Thus, more than 35 years ago, J.A.C. Grant suggested "implement[ing]the law covering actions for trespass, even going so far as to hold the government liable in damages for the torts of its agents."[59] And, William Plumb, Jr., accompanied his powerful attack on the rule with a similar suggestion.[60]

Mapp's traumatic effects

At the time of Plumb's article, the admissibility of illegally-seized evidence had "once more become a burning question in New York."[61] Delegates to the 1938 constitutional convention had defeated an effort to write the exclusionary rule into the constitution, but only after a long and bitter debate.[62] The battle then moved to the legislature, where bills were pending to exclude illegally obtained, or at least illegally wiretapped, evidence.[63]

Against this background, Plumb offered a whole basketful of alternatives to the rule[64] and he said the state legislature "should make a thorough study of the problem of devising effective direct remedies [such as those he had outlined] to make the constitutional guarantee 'a real, not an empty blessing.'"[65] But nothing happened.

Otherwise why would a New York City Police Commissioner say of *Mapp* some 20 years later:

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this . . . I was immediately caught up in the entire problem of reevaluating our procedures which had followed the *Defore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp*. The problems were manifold. [Supreme Court decisions such as *Mapp*] create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen . . .[66]

In theory, *Defore*,[67] which rejected the exclusionary rule in New York, had not expanded lawful police powers one iota. Nor, in theory, had *Mapp* reduced these powers. What was an illegal search before *Defore* was still an illegal search. What was an unlawful arrest before *Mapp* was still an unlawful arrest.

The *Defore* rule, of course, was based largely upon the premise that New York did not need to adopt the exclusionary rule because existing remedies were adequate to effectuate the guaranty against illegal search and seizure. Cardozo said that:

> The officer might have been resisted[!], or sued for damages or even prosecuted for oppression. He was subject to removal or other discipline at the hands of his superiors.[68]

Why, then, did *Mapp* have such a "dramat-

57. Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U.CHI. L.REV. 345, 346 (1936).
58. *Id.* at 348.
59. J.A.C. Grant, *Search and Seizure in California*, 15 SO. CALIF. L.REV. 139, 154 (1942).
60. William Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L. Q. 337, 387 (1939).
61. *Id.* at 349.
62. 1 NEW YORK CONSTITUTIONAL CONVENTION, Revised Record 358-594 (1938).
63. Plumb, *supra* n. 60, at 349 n. 40 and 357 n. 94.
64. *Id.* at 387-389.
65. *Id.* at 385.
66. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEXAS L.REV. 939, 941 (1966).
67. People v. Defore, 242 N.Y. 13, 19, 150 N.E. 585 (1926).
68. *Id.* at 586-587.

re" and "traumatic" effect? Why did it necessitate "creating new policies?" What were the old policies like? Why did it necessitate retraining sessions from top to bottom? What was the *old* training like? What did the commissioner mean when he said that before *Mapp* his department had "followed the *Defore* rule"?

> On behalf of the New York City Police Department as well as law enforcement in general, I state unequivocally that every effort was directed and is still being directed at compliance with and implementation of *Mapp* . . .[69]

Isn't it peculiar to talk about police "compliance with" and "implementation of" *a remedy* for a violation of a body of law the police were supposed to be complying with and implementing all along? Why did the police have to make such strenuous efforts to comply with *Mapp* unless they had not been complying with the Fourth Amendment?

69. Murphy, *supra* n. 66, at 941.

Are comparisons with other countries meaningful?

Though it may be tempting to think that the serious defects of our criminal justice system are the result of our failure to adopt European models of investigation and trial, it may be that the faults of our system are

> better explained by such factors as our ethnic and racial differences, the traditional lawlessness of our people and our officials, and our insistence on using the criminal law to combat every form of socially disapproved conduct . . . We can no more import our solutions than we can export our problems.[1]

Nevertheless, it is plain to Judge Wilkey that "one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it." "How do all the other civilized countries control their police?" he asks. "Why does the United States, alone, rely on the irrational exclusionary rule?"

In his reliance on comparisons with other countries to attack the exclusionary rule, Judge Wilkey parts company with the two academicians he has chiefly leaned on, Steven Schlesinger and Dallin Oaks. Schlesinger saw little point in making comparisons between Canada and the United States.[2] He recognized that there may be no comparable need for the exclusionary rule in Canada (and Western European countries) for several reasons:

- Their police "are simply better disciplined than their American counterparts."[3]
- Canada's crime rate, "especially that of violent crime, is substantially less than that of the United States, thus putting less pressure on the police to deal with crimes by illegal methods."[4]
- Canada's problem with crime is not exacerbated by the level of racial tension experienced in the United States."[5]

Finally, Schlesinger noted, "it would seem that these factors which differentiate the Canadian law enforcement situation from the American are likewise present in the nations of Western Europe."[6]

Legislative oversight

Some 20 years ago, Justice Jackson suggested another possible factor when he said:

> I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition, but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it . . . [T]o transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so.[7]

1. P. Johnson, Book Review, 87 YALE L.J. 406, 410, 414 (1977).
2. S. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 107 (App. II). New York: Marcel Dekker, 1977.
3. *Id.*
4. *Id.* at 107-08.
5. *Id.* at 108.
6. *Id.*
7. R. Jackson, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 81-82. New York: Harper Torchbooks, 1963 (originally published in 1955 by Harvard University Press).

Flowing from the *Mapp* case is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure.[70]

Doesn't this issue flow from the Fourth Amendment itself? Isn't that what the Fourth Amendment is all about?

The police reaction to *Mapp* demonstrates the unsoundness of the underlying premise of *Defore*. Otherwise why, at a post-Mapp training session on the law of search and seizure, would Leonard Reisman, then the New York City Deputy Police Commissioner in charge of legal matters, comment:

> The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a

70. *Id.* at 943. For similar reaction to Mapp by other law enforcement officials, see Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 440–43 (1964).

More recently, an American political scientist furnished examples of "zealous legislative oversight" of the police of Scotland, Sweden, West Germany and France, indicating that it is still "good politics" in many European countries to observe civil liberties.[8] It was noted, too, that "[c]ivilians do not just oversee but actually run most European police departments";[9] that several European countries reserve hundreds of positions for lawyers who are recruited directly into the upper ranks[10]; that "European police departments place much more emphasis on education"[11]; and that some European countries actually encourage complaints against police and, not infrequently, sustain them.[12]

Canada's differences

How do other countries control their police without the exclusionary rule? At least with respect to Canada, Professor Oaks offers explicit answers,[13] but his answers do not demonstrate the "irrationality" of the rule in the American setting. Rather, they indicate why Canada may not need an exclusionary rule, but why the United States still does.

First, "police discipline is relatively common . . . Second, police officers are occasionally prosecuted for criminal misconduct occurring in the course of their official duties." Oaks considers a third factor perhaps most important of all: ". . . an aggrieved person's tort cause of action against an offending police officer is a real rather than just a theoretical remedy . . ."

But he suggests that the difference is more than simply the remedies. "[P]olice are greatly concerned about obeying the rules and very sensitive to and quick to be influenced by judicial criticism of their conduct," he writes. And Canadian prosecutors play a different role from that of American prosecutors. A prosecutor there "will sometimes exercise what he considers to be his teaching function with the police by refusing to introduce evidence that he considers to have been improperly obtained." Moreover, "Canadian prosecutors are part of the Ministry of Justice, which has . . . command authority over most of the police organizations . . ." and channels by which to correct offensive practices. —*Y.K.*

8. Berkley, *Europe and America: How the Police Work*, THE NEW REPUBLIC, Aug. 2, 1969, in A. Niederhoffer & A. Blumberg, eds., THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE 51. Hindale, Ill: Dryden Press 2d ed. 1976.

9. *Id.* at 50.

10. *Id.* at 49.

11. *Id.*

12. "German police departments set up special booths at public events, asking visitors to make complaints. The number of complaints against policemen in such cities as London and Berlin far exceeds the number filed against policemen in New York City. And a much higher ratio of complaints is sustained, nearly 20 per cent in West Berlin." *Id.* at 51.

13. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 702–03, 705–06 (1970). Canada, of course, "has no written law comparable to the fourth amendment prohibition against unreasonable searches and seizures." *Id.* at 704.

warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?[71]

No incentive for change

As I have already indicated, critics of the exclusionary rule have often made proposals for effectuating the Fourth Amendment by means other than the exclusionary rule—but almost always as a *quid pro quo* for rejecting or repealing the rule. Who has ever heard of a police-prosecution spokesman urging—or a law enforcement group supporting—an effective "direct remedy" for illegal searches and seizures in a jurisdiction which *admitted* illegally seized evidence?[72] Abandoning the exclusionary rule without waiting for a meaningful alternative (as Judge Wilkey and Chief Justice Burger would have us do) will not furnish an incentive for devising an alternative, but *relieve* whatever pressure there now exists for doing so.

I spoke in my earlier article of the great symbolic value of the exclusionary rule (pages 69-72, 83-84). Abolition of the exclusionary rule, after the long, bitter struggle to attain it, would be even more important as a symbol.

During the 12-year reign of *Wolf*, some state judges

> remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule.[73]

Their hope proved to be in vain. *Wolf* established the "underlying constitutional doctrine" that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers"[74] (though it did not require exclusion of the resulting evidence); *Irvine* warned that if the states "defaulted and there were no demonstrably effective deterrents to unreasonable searches and seizures in lieu of the exclusionary rule, the Supreme Court might yet decide that they had not complied with 'minimal standards' of due process."[75] But neither *Wolf* nor *Irvine* stimulated a single state legislature or a single law enforcement agency to demonstrate that the problem could be handled in other ways.

The disappointing 12 years between *Wolf* and *Mapp* give added weight to Francis Allen's thoughtful commentary on the *Wolf* case at the time it was handed down:

> This deference to local authority revealed in the *Wolf* case stands in marked contrast to the position of the court in other cases arising within the last decade involving rights 'basic to a free society.' It seems safe to assert that in no other area of civil liberties litigation is there evidence that the court has construed the obligations of federalism to require so high a degree of judicial self-abnegation.
>
> . . . [I]n no other area in the civil liberties has the court felt justified in trusting to public protest for protection of basic personal rights. Indeed, since the rights of privacy are usually asserted by those charged with crime and since the demands of efficient law enforcement are so insistent, it would seem that reliance on public opinion in these cases can be less justified than in almost any other . . .[76]

Now Judge Wilkey asks us to believe that the resurrection of *Wolf* (and evidently the overruling of the 65-year-old *Weeks* case as well) will permit "the laboratories of our 51 jurisdictions" to produce meaningful alternatives to the exclusionary rule. (Again, see text following note 48). His ideological ally, Chief Justice Burger, is even more optimistic. He asks us to believe that a return to the pre-exclusionary rule days "would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct."[77]

And to think that Judge Wilkey (on page 232) accuses *defenders* of the exclusionary rule of being "stubbornly blind to 65 years of experience"! □

71. N.Y. Times, April 28, 1965, p. 50.

72. Before the *Cahan* decision "[l]aw enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action. And there was little evidence that other groups would take the initiative to force the police to come before the legislature." Barrett, *supra* n. 56, at 592-595.

73. Traynor, *supra* n. 2, at 324.

74. Elkins v. United States, 364 U.S. 206, 213 (1960) (the Court, per Stewart, J., describing *Wolf*).

75. Traynor, *supra* n. 2, at 324.

76. Allen, *supra* n. 47 at 11, 12-13.

77. Stone v. Powell, 428 U.S. 465, 496, 501 (1976) (dissenting).

A call for alternatives to the exclusionary rule: let Congress and the trial courts speak

by Malcolm Richard Wilkey

In comparison with Professor Kamisar's response to my criticisms of the exclusionary rule, my comments will be brief. Essentially, I am content to rest on the affirmative case for reform stated in my original article.

It is obvious, although he does not specifically say so, that Professor Kamisar chooses to defend his position on the second of the two grounds which I posited as his inevitable choices. Thus, he does not claim that the Fourth Amendment necessarily mandates the exclusionary rule; he says only that, under the Constitution, we have a choice of methods to enforce the ban against unreasonable searches and seizures and that the exclusionary rule is the best choice.

If there is to be a choice, however, there must be grounds for a choice. Indisputably valid and convincing evidence cannot be excluded on whim, fancy, or unproven theory. The burden of proof is on those like Professor Kamisar, who would exclude such evidence. No one, not even Professor Kamisar, has come forward with such proof.

Oaks' conclusion of 1970 is still uncontradicted:

> [T]oday, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the actual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness.[1]

At the same time, however, Oaks did refute Professor Kamisar:

> Kamisar is merely saying what the Supreme Court and a considerable number of scholars have said over and over again, that in the absence of any better alternative, we are willing to take the deterrent effect of the exclusionary rule solely on the basis of assumption.
>
> In sum, the rhetoric concerning the factual basis for the exclusionary rule amounts to no more than 'fig-leaf phrases used to cover naked ignorance.'[2]

I submit that whatever the merits of his second article in emphasizing the complexities of the problem, Kamisar has not made a case for deliberately choosing the exclusionary rule over the available alternatives.

1. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 672 (1970).
2. *Id.* at 678.

Moving toward alternatives

It is the downplaying of available alternatives that I find most distressing in Professor Kamisar's position. He argues that "*for many decades* a majority of the states had no exclusionary rule but *none of them* developed any meaningful alternative" (page 346). He even dredges up an ancient dilemma—the policeman is liable but financially irresponsible while the state or municipality has financial responsibility but no liability. This ignores the great erosion in the law of sovereign immunity which has occurred, and the capacity of Congress to speak effectively about it.

I do not really know whether any "meaningful" alternative to the exclusionary rule emerged in any of the states prior to *Mapp*, but I do suggest that, wherever we have been and wherever we want to go, we start from where we are now. I propose Congressional action to provide meaningful alternatives to the exclusionary rule. Congress could directly provide federal remedies, and indirectly permit and encourage the states to provide the same or alternative remedies. In other words, the exclusionary rule could be abolished now, conditioned on the enactment of acceptable alternatives.

I would prefer to see the exclusionary rule abolished conditionally with alternatives provided simultaneously, but I urge abolition in any case. I do so because the rule is pernicious in its present form, and I am confident that more attractive alternatives would speedily emerge.

At the outset of my original article (pages 217–218), I discussed the question of who should act first, the Supreme Court or Congress. If Congress seizes the initiative, it could simultaneously provide a federal alternative and condition abolition of the rule in the states on their providing an equal remedy. If the Supreme Court acted first, I believe Congress would act speedily to fill the gap with a federal remedy.

Therefore, I respectfully suggest to Professor Kamisar that he has not met the issue squarely: he has given us some history; quotations from almost everyone of prominence who has endorsed the rule; and some crime statistics whose current or past relevance is not immediately apparent.[3] But he has not analyzed the practical working of the present exclusionary rule as compared to the excellent possibilities for logical reform inherent in the proposals I made.

The multiple causes of crime and the empirical data

In his discussions of the crime rate and the exclusionary rule and guns and the exclusionary rule, Professor Kamisar generally indicates that I attribute all crime, or all crime with handguns, or all crime rate differences, to the presence or absence of the exclusionary rule. Such a position appears easy to refute by statistics, which necessarily embrace the effect of many factors.

Congress could provide alternatives to the exclusionary rule and encourage the states to do the same.

For example, it is no surprise to me that crime did not decrease in Michigan from 1963 to 1970—a period in which the state, in effect, abolished the exclusionary rule. The fact is that crime increased *everywhere* during the turbulent 60s, and no one could expect that abolishing the rule would give Michigan immunity from the nationwide epidemic.

Actually, as Professor Kamisar quoted but failed to recognize, I referred to the "huge social cost . . . of street crimes . . . which flourish *in no small degree* simply because of the exclusionary rule . . ." (page 215). I

3. On the pitfalls of statistics in this field, see Oaks, *supra* n. 1, at 687–89, 712–16.

did not rule out other factors here, as I did not rule out other factors in the comparison of the United States and other countries. It may well be, ... Chief Justice Burger has suggested, that the effect of the exclusionary rule is not readily susceptiable to empirical proof.[4] But I submit that logically we all recognize that the effects of the exclusionary rule, by its presence or absence, must be there in some degree in the various ways that I have described them. The available empirical data tends strongly to support this idea,[5] but obviously selective opposing arguments can be made.

Even if abolishing the rule resulted in minimal effect on the number of illegal searches, and even if the presence or absence of the rule has no discernible effect on the overall crime rate, is this an argument in support of an irrational system of freeing criminals from punishment? This is the most visible, undeniable effect of the exclusionary rule, and one which brings the entire system of justice into disrepute.

Unreasonable searches—the level of probable cause

Whether Professor Kamisar's question—"Are we talking about the impact of the exclusionary rule or the impact of the Fourth Amendment itself?"—reflects confusion in my mind or his, I leave to the reader. But by all means, let us try to set the matter straight. Professor Kamisar asserts, "Abolishing the rule would not confer a right on our police to search 'on the slightest suspicion'—or affect lawful police practices in any way. Only a change in the substantive laws of search and seizure can do that." And, earlier, he maintains that I have made "really an attack on the constitutional guaranty itself, not the exclusionary rule."

I thought I had made it perfectly clear (page 224, note 2) in "How the exclusionary rule hampers gun control" that there were two separate issues: (1) the exclusionary rule as an enforcement tool for the Fourth Amendment, and (2) the standard of probable cause for a valid search and seizure. As I said in that footnote,

> I am not suggesting that abolishing the rule will result in a wholesale abandonment of any standard of probable cause for a valid search. Not at all. The standard of probable cause required is a totally different issue, one that I do not specifically address in this article.

I went on to explain why, even without a change in the standard of probable cause, but after the abolition of the exclusionary rule, we may expect fewer illegal searches but more successful prosecutions.

But since Professor Kamisar has raised the second issue by implying that I included it in the one which I addressed, I must ask: what is the "constitutional guaranty itself"? (which I have not attacked, but rather, seek to implement more effectively). That guaranty is "the right of the people to be secure . . . against unreasonable searches and seizures." What makes a search unreasonable is the absence of sufficient probable cause to justify the search. Therefore, the level of probable cause required determines the permissible conduct of the police.

I made and make no effort to cite literally hundreds of cases in which the standard of probable cause required by the courts, particularly the appellate courts, was so high and unreasonable as to appear absurd, silly, and fatuous to layman and lawyer alike. I do not make that effort because I am firmly

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4. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971). (Burger, C.J., dissenting). *Cf.* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970) (available data inconclusive on proposition that exclusionary rule discourages illegal searches and seizures).

5. My position is congruent with that set forth in Oaks' article, *supra* n. 1 at 755-56. Recognizing the limitations of the available empirical data, he labelled his final section "Postscript" (not "Conclusion") and carefully stated:

"This postscript draws upon that evidence, but it brushes past the uncertainties identified in the discussion of the data and makes some assertions that are not fully supported by it. What follows is an argument, not a conclusion. The exclusionary rule should be abolished, but not quite yet. [It fails in] deterring illegal searches and seizures by the police. . . . [It] imposes excessive costs on the criminal justice system . . .

"Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. [It] should be replaced by an effective tort remedy against the offending officer or his employer. . . ."

(Two political scientists—Bradley Canon and Steven Schlesinger—will discuss empirical studies on the effects of the exclusionary rule in *Judicature* next month.)

convinced that, whatever standard of probable cause is employed, the exclusionary rule is both an ineffective and pernicious remedy for any violation of the constitutional right, no matter how defined.

The need for a new standard

Having taken the time to make this dichotomy of issues clear, I want to emphasize that the definition of "unreasonable searches and seizures" is nowhere found in the Constitution. It has been a matter for the courts to decide, and it could be a matter for Congress. I go back to former Solicitor General Griswold's principle on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good, careful, conscientious police officer to do under the circumstances, then he should be supported."[6]

Dean Griswold did not assert, and neither do I, that this would be sufficient for a judicial standard, but it surely is not beyond the realm of possibility for Congress to define a standard of reasonable search and seizure, i.e., the level of probable cause required, in terms which would meet more common sense standards than what we find in many appellate decisions. Such a definition by Congress of what is a reasonable and an unreasonable search and seizure might be buttressed in the legislative history by a recital of some representative cases which

6. Erwin N. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT (1975). I cited Griswold in my first article at 219 n. 9.

Comparisons with other countries

Why is everyone out of step except my Uncle Sam?

In his effort to validate the unique American rule by the uniqueness of America, Professor Kamisar inadvertently gives the reforms I advocate a strong push forward. Far from parting company with Professors Schlesinger and Oaks, I can certainly agree "that there may be no comparable need for the exclusionary rule in Canada and Western European countries." The fundamental question is why.

I would say that any "need" for the exclusionary rule arises because of our failure intelligently and vigorously to pursue other methods of enforcing the Fourth Amendment to protect the privacy of individuals and to control the police. That "need" arises in the same way the need for sleeping pills frequently arises—the neglect of proper exercise, a moderate diet, and regular hours of work, eating, and sleeping—and the rule is about as ineffective and habit-forming as those pills.

In regard to Canada, Kamisar repeats Oaks' answer to my question: "How do other countries manage to control their police without relying on the exclusionary rule?". Oaks' answer—which Kamisar quotes in his article and which I discuss below—reinforces the very points I made in my article. Kamisar underlines "the American setting" as being different. He is right. But why is it different? One vital reason is that Canada never went the route of the exclusionary rule. It has relied on other methods of controlling police and protecting the privacy of individuals—precisely the methods I advocated in my article.

- Canada pursues police discipline seriously, as Kamisar says. Police discipline will never be pursued seriously in the United States so long as disciplining officers for infractions will inevitably prove the Fourth Amendment violation and bar the use of the evidence in a prosecution. (See pages 226–227 of my first article).
- Canada prosecutes police officers for criminal misconduct, as Kamisar notes. This is exactly what I propose should happen, not

> have required utterly absurd levels of probable cause and which no longer could be considered as governing precedent in light of the new statutory standard. In determining such a statutory standard of "reasonableness," which is always Congress's prerogative, Congress might look at our own experience and mores as well as the standards of probable cause for search and seizure used in other civilized nations with cultures similar to our own.
>
> As the Court said only a few years ago, "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution.[7] It is equally apparent that Congress may, in the first instance, describe for purposes of law enforcement such things as what may give rise to "probable cause" and when a warrant may be dispensed with.[8] Statutory characterizations of constitutional provisions will be subject to judicial review, of course, to assure harmony with the judicial understanding of the constitutional requirements, but a prior legislative determination might appropriately inform the content of such open-ended language as "unreasonable" and "probable cause."[9]
>
> Let me emphasize, though, that this review of the standard of reasonableness, i.e., the requisite level of probable cause, should not be made, if at all, until after we have abolished the exclusionary rule and gained some experience with alternative methods of protecting the privacy of individuals and controlling the police. What is "reasonable" is always a function of past experience applied to present time, place, and circumstances. We need to see how the police operate under a new dispensation and how the courts construe "probable cause" without the overhanging distortion of the exclusionary rule threatening to free undeniably guilty criminals. Only then can we, if need be, evaluate the standard of reasonableness and probable cause.

7. Almeida Sanchez v. United States, 413 U.S. 266, 272 (1973).

occasionally but every time, with the punishment meted out to equate with the seriousness of the offense (pages 230–32).

- Canada makes an aggrieved person's tort cause of action a real remedy, not a theoretical one, as Kamisar writes. This is exactly what I advocate (page 231).
- Canadian prosecutors are part of the Ministry of Justice, which exercises direct command authority over most of the police organizations, as Kamisar tells us. Again, as I pointed out before (page 220), this illustrates the total illogic of an exclusionary rule in the United States where the "punishment" of excluding the evidence really affects the prosecutor, not the police officer or his own separate command organization. Obviously, it would be more logical to employ the exclusionary rule in Canada, where the exclusion of evidence theoretically might have an impact on the command organization which controls both the prosecutor and the police.

All in all, while granting whatever historical and ethnic differences there are between Canada (and the other British Commonwealth countries) and the United States, the differences in this area of law enforcement basically result from our having chosen methods of enforcement different from Canada and the rest of the civilized world. □

—M.R.W.

Making hypocrites of judges

The suggestion for a possible later examination of the level of probable cause to constitute a reasonable search and seizure is, as I have painfully tried to make clear, an issue separate and distinct from retaining or abolishing the exclusionary rule itself. But, while adding to thought... reform previously expressed, I should convey the first reaction I received to my original article. A state court judge whom I have never met called to say that, although he agreed completely with me, I had overlooked one most salient vice of the exclusionary rule—that not only the police but also the judges are

8. *See* 18 U.S.C. §2518(7) (authorizing warrantless wiretaps in specific circumstances).

9. *Cf.* Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483, 4486 (U.S. 23 May 1978) (probable cause to conduct an administrative search may be based on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].").

corrupted by the exclusionary rule. Another state court trial judge made this same point in a letter.

Time and time again, we are told, trial judges are blatantly hypocritical in construing the Fourth Amendment's definition of an unreasonable search and seizure because they know full well that the illogical penalty of total exclusion of evidence is damaging to the cause of justice. If the evidence were to be admitted anyway, the trial judge would not hesitate to point out the errors of the police, and if penalties were authorized, to impose such penalties on the erring officer. But he does not do it because, conscious of the safety and welfare of the community, and sharing a very righteous indignation against a proven law violator, the trial judge thinks the criminal should not escape unpunished.

It is an illogical penalty to exclude the evidence totally, and it is damaging to the cause of justice.

Not only is this a corruptive influence on trial judges, and an unnecessary burden on the appellate court to correct these errors, but it demonstrates that the number of illegal searches, accurately analyzed, is greater than those recorded in the case books. If the disproportionate penalty of exclusion and bar to prosecution were not the inevitable result of declaring that the police had erred, trial judges would have no motive to call it other than it is, and the police would be criticized—we hope constructively—more than they are now. Abolishing the exclusionary rule as a penalty would make possible a truer measurement of the short-comings of the police, and the proper measures could be taken to correct them.

That trial judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community, I have no doubt. It is regrettable, and we should rid ourselves of this hypocrisy. The only way to do so is to get rid of the exclusionary rule and its baneful influence, and to set up a system which will permit the courts to deal honestly and separately with both the criminal and the police.

Polling the trial judges

My first caller about the original article claimed that "90 per cent of the judges would agree with you, too." I don't know if his estimate is correct—it would appear a polite, if hopeful, exaggeration—but I would expect and hope that a majority of judges would find themselves in general agreement with my views. In any case, I think we should find out—not what judges think about my views, but what judges think about the exclusionary rule.

Reliable empirical data is very hard to come by, and, indeed, final conclusions on empirical data may be logically impossible. Therefore, informed opinion assumes greater importance, and the most reliable opinions as to the efficacy and desirability of the exclusionary rule would be those of state and federal trial judges. The Federal Judicial Center, the National Center for State Courts or some other impartial research body should seek the views of each and every trial judge of general jurisdiction about the exclusionary rule, its impact, its applicability, its merits and demerits, its retention or abolition, and the viable alternatives of enforcing the Fourth Amendment.

While the views of academicians, police commissioners, appellate judges and laymen are entitled to respect, I know of no body of Americans more qualified to define and describe the role of the exclusionary rule in the administration of justice in our country than trial judges. They apply it and live with it day by day. They must know intimately the good and the bad features of the exclusionary rule as it exists in reality, not theory. They should be consulted. □

letters

The rule and judicial integrity

I have several comments to make in reaction to the debate over the exclusionary rule (August, November 1978; February 1979).

Judge Malcolm Wilkey's readiness to link the adoption of the exclusionary rule to the increase in the level of crime in the United States is highly questionable. Research indicates that the increase in crime in the last few decades is a world-wide phenomenon. Although the causes are not clear, the exclusionary rule does not seem to be a significant factor, since countries that never adopted the rule suffer from the same problem.

Another of Judge Wilkey's principal allegations is that the exclusionary rule damages judicial integrity. One wonders, however, what undermines the reputation of the judicial system more—the admission of illegally obtained evidence or its exclusion? What moral stance will the judicial system be taking if Judge Wilkey's solution is adopted? A judge will be condemning a policeman's misconduct, yet in the same legal process he will hear the policeman's testimony and declare admissible the fruits of his illegality.

The judicial process is not, as Judge Wilkey seems to think, *purely* a "truth seeking process" (November, page 222). Limitations on the testimony of relatives, rules against self-incrimination, and others indicate that the process is more accurately defined as a *limited* truth-seeking process. That is particularly true in the adversary system, which imposes most of its restrictions on the prosecution. These restrictions are usually connected with moral principles and human rights, and the adversary system assures their preservation.

The exclusionary rule is a meaningful measure in that context, helping to protect the right of privacy on the one hand, and the purity and morality of the legal system on the other.

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Search first, pay later?

In his discussions, "How the exclusionary rule hampers gun control" and "Do people object to airport searches?" (November, 1978), Judge Wilkey's complaint is not with the exclusionary rule, but with the Fourth Amendment.

When he states that the rule prevents the police from engaging in certain tactics which reduce gun violations, he is admitting that the tactics are now held by our courts to be unconstitutional. I hope he is not advocating that the way to deal with the gun problem is to obtain the necessary evidence through unlawful searches and then to recompense the defendant through a civil law suit.

Harris L. Hartz
Albuquerque, New Mexico

A follow-up on the debate over the exclusionary rule

The exclusionary rule does not significantly affect prosecutions in federal criminal cases, according to a new study by the General Accounting Office ("Impact of the Exclusionary Rule on Federal Criminal Prosecutions," GGD-79-45, April 19, 1979).

The project, which covered 42 of the 95 U.S. attorneys offices in the country, analyzed 2,801 cases in which defendants were likely to file motions to suppress evidence. The findings tend to contradict earlier studies, which indicated that courts were granting a high percentage of such motions.

- Evidence was excluded as a result of a Fourth Amendment motion to suppress in only 1.3 per cent of all cases, the new study said.
- Among defendants who go to trial and have a formal suppression hearing, courts deny "the overwhelming majority" of suppression motions (85 per cent in the larger jurisdictions).
- U.S. attorneys dropped prosecution in only 0.4 per cent of the cases because of Fourth Amendment search and seizure problems.
- Suppression motions were filed in 16 per cent of the cases.

The study was conducted by the GAO for Senate Judiciary Committee chairman Edward M. Kennedy (D-Mass.), who is working on a legislative alternative to the rule for some cases.

The exclusionary rule: have critics proven that it doesn't deter police?

by Bradley Canon

Editor's note: Since last August, Judicature has published three widely-read discussions on whether the courts should retain the exclusionary rule, which requires judges to suppress evidence that police obtained through an illegal search.

Professor Yale Kamisar initiated the debate last August ("Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?") and U.S. Circuit Judge Malcolm Wilkey gave his response in November ("The exclusionary rule: why suppress valid evidence?"). Both men made their closing arguments last month.

Now two social scientists will discuss a key question in the debate: does the rule really deter police from making illegal searches? Bradley Canon argues that the evidence is inconclusive; in some cities, the rule deters; in others, it doesn't. Steven Schlesinger responds that the rule's proponents bear the burden of proving that it is effective—and they have not provided such proof.

Judge Malcolm Wilkey attacks the exclusionary rule in search and seizure in terms of both logic and experience. I will leave the logical arguments to others; my purpose here is to evaluate his claims that experience proves that the rule is socially costly and that it fails to achieve its purpose of securing police compliance with the Fourth Amendment.

According to Wilkey a variety of crimes would be significantly curtailed if the rule did not exist: gambling, narcotics, prostitution, armed robbery and concealed weapons.[1] No evidence, however, is offered in support of this assertion. Indeed, it is hard to see even a logical connection between the rule and the incidence of some of the crimes. Armed robbery is certainly far more a product of a society whose public policy (the only one in the civilized world, I might add) allows almost unrestricted access to weap-

1. Malcolm Richard Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 215 (November 1978).

ons rather than the legal inability of the police to search for guns in the few minutes before the crime occurs.

Moreover, the exclusionary rule in no way prevents the police from confiscating concealed weapons.[2] The real problem is not that criminals walk down the streets with bulging automatics in their coats or submachine guns thinly covered by blankets. The problem is that the weapons are well hidden and the police often do not know whom to search. Though reading Dick Tracy may suggest otherwise, criminals do not come in malformed, misshapen sizes rendering them easily identifiable to the police. Getting rid of the exclusionary rule would not alter the situation very much (unless, of course, the police adopted a policy of searching *everyone* randomly—in which case we would truly be living in a police state).

The impact of Mapp

Indeed, taking Wilkey's argument to its logical conclusion, one would have to believe that we lived in a rather crime-free society before *Mapp* v. *Ohio* in 1961.[3] This of course is hardly the case. It was in the 1920's and 1930's, not the 1970's that Dillinger, Capone and other gangsters walked the streets carrying violin cases. It was in the 1950's, not the 1970's, when organized crime's involvement in gambling became so notorious that the Kefauver Committee made headlines for months investigating it. I argue not that there is less crime today than there was before *Mapp*, but Judge Wilkey's assertion that the incidence of crime is *related to* the exclusionary rule fails to withstand even the most modest scrutiny.

In this vein, in fact, I find it amazing that Wilkey imputes to criminals a detailed knowledge of the law of search and seizure. ("Criminals," he writes, "know the difficulties of the police in making a valid search which will stand up under challenge at trial."[4] No evidence is offered that criminals are so learned in the law and it seems quite anomalous to assume so, considering that search and seizure law is so confusing or uncertain that the nation's most prominent jurists and legal scholars have described it as a "quagmire,"[5] a "no man's land"[6] and a "course of true law [that] has not run smooth."[7]

Ironically, Chief Justice Burger, a staunch opponent of the exclusionary rule, argues that one of its disadvantages is that *policemen* do not understand the intricacies of search and seizure law and thus often make mistakes in search situations.[8] He may well be right on this point, but if so Judge Wilkey's implantation seems all the more surprising. It takes more credulity than I have to believe that the basic problem is one of "smart crooks" and "dumb cops."

A differential impact

My main concern with Judge Wilkey's article, however, is not a fear that readers will be taken in by his exaggerated or unsound claims about the responsibility of the exclusionary rule for the high incidence of crime nowadays. Most readers, I am confident, have sufficient judgment to discount such claims. My concern, rather, is that they will accept the judge's assertion that empirical studies demonstrate that the rule is ineffective in deterring police violations of the Fourth Amendment. After all, they might reason, Wilkey is not reporting his own observations or conclusions here, but is merely citing studies carried out by others.

The problem is that Judge Wilkey's treatment of these studies leaves much to be desired. It seems that he relies in large part on the summaries of these studies and conclusions drawn from them by Professor Steven Schlesinger in his recent monograph on the rule.[9] Schlesinger is quite open in his

2. Judge Wilkey fails to recognize this point in his discussion of the exclusionary rule and gun control, *id.*, at 224-225.

3. 367 U.S. 643 (1961).

4. Wilkey, *supra* n. 1, at 224.

5. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. LAW BULL. 9 (1972).

6. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474 (1961).

7. Frankfurter, J., concurring in Chapman v. U.S., 365 U.S. 610, 618 (1961).

8. Dissenting in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, at 417 (1976).

9. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE. New York: Dekker, 1977.

hostility to the exclusionary rule and, unfortunately, this has led him to misinterpret some studies and downplay others. Moreover, additional evidence has become available after Schlesinger's work was published.

When the totality of the evidence is examined more fully and more dispassionately, it does not support the Wilkey-Schlesinger conclusion that the rule is inefficacious in curbing illegal police searches. Neither, I should make it clear, does the evidence support the opposite conclusion—that the rule deters police illegalities nearly 100 per cent of the time. Put shortly, the rule has a differential impact depending upon time and place.

Replicating the Oak's study

Let us take a hard look at the empirical evidence. Wilkey argues that Dallin Oaks' study[10] is the "most comprehensive study ever undertaken"[11] on the subject. But Oaks' own research is devoted chiefly to drawing inferences about police behavior in Cincinnati from arrest records in search and seizure type crimes (largely gambling, narcotics, and weapons offenses) in the five or six years before and after *Mapp*.[12] It is a careful study and there is little doubt that the rule had only minimal impact on police behavior in Cincinnati immediately following *Mapp*. But it can hardly be considered comprehensive.

Few would be so bold as to join Judge Wilkey in claiming that police behavior in one city 15 years ago is representative of police behavior throughout the United States in 1978. Oaks himself freely admits that his study "obviously falls short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."[13] Indeed, Wilkey puts words in Oaks' mouth when he tells us that "Oaks concluded" that the exclusionary rule is a failure:[14] Oaks took pains to note that this assertion "is an argument, not a conclusion."[15]

Working on a Ford Foundation grant in 1972-73, I replicated Oaks' Cincinnati study for 19 other American cities.[16] Statistical techniques were used to eliminate arbitrary judgments and control for alternate explanations. In nine of the cities, there was a statistically significant decrease in arrests in all or most search and seizure crimes following *Mapp*, while in the other 10 the impact was minimal or absent.[17]

Seemingly the exclusionary rule can and does have a very real, although hardly universal deterrent, effect on the police. The rule's impact, I concluded, depended much on such factors as degree of professional training prevailing in a department, policies of chiefs of police and squad commanders, the attitudes of mayors, city councils and other officials, etc. There simply was no singular response (or non-response) pattern to the exclusionary rule in the five or six years after *Mapp*.

Other studies

Schlesinger also briefly discusses Michael Ban's study of the use of search warrants in Cincinnati and Boston[18] and the Columbia Law School study of narcotics arrests in Manhattan following *Mapp*.[19] Ban found the annual use of search warrants rose from virtually zero to over 100 in Cincinnati

10. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

11. Wilkey, *supra* n. 1, at 222.

12. Oaks also collected data on the frequency of motions to suppress evidence in Ohio courts and Washington. The former data were used by Spiotto, *infra* n. 35, and will be discussed at some length later. The Washington data offer no support for a claim that the police continued to violate the Fourth Amendment after *Mapp*.

13. Oaks, *supra* n. 10, at 709.

14. Wilkey, *supra* n. 1, at 222.

15. Oaks, *supra* n. 10, at 755.

16. The results are reported in Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977). A preliminary and less methodologically oriented report is found in Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against A Precipitous Conclusion*, 62 KY. L.J. 681 (1974). I rely on the former in the above discussion as it is more rigorous and corrects some errors appearing in the earlier article.

17. Canon, *Testing the Effectiveness . . .*, *supra* n. 16, at 72, Table 2.

18. Ban, "The Impact of Mapp v. Ohio on Police Behavior" (paper delivered at Midwest Political Science Association, May, 1973).

19. Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COL. J.L. & SOC. PROBS. 87 (1968); Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices, 1960-62*, 1 CRIM. L. BULL. 549 (1965).

while in Boston it went from about 100 to nearly 1,000.[20] He argued the Cincinnati figures are too low to represent wholehearted compliance with the Fourth Amendment—a conclusion that dovetails well with Oaks' Cincinnati findings. On the other hand, Ban concedes the Boston figures imply considerable if begrudging police compliance.

The Columbia study noted a dramatic decline in narcotics arrests in premises but only a slight decline of street arrests. The authors conclude that *Mapp* inhibited police from illegal invasion of homes, etc., but not from street searches. They also speculate that this was partly due to the vice squad's (which conducts raids on premises) greater awareness of the decision and its implications. Again, these studies demonstrate the differential impact of the exclusionary rule; they hardly lend support to Judge Wilkey's claims that the empirical evidence shows the rule to be a "total failure in its primary task of deterring illegal police activity."[21]

The data involved in the above studies have one common feature: they come from the period immediately following the *Mapp* decision. However, in evaluating the exclusionary rule with an eye toward a public policy decision of retention, modification or abrogation, we must be interested in its present rather than its past impact on police behavior. Unless we can be reasonably sure that the impact reported in the early 1960's persists without great change into the present, the value of the above studies is quite limited. And while the data are thin and inferences tenuous, there is some reason to believe that the rule has become more effective than it was in the early 1960's.

A recent survey

In 1973 I sent questionnaires to police departments, prosecutors and public defenders in all American cities with populations of more than 100,000.[22] I asked whether then current search and seizure practices differed from those prevalent in 1967 and, if so, how. Responses came from over half the cities and clearly indicated that in most of them police compliance with the Fourth Amendment increased significantly over the six year period.

- Four-fifths of them reported the use of search warrants was more than 50 per cent greater than the 1967 level and 35 per cent of the cities reported an increase of more than 100 per cent.[23]
- Nearly two-thirds of the departments reported more restrictive policies pertaining to searches accompanying an arrest than they espoused six years earlier;[24] 18 per cent reported a stricter policy regarding searches of automobiles.[25]
- Moreover, while comparison with 1967 figures showed only modest change, 50 per cent of the cities reported that motions to suppress evidence were granted less than 10 per cent of the time[26] and in 63 per cent it was reported that charges were "rarely" dropped because of illegal seizure of the evidence.[27]

Even in the absence of the above data, one could reasonably surmise on the basis of impact patterns reported for other Supreme Court criminal justice decisions that the exclusionary rule is more effective now than it was in the immediate post-*Mapp* years. The controversial *Miranda* decision,[28] for instance, received only spotty compliance by police departments in the two or three years after its promulgation.[29] More recently, however, it seems to be effective in controlling police behavior—and even has won the approval of many officers.[30] And immediately following *In re Gault*[31] compliance

20. Ban, *supra* n. 18, at 7, Table 1.
21. Wilkey, *supra* n. 1, at 222.
22. The results are reported in Canon, *Is the Exclusionary Rule . . ., supra* n. 16.
23. *Id.*, at 712, Table 6.
24. *Id.*, at 715, Table 8.
25. *Id.*, at 719, Table 9.
26. *Id.*, at 722, Table 10.
27. *Id.*, at 724, Table 11.
28. Miranda v. Arizona, 384 U.S. 426 (1966).
29. Wald, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); Medalie, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).
30. Wasby, SMALL TOWN POLICE AND THE SUPREME COURT. Lexington, Massachusetts: D.C. Heath, 1976, *passim*; Cinnino, *Confessions and Right to Counsel: The Impact of Miranda in Missouri*, 17 ST. LOUIS U. L. J. 572 (1973).
31. 387 U.S. 1 (1967).

was a hit and miss affair, many juvenile judges did not seem to know that such a decision had even been made.[32] Again, a decade's time has permitted the word to circulate and eroded resistance.[33]

Experience tells us that sudden and dramatic changes in policy such as occurred with the *Mapp* decision do not produce alteration in behavior overnight. Information about Supreme Court decisions is particularly poorly disseminated, often easily misunderstood and sometimes ignored in deference to habit or convenience.[34] But eventually the word is spread; young, professionally trained recruits infuse the ranks; old-timers become a vanishing breed. It is not certain, of course, that police search and seizure behavior has followed this scenario, but it is certainly a plausible hypothesis.

Spiotto's study

The only other empirical evidence Judge Wilkey discusses is James Spiotto's study comparing results of a study of motions to suppress in search and seizure crimes in the Chicago Municipal Court in 1950 with those in 1969 and 1971.[35] Wilkey makes much of the findings and quotes Spiotto as follows:

> over a twenty year period in Chicago, the proportional number of motions to suppress evidence [in narcotics and weapons cases] allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct.[36]

This is an amazing conclusion. Spiotto is utterly unaware that Illinois adopted the exclusionary rule in 1924[37]—some 37 years before *Mapp*. (Besides being a legal researcher, Spiotto is an Illinois resident, so it is not easy to explain this monumental error.)[38] Thus the court was governed by the rule in 1951 as well as in 1969 and 1971 and the *Mapp* decision would have no legal impact on its receptivity to motions to suppress.

It could be argued—although it is not a point made by either Spiotto or Wilkey—that *Mapp* had an impact even in those states which had previously adopted the rule because federal civil liberties decisions have a greater visibility than those made by states or because police officers have reason to believe that state judges do not take such decisions seriously while federal judges do. This may be true in some jurisdictions,[39] but it is obviously not the case in Chicago. Its court was clearly enforcing the exclusionary rule prior to *Mapp*; the 1950 study shows that 98 per cent of all motions to suppress were granted.[40]

Even if Illinois had not adopted the rule long before *Mapp*, Spiotto's conclusion about the rule's inefficacy would be flawed. After all, if there were no exclusionary rule, there would be no point in defendants moving to suppress evidence (such motions would obviously be denied) and consequently there would be few such motions filed and none granted. Thus it would be

32. Lefstein, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC. REV. 491 (1969); Canon and Kolson, *Rural Compliance With Gault: Kentucky, A Case Study*, 10 J. FAMILY L. 300 (1971).

33. In the spring of 1975, my graduate seminar at the University of Kentucky replicated the study reported in Canon and Kolson, *supra* n. 32. The results clearly demonstrated a much higher knowledge of and compliance with Gault by the state's juvenile judges than was the case in 1969.

34. Dolbeare and Hammond, THE SCHOOL PRAYER DECISION: FROM COURT POLICY TO LOCAL PRACTICE. Chicago: University of Chicago Press, 1971; Washy, *The Communication of the Supreme Court's Criminal Procedures Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1083 (1973).

35. The data is reported in Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEG. STUDIES 243 (1973); Spiotto also discussed it in *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & ADMIN. 36 (1973). The 1952 study is reported in Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. L. REV. 493 (1952). The 1969 data is discussed in Oaks, *supra* n. 10.

36. *The Search and Seizure Problem . . .*, *supra* n. 35, at 37 (cited by Wilkey, *supra* n. 1, at 222-223).

37. People v. Castree, 143 N.E. 112 (1924).

38. It is not absolutely clear from the above quotation that Spiotto is unaware of Illinois' earlier adoption of the rule. However, at another point, Spiotto makes his ignorance on the point quite plain. *See, Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 276, where he says, "As pointed out earlier in this study, during the period 1950-1970, *in the course of which the exclusionary rule was introduced in Illinois, . . .*" (emphasis added).

39. I explore this hypothesis in Canon, *Testing the Effectiveness . . .*, *supra* n. 16. The aggregate evidence lends it some support.

40. Spiotto, *Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 247, Table 1.

perfectly natural that the porportion of such motions granted would rise dramatically after the *Mapp* decision when judges would be constitutionally obligated to consider them seriously and grant those with merit. The "significant increase" Spiotto reports would tell us nothing about the impact of the rule on police conduct; it would speak only of the perfectly obvious impact of the rule on the conduct of *defense attorneys*.[41]

Finally, it might be argued that regardless of when the exclusionary rule was adopted, the percentage of motions to suppress is much too high—running 69 per cent in 1950 and in the 30 per cent to 35 per cent range in the 1969-71 period[42]—and that this in itself is damning evidence of the rule's ineffectiveness. Chicago, however, is not a very typical city in this respect. As previously noted, in three-fifths of large American cities, 10 per cent or fewer of such motions are granted and in only a handful were over 25 per cent of such motions granted.[43] Indeed, Chicago police are reputed to enforce the vice laws in a manner which insures that motions to suppress will be successful.[44] Thus they have their cake and eat it too by appearing to engage in vigorous enforcement activity and yet refraining from seriously endangering the continued existence of organized vice.

Existing data make it impossible to establish a universal conclusion—either "yes, it works" or "no, it doesn't work."

Conclusion

In summary, Spiotto's study of motions to suppress sheds no light at all on the efficacy of the exclusionary rule. It is highly unfortunate that both Professor Schlesinger and Judge Wilkey place so much reliance on it. The endorsement of the badly flawed study by persons in such positions lends it undeserving credibility among readers unfamiliar with the subject. That Wilkey and Schlesinger rely on Spiotto's so-called conclusions so eagerly is (especially in Schlesinger's case, as he is a social scientist presumably experienced in the analysis of data) yet another attestation to the ever present human tendency to grasp at any straw in order to promote values and beliefs already adopted.

None of the above is meant to suggest that the exclusionary rule is or inevitably will be largely effective in securing police compliance with the Fourth Amendment. What it is, simply, is a refutation of repeated assertions and implications that the rule is ineffective in deterring police misconduct. Existing data at the present time make it impossible to establish empirically a universal "yes, it works" or a "no, it doesn't work" conclusion—or even anything approximating such a conclusion.

Judge Wilkey, Professor Schlesinger and others have every right to disagree with the exclusionary rule: certainly there are reasoned arguments which can be advanced against it independent of an empirical one. But what they do not have a right to do is to disseminate a myth that empirical studies show that the issue has been resolved negatively. To the degree that empirical studies of its impact bear on the decision to retain, modify or abandon the rule, the public—and the decision-makers—are entitled to facts, not myths. □

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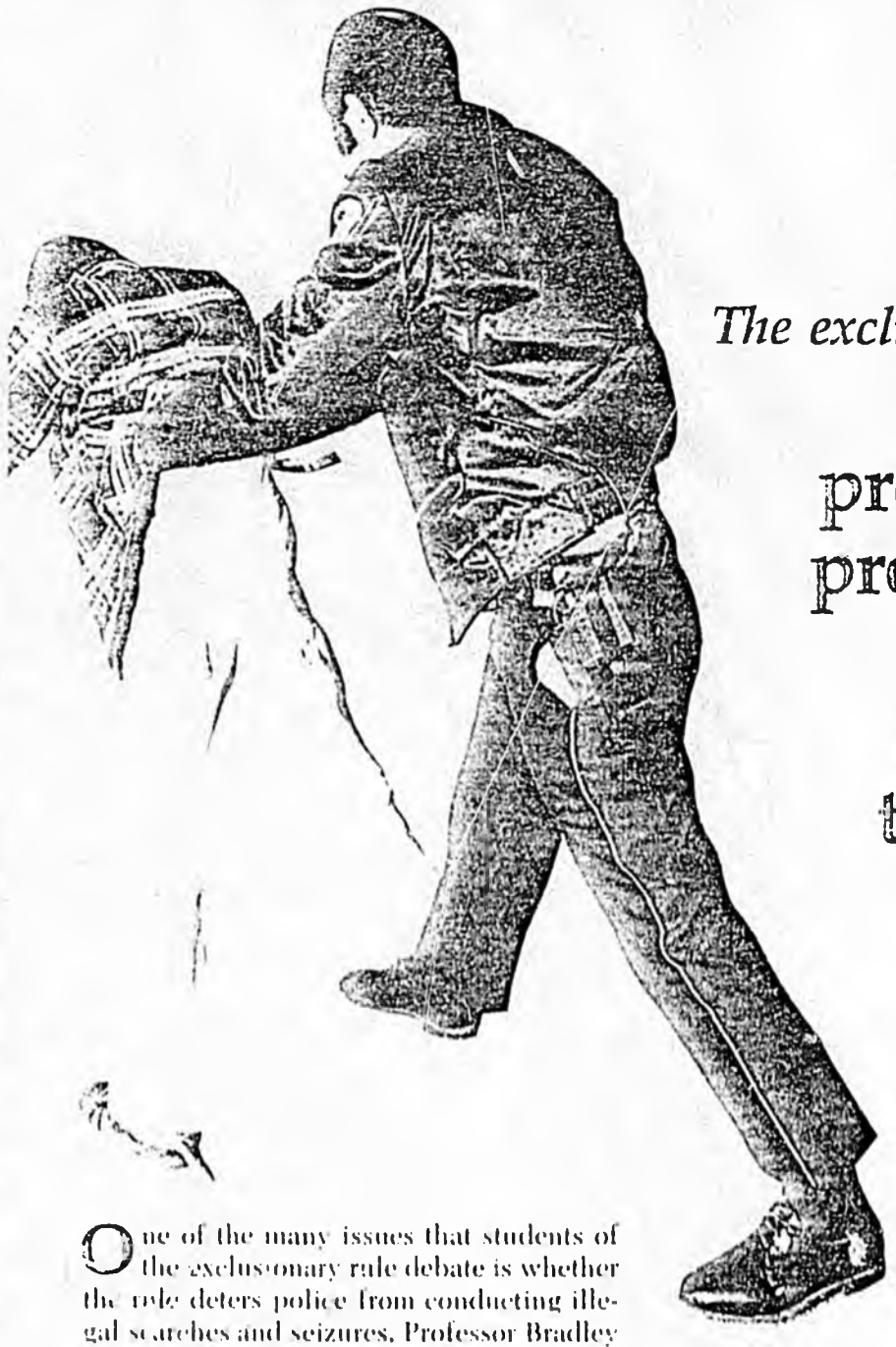
See the following article for an opposing view.

41. Oaks agrees with this point, *supra* n. 10, at 713-14.

42. Spiotto, *Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 247, Table 1.

43. Canon, *Is the Exclusionary Rule . . .*, *supra* n. 16, at 722, Table 10. See the discussion surrounding n. 26, *supra*.

44. See Comment, *supra* n. 35, and LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, at 423 (1965).



The exclusionary rule: have proponents proven that it is a deterrent to police?

by Steven R. Schlesinger

One of the many issues that students of the exclusionary rule debate is whether the rule deters police from conducting illegal searches and seizures. Professor Bradley Canon has discussed some of the empirical evidence on that issue in the preceding article. And perhaps he has achieved his very modest goal—to show that, in some situations, studies have not completely disproved the rule's effectiveness in deterring police conduct.

His findings, however, cannot possibly be interpreted as a justification for continuing the rule, if we view the evidence in proper perspective. One must keep in mind, first and foremost, that the burden is on proponents of the exclusionary rule to show that it *is* an effective deterrent. Some 18 years after *Mapp* v. *Ohio*,[1] the available evidence does not even come close to satisfying that requirement.

Why is the burden on the proponents of the rule? First, whatever the original justification for the rule set forth in *Boyd* v. *United States*[2] and *Weeks* v. *United States*,[3] it is

1. 367 U.S. 643 (1961).
2. 116 U.S. 616 (1886).
3. 232 U.S. 383 (1914).

clear that the current Supreme Court considers deterrence to be the primary justification for the rule.[4] If, therefore, the rule is not an effective deterrent, then it is appropriate for the Court to reconsider its position.

Second, it is clear—and the proponents of the rule to some extent concede—that the rule has many costs and disadvantages not related to deterrence. Judge Malcolm Wilkey has discussed some of these costs, but we would do well to list them again:

- the rule releases many otherwise guilty persons, some of whom are dangerous or violent;[5]
- it diminishes public respect for the legal and judicial system;[6]
- it fails to distinguish between more and less serious crimes[7] or between willful, flagrant violations by an officer and "good-faith" errors committed in difficult circumstances;[8]
- it excludes the most credible kinds of evidence;[9]
- it intensifies plea bargaining, since a questionable search may well be one of the bargaining points between prosecution and defense,[10] and
- the rule tends to push the judiciary toward dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress.[11]

The possibility of deterrence, therefore, must be weighed against these costs. Since the proponents of the rule offer deterrence as a justification for it, the burden is on them to show that the advantages of deterrence outweigh these heavy social costs.

The empirical evidence

In the preceding article, Professor Canon describes as a "myth" the claim that empirical studies have shown that the rule is an ineffective deterrent. In fact, the empirical studies, while not conclusive, indicate just that.

In my book, to which Canon repeatedly refers, I reported primarily on the empirical studies of Dallin Oaks, Michael Ban, James Spiotto, and Professor Canon.[12] Let us review briefly the findings from each of those studies.

Oaks' 1970 study of law enforcement in Cincinnati between 1956 and 1967 convinced him that:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelm-

1. As the Court said in Stone v. Powell, 428 U.S. 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights."

5. Oaks' study of motions to suppress in gambling, narcotics and weapons cases in Chicago indicates that "in every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 746 (1970).

6. *See* Stone v. Powell, *supra* n. 4, at 490-91.

7. As to applying the exclusionary rule only in the most serious cases, see Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974).

8. Both Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L. J. 573, 577-78 (1971) and *Student Comment: The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. OF CRIM. L., C. AND P.S. 256, 257-59 (1972) note that the rule fails in any way to take account of the seriousness of the violations committed by the police officer.

See also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 418-19 (Burger, C.J., dissenting) (1971) and Kamisar, *Wolf and Lustig, Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1146-47 (1959).

9. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 215, 223 (1978).

10. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56, 80-2 (1968).

11. As to the effect of the rule on other, often related, legal matters, Mr. Justice White has recently observed: "If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases." Rakas v. Illinois, 47 U.S.L.W. 4925, 4933 (1978).

For a discussion of the disadvantages of the exclusionary rule not related to deterrence, see Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 60-63 (1977).

12. Schlesinger, *supra* n. 11; Oaks, *supra* n. 5; Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May, 1973); and "Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio" (delivered at the annual meeting of the American Political Science Association, New Orleans, September, 1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1973-74).

ing majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement directed at prosecution.[13]

Ban's two studies of the impact of the rule in Boston and Cincinnati, conducted in the mid-1960's, also tend to confirm the ineffectiveness of the rule.[14] Ban concludes that the rule showed spotty effectiveness in Boston and almost none in Cincinnati.

Spiotto's study of motions to suppress in Chicago between 1950 and 1971 convinced him that "the deterrent rationale for the rule does not seem to be justified" and that "given the present status of the law and the workings of the exclusionary rule, change is warranted. . . ."[15] Contrary to Professor Canon's claim, I never endorsed Spiotto's work completely.[16]

Canon's findings indicate the rule may have had some impact, but they hardly make a case for a substantial deterrent effect.

While Spiotto's research contains real weaknesses, including a faulty research methodology, his study nonetheless tends to show that in Chicago police misbehavior did not decrease over a 21 year period (1950-1971) during which Illinois had a self-imposed exclusionary rule. Likewise, it did not decrease in the 10 years after the rule was imposed on all the states by the United States Supreme Court. Thus, while Spiotto's research decidedly does not answer the question about how much more police illegality there would be without the rule, Chicago's experience lends little credence to Canon's thesis that the rule deters over time.

Professor Canon has previously admitted that it would be fair to treat these studies of Cincinnati, Boston and Chicago, as well as studies of Washington, D.C. and New York, as an indictment of the rule, if not a conviction.[17] But he now maintains that two of his studies, published in 1974 and 1977, support the notion that the rule deters.

Canon's Studies

His 1974 study attempts to update (to 1973) evidence on the rule's deterrent effect.[18] However, it suffers from so many methodological flaws and other difficulties that its findings are not very useful. In fact, Canon now admits that "some errors" appear in the newer article. For example, much of his study was based on questionnaires which he mailed to police, prosecutors, and public defenders in American cities with populations of more than 100,000. But he received returns on only 47.4 per cent of the questionnaires sent to the police, 35.2 per cent of those sent to prosecutors and 40.2 per cent of those sent to public defenders.[19] Thus, the nature and size of his sample simply do not permit valid generalization; it was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law—those whose practices would have negated Canon's thesis about the effectiveness of the rule—would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or to announce their own failure to obey the law.

Professor Canon nowhere stated which officials filled out the questionnaires. And, generally speaking, there is simply no way of knowing whether the questionnaires were answered truthfully. Anyone trying to give the police a favorable image might have been less than candid in reporting about police compliance with proper search and seizure procedures.

13. Oaks, *supra* n. 6, at 735.
14. Ban, *supra* n. 12.
15. Spiotto, *supra* n. 12.
16. Schlesinger, *supra* n. 11, at 64-65, n. 9.
17. Canon, *supra* n. 12, at 699.
18. *Id.*
19. *Id.*, at 702, n. 31.

Other difficulties

In addition to the general methodological difficulties in this study, it is important to examine the research methods that Professor Canon used on three of his major topics: numbers of search warrants issued,[20] changes in police search and seizure policies,[21] and successful motions to suppress evidence.[22]

Canon asked both police and prosecutors to estimate the number of search warrants issued annually in their respective cities. He then compared these estimates for the early 1970s with what he admitted were very thin data concerning the number of search warrants issued in the 1950s and 1960s. He concluded, not surprisingly, that there was an increase in the number issued.

Yet the crucial question is *why* there was such an increase; Canon's own findings on causality seriously undercut his argument for the rule's deterrent effect. The respondents said that 55 per cent of the increase could be attributed to an upsurge in narcotics crimes, 24 per cent to judicial rulings (all judicial rulings on search and seizure, not just those on the exclusionary rule), 22 per cent to more police and better training, and 4 per cent to other causes.[23] While these findings indicate that the exclusionary rule may have had some impact, they hardly make a case for a substantial deterrent effect.

Professor Canon asked the police in the 1974 questionnaire about the extent to which their search and seizure policies had changed since 1967-68 and, again not surprisingly, they reported that the rule had a substantial impact. Yet the problems with Canon's research strategy here are serious. As he admitted, statements of official "headquarters" policy may not conform to actual police practice in the field.[24] Further, Professor Canon conceded that "such statements were sometimes unduly generalized to conform with sparsely worded questionnaire alternatives."[25]

Professor Canon himself noted that "some policies could be misreported so that they would appear to be in conformity with the law."[26] In fact, for the police to have answered Canon's questions in a manner which conflicted with his thesis would have required them to admit that, as a matter of official policy, they broke the law. To put it mildly, the questions themselves contained strong inducements for the police to answer in a manner which confirmed Canon's thesis. Amazingly, some departments did openly admit to policies which seemed to conflict with rulings of the United States Supreme Court[27]—no splendid testimony to the effectiveness of the exclusionary rule.

Finally, Canon's 1974 study sought to cast doubt on Spiotto's research on successful motions to suppress in Chicago by showing that Chicago was atypical in that it had more successful motions to suppress than the average American city. Though Canon did demonstrate that in this respect Chicago was atypical, he ignored the fundamental question: what effect did imposition of the exclusionary rule have on successful motions to suppress in Chicago and other American cities? What we really need to know is whether the rule reduced police misbehavior, as we would see from evidence of a decrease over time in successful motions to suppress. Neither Spiotto nor Canon has answered this question.

Professor Canon now claims that his more recent study[28] corrects "some errors" in the first, and is more rigorous. In fact, his 1977 study represents one of the most damning pieces of evidence produced so far regarding the rule's ineffectiveness. In his later study, Canon replicated Oaks' 1970 Cincinnati study for 19 other American cities. Summarizing his findings, Canon said the data indicated that the rule "has not always or even *often* worked,"[29] "that *Mapp* had seemingly little or no impact on the majority of cases,"[30] and that the data "do not come close to supporting a claim that the rule

20. *Id.*, at 707-16.
21. *Id.*, at 716-17.
22. *Id.*, at 717-24.
23. *Id.*, at 713.
24. *Id.*, at 716.
25. *Id.*
26. *Id.*
27. *Id.*
28. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. (1977).
29. *Id.*, at 75.
30. *Id.*

wholly or *largely* works"[31] (emphasis supplied). If these are Canon's own conclusions about the deterrent effect of the rule, he is hardly in a position to criticize those who conclude that, according to the available empirical evidence, the rule is not an effective deterrent against police misbehavior.[32]

The burden of proof

It is crucial to return for a moment to the discussion of the burden of proof with which I began this essay. Certainly, Professor Canon has not even come close to satisfying the heavy burden of proving the rule's deterrent effectiveness. Such proof is clearly required when deterrence is the primary justification currently used by the Supreme Court for the rule, and when it entails so many serious costs and disadvantages.

Furthermore, criminal justice literature supplies many reasons for doubting the deterrent effectiveness of the rule. First, the operative scope of the rule is limited—only evidence presented at trial, a narrow stage in the criminal process, is excluded. Thus, the trial affects only a small proportion of police activity.[33] Given the extraordinary amount of plea bargaining in American courts today, the instances in which the rule can be invoked at trial are dramatically reduced.[34]

Second, the impact of the rule falls only indirectly on police—it does not discipline the errant officer; the brunt of the exclusionary rule's effect is actually borne by the prosecution, which generally has little or no power to punish police misconduct.[35] Third, officers whose illegal actions result in loss of convictions may receive the implicit or explicit approval of their superiors.[36] Fourth, trial judges do not often explain to officers why their evidence is excluded; the impact of the rule is limited if the police are not informed of the nature and effect of their wrongdoing.[37]

Fifth, loss of convictions through exclusion of evidence is not as serious a matter for police as might be thought, since police effectiveness usually is judged by the number of "collars" or arrests, not by the number of convictions. Sixth, in jurisdictions where prosecutors decline to prosecute cases with substantial search and seizure problems, there are relatively few instances in which the rule can be invoked.[38] Seventh, there are some strong indications that the rule even encourages certain forms of police misconduct.[39]

31. *Id.* Professor Canon attributes the weakness of these findings to the fact that only a few years elapsed between the *Mapp* decision and 1965, the date of the study. He theorizes that the impact of *Mapp* increased over time. No study in the ensuing 13 years, however, has reliably shown the exclusionary rule to have a deterrent effect.

32. *See, e.g.*, Mr. Justice Powell's majority opinion in *Stone v. Powell* which cites Canon's contrary views but concludes that there is an "absence of supporting empirical evidence" for the proposition that the rule deters police misbehavior. *Id.* at 492. Canon's contrary view is cited in note 22.

33. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE, 91 (1967).

34. *See* Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 95-6 (1969).

35. Oaks, *supra* n. 5, at 726, and Wingo, supra n. 8, at 576, note that the real brunt of the rule falls on the prosecutor, not the police.

36. Oaks, *supra* n. 5, at 727.

37. *See* Lafave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965); *see also* Oaks, *supra* n. 5, at 730-31.

38. Oaks, *supra* n. 5, at 688-89.

39. One study dealing with this problem notes that the same police officers are involved repeatedly in illegally conducted gambling raids which could very easily have been carried out in a legal manner, for example, by obtaining arrest warrants. The study concludes that some gambling raids are intentionally conducted in violation of search and seizure rules "... to immunize the gamblers while at the same time satisfying the public that gamblers are being harrassed by police." Dash, *Cracks in the Foundation of Criminal Justice*, 1 ILL. L. REV. 385, 391-2 (1951).

Another study indicates that police allegations as to how evidence was obtained changed after the *Mapp* decision, although actual police practices did not change substantially. The data indicate that police officers often fabricate testimony to avoid the effects of *Mapp*-based motions to suppress illegally seized evidence. *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. AND SOC. PROB. 91-6 (1968).

Also, Oaks notes that the rule creates an incentive for lying by the police and, through interviews with police officials, he documents the most common types of situations in which police fabrication occurs. Oaks, *supra* n. 5, at 739-42.

For a general discussion of the reasons for doubting the deterrent effectiveness of the exclusionary rule, see Schlesinger, *supra* n. 11, at 56-60. A more careful reading of my book would have shown Professor Canon that I did not, as he implies, take the position that the rule totally fails to deter. In fact, I observed: "There can be no doubt that a certain number of illegal acts are deterred by the rule, for many law enforcement officials must be reluctant to gather evidence which will be of no value in court." *Id.* at 56.

Ending the rule's tyranny

Two major rationales for the exclusionary rule, other than deterrence, are that it protects both individual privacy and the integrity of the American judicial system. I have attempted elsewhere to show that both of these justifications are inadequate and unsatisfactory;[40] space does not permit me to address these matters further here.

If, as I have suggested, the rule lacks substantial justification, the most important practical problem is how to move away from the tyranny of the exclusionary rule as the only remedy for any and all police search and seizure misconduct. If the rule were simply abandoned without some substitute, the police might infer, in Chief Justice Burger's phrase, that "open season"[41] had been declared on all criminal suspects—that all constitutional restraints on search and seizure had been removed. I have suggested elsewhere that successful alternatives to the rule probably would involve a combination of: police discipline imposed by an independent review board to which cases of police misconduct would be reported by victims, the general public or judges; and an improved civil remedy for innocent victims of illegal searches and seizures.[42]

The Court should make clear that states which develop acceptable substitutes will no longer be saddled with the exclusionary rule.

What the Court should do is to make it clear that those states which develop acceptable substitutes will no longer be saddled with the exclusionary rule. For their part, state legislatures and Congress should enact alternative schemes along the lines I have suggested and test them in the courts through cases reviewing criminal convictions. The fundamental standard for judging the acceptability of such substitutes would be the promise they offer for accomplishing the two objectives of disciplining police officers who engage in improper searches and seizures and of compensating the innocent victims of police misconduct.

Judicial and legislative actions of this kind would have several substantial benefits. First, no jurisdiction could successfully avoid dealing with police misbehavior. Second, we would discover whether the states, whose public officials (especially the attorneys general) have vehemently criticized the rule for years, are willing to shoulder the burden of formulating and testing alternatives to the rule. Third, diversity of experience among the states and the federal government would provide some real evidence (not speculation) as to how the rule operates in comparison with its alternatives.

We should try such alternatives at the state and federal levels and use the resulting knowledge to guide future attempts at deterring police misconduct. Such efforts may move us closer to an effective law enforcement system and away from the irrational, capricious and sometimes downright dangerous results of the exclusionary rule. The prospect of state and federal alternatives to suppression of evidence renders the future uncertain, but such uncertainty seems to be the only way to move us away from the tyranny of the exclusionary rule. □

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Editor's note: Bradley Canon has prepared a response to Steven Schlesinger's criticisms, but our deadline prevented us from including it in this issue. We will publish Canon's response—and a final reply from Schlesinger—next month.

40. Schlesinger, *supra* n. 11, at 47-50, 86-87.
41. Bivens v. Six Unknown Named Agents, *supra* n. 8, at 421 (Burger, C.J., dissenting).
42. Schlesinger, *supra* n. 11, chapter 4.

letters

A distortion of justice

I was delighted to read Judge Wilkey's article on the exclusionary rule (November, 1978). It states with admirable clarity and beautiful logic the views of a vast majority of the people of this country, including our judges.

The rule of exclusion distorts justice so monstrously that a determined effort must be made to eliminate it. I felt that Professor Kamisar's arguments desperately needed to be answered, but I did not expect such a brilliant answer, one which totally destroys all arguments offered to support the rule.

I would like to see copies of the article made available to the President, the Attorney General, and every member of Congress. Also, I hope that the American Judicature Society, the American Bar Association and every organization involved in the administration of the system of criminal jus ice will get behind a Bill to eliminate the exclusionary rule and create an acceptable, effective and meaningful alte;ative.

George M. Scott
Judge
Fifth Judicial District
Spencer, West Virginia

Too liberal construction of the law

To exclude certain evidence because of actions of the law enforcement officer merely serves to frustrate the judicial system and release the criminal and leave the citizenry unprotected. Does permitting a known criminal to go free serve any purpose but that of abstract theory?

The argument that without this safeguard innocent citizens will be accosted is not valid. After all, law enforcement officers are part of the citizenry; the proper procedures and guidelines, enforced by governmental agencies, would protect all of us, while at the same time promoting justice. Although some overzealous officers may occasionally encroach upon certain standards of liberty and privacy, our system as a whole should not be made to suffer by a too liberal construction of the law.

Societies throughout history have experienced crime and ours is no exception. The increase, I believe, is due to factors over which the courts, for the most part, have no control. Some restraint is necessary, but I believe the exclusionary rule and those who support it are creating a destructive and corrosive momentum that will erode the foundations upon which our country is supported. We must move in the opposite direction and find a more reasonable positon.

A. Eric Johnston
Birmingham, Alabama

A clarification from Professor Canon

In my article "The exclusionary rule: have critics proven that it doesn't deter police?" (March, 1979), I drew the conclusion that James Spiotto was unaware that Illinois had adopted the exclusionary rule prior to the *Mapp* v. *Ohio* decision in 1961.

My conclusion was based upon a statement in Mr. Spiotto's article "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives" published in the 2 *Journal of Legal Studies* 243, 246 (1973) which read as follows: "As pointed out earlier in this study, during the period 1959-1970, in the course of which the exclusionary rule was introduced in Illinois,..."

Mr. Spiotto's article was a condensation of a longer study he conducted which is unpublished but available from the University of Chicago Law Library and the U.S. Department of Justice. In this original study, it is quite clear that he is fully aware of Illinois' earlier adoption of the exclusionary rule.

It is also clear that this study's main contribution is the development of extensive data on Chicago police practices bearing generally on the exclusionary rule and that Mr. Spiotto does not approach these data from a before and after perspective. However, in the process of condensing the study, some of the language was changed which could lead readers to believe it was a before and after study.

I am happy to set the record straight in this matter and I am sorry for any inconvenience caused to Mr. Spiotto.

Bradley Canon

A postscript on empirical studies and the exclusionary rule

by Bradley C. Canon

Editor's note: *Does the exclusionary rule deter police from making illegal searches? That question was a topic of discussion in Judicature last month as part of the Kamisar-Wilkey debate over the exclusionary rule (August 1978, November 1978, February 1979).*

Professor Bradley Canon said that studies so far have not been conclusive; in some cities, the rule appears to work, in other cities, it doesn't. In reply, Professor Steven Schlesinger argued that studies which support the rule's effectiveness contain far more weaknesses than those which question its deterrent value.

Here is the final exchange between the two authors.

Much of what Professor Schlesinger writes does not reply to me at all. Roughly half of his space is devoted to a brief summary of several non-empirical reasons for modifying or abrogating the exclusionary rule and to a lengthy presentation of an alternate mechanism. Insofar as the series of articles in Judicature goes, I have no quarrel with him over this aspect of his response. In fact, in closing my earlier piece, I acknowledged that some reasoned non-empirical arguments could be advanced against the rule (page 403).

But as Schlesinger himself noted, I set a more "modest goal" for my article. I wanted to refute Judge Wilkey's emphatic assertion that the empirical evidence available on the subject conclusively proved the ineffectiveness of the exclusionary rule in deterring police violations of the Fourth Amendment.[1] Given his status as a federal judge and the sweeping nature of his statements, I feared that readers unfamiliar with the empirical studies themselves would accept his assertions uncritically.

Schlesinger allows that I may well have achieved my goal of showing that the evidence does not demonstrate the rule's ineffectiveness, and then adds that my findings cannot be considered a justification for the rule's continuance. But I never argued that the evidence justified retaining the rule. In replying to Judge Wilkey, I was quite explicit in concluding that available evidence is inconclusive at this time and gives no real comfort to either side. My purpose was to counteract a myth that all the available evidence indicates that the rule has failed to work.

While there is no disagreement that my first article achieved its goal, Schlesinger uses his discussion of my position as an opportunity to advance the proposition that the proponents of the exclusionary rule have the burden of proving that the rule is an effective deterrent to illegal police behavior. It is a somewhat surprising argument since it has been the rule's opponents—Oaks,[2] Chief Justice Burger,[3] and now Judge Wilkey—who have initiated the discussion of the empirical findings. Why do they do

1. Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 *Judicature* 215 (1978).

2. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

3. Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

this if the burden of proof is on the other side?[4]

The problems of research

In discussing my investigations into the rule's impact,[5] Schlesinger concludes that my findings are, "not very useful" (page 406). Many of his criticisms amount to little more than the stressing of problems and caveats I acknowledged when writing the articles. A point-by-point counter-discussion would be rather time consuming and repetitive of what I have already said in the articles about these problems. Let me instead offer a brief, general discussion about the nature of empirical research into the impact of the exclusionary rule.

Obviously the best way of obtaining data about the deterrent effect of the exclusionary rule is to observe large numbers of policemen surreptitiously as they perform their duties. But that's logistically and financially impossible (and perhaps ethically impermissible),[6] so social scientists use alternate methods. I have used two basic alternatives in gathering information on the rule's impact upon police behavior: (1) drawing inferences about their behavior from recorded data, such as arrest and search warrant records; and (2) asking law enforcement officials questions about their policies, observations and behavior.

Presumably, Schlesinger does not object to the first alternative; Oaks,[7] Ban,[8] and the Columbia study which he cites favorably[9] also use this method. However, he objects to the second alternative because he thinks my respondents were likely to have falsified their replies—especially the police who he believes are fearful of admitting violations of the Fourth Amendment.

Now perhaps a few did lie. And, on the other hand, perhaps one or two calculating respondents reported violative policies where none existed in order to create the erroneous impression that the rule is not working and thus augment its chances of abolition. But the point is that there is no real reason to believe that police lying is very extensive.

Social scientists frequently ask people questions (promising anonymity, as I did) about their private, embarrassing or even illegal behavior. Only in this manner can we study such phenomena as voting behavior, sexual behavior, drug use, and wife beating. No one seriously contends that such studies are not very useful. Are the police any different?

Researchers such as Skolnick[10] and Wasby[11] have had no difficulty in obtaining from them admissions of illegal acts or unconstitutional policies. Indeed, in the past the police were quite candid about their violations of the Fourth Amendment.[12] As the exclusionary rule pertains to the admissibility of evidence in court and contains no punitive sanction against those transgressing the Fourth Amendment, there is no reason for the police to be less candid now.

4. Because of the difficulties of conducting thorough-going empirical research into the rule's impact and the inconclusive nature of the present evidence, I suspect the "burden" will not be embraced by either side.

5. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1974) and Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977).

6. Moreover, even if such observation could be carried out, it would only inform us about the present day state of police behavior with regard to illegal searches. We would still lack comparative information about such behavior before 1961 when the Court reposed the rule on the states in Mapp v. Ohio, 367 U.S. 643. Of course, there is no way such information could be obtained now.

7. Oaks, *supra* n. 2.

8. Ban, "The Impact of Mapp v. Ohio on Police Behavior" delivered at the Midwest Political Science Association meeting, Chicago, May, 1973) and "Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio" delivered at the meeting of the American Political Science Association, New Orleans, September 1973).

9. In his book, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (New York: Dekker, Marcel, Inc., 1977), chap. 3, Schlesinger favorably cites Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 1 COL. J. L. & SOC. PROBS. 86 (1968) which draws inferences from recorded data.

10. Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY. New York: Wiley, 1967.

11. Stephen Wasby, SMALL TOWN POLICE AND THE SUPREME COURT. Lexington, Mass.: Lexington Books, 1976.

12. Murphy, *The Problems of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966) and Kamisar, *On the Tactics of Police-Prosecutor Oriented Critics of the Court*, 49 CORNELL L. Q. 436, at 441-43 (1964).

A comprehensive picture

The object of my investigation was to obtain as comprehensive a picture of the impact of the exclusionary rule as my resources would permit. It would have been foolish to ignore the possibility of asking questions of the actual participants in the impact process for fear that a few would lie. The data were collected and reported with proper cautions. Standing alone, they are not as reliable as recorded data, but they do not stand alone. The questionnaire results show basically the same conclusion as the recorded data—that the exclusionary rule has a differential impact as a deterrent. The similarity of results enhances the questionnaire data's reliability.

Since it is so difficult to obtain quality information on the impact of the exclusionary rule,[13] researchers are necessarily going to have to accept data that is not as reliable as they would desire. Even the recorded data contain some reliability problems; inferences drawn from them are based upon assumptions whose accuracy is presumed but is not 100 per cent certain—for example, that a substantial proportion of narcotics arrests result from police search and seizure behavior. Moreover, even Oaks and Ban, whose research methods cause Schlesinger no problems, sometimes use data based upon interviews with law enforcement officials or judges.[14]

To conclude, Schlesinger may want to argue that the problem of reliability of data makes studies of the rule's impact "not very useful." But if that is the case, why bring up the empirical question in the first place? If we are going to consider the evidence as a meaningful factor in determining the future of the exclusionary rule, we need to do so as thoroughly and as dispassionately as possible. □

13. Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. REV. 740 (1975).

14. Oaks, *supra* n. 2, at 706, 717, 739-41; Ban, *Local Courts . . .*, *supra* n. 8, *passim*.

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A reply to Professor Canon

by Steven R. Schlesinger

In large measure, Professor Canon's response to my article misstates or evades what I said. He claims, for example, not to understand why the exclusionary rule's proponents must bear the burden of proving its deterrent effectiveness. There are at least two reasons.

First, the Supreme Court has made clear, since 1965, that it regards deterrence of improper police behavior as the primary rationale for the rule. The leading cases on the exclusionary rule in search and seizure make this point explicitly.[1] If the proponents of the rule are unable to show that it is an effective deterrent, then it is time for the Court to reconsider its position.

Canon claims not to understand why Chief Justice Burger,[2] Judge Wilkey[3] and Professor Oaks[4] have initiated a discussion of the empirical findings if the burden of proof rests with the rule's proponents. Clearly, they have done so because the exclusionary rule rests on a proposition for which, as they and I have argued, there is very little empirical support. In short, Burger, Wilkey, Oaks and I believe that Supreme Court decisions should be rational and that irrational decisions should be overturned.

Second, proponents bear the burden of proving the rule's deterrent effectiveness because the exclusionary rule has many costs and disadvantages, some of which I mentioned in my previous article (pages 404-405). Contrary to Canon's claims, therefore, my discussion of non-empirical aspects of

1. *See* Linkletter v. U.S., 381 U.S. 618, 636-38 (1965); U.S. v. Calandra, 414 U.S. 338, 347 (1974); and Stone v. Powell, 428 U.S. 465, 486 (1976).

2. Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 338, 416 (1971) (Burger, C.J., dissenting).

3. Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 215 (1978).

4. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

the rule is plainly responsive to him; it is the responsibility of the rule's proponents to show that the advantages of deterrence outweigh these heavy social costs.

Canon distorts my position on the state of evidence when he says that "Schlesinger allows that I may well have achieved my goal of showing that the evidence does not demonstrate the rule's ineffectiveness." In fact, I said that "the empirical studies indicate [that the rule is an ineffective deterrent]" (page 405), although, "*in some situations*, studies have not *completely disproved* the rule's effectiveness in deterring police misconduct." (Page 404, emphasis supplied).

As I showed previously, all but one of the seven studies discussed by Canon and me—those of Oaks, Ban, Spiotto, Canon and the Columbia Journal of Law and Social Problems—conclude that the rule does not generally deter.[5] In fact, Canon himself concludes, in his most recent and methodologically sophisticated study, that "the rule has not always or even *often* worked" and that the data "do not come close to supporting a claim that the rule wholly or *largely* works."[6] (Emphasis supplied). Although his earlier study suggests that "many of the findings support a positive inference—that the rule goes far toward fulfilling its purpose,"it suffers from so many methodological and other flaws as to be less than useful.[7]

Canon discusses only one of my many criticisms of that 1974 study—and not the most important one. That study used questionnaires to elicit information from the police and others about their search and seizure practices. For the police to have answered Canon's questions in a manner which conflicted with his thesis that the rule deters would have required them to admit that they broke the law. I leave it to the reader to decide how candid the police would be in these circumstances.

By arguing that other researchers have used similar procedures, Canon does not demonstrate the strength of his own study but the weakness of the others. Furthermore, the studies he cites appear to have collected data *directly* from their subjects, whereas his own study depended on two tiers of police responding, each with its own incentive to color the facts.

Canon's response ignores major problems with his 1974 study: the nature and size of his sample (well under 50 per cent) do not permit valid generalization, since the sample was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or announce their failure to obey the law.

Canon also ignores a second important problem: responses to the questionnaire involving official headquarters policy "may not conform to actual police practice in the field."[8] That Canon conceded this defect in his 1974 study does not improve the reliability of his conclusions.

What, then, is the bottom line? It is that all of us live under the irrational tyranny of an inflexible rule which releases many dangerous and violent persons *and* which, as Professor Canon himself has admitted, does "not always or even often" have a deterrent effect on police. Perhaps it is fair to say that, as long as we allow the rule to continue, we deserve what we get. □

5. Oaks, *supra* n. 4; Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May 1973); Ban, "Local Courts v. the Supreme Court: The Impact of *Mapp* v. *Ohio*" (delivered at the annual meeting of the American Political Science Association, New Orleans, 1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1973-74); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Local Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977); and *Effect of Mapp v. Ohio on Police Search and Seizure Practice in Narcotics Cases*, 4 COLUMBIA J. L. & SOC. PROB. 87 (1968).

6. Canon, *Testing . . .*, *supra* n. 5, at 75.

7. Canon, *Is the Exclusionary Rule . . .?*, *supra* n. 5, at 726.

8. *Id.* at 716.

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AS 25.30.050(a) are jurisdictional, so that her failure to oppose the motion did not result in waiver of the jurisdictional defect.[7]

[2] In addition to the jurisdictional defect inherent in the August 1977 superior court proceeding, we think it of further significance that the superior court denied Karen's January 1978 modification motion without conducting an evidentiary hearing, although one was requested. Given the jurisdictional flaw underlying the superior court's August 1977 order and its subsequent denial of a hearing to Karen on her motion for change of custody, we have concluded that the matter should be remanded to the superior court for the purpose of conducting a hearing to determine custody and visitation rights.[8]

Remanded for further proceedings.

BURKE, J., not participating.

7. Even if the superior court has assumed that primary jurisdiction was vested in Alaska, because it was the state of initial jurisdiction and Ronald still lived here, AS 25.30.050(a) still precluded Alaska from assuming jurisdiction until the Oregon court declined jurisdiction. *See* Commissioner's Note to § 6 of the Uniform Child Custody Jurisdiction Act (U.L.A.) (1973): "When the courts of more than one state have jurisdiction under section 3 or 14, priority in time determines which court will proceed with the action . . ."

8. Although the jurisdictional underpinnings of the superior court's August 1977 order have been voided, it can be persuasively argued that in February 1978 when the superior court denied Karen's motion for change of custody, it did have jurisdiction since the Oregon court in October 1977 had declined to exercise jurisdiction over Karen's modification proceeding. Given the foregoing and the fact that the children have been in Ronald's custody in Alaska since October 1977, we deem it appropriate that the children remain in Ronald's custody pending resolution of the custody issues.

Further, upon remand of the case to the superior court, we think the determination should be based on Ronald's July 1977 motion for change of permanent custody from Karen. Since the superior court lacked jurisdiction to modify the earlier award of custody to Karen at that time, and no subsequent hearing was held prior to the judge's February 1978 affirmance of his order, we think the burden is properly on Ronald to show that permanent custody should be changed form Karen to him. The court's determination, however, should be based on the best interests of the children at the time that that determination is made.

STATE of Alaska, Petitioner,

v.

Theodore GLASS, Respondent.

STATE of Alaska, Petitioner,

v.

Michael THORNTON, Respondent.

James W. ALDRIDGE, Appellant,

v.

STATE of Alaska, Appellee.

Thomas Lee COFFEY, Appellant,

v.

STATE of Alaska, Appellee.

Nos. 3565, 3764, 2965 and 3002.

Supreme Court of Alaska.

May 25, 1979.

The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., granted defendant's motion to suppress evidence obtained by electronic surveillance of alleged narcotics transaction which gave rise to defendant's indictment, and State's petition for review was granted. The Supreme Court, 583 P.2d 872, affirmed. On rehearing, the Supreme Court, Boochever, C. J., held that under circumstances, apart from *Glass*, *Thornton*, *Aldridge*, and *Coffey* cases, which were considered by Supreme

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Court as one case, *Glass* decision holding that warrantless electronic monitoring of conversation between police informant and defendant violates defendant's right of privacy and freedom from unreasonable searches and seizures under Alaska Constitution, would apply only prospectively to activity occurring on or after September 15, 1978, date of decision.

Ordered accordingly.

Burke, J., filed concurring opinion.

Rabinowitz, J., dissented and filed opinion in which Connor, J., joined.

1. Courts ⇐100(1)

Apart from *Glass, Thornton, Aldridge* and *Coffey* cases, which were considered by Supreme Court as one case, *Glass* decision holding that warrantless electronic monitoring of conversation between police informant and defendant violates defendant's right of privacy and freedom from unreasonable searches and seizures under Alaska Constitution, would apply only prospectively to activity occurring on or after September 15, 1978, date of decision, where purpose of decision pointed decisively away from retroactive application, reliance by law enforcement officials on *pre-Glass* law was reasonable, and retroactive application would have substantial negative effect on administration of justice.

2. Courts ⇐100(1)

If a decision simply applies an established rule of law, even if in a new factual situation, question of retroactivity does not arise; question of retroactivity arises only when a court announces a new rule of law.

3. Courts ⇐100(1)

Constitution does not require that new rules of law be given retroactive effect, and a court must make an independent decision in each case.

4. Courts ⇐100(1)

When stability of legal norms and continuity in application of such norms are core values to be protected in fashioning a legal rule, general rules of law promoting predictability for those who must rely on rules are favored; in determining retroactivity, however, these policy considerations are not extant; Supreme Court does not want to encourage people to disregard law in expectation that courts will change law and that change will be retroactive, and thus when issue of retroactivity is concerned, case-by-case approach is particularly desirable.

David C. Backstrom, Deputy Public Defender, and Brian Shortell, Public Defender, Anchorage, for respondents Theodore Glass and Michael Thornton.

James H. Cannon, Johnson, Christenson, Shamberg & Glass, Inc., Fairbanks, for appellant James W. Aldridge.

Robert Merle Cowan, Kenai, Walter Share, Asst. Public Defender, Anchorage, for appellant Thomas Lee Coffey.

Dean J. Guaneli, Patrick J. Gullufsen, Asst. Attys. Gen., Daniel W. Hickey, Chief Prosecutor, James L. Hanley, Asst. Dist. Atty. and Avrum M. Gross, Atty. Gen., Juneau, for appellee and petitioner.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION ON REHEARING

BOOCHEVER, Chief Justice.

[1] In *State v. Glass*, 583 P.2d 872 (Alaska 1978), we held that warrantless electronic monitoring of a conversation between a police informant and a defendant violated the defendant's right of privacy and freedom from unreasonable searches and seizures under the Alaska Constitution. On January 15, 1979, after considering supplemental briefs by the parties, we issued an order, with opinion to follow, stating what cases would be governed by *Glass*. *State v. Glass*, 583 P.2d 872 (Alaska 1978), *State v. Thornton*, 583 P.2d 886 (Alaska 1978), *Aldridge v. State*, 584 P.2d 1105 (Alaska 1978), and *Coffey v. State*, 585 P.2d 514 (Alaska 1978), are governed by the new ruling. Apart from those cases, the *Glass* decision will apply prospectively to activity occur-

ring on or after September 15, 1978, the date of the decision.[1]

[2] If a decision simply applies an established rule of law, even if in a new factual situation, the question of retroactivity does not arise. The question of retroactivity arises only when a court announces a new rule of law. *Milton v. Wainwright*, 407 U.S. 371, 381 n. 2, 92 S.Ct. 2174, 2180, 33 L.Ed.2d 1, 9 n. 2 (1972) (Stewart, J., dissenting); *Desist v. United States*, 394 U.S. 244, 247–48, 89 S.Ct. 1030, 1032, 22 L.Ed.2d 248, 254, *rehearing denied*, 395 U.S. 931, 89 S.Ct. 1776, 23 L.Ed.2d 251 (1969).

This court had not previously decided, or even discussed, whether a warrant requirement applied to participant monitoring, but most federal and state decisions, including the plurality decision by the United States Supreme Court in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453, *rehearing denied*, 402 U.S. 990, 91 S.Ct. 1643, 29 L.Ed.2d 156 (1971), had not imposed such a requirement.[2] Defendants point to law review articles discussing the increasing independence of state courts, and past decisions of this court interpreting our state constitutional guarantees, specifically the right to privacy, more broadly than federal guarantees. They argue that the law enforcement community should have foreseen that Alaska would adopt a warrant requirement and add that the police should be encouraged to obtain warrants in borderline cases. While we agree with the latter argument as a general proposition, we decline to require police departments and prosecutors to monitor the general trends noticed in law review commentary and to assume, on a question of first impression in this state, that this court will interpret our constitution in a specific manner, in the absence of clear authority so construing a similar constitutional provision. Thus, our holding in *Glass* represents a new rule of law, and we must examine what cases that new rule will govern.

The state acknowledges that defendant Glass should receive the benefit of the new rule. Its brief states:

> It is clear that the benefit of the new rule is given to the defendant in the declaring decision. . . . [L]itigants have no incentive to proceed if they would not receive the benefit of the new rule.

Although *Thornton*, *Aldridge* and *Coffey* were not formally consolidated with *Glass*, they were under advisement at the same time and were, in effect, considered by the court as one case. All of the decisions, with the exception of *Coffey*, were announced on the same day as *Glass*. *Coffey* was delayed because it dealt with other issues, in addition to participant monitoring.[3] Thus, the applicability of the *Glass* holding to *Thornton*,[4] *Aldridge* and *Coffey* is simply an ex-

1. In arriving at our decision, we considered the detailed arguments urging retroactive application of *Glass* in *Nix v. State* and *Allen v. State*. In both cases, we granted the petitions for review and affirmed the trial court orders refusing to apply *Glass* retroactively. Our decision was based on the order issued in the instant case. *See Nix v. State*, No. 4286 (Alaska, Jan. 15, 1979), and *Allen v. State*, No. 4395 (Alaska, Jan. 15, 1979).

2. In *Glass*, we noted authority to the contrary, which we believe is better reasoned, and also noted that *White* was far from a clearcut holding by the Supreme Court, 583 P.2d at 876–78.

3. Of all the cases, the briefing in *Coffey* was probably the most influential in our holding regarding participant monitoring. In addition to that issue, we evaluated Coffey's arguments concerning pre-indictment delay, speedy trial violation, entrapment, denial of cross-examination, error in jury instructions and bias of the trial judge. 585 P.2d at 519–26.

4. We note an alternative ground under which *Thornton* would be covered by the *Glass* holding. In *Thornton*, the *state*, not the defendant, petitioned for review of an order granting a motion to suppress. Judge Blair, who heard the suppression arguments in *Thornton*, suppressed the results of the warrantless participant monitoring anticipating, in effect, our holding in *Glass*. In fact, it was Judge Blair, in a "well-reasoned decision," *State v. Glass*, 583 P.2d at 882, who had initially suppressed the tapes in *Glass*, and our decision affirmed his suppression order. Thus, the law, as applied to *Thornton*, has always been in conformity with the *Glass* decision. In *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), the court gave primarily prospective application to its holding, but noted:

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tension of applicability of the rule to defendant Glass.

Any further line we draw will inevitably be somewhat arbitrary. When the law changes, some get the benefit of the change, others do not. When only the named defendant is covered by the new rule, other defendants whose appeals raised the same issue may feel it was simply the vagaries of the court calendar that prevented their case from being the landmark decision. If all cases on direct review receive the benefit, those on collateral review do not. If the court attempts to increase equity between defendants by increasing the coverage of the new rule, it increases the unfairness to society and law enforcement officials who in good faith relied on the law as it was when they acted. We noted in *Judd v. State*, 482 P.2d 273, 278 (Alaska 1971):

> [O]nce one realizes that any decision will involve an arbitrary classification which is not particularly defensible except in terms of its impact, then one has arrived at a starting point for making the necessary policy decisions.

[3, 4] The constitution does not require that the new rules of law be given retroactive effect, *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601, 608 (1965);[5] *Judd v. State*, 482 P.2d at 276, and a court must make an independent decision in each case.[6] In *Judd v. State*, 482 P.2d at 278 (Alaska 1971),[7] we noted the criteria guiding resolution of the question of retroactivity:

> (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. *Linkletter v. Walker*, 381 U.S. 618, 636–638, 85 S.Ct. 1731, 14 L.Ed.2d 601, 612–613 (1965). [footnote integrated into text]

The purpose of the rule in *Glass* is to protect the privacy of Alaskans and the spontaneity of discourse that marks a free society. The tapes in *Glass* were not excluded because of their potential unreliability:

> We exclude the evidence not because it is unreliable but because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction.

583 P.2d at 878 (citation omitted).

The purpose criteria points quite decisively away from retroactive application of *Glass*:

> However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today.

413 F.2d at 1117 (citation omitted). *Dickerson* was impliedly overruled on other grounds by the Supreme Court in *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), and expressly overruled on those other grounds on the authority of *Beckwith* in *United States v. Fitzgerald*, 545 F.2d 578, 581 (7th Cir. 1976).

> favored. In determining retroactivity, however, these policy considerations are not extant. We do not want to encourage people to disregard the law in the expectation that courts will change the law and that the change will be retroactive. Thus, when the issue of retroactivity is concerned, the case-by-case approach is particularly desirable. *See Linkletter v. Walker*, 381 U.S. at 629, 85 S.Ct. at 1737, 14 L.Ed.2d at 608 (1965).

5. *Linkletter's* square holding that nothing in the constitution compels retroactive application of new rules answers the equal protection argument advanced by appellant Aldridge. Moreover, since we apply the holding to *Aldridge*, we do not need to address his alarm that other defendants would be denied equal protection if they do not receive the same protections as him.

6. Where stability of legal norms and continuity in the application of such norms are the core values to be protected in fashioning a legal rule, general rules of law promoting predictability for those who must rely on the rules are

7. *Judd* examined the retroactive effect of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, *rehearing denied*, 396 U.S. 869, 90 S.Ct. 36, 24 L.Ed.2d 124 (1969), which limited the scope of warrantless searches incident to an arrest. We held that the rule of *Chimel* "shall apply to all police searches taking place after the date of the *Chimel* opinion of June 23, 1969." 482 P.2d at 279. Earlier, in *Fresneda v. State*, 458 P.2d 134, 143 n. 28 (Alaska 1969), we held that *Chimel* would be applied to cases on direct review in this court at the time *Chimel* was decided.

A review of the decisions of the Supreme Court of the United States dealing with retroactivity questions indicates that the starting point in analysis is the purpose criterion. Where the purpose of the new rule is primarily related to the integrity of the verdict, the application thereof has generally been extended to all cases.

. . .

On the other hand, where the purpose of a new constitutional standard is not to minimize arbitrary or unreliable fact findings, but to serve other ends, retroactive application has generally been denied.

Rutherford v. *State*, 486 P.2d 946, 952–53 (Alaska 1971) (footnotes omitted).

The exclusion of tape recordings that are the product of warrantless participant monitoring serves two functions. First, it deters the police from monitoring conversations between an informant and a citizen without first obtaining a warrant.[8] This deterrence function cannot be served by applying *Glass* to police conduct occurring before the date of the decision. The second rationale is

> the imperative of judicial integrity which requires that the courts not be made "party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

State v. *Sears*, 553 P.2d 907, 912 (Alaska 1976) (footnote omitted). The judicial integrity function is not undermined when the police conformed their actions to what was the law when they acted. We stated in *Judd*:

> [P]ractical problems [arise] from the undisputed fact that the police, prosecuting agencies and the public have relied upon the previous statements of the law, and that the great impact of and respect for the law in our society is based on such acceptance by the public generally. A change for the future can be digested but the application of a new interpretation to past conduct which was accepted by previous judicial decisions leads us to confusion and a hesitancy to accept any theory except one of gamesmanship with corresponding disrespect for our whole system of laws.

482 P.2d at 278–79 (footnote omitted).

We turn to the second criterion by noting that the fact of reliance by law enforcement officials on pre-*Glass* law was reasonable. Law enforcement officials could not be expected to foresee our ruling in *Glass*, and thus decisions not to seek warrants for participant monitoring were entirely reasonable and in good faith. The extent of law enforcement reliance intermingles with the third criterion, the effect of retroactive application on the administration of justice.

If the rule in *Glass* were given complete retroactivity so that it would apply to cases already completed, the negative effect on the administration of justice would be substantial. *Desist* v. *United States*, 394 U.S. 244, 251, 89 S.Ct. 1030, 1034, 22 L.Ed.2d 248, 256, *rehearing denied*, 395 U.S. 931, 89 S.Ct. 1776, 23 L.Ed.2d 251 (1969).[9] The state's brief accurately notes:

8. The defendants argue that both the initial taping and the subsequent use of the tapes in court invade their constitutional rights. We do not perceive the taping and the use as separate constitutional violations. The evil *Glass* addresses is police taping of conversations outside the province of judicial scrutiny:

> If . . . law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations [without a warrant], nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed or have espoused unpopular causes.

583 P.2d at 878. We believe that we sufficiently protect free and open discussion by a prospective application of the warrant requirement.

Further, the defendants' argument proves too much. Whenever a decision imposes a warrant requirement, defendants could argue that the use of the evidence, apart from its initial gathering, is a separate harm. However, the criteria for retroactivity recognize that admitting evidence gathered according to then-existing law is not always unfair to the defendant, particularly if the evidence is reliable.

9. *Desist* held that *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),

Every case in which conviction may have resulted from tape recorded evidence would have to be reopened and examined. In many cases, evidence will have been lost, memories faded and witnesses unavailable.

The defendants implicitly admit these consequences because they only urge retroactive application of *Glass* to cases pending review at the time of the *Glass* decision.[10] Estimates from the state and the defendants indicate that the prosecution of a number of cases currently in the legal system entails conversations monitored without a warrant.[11] We acknowledge that in these cases, the police informant could testify without the tapes. The tapes may, however, bolster the informant's testimony and we believe that if the police had prior knowledge that *Glass* would become the law, they could have sought and, based upon the facts in most of these cases, could have obtained warrants authorizing the monitoring.[12] We decline to penalize the prosecution under those circumstances.

Based on the purpose behind our ruling in *Glass*, we conclude that the decision, with the exceptions of the four cases previously noted, will apply prospectively to activity occurring on or after September 15, 1978.[13]

BURKE, J., concurs.

RABINOWITZ, J., with whom CONNOR, J., joins, dissents.

BURKE, Justice, concurring.

I concur in today's opinion on rehearing but wish to state that I still believe strongly that this case was wrongly decided in the first place, for the reasons expressed in my dissent in *State v. Glass*, 583 P.2d 872 (Alaska 19978). That belief is now further strengthened by the holding of the United States Supreme Court in *United States v. Caceres*, —— U.S. ——, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979).

RABINOWITZ, Justice, dissenting.

In *Fresneda v. State*, 458 P.2d 134, 143 n. 28 (Alaska 1969), we held that the constitutional rule announced in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), was applicable to all cases pending upon direct review in this court as of the date of the *Chimel* decision.[1] I am not

which rejected the distinction between trespassory searches and those in which there was no physical penetration of the protected premises, would not be given retroactive application. In *Desist*, the court noted:

> [T]he determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court.

394 U.S. at 251, 89 S.Ct. at 1035, 22 L.Ed.2d at 256.

10. Only appellant Coffey has requested that this court apply *Glass* "purely retroactively." Coffey asks, in the alternative, that *Glass* be applied to all cases pending appellate review.

11. An affidavit from Daniel W. Hickey, the state's Chief Prosecutor, states that at least forty-eight cases involve "nonconsensual participant monitoring and/or recording of statements made to an individual now known to be a state agent." The affidavit was based on response to a memorandum sent to all district attorneys throughout the state.

The defendants do not offer a general counterestimate, but the *Nix* petition for review points to one case involving fifteen defendants in Anchorage, fifteen to twenty individual cases in Juneau, and five to seven cases being handled by the Fairbanks Public Defender. That estimate of cases involving participant monitoring may not include cases being handled by private attorneys. The basis for the estimate is not indicated in the brief.

12. *See State v. Glass*, 583 P.2d at 881.

13. "We note that the Supreme Court of Michigan has held that the rule of *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975), would not be retroactive. In *People v. Drielick*, 400 Mich. 559, 255 N.W.2d 619, 620 (1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978), the court refused to apply *Beavers*, which prohibited warrantless transmission of a conversation by a participant, to a case on direct review at the time of *Beavers*.

1. In reaching this holding, we relied on *Desist v. United States*, 394 U.S. 244, 255-58, 89 S.Ct. 1030, 1037-38, 22 L.Ed.2d 248, 259-61 (1969) (Harlan, J., dissenting); *Linkletter v. Walker*, 381 U.S. 618, 627, 85 S.Ct. 1731, 14 L.Ed.2d 601, 607 (1965); and H. Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to*

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(Alaska 1978).

ins in the dissent.

EY NUMBER SYSTEM

SHINE, Appellant,

v.

Alaska, Appellee.

No. 4191.

Court of Alaska.

ne 15, 1979.

as convicted in the Superi-
Judicial District, Seaborn,
of sale of marijuana, and
e Supreme Court held that
ng sale of marijuana was
lly overbroad.

otics ⇐43

hibiting sale of marijuana
ad on basis of proscribing
was protected by right of
as conduct which could be
gulated by the state. AS

Saul R. Friedman, Rice, Hoppner, Hedland, Fleischer & Ingraham, Anchorage, for appellant.

Charles William Cohen, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

OPINION

PER CURIAM.

Appellant was convicted of sale of marijuana in violation of AS 17.12.010.[1] In this appeal he attacks the constitutionality of the statute, arguing that it "is overly broad and violates both the federal and Alaska constitutions because it proscribes conduct which is protected by the right of privacy as well as conduct which can be legitimately regulated by the State." In light of our holding in *Brown v. State*, 565 P.2d 179 (Alaska 1977), this appeal is frivolous. *See also Anderson v. State*, 562 P.2d 351 (Alaska 1977). Accordingly, the judgment of the superior court is AFFIRMED.

WEST KEY NUMBER SYSTEM

on, 35 U.Chi.L.Rev. 719, 762–64

in *Fresneda* v. *State*, 458 P.2d Alaska 1969), we observed that rule we adopted dates back to Marshall's opinion in *United oner Peggy*, 5 U.S. (1 Cranch) (1801). *See also Lopez* v. *Bow-*, 66 n. 7 (Alaska 1972) ("The e [*Fresneda*] rule on retrospec- is that where several cases are pending on appeal which each present the same issue, the fortuity of which case is first decided should not be determinative of that issue in the other cases.")

1. Appellant participated in the sale of 28 pounds of marijuana to an undercover police officer. The prearranged sale took place in an automobile at Anchorage International Airport. The purchase price was $7,000.

commodation for the remaining woman, such as sharing a room with a matron until the number of women employed came out to an even number. A little creative imagination on the part of the ferry system, which may necessitate some shifting of crew members among the different vessels of the ferry system, certainly would solve the "great problem" the ferry system contends it faces and which it created by its own actions.

[3] All that we need say is that neither the berthing problems nor the other matters we have discussed are of sufficient import to justify the sex discrimination in employment that was practiced by the ferry system at the time the plaintiffs sought employment. The position of a utility person or waiter in the steward's department was not such as to reasonably demand that only males be hired. There was no urgent or overriding necessity that there be a distinction in such employment on the basis of sex.[6] Summary judgment in favor of the ferry system was improvidently granted.

The judgment is reversed. The case is remanded to superior court (a) for the entry of summary judgment in favor of plaintiffs, and (b) for the purpose of resolving issues raised in the plaintiffs' complaints, such as back pay, seniority status, etc.

Reversed and remanded.

6. The Federal Civil Rights Act prohibits discrimination in employment on account of religion (42 U.S.C. § 2000e-2), "Unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). In *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, Opn.No. 1720 (Alaska, September 15, 1978), we held that because of the similarities between the Federal and Alaska Civil Rights Statutes, there should be read into the Alaska Statute (AS 18.80.220) the "reasonable accommodation" exception in the federal law regarding religious beliefs.

However, in the case at hand, there is no necessity to rely upon federal decisional law to reach the result we have. The reason for this is that (1) we are not dealing with religion, which is not included within the "reasonable demands" exception in the Alaska Statute; and (2) the "reasonable demands" exception to the prohibition against discrimination on account of sex in the Alaska Statute is clear and unambiguous, and does not necessitate resort to federal decisional law for interpretation.

STATE of Alaska, Petitioner,

v.

Theodore GLASS, Respondent.

No. 3565.

Supreme Court of Alaska.

Sept. 15, 1978.

The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., granted defendant's motion to suppress evidence obtained by electronic surveillance of alleged narcotics transaction which gave rise to defendant's indictment, and State's petition for review was granted. The Supreme Court, Boochever, C. J., held that where conversation between defendant and informant in defendant's home was electronically recorded by police officers stationed outside defendant's home while monitoring frequency of transmitter worn by informant and where monitoring and recording of conversation was done without benefit of search warrant or other court order, monitoring and recording of conversation violated defendant's rights under State Constitution, and all evidence of tape recording was inadmissible in prosecution for possession and sale of a narcotic drug.

Affirmed.

Burke, J., filed a dissenting opinion.

1. Criminal Law ⇨1024(1)

Where Supreme Court's review of suppression order would materially advance ultimate termination of prosecution for pos-

session and sale of narcotic drug and where question concerning propriety of suppression motion was of sufficient importance to justify immediate attention, State's petition for review of order granting suppression motion would be granted.

2. Courts ⇐97(6)

Federal decisions dealing with Fourth Amendment to the United States Constitution should not be regarded as determinative of scope of Alaska's right to privacy amendment since no such express right is contained in United States Constitution. U.S.C.A.Const. Amend. 4; Const. art. 1, § 22.

3. Telecommunications ⇐491

One who engages in a private conversation is entitled to assume his words will not be broadcast or recorded absent his consent or a warrant. U.S.C.A.Const. Amend. 4; Const. art. 1, §§ 14, 22.

4. Searches and Seizures ⇐7(1)

Where a person exhibits an actual, or subjective, expectation of privacy and where that expectation is one that society is prepared to recognize as reasonable, person is entitled to Fourth Amendment protection. U.S.C.A.Const. Amend. 4.

5. Constitutional Law ⇐18

Supreme Court may construe Alaska's state constitutional provisions as affording rights additional to those provided in United States Constitution.

6. Criminal Law ⇐394.4(1)

Contraband discovered in an illegal entry by police is inadmissible although it is best evidence that contraband was present, as police conduct may not be justified on the basis of the fruits obtained; evidence is excluded not because it is unreliable but because transcendent values preserved by constitutional guarantee are of greater societal moment than use of that evidence to obtain a criminal conviction. U.S.C.A. Const. Amend. 4; Const. art. 1, § 14.

7. Constitutional Law ⇐82(7)

State constitutional amendment providing that right of the people to privacy is recognized and shall not be infringed affords broader protection than penumbral right inferred from other constitutional provisions. Const. art. 1, § 22.

8. Telecommunications ⇐435

Privacy amendment to State Constitution prohibits secret electronic monitoring of conversations upon mere consent of a participant. Const. art. 1, § 22.

9. Telecommunications ⇐491

Expectation that one's conversations will not be secretly recorded or broadcast is reasonable. U.S.C.A.Const. Amend. 4; Const. art. 1, §§ 14, 22.

10. Telecommunications ⇐493

In the absence of a search warrant, participant electronic bugging evidence is illegally acquired. U.S.C.A.Const. Amend. 4; Const. art. 1, §§ 14, 22.

11. Telecommunications ⇐496

Generally, search warrant should be required before permitting electronic monitoring of conversations. Const. art. 1, §§ 14, 22; U.S.C.A.Const. Amend. 4.

12. Constitutional Law ⇐82(7)

Right of privacy is infringed by warrantless participant monitoring of private conversations regardless of locus of police surveillance. Const. art. 1, §§ 14, 22; U.S.C.A.Const. Amend. 4.

13. Criminal Law ⇐394.3

Where conversation between defendant and informant in defendant's home was electronically recorded by police officers standing outside home by monitoring frequency of transmitter worn by informant and where monitoring and recording of conversation were done without benefit of search warrant or other court order, monitoring and recording of conversation violated defendant's privacy rights under State Constitution, and all evidence of tape recording was inadmissible in prosecution for possession and sale of narcotic drug. AS 17.10.010; Const. art. 1, §§ 14, 22; U.S.C.A. Const. Amend. 4.

Digest

Richard J. Ray, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Avrum M. Gross, Atty. Gen., Juneau, for petitioner.

David C. Backstrom, Deputy Public Defender, Fairbanks, and Brian Shortell, Public Defender, Anchorage, for respondent.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, BURKE and MATTHEWS, Justices.

OPINION

BOOCHEVER, Chief Justice.

The sole issue presented by this petition for review is whether the superior court erred in granting a motion to suppress evidence obtained by electronic surveillance of the alleged narcotics transaction which gave rise to the respondent's indictment.

The facts, insofar as they are important to our decision of this issue, can be briefly stated. On April 26, 1977, members of the Fairbanks Areawide Narcotics Team, a police unit made up of state and local officers, fitted a police informant, Rondi Baker, with a small radio transmitting device. Baker was then transported to respondent Theodore Glass' home where she believed she could purchase heroin. Baker entered and, while on the premises, allegedly purchased a quantity of heroin from Glass. The conversation surrounding that transaction was electronically recorded by police officers stationed outside the home by monitoring the frequency of the transmitter worn by Baker. The monitoring and recording of that conversation was done without benefit of a search warrant or other order of the court.

[1] As a result of these events, Glass was indicted on two counts—possession of a narcotic drug and sale of a narcotic drug—in violation of AS 17.10.010. Prior to his trial, he moved to suppress all evidence of the tape recording, alleging violation of his rights under the fourth amendment to the Constitution of the United States and art. I, sec. 14 of the Constitution of the State of Alaska, both of which prohibit unreasonable searches and seizures, and under art. I, sec. 22 of the Alaska Constitution, which guarantees Alaska's citizens the right to privacy. The superior court granted Glass' motion, stating in a written opinion:

> No warrant was obtained by the State although the circumstances most certainly provided sufficient time for application therefor to have been presented to an impartial magistrate. The subject broadcasts from within the confines of the defendant's home were searches and were severe invasions into the privacy of the defendant. The Constitution of the State of Alaska mandates suppression of the tape recording of the transaction. The live testimony of the informant is still allowable.

This ruling is now before this court on the state's petition for review.[1]

The issue in this case is of substantially more significance than whether or not Theodore Glass committed the offense charged in the grand jury's indictment. It presents a question of major importance as to the scope of the right to privacy expressly set forth by an amendment to the Alaska Constitution: "The right of the people to privacy is recognized and shall not be infringed. . . ."[2]

[2] In its petition, the state relies primarily upon federal decisions dealing with the fourth amendment to the United States Constitution.[3] The authority is questiona-

1. We granted the petition for review to resolve a controlling question of law as to which there is substantial ground for difference of opinion. Review will materially advance the ultimate termination of the litigation, and the question is of sufficient importance to justify our immediate attention. *See* Appellate Rules 23 and 24.

2. Art. I, sec. 22, Alaska Constitution.

3. The fourth amendment to the United States Constitution specifies:

> *Searches and seizures.* 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

ble, and, in our view, not persuasive as to the construction of Alaska's analogous provision.[4] In any event, those authorities should not be regarded as determinative of the scope of Alaska's right to privacy amendment, since no such express right is contained in the United States Constitution.[5]

Looking first to the federal cases cited by the state, we note that all except *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), pre-date the major change wrought by *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). At the trial of Katz, the government was permitted to introduce evidence of telephone conversations overheard by F.B.I. agents who had attached a listening and recording device to the outside of a public telephone booth from which Katz had placed his calls. Previously, fourth amendment cases had been considered from a property standpoint—whether a trespass had been committed. In *Katz*, the court held that the "Fourth Amendment governs not only the seizure of tangible items, but extends as well as to the recording of oral statements," 389 U.S. at 353, 88 S.Ct. at 512, 19 L.Ed.2d at 583, independent of trespass considerations. The court indicated that the warrant requirement of the fourth amendment had no fixed locational limitations: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." 389 U.S. at 359, 88 S.Ct. at 515, 19 L.Ed.2d at 586. The court stated that the fourth amendment "protects people, not places." 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582. It thus was immaterial whether the phone booth was a "constitutionally protected" area.[6]

> One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.[7]

[3] We believe that one who engages in a private conversation is similarly entitled to assume that his words will not be broadcast or recorded absent his consent or a warrant.

[4] Justice Harlan, in his concurrence in *Katz*, discussed the protection the fourth amendment affords to people. He set forth a dual requirement—first, that a person have exhibited an actual (subjective) expectation of privacy; and, second, that the expectation be one that society is prepared to recognize as reasonable.[8] We have adopted that rationale for Alaska.[9]

searched, and the persons or things to be seized.

4. Art. I, sec. 14 of Alaska's Constitution provides:

> *Searches and Seizures.* The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. 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.

5. The United States Supreme Court has inferred a right to privacy as to certain activities from other rights set forth in the first ten amendments. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (individual decision to have an abortion); *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (private possession of obscene materials); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (use of contraceptives by married persons).

6. Similarly, we believe that the dissent's reliance on *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952), and general citation to other authorities predating *Katz* fails to recognize the significance of the demise of a trespass requirement and the subjecting of conversations to search and seizure provisions.

7. 389 U.S. at 352, 88 S.Ct. at 511, 19 L.Ed.2d at 582.

8. 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588.

9. *See Smith v. State*, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086, 94 S.Ct. 603, 38 L.Ed.2d 489 (1973), *quoting* Justice Harlan's opinion in *Katz* as a "touchstone." We have repeatedly reaffirmed this test. *Woods & Rohde, Inc. v. State*, 565 P.2d 138, 149 (Alaska 1977); *Anderson v. State*, 555 P.2d 251, 260–61 (Alaska 1976); *Nathanson v. State*, 554 P.2d 456, 458 (Alaska 1976).

Katz did not involve the surreptitious broadcasting or recording of a conversation by a party to the conversation. After the *Katz* decision, there was a division of opinion among the federal courts regarding consensual eavesdropping.[10] The issue was confronted by the United States Supreme Court in *United States v. White*, *supra*. Government agents were permitted to testify as to conversations between the accused and an informant who carried a concealed radio transmitter. The informant did not appear as a witness. The United States Court of Appeals for the Seventh Circuit reversed the convictions, holding the evidence to be inadmissible under *Katz*.[11]

Speaking for four members of the Supreme Court, Justice White held that there was no violation of the fourth amendment and that, in any event, the case pre-dated *Katz* which was therefore not applicable. Under the decision in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969), *Katz* was held to apply only to surveillance that occurred subsequent to the date of that decision.

Justice Brennan concurred in the result on the basis of *Desist*; but he agreed with the views of the dissenters, Justices Marshall, Douglas and Harlan, that undisclosed electronic broadcasting or recording of a conversation by a participant violated the fourth amendment in the absence of a warrant. Justice Black concurred in the judgment because of his dissent in *Katz* which expressed the view that conversations can neither be searched nor seized and are, therefore, not subject to fourth amendment protection.

[5] In construing similar provisions of Alaska's Constitution, we, of course, give careful consideration to the holdings of the United States Supreme Court, although we are not bound by them.[12] *White*, however, does not present a clear cut agreement by any majority of the justices, and our decision as to Alaska's Constitution should therefore be influenced solely by the reasoning supporting the differing positions. Moreover, the United States Supreme Court has carefully stated:

> [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States. (footnote omitted, emphasis in original)[13]

In *Holmes v. Burr*, 486 F.2d 55 (9th Cir.), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 850, 38 L.Ed.2d 744 (1973), the court was confronted with a case in which Marberger, a participant in a telephone conversation with Holmes, permitted government agents to eavesdrop and record the conversation. The tape was admitted at trial. Despite

10. *See* Saunders, "Electronic Eavesdropping and the Right to Privacy," 52 Boston U.L.Rev. 831, 832 (1972). *Compare United States v. Jones*, 292 F.Supp. 1001 (D.D.C.1968), *reversed*, 140 U.S.App.D.C. 70, 433 F.2d 1176 (1970), *with United States v. Devore*, 423 F.2d 1069 (4th Cir. 1970), *cert. denied*, 402 U.S. 950, 91 S.Ct. 1604, 29 L.Ed.2d 119 (1971), *United States v. Polansky*, 418 F.2d 444 (2d Cir. 1969); *United States v. Gardner*, 416 F.2d 879 (6th Cir. 1969); *Koran v. United States*, 408 F.2d 1321 (5th Cir. 1969), *cert. denied*, 402 U.S. 948, 91 S.Ct. 1603, 29 L.Ed.2d 118 (1971); *United States v. Kaufer*, 406 F.2d 550 (2d Cir. 1969), *aff'd*, 394 U.S. 458, 89 S.Ct. 1223, 22 L.Ed.2d 414 (1969), and *Dancy v. United States*, 390 F.2d 370 (5th Cir. 1968). *See also*, *Doty v. United States*, 416 F.2d 887 (10th Cir. 1968), *vacated and remanded with instructions to dismiss, sub nom., Epps v. United States*, 401 U.S. 1006, 91 S.Ct. 1247, 28 L.Ed.2d 542 (1971).

11. 405 F.2d 840 (7th Cir.), *aff'd en banc*, 405 F.2d 838 (1969).

12. We may construe Alaska's constitutional provisions as affording additional rights. *See, e. g., Zehrung v. State*, 569 P.2d 189 (Alaska 1977), *opinion on rehearing*, 573 P.2d 858 (Alaska 1978) (search and seizure); *Woods & Rohde, Inc. v. State*, 565 P.2d 138 (Alaska 1977) (search and seizure); *Blue v. State*, 558 P.2d 636 (Alaska 1977) (right to counsel at pre-indictment line-up); *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976) (equal protection); *Yarbor v. State*, 546 P.2d 564 (Alaska 1976) (speedy trial); *Scott v. State*, 519 P.2d 774 (Alaska 1974) (self-incrimination); *R. L. R. v. State*, 487 P.2d 27 (Alaska 1971) (jury trial in delinquency proceeding); *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) (jury trial).

13. *Katz v. United States*, 389 U.S. at 350-51, 88 S.Ct. at 510-11, 19 L.Ed.2d at 581.

White, Judge Hufstedler dissented from a holding affirming the conviction. The rapid expansion of governmental surveillance by wiretapping and bugging is reviewed in that dissent. Judge Hufstedler states that participant monitoring and electronic surveillance are much more widespread, running into tens of thousands of instances per year. *Id.* at 65. She states:

> In a pluralistic society dedicated to liberal democratic traditions, confidential communication serves as a lubricant for the smooth functioning of social and political institutions. Without "uninhibited, robust, and wide-open" public and private expression on the great issues of our day, as well as private discussion about the mundane, the trivial, and the banal, a once free society will soon become a nation of "hagridden and furtive" people.
>
> . . .
>
> The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation. Extensive police-instigated and clandestine participant recordings, coupled with their use as evidence of any self-incriminating remarks of the speaker, pose "a grave danger of chilling all private, free, and unconstrained communication. . . . In a free society, people ought not to have to watch their every word so carefully." *Lopez v. United States*, . . . 373 U.S. at 452, 83 S.Ct. at 1395 (Brennan, J., dissenting).[14]

The dissent points out that to say that Marburger's consent is Holmes' consent is a fiction that has been expressly rejected by the Supreme Court in the context of warrantless searches and seizures.[15] The evidence therefore is inadmissible on any consent theory.[16]

The principal distinction between the risk that one's confidant may be a gossip and the risk that the conversation is being broadcast or recorded is explained:

> Repetition of conversations thought to be confidential is a known risk. However, the risk that one's trusted friend may be a gossip is of an entirely different order than a risk that the friend may be transmitting and recording every syllable. The latter risk is not yet rooted in common American experience, and it should not be thrust upon us: the differences between talking to a person enswathed in electronic equipment and one who is not are very real, and they cannot be reduced to insignificance by verbal legerdemain. All of us discuss topics and use expressions with one person that we would not undertake with another and that we would never broadcast to a crowd. Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person.[17]

In the case at bar, the state argues that there is no difference between talking to a friend who repeats what is told in confidence and talking to one with a transmitter or recorder. All one needs do to refute that statement is to ask the question of oneself; would it make a substantial difference to the speaker to assume the risk, not only that one's confidence will be betrayed by oral recollections, but also the risk that one's remarks will be secretly recorded or broadcast? Certainly, many of the casual, the caustic, the irreverent remarks would

14. 486 F.2d at 65-66.

15. *Id.* at 71.

16. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (hotel manager cannot consent on behalf of guest to search of guest's room); *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord cannot consent to search of tenant's quarters). *See also, Robinson v. State*, 578 P.2d 141 (Alaska 1978).

17. 486 F.2d at 72.

be inhibited, as would criticism of individuals and policies. The employee could not with impunity point to shortcomings in his superiors or in the functions of his office. Families could not freely discuss the foibles of others. Clever prodding may elicit thoughtless comments about sex, religion, politics, acquaintances, personal finances and even one's innermost thoughts. One takes the risk that his friend may repeat what has been said. One shouldn't be required to take the additional risk of an entirely different character—that his conversation is being surreptitiously transcribed or broadcast.

A confidence repeated by a false friend is received by third parties with the attendant circumstances of the "friend's" credibility and memory. One's ill-considered remarks are not thereby preserved for posterity on the reels of magnetic tape nor insulated from the faded memories inherent in the passage of time. Faced with the choice of silence or the risk that comments will be "etched in stone," a speaker may choose the former alternative, to the manifest diminution of the spontaneity which marks our daily discourse.[18]

[6] To argue that the monitored conversation is admissible because it is merely a more reliable version of the informant's testimony is to respond to an irrelevant question. Contraband discovered in an illegal entry by police is inadmissible although it is the best evidence that contraband was present. We exclude the evidence not because it is unreliable but because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction. *See Holmes v. Burr*, 486 F.2d at 74 (Hufstedler, J., dissenting). It is axiomatic that police conduct may not be justified on the basis of the fruits obtained. *Schraff v. State*, 544 P.2d 834 (Alaska 1975).

It is, of course, easy to say that one engaged in an illegal activity has no right to complain if his conversations are broadcast or recorded. If, however, law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations, nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed or have espoused unpopular causes.

Six of the seven justices of the Michigan Supreme Court held, recently, in the absence of a specific privacy provision such as that contained in Alaska's Constitution, that the defendant was denied the right under the Michigan Constitution to freedom from an unreasonable search and seizure when a police officer testified to a conversation between the defendant and an informant equipped with a concealed transmitter which relayed the conversation to the officer without the defendant's knowledge. *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511, 516, *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975).

An even more compelling reason for such a ruling is presented by Alaska's specific constitutional provision recognizing a right to privacy which shall not be infringed. The Montana Supreme Court has recently held in *State v. Brackman*, 582 P.2d 1216 (Mont.1978), that its constitutional right to privacy provision which states in part that the right to privacy "shall not be infringed without the showing of a compelling state interest" prohibited surreptitious broadcasting to the police of a conversation by a party to the conversation. Two justices dissented on the basis that there was no expectation of privacy since the conversation occurred in the public parking lot of a shopping center.

[7] Although there is no recorded legislative history of Alaska's right to privacy

18. In this context, seizure of a conversation and the ideas expressed therein may implicate rights of free speech guaranteed by the first amendment to the United States Constitution and art. I, sec. 5 of the Alaska Constitution. Knowledge that the courts will permit warrantless monitoring of innocent conversations could chill the conversations themselves. *See Burkhart v. Saxbe*, 448 F.Supp. 588, 603 (E.D.Pa.1978).

provision,[19] it is clear that it affords broader protection than the penumbral right inferred from other constitutional provisions.[20] Were that not the case, there would have been no need to amend the constitution.

Federal courts have recognized the power of the states to regulate rights to privacy in a manner broader than the federal protections.[21] California has specifically included surveillance and data collecting activities within the aegis of its right to privacy amendment. *White v. Davis*, 13 Cal.3d 757, 120 Cal.Rptr. 94, 105, 533 P.2d 222, 233 (1975).

Assistance in ascertaining some purposes behind Alaska's privacy amendment may be obtained, despite the lack of a recorded history, from analogy to similar provisions recently enacted by other states.

Hawaii, which became a state immediately after Alaska, similarly had no express right to privacy in its original constitution. In 1968, its constitution was amended to add the phrase "invasions of privacy" to the provisions on search and seizure. The amended section reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated.[22]

In *State v. Roy*, 54 Haw. 513, 510 P.2d 1066, 1068–69 (1973), the Hawaii Supreme Court explained the purpose of that amendment. In a case where a police informant, without the assistance of electronic devices, testified about purchasing marijuana, the court held the evidence admissible. The Hawaii privacy amendment was held not to prevent a person's repeating a conversation. Its purpose was described as follows:

> A careful review of Report No. 55 of the 1968 Constitutional Convention, in which the amendment was proposed, and of the debates in the Committee of the Whole regarding that amendment, has led us to conclude that the delegates to the constitutional convention added to article I, § 5 the words "invasion of privacy" out of a concern to protect against extensive governmental use of electronic surveillance techniques, and not out of any desire to curb the activities of secret government agents.[23]

As noted previously, California has also recently approved an amendment to its constitution, including the right to privacy among the inalienable rights of all people. In *White v. Davis*, 13 Cal.3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975), a case which illustrates that the dire, Orwellian *1984* predictions by those opposing the warrantless use of electronic devices are not figments of imagination, the California right to privacy provision was applied. Police officers posed as students and covertly recorded discussions in university classes and in public and private meetings. In holding such surveillance activities to be in violation of California's privacy amendment, the court stated:

> Although the full contours of the new constitutional provision have as yet not even tentatively been sketched, we have concluded that the surveillance and data gathering activities challenged in this case do fall within the aegis of that provision.[24]

[8] Similarly, we believe that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant. Like California's provision, the contours of Alaska's right to privacy are not yet firmly established.[25] The meaning of privacy of

19. *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974).

20. *Woods & Rohde, Inc. v. State*, 565 P.2d 138, 149 (Alaska 1977).

21. *See Katz v. United States*, *supra* 389 U.S. at 350–51, 88 S.Ct. at 510–511, 19 L.Ed.2d at 581; and *Dietemann v. Time, Inc.*, 449 F.2d 245, 251 (9th Cir. 1971), and cases cited therein.

22. Art. I, s[illegible] 5, Hawaii Constitution.

23. *Id.* at 106[illegible]69.

24. 120 Cal.Rptr. at 105, 533 P.2d at 233.

25. Among the cases applying the Alaska constitutional provision are *State v. Erickson*, 574 P.2d 1 (Alaska 1978) (possession of cocaine for personal use in the home not protected); *Fal-*

necessity must vary depending on the factual context and the often competing interests of society and the individual.[26] The protection has been defined,[27] for example, as the right "to be let alone," [28] the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others," [29] and the right which protects "the individual's interest in preserving his essential dignity as a human being." [30] Our conclusion is consistent with these concepts and with the test of privacy articulated by Justice Harlan in *Katz, supra*, and adopted by this court.

Applying Justice Harlan's two-pronged test, we believe that one communicating private matters to another exhibits an actual (subjective) expectation of privacy whether or not the listener is equipped with electronic devices. The key question is whether that expectation of privacy is one that society is prepared to recognize as reasonable.

[9] In the context of law enforcement, it is true that the use of informers is a highly necessary tool in fighting crime. In combating illegal sale of drugs, as involved in this case, because of the clandestine nature of the transactions, testimony by police informers or others trusted by the criminal is one of the few methods by which convictions may be obtained.[31] Society is not willing to accept as reasonable the subjective expectation of one engaged in a conversation that it will not be repeated. For generations, while not condoning the gossip or false friend, society has countenanced the repetition of private conversations. The use of surreptitious electronic devices to broadcast or record conversations, however, is a development of recent vintage. We conclude that the expectation that one's conversations will not be secretly recorded or broadcast should be recognized as reasonable.

Even prior to California's enactment of its privacy amendment, the United States Court of Appeals for the Ninth Circuit held, in a diversity case, that a California common law cause of action for invasion of privacy was established when employees of Time, Inc., gained entrance to the office portion of the plaintiff's home with his consent and then secretly photographed him and electronically recorded and transmitted his conversation to third persons without his consent. The activity occurred in cooperation with the police in cracking down on medical quackery. Expressing the view of many jurisdictions that such electronic surveillance violated privacy rights, the court stated:

> In jurisdictions other than California in which a common law tort for invasion of privacy is recognized, it has been consistently held that surreptitious electronic recording of a plaintiff's conversation causing him emotional distress is actionable. Despite some variations in the description and the labels applied to the tort, there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special

con v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977) (certain information communicated to physicians is within zone of privacy); *Woods & Rohde, Inc. v. State*, 565 P.2d 138 (Alaska 1977) (warrantless administrative inspections of private business premises prohibited); *Anderson v. State*, 562 P.2d 351 (Alaska 1977) (state may control sexual conduct of juveniles); *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (possession of marijuana by adults for personal use in the home protected). *See also*, Howard, "State Courts and Constitutional Rights in the Day of the Burger Court," 62 Va.L.Rev. 873, 928-37 (1976).

26. *See State v. Erickson*, 574 P.2d 1, 22 n. 144 (Alaska 1978).

27. *See generally*, Hodges, "Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?" 3 Hastings Const.L.Q. 261, 262-63 (1976).

28. Warren and Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193, 205 (1890).

29. Westin, *Privacy and Freedom* 7 (1967).

30. Hufstedler, "The Directions and Misdirections of a Constitutional Right of Privacy," 26 Record of N.Y.C.B.A. 546, 550 (1971).

31. *Pascu v. State*, 577 P.2d 1064, 1068 (Alaska 1978).

damages is not required. (*E. g., Nader v. General Motors Corp.* (1970) 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (applying District of Columbia law); *Hamberger v. Eastman* (1964) 106 N.H. 107, 206 A.2d 239; *Roach v. Harper* (1958) 143 W.Va. 869, 105 S.E.2d 564; *McDaniel v. Atlanta Coca-Cola Bottling Co.* (1939) 60 Ga.App. 92, 2 S.E.2d 810; *cf. Pearson v. Dodd*, 133 U.S.App.D.C. 279, 410 F.2d 701, cert. denied (1969) 395 U.S. 947, 89 S.Ct. 2021, 23 L.Ed.2d 465).[32]

[10] If for the purposes of civil litigation, participant electronic bugging constitutes an invasion of a common law right to privacy, such conduct obviously violates an expressed constitutional declaration of the right. In the absence of a search warrant, evidence so obtained should be held to be illegally acquired.

[11] It seems only just that conduct of those engaged in criminal activity be revealed. Legitimate interests of law enforcement authorities, however, may generally be met in the same manner as in other searches and seizures. In the absence of limited exceptions, a search warrant should be obtained from an impartial magistrate, based on probable cause to believe that criminal activity will be discovered,[33] before electronic monitoring of conversations should be allowed. It may be that, as in other search and seizure contexts, the requirement of a warrant may be obviated under exigent circumstances. We withhold passing on that issue until presented with a specific case. Generally, however, a search warrant should be required before permitting electronic monitoring of conversations.

[12, 13] We believe that this requirement will not unreasonably impinge on legitimate law enforcement efforts.[34] In *United States v. White, supra*, there was testimony about eight separate conversations that were monitored. 401 U.S. 745, 747, 91 S.Ct. 1122, 1123, 28 L.Ed.2d 453, 456. Certainly, based on an affidavit of the informant as to earlier non-monitored conversations, a warrant was obtainable. In Glass' case, it appears that Ms. Baker believed she could purchase heroin at Glass' home.[35] If there were probable cause for the belief, a warrant could have been secured.[36] Just as the warrant requirement protects against unreasonable search and seizures, it can prevent improper invasions of privacy by electronic monitoring. Alaska's Constitution mandates that the people be free from invasions of privacy by means of surreptitious monitoring of conversations.

32. 449 F.2d at 247–48.

33. *See, e. g., Keller v. State*, 543 P.2d 1211, 1215 (Alaska 1975); *State v. Spietz*, 531 P.2d 521, 523 (Alaska 1975)

34. One argument advanced is that bugging aids in safeguarding informants. This may be questionable since the presence of electronic devices on the informant may add to his risk, because sophisticated "anti-bugging" technology may disclose the presence of the device or it may otherwise be discovered. In any event, New Hampshire has met that contention by holding that a statute which permits participant monitoring does not permit the introduction at trial of a tape recording of a conversation transmitted by such a device. The court held that the purpose of the statute's exception was to allow police officers to protect the undercover officer and that monitoring for purposes of rescue was not equivalent to monitoring for purposes of introduction of the conversation at trial. *State v. Ayres*, 383 A.2d 87, 88 (N.H.1978).

35. We have previously recognized the high degree of protection surrounding the home. *See, e. g., Anderson v. State*, 562 P.2d 351, 358 (Alaska 1977); *Ravin v. State*, 537 P.2d 494, 503–04 (Alaska 1975). We decline to base our holding on this particularized protection, however, since we have concluded that the right of privacy is infringed by warrantless participant monitoring of private conversations regardless of the locus of the police surveillance.

36. The dissent cites Justice Coleman's prediction in her dissent in *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511, 522 *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975), that the technical requirements for specificity in the issuance of a warrant could frustrate legitimate searches and seizures of conversations incident to criminal activity. We do not agree. Conversations, of course, may occur in a variety of places and on a variety of subjects. What is required is a description of the person and subject which is reasonable under the circumstances, and we shall leave further refinement of requirements to future cases.

We hold that Judge Blair's well-reasoned decision suppressing the evidence obtained by electronic surveillance correctly applied the precepts guaranteed by art. I, secs. 14 and 22 of the Alaska Constitution.[37]

AFFIRMED.

BURKE, J., dissents.

BURKE, Justice, dissenting.

The Supreme Court of the United States has consistently held that the Fourth Amendment does not prevent the use, as evidence, of statements electronically monitored or recorded under circumstances similar to those present in the case at bar. *See, e. g., Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). *See also United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). Other federal courts and a multitude of state courts interpreting similar provisions found in their own state constitutions have expressed the same view. *See Annot.*, 97 A.L.R.2d 1283 (1964). Thus, the overwhelming weight of authority holds that evidence secured by means of a mechanical or electronic monitoring device is admissible, where it appears that one of the parties to the conversation consented to or cooperated in its interception. *Id.*

In *On Lee v. United States, supra*, a narcotics agent overheard a conversation by means of a microphone and radio transmitter carried by an informant with whom the defendant spoke. The agent's testimony relating what he had heard was held properly admitted against the defendant in his trial for selling opium. Rejecting the defendant's argument that such conduct was analogous to illegal wiretapping, the Supreme Court of the United States held that there was no violation of his Fourth Amendment rights, saying:

> The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties impro-

37. Although it has not been raised by the parties, we note the existence of AS 11.60.290 which provides:

> *Eavesdropping.* It is unlawful for a person to
>
> (1) use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation;
>
> (2) use or divulge any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device for his own or another's benefit;
>
> (3) publish the existence, contents, substance, purport, effect or meaning of any conversation he has heard through the illegal use of an eavesdropping device;
>
> (4) divulge, or publish the existence, contents, substance, purpose, effect or meaning of any conversation he has become acquainted with after he knows or reasonably should know that the conversation and the information contained in the conversation was obtained through the illegal use of an eavesdropping device.

Conduct prohibited by AS 11.60.290 is punishable by fine or imprisonment or both pursuant to AS 11.60.310. Our holding is unaffected by this statute, however, since we are interpreting constitutional provisions. Moreover, we do not construe AS 11.60.290 as positively sanctioning conduct not declared unlawful therein. The report of the House Judiciary Committee accompanying the original bill, enacted prior to the adoption of the right to privacy amendment, stated:

> In regard to evidence obtained by wiretap or other eavesdropping devices being used in court proceedings the bill does not in any way change the existing law of Alaska. The admittance or rejection of such evidence is left to case law and the rules governing the admissibility of evidence as interpreted by the court.

1966 H.J. at 525-29. *See also, Roberts v. State*, 453 P.2d 896, 900-02 (Alaska 1969).

vised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment. . . . [1]

In *Lopez v. United States, supra*, the Supreme Court gave its approval to use of a wire recording of a conversation between the defendant and an Internal Revenue agent in which the defendant offered the agent a bribe. During a visit to the defendant's office the agent recorded the conversation on a small recording device carried in his pocket. Noting, as did the superior court in this case, that the agent himself could testify about the conversation, the Court said:

> Once it is plain that [agent] Davis could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of that conversation emerges in proper perspective. The Court has in the past sustained instances of "electronic eavesdropping" against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. *See, e. g., Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 [66 A.L.R. 376]; *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman v. United States* [365 U.S. 505, 81 S.Ct. 679], 5 L.Ed.2d 734, supra. The validity of these decisions is not in question here. Indeed this case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it would not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.[2]

More recently, in *United States v. White, supra*, the Supreme Court reversed a decision of the United States Court of Appeals for the Seventh Circuit which held that it was error to admit the testimony of a government agent relating a conversation between the defendant and an informant overheard by monitoring transmissions from a radio transmitter concealed upon the person of the informant. Four members of the Court saw no necessity for a warrant. In a plurality opinion, Mr. Justice White stated:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S. [293] at 300-303, 87 S.Ct. 408 at 412-414 [17 L.Ed.2d 374 at 381, 382]. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States*, supra; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency, *On Lee v. United States*, supra. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the

1. 343 U.S. at 753-54, 72 S.Ct. at 972.

2. 373 U.S. at 438-39, 83 S.Ct. at 1387-88.

same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[3]

The view reflected by the foregoing authorities has been incorporated in § 4.1 of the American Bar Association's Standards Relating to Electronic Surveillance (Approved Draft, 1971). The standard provides:

> The use of electronic surveillance techniques by law enforcement officers for the overhearing or recording of wire or oral communications with the consent of one of the parties should be permitted.[4]

3. 401 U.S. at 751, 91 S.Ct. at 1125. Mr. Justice Black concurred in the judgment of the Court for the reasons set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 589 (1967), namely: that eavesdropping carried out by electronic means involves no "search" or "seizure." In *Katz* the Court held that there was a Fourth Amendment violation where government agents attached a listening device to the outside of a telephone booth and recorded the defendant's end of a telephone conversation. Unlike the facts in this case, no party to that conversation had consented to its being monitored and recorded by the police. Mr. Justice Brennan concurred in the result in *White*, stating that reversal was required by *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). In *Desist* the Court held that *Katz*, *supra*, would apply prospectively, *i. e.*, only to those electronic surveillances occurring after the date of that decision in 1969. (The surveillance in *White v. United States* occurred in 1965.) However, Mr. Justice Brennan further expressed the belief that the Fourth Amendment imposes a warrant requirement both where an informant secretly records a conversation with the accused and where he transmits that conversation as was done in the case at bar.

4. The commentary to § 4.1 states:

> Ultimately, the standard rests on the proposition that the "function of a trial is to seek out and determine the truth or falsity of the charges brought against the defendant." *Lopez v. United States*, 373 U.S. 427, 440 [83 S.Ct. 1381, 10 L.Ed.2d 462] (1963). To that end, the law must always seek to obtain the best and most reliable evidence. Traditionally, that evidence has consisted mainly of the testimony of witnesses who saw or heard what they later reveal in court. No man knows better, however, the fallibility of human testimony than that man who is trained in the law. The prospect that science through electronic surveillance techniques can provide us with evidence not subject to the frailties of human nature ought, therefore, to be applauded. The use of such techniques in this area, in short, should be encouraged, not discouraged, and they should not be encumbered with administrative procedure. Where trained investigators are conducting routine interviews, reliance may properly be placed in the agents' memories aided by notes taken contemporaneously. See *Campbell v. United States*, 373 U.S. 487 [83 S.Ct. 1356, 10 L.Ed.2d 501] (1963). But where informants, whose credibility may be suspect, are used, see, *e. g.*, *Osborn v. United States*, 385 U.S. 323 [87 S.Ct. 429, 17 L.Ed.2d 394] (1966), where victims of crimes are engaged in key conversations with the perpetrators themselves, see, *e. g.*, *Rathbun v. United States*, 355 U.S. 107 [78 S.Ct. 161, 2 L.Ed.2d 134] (1957), or where the investigators as such are individually involved and their credibility will be a significant factor in the subsequent trial, see, *e. g.*, *Lopez v. United States*, 373 U.S. 427 [83 S.Ct. 1381, 10 L.Ed.2d 462] (1963), every effort should be made to record the conversations through the best available means. For a recording will reproduce the very words spoken with all the added significance that comes from inflection, emphasis and the other aspects of oral speech. See *State v. Reyes*, 209 Ore. [Or.] 595, 308 P.2d 182 (1957). The goal of finding the truth in the criminal trial demands no less. The defendant, too, has a stake in the best evidence being presented to the court and jury. Thus, recording as such "involves no 'eavesdropping' whatever in any proper sense of that term." *Lopez v. United States*, 373 U.S. 427, 439 [83 S.Ct. 1381, 10 L.Ed.2d 462]. It should not be unthinkingly placed in the same category with wiretapping or bugging. Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 Minn.L.Rev. 855, 866 (1960); Schwartz, *On Current Proposals To Legalize Wiretapping*, 103 U.Pa.L.Rev. 157, 166-67 (1954). Overhearing too, is not eavesdropping. "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. • • • It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording or transmitting to another." *Katz v. United States*, 389 U.S. 347, 363 n* [88 S.Ct. 507, 19 L.Ed.2d 576] (1967) (White, J. concurring)

> The crucial issue in any overhearing or recording situation is instead the right of the

One of the two decisions called to our attention holding directly to the contrary is from the Supreme Court of Michigan, *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975), *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975). In that case the court held that in the absence of a search warrant, electronic monitoring of a defendant's conversation with an informant constituted an unreasonable search and seizure, under a provision of the Michigan Constitution similar to our own art. I, § 14. However, the Michigan court held, as did the superior court in the case at bar:

> The admissibility of the informant's testimony is in no way affected by ruling inadmissible the testimony of the two police officers [who monitored the conversation]. The warrantless monitoring and subsequent testimony of these two witnesses renders tainted the *transmitted* account of the conversation, but does not in any way prevent the informant from testifying as to the statement spoken to him *directly*.[5]

In a well-reasoned dissent, Justice Coleman of the Michigan court, criticized the position taken by her colleagues, stating:

> By federal standards and, I assume, by the standards of the majority of this Court, a record from a device taped to [the informant's] body would be admissible in evidence as would be testimony by people listening from a closet or at an open window or viewing the premises with binoculars. Conversations can be written down or related to third parties. As a practical matter, monitoring the same consensual conversation through a "walkie-talkie" provides no greater degree of "intrusion."
>
> It serves to encourage defendant's honesty and to protect the life of the agent or informant. He plays a deadly game and the microphone allows him speedy access to help.
>
> More importantly, it provides a means to protect the courtroom against degrading and flagrant use of perjury.
>
> Further, the very nature of the narcotics trade renders it subject to need for quick action. Otherwise, the "bird will have flown," the opportunity to listen to a "buy" will have been lost. The requirement that the officer first find a magistrate and then try to describe the conversation to be "seized" and the place (under *Katz*, it could be anyplace, including some sidewalk) where it is to be "seized" and then to go with the warrant (if any) to the scene is designed for self-defeat.[6]

Like Justice Coleman I believe the better view is that favored by the great weight of authority. Accordingly, in the case at bar, I would hold that the recording of respondent Glass' conversations with the informant Baker was not a violation of any right guaranteed to Glass by art. I, § 14 of the Constitution of the State of Alaska, and that the superior court erred in suppressing evidence of that tape recording on the grounds stated.

Similar reasoning leads me to the further conclusion that there was no violation of Glass' rights under art. I, § 22 of the State Constitution. That section provides:

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

witness himself to testify. Where he is entitled to testify, there can be no valid objection to the use of an overhearing or recording device, and the introduction of its product at trial. No one should have the right to exclude the testimony of a third party or a recordin[g] and "rely on possible flaws in the [witness's] [illegible] memory, or to challeng[e] [his] [illegible] credibility without being [illegible]set by corroborating evidence that is not susceptible of impeachment." *Lopez v. United States*, 373 U.S. at 439 [83 S.Ct. 1381]. Overhearing, too, may be necessary for the protection of an informant. Only the most serious reasons grounded in the most fundamental policy considerations should warrant the failure to use or the suppression of relevant and reliable evidence. *Nardone v. United States*, 308 U.S. 338, 340 [60 S.Ct. 266, 84 L.Ed. 307] (1939). Overhearing or recording involves none of those reasons or considerations.

A.B.A. Standards Relating to Electronic Surveillance (Approved Draft, 1971) at 126-27.

5. 227 N.W.2d at 516. (Emphasis in original.)

6. *Id.* at 522.

Digest

Unquestionably, as recognized by the superior court, and even respondent, Baker would be entitled to testify concerning her own dealings with Glass and to relate the conversations surrounding those dealings to the best of her recollection. Therefore, the electronic recording of those conversations was not an invasion of respondent's privacy. The electronic recording simply provided an accurate record of the incriminating statements made to Baker and it is undisputed that Baker could testify personally as to these statements. As stated in *Lopez v. United States, supra*:

> Stripped to its essentials [respondent's] argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.[7]

I consider that argument to be without merit. Like the Supreme Court of the United States in *Lopez*, I think that the risk respondent took in dealing with Baker included the risk that the words spoken "would be accurately reproduced in court, whether by faultless memory or mechanical recording."[8] *See also State v. Roy*, 54 Haw. 513, 510 P.2d 1066 (1973).

The majority's reliance on *White v. Davis*, 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222 (1975), is, I believe, completely unwarranted. I see little similarity between the surveillance done in the case at bar and that done in *White*, where police officers engaged in wholesale secret recording of university class discussions in order to compile dossiers on those present, rather than as part of an investigation of specific criminal activity. Central to the California Supreme Court's condemnation of the surveillance in that case was the obvious threat posed to First Amendment freedoms, and its recognition that, "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" 120 Cal.Rptr. at 101, 533 P.2d at 229, quoting the Supreme Court of the United States in *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). In short, any governmental interest that might have been furthered by the type of surveillance carried on in that case was held to be outweighed by a free society's interest in having the university classroom remain a forum for the free exchange of ideas. I certainly applaud the decision in *White*, but what that all has to do with the situation in the case at bar is beyond my ken.

I would reverse the superior court's suppression order.

7. 373 U.S. at 439, 83 S.Ct. at 1388.

8. *Id.*

STATE of Alaska, Petitioner,

v.

Michael THORNTON, Respondent.

No. 3764.

Supreme Court of Alaska.

Sept. 15, 1978.

The Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, J., entered order suppressing evidence consisting of tape recordings of conversations between defendant and police informant and State's petition for review was granted. The Supreme Court, Boochever, C. J., held that recording of conversations violated defendant's rights under State Constitution.

Affirmed.

Burke, J., filed a dissenting statement.

Evidence fails to support exclusionary rule's critics

By Ronald K.L. Collins and Robert C. Welsh

Eugene, Ore.
Current attempts to modify the exclusionary rule in law call to mind Woody Allen's sage observation that the lion and the lamb shall lie down together, but the lamb won't get much sleep.

At issue is whether the U.S. Supreme Court should adhere to its nearly 70-year-old rule that evidence obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures may not be used in a criminal trial.

In the case of Illinois vs. Gates, opponents of the rule have succeeded in persuading the court to consider whether illegally seized evidence may nonetheless be introduced in a trial when the police acted on the basis of a "good faith" belief that their actions were constitutional.

Some arguments for adopting this position have great surface appeal. Why should prosecutors be prohibited from using reliable evidence of the defendant's guilt when the police believe that their actions were legal? This rationale seems forceful in the context of the Gates case, where police officers relied upon a court search warrant that later was declared invalid.

Proponents of the good-faith rationale are not likely to limit their arguments to the circumstances in the Gates case. Presumably, they would allow admission of most improperly gathered evidence whenever the police believed they were obeying the law.

The argument for a good-faith exception fails on no fewer than three counts.

First, as a statement of constitutional law, it breeds governmental disrespect for constitutional restraints. As a search-and-seizure expert, Prof. Wayne LaFave of the University of Illinois, recently observed, adoption of the good-faith exception would entail a "revision of the old quip that 'close only counts in horseshoes and grenades.'" Nor is there is no reason to assume that the good-faith rationale, if let loose in the Gates case, would not move to other constitutional fronts. Would courts embrace the proposition that "'close' counts" when a municipality bans certain forms of constitutional expression, or when a judge denies the news media access to criminal proceedings?

Second, the alleged benefits to be derived from the good-faith exception are not worth the compromise that our society would have to strike with fundamental constitutional rights. There is no reliable evidence that the exclusionary rule significantly interferes with our ability to apprehend and convict criminals. As a 1978 study by the U.S. comptroller general concluded, only four-tenths of 1 percent of all federal prosecutions from July to August of that year were jeopardized by the exclusion of evidence.

Third, adoption of the good-faith exception would undo many advances that have occurred as a result of the exclusionary rule. Since the supreme court extended the rule to the states in 1961, many police departments have developed ongoing instruction programs in search-and-seizure law. The use of search warrants has increased dramatically.

The good-faith exception would jeopardize these accomplishments because it places a premium not on an officer's knowledge of the law but on his ignorance. Why should police departments adopt and enforce internal guidelines confining police discretion if ignorance is the standard? Notably, it remains a mystery whether the police in the Gates case had or followed departmental guidelines.

If a supreme court majority is determined to retreat in this area, it is better that it take a different approach. Instead of sanctioning unconstitutional police conduct by admitting illegally obtained evidence, the court should shift the good-faith debate directly into the Fourth Amendment arena in order to determine whether such actions are compatible with the amendment's expressed command of reasonableness. This tactic at least would place the good-faith exception within added constitutional boundaries and would not therefore permit exceptions to otherwise protected rights.

Defending the exclusionary rule does not mean that society is powerless to protect itself. But American society cannot call itself free if it fights crime by imprisoning the Fourth Amendement.

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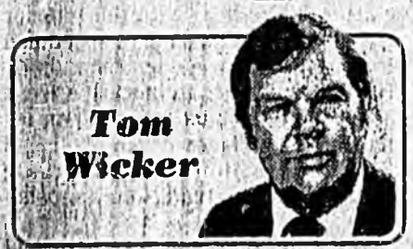
Exclusionary rule aids public, not criminals



Views expressed here do not necessarily represent those of the Daily News-Miner

Not long after President Reagan's Task Force on Violent Crime recommended in 1981 that Congress legislate a "good-faith exception" to the so-called "exclusionary rule," a Task Force member told me privately that the rule did not really prevent many criminals from going to jail.

But, he said, people thought it did. In his view, something therefore had to be done about the exclusionary rule, so that people would believe something was being done about crime.

The rule, promulgated for federal criminal prosecutions in 1914 and extended to state courts in 1961, provides that evidence seized in violation of Fourth Amendment prohibitions against unreasonable and improperly warranted searches and seizures is inadmissible in criminal trials.

As fear of crime has become epidemic in America, the myth has spread that streams of criminals are going free because the exclusionary rule prevents the evidence against them from being used in court. The Fifth Circuit Court of Appeals has responded with an exception to the rule, providing that unconstitutionally seized evidence is admissible if the police had a reasonable, good-faith belief that they were acting properly.

Last week the Supreme Court heard arguments on whether it too should adopt a "good-faith exception," presumably for courts at all levels. Five justices already have indicated some willingness to modify or abolish the rule.

In an article in the December 1981 issue of the Georgetown Law Journal, William J. Mertens and Silas Wasserstrom, both experienced public defenders, argue compellingly that for the Supreme Court to take such a step would significantly widen police latitude and water down Fourth Amendment protections.

Their article is too long and detailed to be easily condensed, but several of their points can be summarized:

1. Deterrence of police misconduct will be diminished under a good-faith exception rule because the exception inevitably will substitute for the specific standards of the Fourth Amendment a test of the "general reasonableness" of police searches and seizures.

But a police officer "cannot be deterred from violating the Constitution unless he knows that his actions are in fact unconstitutional"; and the danger of the good-faith exception is that courts would test the "reasonableness" rather than the constitutionality of an officer's action. Not only would that often condone the action; but also, if it did the court would not need to decide whether or how the Constitution might have been violated. Officers would be "left in welcome ignorance, free to make such 'reasonable' mistakes in 'good faith' forever."

2. The good-faith exception also would undermine what the authors call "systemic deterrence." At their own discretion, for example, District of Columbia police used to stop autos for routine license and registration checks. But in 1979 the Supreme Court held such checks unconstitutional, unless the officer stopping the car had "articulable suspicion" of criminal activity. The decision brought an immediate cessation of routine checks in the District and other jurisdictions.

If the court had taken a "good-faith" approach, or had applied a test of "reasonableness" rather than the standards of the Fourth Amendment, routine stop-and-check procedures probably would still be common in many jurisdictions; and in future that could happen on far more serious constitutional questions.

3. In deciding upon the good faith and reasonableness of an officer's action, what standards would the courts apply? Who would bear the burden of proof? What evidence on the question of good faith would be admissible? If a criminal defendant, for example, had to prove bad faith or unreasonableness on an officer's part, the defendant's rights might be doubly endangered, for such proof could be difficult to establish.

Or suppose the defense contends that an officer was well-trained and should have known better than to violate a defendant's rights, hence could not have been acting mistakenly but in good faith. The prosecution might have to argue that the officer was not well trained: poor training might actually become a police aid in making unconstitutional searches and seizures stand up in court.

4. If, to protect constitutional rights under a good-faith exception, officers were made personally liable in civil and criminal law for Fourth Amendment violations, the authors argue that law enforcement might actually suffer. Policemen in ambiguous situations, fearing personal liability for wrongful action, might refuse to act at all—possibly permitting more criminals to escape justice than the exclusionary rule does.

The argument, of which these points are but a sample, is complex but the logic is persuasive: a good faith exception will weaken not just the exclusionary rule but the Fourth Amendment itself.

Few Criminals Appeal, Says Survey, and Fewer Succeed

LA TIMES 2/5/84

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—Of the few criminal defendants who exercise their right to appeal, very few win reversals of their convictions, according to a new study of the California Court of Appeal.

The study, based on an analysis of court data here and interviews with justices, concludes that critics' claims that appellate courts overturn too many convictions is a "red herring."

The 104-page document, an unusually detailed look at a state appellate court, was published last week by the American Bar Foundation, a legal research organization supported by the American Bar Assn. It was prepared by Thomas Y. Davies, a research attorney for the foundation. In all, he studied 544 criminal appeals that came before the court here during the mid-1970s and found that only 26 (or less than 5%) resulted in reversals.

"The notion that (legal) loopholes allow large numbers of criminals to escape their just deserts is a recurring theme in our public dialogue on criminal justice," Davies said. "But this study and other research suggest that this theme is seriously flawed."

Among other things, the study found that:

—Nine of 10 defendants convicted had pleaded guilty without going to trial, thus virtually foreclosing appeal. Of those convicted by a jury, about half appeal. Overall, only about one in 20 convictions is appealed.

—Most appeals offer little indication that the defendant is innocent, and the courts therefore are reluctant to reverse convictions, particularly in serious crimes. Unless a

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REVERSALS: Criminal Appeals Tally Checked

Continued from First Page

legal error has affected the verdict, the court will find the error to be "harmless" and allow convictions to stand. Of the cases studied, 204 legal errors were found by the court but only 26 led to reversals.

One unnamed justice interviewed in the study was quoted as saying, "I will confess that I sometimes get really irritated when I get (an appeal) that seems to boast that 'I'm guilty all right but the cops didn't follow the rules when I was convicted, so turn me loose.'"

The fact that the court found few appeals convincing confirmed a view held by many legal authorities.

Jesse H. Choper, dean of law at the University of California, Berkeley, asked to comment on the study, observed: "The criminal appellant has everything to gain and nothing to lose. There's always hope. And filing an appeal may even have therapeutic value. But as a result, many appeals just don't have much substance to them."

But Choper agrees that even a single reversal can have broad impact on the criminal justice system when it involves a key legal question, such as the admissibility of confessions or the rules of search and seizure. "It can affect the way police conduct investigations; it can affect the way prosecutors conduct cases," he said.

Davies, in an interview, acknowledged that reversals in some cases can have effects well beyond their numbers. But he stressed that it is more often the state's Supreme Court, rather than the intermediate appellate courts, that issue landmark rulings. The appeal courts may implement new rules but rarely do they create them, he said.

'Applying . . . Standards'

"The judges of the Court of Appeal don't see themselves as having the same responsibility for articulating legal standards as does the Supreme Court," he said. "They see themselves as simply applying those standards to specific cases."

The state Court of Appeal includes 77 justices sitting in six districts throughout the state. By law, the appellate court must formally review all appeals from criminal trial judgments. In fiscal 1981, the appellate courts issued 3,891 opinions on criminal appeals. The state Supreme Court, exercising discretionary review of appellate decisions, issued 19 such opinions during the same period.

The foundation study focused on a group of cases before the Court of Appeal here from 1974 to 1976. That court's reversal rate of 5% at that time compares with the 10% rate among cases being handled by the state Supreme Court and throughout the Court of Appeal. Most reversals permit retrials, but in some cases retrials are not possible, such as when key evidence may not be used or when witnesses are no longer available.

Most of the appeals filed here raised claims of prejudicial evidence, illegally obtained evidence, erroneous jury instructions, insufficient evidence of guilt, improper comments by the prosecutor, inadequate representation by defense counsel and improperly obtained confessions.

Davies' analysis concluded that the court is reluctant to reverse convictions unless there were "egregious errors" during the trial. Most of the cases, he said, "involve serious crimes and little if any basis for doubt about factual guilt."

'Punish the Prosecutor'

One of the justices interviewed for the study noted that the clear showing of guilt frequently led the court to find that any procedural errors that occurred were "harmless" and could not have affected the trial outcome. This justice, citing an ethically dubious tactic by a prosecutor in a case, remarked, "Sometimes you'd like to reverse a case to punish the prosecutor in a case like this, but he isn't the one who gets punished if you reverse (the conviction)."

The study also found that the more serious the crime, the less likely a conviction will be reversed. Convictions for murder and robbery, for example, were reversed less than 2% of the time. By contrast, the rate was about 17% for fraud, forgery and bribery convictions.

The data "tend to refute" the notion that the court is "eager or even willing" to reverse serious convictions on the basis of procedural technicalities, the study concluded.

It quoted a justice as saying, "The difficulty is that some of the rules aren't really related to the ascertainment of truth in the case and they get bogged down in procedural questions that may be pretty peripheral."

Prison study aims to unlock truth about cost of incarceration

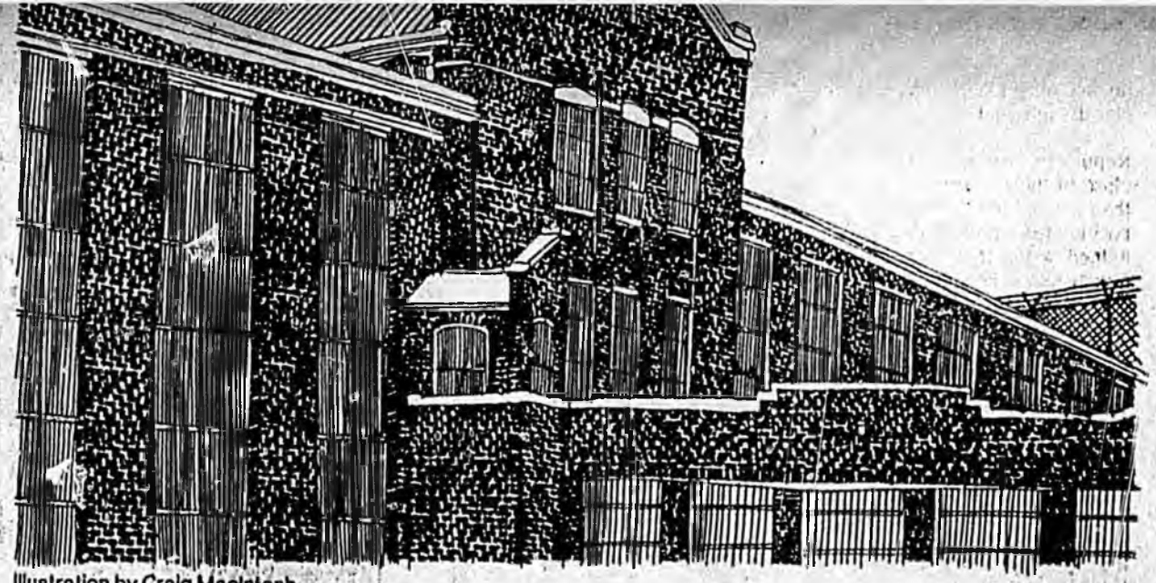

Illustration by Craig Macintosh

By Leonard Inskip
Associate editor

"Lock more of 'em up," is a popular response to crime. "Stop the growth of government, cut taxes," is a popular response to high taxes and budget deficits. But you can't have it both ways.

Minnesota built one of the most secure men's prisons in the country, the new Oak Park Heights facility, but hasn't had enough money to open it fully. Meanwhile, there's talk of building a new women's prison to replace the old one at Shakopee. Hennepin County, despite cuts in many programs, is expanding its juvenile detention facilities.

Not enough people make the connection between getting tough and spending tax money, or between spending more here and less there. One group does. It's the influential Minnesota Citizens Council on Crime and Justice (formerly called Correctional Service of Minnesota).

The council is studying whether Minnesota needs the capacity of all its prisons, whether spending can be reduced, whether institutions can be closed or shrunk, whether lower-cost or more-effective alternatives can be found. At a minimum, the council wants to lean the cost of incarceration and make sure the public knows it.

It's up against the kind of get-tougher attitudes expressed by the attorney general candidates last fall. Republican Elliot Rothenberg urged tougher sentencing guidelines. Democrat Hubert Humphrey III, the winner, defended the guidelines in general but opposed "mandatory minimum incarceration" for residential burglaries. Both proposals would result in more people in prison. Neither candidate's literature mentioned what their proposals might cost or where the money would come from.

Gov. Rudy Perpich wants public spending reexamined to get leaner government, and he's said he welcomes ideas from people outside government. The council on crime and justice can provide an informed perspective. And, though it is still assembling data and has not reached any final conclusions, the council will make recommendations to the governor, Legislature and Department of Corrections, says Richard Ericson, executive director.

The council, with help from the Northwest Area Foundation, set up a 12-member prison committee, headed by Martha Atwater of Wayzata. Among its members are a former corrections commissioner, two railroad presidents (one retired), a minister of a prominent Minneapolis church, two corporation presidents. This week the committee will hear from Orville Pung, commissioner of corrections, and Frank Wood, Oak Park warden.

The committee's function, Ericson says, is to ask tough questions — questions that might not be asked elsewhere.

Example: Minnesota has an old prison for women. Something better is needed. But must the state spend up to $15 million for a new prison, as some propose? Or could a place like Rochester state hospital, closed last year, be converted to a women's prison? There's talk of closing colleges. Could one of them be used? What about the Oak Park prison, built at a cost of $31 million but only half-filled? That prison, opened in 1982, has eight totally segregated sections, each for about 80 prisoners. Could part of Oak Park be used for women?

Example: The old Stillwater prison, built around the turn of the century. When nearby Oak Park prison (406 beds) was built, a tradeoff was that Stillwater (1,152 beds) would be modernized and reduced to a more manageable size, perhaps half the present size or less. Stillwater is now open and nearly full. Should that policy continue?

Example: 167 Wisconsin prisoners (perhaps more later), as well as some federal prisoners, are housed in Minnesota prisons for $55 a day per prisoner. That policy was adopted to help get Oak Park open. But does that $55 cover the true cost of Minnesota's prison program? (The council suspects it doesn't.) Might the policy encourage Minnesota to create a prison staff bigger than Minnesota's long-term needs? (It might.) Could the policy make it easier to promote get-tough sentencing, regardless of cost, need for such sentencing, or diversion of resources from other programs? (The council fears it might.)

Governments have a tendency to focus on initial costs (bonding for example), rather than long-range operating costs to be funded by future legislatures and county boards. University of Minnesota criminologist David Ward gave the prison-study committee one estimate: "Over a 30-year period capital outlay cost for a prison is only going to represent 8 percent of the cost. Ninety-two percent is going to be accounted for largely by staff salaries followed by food and other expenses." If a way is not found to reduce Stillwater's operating budget, then the budget for Oak Park, when fully funded at close to $10 million a year, will simply be on top of what the state previously spent for prisons.

Meanwhile, says Ericson, crime rates are stabilizing or even falling. One reason is that the population of young adults, a crime-prone group, is headed downward. Parallels exist in the closing of schools and in the drop in highway deaths.

There's also a matter of priorities. Prisons compete for public funds with community programs related to crime: probation, diversion, halfway houses, community service, aid for crime victims. Many such programs have suffered budget cuts, a trend that worries Ericson.

Partially with state funds, the council operates crime-victim centers in the Twin Cities that have served 15,000 people. On the average, the victims "are not demanding long, long sentences," says Ericson. What they want, he says, is accountability, which can mean restitution or repairs. The feedback from victims is not consistent with demands for longer sentences, he says.

The council has been around since 1957. Supported by the United Way, foundations and corporations, the council has a budget of $500,000, including the state money, and a staff of 15.

"We're a small voice at a time when most everyone is willing to dish out longer sentences," says Ericson. "But it's our job to stimulate thinking about alternatives," to say to legislators and the public, "Go slow, folks. Insist you have good answers."

The flush years of the 1970s made it relatively easy for Minnesota to undertake things like a new zoo and and a new prison, while continuing to support an old zoo and old prisons. Today, as Perpich has said, it's time to reexamine. The state is fortunate to have a long-established, respected organization like the Citizens Council on Crime and Justice to help in that reexamination.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM January 23, 1984

SUBJECT: "Good faith" exception to the exclusionary rule (Work Order No. 13-1801)

TO: Senator Vic Fischer
Chairman, Senate State Affairs Committee

FROM: Edward H. Hein
Legislative Counsel

You have asked for a brief summary of the issues raised in two cases now before the United States Supreme Court dealing with the so-called "good faith" exception to the exclusionary rule.

The Fourth Amendment to the United States Constitution protects the privacy of persons by prohibiting unreasonable searches and seizures of their persons or property by the police. The essential requirement of the Fourth Amendment is that, except in certain emergency situations, searches may be made only pursuant to a warrant issued by an independent magistrate or judge and supported by a finding that there is "probable cause" to believe that the place to be searched contains evidence of a crime. The warrant must describe with particularity the place to be searched and the items to be seized. The police seeking the warrant must swear that their knowledge is based on personal observation or on information supplied by a credible and reliable informant. But under a ruling handed down by the Supreme Court last term, a magistrate must consider the "totality of circumstances" and make a "practical, common-sense decision" on whether to issue a warrant.

Despite all these safeguards, and despite the best efforts of police to comply, defective warrants are frequently issued. Evidence seized under the authority of such warrants is obtained in violation of the Fourth Amendment and, under the "exclusionary rule", is routinely suppressed at trial.

The result is that otherwise strong cases are often lost because crucial evidence cannot be introduced.

The exclusionary rule has applied in federal criminal cases since 1914 and in all state criminal trials since 1961. The primary rationale for the rule is that by suppressing evidence that is illegally seized it is thought that police will be deterred from making unreasonable searches and will have more respect for citizens' privacy. At issue in the cases now before the Supreme Court is whether the rule can have any deterrent effect on police who act reasonably and in good faith, and who do everything that could be expected of them, including obtaining a search warrant. The question is whether the exclusionary rule should be applied mechanically and absolutely, or whether a "good faith" exception should be created.

The arguments for creating the exception are that the cost of excluding relevant evidence in criminal trials is too high, that too many criminals are going free on "technicalities", and that the rule cannot serve any deterrent effect when the police are not guilty of any misconduct. The arguments against creating the exception are that the rule really does make the police and the judges and magistrates who issue warrants more careful, that it keeps the police from casually invading citizens' reasonable expectations of privacy in their homes and elsewhere, and that relatively few cases are actually dismissed because of application of the rule.

Both of the cases that were argued before the Supreme Court last week involved police searches based on defective warrants. In Massachusetts v. Sheppard, a magistrate signed and the police used a form warrant for drug searches to obtain evidence from a murder suspect's home. The suspect was convicted on the basis of the evidence, but the state's highest court overturned the conviction, saying that the evidence should have been suppressed because the warrant did not properly describe the items to be seized. A new trial was ordered.

In the companion case, United States v. Leon, a federal trial judge in California suppressed evidence of drugs seized by police who obtained a warrant from a state judge on the basis of information from a caller's tip. The judge ruled that the warrant was not based on adequate "probable cause". The Ninth Circuit Court of Appeals agreed.

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