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Amsterdam, Tony
Stanford

Dana Hrike

ACLU - Amicus Brief on what is in U.S. Court.
Craig Cornish (ACLU)
Recent Back-up
— Denver

Anchorage Contacts

Nancy Gordon
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Juneau -
+ Al Gross
+ Susan Burke
! Bud Carpenetti
Peg Burke

Juneau Public Defender

Good faith... exception
U.S. Supreme Court

Cases
Gr. 3

58 Min L.R. Amsterdam

Waiving Sept. 9.
State Supreme Court.

Sears,
~~P~~ - See O'Connor's dissent
Police/Police
Integrity of Court System.
Constitutional Right of Privacy

Con

Can achieve deterrent effect using civility.

evidence is a result of misconduct by police.

Determining Police.

a) Suing police
+ small town
- sure there is bound to be protected.

b) + Riches will get off.
+ unpopular "clients" will

← Historically, more have died in police states than in other forms of government.

What do they do in Canada?
Point "exclusionary Rule".

→ what was catalyst for "exclusionary rule".

Brian Porter
+ Death Penalty
+

No. 81-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

Petitioner,

—v.—

LANCE and SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, AS *AMICI CURIAE*

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February, 1983

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, and the ACLU of Illinois is one of its state affiliates, dedicated to preserving and protecting the liberties safeguarded by the Constitution and its Bill of Rights. The prohibitions against unreasonable searches and seizures embodied in the Fourth Amendment are critically important among those safeguards. They belong, as Justice Jackson forcefully observed after his return to the Court in 1948, "in the catalog of indispensible freedoms." Brinegar v. United States, 338 U.S. 160, 180 (1948) (dissenting opinion).

The American Civil Liberties Union has participated in many of the leading decisions by which this Court has given

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1. A letter consenting to the filing of this brief has been lodged with the Clerk.

shape and life to the Fourth Amendment's guarantee. Indeed, the ACLU filed the onl brief before the Court in Mapp v. Ohio urging application of the exclusionary rule to the states, and was invited by the Court to raise the point at oral argument. 367 U.S. 643, 646 n.3 (1961). We appear here amici curiae because, in light of th order requesting reargument, this case no appears to present the most serious risk faced by Americans in recent years to the preservation of the Fourth Amendment as a real barrier to unconstitutional searche and seizures.

In the view of amici, any question concerning good faith defense is not properly before the Court, not only for the reasons set forth by Justice Stevens dissenting to the order for reargument, but also for the reason, advanced by respondents, that Illinois adopted the exclusionary rule as a matter of

state law in 1923 and stoutly adhered to it again after Wolf v. Colorado, 338 U.S. 25 (1948). See Elkins v. United States, 364 U.S. 206, 226 (1960)(citing Illinois cases). Should the Court reach the question, however, we hope that the analysis presented here -- demonstrating that in probable cause cases the good faith exception would be either redundant to the probable cause standard, or an impermissible substantive dilution of heretofore unchallenged standards of probable cause -- will be of assistance to the Court, and to the Fourth Amendment which protects us all.

SUMMARY OF ARGUMENT

A magistrate may issue a warrant where the facts presented to him, reasonably credited by officers, would justify a prudent person in believing that a sear would probable be fruitful. Since probable cause is not defeated by reasonable errors of fact, e.g., United States v. Robinson, 414 U.S. 218 (1973) or of law, Michigan v. DeFillippo, 443 U.S. 31 (197 an objective good faith exception would be wholly redundant in cases where the c claimed violation was of the substantive probable cause standard.

Illinois appears to recognize the congruence of probable cause and a good faith exception, and properly urges the Court to decide this case without reach ing a good faith standard. If a good faith exception were broader than proba cause, as suggested by the United State that lesser standard would become the s

stantive measure of Fourth Amendment protection, since exclusion is the only means available for giving life to the probable cause standard. Damage suits and injunctive suits are unavailable; and Article III would bar a court upholding admission through a good faith exception from going on to decide the Fourth Amendment issue. E.g., Bowen v. United States, 422 U.S. 916 (1975); DeFunis v. Odegaard, 416 U.S. 312 (1974).

This Court -- unanimously in Weeks v. United States and Olmstead v. United States, and again in Mapp v. Ohio -- has held that the Fourth Amendment itself, and imperatives of judicial integrity, forbid introduction at trial of evidence illegally seized from a defendant. The illegal search and seizure is inescapably part of a larger evidentiary transaction for which it was undertaken; and the Courts may not insulate themselves from the entire illegality --

the illegal acquisition of evidence for use at trial -- of which they are inevitably a part.

Even when viewed under a cost-benefit analysis, exclusion when good faith is present is essential. The costs incurred by exclusion are only the costs the framers decided to impose under the Fourth Amendment were it obeyed. The benefits are the systemic deterrence afforded whenever this Court announces a Fourth Amendment rule, and police departments thereupon disseminate it to officers throughout the field through training, and continuing education. A good faith exception would nearly always be applicable in close cases, cases resolving previously unsettled issues, or cases reversing prior decisions; and it is precisely in those cases where the opportunity to determine law is available only through application of the exclusionary rule, where systemic deterrence has

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A good faith exception would signal a departure from the Court's reliance on categorical rules and bright lines and would return the Court instead to the discredited, unguided reasonableness approach of United States v. Rabinowitz, 339 U.S. 56 (1950). By focussing attention not on the legality of searches but on the reasonableness of belief in their legality, it would have prevented adjudication of some of this Court's most important recent Fourth Amendment precedents, e.g., Torres v. Puerto Rico, 442 U.S. 465 (1979) and Ybarra v. Illinois, 444 U.S. 85 (1980).

Even if the "costs" of enforcing the Fourth Amendment are relevant, the statistical data relied on by the United States, largely erroneous, interested, and irrelevant, is wholly incapable of justifying adoption of a good faith exception. Moreover, such an exception

would place a heavy premium on police ignorance, and would predictably lead to a deterioration of police training and in-service education programs regarding Fourth Amendment standards.

INTRODUCTORY STATEMENT

The Fourth Amendment is an exclusionary rule. It embodies a judgment that a free society is best served by preventing the police from acquiring certain relevant evidence, even at the cost of unprosecuted crime. Thus, every case in which evidence is suppressed because it was gathered in violation of the Fourth Amendment is one in which the founders had already determined that government should have foregone access to that information in the first place.[2] The exclusionary rule merely provides specific performance of the will of the founders.

In a perfect world, all officials

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2. See, e.g., United States v. Rabinowitz, 339 U.S. 56, 67-68 (1950)(Black, J., dissenting)("the framers of the Fourth Amendment must have concluded that reasonably strict search and seizure requirements were not too costly a price to pay ...."); Mincey v. Arizona, 437 U.S. 385, 393 (1978). See also Appendix A, infra (contemporary response to Dean Wigmore's criticism of Weeks v. United States, 232 U.S. 383 (1914)).

would voluntarily comply with the requirements of the Fourth Amendment. In our imperfect world, however, courts must confront evidence which the government should not have seized, either because probable cause was not present, or because the procedural and/or operational requirements of the Fourth Amendment were not complied with. In this case, defendant argues that a magistrate misapplied the substantive probable cause test and issued a search warrant even though the requisite degree of probability was not present.[3]

The narrow issue on reargument is whether the evidence may be used, regardless of whether or not the magistrate

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3. The issues raised by a good faith exception where, as here, only the substantive probable cause requirement is at issue may differ significantly from the issues posed in cases involving the procedural and/or operational requirements of the Fourth Amendment. For a discussion of the latter see Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo.L.J. 365, 454-57 (

wrongly decided the Fourth Amendment issue, if both the magistrate and the police acted reasonably in believing that probable cause was present. However, where, as here, the sole issue before the Court is the substantive reach of the concept of probable cause codified in the Fourth Amendment, it is meaningless to speak of an objective good faith error in applying substantive Fourth Amendment standards. The concept of probable cause as developed by this Court requires merely an objectively reasonable assessment that it is more probable than not that a search will uncover evidence of crime.[4] Such an objectively reasonable assessment is precisely the

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4. "Probable cause exists 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been committed."

Brinegar v. United States, 388 U.S. at 175-76 (quoting Carroll v. United States, 267 U.S. 132-165 (1925)).

standard suggested by both Illinois and the Solicitor General as defining the scope of a suggested objective good faith defense. Given the virtual identity between probable cause as it has been defined by this Court and the concept of an objective good faith defense which is the centerpiece of the Solicitor General's brief, a finding that objective good faith existed is the functional equivalent of a finding that probable cause, in fact, existed. If, on the other hand, the Solicitor General's concept of objective reasonableness requires a lower threshold of probability than traditional conceptions of probable cause, he is arguing not for a good faith defense, but for a substantive dilution in the definition of the degree of probability required by the Fourth Amendment. In place of the traditional test of probable cause defined as an objectively reasonable assessment

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that it is more likely than not that evidence of crime will be obtained, the Solicitor General would substitute a test of objectively reasonable belief that an objectively reasonable probability existed -- an exercise in linguistic reductionism leading to the inevitable dilution of the substantive meaning of probable cause.

I. THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD ALREADY AFFORDS LAW ENFORCEMENT OFFICERS THE SCOPE FOR OBJECTIVELY REASONABLE ERRORS WHICH COULD CONSTITUTIONALLY BE PROVIDED BY A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

By authorizing search where law enforcement officers reasonably believe and a magistrate reasonably determines that evidence of crime is likely to be found

in a particular place, the probable cause standard already affords precisely the scope for errors of fact and law which proponents of a good faith exception claim is necessary. Petitioner Illinois concedes as much, and quite correctly urges that this case can and should be decided under traditional probable cause standards recognizing that adoption of a good faith exception for cases like this is unnecessary because redundant.[5] If a good faith exception were broader -- as broad as that apparently sought by the Solicitor General who seems to urge that the seizure of evidence pursuant to a warrant renders such evidence admissible at trial even if the magistrate lacked probable cause[6] -- it would effectively eliminate the requirement at the historical heart of the Fourth Amendment -- that "no warrants shall is-

5. See Petitioner's Brief for Reargument (hereafter "Pet. Supp. Br.") 19; see also n.15 infra

6. See Supplemental Brief for the United States (hereafter "U.S. Supp. Br.") 43-44.

sue, but upon probable cause".

A. The Fourth Amendment Requires Only Probable Cause, Not Certainty, And Is Not Defeated By Reasonable Errors Of Fact Or Of Law.

A search warrant is valid if, on the basis of facts officers reasonably believed to be true,[7] a magistrate reasonably determined that a prudent person would be justified in believing that a search would yield either contraband or the fruits, instrumentalities, or evidence of a crime.[8] Certainty is not required; the likelihood of engaging in a fruitful search must only be more probable than not, and may be based on rumors, hearsay, a suspect's prior record, or other evidence inadmis-

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7. Franks v. Delaware, 438 U.S. 154 (1978).

8. The critical judgment, of course, is the magistrate's, not the officer's. See, e.g., United States v. United States District Court, 407 U.S. 297, 316 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); Whiteley v. Warden, 401 U.S. 560 (1971). See also infra at 21-23.

sible at trial.[9]

As this Court's cases demonstrate, this standard expressly provides scope for reasonable errors of fact and of law. Probable cause is not defeated if the "facts" which the officers present to the magistrate turn out to be inaccurate (so long as the officers themselves reasonably credit those facts), or if the assessment that a search would produce evidence of crime turns out to have been misjudged.[10] Similarly, probable cause does not dissipate because a substantive criminal statute is

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9. See, e.g., United States v. Ventresca, 380 U.S. 102, 107-09 (1965); Draper v. United States, 358 U.S. 307 (1959); Aguilar v. Texas, 378 U.S. 108 (1964); Hill v. California, 401 U.S. 797 (1971); cf. Brinegar v. United States, 338 U.S. at 172-77.

10. See, e.g., Franks v. Delaware, 438 U.S. at 165; United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, supra; cf. New York v. Adams, 53 N.Y.2d 1, 443 N.E.2d 537, 439 N.Y.2d 877 (1981); United States v. Matlock, 415 U.S. 164 (1974).

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later construed differently or held unconstitutional.[11] So long as the magistrate reasonably determines that a search will be fruitful -- whether or not the information he bases his determination on is accurate, and whether or not a crime has even been committed -- there is no Fourth Amendment violation and evidence seized in a search pursuant to the warrant is admissible.

B. In Ruling On A Suppression Motion Challenging Search Pursuant To A Warrant As Lacking Probable Cause, The Question Which Proponents Of An Objective Good Faith Exception To The Exclusionary Rule Would Make Determinative -- Did The Magistrate Reasonably Assess The Existence Of Probable Cause -- Is Precisely The Same As Asking Whether Probable Cause Existed.

Where, as here, the only alleged Fourth Amendment violation is the deter-

11. Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979).

mination of probable cause, a good faith exception to the exclusionary rule would be wholly redundant.

If the facts presented to the magistrate would warrant a good faith, reasonable belief that the search comports with the Fourth Amendment, then the probable cause standard has been met.[12] If, on subsequent review, a court determines that probable cause (defined by this Court as an objectively reasonable assessment of probability) was not present, it necessarily follows that the assessment of probable cause was objectively unreasonable. To go further, and ask whether even though probable cause was not present, a magi-

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12. Like the United States, we assume that inquiry under the good faith exception which this Court requested supplemental briefing to explore would emphasize objective reasonableness, see U.S. Supp. Br. 58 n.39; see also Scott v. United States, 436 U.S. 128, 135-36 (1978), although subjective belief is necessarily an element to some extent as well. E.g., Franks v. Delaware, 448 U.S. at 164-65.

strate (or even the presenting officers) could reasonably have believed it was present, makes no sense: if they could reasonably have believed that probable cause existed, then by the definition of Draper, Brinegar and Aguilar -- by "the substance of all known definitions of probable cause"[13] -- probable cause was present.[14] This is especially so since, as this Court has repeatedly made clear, the reviewing court is not to substitute its own judgment; the test is whether the initial judgment was reasonable, and significant deference is due when the initial determination was that of a magistrate. United States v. Ventresca, 380 U.S. at 108;

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13. Brinegar v. United States, 338 U.S. at 175.

14. This point has been made, in a different context, by Judge Jon Newman. See Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Remedy for Law Enforcer's Misconduct, 87 Yale L.J. 447, 460 (1978).

Aguilar v. Texas, 378 U.S. at 110-11; United States v. Jones, 362 U.S. 257, 270-71 (1960).

To its credit, Illinois appears to recognize the identity between probable cause and a good faith exception.[15] The

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15. See, e.g., Pet. Supp. Br. 11-13 ("at least in the area of probable cause and similar factual questions ... so long as the officer's or magistrate's error was a reasonable one, the exclusionary rule should not be applied"); Pet. Supp. Br. 19 ("As a practical matter, it may not make much difference, at least in the area of probable cause, whether this Court adopts the modification of the exclusionary rule ... or decides this case on the basis of the traditional Carroll-Brinegar-Jones standard of probable cause); Pet. Supp. Br. 26 ("[T]he proposed modification of the exclusionary rule is, in essence, a return to the traditional standard of probable cause"); see also id. 16-19.

Perhaps because the position urged here by amicus (and on which petitioner's brief on reargument is premised) might be thought unresponsive to the question this Court ordered the parties to rebrief, in portions of its brief Illinois essays an unconvincing "good faith exception" that would differ from probable cause. Thus, petitioner's submission that "Judge Lewis' assessment of the probabilities was a reasonable one, even assuming arguendo that it was mistaken", Pet. Br. 27, is meaningless. If the assessment was reasonable, it was not "mistaken" within the meaning of this Court's practical approach to probable cause exemplified by Brinegar and Vencresca.

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good faith exception proposed by the United States may differ from the probable cause standard, since it appears to focus solely on the officers, rather than the magistrate, and seems to insulate evidence seized pursuant to a warrant from suppression, even when the magistrate could not have reasonably determined that probable cause existed. See U.S. Supp. Br. 43.[16] Exclusive atten-

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16. We are told that exclusion may nevertheless be appropriate where "the factors relied on by the magistrate were so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable," quoting Brown v. Illinois, 422 U.S. at 610-611 (Powell, J., concurring), but the line between after-the-fact reasonableness under Aguilar, 378 U.S. at 111, and "entirely unreasonable" is left quite uncertain. Professor Kaplan, on whom the United States heavily relies, has criticized a similarly unclear standard under which an unreasonable determination of probable cause would not bar admissibility so long as it was not "reckless" or "deliberate". Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L. Rev. 1027, 1044-45 (1974).

tion to the officers' judgment rather than the magistrate's, however, is squarely inconsistent with the core Fourth Amendment requirement that a magistrate's objectively reasonable judgment of probable cause -- not merely his signature, not his incorrect assessment of probable cause, and not an officer's belief that probable cause exists -- is the fundamental prerequisite for most lawful searches. See, e.g., Nathanson v. United States, 290 U.S. 41 (1933) and Franks v. Delaware, supra (rejecting proposition that magistrate's signature on warrant sufficient to establish valid search); Ybarra v. Illinois, 444 U.S. 85 (1979) and Torres v. Puerto Rico, 442 U.S. 465 (1979)(undoubted good faith of police searching under clear statutory authority irrelevant where probable cause is lacking); Delaware v. Prouse, 440 U.S. 648 (1979) and Dunaway v. New York, 442 U.S. 200 (1979)(undoubted

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good faith of officers acting pursuant to state court determinations that the particular searches at issue did not require probable cause irrelevant where appropriate substantive standard not met); Whitely v. Warden, supra (officer's belief that valid warrant issued irrelevant where magistrate could not properly have found probable cause).[17]

As we now show in greater detail, the good faith exception proposed by the United States, if broader than the probable cause standard, has precisely the vice this Court found in each of these cases: it would "denude the probable cause requirement of all real meaning." Franks v. Delaware, 438 U.S. at 168.

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17 The failure of the United States to discuss any of these cases except Franks -- each of which would have been decided differently under its approach -- is striking.

C. If A Good Faith Exception Would Afford Any Broader Scope For Error Than Probable Cause, It Would Violate The Fourth Amendment By Systematically Failing To Deter And Indeed Inducing Searches On Warrants Absent Probable Cause.

Law is what law does. A rule of law, especially a constitutional rule, which finds no sanction, and which need not be applied in the courts even in appropriate cases, is empty rhetoric. Davis v. Passman, 442 U.S. 228, 242 (1979).[18] To say that the Constitution forbids search warrants to issue on less than probable cause, but permits the admission of evidence seized when probable cause was lacking, is effectively to protect "the right of the people to be secure" only procedurally, through search warrants, but without the sub-

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18. "[U]nless such rights are to become merely precatory, the class of litigants who allege that their own constitutional rights have been violated and who at the same time have no effective means other than the judiciary to enforce these rights must be able to invoke the existing jurisdiction of the courts for [their] protection .... " Id.

stantive protection of probable cause. Nathanson v. United States, supra; Aguilar v. Texas, supra; Franks v. Delaware, supra.

One need look only so far as the history of the Fourth Amendment in states without exclusionary rules between Wolf and Mapp to demonstrate the truth of these observations. Commentators, state courts, and ultimately this Court found the tension between the "right" enunciated in Wolf and its utter meaninglessness unbearable. See generally Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 323-24 (prior to Mapp, Fourteenth Amendment search and seizure guarantees were not protected by states); Elkins v. United States, 364 U.S. 206, 224-32 (1960) (listing post-Wolf state court decisions on admissibility of unlawfully seized evidence); People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955)(Traynor, J.). Leading law enforcement authorities

throughout the nation reacted to Mapp as if the Supreme Court had suddenly created the probable cause and warrant requirements, rather than merely enforced rules applicable to the states all along.[19]

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19. Commissioner Michael Murphy of New York observed:

> I can think of no decisions 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 program 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 .... Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen.

Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?", 62 Jud. 66, 72 (1978)(quoting Murphy, Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments, 44 Texas L.Rev. 939, 941 (1966)). Similarly, when the California Supreme Court adopted the exclusionary rule, Los Angeles Police Chief William Parker bitterly attacked it for prohibiting "affirmative action" by the police against crime until and unless police possess "sufficient information to constitute probable cause". Nevertheless, mistaking the newly-applicable exclusionary rule for the substantive guarantee which had theoretically, but not in reality, long been law in California, Chief Parker continued:

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If evidence seized under warrants based on less than probable cause were admissible, that lesser standard would quickly measure the substantive protection afforded by the Fourth Amendment. Contrary to the suggestion that exclusion of evidence seized pursuant to an erroneous and, by definition, unreasonable judicial determination of probable cause is "irrational" (U.S. Supp. Br. 37), exclusion is essential because it is the only means for giving life to the probable cause standard.[20] Damage suits are

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> [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.

Id. (quoting W. Parker, Police 117, 131 (emphasis added). See also id. at 70-72 (similar experience in Minnesota); Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing", 62 Judicature 337, 349 (1979)(New York).

20. As pointed out supra at 9-12, had the Fourth Amendment been complied with, of course, the evidence would also have been "excluded". Although

impossible because the warrant-issuing magistrate is immune from suit, Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978), and the officers searching pursuant to a warrant normally have a secure good-faith defense. United States v. Ross, 72 L.Ed. 2d 572, 593 n.32. Injunctive relief is similarly barred. See Brinegar v. United States, 338 U.S. at 182 (Jackson, J., dissenting); Rizzo v. Goode, 423 U.S. 362 (1976). Nor could a court, consistent with Article III of the Constitution, rule on the legality of the warrant where the

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the United States criticizes application of the exclusionary rule in cases such as Coolidge v. New Hampshire, 403 U.S. 443 (1971), agreeing with Justice Harlan that nothing in Coolidge touched on "core" Fourth Amendment values, id. at 491, that very criticism suggests the need to apply the exclusionary rule at least where, as here, such "core" values are implicated. With good historical reason, see, e.g., Lasson, History and Development of the Fourth Amendment to the United States Constitution, 35-36, 47, 100-03 (1937); T. Taylor, Two Studies in Constitutional Interpretation, 23-46 (1969), the Court has long found the probable cause standard the heart, the "minimum requirement" of the Fourth Amendment, Chambers v. Maroney, 399 U.S. 42, 51 (1970). See also United States v. Ross, 72 L.Ed.2d at 583-84.

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good faith standard was made out, the surprising suggestion of the United States (Supp. Br. 61-62) not to the contrary. See, e.g., Bowen v. United States, 422 U.S. 916 (1975)(criticizing Ninth Circuit on Article III grounds for ruling on illegality of a search when decision on retroactivity of Almeida-Sanchez v. United States, 413 U.S. 916 (1975) made constitutional ruling unncessary); Defunis v. Odegaard, 416 U.S. 312, 316 (1974)("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); Stovall v. Denno, 388 U.S. 298, 301 (1967)(Article III precludes announcing rule of law purely prospectively without application to case in which rule is announced).[21] Finally, reliance on the

21. The Court has declined to determine the constitutionality of judicial or executive action where official immunity or a good faith defense has precluded relief. See, e.g., Procunier v.

magistrate's assessment alone, without possibility of judicial review (or with review available only in outrageous cases, see U.S. Supp. Br. 43-44) could not long maintain current substantive standards of probable cause as a bulwark against unconstitutional searches and seizures, as this Court has recently recognized, Franks v. Delaware, supra.[22] Since a principal

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Navarette, 434 U.S. 555, 566 n.14 (1978); Stump v. Sparkman, supra.

Even assuming arguendo that a court admitting evidence pursuant to a good faith exception could go further and measure the magistrate's determination against the probable cause standard as well, moreover, the fact-bound nature of the probable cause determination and its inherent resistance to being captured by formulas and rules would virtually ensure that even a newly-enumerated probable cause assessment would have no operative effect, since the good faith standard would continue to protect all (or nearly all) sub-probable cause warrant searches.

22. The Franks Court observed that "[i]t is the ex parte nature of the initial hearing ... that is the reason for review." 438 U.S. at 169. So far as we are aware, not a single member of this Court since Weeks has voted to decide a case on the ground that a magistrate's erroneous determination of probable cause was beyond review, although it has been generally held that the magistrate's determination is entitled to deference

justification for affording judges and magistrates judicial immunity has been the amenability of their judicial errors to the corrective processes of appellate review, Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 354 (1872); Stump v. Sparkman, 435 U.S. at 369 (Powell, J., dissenting), abolition of review by way of exclusion would be particularly ironic. In light of our constitutional system's commitment to subjecting abridgements of liberty to adversary judicial scrutiny except in the most extraordinary circumstances, particularly where judges may have exceeded constitutional limits, Rose v. Mitchell, 443 U.S. 545 (1979), it would be unthinkable to subject valuable Fourth Amendment freedoms to the unreviewable judgments of

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see supra at 19-20, and there has of course been a modicum of disagreement about particular determinations of probable cause. Under the United States' view, Nathanson v. United States, a unanimous decision and one of the bulwarks of the Fourth Amendment, was wrongly decided.

magistrates without possibility of judicial review, especially in light of the extremely minimal requirements for magistrates issuing warrants, Shadwick v. City of Tampa, 407 U.S. 345 (1972).

Equally importantly, by directing the attention of the police to whether a magistrate could be found to sign a warrant,[23] rather than to whether probable cause sufficient to warrant a magistrate's signature was present, the proposed good faith exception would reverse the present incentive "in close cases ... to err on the side of constitutional behavior." United States v. Johnson, 73 L.Ed.2d 202, 221 (1982); see also Owen v. City of Independence, 445 U.S. 622, 652-56 (1980). As in Johnson, the rule sought by the United States would "encourage police or other courts to disregard the plain purport of [the Court's

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23. There is substantial evidence that magistrate shopping is not uncommon. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith, 43 U.Pitt.L.Rev. 307, 351 (1982).

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decisions and to adopt a let's-wait-until-it's-decided approach". Id. (citation omitted). Moreover, as this Court has recently observed, a rule preventing challenge to unconstitutional conduct except in the most egregious cases "could also have the deleterious effect of freezing constitutional law in its current state of development .... " Owen v. City of Independence, 445 U.S. at 651 n.33.

Application of any sub-probable cause standard a good faith exception might incorporate -- e.g., admission of evidence seized under warrants deficient under Nathanson or Aguilar, or so long as reasonable belief under Terry was present -- would be indistinguishable in practice from the continued full application of the exclusionary rule together with a corresponding relaxation of probable cause. Such a dilution of probable cause standards would perhaps be justified

by some on grounds of social policy, although many, including amici, would strongly oppose it; but it would take either amendment of the Constitution or reversal of every one of this Court's probable cause decisions from Carroll and Brinegar through United States v. Ross to accomplish such a rewriting of a fundamental aspect of our law.

II. ILLEGALLY SEIZED EVIDENCE IS INADMISSIBLE AT TRIAL EVEN WHEN THE ILLEGAL SEIZURE WAS EFFECTED IN GOOD FAITH BECAUSE (A) THE FOURTH AMENDMENT FORBIDS IT; (B) THE USE OF SUCH EVIDENCE WOULD ENCOURAGE UNLAWFUL ACTIVITY; AND (C) RECOGNITION OF A DEFENSE BASED ON IGNORANCE OF THE LAW WOULD DISCOURAGE EFFECTIVE POLICE TRAINING.

Amici have demonstrated that in cases in which the substantive definition of probable cause is at issue, no difference exists between probable cause and the objective reasonableness requires to establish a good faith defense. If, however, this Court believes that the objective reasonableness required to establish a good faith defense is less stringent than the objective reasonableness required to establish probable cause, it must confront the question of whether evidence obtained on less than probable cause may be used in contravention of the wishes of the founders.

A. The Use At Trial Of Evidence Obtained On Less Than Probable Cause Violates The Fourth Amendment.

It is a measure of what we may have lost as a free people that the question of whether unconstitutionally seized evidence may be utilized in a criminal case has been reduced in the minds of many to a strictly utilitarian equation: as long as the benefits of violating the Constitution outweigh the burdens,

the government asserts, the government may rely on "socially efficient" unconstitutional behavior to obtain a criminal conviction. Such an equation cannot, however, be the sole determinant of whether or not the government elects to benefit from its own lawless activity.[24] Both the Fourth Amendment and the imperative of judicial integrity forbids the courts -- and the government -- from becoming accessories to even a good faith violation of the Constitution. One can hardly expect widespread voluntary compliance with law when the government itself is licensed to break it.

It is not merely the illegal seizure of evidence which the Fourth Amendment condemns, but its use as part of an evidentiary transaction commencing with the police and continuing through the prosecutor to the court itself. E.g., Olmstead v. United States, 277 U.S. 438, 468 (1978) (adherence to Weeks for constitutional violations)(Taft, C.J.); Weeks v. United States, 232 U.S. at 391-92.[25] Since the

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24. Neither Weeks v. United States, supra, nor its early progeny rested on deterrence to the slightest degree. No mention of deterrence to support the rule appears in this Court's cases until Wolf v. Colorado, supra, and even in Wolf, the concept of deterrence ironically appeared in the Court's discussion of why the exclusionary rule was not being applied to the states:

> Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn ... a State's reliance upon other methods which, if consistently enforced, would be equally effective.

338 U.S. at 31 (emphasis added). Of course, the premise of Mapp, unchallenged to this day, is that such alternative remedies do not exist in any state in the union, as the United States apparently concedes. U.S. Supp. Br. 63-64.

25. Chief Justice Taft's majority opinion in Olmstead differed from Justices Holmes' and Brandei in refusing to apply the exclusionary rule to evidence seized merely illegally, but not unconstitutionally. The holding in Weeks, accepted by the entire Olmstead Court, was as follows:

> The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people ... against all unreasonable searches and seizures under the guise

the government asserts, the government may rely on "socially efficient" unconstitutional behavior to obtain a criminal conviction. Such an equation cannot, however, be the sole determinant of whether or not the government elects to benefit from its own lawless activity.[24] Both the Fourth Amendment and the imperative of judicial integrity forbids the courts -- and the government -- from becoming accessories to even a good faith violation of the Constitution. One can hardly expect widespread voluntary compliance with law when the government itself is licensed to break it.

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court is integral to the transaction, it cannot insulate itself from responsibility for the unconstitutional nature of the evidence. As Chief Justice Traynor observed:

> When ... the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its hand and by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the government acting as judge.

People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

Accordingly, so far as a discussion of illegally seized evidence against a defendant whose rights were violated by the seizure is concerned, the Constitution itself requires exclusion. Weeks

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of law. This protection reaches all alike ... and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws.

v. United States, 232 U.S. at 391-92; Olmstead v. United States, 277 U.S. at 468; Mapp v. Ohio, 367 U.S. at 655, 657, 660.[26]

Although some have argued that the Court has departed from the views of the Weeks, Olmstead, and Mapp Courts, and have suggested that the judiciary may participate in a tainted evidentiary transaction which commenced with an illegal search of a defendant, the cases relied on (e.g., United States v. Calandia, 414 U.S. 338 (1973)) all involved the collateral use of illegally seized evidence, and none the use at trial for which the illegal seizure -- deliberate or not -- was undertaken. See, e.g., Stone v. Powell, 428 U.S. 465, 492-93 (1976). Amici urge that the concept of judicial integrity be reaffirmed

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26. Mapp could only have been a constitutional rule, since the Court lacks power to reverse state criminal convictions for violation of lesser norms.

as a bulwark of the Fourth Amendment, and that the Court adhere to the original understanding of Weeks. Judicial use is conceptually inseparable from evidentiary seizures because evidentiary seizures make no sense without an expectation of judicial use. The concept of evidence compels attention to the entire transaction. When any part of the government, including a court at a criminal trial, participates in an evidentiary transaction against an individual that includes a search or seizure violating his Fourth Amendment rights, it commits a constitutional wrong.

B. The Use of Illegally Seized Evidence, Even if Obtained in Good Faith, Would Encourage the Commission of Unlawful Acts.

As we have demonstrated, when use at case-in-chief is concerned, the question is not whether the costs of suppression outweigh the deterrent effect, but simply whether "the admission of evidence encourages violations of Fourth Amendment rights." United States v. Janis, 428 U.S. 433, 458 n.35; see also Stone v. Powell, 428 U.S. at 492.[27] Even if one approaches the exclusionary rule as a strict cost/benefit exercise, however, the significance of the exclusionary rule would be seriously compromised when evidence seized illegally -- whether or not in "good faith" -- is admitted as part of the government's case-in-chief.

The cost of the exclusionary rule is, of course, nothing more than doing without evidence which the founders determined should never have been obtained in

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27. By holding that "courts must not commit or encourage violations of the Constitution," the Janis Court appears to have established a constitutional requirement to exclude evidence where failure to do so would encourage unconstitutional conduct. See Janis, 428 U.S. at 458 n.35; Mertens & Wasserstrom, supra n. 3 at 386 n.100. Professor Amsterdam has discerned a similar requirement, see Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 431-433, and it is implicit even in Justice Frankfurter's opinion for the Court in Wolf v. Colorado, 338 U.S. at 31.

the first place. Thus, for example, were we to dispense with the exclusionary rule and rely upon Draconian tort and criminal penalties to deter unlawful search activity, ideally the "cost" would be the same. Police officials, fearing retribution, would refrain from conducting an illegal search, thereby depriving the system of the same evidence currently excluded by the exclusionary rule. See supra at 9-13 and infra Appendix A. As a practical matter, of course, we know that no such retributive system existed either pre-Mapp or post-Mapp, and none is likely to.[28] Thus, the cost analysis submitted by the United States is merely shorthand for the proposition that an effective mechanism should be replaced with an ineffective one because we are not prepared to bear the "cost" of the value judgments embedded in the Fourth Amendment. If, however, heretofore settled Fourth Amendment standards are to be modified, it should be by direct amendment or open judicial reexamination and not by the covert device of rendering them unenforceable.

The benefits of the exclusionary rule are obvious. First, it acts as a powerful incentive to the adoption of police procedures designed to comply with Fourth Amendment guidelines. Second, it reinforces our commitment to the founders' idea by unequivocally reaffirming our respect for the Fourth Amendment. Finally, like legal norms generally, which are enforceable whether or not the actor knows what the law is, it deters both willful and careless activity in viola-

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28. "Self-scrutiny is a lofty-ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clauses ... " Franks v. Delaware, 438 U.S. at 169 (quoting from Mapp v. [illegible] Colorado).

tion of the Fourth Amendment.[29]

The impact of a good faith defense on the benefits of the exclusionary rule is equally obvious.

First, contrary to the submission of the United States, which argues strenuously that an honest mistake such as was made by the Delaware State police "should not be met with the severe sanction of suppression,"[30] it is precisely in close cases where a good faith exception would presumably apply that this Court's enunciation of new law predictably leads to the most substantial reduction, through systemic deterrence, of unlawful activity. A recent detailed study of police reactions to Delaware v. Prouse, 440 U.S. 648 (1979) demonstrates how police departments in Washington, D.C. and Delaware responded immediately by issuing detailed new instructions to officers in the field, setting forth the rules established in Prouse and advising them to desist from present (unconstitutional) practices. Mertens & Wasserstrom, supra n.3, at 399-401. The Legal Liaison Office of the Delaware State Police (and presumably similar offices in similar states as well) disseiminates "[a]ll court decisions affecting daily police operations ... to patrol officers by similar Legal Memorandums." Police in other jurisdictions respond similarly to this Court's decisions where

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29. The proposition that the exclusionary rule cannot deter well-meaning violations is contrary to settled principles of criminal law. See, e.g., Holmes, The Common Law, 48 (1881); Lambert v. California, 355 U.S. 225, 228 (1957).

30. U.S. Supp. Br. 36. Throughout, the United States refers confusingly to the exclusionary rule as a sanction against or punishment of the individual officer. See, e.g., U.S. Supp. Br. at 30, 36. As the United States knows, however, the deterrent effect of the rule has rarely, if ever, been supported as a punishment of offending officers. Its deterrent effect is obviously found in general or systemic deterrence. See generally

good faith would have been shown.[31]

Assuming, as seems extremely reasonable, that such departmental directions lead to substantial compliance from officers in the field, police throughout the country have now abandoned an unconstitutional practice at the suppression of a single marijuana prosecution. Countless motorists have been spared violations of their constitutional rights. The rule, even where good faith is present, prevents abridgement of Fourth Amendment rights through law enforcement's institutional response to changes in Fourth Amendment law.

Moreover, a good faith exception would inhibit the very evolution of vital constitutional guidelines, since courts would inevitably focus on the fact-based issue of good faith before deciding a Fourth Amendment issue. Had a good faith exception to the exclusionary rule existed of the type proposed by the United States, the Delaware courts would undoubtedly have used it to reject Prouse's motion to suppress the marijuana which police had seized and for whose possession he had been charged, without even the occasion to decide the constitutional question; and even if the court had gone on to

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31. Mertens & Wasserstrom, supra n. 3, at 400 n.174 (reaction to Almeida-Sanchez v. United States, 413 U.S. 266 (1973)); id. at 401 n.175 (address by FBI Director Webster detailing FBI's present methods for apprising field agents of relevant Supreme Court and Court of Appeals Fourth Amendment violations.) At a post-Mapp training session, the New York Deputy Police Commissioner commented:

> 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 United States Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant -- illegally, if you will -- was admissible in state courts. So the feeling was, why bother?

N.Y. Times, April 28, 1965, p.50. See also supra at n.19 (post-Mapp experience of New York and Los Angeles). See also Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 681, 710-14 (1974)(post-Mapp increase in number of search

"decide" the constitutional question despite denial of the suppression motion, its ruling would have been merely dicta, unreviewable in this Court. See United States v. Bowen and other cases cited supra at 29. Moreover, this Court's cases make clear that no other case could have arisen in which to formulate the rule of law the suppression motion in Prouse occasioned.[32]

In short, since it is readily apparent that many of the vital protections afforded by the Fourth Amendment could never have been enunciated without exclusionary rule applying where the good faith exception advanced by the United States would have been applicable, e.g., Chimel v. California, 395 U.S. 752 (1969), overruling United States v. Rabinowitz, 339 U.S. 556 (1950) (limits of search incident to arrest); United States v. Katz, 389 U.S. 347 (1967), overruling Olmstead v. United States, 277 U.S. 438 (1928) (electronic eavesdropping); Payton v. New York, 445 U.S. 573 (1980) (warrantless entry into house for arrest); Steagald v. United States, 451 U.S. 204 (1981) (entry into third-party house upon arrest warrant), the exception must be rejected on grounds of deterrence.[33]

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32. Injunctive or declaratory relief would appear foreclosed by such cases as Rizzo v. Goode, 423 U.S. 362 (1976) and O'Shea v. Littleton, 414 U.S. 488 (1974), but see City of Los Angeles v. Lyons, No. 81-1064 (decision pending). Damages would appear barred by the good faith defense, see, e.g., Pierson v. Ray, 386 U.S. 547 (1967). See also supra at 27-28.

33. See generally Mertens & Wasserstrom, supra n.3, at 401-06. The cases cited supra, plainly refute the suggestion of the United States that the "lost decisionmaking opportunities will be confined to "grey, twilight area[s]" of Fourth Amendment law. More generally, the underlying premise -- that a good faith exception was unwise for nearly seventy years so that the courts could decide Fourth Amendment cases, but that we now have "enough law" and should now adopt the exception -- represents a Panglossian view of the law and legal development which has no support in our jurisprudence.

C. Maintenance of the Present Scope Of the Fourth Amendment Would Be Impermissible Under a Good Faith Exception. The Fourth Amendment Would Shrink to Reasonableness in Every Case, Without the Specific and Reasonably Bright-Line Rules the Court has Relied on to Cabin Police Investigation Within Constitutional Limits.

Although the Court has correctly recognized that the fundamental test of every search or seizure is its reasonableness, it has resisted relying solely on an unguided inquiry into the reasonableness of police conduct under the circumstances of individual cases. See United States v. Rabinowitz, 339 U.S. 56, 83-84 (1950)(Frankfurter, J., dissenting); Chimel v. California, 395 U.S. 752, 768 (1969), overruling United States v. Rabinowitz.[34] Under the discredited Rabinowitz approach, which left reasonableness to the unguided discretion of the trial court, "appellate courts defer to trial courts and trial courts defer to police."[35] In the absence of clear rules for police to follow, what they do will rarely be found "unreasonable", and the "right of the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." Beck v. Ohio, 379 U.S. 89, 97 (1964). Accordingly, the Court has rested the protection of the Fourth Amendment largely on a process of categorization, relying on reasonably bright lines to enable greater police compliance with the Fourth Amendment.[36]

The good faith exception suggested by the United States is wholly inconsistent with that objective, categorical approach, and would soon turn Fourth Amendment juris-

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34. Justice Frankfurter's criticism in Rabinowitz of the "facts and circumstances" approach to Fourth Amendment reasonableness has been termed the "lore of the Fourth Amendment". Amsterdam, supra n.27, at 394. See United States v. United States District Court, 407 U.S. 297, 315-16 (1972).

35. Amsterdam, supra n.27, at 394.

36. See, e.g., New York v. Belton, 453 U.S. 454 (1981); United States v. Ross, supra.

prudence into the "immense Rorschach blot"[37] that the Court has strenuously avoided. The inexorable tendency of a good faith exception to reduce present probable cause standards has already been analyzed in Point IC, supra. Equally damaged, however, would be the Court's categorical approach to the warrant requirement, which has been seen as "the very heart of the Fourth Amendment directive", United States v. United States District Court, 407 U.S. at 316. As Justice Jackson, himself a former prosecutor, long ago observed, "The extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit", Brinegar v. United States, 338 U.S. at 183 (dissenting opinion).[38]

37. Amsterdam, supra n.27 at 394.

Cases like Torres v. Puerto Rico, 442 U.S. 465 (1979), for example, would not be substantively decided under the approach of the United States. The lower courts would find the action of the searching officers who acted under legislative direction in objective good faith. Similarly, the rule established by Ybarra v. Illinois, 444 U.S. 85 (1980), could not have been settled, since, as in Torres, the officers certainly acted reasonably -- even if illegally -- in searching, under an Illinois

38. Significantly, the number of warrants issued by federal magistrates declined from 7338 in 1972 to 4756 in 1980, the very period during which the exclusionary rule began to be held not to apply beyond direct criminal trials. 1980 Annual Report of the Director of the Administrative Office of the U.S. Courts, at 140. This, during a period when the federal rules were changed to permit telephonic warrants. There is every reason to believe that this 40% drop reflects a drop in warrant applications presented to magistrates, not in grant of applications presented. By contrast, warrant applications rose sharply after Mapp, see Kamisar, On the Tactics of Police - Prosecutor Oriented Critics of the Court, 49 Cornell L.Q. 436 (1964); Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 651, 710-14 (1974).

statute, portions of the bar for which they had a warrant.

In short, the legal question settled by the courts would no longer be whether a warrant was necessary under the circumstances, a ruling which could then disseminated by law enforcement agencies with substantial practical impact, but whether police were reasonable in thinking that it was not. The scope for warrantless searches would be accordingly expanded. Reasonable arguments, of course, have been advanced against this Court's understanding and application of the warrant clause;[39] but if the present substantive and procedural requirements of the Fourth Amendment are to be relaxed, better that it be done directly, rather than indirectly as a consequence of the degree to which purportedly unchanged Fourth Amendment standards are rendered sterile through barriers to their enforcement.

39. See generally, T. Taylor, Two Studies in Constitutional Interpretation (1969).

D. The Remaining Arguments Supporting A Good Faith Exception Are Insufficient to Warrant, and Additional Considerations Militate Against, Its Acceptance.

Emphasizing the importance of maintaining settled law, of clarity, and of "respect for continuity", so far as the Fourth Amendment is concerned, particularly when so many officers in so many localities necessarily make daily decisions under the shadow of this Court's Fourth Amendment jurisprudence, Justice Frankfurter warned against

> reinforc[ing] needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance -- for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.

United States v. Rabinowitz, 339 U.S. at 86.

The approach the United States urges here would not only dramatically

reverse "the course of true law" since the Court's unanimous decision in Weeks, but would severely increase the likelihood of different results in similar cases. Judgments as to the objective good faith of officers in identical cases might well depend on the training of officers in a jurisdiction, or whether a rule of law had been locally settled. Morecver, the unifying forces of appellate review which work when the question is "what is the law?" have far less force when the question is "would a reasonable police officer (in Chicago? in rural Wyoming?) have believed his action was lawful?"

Against this background, the argument of the United States attacking Weeks and supporting creation of a good faith exception lack merit.

1. Cost

We have previously pointed out that the principal "cost" of the exclusionary rule as currently enforced to which the United States and other critics object is a cost imposed by the Fourth Amendment's substantive requirements, see supra at 41-43, and therefore not one which opponents of the exclusionary rule can properly rely on. Moreover, of course, those"costs" are not especially attributable to cases to which a good faith exception would apply and therefore, if compelling, bear on the entire exclusionary question, not to the narrower question before the Court.

Nevertheless, we briefly address the question of costs, first, to show that the evidence relied on by the United States is entirely speculative, erroneous, interested and irrelevant, and second, to show that even on its own terms that evidence fails to support the enormity of the change sought by the United States.

The leading study on costs, the GAO report, fully confirms Professor LaFave's

judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed."[40] Although the United States suggests that GAO figures for federal prosecutorial declinations for Fourth Amendment reasons are unrepresentative, a recent independent study (funded by LEAA) showed that in five localities, declinations for all due process reasons -- not just search and seizure -- ranged from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.[41]

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40. W. LaFave, Search and Seizure § 1.2 n.9 (1981 Supp.).

41. Brosi, A Cross-City Comparison of Felony Case Processing (LNSLAW 1979) at 19. Of more than 15,000 declinations for due process reasons, only one homicide was involved and no rapes. 83% of the declinations in New Orleans involved drug cases. Id.

The other conclusion drawn by the United States from the GAO report -- that "a definite relationship exists between suppression of evidence" and conviction (U.S. Br. 47) since conviction rates are lower for defendants whose suppression motions are granted -- is similarly unjustified. The GAO could not explain and declined to speculate on the reason for that statistic; and it is reasonable to assume that counsel who managed (against heavy odds) to prevail on suppression motions are more energetic, competent, and successful than those who do not.

The conclusions of the NIJ study relied on by the United States are both exceptionally misleading and seriously flawed.[42] Quoting from the report's summary, the United States claims that "4.8%, or the more than 4000 felony cases declined for prosecution [statewide] were rejected because of search and seizure problems," U.S. Supp. Br. 48, with somewhat higher figures in particular communities. Id. at n.29. Yet the relevant measure of the rule's cost is not what percent of rejected cases (86,033)

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42. We note, although the Solicitor General did not, that NIJ is a part of the Department of Justice. The NIJ study was commissioned by political appointees to support the administration's policy directives. When a request for proposals to consultants was entirely unsuccessful, NIJ undertook the study itself in extraordinary haste: it was commenced on October 1, 1982, and completed by December.

were rejected for Fourth Amendment reasons, but what percent of felony complaints (520,993) were so rejected; and on that basis, the NIJ statistics show that less than 0.8% of arrests made by police were reported by the police and prosecutors as declined for Fourth Amendent reasons.[43]

Similarly misleading is the reliance on NIJ figures concerning the re-arrest rate of those "released because their cases had been rejected for prosecution."[44] See U.S. Br. at 49. Neither the United States nor its "study" included any comparative data on re-arrest rates for those with past involvement in the criminal justice system generally; and assuming, as many studies have, that those who have been incarcerated commit more crime after release than those who have not, it would be as reasonable to support the exclusionary rule for preventing (even non-official) crime. Certainly there is no basis for linking the extraordinarily slight incidence of the exclusionary rule to free defendants to the likelihood of vel non of a defendant's future criminal conduct.[45]

Even to the minimal extent that the government's own study points to a dis-

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43. All of the data are self-reports by prosecutors; none were verified in any way. Also misleading is reliance on an NIJ figure of "30% of all felony drug arrests [rejected] because of search and seizure problems." U.S. Br. at 49. The number on which that percentage is based -- 114 cases -- is far too small to be of the slightest statistcal value.

44. Preliminarily, it should be noted that a defendant not tried on the original charge was apparently classified as released even if convicted on other (usually lesser, to be sure) charges.

45. The GAO study reported that evidence was excluded in only 1.3% of 2804 cases (36) accepted for prosecution; a suppression motion was made in only 16% of those 2804 cases, and granted in total in only 3% of the 16%.

Although we are unaware of firm evidence on the subject, reported cases made clear that suppression does not necessarily lead to a failure of prosecution. For example, the defendants in six recent cases in this Court -- Mincey v. Arizona, 437 U.S. 385 (1977); Brewer v. Williams, 430 U.S. 387 (1976)(Sixth Amendment); Franks v. Delaware, 438 U.S. 154 (1977); Davis v. Mississippi, 394 U.S. 721 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); and Coolidge v. New Hampshire, 403 U.S. 443 (1971) were all convicted on remand. See, e.g., Mertens & Wasserstrom, supra n.3, at 445.

cernible "cost", that cost is concentrated nearly wholly in drug cases; only 0.4% of the California cases declined for prosecution for search and seizure reasons involved rape and murder, and even including assault the figure rises only to 3.6%.[46] Cutting a good faith hole in the exclusionary rule for all cases so large as to render decisions like Delaware v. Prouse and Payton v. New York, supra, impossible, when the principal cost to which the United States points is concentrated in only a small fraction of cases, and not those which have led to public concern over street crime, is hardly the proportionality the United States professes to seek.[47]

In any event, since even the United States concedes that modification of the rule will not affect the crime problem to a "material extent", see U.S. Supp. Br. 50, continued reliance on the "costs" of the rule is sheer demagoguery.

2. Premium on Ignorance

Despite the United States' vigorous protestations to the contrary (U.S. Supp. Br. 57), a good faith exception would plainly put a premium on 'police ignorance'. Any departure from standards taught in the training of police in a given locality would be extremely probative, from a

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46. See also INSLAW, supra n. 41, at 19; NIJ at 12-13 (more than 70% drug-related). Significantly, all the figures relied on by the United States from the NIJ study are for arrests, not convictions, and therefore are likely to substantially overstate any "cost" involved.

Available data on suppression motions indicate that they are denied in great proportion. See U.S. Br. at 53. See also Davies, Do Criminals Due Process Principles Make a Difference?, 1982 Am. Bar Assn. Res. J. 247, 265.

47. So far as proportionality is concerned, it can hardly have any place in cases like this, that involve not a claim of a "technicial" violation, but rather the substantive standard of the Fourth Amendment. If probable cause is not present, there is no justification for a search. After Rummel v. Estelle, 445 U.S. 263 (1980), Hutto v. Davis, 70 L.Ed.2d 556 (1982), it is difficult to believe that district courts are to be set out to determine proportionality on a case-by-case basis.

defendant's point of view, of the lack of objective good faith. To the extent that departmental training materials condemned certain procedures -- say, procedures not currently judicially condemned in the local jurisdiction but struck down in other states or appellate courts -- any officer engaging in these procedures could be found not acting as a reasonably trained, cautious and prudent officer.[48] The current incentive to properly train and educate officers would be reversed.

CONCLUSION

Just last term, the Court counted it of the "greatest importance ... that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history." United States v. Ross, 72 L.Ed.2d at 593. The history of the exclusionary rule in this Court admits of no good faith exception. For that reason, and for all the other reasons set forth in this brief, such an exception should be firmly rejected by this Court.

Respectfully submitted,

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February 11, 1983

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48. Professor Kaplan rejects a good faith exception precisely because it would foster police ignorance, see Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1044 (1974), and the United States' reliance on his article in this regard (U.S. Supp. Br. 58) is inexplicable.

APPENDIX

APPENDIX

In response to Wigmore's famous criticism of the exclusionary rule, the American Bar Association published this reply by Connor Hall, a member of the Cabel County Bar in Huntington, West Virginia:

> 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 injustice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.

C. Hall, Evidence and the Fourth Amendment, 8 A.B.A.J. 646 (1922), reprinted in Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than an Empty Blessing, 62 Jud. 337, 344 (1979).

NOTES

EXCLUSIONARY RULE: *Not Extended to Deter Excessive Force in Arresting a Fleeing Nonviolent Felony Suspect—State v. Sundberg, 611 P.2d 44 (Alaska 1980)—State v. Sundberg*[1] presented an issue of first impression for the Alaska Supreme Court, namely, whether the exclusionary rule could properly be applied as a deterrent against the use of excessive force by police in arresting a fleeing nonviolent felon. The court declined the opportunity to expand the exclusionary rule to this situation. By examining the concerns of the Alaska Supreme Court, this casenote sets out arguments which advise a reconsideration of the *Sundberg* ruling.

On the night of April 30, 1978, a dispatched police officer spotted a burglary suspect, respondent Russell Sundberg, carrying a pillow case near a broken window of a pharmacy. After respondent dropped the pillow case and began running down the sidewalk, the officer pursued Sundberg for twenty feet and then shouted, "Hold it, police officer." The officer opened fire on respondent from approximately fifty yards, failing to give the warning shot required by departmental guidelines. Hit in the foot and thigh, respondent fell to the sidewalk. Drugs from the pharmacy were found in the pillow case. Cartridges found in Sundberg's jacket were the same type as those in a handgun discovered on the roof of the building housing the pharmacy. While Sundberg's fingerprints were on neither the handgun nor the cartridges, the superior court concluded that Sundberg was armed. Though the street was well lit, the prosecution offered no testimony that Sundberg reached for or discarded a weapon. Respondent moved to suppress all evidence obtained by his arrest and argued that AS 12.25.080[2] was unconstitutional if interpreted to allow the use of deadly force to arrest a fleeing nonviolent felon. Finding that the statute violated Alaska's constitutional guarantee against unreasonable searches and seizures,[3] the superior court granted a sup-

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1. 611 P.2d 44 (Alaska 1980).
2. AS 12.25.080 provides:
   If the person arrested either flees or forcibly resists after notice of intention to make the arrest, the peace officer may use all the necessary and proper means to effect the arrest.
3. ALASKA CONST. art. I, § 14 provides:
   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

pression order. The Supreme Court of Alaska reversed, refusing to apply the exclusionary rule as a sanction against the use of excessive force by police in arresting a fleeing nonviolent felon.[4]

I. The Alaska Supreme Court's Analysis

In considering the application of the exclusionary rule to the instant case, the Alaska Supreme Court focused on the constitutionality of the state statutory scheme which permits a police officer to use all force "necessary and proper" to arrest a fleeing felon.[5] By so doing, the court followed the analyses of other state and federal courts which had examined similar statutory schemes allowing the police to use deadly force to arrest felons.[6] Only one court has found such a statutory plan unconstitutional. In *Mattis v. Schnarr*,[7] the Eighth Circuit Court of Appeals held Missouri's statutory scheme unconstitutional, finding that it deprived felons of due process under the fourteenth amendment by maintaining a general presumption that all fleeing felons pose a threat to the arresting officers and the police.[8]

Alaska's statute, AS 12.25.080, permits a police officer to use all force "necessary and proper" to arrest a fleeing felon. The court questioned the constitutionality of this "over-inclusive" statute because it seemingly presumes that all fleeing felons pose a threat to the arresting officers and the public.[9] In addition, the Alaska Supreme Court acknowledged two more fundamental ob-

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It has been stated that Alaska provides broader protection against unreasonable searches than the fourth amendment of the federal Constitution since property is expressly protected under Alaska's constitution.

4. State v. Sundberg, 611 P.2d 44 (Alaska 1980).

5. *Id.* at 49-50.

6. Courts have generally upheld the constitutionality of statutes permitting deadly force in apprehending fleeing felons: Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (a Tennessee statute was not violative of the eighth amendment, was not unconstitutionally overbroad or vague, and was not violative of the fourteenth amendment); Wiley v. Memphis State Police Dep't, 548 F.2d 1247 (6th Cir. 1977), *cert. denied*, 434 U.S. 822 (a Tennessee statute was found constitutional without separate discussion of challenges based on the fourth, fifth, sixth, eighth, thirteenth, and fourteenth amendments). *See* Wolfer v. Thaler, 525 F.2d 977 (5th Cir. 1976), *cert. denied*, 425 U.S. 975 (dismissal of § 1983 action against a police officer affirmed on the ground that the Texas law had been amended after the shooting, though victim's parents had standing to sue); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975) (federal court applied state law affording privilege to use force to arrest a felon and barred an individual police officer's liability for damages in a § 1983 action). *Compare* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *reh. denied sub nom.*, Ash roft v. Mattis, 433 U.S. 915 (1977).

7. 547 F.2d 1007 (8th Cir. 1976), *reh. denied sub nom.*, Ashcroft v. Mattis, 433 U.S. 915 (1977).

8. 547 F.2d at 1019-20.

9. State v. Sundberg, 611 P.2d 44, 49-50 (Alaska 1980).

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jections against the use of deadly force to arrest nonviolent felony suspects. First, the use of such force is morally wrong and highly disproportionate to the alleged crime. Second, the deprivation of life without a trial is offensive to our conception of justice, and in particular, to our presumption of innocence.[10]

However, the court approved the use of a companion statute, AS 11.81.370,[11] which provides a standard of reasonableness for interpreting the term "necessary and proper force" as provided in AS 12.25.080. AS 11.81.370 applies the Model Penal Code policy that life should not be taken except to protect life or bodily security or to arrest one who endangers those interests.[12] Model Penal Code § 3.07(2)(b) provides that a police officer may use deadly force to arrest a felon only when the officer believes that the individual has committed a felony which "involved conduct including the use or threatened use of deadly force," or which involved "substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."[13] The philosophy behind the Model Penal Code and AS 11.81.370 departs from the traditional classifications of crime as a felony or misdemeanor, wherein the common law would only permit the use of deadly force in apprehending felons. Both the Model Penal Code and AS 11.81.370 focus instead upon balancing various interests: the need to secure suspects, the safety of the arresting officers, and the value of human life. By approving AS 11.81.370, the Alaska Supreme Court implicitly found that the stautory scheme strikes a valid balance between the rights of the suspect and interests of society by protecting the suspect's rights to life and to trial, and at the same time, safeguarding society's interests to prevent future crimes and to sustain the efficacy of the criminal justice system.

The court noted that approval of less stringent statutory standards than those provided in AS 11.81.370 would raise grave

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10. *Id.* at 50.

11. Similar to MODEL PENAL CODE § 3.07(2)(b), AS 11.81.370(a) provides:

> A peace officer in making an arrest, or terminating an escape may use deadly force only when and to the extent he reasonably believes the use of deadly force is necessary to make the arrest or terminate the escape or attempted escape from custody of a person he reasonably believes
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> (1) has committed or attempted to commit a felony which involved the use of force against a person;
>
> (2) has escaped or is attempting to escape from custody while in possession of a firearm on or about his person; or
>
> (3) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

12. *See* 35 ALI PROCEEDINGS 283-93 (1957), discussed in Comment, *The Use Of Deadly Force In The Protection Of Property Under The Model Penal Code*, 59 COLUM. L. REV. 1212, 1222 (1959).

13. MODEL PENAL CODE § 3.07(2)(b)(iv) (Proposed Official Draft, 1962).

doubts as to the constitutionality of the more relaxed statute.[14] Thus, even though the court recognized possible fourth amendment violations in applying AS 12.25.080's "necessary and proper force" to arrest a fleeing nonviolent felon without referring to AS 11.81.370's reasonableness standard, the Alaska Supreme Court rejected the application of the exclusionary rule in the instant case. The court articulated several reasons for its decision. First, the exclusionary rule is not needed since other remedies fulfill the rule's deterrent goal. Second, since the exclusionary rule is not usually applied in the fleeing felon-arrest situation, but only in a setting where the object of police efforts is to obtain evidence of criminal action. Third, invoking the exclusionary rule in the absence of a history of arrests involving excessive force by Alaskan police officers would achieve only a marginal deterrent effect. Fourth, the particular facts of the present case do not compel the imposition of the exclusionary rule.

II. Criticism of the Court's Reasoning in Refusing to Apply the Exclusionary Rule to Excessive Force Arrests

The Alaska Supreme Court considered this case as a statutory violation and not as a constitutional question. However, the court apparently weigned factors both for and against application of the exclusionary rule since the court articulated four reasons in refusing to employ the exclusionary rule in excessive force arrest situations. The court's analysis is not without shortcomings. Moreover, the court's willingness to reassess the applicability of the exclusionary rule indicates that the rule may be appropriate in the context of excessive force arrests.

By upholding a rule of substantive constitutional law which permits reasonable use of deadly force to apprehend suspects, the Alaska Supreme Court apparently subscribes to the proposition that any challenge of excessive force would necessarily be a substantive interpretation of AS 11.81.370 rather than an evidentiary issue under the exclusionary rule. Since AS 11.81.370 is constitutional, allegations of excessive force would be restricted to having a jury weigh the evidence against the statute, which provides guidelines for when a reasonable use of deadly force is necessary and proper to effect an arrest.

A remedy beyond that of following a standard of reasonableness is needed in cases where excessive police force is allegedly used to arrest a fleeing nonviolent felon. While a jury may deter-

14. State v. Sundberg, 611 P.2d 44, 50, n.16 (Alaska 1980).

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mine that unreasonable force was used to secure a suspect, this accomplishes little for the defendant, as no actual remedies are provided by Alaska's statutory scheme. Moreover, where unreasonable force is found under a fourth amendment analysis, the exclusionary rule, a remedy of the same constitutional dimensions, is appropriate. When an individual's rights against unreasonable search and seizure are violated, deterrence of such future conduct and the maintenance of judicial integrity mandate the application of the exclusionary rule.

At present, if the jury determines that unreasonable force was involved in apprehending a suspect, the suspect remains in custody and the only recourse is to pursue an individual action for damages against the arresting officer.[15] The presumption here is that all evidence would be admissible even when unreasonable force is found. However, the Alaska Supreme Court acknowledged two fundamental objections against the use of deadly force to arrest nonviolent felony suspects. In quoting a commentator, the court stated,

> The First is that use of such force merely to arrest for a nonviolent crime is grossly disproportionate and morally wrong. The Second objection is that the deprivation of life without trial is offensive to the presumption of innocence and other values central to our conception of justice. . . .[16]

These objections weigh in favor of a systematic deterrent against police violations of a suspect's due process rights by asserting the exclusionary rule and suppressing the evidence, as in the present case. The criminal justice system should not condone a law enforcement officer's failure to observe the balance between a suspect's rights to life and to trial and society's interest in preventing crime by using unneeded and unreasonable excessive force.[17]

Alaska has long applied the exclusionary rule. Even before the United States Supreme Court rendered all evidence obtained through an unlawful search and seizure inadmissible in state as well as federal trials in *Mapp v. Ohio*,[18] Alaska enforced the exclusionary rule in its territorial courts.[19] Since approving the exclu-

15. A suspect's remedies against individual police officers' violations of his/her constitutional rights are discussed later in the text.

16. Comment, *Deadly Force To Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L.L. REV. 361, 372-73 (1976).

17. *Id.* at 373-94. *Accord*, Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 366-67 (1974).

18. 367 U.S. 643 (1961).

19. United States v. Pappadementro, 6 Alaska 769 (D.C. Alaska 1922) (evidence procured from defendant's residence from unlawful entry by federal marshalls, who held warrant for defendant's arrest, inadmissible); United States v. Doumain, 7 Alaska 31 (D.C. Alaska 1923) (evidence procured from defendant's residence by a federal marshall in a warrantless search inadmissible).

sionary rule upon entering statehood,[20] the Alaska Supreme Court has explored the limits of the rule.[21] However, in the instant case, the court limited the application of the exclusionary rule where a police officer has used excessive force to arrest a nonviolent felon. The court's four reasons for this result are unconvincing.

First, the Alaska Supreme Court states that other remedies against an offending police officer are available to deter illegal police conduct: criminal sanctions, police departmental proceedings, civil rights actions, and common tort suits.[22] To the extent that other remedies are available, their focus is upon the individual police officer and their effectiveness is inconclusive.[23]

Criminal sanctions against an offending police officer are difficult for a suspect to litigate and are infrequently granted.[24] Several reasons explain the general ineffectiveness of criminal sanctions. Prosecutors, who must maintain a healthy working relationship with law enforcement agents, are not apt to file criminal charges against police officers. Criminal cases require the prosecution to prove beyond a reasonable doubt that the wrongdoing officer acted with specific intent. Juries may be reluctant to find as criminals those who are seeking to enforce the law.[25] Furthermore, criminal sanctions provided under state statutes are often minimal. Alaska's current criminal sanction against police interference with an individual's constitutional rights, AS 11.76.110, renders such illegal behavior only a misdemeanor.[26]

20. Ellison v. State, 383 P.2d 716 (Alaska 1963) (evidence procured from impounded vehicle in a warrantless search inadmissible due to its unreasonable search and seizure).

21. *See, e.g.*, State v. Glass, 583 P.2d 872 (Alaska 1978) (electronically recorded conversation inadmissible in a narcotics prosecution); Cruse v. State, 584 P.2d 1141 (Alaska 1978) (evidence stemming from independent and lawful source admissible even though it could have resulted from the unlawful search); State v. Sears, 553 P.2d 907 (Alaska 1976) (exclusionary rule not applicable in probation and parole revocation hearings since not criminal proceeding).

22. State v. Sundberg, 611 P.2d 44, 51-52 (Alaska 1980).

23. 1 W. LAFAVE, SEARCH AND SEIZURE, § 1.8(c) at 179-80 (1978).

24. Newman, *Suing The Lawbreakers: Proposal To Strengthen § 1983 Damages Remedy For Law Enforcers' Misconduct*, 87 YALE L.J. 447, 449-50 (1978); 1 W. LAFAVE, SEARCH AND SEIZURE, § 1.8(c) at 179-80 (1978). *See also* Annot., 83 A.L.R.3d 174, 224-30 (1976).

25. *Id.*

26. AS 11.76.110 provides:

Interference with Constitutional Rights.

(a) A person commits the crime of interference with constitutional rights if

(1) he injures, oppresses, threatens, or intimidates another person with intent to deprive that person of a right, privilege, or immunity in fact granted by the constitution or laws of this state;

(2) he intentionally injures, oppresses, threatens, or intimidates another person because that person has exercised or enjoyed a right, privilege, or immunity in fact granted by the constitution or laws of this state; or

(3) under color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, he intentionally deprives another of

Not only are authors and commentators in disagreement concerning the effectiveness of administrative remdies,[27] but federal courts may be barred from ordering local police departments to adopt and implement an effective police discipline system. In *Rizzo v. Goode*,[28] the United States Supreme Court reversed the district court's injunctive order which had significantly revised internal procedures of the Philadelphia police department. The Court found that the individual respondents lacked the requisite "personal stake in the outcome" since respondents' injury rested upon what an unnamed group of policemen might do in the future due to the officers' understanding of the department's disciplinary system. None of the petitioner class—the mayor, police commissioner, nor other Philadelphia city officials—had affirmatively deprived respondents of any constitutional rights by adopting a plan authorizing police misconduct. In addition, the Court adhered to the separation of powers doctrine by not asserting federal equitable power over state administration of its own law.[29] Even where a cause of action was brought under a federal statute, 42 U.S.C. § 1983, " 'the principles of equity, comity, and federalism' must nevertheless restrain a federal court."[30]

Civil suits involve direct claims by victims of official wrongdoing to secure compensation for the denial of the victims' constitutional rights. These claims are based upon either common law, such as a traditional tort action for false arrest, statutes, such as § 1983 civil rights actions authorized by Congress,[31] or the Constitution itself, such as civil tort actions against law enforcement agents for violation of fourth amendment rights.[32] In civil rights

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a right, privilege, or immunity in fact granted by the constitution or laws of this state.

At the time of the offense in the instant case AS 11.60.350 was in force, which explicitly set out the punishment for the misdemeanor as imprisonment for not more than one year, or a fine of not more than $1,000, or both.

27. *See* Schwartz, *Complaints Against The Police: Experience Of The Community Rights Division Of The Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970); Note, *The Administration Of Complaints By Civilians Against The Police*, 77 HARV. L. REV. 499 (1964).

28. 423 U.S. 362 (1976).

29. *Id.* at 379-81.

30. *Id.* at 379 (1976), citing Mitchum v. Foster, 407 U.S. 225, 243 (1972).

31. 42 U.S.C. § 1983 (Supp. III 1979) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In 1961, the Supreme Court of the United States ruled that state officials could not avoid sanctions by asserting that their actions were also prohibited by state law. Monroe v. Pape, 365 U.S. 167, 170-71 (1961), *rev'd on other grounds*, 436 U.S. 663 (1978).

32. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

actions, police defendants are afforded qualified immunity from liability based on a good faith belief in the propriety and reasonableness of their actions in accordance with statutory or administrative authority.[33] Likewise, civil tort suits against law enforcement agents for violation of fourth amendment rights are subject to the same good faith defense.

The circular reasoning of the good faith defense doctrine makes it difficult for the plaintiff-suspect to obtain a judgment against police defendants.[34] To succeed in a cause of action for an arrest in violation of a victim's fourth amendment rights, the plaintiff must prove an arrest was made without probable cause.[35] Then, an officer may assert a good faith defense that he reasonably believed he had probable cause to effect the arrest.[36] The full circle is reached because an unlawful arrest, which the plaintiff must prove, is defined as an arrest for which a prudent police officer could not reasonably believe there was probable cause. The good faith defense's anomaly is equally striking where a victim must prove the use of greater force than reasonably necessary to effect an arrest. A police department must controvert the definition of excessive force and prove necessary and reasonable force.[37] A jury is left to choose between the credibility of a plaintiff and of a police department agent.

One federal judge, Jon C. Newman,[38] stated that the § 1983 damage suit has potential as an effective deterrent against police misconduct but that it must be substantially restructured to afford the injured victim a better chance of success. Judge Newman noted the shortcomings of the § 1983 suit as a "suit brought by the wrong plaintiff against the wrong defendant, subject to the wrong

33. Pierson v. Ray, 386 U.S. 547 (1967) (in a § 1983 action, police officers are entitled to a defense of "good faith and probable cause" even though an arrest was pursuant to a statute which might subsequently be ruled unconstitutional). *See* Butz v. Economou, 438 U.S. 478 (1978) (although federal executive officials are afforded qualified immunity from damages liability as a general rule, certain officials such as administrative judges or agency attorneys and officials who serve as prosecutors in an administrative adjudication are absolutely immune).

Although Monell v. Dep't of Social Services, 436 U.S. 658 (1978), held that a city may be liable under a § 1983 action where plaintiff's injury resulted from policy or custom followed by the city, it is an open question whether use of excessive force under a statute permitting reasonable force is within a city's policy or custom. *See* Garner v. Memphis Police Dep't, 600 F.2d 52 (6th Cir. 1979) (action against municipality remanded for consideration of the above open question after *Monell*).

34. Bivens v. Six Unknown Named Agents, *on remand*, 456 F.2d 1339 (2d Cir. 1972), 403 U.S. 388 (1971). Furthermore, an open question still exists as to whether a city is liable for a *Bivens*-type action.

35. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 111-16 (1975).

36. *See* Bivens v. Six Unknown Named Agents, note 34 *supra*.

37. *See* Newman, *supra* note 24, at 460.

38. Judge, United States District Court, District of Connecticut.

defenses, litigated under the wrong burden of proof, and rewarded if successful with the wrong measure of damages."[39] In calling for congressional revision and expansion of the statute, the judge urged that the plaintiff or the "party injured" include the United States, since its own Constitution and laws are violated, and that the defendant or state police officer include his or her superiors as well as federal officers. The good faith defense is characterized at best to present confusion and at worst to defeat legitimate claims due to the doctrine's circular reasoning. The plaintiff's current burden of proof should be shifted partly to the defendant to comport with the criminal law standard of proof.[40] Present low monetary awards should be increased to provide adequate compensation for violations of constitutional rights and for any resulting detention time.[41]

However, the concern of the United States Supreme Court in its promulgation of the exclusionary rule and in its present view of the rule is not primarily with whether other remedies are available: "What remedies the defendant may have against them [police officers] we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."[42] Thus, in spite of arguments concerning the effectiveness of individual remedies, a systematic remedy such as the exclusionary rule is appropriate for fourth amendment violations.

The second reason the Alaska Supreme Court declined to apply the exclusionary rule to the instant case is that the rule is not usually invoked in the felony-arrest situation. Although the exclusionary rule has typically been applied where there is a search for static evidence, the fourth amendment prohibition against unreasonable searches applies to arrests as well.[43] The Alaska court has noted that an unlawful arrest renders a subsequent search in-

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39. *See* Newman, *supra* note 24, at 453.

40. Thus, plaintiff bears the burden of producing evidence to prove a denial of liberty by being arrested by excessive force. Plaintiff should not have to also prove a negative, that the intrusion was unwarranted. The burden of persuasion is better undertaken by defendant due to his access to such evidence. Otherwise, Judge Newman asserts, a fifty-fifty proposition is presented whereby a plaintiff may lose since a jury may tend to weigh credibility in favor of the law enforcement defendant. *Id.* at 463-64.

41. Newman, *supra* note 24, at 465.

42. Weeks v. United States, 232 U.S. 383, 398 (1914) (exclusionary rule promulgated to suppress evidence procured from warrantless search of defendant's residence).

43. United States v. Watson, 423 U.S. 411, 423 (1976) (Powell, J., concurring) (although arrest is "quintessentially a seizure", consent to search is presumed voluntary where defendant is in custody). *See also* Terry v. Ohio, 392 U.S. 1 (1968) (despite the fact that a brief detainment not amounting to an arrest is a "seizure" requiring Fourth Amendment protection and that no probable cause for an arrest or search exists, a stop and frisk is constitutionally permissible).

cident to that arrest invalid.[44] Moreover, the Alaska Supreme Court implicitly accepted the fleeing felon-arrest situation as potentially within the ambit of the exclusionary rule by stating that it would reconsider the rule's applicability in this context should other remedies prove ineffective.

Thus, it seems that the Alaska Supreme Court may be willing to address a troublesome issue which it declined to discuss in the instant case: that there is no evidence resulting from this illegal arrest to be excluded. The exclusionary rule is usually applied in cases where an illegal search and seizure is committed and all the resulting evidentiary fruit are suppressed.[45] However, respondent in the instant case dropped the pillow case before the illegal arrest. The stolen drugs in the pillow case were abandoned and are not fruits of the illegal arrest. This difficulty is compounded by the fact that probable cause to arrest is already established in a deadly force to arrest situation, and the dropped pillow case could be properly seized.[46] Hence, the court may reserve application of the exclusionary rule until a case arises which involves evidence resulting from an excessive force arrest.

Third, the Alaska Supreme Court noted that the imposition of the exclusionary rule was not called for in the absence of a history of excessive force arrests by Alaskan police officers. However, actual occurrences of excessive force arrests by Alaskan police officers are foreseeable. A recorded history of such occurrences should be unnecessary to impose a preventive measure, namely, the exclusionary rule. The premise of our legal system is to prevent injustice, not to repair it.[47]

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44. Schraff v. State, 544 P.2d 834 (Alaska 1975).

45. Wong Sun v. United States, 371 U.S. 471 (1963) ("fruits of the poisonous tree" doctrine applied to exclude evidence obtained indirectly from constitutional violations and "purged taint" exception applied to allow evidence obtained which had been attenuated from the constitutional violations). *See* Anderson v. State, 555 P.2d 251 (Alaska 1976) (pornographic material obtained while conducting a search for marijuana pursuant to a search warrant rendered inadmissible, not on a "fruit of the poisonous tree" doctrine, but on a "plain view" theory).

46. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (evidence discovered from an independent source, despite direct relation to the unconstitutional search and seizure, is admissible).

The exclusionary rule could arguably be invoked outside of the excessive force to arrest context by asserting that the search of a dropped pillow case, in the instant case, is not within the scope of a search incident to arrest. A search incident to arrest may be conducted of the person and the area within his immediate control in order to recover weapons or destructible evidence. Chimel v. California, 395 U.S. 752 (1969). Certainly a bag dropped some distance from the spot of arrest does not necessitate a search under the rationale of *Chimel*. This search also is not included within other exceptions to a general rule that a search requires a warrant: plain view, emergency situation, inventory search, consent search, or stop and frisk. For a review of search and seizure law in federal court and in Alaska state court, *see* Schraff v. State, 544 P.2d 834 (Alaska 1975).

47. *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (exclusionary rule applied as

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Finally, the Alaska Supreme Court found that the facts of the instant case did not warrant the imposition of the exclusionary rule. The court concluded that the officer had probable cause to make the arrest, acted in accordance with departmental guidelines and used a degree of force permitted by AS 12.25.080, which had not yet been reviewed by the court. There is no dispute that the officer had probable cause to arrest Sundberg. However, the officer did not act in accordance with departmental guidelines: although he did give a warning call, he failed to give a warning shot before opening fire on the suspect. Moreover, the officer opened fire when the well-lit street allowed the officer to see that Sundberg was unarmed. Although the court did not find that the facts of the present case warrant favoring the exclusionary rule in balancing the interests of society in preventing crime, a factual situation of more egregious police conduct may require the application of the exclusionary rule. An unarmed burglary suspect's rights to life and to trial should be protected from a police officer's use of excessive or deadly force to arrest him.

Underlying the Alaska Supreme Court's stated concerns is an additional reason for the court's hesitation to apply the exclusionary rule in the fleeing felon-arrest situation—the ineffectiveness of the exclusionary rule as a systematic deterrent against illegal law enforcement action. The Alaska Supreme Court's assertion that deterrence is the primary purpose of the exclusionary rule is consistent with the current Supreme Court view.[48] In *United States v. Janis*,[49] the United States Supreme Court reviewed the three major studies concerning the efficacy of the exclusionary rule[50] and concluded that each study appeared flawed.[51] The Court stated that it was in no better position to determine the deterrent effect of

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a deterrent where state officials unlawfully seized evidence to be used in a federal criminal trial).

43. United States v. Calandra, 414 U.S. 338 (1974) (deterrence of unlawful conduct would not be furthered since illegally seized evidence involved in questioning of grand jury witness could not be used at trial). United States v. Janis, 428 U.S. 433 (1976) (deterrence purpose of the exclusionary rule would not be served since documents unlawfully seized by state agents were to be used in a federal civil tax proceeding).

49. 428 U.S. 433 (1976).

50. Oaks, *Studying The Exclusionary Rule In Search And Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy And The U.S. Exclusionary Rule*, 1 J. POLICE SCI. AND AD. 36 (1973). These two studies indicate that the rule has not significantly affected police behavior and conclude that it has little or no value as a deterrent. Research more favorable to the exclusionary rule has attacked the above studies but has conceded that favorable evidence is no more conclusive: Cannon, *Is The Exclusionary Rule In Failing Health? Some New Data And A Plea Against A Precipitous Conclusion*, 62 KY. L.J. 681 (1974).

51. *See* Critique, *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 (1974).

the exclusionary rule than in 1960, on the eve of adopting the exclusionary rule for state prosecutions. At that time, all empirical evidence as to the rule's effectiveness was also inconclusive.[52] Balancing the deterrent effect of an unlawful search and seizure of documents by a state law enforcement officer against the use of the secured evidence in a federal civil tax proceeding, the Court concluded that the purpose of deterrence would not be served and consequently did not apply the exclusionary rule.[53] The continued applicability of the exclusionary rule as a deterrent against unlawful police conduct should depend upon a balancing process in which, according to one commentator,

> The deterrent efficacy of the exclusionary rule can be evaluated without resort to the notion of burdens of proof. If all laws which are justified wholly or partly on the ground that they deter undesirable conduct had to be justified by showing that they actually do deter, very little of the criminal law, at least, could meet the test. Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred. . . .[54]

The Supreme Court in *United States v. Janis* also sustained the vitality of a second, albeit subordinate purpose for the exclusionary rule, that a government should not become a party to the wrong committed by its officers.[55] In considering judicial integrity as well as the deterrence of police misconduct, the focus "must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights."[56] The words of Justice Brandeis could not be easily diluted:

> 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 imperiled 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.[57]

52. United States v. Janis, *supra* note 48, at 450-52, n.22.

53. *Id.* at 454.

54. Dworkin, *Fact Style Adjudication And The Fourth Amendment: The Limits Of Lawyering*, 48 Ind. L.J. 329, 333 (1973).

55. Alaska's Supreme Court accepted the judicial integrity rationale for the exclusionary rule in State v. Sears, 553 P.2d 907 (Alaska 1976) (Alaska's exclusionary rule does not apply in probation and parole revocation hearings).

56. United States v. Janis, 428 U.S. 433, 458, n.35 (1976).

57. Olmstead v. United States, 277 U.S. 438, 485 (1923) (Brandeis, J., dissenting).

Moreover, Justice Burger in his harsh criticism of the exclusionary rule in *Bivens v. Six Unknown Agents*[58] relented from calling for the rule's destruction until an alternative can be found.

III. Conclusion

Although the Supreme Court of Alaska accepted a statutory standard of reasonableness in this case as a remedy against excessive police force in arrest situations, the exclusionary rule should be applied as a further remedy. Where a jury determines that unreasonable force was used to secure a suspect, Alaska's statutory scheme provides no remedies. Moreover, where unreasonable force is found under a fourth amendment analysis, the exclusionary rule is appropriate since it is a remedy of constitutional dimensions. To the extent that other remedies are available to the victim who is deprived of constitutional rights, their focus is upon the individual police officer and their effectiveness is inconclusive. Practitioners should note that the court did not preclude a reconsideration of the application of the exclusionary rule in the excessive-force-to-arrest situation; an appropriate case should therefore be advanced to the court.

Where shooting a fleeing nonviolent felon to make an arrest is found an unreasonable search and seizure, all secured evidence should be suppressed. Society's interest in guaranteeing the suspect the right to life and trial should outweigh preventing crime at all costs. It is morally reprehensible and contrary to the presumption of innocence in our criminal justice system to permit a government to condone illegal action by its own officers. Since empirical evidence is inconclusive, the public should be able to at least have faith that deterrence of a government's participation in unlawful searches and seizures is effected through the application of the exclusionary rule. Chief Justice Burger's comment in his dissent in *Bivens v. Six Unknown Agents*, where an individual was afforded a civil cause of action for a federal law enforcement agent's violation of fourth amendment rights, is equally appropriate in the instant case:

> I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might

58. 403 U.S. 388 (1971) (Burger, J., dissenting).

conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket, or a shoplifter.[59]

*Velma K. Lim**

59. *Id.* at 419.

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5. *Id.* at 49
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III

During his last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:

"The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

In this case, I firmly believe that a proper "sensitivity to the legitimate interests of both State and National Governments" requires invalidation of Titles I and III of PURPA insofar as they apply to state regulatory authorities. Accordingly, I respectfully dissent from the Court's decision to uphold those portions of the statute.

UNITED STATES, Petitioner

v.

Albert ROSS, Jr.

No. 80-2209.

Argued March 1, 1982.

Decided June 1, 1982.

Defendant was convicted before the United States District Court for the District of Columbia, William R. Bryant, Chief Judge, of possession of narcotics with intent to distribute, and he appealed. The Court of Appeals, Ginsburg, Circuit Judge, 655 F.2d 1159, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Stevens, held that police officers who had legitimately stopped automobile and who had probable cause to believe that contraband was concealed somewhere within it could conduct warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since scope of warrantless search of automobile is not defined by nature of container in which the contraband is secreted, but rather, it is defined by the object of the search and places in which there is probable cause to believe that it may be found.

Reversed and remanded.

Justice Blackmun and Justice Powell filed concurring opinions.

Justice White dissented and filed opinion.

Justice Marshall dissented and filed opinion in which Justice Brennan joined.

1. Searches and Seizures ⇐7(1)

A search conducted pursuant to exception to warrant requirement applicable to searches of vehicles that are supported by probable cause is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(10)

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(10)

When a legitimate search is under way, and when its purpose and its limits have

been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks and wrapped packages, in the case of a vehicle, must give way to the interest in prompt and efficient completion of task at hand. U.S.C.A.Const.Amend. 4.

4. Searches and Seizures ⇐7(10)

Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view, but the protection afforded by the Amendment varies in different settings. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures ⇐7(10)

Individual's expectation of privacy in vehicle and its contents may not survive if probable cause is given to believe that vehicle is transporting contraband. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐3.3

The scope of warrantless search based on probable cause is no narrower, and no broader, than the scope of a search authorized by warrant supported by probable cause; only prior approval of magistrate is waived, and the search otherwise is as the magistrate could authorize. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇐8

In choosing to search without a warrant on their own assessment of probable cause, police officers lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. U.S.C.A.Const.Amend. 4.

8. Searches and Seizures ⇐7(10)

Police officers who had legitimately stopped automobile and who had probable cause to believe that contraband was concealed somewhere within it could conduct warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since scope of warrantless search of automobile is not defined by nature of container in which the contraband is secreted, but rather, is defined by the object of the search and places in which there is probable cause to believe that it may be found; overruling *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 644, and modifying *Arkansas v. Sanders*, 44 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235. U.S.C.A. Const.Amend. 4.

9. Courts ⇐90(3)

Although Supreme Court's decision that police officers with probable cause to search a vehicle may conduct a warrantless search of every part of the vehicle, including containers and packages, was inconsistent with one prior Supreme Court decision and with a portion of another prior decision, the doctrine of stare decisis did not preclude the decision since there was no court opinion supporting a single rationale for Court's judgment in the first prior case, and the Court's decision rejected only some of the reasoning in the second prior case. U.S.C. A.Const.Amend. 4.

Syllabus *

Acting on information from an informant that a described individual was selling narcotics kept in the trunk of a certain car parked at a specified location, District of Columbia police officers immediately drove to the location, found the car there, and a short while later stopped the car and arrested the driver (respondent), who matched the informant's description. One of the officers opened the car's trunk, found a closed brown paper bag, and after opening the bag, discovered glassine bags containing white powder (later determined to be heroin). The officer then drove the car to headquarters, where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Respondent was subsequently convicted of possession of heroin with intent to distribute—the heroin and currency found in the
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L.Ed.2d 235. Pp. 2165–21

(c) Where police offi
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the object of the search.

1. "The right of the people
persons, houses, papers,

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, [illegible] 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499

and currency found in the searches having been introduced in evidence after respondent's pretrial motion to suppress the evidence had been denied. The Court of Appeals reversed, holding that while the officers had probable cause to stop and search respondent's car—including its trunk—without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. Pp. 2162–2173.

(a) The "automobile exception" to the Fourth Amendment's warrant requirement established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. Pp. 2162–2164.

(b) However, the rationale justifying the automobile exception does not apply so as to permit a warrantless search of any movable container that is believed to be carrying an illicit substance and that is found in a public place—even when the container is placed in a vehicle (not otherwise believed to be carrying contraband). *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538; *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235. Pp. 2165–2167.

(c) Where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Pp. 2169–2172.

(d) The doctrine of *stare decisis* does not preclude rejection here of the holding in *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, and some of the reasoning in *Arkansas v. Sanders*, *supra*. Pp. 2172–2173.

210 U.S.App.D.C. 342, 655 F.2d 1159, reversed and remanded.

Andrew L. Frey, Washington, D. C., for petitioner.

William J. Garber, Washington, D. C., for respondent.

Justice STEVENS delivered the opinion of the Court.

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. The Court in *Carroll* did not explicitly address the scope of the search that is permissible. In this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view. We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched."[1]

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

I

In the evening of November 27, 1978, an informant who had previously proved to be reliable telephoned Detective Marcum of the District of Columbia Police Department and told him that an individual known as "Bandit" was selling narcotics kept in the trunk of a car parked at 439 Ridge Street. The informant stated that he had just observed "Bandit" complete a sale and that "Bandit" had told him that additional narcotics were in the trunk. The informant gave Marcum a detailed description of "Bandit" and stated that the car was a "purplish maroon" Chevrolet Malibu with District of Columbia license plates.

Accompanied by Detective Cassidy and Sergeant Gonzales, Marcum immediately drove to the area and found a maroon Malibu parked in front of 439 Ridge Street. A license check disclosed that the car was registered to Albert Ross; a computer check on Ross revealed that he fit the informant's description and used the alias "Bandit." In two passes through the neighborhood the officers did not observe anyone matching the informant's description. To avoid alerting persons on the street, they left the area.

The officers returned five minutes later and observed the maroon Malibu turning off Ridge Street onto Fourth Street. They pulled alongside the Malibu, noticed that the driver matched the informant's description, and stopped the car. Marcum and Cassidy told the driver—later identified as Albert Ross, the respondent in this action—to get out of the vehicle. While they searched Ross, Sergeant Gonzales discovered a bullet on the car's front seat. He searched the interior of the car and found a pistol in the glove compartment. Ross then was arrested and handcuffed. Detective Cassidy took Ross' keys and opened the trunk, where he found a closed brown paper bag. He opened the bag and discovered a number of glassine bags containing a white powder. Cassidy replaced the bag, closed the trunk, and drove the car to Headquarters.

At the police station Cassidy thoroughly searched the car. In addition to the "lunch-type" brown paper bag, Cassidy found in the trunk a zippered red leather pouch. He unzipped the pouch and discovered $3,200 in cash. The police laboratory later determined that the powder in the paper bag was heroin. No warrant was obtained.

Ross was charged with possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)[1]. Prior to trial, he moved to suppress the heroin found in the paper bag and the currency found in the leather pouch. After an evidentiary hearing, the District Court denied the motion to suppress. The heroin and currency were introduced in evidence at trial and Ross was convicted.

A three-judge panel of the Court of Appeals reversed the conviction. It held that the police had probable cause to stop and search Ross' car and that, under *Carroll v. United States*, *supra*, and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, the officers lawfully could search the automobile—including its trunk—without a warrant. The court considered separately, however, the warrantless search of the two containers found in the trunk. On the basis of *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, the court concluded that the constitutionality of a warrantless search of a container found in an automobile depends on whether the owner possesses a reasonable expectation of privacy in its contents. Applying that test, the court held that the warrantless search of the paper bag was valid but the search of the leather pouch was not. The court remanded for a new trial at which the items taken from the paper bag from the leather pouch, co

The entire Court of Appe rehear the case en banc. court rejected the panel's distinction of constitutiona isted between the two con respondent's trunk; it hel should not have opened without first obtaining court reasoned:

"No specific, well-deli called to our attention p to dispense with a warr search 'unworthy' contai we believe that a rule validity of a warrantl turn on judgments abo of a container would imp able and unmanageable and courts. For these cause the Fourth Amend persons, not just those or fastidiousness to pla containers that decisio rank in the luggage line, Fourth Amendment war forbids the warrantles closed, opaque paper b extent that it forbids opening of a small unlo

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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 th to be seized." U.S.Const.,

2. The court rejected the ment that the warrantless s pouch was justified as incid arrest. App. to Pe for Government has not c all

3. Judge Tamm, the author opinion, reiterated the view hibited the warrantless se pouch but not the search Judge Robb agreed that th pelled by *Sanders*, althoug his opinion "the right to se should include the right to found within the automob to search a lawfully arres with it the right to examin wallet and any envelope and the right to search a co ty to open and search a containers found within th

taken from the paper bag, but not those from the leather pouch, could be admitted.[2]

The entire Court of Appeals then voted to rehear the case en banc. A majority of the court rejected the panel's conclusion that a distinction of constitutional significance existed between the two containers found in respondent's trunk; it held that the police should not have opened either container without first obtaining a warrant. The court reasoned:

> "No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search 'unworthy' containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decision-makers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch." 655 F.2d 1159, 1161 (CADC 1981) (footnote omitted).

The en banc Court of Appeals considered, and rejected, the argument that it was reasonable for the police to open both the paper bag and the leather pouch because they were entitled to conduct a warrantless search of the entire vehicle in which the two containers were found. The majority concluded that this argument was foreclosed by *Sanders*.

Three dissenting judges interpreted *Sanders* differently.[3] Other courts also have read the *Sanders* opinion in different ways.[4] Moreover, disagreement concerning the proper interpretation of *Sanders* was at least partially responsible for the fact that *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, was decided last Term without a Court opinion.

There is, however, no dispute among judges about the importance of striving for clarification in this area of the law. For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law

place to be searched, and the persons or things to be seized." U.S.Const., Amdt. 4.

2. The court rejected the Government's argument that the warrantless search of the leather pouch was justified as incident to respondent's arrest. App. to Pet. for Cert. 137a. The Government has not challenged this holding.

3. Judge Tamm, the author of the original panel opinion, reiterated the view that *Sanders* prohibited the warrantless search of the leather pouch but not the search of the paper bag. Judge Robb agreed that this result was compelled by *Sanders*, although he stated that in his opinion "the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room." 655 F.2d, at 1180. Judge MacKinnon concurred with Judge Tamm that *Sanders* did not prohibit the warrantless search of the paper bag. Concerning the leather pouch, he agreed with Judge Wilkey, who dissented on the ground that *Sanders* should not be applied retroactively.

4. Many courts have held that *Sanders* requires that a warrant be obtained only for personal luggage and other "luggage-type" containers. See, *e.g.*, *United States v. Brown*, 635 F.2d 1207 (CA6 1980); *United States v. Jiminez*, 626 F.2d 39 (CA7 1980). One court has held that *Sanders* does not apply if the police have probable cause to search an entire vehicle and not merely an isolated container within it. Cf. *State v. Bible*, 389 So.2d 42 (La.1980), *remanded*, 453 U.S. 918, 101 S.Ct. 3153, 69 L.Ed.2d 1001; *State v. Hernandez*, 408 So.2d 911 (La.1981); see also *United States v. Ross*, 655 F.2d, at 1180 (Robb, J., dissenting).

enforcement. No single rule of law can resolve every conflict, but our conviction that clarification is feasible led us to grant the Government's petition for certiorari in this case and to invite the parties to address the question whether the decision in *Robbins* should be reconsidered. —— U.S. ——, 102 S.Ct. 386, 70 L.Ed.2d 205.

II

We begin with a review of the decision in *Carroll* itself. In the fall of 1921, federal prohibition agents obtained evidence that George Carroll and John Kiro were "bootleggers" who frequently traveled between Grand Rapids and Detroit in an Oldsmobile Roadster.[5] On December 15, 1921, the agents unexpectedly encountered Carroll and Kiro driving west on that route in that car. The officers gave pursuit, stopped the roadster on the highway, and directed Carroll and Kiro to get out of the car.

No contraband was visible in the front seat of the Oldsmobile and the rear portion of the roadster was closed. One of the agents raised the rumble seat but found no liquor. He raised the seat cushion and again found nothing. The officer then struck at the "lazyback" of the seat and noticed that it was "harder than upholstery ordinarily is in those backs." 267 U.S., at 174, 45 S.Ct., at 292. He tore open the seat cushion and discovered 68 bottles of gin and whiskey concealed inside. No warrant had been obtained for the search.

Carroll and Kiro were convicted of transporting intoxicating liquor in violation of the National Prohibition Act. On review of those convictions, this Court ruled that the warrantless search of the roadster was reasonable within the meaning of the Fourth Amendment. In an extensive opinion written by Chief Justice Taft, the Court held:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149, 45 S.Ct., at 283.

The Court explained at length the basis for this rule. The Court noted that historically warrantless searches of vessels, wagons, and carriages—as opposed to fixed premises such as a home or other building—had been considered reasonable by Congress. After reviewing legislation enacted by Congress between 1789 and 1799,[6] the Court stated:

> "Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151, 45 S.Ct., at 284.

5. On September 29, 1921, Carroll and Kiro met the agents in Grand Rapids and agreed to sell them three cases of whiskey. The sale was not consummated, however, possibly because Carroll learned the agents' true identity. In October, the agents discovered Carroll and Kiro driving the Oldsmobile Roadster on the road to Detroit, which was known as an active center for the introduction of illegal liquor into this country. The agents followed the roadster as far as East Lansing, but there abandoned the chase.

6. The legislation authorized customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it concealed goods subject to duty. The same legislation required a warrant for searches of dwelling places. 267 U.S., at 150–151, 45 S.Ct., at 284.

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The Court reviewed additional legislation passed by Congress[7] and again noted that

> "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153, 45 S.Ct., at 285.

Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods.[8] It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.[9]

In defining the nature of this "exception" to the general rule that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used," *id.*, at 156, 45 S.Ct., at 285, the Court in *Carroll* emphasized the importance of the requirement

7. In particular, the Court noted an 1815 statute that permitted customs officers not only to board and search vessels without a warrant "but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." *Id.*, at 151, 45 S.Ct., at 284.

8. In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

9. Subsequent cases make clear that the decision in *Carroll* was not based on the fact that the only course available to the police was an immediate search. As Justice Harlan later recognized, although a failure to *seize* a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless *search*. *Chambers v. Maroney*, 399 U.S. 42, 62–64, 90 S.Ct. 1975, 1986–1987, 26 L.Ed.2d 419 (opinion of Harlan, J.). The Court in *Chambers*, however—with only Justice Harlan dissenting—refused to adopt a rule that would permit a warrantless seizure but prohibit a warrantless search. The Court held that if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney*, 399 U.S., at 52, 90 S.Ct., at 1981.

The Court also has held that if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded. *Chambers, supra; Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209. These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile—which often could leave the occupants stranded on the highway—the Court rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference.

that officers have probable cause to believe that the vehicle contains contraband.

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 153–154, 45 S.Ct., at 285.

Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. "'[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.'" *Id.*, at 161–162, 45 S.Ct., at 288 (quoting *Director General v. Kastenbaum*, 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146).[10]

[1] In short, the exception to the warrant requirement established in *Carroll* —the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause.[11] In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.[12]

10. After reviewing the relevant authorities at some length, the Court concluded that the probable cause requirement was satisfied in the case before it. The Court held that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.*, 267 U.S., at 162, 45 S.Ct., at 288. Cf. *Brinegar v. United States*, 338 U.S. 160, 176–177, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879; *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134.

11. See *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629; *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538; *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419; *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209; *Colorado v. Bannister*, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1.

Warrantless searches of automobiles have been upheld in a variety of factual contexts quite different from that presented in *Carroll*. Cf. *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730; *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706; *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. Many of these searches do not require a showing of probable cause that the vehicle contains contraband. We are not called upon—and do not—consider in this case the scope of the warrantless search that is permitted in these cases.

12. As the Court in *Carroll* concluded:

"We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* [*v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652] and *Amos* [*v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654] cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them." 267 U.S., at 156, 45 S.Ct., at 286.

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III

The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance. That argument, however, was squarely rejected in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538.

Chadwick involved the warrantless search of a 200-pound footlocker secured with two padlocks. Federal railroad officials in San Diego became suspicious when they noticed that a brown footlocker loaded onto a train bound for Boston was unusually heavy and leaking talcum powder, a substance often used to mask the odor of marijuana. Narcotics agents met the train in Boston and a trained police dog signaled the presence of a controlled substance inside the footlocker. The agents did not seize the footlocker, however, at this time; they waited until respondent Chadwick arrived and the footlocker was placed in the trunk of Chadwick's automobile. Before the engine was started, the officers arrested Chadwick and his two companions. The agents then removed the footlocker to a secured place, opened it without a warrant, and discovered a large quantity of marijuana.

In a subsequent criminal proceeding, Chadwick claimed that the warrantless search of the footlocker violated the Fourth Amendment. In the District Court, the Government argued that as soon as the footlocker was placed in the automobile a warrantless search was permissible under *Carroll*. The District Court rejected that argument,[13] and the Government did not pursue it on appeal.[14] Rather, the Government contended in this Court that the warrant requirement of the Fourth Amendment applied only to searches of homes and other "core" areas of privacy. The Court unanimously rejected that contention.[15] Writing for the Court, THE CHIEF JUSTICE stated:

> "[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause al searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of responden's' footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." 433 U.S., at 8–9, 97 S.Ct., at 2481–2482 (footnote omitted).

The Court in *Chadwick* specifically rejected the argument that the warrantless search was "reasonable" because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in

13. The District Court noted:

> "In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in [the federal building]. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of an automobile's open trunk." *United States v. Chadwick*, 393 F.Supp. 763, 772 (Mass.1975).

14. This Court specifically noted: "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes." 433 U.S., at 11–12, 97 S.Ct., at 2483–2484.

15. See *id.*, at 17, 97 S.Ct., at 2486 (BLACKMUN, J., dissenting).

an automobile," *id.*, at 13, 97 S.Ct., at 2484, and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.*, at [illegible] n. 7, 97 S.Ct., at 2484, n.7. In ruling that the warrantless search of the footlocker was unjustified, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant. Cf. *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877; *United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282. In sum, the Court in *Chadwick* declined to extend the rationale of the "automobile exception" to permit a warrantless search of any movable container found in a public place.[16]

The facts in *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, were similar to those in *Chadwick*. In *Sanders*, a Little Rock police officer received information from a reliable informant that Sanders would arrive at the local airport on a specified flight that afternoon carrying a green suitcase containing marijuana. The officer went to the airport. Sanders arrived on schedule and retrieved a green suitcase from the airline baggage service. Sanders gave the suitcase to a waiting companion who placed it in the trunk of a taxi. Sanders and his companion drove off in the cab; police officers followed and stopped the taxi several blocks from the airport. The officers opened the trunk, seized the suitcase, and searched it on the scene without a warrant. As predicted, the suitcase contained marijuana.

The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth Amendment, and this Court affirmed. As in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable; the police had probable cause to seize the suitcase before it was placed in the trunk of the cab and did not have probable cause to search the taxi itself.[17] Since the suitcase had been placed in the trunk, no danger existed that its contents could have been secreted elsewhere in the vehicle.[18] As THE CHIEF JUSTICE noted in his opinion concurring in the judgment:

"Because the police officers had probable cause to believe that respondent's green suitcase contained marijuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States v. Chadwick*, 433 U.S. 1 [97 S.Ct. 2476, 53 L.Ed.2d 538] (1977).

. . . . .

Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the

16. The Court concluded that there is a significant difference between the seizure of a sealed package and a subsequent search of its contents; the search of the container in that case was "a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker." *Id.*, 433 U.S., at 13, n. 8, 97 S.Ct., at 2485, n. 8. A temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual—and without as great a burden on the police—as in the case of the seizure of an automobile. See n. 9, *supra*.

17. The Arkansas Supreme Court carefully reviewed the facts of the case and concluded: "The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it." *Sanders v. State*, 262 Ark. 595, 599, 559 S.W.2d 704, 706 (1977). The court also noted: "The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental." *Id.*, at 600, n. 2, 559 S.W.2d, at 706.

18. Moreover, none of the practical difficulties associated with the detention of a vehicle on a public highway that made the immediate search in *Carroll* reasonable could justify an immediate search of the suitcase, since the officers had no interest in detaining the taxi or its driver.

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suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more." *Id.*, at 766–767, 99 S.Ct., at 2594.

The Court in *Sanders* did not, however, rest its decision solely on the authority of *Chadwick*. In rejecting the State's argument that the warrantless search of the suitcase was justified on the ground that it had been taken from an automobile lawfully stopped on the street, the Court broadly suggested that a warrantless search of a container found in an automobile could never be sustained as part of a warrantless search of the automobile itself.[19] The Court did not suggest that it mattered whether probable cause existed to search the entire vehicle. It is clear, however, that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter.

Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, however, was a case in which suspicion was not directed at a specific container. In that case the Court for the first time was forced to consider whether police officers who are entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. In the early morning of January 5, 1975, police officers stopped Robbins' station wagon because he was driving erratically. Robbins got out of the car, but later returned to obtain the vehicle's registration papers. When he opened the car door, the officers smelled marijuana smoke. One of the officers searched Robbins and discovered a vial of liquid; in a search of the interior of the car the officer found marijuana. The police officers then opened the tailgate of the station wagon and raised the cover of a recessed luggage compartment. In the compartment they found two packages wrapped in green opaque plastic. The police unwrapped the packages and discovered a large amount of marijuana in each.

Robbins was charged with various drug offenses and moved to suppress the contents of the plastic packages. The California Court of Appeal held that "[s]earch of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him"[20] and that the warrantless search of the packages was justified because "the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents." 103 Cal.App.3d 34, 40, 162 Cal.Rptr. 780, 783 (1980).

This Court reversed. Writing for a plurality, Justice Stewart rejected the argument that the outward appearance of the packages precluded Robbins from having a reasonable expectation of privacy in their contents. He also squarely rejected the argument that there is a constitutional distinction between searches of luggage and searches of "less worthy" containers. Justice Stewart reasoned that all containers are equally protected by the Fourth Amendment unless their contents are in plain view. The plurality concluded that

19. The Court stated that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U.S., at 764, n. 13, 99 S.Ct., at 2593, n. 13. This general rule was limited only by the observation that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Ibid.*

20. 103 Cal.App.3d 34, 39, 162 Cal.Rptr. 780, 782 (1980).

the warrantless search was impermissible because *Chadwick* and *Sanders* had established that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 453 U.S., at 425, 101 S.Ct., at 2845.

In a concurring opinion, Justice Powell, the author of the Court's opinion in *Sanders*, stated that "[t]he plurality's approach strains the rationales of our prior cases and imposes substantial burdens on law enforcement without vindicating any significant values of privacy." *Id.*, at 429, 101 S.Ct., at 2847.[21] He noted that possibly "the controlling question should be the scope of the automobile exception to the warrant requirement," *id.*, at 435, 101 S.Ct., at 2850, and explained that under that view

> "when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post*, at 451 and n. 13 [101 S.Ct., at 2859 and n.13] (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders*, neither of which is an 'automobile case,' because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile." *Ibid.*

The parties in *Robbins* had not pressed that argument, however, and Justice POWELL concluded that institutional constraints made it inappropriate to re-examine basic doctrine without full adversary presentation. He concurred in the judgment, since it was supported—although not compelled—by the Court's opinion in *Sanders*, and stated that a future case might present a better opportunity for thorough consideration of the basic principles in this troubled area.

That case has arrived. Unlike *Chadwick* and *Sanders*, in this case police officers had probable cause to search respondent's entire vehicle.[22] Unlike *Robbins*, in this case the parties have squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle. We now address that question.

21. "While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigar box or a Dixie cup in the course of a probable cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain a warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." 453 U.S., at 433–434, 101 S.Ct., at 2849–2850 (POWELL, J., concurring).

The substantial burdens on law enforcement identified by Justice POWELL would, of course, not be affected by the character of the container found during an automobile search. No comparable practical problems arise when the official suspicion is confined to a particular piece of luggage, as in *Chadwick* and *Sanders*. Cf. n. 19, *supra*.

22. The en banc Court of Appeals stated that "[b]ased on the tip the police received, Ross's car was properly stopped and searched, and the pouch and bag were properly seized." 655 F.2d, at 1168 (footnote omitted). The court explained:

"[W]e believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." *Id.*, at 1168, n. 22.

The court further noted that "[i]n this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified." *Id.*, at 1166.

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IV

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Its answer is determined by the scope of the search that is authorized by the exception to the warrant requirement set forth in *Carroll*.

IV

In *Carroll* itself, the whiskey that the prohibition agents seized was not in plain view. It was discovered only after an officer opened the rumble seat and tore open the upholstery of the lazyback. The Court did not find the scope of the search unreasonable. Having stopped Carroll and Kiro on a public road and subjected them to the indignity of a vehicle search—which the Court found to be a reasonable intrusion on their privacy because it was based on probable cause that their vehicle was transporting contraband—prohibition agents were entitled to tear open a portion of the roadster itself. The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.

In *Chambers v. Maroney* the police found weapons and stolen property "concealed in a compartment under the dashboard." 399 U.S., at 44, 90 S.Ct., at 1977. No suggestion was made that the scope of the search was impermissible. It would be illogical to assume that the outcome of *Chambers*—or the outcome of *Carroll* itself—would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

In its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile. In *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629, the Court upheld a warrantless seizure of whiskey found during a search of an automobile, some of which was discovered in "whiskey bags" that could have contained other goods.[23] In *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151, federal officers seized and searched packages of unstamped liquor found in the trunk of an automobile searched without a warrant. As described by a police officer who participated in the search: "I turned the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper and tied with twine; I think somewhere around thirty packages, each one containing six bottles."[24] In these cases it was not contended that police officers needed a warrant to open the whiskey bags or to unwrap the brown paper packages. These decisions nevertheless "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States v. Deveaux*, 5 Cranch 61, 88, 3 L.Ed. 38 (Marshall, C. J.). The fact that no such argument was even made illuminates the profession's understanding of the scope of the search permitted under *Carroll*. Indeed, prior to the decisions in *Chadwick* and *Sanders*, courts routinely had held that containers and

23. At the suppression hearing, defense counsel asked the police officer who had conducted the search: "Isn't it possible to put other goods in a bag that has the resemblance of a whiskey bag?" The officer responded: "I suppose it is. I did not think of that at that time. I knew it was whiskey, I was sure it was." App., O.T. 1930, No. 477, p. 27.

24. App., O.T.1938, No. 49, p. 23. The brief of then Solicitor General Robert Jackson noted that the items searched "were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted." Brief for United States, O.T.1938, No. 49, p. 6.

packages found during a legitimate warrantless search of an automobile also could be searched without a warrant.[25]

As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history. It is therefore significant that the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle. Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.[26] The Court in *Carroll* held that "contraband goods *concealed* and illegally transported in an automobile or other vehicle may be searched for without a warrant." 267 U.S., at 153, 45 S.Ct., at 285 (emphasis added). As we noted in *Henry v. United States*, 361 U.S. 98, 104, 80 S.Ct. 168, 172, 4 L.Ed.2d 134, the decision in *Carroll* "merely relaxed the requirements for a warrant on grounds of impracticability." It neither broadened nor limited the scope of a lawful search based on probable cause.

[2, 3] A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.[27] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient comple at hand.[28]

This rule applies equally t as indeed we believe it must which the Court was in virtu agreement in *Robbins* was t tional distinction between "unworthy" containers woul Even though such a disti could evolve in a series of paper bags, locked trunks, and orange crates were pla of the line or the other,[30] t pose of the Fourth Amendi such a distinction. For ju frail cottage in the kingdo entitled to the same guaran as the most majestic mansio a traveler who carries a to few articles of clothing in knotted scarf claim an conceal his possessions from tion as the sophisticated exe locked attaché case.

[4] As Justice Stewart bins, the Fourth Amendmen

25. See, *e.g.*, *United States v. Soriano*, 497 F.2d 147, 149–150 (CA5 1974) (en banc); *United States v. Vento*, 533 F.2d 838, 867, n. 101 (CA3 1976); *United States v. Tramunti*, 513 F.2d 1087, 1104 (CA2 1975); *United States v. Issod*, 508 F.2d 990, 993 (CA7 1974); *United States v. Evans*, 481 F.2d 990, 994 (CA9 1973); *United States v. Bowman*, 487 F.2d 1229 (CA10 1973). Many courts continued to apply this rule following the decision in *Chadwick*. Cf. *United States v. Milhollan*, 599 F.2d 518, 526–527 (CA3 1979); *United States v. Gaultney*, 581 F.2d 1137, 1144–1145 (CA5 1978); *United States v. Finnegan*, 568 F.2d 637, 640–641 (CA9 1977). In ruling that police could search luggage and other containers found during a legitimate warrantless search of an automobile, courts often assumed that the "automobile exception" of *Carroll* applied whenever a container in an automobile was believed to contain contraband. That view, of course, has since been qualified by *Chadwick* and *Sanders*.

26. It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise. See nn. 6 and 7, *supra*. Presumably such merchandise was shipped then in containers of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country—whether contraband was transported in a horse drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

27. In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes:

"Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" 2 LaFave, Search and Seizure 152 (1978) (quoting *Massey v. Commonwealth*, 305 S.W.2d 755, 756 (Ky.1957)).

28. The practical consideratio warrantless search of an aut to apply until the entire searc ble and its contents has been gually, the entire vehicle its upholstery) could be searche rant, with all wrapped article found during that search then trate. But prohibiting police i mediately a container in which search is most likely to be fo forcing them first to comb t would actually exacerbate the vacy interests. Moreover, un itself was opened the police certain that the contraband w a yet undiscovered portion of in every case in which a cont the vehicle would need to be warrant was obtained. Such would be directly inconsistent ale supporting the decisions *Chambers*. Cf. nn. 19 and 22,

29. Cf. 453 U.S., at 426–427, 10 2846 (plurality opinion); *id.*, a at 2851 (BLACKMUN, J., dis 443, 101 S.Ct., at 2854 (REH senting); *id.*, at 447, 101 S.Ct VENS, J., dissenting).

prompt and efficient completion of the task at hand.[28]

This rule applies equally to all containers, as indeed we believe it must. One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper.[29] Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other,[30] the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,[31] so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

[4] As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view. 453 U.S., at 427, 101 S.Ct., at 2846 (plurality opinion). But the protection afforded by the Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents. A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause.

[5–7] In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a

28. The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* and *Chambers*. Cf. nn. 19 and 22, *supra*.

29. Cf. 453 U.S., at 426–427, 101 S.Ct., at 2845–2846 (plurality opinion); *id.*, at 436, 101 S.Ct., at 2851 (BLACKMUN, J., dissenting); *id.*, at 443, 101 S.Ct., at 2854 (REHNQUIST, J., dissenting); *id.*, at 447, 101 S.Ct., at 2856 (STEVENS, J., dissenting).

30. If the distinction is based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy, however, the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked "private" might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances.

31. "'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dares not cross the threshold of the ruined tenement!'" *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332 (quoting remarks attributed to William Pitt); cf. *Payton v. New York*, 445 U.S. 573, 601 n. 54, 100 S.Ct. 1371, 1388 n. 54, 63 L.Ed.2d 639.

movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which—in light of *Carroll*—does not itself require the prior approval of a magistrate. The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.[32]

[8] The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

V

[9] Our decision today is inconsistent with the disposition in *Robbins v. California* and with the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins* relied. Nevertheless, the doctrine of *stare decisis* does not preclude this action. Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case; although we reject the precise holding in *Robbins*, there was no Court opinion supporting a single rationale for its judgment and the reasoning we adopt today was not presented by the parties in that case. Moreover, it is clear that no legitimate reliance interest can be frustrated by our decision today.[33] Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history.

We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290:

> "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 [88 S.Ct. 507, 514, 19 L.Ed.2d 576] (footnotes omitted)."

The exception recognized in *Carroll* is unquestionably one that is "specifically established and well-delineated." We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

32. In choosing to search without a warrant on their own assessment of probable cause, police officers of course lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. Cf. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. Although an officer may establish that he acted in good faith in conducting the search by other evidence, a warrant issued by a magistrate normally suffices to establish it.

33. Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate.

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It is so ordered.

Justice BLACKMUN, co

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The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring.

My dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation in what is rightly described as "this troubled area." *Ante*, at 2168. See *United States v. Chadwick*, 433 U.S. 1, 17, 97 S.Ct. 2476, 2486, 53 L.Ed.2d 538 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 768, 99 S.Ct. 2586, 2595, 61 L.Ed.2d 235 (1979); *Robbins v. California*, 453 U.S. 420, 436, 101 S.Ct. 2841, 2851, 69 L.Ed.2d 744 (1981).

I adhere to the views expressed in those dissents. It is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established. Justice STEVENS' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed. In order to have an authoritative ruling, I join the Court's opinion and judgment.

Justice POWELL, concurring.

In my opinion in *Robbins v. California*, 453 U.S. 420, 429, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744 (1981), concurring in the judgment, I stated that the judgment was justified, though not compelled, by the Court's opinion in *Arkansas v. Sander*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). I did not agree, however, with the "bright line" rule articulated by the plurality opinion. Rather, I repeated the view I long have held that one's "reasonable expectation of privacy" is a particularly relevant factor in determining the validity of a warrantless search. I have recognized, that with respect to automobiles in general, this expectation can be only a limited one. See *Arkansas v. Sanders, supra*, at 761, 99 S.Ct., at 2591; *Almeida-Sanchez v. United States*, 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (POWELL, J., concurring). I continue to think that in many situations one's reasonable expectation of privacy may be a decisive factor in a search case.

It became evident last Term, however, from the five opinions written in *Robbins* – in none of which THE CHIEF JUSTICE joined—that it is essential to have a Court opinion in *automobile* search cases that provides "specific guidance to police and courts in this reoccurring situation". *Robbins v. California*, 453 U.S., at 435, 101 S.Ct., at 2850 (POWELL, J., concurring). The Court's opinion today, written by Justice STEVENS and now joined by four other Justices, will afford this needed guidance. It is fair also to say that, given *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the Court's decision does not depart substantially from Fourth Amendment doctrine in automobile cases. Moreover, in enunciating a readily understood and applied rule, today's decision is consistent with the similar step taken last Term in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

I join the Court's opinion.

Justice WHITE, dissenting:

I would not overrule *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981). For the reasons stated by Justice Stewart in that case, I would affirm the judgment of the Court of Appeals. I also agree with much of Justice Marshall's dissent in this case.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself.[1] By equating a police officer's estimation of probable cause with a magistrate's, the Court utterly disregards the value of a neutral and detached magistrate. For as we recently, and unanimously, reaffirmed:

"The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Shadwick v. City of Tampa*, 407 U.S. 345, 350, 92 S.Ct. 2119, 2122, 32 L.Ed.2d 783 (1972), citing *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

A police officer on the beat hardly satisfies these standards. In adopting today's new rule, the majority opinion shows contempt for these Fourth Amendment values, ignores this Court's precedents, is internally inconsistent, and produces anomalous and unjust consequences. I therefore dissent.

I

According to the majority, whenever police have probable cause to believe that contraband may be found within an automobile that they have stopped on the highway,[1] they may search not only the automobile but also any container found inside it, without obtaining a warrant. The scope of the search, we are told, is as broad as a magistrate could authorize in a warrant to search the automobile. The majority makes little attempt to justify this rule in terms of recognized Fourth Amendment values. The Court simply ignores the critical function that a magistrate serves. And although the Court purports to rely on the mobility of an automobile and the impracticability of obtaining a warrant, it never explains why these concerns permit the warrantless search of a *container*, which can easily be seized and immobilized while police are obtaining a warrant.

The new rule adopted by the Court today is completely incompatible with established Fourth Amendment principles, and takes a first step toward an unprecedented "probable cause" exception to the warrant requirement. In my view, under accepted standards, the warrantless search of the container in this case clearly violates the Fourth Amendment.

A

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The warrant requirement is crucial to protecting Fourth Amendment rights because of the importance of having the probable cause determination made in the first instance by a neutral and detached magistrate. Time and again, we have emphasized that the warrant requirement provides a number of protections that a post-hoc judicial evaluation of a policeman's probable cause does not.

The requirement of prior review by a detached and neutral magistrate limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all. See *United States v. United States District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972); *Abel v. United States*, 362 U.S. 217, 252, 80 S.Ct. 683, 703, 4 L.Ed.2d 668 (1959) (Justice BRENNAN, with whom Chief Justice Warren, Justice Bla Douglas join, dissenting) may also "prevent hindsig the evaluation of the rea search or seizure." *Unite tinez-Fuerte*, 428 U.S. 54 3074, 3086, 49 L.Ed.2d 1116 *Beck v. Ohio*, 379 U.S. 89, 228, 13 L.Ed.2d 142 (1964) even if a magistrate would the search that the police interposition of a magistrat ment reassures the public process of law has been res

"The point of the Four which often is not gras officers, is not that it den ment the support of the which reasonable men dence. Its protection co ing that those inferences neutral and detached ma of being judged by the of the often competitive en reting out crime." *John States*, 333 U.S. 10, 13–1 368–369, 92 L.Ed. 436 (19

See also *Marshall v. Barlow'* 307, 323, 98 S.Ct. 1816, 1825, (1978); *United States v. Un trict Court*, 407 U.S., at 32 2138. The safeguards embod rant requirement apply as automobile searches as to an

Our cases do recognize a tion to the warrant requirem automobile searches. Throu sions, two major considerati advanced to justify the aut tion to the warrant requirem upheld only those searches th justified by those considerati

First, these searches have on the basis of the exigency of the automobile. See, e.g.

1. The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

2. The fact that the police are remove the occupants from th remove the justification for search. If police could not com ate search of a stopped automo often be left with the difficult

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tice Warren, Justice Black, and Justice Douglas join, dissenting). Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976); see also *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964). Furthermore, even if a magistrate would have authorized the search that the police conducted, the interposition of a magistrate's neutral judgment reassures the public that the orderly process of law has been respected:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 368–369, 92 L.Ed. 436 (1948).

See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1825, 56 L.Ed.2d 305 (1978); *United States v. United States District Court*, 407 U.S., at 321, 92 S.Ct., at 2138. The safeguards embodied in the warrant requirement apply as forcefully to automobile searches as to any others.

Our cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Throughout our decisions, two major considerations have been advanced to justify the automobile exception to the warrant requirement. We have upheld only those searches that are actually justified by those considerations.

First, these searches have been justified on the basis of the exigency of the mobility of the automobile. See, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This "mobility" rationale is something of a misnomer, cf. *Cady v. Dombrowski*, 413 U.S. 433, 442–443, 93 S.Ct. 2523, 2528–2529, 37 L.Ed.2d 706 (1973), since the police ordinarily can remove the car's occupants and secure the vehicle on the spot. However, the inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession.[2] This alternative creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court's automobile exception to the warrant requirement. See *Chambers*, 399 U.S., at 51, n. 9, 90 S.Ct., at 1981, n. 9.

In many cases, however, the police will, prior to searching the car, have cause to arrest the occupants and bring them to the station for booking. In this situation, the police can ordinarily seize the automobile and bring it to the station. Because the vehicle is now in the exclusive control of the authorities, any subsequent search cannot be justified by the mobility of the car. Rather, an immediate warrantless search of the vehicle is permitted because of the second major justification for the automobile exception: the diminished expectation of privacy in an automobile.

Because an automobile presents much of its contents in open view to police officers who legitimately stop it on a public way, is used for travel, and is subject to significant government regulation, this Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas. See *Arkansas v. Sanders*, 442 U.S. 753, 761, 99 S.Ct. 2586, 2591, 61 L.Ed.2d 235 (1979) (collecting cases). This

2. The fact that the police are able initially to remove the occupants from the car does not remove the justification for an immediate search. If police could not conduct an immediate search of a stopped automobile, they would often be left with the difficult task of deciding what to do with the occupants while a warrant is obtained. In the case of a parked automobile, by contrast, if the automobile is unoccupied, this problem is not presented. See, *e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

justification has been invoked for warrantless automobile searches in circumstances where the exigency of mobility was clearly not present. See, *e.g.*, *South Dakota v. Opperman*, 428 U.S. 364, 367–368, 96 S.Ct. 3092, 30[illegible] 49 L.Ed.2d 1000 (1978); *Cady v. Dombrowski*, 413 U.S., at 441–442, 93 S.Ct., at 2528. By focusing on the defendant's reasonable expectation of privacy, this Court has refused to require a warrant in situations where the process of obtaining such a warrant would be more intrusive than the actual search itself. Cf. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A defendant may consider the seizure of the car a greater intrusion than an immediate search. See *Chambers*, 399 U.S., at 51–52, 90 S.Ct., at 1981. Therefore, even where police *can* bring both the defendants and the automobile to the station safely and can house the car while they seek a warrant, the police are permitted to decide whether instead to conduct an immediate search of the car. In effect, the warrantless search is permissible because a warrant requirement would not provide significant protection of the defendant's Fourth Amendment interests.

B

The majority's rule is flatly inconsistent with these established Fourth Amendment principles concerning the scope of the automobile exception and the importance of the warrant requirement. Historically, the automobile exception has been limited to those situations where its application is compelled by the justifications described above. Today, the majority makes no attempt to base its decision on these justifications. This failure is not surprising, since the traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle.

The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate. See *Sanders*, 442 U.S., at 762–766 and nn. 10, 14, 99 S.Ct., at 2592–2594 and nn. 10, 14. The lesser expectation of privacy rationale also has little force. A container, as opposed to the car itself, does not reflect diminished privacy interests. See *id.*, at 762, 764–765, 99 S.Ct., at 2592, 2593. Moreover, the practical corollary that this Court has recognized—that depriving occupants of the use of a car may be a greater intrusion than an immediate search—is of doubtful relevance here, since the owner of a container will rarely suffer significant inconvenience by being deprived of its use while a warrant is being obtained.

Ultimately, the majority unable to rely on the justifications underlying the automobile exception, simply creates a new "probable cause" exception to the warrant requirement for automobiles. We have soundly rejected attempts to create such an exception in the past, see *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and we should do so again today.

In purported reliance on *Carroll v. United States*, *supra*, the Court defines the permissible scope of a search by reference to the scope of a probable cause search that a magistrate could authorize. Under *Carroll*, however, the mobility of an automobile is what is critical to the legality of a warrantless search. Of course, *Carroll* properly confined the search to the probable cause limits that would also limit a magistrate, but it did not suggest that the search could be as *broad* as a magistrate could authorize upon a warrant. A magistrate could authorize a search encompassing containers, even though the mobility rationale does not justify such a broad search. Indeed, the Court's reasoning might have justified the search of the entire car in *Coolidge* despite the fact that the car was not "mobile" at all. Thus, in blithely suggesting that *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause," *ante*, at 2170, the majority assumes what has never been the law: that the scope of the automobile-mobility exception to the warrant requirement is as broad as the "lawful" probable cause search mobile, *i.e.*, one authorized by

The majority's sleight-of- the obvious differences betw tion served by a magistrate determination of probable c function of the automobile ex irrelevant to a magistrate's fi er the items subject to sear may be in danger of destr impractical to store, or wheth ate search would be less int seizure without a warrant. only concern is whether the cause to search them. Wher focused not on a particular it a vehicle, home, or office, t might reasonably authorize closed containers at the loc But an officer on the beat w automobile without a warra tled to conduct a broader s exigency obviating the wa After all, what justifies t search is not probable cause *able cause coupled with the automobile.* Because the s *rantless* search should deper of the justification for dis warrant, the entire premise ty's opinion fails to support

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3. The plurality stated: "[Ch ers] made clear, if it was no a closed piece of luggage fo searched car is constitutiona

quirement is as broad as the scope of a "lawful" probable cause search of an automobile, *i.e.*, one authorized by a magistrate.

The majority's sleight-of-hand ignores the obvious differences between the function served by a magistrate in making a determination of probable cause and the function of the automobile exception. It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction, or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant. A magistrate's only concern is whether there is probable cause to search them. Where suspicion has focused not on a particular item but only on a vehicle, home, or office, the magistrate might reasonably authorize a search of closed containers at the location as well. But an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies. After all, what justifies the warrantless search is not probable cause alone, but *probable cause coupled with the mobility of the automobile.* Because the scope of a *warrantless* search should depend on the scope of the justification for dispensing with a warrant, the entire premise of the majority's opinion fails to support its conclusion.

The majority's rule marks the startling assumption that a policeman's determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate. This assumption ignores a major premise of the warrant requirement—the importance of having a neutral and detached magistrate determine whether probable cause exists. See 2174–2175, *supra.* The majority's explanation that the scope of the warrantless automobile search will be "limited" to what a magistrate could authorize is thus inconsistent with our cases, which firmly establish that an on-the-spot determination of probable cause is *never* the same as a decision by a neutral and detached magistrate.

C

Our recent decisions in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *Arkansas v. Sanders*, *supra*, and *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), clearly affirm that movable containers are different from automobiles for Fourth Amendment purposes. In *Chadwick*, the Court drew a constitutional distinction between luggage and automobiles in terms of substantial differences in expectations of privacy. 433 U.S., at 12, 97 S.Ct., at 2484. Moreover, the Court held that the mobility of such containers does not justify dispensing with a warrant, since federal agents had seized the luggage and safely transferred it to their custody under their exclusive control. *Sanders* explicitly held that "the warrant requirement applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U.S., at 766, 99 S.Ct., at 2594. And *Robbins* reaffirmed the *Sanders* rationale as applied to wrapped packages found in the unlocked luggage compartment of a vehicle. 453 U.S., at 425, 101 S.Ct., at 2845.[3]

In light of these considerations, I conclude that any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile. See *Sanders*, 442 U.S., at 763–765 and n. 13, 99 S.Ct., at 2592, 2593 and n. 13; *Chadwick*, 433 U.S., at 17, n. 1, 97 S.Ct., at 2486, n. 1 (Justice BRENNAN, concurring). *Chadwick*, as the majority notes, "reaffirmed the general principle that closed packages and containers may not be searched without a warrant." *Ante*, at 2166. Although there is no need to describe the exact contours of

3. The plurality stated: "[*Chadwick* and *Sanders*] made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Robbins v. California*, 453 U.S. 420, 425, 101 S.Ct. 2841, 2845, 69 L.Ed.2d 744 (1981) (plurality opinion).

that protection in this dissenting opinion, it is clear enough that closed, opaque containers—regardless of whether they are "worthy" or are always used to store personal items—are ordinarily fully protected. Cf. *Sanders*, 442 U.S., at 764, n. 13, 99 S.Ct., at 2593, n. 13.[4]

Here, because appellant Ross had placed the evidence in question in a closed paper bag, the container could be seized, but not searched, without a warrant. No practical exigencies required the warrantless searches on the street or at the station: Ross had been arrested and was in custody when both searches occurred, and the police succeeded in transporting the bag to the station without inadvertently spilling its contents.[5]

II

In announcing its new rule, the Court purports to rely on earlier automobile search cases, especially *Carroll v. United States, supra*. The Court's approach, however, far from being "faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history," *ante*, at 2172, is plainly contrary to the letter and the spirit of our prior automobile search cases. Moreover, the new rule produces anomalous and unacceptable consequences.

A

The majority's argument that its decision is supported by our decisions in *Carroll* and *Chambers* is misplaced. The Court in *Carroll* upheld a warrantless search of an automobile for contraband on the basis of the impracticability of securing a warrant in cases involving the transportation of contraband goods. The Court did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable.[6] "In cases where the securing of a warrant is reasonably practicable, *it must be used*.... In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." *Id.*, at 156, 45 S.Ct., at 286 (emphasis added).[7] As this Court reaffirmed in *Chambers*, 399 U.S., at 50, "[n]either *Carroll, supra*, n this Court require or sugg conceivable circumstance auto even with probable ca without the extra protec that a warrant affords."

Notwithstanding the re cases, the majority argues *Chambers* support its deci tegral compartments of a ally equivalent to containe car, and because the practi the police of the *Carroll* dc largely nullified if the per a warrantless search of a not include containers and inside the vehicle." *Ante* ther of these argument First, the Court's argume warrantless searches of compartments of the car *Chambers*, while protecti tainers within the car, v cal" and "absurd," *ante*, the reason why this Court rantless searches of auto ments. Surely an integr within a car is just as mob the same practical problem as the car itself. This ca movable containers located The fact that there may be tion of privacy in both con partments is irrelevant, si rationale is not, and cannot tion for the warrantless se ments.

The Court's second argu cuses on the practical adva of the *Carroll* doctrine, f The practical considerati cerned the *Carroll* Court in culty of immobilizing a vehi rant must be obtained. Th occasion to address whe present the same practica the car itself or integral c the car. They do not. Se *Carroll* hardly suggested, a

4. This rule may present some line-drawing problems, but no greater than those presented when a movable container is in the arms of a citizen walking down the street. There is no justification for relying on marginal difficulties of definition to reject a warrant requirement in one situation but not the other.

5. The Government argues that less secure containers such as paper bags can easily spill their contents; thus, no privacy interest of the defendant is protected if police are required to seize the container and bring it to the station. Whatever the force of this argument in other contexts, here police succeeded in reclosing the bag after the initial search and transporting it to the station without incident.

6. The Court in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), seems to have assumed that the police could not arrest the occupants of the automobile, since the offense was a misdemeanor and was not deemed to have been committed in the officers' presence. See 2 W. LaFave, Search & Seizure 511 (1978). Accordingly, police were faced with an exigency often not encountered today in searches of stopped automobiles: in order to *seize* the car pending the securing of a warrant, they would have to leave the occupants stranded

7. In *Carroll*, of course, no movable *container* was searched. Although in other early cases containers may in fact have been searched, see *ante*, at 2169–2170, the parties did not litigate in this Court the question whether containers deserve separate protection.

The Court's suggestion that the absence of such an argument "illuminates the profession's understanding of the scope of the search permitted under *Carroll*," *ante*, at 2169, is an unusual approach to constitutional interpretation. I would hesitate to rely upon the "profession's understanding" of the Fourteenth Amendment or of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), in the early part of this Century as justification for not granting Negroes constitutional protection. See *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Moreover, for a number of reasons, including the broad scope of the permitted search incident to arrest prior to *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and the uncertain meaning of a "search" prior to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the profession formerly advanced different arguments against automobile searches than it advances today.

Chambers, 399 U.S., at 50, 90 S.Ct., at 1980, "[n]either *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Notwithstanding the reasoning of these cases, the majority argues that *Carroll* and *Chambers* support its decisions because integral compartments of a car are functionally equivalent to containers found within a car, and because the practical advantages to the police of the *Carroll* doctrine "would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle." *Ante*, at 2170. Neither of these arguments is persuasive. First, the Court's argument that allowing warrantless searches of certain integral compartments of the car in *Carroll* and *Chambers*, while protecting movable containers within the car, would be "illogical" and "absurd," *ante*, at 2169, ignores the reason why this Court has allowed warrantless searches of automobile compartments. Surely an integral compartment within a car is just as mobile, and presents the same practical problems of safekeeping, as the car itself. This cannot be said of movable containers located within the car. The fact that there may be a high expectation of privacy in both containers and compartments is irrelevant, since the privacy rationale is not, and cannot be, the justification for the warrantless search of compartments.

The Court's second argument, which focuses on the practical advantages to police of the *Carroll* doctrine, fares no better. The practical considerations which concerned the *Carroll* Court involved the difficulty of immobilizing a vehicle while a warrant must be obtained. The Court had no occasion to address whether *containers* present the same practical difficulties as the car itself or integral compartments of the car. They do not. See *supra*, at 2178. *Carroll* hardly suggested, as the Court implies, *ante*, at 2170, that a warrantless search is justified simply because it assists police in obtaining more evidence.

Although it can find no support for its rule in this Court's precedents or in the traditional justifications for the automobile exception, the majority offers another justification. In a footnote, the majority suggests that "practical considerations" militate against securing containers found during an automobile search and taking them to the magistrate. *Ante*, at 2171, n. 28. The Court confidently remarks: "Certainly no privacy interest is served . . . by prohibiting police from opening immediately a container in which the object of the search may most likely be found and instead forcing them first to comb the entire vehicle. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle." *Id.* The vehicle would have to be seized while a warrant was obtained, a requirement inconsistent with *Carroll* and *Chambers*. *Id.*

This explanation is unpersuasive. As this Court explained in *Sanders* and as the majority today implicitly concedes, the burden to police departments of seizing a package or personal luggage simply does not compare to the burden of seizing and safeguarding automobiles. *Sanders*, 442 U.S., at 765, n. 14, 99 S.Ct., at 2593, n. 14; *ante*, at 2165 and 2166, n. 16. Other aspects of the Court's explanation are also implausible. The search will not always require a "combing" of the entire vehicle, since police may be looking for a particular item and may discover it promptly. If, instead, they are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant's privacy; whether or not it contains contraband, the police will continue to search for new evidence. Finally, the defendant, not the police, should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant. Cf.

Sanders, 442 U.S., at 764, n. 12, 99 S.Ct., at 2593, n. 12. The more reasonable presumption, if a presumption is to replace the defendant's consent, is surely that the immediate search of a closed container will be a greater invasion of the defendant's privacy interests than a mere temporary seizure of the container.[8]

B

Finally, the majority's new rule is theoretically unsound and will create anomalous and unwarranted results. These consequences are readily apparent from the Court's attempt to reconcile its new rule with the holdings of *Chadwick* and *Sanders*.[9] The Court suggests that probable cause to search only a container does not justify a warrantless search of an automobile in which it is placed, absent reason to believe that the contents could be secreted elsewhere in the vehicle. This, the majority asserts, is an indication that the new rule is carefully limited to its justification, and is not inconsistent with *Chadwick* and *Sanders*. But why is such a container more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable cause search of an entire automobile?[10] This rule plainly has peculiar and unworkable consequences: the Government "must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located." *United States v. Ross*, 655 F.2d 1159, 1202 (CADC 1981) (en banc) (Wilkey, J., dissenting).

Alternatively, the majority may be suggesting that *Chadwick* and *Sanders* may be explained because the connection of the container to the vehicle was incidental in these two cases. That is, because police had preexisting probable cause to seize and search the containers, they were not entitled to wait until the item was placed in a vehicle to take advantage of the automobile exception. Cf. *Coolidge v. New Hampshire*, *supra*; 2 W. LaFave, Search & Seizure 519–525 (1978). I wholeheartedly agree that police cannot employ a pretext to escape Fourth Amendment prohibitions and cannot rely on an exigency that they could easily have avoided. This interpretation, however, might well be an exception that swallows up the majority's rule. In neither *Chadwick* nor *Sanders* did the Court suggest that the delay of the police was a pretext for taking advantage of the automobile exception. For all that appears, the Government may have h sons for not searching a probable cause. In any e to rely on such an uncer guishing between legiti mate searches for contai hardly indicates that t proach has brought clari of the law. *Ante*, at 453 U.S., at 435, 101 S.C POWELL, concurring i

III

The Court today ignor tion that *Chadwick* es movable containers an also rejects all of the re *Sanders*[12] and offers a that appears inconsisto See *supra*, at 2179. S effectively overruled. ambiguously overrules *Robbins*, *ante*, at 2172, avoids stating that it is itself.

The only convincing e for the majority's broad it assists police in con searches, ensuring that ers into which criminal goods will no longe ment shield. See *ant* a legitimate search the Court instructs us

8. Seizures of automobiles can be distinguished because of the greater interest of defendants in continuing possession of their means of transportation; in the case of automobiles, a seizure is more likely to be a greater intrusion than an immediate search. See *Chambers v. Maroney*, 399 U.S. 42, 51–52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970).

9. Both cases would appear to fall within the majority's new rule. In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), federal agents had probable cause to search a footlocker. Although the footlocker had been placed in the trunk of a car and the occupants were about to depart, the Court refused to rely on the automobile exception to uphold the search. (It is true that the United States did not argue in this Court that the search was justified pursuant to that exception, but the theory was hardly so novel that this Court could not have responsibly relied upon it.) In *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), too, the suitcase was mobile and police had probable cause to search it; it was carried in an automobile for several blocks before the automobile was stopped and the suitcase was seized and searched. Again, however, this Court invalidated the search.

10. In a footnote, the Court appears to suggest a more pragmatic rationale for distinguishing *Chadwick* and *Sanders*—that no practical problems comparable to those engendered by a general search of a vehicle would arise if the official suspicion is confined to a particular piece of luggage. *Ante*, at 2168, n. 21. This suggestion is illogical. A general search might disclose only a single item worth searching; conversely, pre-existing suspicion might attach to a number of items later placed in a car. Surely the protection of the warrant requirement cannot depend on a numerical count of the items subject to search.

11. Unless one of these al is adopted, the Court's the holdings in *Chadwic* only unpersuasive but ap Court's own theory. Th in each case, the connect the vehicle was simply c that the police did not h search the entire vehicl surely did have probab vehicle *for the contain* that the scope of the search is determined onl could authorize. *Ante*, found that container, ac own rule, they should search at least the conta There was probable caus was mobile in each case

Government may have had legitimate reasons for not searching as soon as they had probable cause. In any event, asking police to rely on such an uncertain line in distinguishing between legitimate and illegitimate searches for containers in automobiles hardly indicates that the majority's approach has brought clarification to this area of the law. *Ante,* at 2161; see *Robbins,* 453 U.S., at 435, 101 S.Ct., at 2850 (Justice POWELL, concurring in the judgment).[11]

III

The Court today ignores the clear distinction that *Chadwick* established between movable containers and automobiles. It also rejects all of the relevant reasoning of *Sanders*[12] and offers a substitute rationale that appears inconsistent with the result. See *supra,* at 2179. *Sanders* is therefore effectively overruled. And the Court unambiguously overrules "the disposition" of *Robbins, ante,* at 2172, though it gingerly avoids stating that it is overruling the case itself.

The only convincing explanation I discern for the majority's broad rule is expediency: it assists police in conducting automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield. See *ante,* at 2170. "When a legitimate search is under way," the Court instructs us, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Ante,* at 2170. No "nice distinctions" are necessary, however, to comprehend the well-recognized differences between movable containers (which, even after today's decision, would be subject to the warrant requirement if located outside an automobile), and the automobile itself, together with its integral parts. Nor can I pass by the majority's glib assertion that the "prompt and efficient completion of the task at hand" is paramount to the Fourth Amendment interests of our citizens. I had thought it well established that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978).[13]

This case will have profound implications for the privacy of citizens traveling in automobiles, as the Court well understands. "For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle." *Ante,* at 2161. A closed paper bag, a tool box, a knapsack, a suitcase, and an attache case can alike be searched without the protection of the judgment of a neutral magistrate, based

11. Unless one of these alternative explanations is adopted, the Court's attempt to distinguish the holdings in *Chadwick* and *Sanders* is not only unpersuasive but appears to contradict the Court's own theory. The Court suggests that in each case, the connection of the container to the vehicle was simply coincidental, and notes that the police did not have probable cause to search the entire vehicle. But the police assuredly did have probable cause to search the vehicle *for the container.* The Court states that the scope of the permitted warrantless search is determined only by what a magistrate could authorize. *Ante,* at 2172. Once police found that container, according to the Court's own rule, they should have been entitled to search at least the container without a warrant. There was probable cause to search and the car was mobile in each case.

12. The Court suggests that it rejects "some of the reasoning in *Sanders.*" *Ante,* at 2172. But the Court in *Sanders* unambiguously stated: "[W]e hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U.S., at 766, 99 S.Ct., at 2594. The Court today instead adopts the reasoning of the concurring opinion of THE CHIEF JUSTICE, joined by Justice STEVENS, who refused to join the majority opinion because of the breadth of its rationale. *Id.*

13. Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most "efficient" form of government?

only on the rarely disturbed decision of a police officer that he has probable cause to search for contraband in the vehicle.[14] The Court derives satisfaction from the fact that its rule does not exalt the rights of the wealthy over the rights of the poor. *Ante*, at 2171. A rule so broad that all citizens lose vital Fourth Amendment protection is no cause for celebration.

I dissent.

INWOOD LABORATORIES, INC., et al.

v.

IVES LABORATORIES, INC.

DARBY DRUG CO., INC., et al.

v.

IVES LABORATORIES, INC.

Nos. 80-2182, 81-11.

Argued Feb. 22, 1982.

Decided June 1, 1982.

Suit was brought, inter alia, for an alleged trademark violation. Denial of plaintiff's motion for a preliminary injunction, 455 F.Supp. 939, was affirmed on appeal, 601 F.2d 631, and case was remanded. On remand, the United States District Court for the Eastern District of New York, 488 F.Supp. 394, found for defendants, and plaintiff appealed. The Court of Appeals for the Second Circuit, 638 F.2d 538, reversed and defendants petitioned for writ of certiorari. The Supreme Court, Justice O'Connor, held that findings underlying district court's determination that manufacturers of generic drug, which was designed to duplicate appearance of a similar drug marketed by a competitor under a registered trademark, could not be held vicariously liable under Lanham Act for infringement of that trademark by pharmacists who mislabeled generic drugs with competitor's registered trademark were not clearly erroneous.

Reversed and remanded.

Justice White filed separate opinion concurring in the result in which Justice Marshall joined.

Justice Rehnquist filed separate opinion concurring in the result.

1. Trade Regulation ⇐374

Liability for trademark infringement can extend beyond those who actually mislabel goods with the mark of another. Lanham Trade-Mark Act, § 32 as amended 15 U.S.C.A. § 1114.

2. Trade Regulation ⇐374

Even if a manufacturer does not directly control others in chain of distribution, it can be held responsible for their infringing activities under certain circumstances. Lanham Trade-Mark Act, § 32 as amended 15 U.S.C.A. § 1114.

3. Trade Regulation ⇐374

If a manufacturer or distributor intentionally induces another to infringe a trademark, or has reason to know is engaged in trademark infringement, manufacturer or distributor is contributor for any harm done as res Lanham Trade-Mark Act, 15 U.S.C.A. § 1114.

4. Trade Regulation ⇐4

Pharmacists who mi drugs with manufacturer's mark violated Lanham Act Mark Act, § 32 as amer § 1114.

5. Federal Courts ⇐850

In reviewing factual f court, Court of Appeals "clearly erroneous" stan Civ.Proc. Rule 52(a), 28 U

6. Federal Courts ⇐853

Because of deference unless an appellate court nite and firm conviction t been committed, it must a findings. Fed.Rules Civ.P U.S.C.A.

7. Trade Regulation ⇐5

Findings underlying d termination that manufac drug, which was designed pearance of a similar dru competitor under a regis could not be held vicario Lanham Act for infringem mark by pharmacists who ic drugs with competitor's mark were not clearly err Trade-Mark Act, § 32 as C.A. § 1114; Fed.Rules 52(a), 28 U.S.C.A.

8. Federal Courts ⇐841

An appellate court ca interpretation of the evi trial court simply becau court might give facts an resolve ambiguities diff more sinister cast to acti court apparently deemed

* The syllabus constitutes no of the Court but has be Reporter of Decisions for

14. The Court purports to restrict its rule to areas that the police have probable cause to search, as "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ante*, at 2172. I agree, of course, that the probable cause component of the automobile exception must be strictly construed. I fear, however, that the restriction that the Court emphasizes may have little practical value. See *United States v. Ross*, 655 F.2d 1159, 1168, n. 21 (CADC 1981) (en banc). If police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car, and other containers within it, will contain contraband. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband.

SEARCH AND SEIZURE

A TREATISE ON THE FOURTH AMENDMENT

CHAPTER ONE

THE EXCLUSIONARY RULE AND OTHER REMEDIES

§ 1.2 The Exclusionary Rule Under Attack

Table of New or Retitled Subsections

Subsec.

(g) Limiting the exclusionary rule by disregarding "the underlying intent or motivation of the officers involved."

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1. Kamisar, A Defense of the Exclusionary Rule, 15 Crim.L.Bull. 5 (1979); Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 U.Mo.K.C.L.Rev. 24 (1980); Sunderland, Liberals, Conservatives and the Exclusionary Rule, 71 J.Crim.L. & Crim. 343 (1980). See also the debate carried on in the following series of articles, listed in the order of their appearance: Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment, 62 Judicature 66 (1978); Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214 (1978); Kamisar, The Exclusionary Rule in Historical Perspective, 62 Judicature 337 (1979); Wilkey, A Call for Alternatives to the Exclusionary Rule, 62 Judicature 357 (1979); Canon, The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police?, 62 Judicature 398 (1979); Schlesinger, The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?, 62 Judicature 404 (1979); Canon & Schlesinger, A Postscript on Empirical Studies and the Exclusionary Rule, 62 Judicature 455 (1979).

9. Moreover, there is reason to believe that the "cost" of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed. In Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Report of the Comptroller General, April 19, 1979), an empirical study of cases handled in 38 U. S. Attorneys' offices from July 1-August 31, 1978, it was found that of 2,804 charged defendants only 30% involved a search or seizure and only 11% filed a motion to suppress on Fourth Amendment grounds. These motions were denied in the "overwhelming majority" of cases, so that in only 1.3% of the 2,804 defendant cases was evidence excluded as a result of a Fourth Amendment suppression motion. Moreover, over half of the defendants whose motions were granted in total or in part were convicted nonetheless. As for the cases during the sample period which the U.S. Attorneys declined to prosecute, in only 0.4% of them was a search and seizure problem the primary reason.

Similarly, in Brosi, A Cross-City Comparison of Felony Case Processing 18–20 (1979), an LEAA-sponsored

(New text on page 55, before last paragraph)
At least one court, in United States v. Williams,[71.1] has utilized this approach.

empirical study of state felony cases in various jurisdictions, it was found that "due process related reasons accounted for only a small portion of the rejections at [prosecutor] screening—from 1 to 0 percent." The rate ranged from 13 to 42% in drug cases, but in "felony cases other than drugs, less than 2 percent of the rejections in each city involved abrogations of due process." As for post-filing dismissals and nolles, "due process problems again accounted for little of the attrition, and again most of the due process problems were accounted for by the drug cases."

47. See also Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 40 U.Mo.K.C.L.Rev. 24 (1980), concluding from interviews with police that they would conclude the Fourth Amendment had no meaning if the exclusionary rule were withdrawn.

71.1 622 F.2d 830 (5th Cir. 1980), cert. den., 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114. Ms. Williams, convicted of heroin possession and released pending appeal on the condition she remain in Ohio, was arrested at the Atlanta airport by DEA agent Markonni for violating that travel restriction, resulting in discovery of heroin in her possession. Her motion to suppress that heroin was granted by the district court on the ground that she had been illegally arrested, and that ruling was affirmed by the court of appeals, 593 F.2d 86, but the decision was reversed upon rehearing en banc before 24 circuit judges. Sixteen judges, in an opinion by Politz, J., concluded Williams had been lawfully arrested for breach of court-imposed travel restrictions even absent any initiating request by the court. Thirteen judges, in an opinion by Gee and Vance, JJ., held "that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." They reasoned that "any slight deterrent effect of excluding fruits of good-faith arrests is even less than the small deterrence" which the Supreme Court, in such cases as Stone v. Powell, supra note 71, and United States v. Peltier, infra note 74, concluded "does not justify the societal harm incurred by suppressing relevant and incriminating evidence." They characterized Michigan v. DeFillippo, infra note 74.1, as "closely analogous" to the instant case in that both involved "technical violations," there an arrest "made in good-faith reliance on a statute that is later declared unconstitutional" and here "a reasonable interpretation of a statute that is later construed differently." Thus, *even if* Agent Markonni was wrong in *either* his assumption that violation of a travel restriction was an offense ("a reasonable factual error about an element of the crime") *or* his assumption that he could arrest without any prior order from the court that released Ms. Williams ("a good-faith 'technical violation,' an action under a reasonable interpretation of the arrest power"), the heroin should be admissible. Because "neither Markonni's good faith nor its reasonableness are questioned here," they left "to another day" the issue of "the proper allocation of the burden of proof" on those matters.

Ten judges in *Williams*, in a concurring opinion by Rubin, J., objected that the rule announced by the 13 was unnecessary because a majority of the court was of the view the arrest was lawful; that no other court had altered the exclusionary rule and that a majority of the Supreme Court had not supported any such qualification; that the change rests upon the mistaken assumption that deterrence is the sole basis of the exclusionary rule; that the change "raises many questions," such as whether it will "shield only errors of fact or both errors of fact and errors of law"; and that if the no-deterrence reasoning of the 13 were sound, then "it appears needless to require the police officer's subjective good faith also be objectively reasonable," as "a policeman who is in complete subjective good faith is unlikely to stop to ask himself, 'Am I also reasonable?'"

The commentators have been critical of *Williams*, Comment, 15 Ga.L.Rev. 487 (1981); Note, 34 Vand.L.Rev. 213 (1981), and in Abell v. Commonwealth, 221 Va. 607, 272 S.E.2d 204 (1980), the court rejected the *Williams* approach, finding no disposition on the part of the Supreme Court to adopt it.

73. Ball, Good Faith and the Fourth Amendment: The "Reasonable" Ex-

(New text on page 37, before subsection (c))

In Michigan v. DeFillippo,[74.1] the Supreme Court held that the Fourth Amendment exclusionary rule does not require the suppression of evidence seized incident to a valid arrest for violation of a presumptively valid ordinance that was later declared unconstitutional. Because the Court emphasized the "good faith reliance" of the arresting officer, much to the distress of the dissenters,[74.2] it might be thought that *DeFillippo* portends adoption of Justice White's proposed across-the-board "good-faith belief" exception to the exclusionary rule. But this is not so. *DeFillippo* dealt with a discrete problem which was not attended by the dangers recited above by Professor Kaplan. There is nothing in the decision which lends support to the White exception; indeed, the Court cautioned that its ruling was not even inconsistent with the numerous prior decisions[74.3] that, notwithstanding the good faith of the policeman, "the exclusionary rule required suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant."

A more limited proposal has been made by Professor Phillip Johnson, namely,

> to abolish the exclusionary rule in cases where the officer's actions were authorized or commanded by a warrant. In other words, where the officer has obtained a warrant, and where he has acted within the scope of the warrant, we would not exclude evidence on the ground that the information before the magistrate did not establish probable cause. What we would do is periodically review the performance of magistrates by going over the files in cases where they issued warrants, and where they declined to issue warrants, to determine if they are exercising their discretion in a responsible manner. * * * For the present time, I propose this innovation only for the federal courts, given the difficulty of supervising the quality of magistrates and their performance in the fifty states. Eventually, I would contemplate that the states would be permitted to imitate the federal system.[74.4]

ception to the Exclusionary Rule, 69 J.Crim.L. & C. 635 (1978).

74.1 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), discussed in greater detail in § 3.2(f).

74.2 Brennan, J., joined by Marshall and Stevens, JJ., who stated:

"The Court errs, in my view, in focusing on the good faith of the arresting officers and on whether they were entitled to rely upon the validity of the Detroit ordinance. For the dispute in this case is not between the arresting officers and respondent. * * * The dispute is between respondent and the State of Michigan. * * * Since the State is responsible for the actions of its legislative bodies as well as for the actions of its police, the State can hardly defend against this charge of unconstitutional conduct by arguing that the constitutional defect was the product of legislative action and that the police were merely executing the laws in good faith."

74.3 E. g., Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979); Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

74.4 P. Johnson, New Approaches to Enforcing the Fourth Amendment 7-9 (Working Paper, Sept. 1978).

A major benefit of this approach, Prof. Johnson points out, is that it "would give law enforcement officers some solid encouragement to employ the warrant process for all searches and arrests which are not made on an emergency basis." [74.5]

In support, Prof. Johnson asserts that there is "no evidence for the assumption that lawlessness among federal magistrates is a pervasive problem akin to police lawlessness, requiring a remedy of this sort with its well known costs and disadvantages." [74.6] When the proposition is put that way, of course, the proposal seems almost beyond dispute, for it is assumed that application of the exclusionary rule to Fourth Amendment violations by judicial officers makes sense *only* if judicial lawlessness is "akin to police lawlessness." Even putting aside the fact that the Fourth Amendment exclusionary rule serves functions other than deterrence [74.7] and that those functions are hardly limited to instances of constitutional violations by police, it would seem that a more neutrally-stated inquiry is whether withdrawing the exclusionary rule from all police activity "authorized or commanded by a warrant" would, to any appreciable extent, result in more Fourth Amendment violations than is now the case. I do not pretend to know the answer to that question, but I am confident that there is no basis for simply assuming a negative answer. Given the fact that empirical studies have shown that "police 'shop around' for a magistrate who is lenient" [74.8] and that there is "substantial disparity between magistrates as to how much evidence is required to obtain a search warrant," [74.9] and that even a leading opponent of the exclusionary rule has "no doubt" that "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," [74.10] I am not sanguine about what would happen if both police and magistrates knew that whatever search and seizure activity was authorized by a warrant could in no way be challenged in a criminal prosecution arising out of that action.

(New text on page 39, before § 1.3)

(g) Limiting the exclusionary rule by disregarding "the underlying intent or motivation of the officers involved." Yet another question which may be appropriately asked at this point, though in some of its manifestations it concerns not the scope of the exclusionary remedy but rather the extent of the Fourth Amendment right itself, is whether a "bad" intent or motivation by the searching or seizing police officer should be ignored so as to bring about the admissibility of evidence which otherwise might be deemed subject to suppression. Some aspects of this problem are dealt with at later points in this Book,[92] but the general subject is appropriately under-

74.5 Id. at 11.

74.6 Id. at 10.

74.7 See § 1.1(f).

74.8 L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 120 (1967).

74.9 Id. at 204.

74.10 Wilkey, A Call for Alternatives to the Exclusionary Rule, 62 Judicature 351, 356 (1979).

87. Comment, 72 Nw.U.L.Rev. 595 (1977).

92. See, e. g., §§ 3.2(b) (on whether probable cause both subjective and objective test), 4.11(e) (subterfuge

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taken here because it also involves consideration of the deterrence rationale and because the Supreme Court, in Scott v. United States,[93] has now focused attention on the broad issue.

In *Scott*, federal agents initiated with judicial authorization a wiretap on a woman's phone because they had reason to believe certain other persons were using her phone in a conspiracy to import and distribute narcotics. Though by statute such surveillance is to be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception," [94] a requirement which certainly has its foundations in the Fourth Amendment,[95] the surveilling agents made no attempt to minimize their interception of conversations occurring via that telephone. The Supreme Court, per Rehnquist, J., found that the agents' conduct in intercepting all calls was reasonable on the facts of the case in that the calls occurred in circumstances in which the agents could "hardly be expected to know that the calls are not pertinent prior to their termination." But that left unresolved the petitioners' "principal contention," namely, that suppression was required because of "the failure to make good-faith efforts to comply with the minimization requirement," to which the government responded that "subjective intent alone * * * does not make otherwise lawful conduct illegal or unconstitutional." As to this, Justice Rehnquist declared:

> We think the Government's position, which also served as the basis for decision in the Court of Appeals, embodies the proper approach for evaluating compliance with the minimization requirement. Although we have not examined this exact question at great length in any of our prior opinions, almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. * * *
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> We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. * * * The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without

searches by execution of search warrant), 5.1(e) (significance of booking, including officer declaring arrest for offense other than that for which probable cause actually exists), 5.2(e) (pretext arrests to search the person), 6.3(d) (subterfuge entry of premises without warrant), 7.5(e) (search of vehicles and pretext arrest, detention, impoundment or inventory), 9.2(e) (significance of police officer's mistake as to whether arrest or only a stop called for), 9.4(f) (subterfuge in frisk context), 10.6(h) (subterfuge in airport searches), 10.8(b) (subterfuge in vehicle use regulation), 10.10(e) (police purpose and search of parolees and probationers).

93. 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978), reh. den., 438 U.S. 908, 98 S.Ct. 3127, 57 L.Ed.2d 1150.

94. 18 U.S.C.A. § 2518(5).

95. Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), conformed to, 20 N.Y.2d 801, 284 N.Y.S.2d 456, 231 N.E.2d 132.

regard to the underlying intent or motivation of the officers involved.[96]

Justice Rehnquist is certainly correct in stating that the Court has "not examined this exact question at great length in any of our prior opinions," but it may nonetheless be fairly said that he has presented a somewhat skewed picture of what the Court has had to say on this subject. In support of the statement in the first paragraph set out above, he quoted from Terry v. Ohio [97] the proposition that in judging Fourth Amendment reasonableness the facts must "be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." But the point being made in *Terry* at that juncture was that "subjective good faith alone" does not establish compliance with the Fourth Amendment, a sound proposition which hardly dictates (unless symmetry is a governing consideration) what position should be taken as to the *absence* of good faith. In support of the first statement in the second paragraph quoted above, Justice Rehnquist relied upon the assertion in United States v. Robinson [98] that in a search incident to arrest case "it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed." But that is not at all surprising in that particular context, for the holding in *Robinson* was that the search of a person incident to his custodial arrest is justified as a standardized procedure without regard to the probability in the particular case that the arrestee is armed or possesses evidence of the crime.[99]

Moreover, *Robinson* hardly supports the proposition that "the underlying intent or motivation" is never relevant, for in that case Justice Rehnquist cautioned that the Court would "leave for another day questions which would arise" upon a showing a police officer "used the subsequent traffic violation arrest as a mere pretext for a narcotics search." And in other cases the Court has upheld certain routine noncriminal searches only after emphasizing that there was "no suggestion whatever that this standard procedure • • • was a pretext concealing an investigatory police motive." [100] Finally, Justice Rehnquist also failed to mention in *Scott* that the Court has previously held that police activity undertaken for one purpose cannot

96. The Court cited at this point United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), cert. den., 414 U.S. 1130, 94 S.Ct. 881, 38 L.Ed. 2d 762; Dodd v. Beto, 435 F.2d 868 (5th Cir. 1970), cert. den., 404 U.S. 845, 92 S.Ct. 145, 30 L.Ed.2d 81; Klingler v. United States, 409 F.2d 299 (8th Cir. 1969), cert. den., 396 U. S. 859, 90 S.Ct. 127, 24 L.Ed.2d 110; Green v. United States, 386 F.2d 953 (10th Cir. 1967), appeal after remand, 411 F.2d 588; Sirimarco v. United States, 315 F.2d 699 (10th Cir. 1963), cert. den., 374 U.S. 807, 83 S.Ct. 1696, 10 L.Ed.2d 1032, and then cautioned: "As is our usual custom, we do not in citing these or other cases intend to approve any particular language or holding in them."

97. 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968).

98. 414 U.S. 218, 94 S.Ct. 467, 38 L. Ed.2d 427 (1973).

99. See § 5.2.

100. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), on remand, S.D., 247 N.W.2d 673 (inventory of impounded vehicle), noting this was also the case in Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

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be upheld on the ground that the same intrusion would have been permissible on the facts in the hands of the police had they only acted for a different purpose.[101] Thus, while the alarm which has been sounded [102] concerning the quoted language from *Scott* is understandable, that case can hardly be read as a definitive analysis settling that in *all* circumstances Fourth Amendment suppression issues are to be resolved without assaying "the underlying intent or motivation of the officers involved." However, the thesis of the discussion which follows is that this is precisely what the rule ought to be and that certain other developments in Fourth Amendment doctrine are necessary to ensure that the *Scott* rule persists in such unqualified form.

One kind of "bad intent" case is that in which, though facts supporting the arrest or search came to light before that action was taken, the police had previously made the subjective determination to act without such facts or without regard to whether such facts were forthcoming. Illustrative is Massachusetts v. Painten,[103] where the relevant facts were as follows:

> Two police officers, having a suspicion that respondent had committed felonies but not having probable cause to believe that he had committed them, went to the door of respondent's apartment. Their motive, the courts below found, was to arrest and search, whether or not their investigation provided the probable cause that would make an arrest and search constitutional. This plan was not communicated to respondent, who when he came to the door was led to believe the officers wished only to speak to him. Told no more than that the officers wished to ask questions, respondent asked them to wait a minute, closed the door, tossed a paper bag onto a fire escape, returned, and let the officers enter. The officers did nothing to respondent but ask questions; while doing that another officer, posted below, who had seen the bag drop, walked through the apartment and out onto the fire escape, where he found guns and bullets in the bag. The officers arrested respondent, and undertook a complete search of the apartment incident to the arrest.[104]

The court of appeals suppressed the evidence, reasoning that what transpired *after* the police knocked on the door was irrelevant because at the time of the knock "the police purpose was to arrest petitioner, although they had no warrant or ground for obtaining one." [105]

101. Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), discussed in text at note 121 infra.

102. Burkoff, The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine, 58 Ore.L.Rev. 151, 181-90 (1979).

103. 368 F.2d 142 (1st Cir. 1966).

104. As summarized by Justice White when the case reached the Supreme Court, 389 U.S. 560, 88 S.Ct. 660, 19 L.Ed.2d 770 (1968).

105. Coffin, J. concurring, thought it critical that the items on the fire escape were obtained by using the apartment "as a conduit" by an officer other than those who had been voluntarily admitted to the apartment, which might well be a sound basis for not reaching the issue here under discussion. He then continued:

> "What troubles me about the opinion of my brothers is their reasoning that, since the officers harbored an improper purpose, their knocking on the door and identifying themselves was also 'improper' and immunized

Though the Supreme Court dismissed the writ as improvidently granted,[106] this appropriate action does not detract from [107] the force of the three dissenters' [108] analysis concerning the relevance of a "bad" intent in a case of this kind:

> The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. In the case before us the syllogism must be that although the policeman's words requested entry for the purpose of asking respondent questions, and the policeman—on being allowed to enter—did nothing to respondent but ask questions, the "fruits" of the policeman's otherwise lawful request to enter and question—the bag tossed out the window and into a place where it could be seen from the street—should not be usable by the State. This is because the policeman was willing, had his lawful conduct not developed probable cause justifying respondent's arrest, to search respondent's apartment unlawfully in the hope of finding evidence of a crime.
>
> That such a rule makes no sense is apparent when one sees it in the context of an abstruse application of the exclusionary rule, imposed on the States as the only available way to encourage compliance by state police officers with the commands of the Fourth Amendment. * * * Because we wish to deter policemen from searching without a warrant, we would bar admission of evidence Officer McNamara discovered by ransacking respondent's apartment without a warrant or a basis for warrantless search. The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce grave and fruitless misallocation of judicial resources.

That reasoning is eminently sound, and has been employed by other courts when confronted with cases of this particular type.[109]

from use any objects jettisoned into public view and beyond petitioner's premises. I would not go so far as to say that such preliminaries could shield evidence later discovered if it were obtained without going on the premises of a suspect."

106. 389 U.S. 560, 88 S.Ct. 660, 19 L.Ed. 2d 770 (1968).

107. Fortas, J., concurring, while agreeing with dismissal "because the record is not adequate for disposition of the case in terms of its constitutional problems," stressed he did not "disagree with the position stated in the dissent."

108. White, J., joined by Harlan and Stewart, JJ.

109. United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), cert. den., 414 U.S. 1136, 94 S.Ct. 881, 38 L.Ed.2d 762 (border patrol agent stopped car on reasonable suspicion but not probable cause for search with intent of

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If "impure plots" not acted upon are insufficient to ju[illegible] of the exclusionary rule in the name of deterrence, what then i[illegible] officer *does* act on his "bad" state of mind in the sense that he [illegible]gages in Fourth Amendment activity despite his *mistaken* belief that he is lacking the necessary grounds for such action? Illustrative is United States v. Rowell,[110] where the police captain who sent officers to arrest the defendant because of information he received from one Pecarro later "testified that after his first [and only] meeting with Pecarro he did not think there were sufficient facts to obtain a warrant." In this situation, it might be argued that exclusion for purposes of deterrence is called for, because suppression in such a case will impress upon the officer that in the future he should not arrest when he believes probable cause is lacking—a desirable result in that if he so believes, often probable cause will actually be lacking. *Rowell* did not go this route, but instead declared in upholding the arrest that the police officer is no more the judge of the insufficiency of his facts than of their sufficiency, the position consistently taken by other courts.[111] This is a correct result. Here again, as Justice White put it in *Painten*, the evidence was "obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment." That being so, the desired communication to the arresting officer is that he *does* have grounds to arrest on such facts, a message which would be muddled at best if the arrest in that case were deemed to necessitate exclusion of evidence. Moreover, there is something to the adage that actions speak louder than words; the fact that the captain in *Rowell* did order his men to arrest defendant is more convincing evidence of what he then perceived his authority to be than any unfortunately-

searching it, after stop kilos of marijuana seen in car, so car searched; held, evidence admissible, as "the fact that the agents were intending at the time they stopped the car to search it in any event—generally the sort of search held unconstitutional in Almeida-Sanchez v. United States, supra—does not render the search, supported by independent probable cause, invalid"); Jones v. State, — Ind.App. —, 409 N.E.2d 1254 (1980) (narcotics thrown out window of motel room after police knocked on door are admissible, for "whatever intent or purpose may have been in their minds, no improper or unlawful act of any kind was committed"); Mullaney v. State, 5 Md.App. 248, 246 A.2d 201 (1968) (police officer knocked on door of motel room, when door opened slightly officer could smell marijuana and see marijuana cigarettes, so he entered; held, "the mere fact by itself that Lieutenant Mitchell may have intended to make an arrest when he knocked on the door of appellant's motel room does not without more, constitute the officer a trespasser, there being no right of a citizen, constitutional or otherwise, which immunizes him from having a policeman knock on his door during reasonable evening hours").

110. 612 F.2d 1176 (7th Cir. 1980).

111. See cases collected in § 3.2(b).

It is not clear that a different result is called for when the justification under scrutiny is not probable cause of crime but probable cause that a person is in need of medical assistance. But in State v. Prober, 98 [illegible]2d 345, 297 N.W.2d 1 (1980), the court held that in such circumstances *Scott* was inapplicable and that "the emergency doctrine requires a two-step analysis. First, the search is invalid unless the searching officer is actually motivated by a perceived need to render aid or assistance. Second, even though the requisite motivation is found to exist, until it can be found that a reasonable person under the circumstances would have thought an emergency existed, the search is invalid. Both the subjective and objective tests must be met."

framed comments elicited from him later concerning his understanding of the legal significance [112] of the information on which he acted.

The *Rowell*-type situation must be distinguished from yet another in which again the question is whether the officer's "underlying intent or motivation" is relevant, illustrated by Klingler v. United States.[113] Police were told by radio that a man with a green jacket and needing a shave had held up a gas station and was now believed to be occupying a 1955 or 1956 white and brown Pontiac with a Minnesota license and two construction helmets visible through the rear window. Later they saw a man in an olive jacket with a few days growth of beard in a 1957 salmon and coral Pontiac with a South Dakota license and two such helmets visible from the rear, so they arrested him for *vagrancy*. The court, after concluding there were not grounds to arrest for vagrancy but were grounds to arrest for robbery, held the arrest lawful "notwithstanding the officer's mistaken statement of grounds." Many other courts have reached the same result,[114] which is as it should be. Exclusion in the interest of deterrence is unjustified here, especially because such situations are often attributable to complicated legal distinctions between offenses or an officer's failure to record all the bases or the strongest basis upon which the arrest was made.[115]

One way of characterizing *Klingler* is to say that the officer's "underlying intent or motivation" simply reflects that he picked the wrong legal theory—claiming the arrest was for offense *A*, as to which probable cause was lacking, instead of offense *B*, as to which grounds for arrest were present. Sometimes the gap between the relied upon but unavailing theory and the availing but unrelied upon theory is greater, as where it is not merely a matter of different offense categories but rather of quite different purposes or objectives. Here as well, as reflected by State v. Ercolano,[116] there is presented the issue of whether the evidence must be suppressed because of "the underlying intent or motivation of the officers involved." The defendant was

112. More difficult is the question of whether the same is true of a purely factual interpretation. See the *DiPasquale* case discussed in § 3.2(b).

113. 409 F.2d 209 (8th Cir. 1969), cert. den., 396 U.S. 859, 90 S.Ct. 127, 24 L.Ed.2d 110.

114. See cases collected in § 5.1(e); and United States v. Brown, 635 F.2d 1207 (6th Cir. 1980); Thomas v. State, 395 So.2d 280 (Fla.App.1981); State v. Sanders, 154 Ga.App. 305, 267 S.E.2d 906 (1980); People v. Patton, 90 Ill.App.3d 263, 45 Ill.Dec. 515, 412 N.E.2d 1097 (1980); Hatcher v. State, — Ind. —, 410 N.E.2d 1187 (1980).

115. "Any other rule would force police officers to routinely charge every citizen taken into custody with every offense they thought he could be held for in order to increase the chances that at least one charge would survive the test for probable cause." United States v. Atkinson, 450 F.2d 835 (5th Cir. 1971), cert. den., 406 U.S. 923, 92 S.Ct. 1700, 32 L.Ed.2d 123.

The court in *Klingler*, as have some others, see § 5.1(e), went on to stress that the "case fails to show bad faith on the part of the officers in making the arrest for vagrancy." That is, "the circumstances do not give rise to the inference that the arrest was effected for the purpose of creating an excuse to search, which would make both the arrest and search illegal." However, for reasons elaborated later in this discussion, see text at notes 138–52 infra, the more fruitful approach is not to inquire into "bad faith" in terms of the underlying motives of the police but instead to determine whether the action taken was in accordance with established standards for that department.

116. 70 N.J. 25, 357 A.2d 1062 (1970).

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arrested in an apartment on a bookmaking charge, after which his automobile, parked on a nearby street, was subjected to impoundment and subsequent inventory, resulting in the discovery of incriminating evidence. Viewed solely as an impoundment-inventory situation, the car search was unlawful because defendant was not given a reasonable opportunity to make other arrangements for disposition of the car,[117] and thus the question arose whether the search could now be upheld on a theory apparently not contemplated by the police—that there was probable cause to search the car and justification for proceeding without a search warrant. The majority in *Ercolano* answered in the negative, reasoning that a contrary result would be "inconsistent with the rationale of the exclusionary rule":

> It is indisputable that the exclusionary rule, to which the states are bound under Mapp v. Ohio, * * * was devised to deter the police from unconstitutional searches and seizures because other remedies were deemed ineffective. * * * It follows from this that if in the present case the police were *intending* only a safekeeping impoundment of the Ercolano vehicle, which as a matter of constitutional law was invalid * * *, the rationale of deterrence of unconstitutional police conduct compels exclusion of the evidence here seized. Saving the validity of the police action on a *court-devised* theory of justification would not deter future unconstitutional impoundments of vehicles or investigatory entries into vehicles without lawful warrant.[118]

Ercolano, however, appears to be a minority view. The Second Circuit has reached the opposite result in essentially the same situation, that is, where again the probable cause theory was substituted for the inventory theory which appeared to have motivated the police search,[119] and other courts have likewise disregarded "the underlying intent or motivation of the officers involved" in favor of some other purpose on which the police action could have been lawfully grounded.[120] Supreme Court cases exist on both sides of the fence. In

117. See § 7.3(c).

118. Schreiber, J., dissenting, stated: "To contend that exclusion of such evidence will act as a deterrent to police action even though defendant's constitutional rights have not been violated is incomprehensible."

119. United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979), cert. den., 444 U.S. 955, 100 S.Ct. 435, 62 L.Ed.2d 328, reh. den., 444 U.S. 1027, 100 S.Ct. 695, 62 L.Ed.2d 663. Two men were lawfully arrested while seated in a car, and the car was then lawfully impounded and was later inventoried, resulting in the discovery of certain incriminating papers. The district court upheld the search as an inventory, but the court of appeals feared that perhaps the examination of papers inside a briefcase could not be justified on that basis and thus affirmed on the ground that what had occurred was a valid *Chambers* search on probable cause. Of significance here is the fact that the court then added: "It is of no importance that the police may have thought their only power was to make an inventory; the test is what could lawfully be done, not what the policemen thought the source of their power to be."

120. Sirimarco v. United States, 315 F.2d 669 (10th Cir. 1963), cert. den., 374 U.S. 807, 83 S.Ct. 1696, 10 L.Ed.2d 1032 (some time after state officers arrested defendant for counterfeiting and seized his car, a federal agent searched the car; though he purported to be making a search incident to the state arrest, a theory rejected by this court, the court then concluded the search could be upheld because as a matter of federal statutory law the agent *could have* impounded the car for forfeiture and then conducted a search of the impounded vehicle; as for the fact this

Jones v. United States,[121] where police entered premises for the purpose of executing a search warrant, a defective procedure in that the entry was at night and the warrant permitted only daytime execution, the majority declined to uphold the entry and discovery of objects in plain view on the ground that the police *could* have lawfully made an intrusion of that magnitude for the purpose of arresting the petitioner, because the "testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, not to arrest petitioner." [122] But in Peters v. New York,[123] where it appears the officer viewed his action in seizing an apparent prowler in his apartment house and conducting a search of his person revealing burglar's tools as only a stop-and-frisk, the Court (to avoid the difficult issue of whether the search had been sufficiently limited in scope under that theory) proceeded without hesitation to characterize the officer's conduct as a lawful arrest and search incident thereto.[124]

Even in an *Ercolano* type of case, Justice Rehnquist's *Scott* rule produces the better result. For one thing, it is to be strongly doubted that the *Ercolano* majority is correct in asserting that exclusion in that situation is compelled by "the rationale of deterrence." Suppression for police reliance on the wrong theory even when there exists an alternative valid theory would prevent unconstitutional searches

latter course of action apparently never occurred to the federal agent, the court stated "the legality of his actions are not affected by his subjective beliefs"); United States v. Capra, 372 F.Supp. 600 (S.D.N.Y.1973), aff'd as to this issue but reversed on other grounds, 501 F.2d 267 (2d Cir. 1974) (court, after finding "little or no support" for search of car on reasons which had been given, namely, that the search was a valid inventory or a search incident to arrest, sustained the search under the *Chambers* rule and added that the officers' "rationale for their right to seize and search the vehicle is not conclusive"); Grimes v. State, — Ind. —, 412 N.E.2d 75 (1980) (though officer had defendant accompany him and surrender gun because he thought defendant consenting to both, action upheld because there were grounds for arrest and search incident, and it "is of no consequence that officer Snow may not have known that he had probable cause to arrest").

121. 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958).

122. The Court may have been influenced to so limit its assessment of the police conduct because, as it acknowledged, discussion of the entry as an arrest entry would "confront us with a grave constitutional question, namely, whether the forceful night time entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought is, consistent with the Fourth Amendment," an issue which the Court did not resolve until over 20 years later. See § 6.1(b).

Clark, J., joined by Burton, J., dissenting in *Jones*, interpreted the district court's findings as indicating "that the officers, not believing the statement of petitioner's wife that he was not there, entered the house to find and arrest petitioner," and thus did not directly dispute the majority view that only the officers' purpose could be considered. *Jones* thus might be viewed as actually involving an issue quite different from that under consideration here, namely, whether it is proper for a reviewing court to uphold a search on a theory not considered by the trial court. See § 11.7(d).

123. 392 U.S. 40, 88 S.Ct. 1889, 20 L. Ed.2d 917 (1968).

124. *Jones* and *Peters* might be distinguished in that in the former case the effort resisted by the Court was to shift from a broader power to a narrower one (i. e., from entry to search for evidence, to entry to arrest), while in the latter case what was permitted was a shift from a narrower power

only if, absent such an extension of the exclusionary rule, it may be assumed police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of which they are presently unaware. That assumption, in my judgment, is fanciful. Moreover, exclusion in an *Ercolano* kind of case has a "Catch-22" quality to it, for then an erroneous legal characterization by a policeman somehow makes his conduct illegal even though but for that mistake the officer would likely have proceeded to the alternative correct legal characterization. In *Ercolano*, for example, it seems highly probable that had the officer not mistakenly concluded the search fell within the *Opperman* inventory rule, he would then have deemed it necessary to consider the probable cause and exigent circumstances issues and would have resolved them so as to proceed with the search under the *Chambers* car search rule. In the face of that, it is especially apparent that *Ercolano* erects an unduly rigid standard by insisting "that policemen act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers." [125] Thus, cases like *Ercolano* press the exclusionary rule into service in such extreme situations that they afford ammunition to those who seek total abolition of the exclusionary rule.

There remains for consideration yet another group of cases, those often given the "pretext" characterization. It is the possible impact of *Scott* on these cases which has prompted the greatest concern. Thus, Professor Burkoff states:

> The result of the *Scott* decision is a substantial neutralization of whatever deterrent disincentives the exclusionary rule currently produces, because any colorable legal construct that accounts for the conduct of officers as objectively viewed vitiates at law the consequences of their improper motives. This implies, for example, that if vice squad officers stop a car to search an individual for narcotics without the requisite probable cause or Terry v. Ohio reasonable suspicion, the fact that the search was unlawfully motivated is irrelevant to the question of the existence of a remediable fourth amendment violation as long as a court can point to other "objectively reasonable" grounds for stopping the car, such as a minor traffic violation.[126] • • •

to a broader power (i. e., from a temporary stop and limited frisk to a full custodial arrest and full search of the person). A court could hardly be expected to uphold certain police action on the ground that something *less* would have been lawful. But that does not explain away *Jones*, for the government's contention (never refuted by the Court) was that the intrusion actually made did not exceed that which *would* have occurred had the agents entered to arrest the defendant and had looked for him. Consider also that "reverse twists" on *Peters* are to be found. See, e. g., United States v. Vargas, 633 F.2d 891 (1st Cir. 1980); United States v. Blair, 493 F.Supp. 398 (D.Md.1980); People v. Stevens, 183 Colo. 309, 517 P.2d 1336 (1974) (officer's intent was to arrest, conduct nonetheless upheld as stop-and-frisk where intrusion did not exceed that permissible under latter theory). See § 9.2(e).

125. Hall, J., in State v. Romeo, 43 N.J. 188, 203 A.2d 23 (1964), cert. den., 379 U.S. 970, 85 S.Ct. 668, 13 L.Ed.2d 563.

126. Burkoff drops a footnote at this point citing several cases reaching a contrary result. For these cases, see § 5.2(e).

Scott also undermines the long established rule that "[a]n arrest may not be used as a pretext to search for evidence," since fourth amendment violations cannot now be established by demonstrating the unlawful motives of the arresting officers. * * * If subjective intent is an inadmissible consideration on the issue whether or not there has been a substantive fourth amendment violation, what other way is there to explore police officer's deterrable motivations for making a stop, an arrest, or a search? [127]

Exactly what constitutes a "pretext" under the "long established rule" referred to by Professor Burkoff? The case from which he quotes, United States v. Lefkowitz,[128] turns out upon close inspection to be of no help in answering this question. The warrantless search in *Lefkowitz* of the premises where defendant was arrested was for evidence of the crime for which he was arrested and not for some other purpose, and the Court was actually concerned with the interplay of the since-repudiated [129] "mere evidence" rule and the pre-*Chimel* [130] rule which seemed to allow a full warrantless search of defendant's premises merely because of his arrest there.

But the case next cited by Burkoff, Abel v. United States,[131] is another matter. There Immigration and Naturalization Service officers, acting pursuant to an administrative warrant for deportation, placed Russian spy Colonel Abel under arrest, incident to which evidence of espionage was uncovered. Abel sought to suppress that evidence in his criminal prosecution on the ground that the government had "resorted to a subterfuge" because the "true purpose in arresting him" was not to determine his deportability but rather to obtain evidence for a criminal espionage prosecution. As to this, Justice Frankfurter declared for the Court:

> Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. A finding of bad faith is, however, not open to us on this record. What the motive was of the I.N.S. officials who determined to arrest petitioner, and whether the I.N.S. in doing so was not exercising its powers in the lawful discharge of its own responsibilities but was serving as a tool for the F.B.I. in building a criminal prosecution against petitioner, were issues fully canvassed in both courts below. The crucial facts were found against the petitioner.

127. Burkoff, The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine, 58 Ore.L.Rev. 151, 189-90 (1979).

128. 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932).

129. See § 2.6(d).

130. See § 6.3(b).

131. 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), reh. den., 362 U.S. 984, 80 S.Ct. 1056, 4 L.Ed.2d 1019.

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133. Crews v. United St
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445 U.S. 463, 100 S.Ct. 12
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An understanding of what the "crucial facts" were in *Abel* requires some elaboration of the facts then set out by the Court: though a defected spy told the FBI Abel worked with him, the FBI then lacked sufficient evidence for a criminal prosecution; Abel's illegal residence in the country was brought to the attention of the INS by the FBI; the FBI promptly supplied additional information requested by the INS; INS agents met with FBI agents before initiating Abel's arrest; FBI agents accompanied INS agents to the hotel where the arrest was to be made; INS agents delayed the arrest until FBI agents had interviewed Abel and unsuccessfully sought his cooperation; FBI agents were present when the INS agents then arrested Abel and searched his room; and FBI agents searched the room further after Abel checked out. From all of this, it is apparent there was very close cooperation between the two agencies and that the "strongest" government interest in Abel (as well it should have been) was because of his activity as a spy. Yet the Court in *Abel* rejected his "subterfuge" claim because one additional critical fact was deemed fully supported by the evidence. That fact, as stated in the findings of the district court, is

> that while the first information that came to them concerning [Abel] • • • was furnished by the F.B.I.—which cannot be an unusual happening—the proceedings taken by the Department differed in no respect from what would have been done in the case of an individual concern[illegible] whom no such information was known to exist.[132]

Abel, then, represents yet another situation in which "the underlying intent or motivation of the officers involved"—to utilize the *Scott* phrase once again—does not require suppression: where, even assuming that intent or motivation was the dominant one in the particular case, the Fourth Amendment activity undertaken is precisely the same as would have occurred had that intent or motivation been entirely absent from the case. This means, for example, that if the police arrest *X* for crime *A*, as they would have in any event, in the anticipation or hope of thereby finding evidence of crime *B* on *X*'s person, the latter "underlying intent or motivation" does not make their action illegal.[133] Similarly, if *X*'s car is searched in the hope or expectation of finding therein evidence of crime *B*, but that search was an inventory which would have been made in any event [134] or a search for evidence of crime *A* which would have been made in any event,[135] again the evidence is admissible. Though some contrary

132. 155 F.Supp. 8 (E.D.N.Y.1957), aff'd, 258 F.2d 485, aff'd, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668, reh. den., 362 U.S. 984, 80 S.Ct. 1056, 4 L.Ed.2d 1019.

133. Crews v. United States, 369 A.2d 1063 (D.C.App.1977), reh., 380 A.2d 277, cert. granted, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 judgment rev., 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537; Diggs v. State, 345 So.2d 815 (Fla.App.1977).

Similarly, where the defendant's bag would have been x-rayed during airport screening and, because of the unidentified mass disclosed by the x-ray, would have been inspected further in any event, this screening process was lawful even though the defendant was suspected to be carrying narcotics. United States v. Smith, 643 F.2d 642 (2d Cir. 1981).

134. In re One 1965 Econoline, 109 Ariz. 433, 511 P.2d 168 (1973). See other cases in accord in note 64 of § 7.5.

135. People v. Hill, 12 Cal.3d 731, 117 Cal.Rptr. 393, 528 P.2d 1 (1974).

authority is to be found,[136] this is a sound result. When the action would have been taken against *X* even absent the "underlying intent or motivation," [137] there is no *conduct* which ought to have been deterred and thus no reason to bring the Fourth Amendment exclusionary rule into play for purposes of deterrence.

There remains, then, the case in which the Fourth Amendment activity would not have been undertaken *but for* the "underlying intent or motivation" which, standing alone, could not supply a lawful basis for the police conduct. The driver of an automobile suspected of unlawful drug activity is placed under custodial arrest for a traffic violation and then searched, though the arrest was not "one which would have been made by a traffic officer on routine patrol against any citizen driving in the same manner." [138] A person suspected of drug activity is arrested late at night inside the premises of another by state police holding city arrest warrants for two minor traffic violations, hardly the usual practice in dealing with outstanding traffic warrants.[139] An arrestee's car is impounded and then inventoried "contrary to the usual procedure followed in traffic cases." [140] Such situations as these involve what the Supreme Court in *Abel* properly characterized as "serious misconduct by law-enforcing officers," and have resulted in suppression of evidence so acquired.[141]

So, it would seem that at long last we have encountered a situation proving the error of Justice Rehnquist's declaration for the Court in *Scott* that searches are to be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." But, it is submitted, this is not the case. The illustrative fact situations in the preceding paragraph and others like them involve "serious misconduct" *in spite of* rather than *because of* the "underlying intent or motivation" of the police. That is, the proper basis of concern is not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation;

136. See cases in § 7.5(d) invalidating routine vehicle inventories merely because the police anticipated finding evidence of crime, and cases in § 4.11(e) holding execution of a search warrant invalid because the police hoped to find something other than the evidence for which the warrant issued. The cases in the first category, it is submitted, are in error. As for those in the second category, they almost always reflect an additional legitimate concern, namely, that the execution of the warrant was likely more intensive than would have been the case had the authorities only been interested in the items named in the search warrant.

137. One might argue, of course, that what the police *would* have done absent the "underlying intent or motivation" is a matter so difficult to prove that it should not be the determining factor. But, the question is whether the answer to that problem is exclusion in a broader range of cases or, instead, as suggested in the later text at note 151 infra, the establishment of standard procedures against which to test the conduct of the police in the particular case.

138. Diggs v. State, 345 So.2d 815 (Fla. App.1977).

139. Harding v. State, 301 So.2d 513 (Fla.App.1974).

140. State v. Volk, 271 So.2d 643 (Fla. App.1974).

141. See cases cited at note 138–40 supra and other cases in §§ 5.2(e), 6.7(d), 7.5(e).

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143. 387 U.S. 523, 87 S.Ct.
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144. 436 U.S. 307, 98 S.Ct.
Ed.2d 305 (1978).

145. United States v. Brig
422 U.S. 873, 95 S.Ct. 2574,
607 (1975).

"a paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures." [142] In terms of the language of *Scott*, then, it may be said that searches of the kind here under discussion do not pass the "standard of objective reasonableness."

That arbitrary action is unreasonable under the Fourth Amendment has been recognized by the Supreme Court in a variety of circumstances. Under Camara v. Municipal Court,[143] so as not to "leave the occupant subject to the discretion of the official in the field," warrants for housing inspections must show that "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." Similarly, Marshall v. Barlow's Inc.[144] ordinarily requires a warrant showing a business inspection "is pursuant to an administrative plan containing specific neutral criteria," as the "authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers." Absent reasonable suspicion cars may not be stopped by roving patrols seeking illegal aliens,[145] but pursuant to United States v. Martinez-Fuerte [146] fixed checkpoints may be operated for that purpose because in such a situation there is not "a grave danger that * * * unreviewable discretion would be abused by some officers in the field." And more recently, in Delaware v. Prouse,[147] the random stopping of vehicles without reasonable suspicion to check for drivers' licenses and vehicle registrations was held unreasonable under the Fourth Amendment, but it was suggested that checkpoints operated for such purposes would be permissible because then "persons in automobiles on public roadways [would] not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." In all of these cases, of course, the need for a meaningful prohibition of arbitrary action was highlighted by the fact that the enforcement activity in question was being permitted without probable cause focusing upon a particular individual or place. In that sense, they are different from the kind of situation presently under discussion, where the arrest or search is on probable cause but that probable cause goes to an offense for which an arrest or search would not ordinarily be made. But given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, that difference hardly matters, for here as well there exists "a power that places the liberty of every man in the hands of every petty officer," [148] precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

142. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 417 (1974).

143. 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

144. 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).

145. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

146. 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), on remand, 538 F.2d 858 (2d Cir.)

147. 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)

148. 2 L. Wroth & H. Zobel, Legal Papers of John Adams 141–42 (1965), setting out Adams' abstract of the argument of James Otis against the writs of assistance.

To the extent that lower court cases of the kind now under consideration have tended, in the course of suppressing evidence on Fourth Amendment grounds, to stress the ulterior motives of the police, they may appear to run contrary to the *Scott* principle. But the inquiry in these cases into "the underlying intent or motivation of the officers involved," it would seem, has ordinarily been prompted by an inability of the courts to ascertain in a more direct fashion whether the police in the particular case had departed from their usual practice. This is not to suggest, however, that inquiry into motivation is either a desirable or an accurate means of resolving that issue. For one thing, there is hardly a perfect correlation between motivation and deviation. Presence of an ulterior motive may show why an officer might want to depart from the usual procedure but does not show that he has done so, and even in the absence of an ulterior motive the officer may have by inadvertence failed to conform to the usual practice. Secondly, and perhaps more important, there is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive. As Professor Amsterdam has quite persuasively noted:

> But surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of police in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.[149]

Underlying the *Scott* rule, then, is the sound notion (expressed earlier by three members of the Court in Massachusetts v. Painten[150]) that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."

What this means, then, is that the *Scott* approach of disregarding "the underlying intent or motivation of the officers involved" is correct even in the situation now under discussion, *provided* there are more reliable and feasible means of determining in a particular case whether or not the challenged arrest or search was arbitrary. This can best be accomplished by more widespread application of the requirement utilized by the Supreme Court in South Dakota v. Opperman,[151] namely, that the Fourth Amendment activity "was carried out in accordance with *standard procedures* in the local police department." If and when the Court makes broader use of that check upon arbitrariness, which unfortunately it has failed to do in circumstances quite obviously calling for that kind of a restriction,[152] there then

149. Amsterdam, note 142 supra, at 436–37.

150. 368 F.2d 142 (1st Cir. 1966).

151. 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), on remand, S.D., 247 N.W.2d 673.

152. Amsterdam, note 142 supra, at 415–16, notes: "Six weeks ago, the Supreme Court handed down decisions

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§ 1.3 Federal vs. tions

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would be no reason to question the proposition put forward by the Court in *Scott*. There would then exist standards against which to examine the police conduct in individual cases; in keeping with the philosophy underlying the *Camara-Prouse* line of cases, decisions of whether to arrest and search when probable cause is present would not be left entirely to officers in the field, and the conduct of individual officers could realistically be judged by resort to those standards.[153]

holding that a police officer who arrests a motorist for a traffic violation may make a full-scale body search incident to the arrest. The holdings were delivered in two cases. In the first case, both the decision of the officer to make a 'full custody arrest' rather than to issue a citation and his decision to conduct a full 'field type search' in connection with arrests for the particular vehicle code violation in question were apparently dictated by local police regulations. In the second case, both decisions were left entirely to the discretion of the officer. If the Court had distinguished the two cases on this ground, it would, in my judgment, have made by far the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761 and 'the child Independence was born.' But it did not. Without evident appreciation of the significance of the issue or the opportunity within its grasp to fashion a solution to a wide array of fourth amendment problems that would otherwise bedevil it forever, the Court kicked the chance away. It thereby held that whether you and I get arrested and subjected to a full-scale body search or are sent upon our respective ways with a pink multi-form and a disapproving cluck when we happen to go for a drive and to leave our operator's licenses on the dressing table depends upon the state of the digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin." See also § 5.2(g).

153. But some courts have utilized the *Scott* theory even when considerable discretion exists. Illustrative are the cases holding motivation irrelevant notwithstanding the fact that Coast Guard officers have vast discretion as to which vessels to stop for a safety and documentation inspection. United States v. Arra, 630 F.2d 836 (1st Cir. 1980); State v. Richards, 388 So.2d 573 (Fla.App.1980).

§ 1.3 Federal vs. State Standards; Constitutional vs. Other Violations

14. See the thoughtful concurring opinion of Linde, J., in State v. Greene, 285 Or. 337, 591 P.2d 1362 (1979), reasoning that states by legislation and localities by rule should deal with search and seizure questions more than they have, given the fact the constitutional limits are often uncertain and, after all, only set the outer limits on police authority.

21. Consider also State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978) (where statute says evidence "obtained as a result" of violation of statutory provisions must be suppressed, suppression not required for noncompliance with statutory requirement that list of items seized be given to person consenting to search, as items were not obtained as a result of that violation).

24. See also United States v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979) (evidence obtained by FBI agent in border search suppressed because statutory authority to conduct such searches limited to certain officials not including FBI agents; court stresses that "important statutory limitations which protect the balance between sovereign power and constitutional rights were violated here," the point being that this special and extraordinary search power should be limited to officials having the special responsibilities which justify that power).

32. See also United States v. Searp, 586 F.2d 1117 (6th Cir. 1978), cert. den., 440 U.S. 921, 99 S.Ct. 1247, 59 L.Ed. 2d 474 (where federal agent obtain search warrant from state judge in course of joint federal-state investigation, it is a federal warrant and thus the provisions of Fed.R.Crim.P. 41 concerning obtaining authorization for nighttime entry apply, but, given fact

§ 1.1 Origins and Purposes of The Exclusionary Rule

Analysis

Subsec.

(a) Origins of the Fourth Amendment.
(b) The Boyd case.
(c) The Weeks case.
(d) The Wolf case.
(e) The Mapp decision.
(f) Purposes.

In this Chapter, attention is given to various actual or potential remedies for police violation of the Fourth Amendment. Without passing judgment at this point upon the relative efficacy of these various remedies, it may nonetheless be said with confidence that the practicing lawyer most frequently encounters the Fourth Amendment in the context of proceedings to determine whether the fruits of a search or seizure are to be admitted into evidence in a criminal case. It is primarily because of the exclusionary rule that courts are called upon to meet the seemingly unceasing challenge of marking the dimensions of the protections flowing from the Fourth Amendment. Thus, it is appropriate to begin this text with a brief historical survey of the origins and purposes of the exclusionary rule.

(a) Origins of the Fourth Amendment.[1] A leading Fourth Amendment scholar has noted: "Alone among these constitutional provisions which set standards of fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England."[2]

In England, the power to search was long used as a means of restricting freedom of the press.[3] A licensing system was introduced by Henry VIII in 1538,[4] and vast powers of search were conferred on those who enforced the system. The Star Chamber,[5] and later the Parliament,[6] authorized virtually unlimited search powers to seek out books and other publications. It was not until the impeachment of a justice for his issuance of general warrants that the Parliament rec-

1. For a more thorough account, see J. Landynski, Search and Seizure and the Supreme Court ch. 1 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937).
2. J. Landynski, supra note 1, at 19.
3. See F. Siebert, Freedom of the Press in England: 1476–1776 (1952).
4. Id. at 48.
5. Id. at 84–85.
6. Id. at 173–76.

ognized, in 1685, "the idea that general warrants were an arbitrary exercise of governmental authority against which the public had a right to be safeguarded." [7] But it was many years later before judicial rulings against such warrants were forthcoming, first in Wilkes v. Wood [8] and later in the most famous case of Entick v. Carrington,[9] where Lord Camden sustained a trespass verdict in favor of the victim of a general warrant. He declared, "if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Because of these decisions and the popular feeling they aroused, Parliament was influenced to act against general warrants.[10] Leading the attack was William Pitt, whose eloquent remarks will never cease to be quoted:

> The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[11]

While this struggle was going on in England, there were important developments on this side of the Atlantic. The writ of assistance, seldom used in England,[12] was utilized by customs officers to enter and search buildings for smuggled goods.[13] In 1761, James Otis, Jr., representing 63 Boston merchants, opposed in court the issuance of new writs. He did not prevail, but this does not detract from the impact of Otis' oratory. As John Adams, a youthful spectator, was later to recall: "[H]e was a flame of fire! * * * Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. * * * Then and there the Child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." [14] Controversy over the writs continued up to the Revolutionary War, although curiously no specific mention of them is to be found in the list of grievances in the Declaration of Independence.[15]

7. N. Lasson, supra note 1, at 38–39.

8. 19 Howell's State Trials 1153 (1763).

9. 19 Howell's State Trials 1029 (1765).

10. N. Lasson, supra note 1, at 49.

11. Id. at 49–50.

12. 1 H. Hockett, The Constitutional History of the United States, 1776–1826, 74 (1939).

13. See N. Lasson, supra note 1, at ch. 2.

14. 10 C. Adams, The Life and Works of John Adams 247–48 (1856)

15. It has been noted, however, that the grievance was possibly intended

The Constitutional Convention, meeting in 1787 in Philadelphia, did not include a bill of rights in its draft constitution, an omission which was the cause of considerable opposition to ratification. One of the points emphasized in the ratification debates was the need for a provision dealing with searches.[16] Because of this national criticism, President Washington urged the addition of a bill of rights,[17] and James Madison assumed the role as sponsor of this effort in the Congress. Madison proposed a clause reading: "The rights of the people to be secured in their persons, their houses, their papers, and the[ir] other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." [18] This provision was altered in committee to read: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." [19] The committee draft was corrected by replacing the word "secured" with "secure" and by adding the inadvertently omitted phrase "unreasonable searches and seizures," but Representative Benson's proposal to use stronger language ("no warrant shall issue") was voted down by a substantial majority.[20] However, Benson, chairman of the committee to arrange the amendments as passed, reported out his own version; this apparently went unnoticed in the House, and the amendment was agreed to in the Senate in this form:

> 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.

The Fourth Amendment, it has been aptly noted, has "both the virtue of brevity and the vice of ambiguity." [21] It does not define the critical word "unreasonable," nor does it indicate what the relationship is between that part prohibiting unreasonable searches and that part setting forth the conditions under which warrants may issue.

to be comprehended within the complaint that the King had "sent hither swarms of Officers to harass our people." N. Lasson, supra note 1, at 80 n. 7.

16. Id. at 92–96, quoting the arguments of Patrick Henry in the Virginia ratification proceedings.

17. The Presidents Speak 5 (D.Lott ed. 1961).

18. 1 Annals of Cong. 452 (1789) [1789–90].

19. Id. at 783.

20. Ibid.

21. J. Landynski, supra note 1, at 42.

lice, who turned certain evidence over to the U.S. marshal, and the marshal later that day participated in a second warrantless search of the house by the police. Upon Weeks' pretrial motion for return of the property seized, the court ordered the return of all of the property except that which the prosecutor wished to introduce into evidence. Before the Supreme Court, Weeks contended that the seizure of his private papers violated the Fourth and Fifth Amendments, but Justice Day (who had also written the *Adams* decision), for a unanimous Court, dealt only with the Fourth Amendment. The Court had no doubt but that, given Weeks' timely motion for return of the illegally seized evidence, a conviction based upon that evidence could not stand:

> 'The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority * * *. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction 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.
>
> * * * To sanction [unlawful invasion of the sanctity of his home by officers of the law] 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.

But, the government countered, what of the *Adams* case, where just ten years earlier a unanimous Court had held that it was no valid objection to the use of papers in evidence that they had been illegally seized and that courts would not interrupt a trial to make a determination of that question? *Adams*, Justice Day responded, had as its underlying principle the notion that a court engaged in a criminal trial should not have to get into the collateral issue of the source of competent evidence, and thus it had no application here, as Weeks had petitioned for return of the property before trial. Hence the Court concluded that it was necessary to reverse the judgment because of prejudicial error in holding and permitting use at trial of those papers Weeks had sought which had been seized by the marshal. The same result was not required as to the fruits of the first search, conducted by state officers, "as the 4th Amendment is not directed to individual misconduct of such officials."

While the *Weeks* Court thus saw no constitutional impediment to admitting in a federal trial the fruits of a state search, it was later necessary for the Court to give this matter closer attention. In two 1927 cases, the Supreme Court concluded otherwise as to state searches with either federal participation or a federal purpose. In Byars v. United States,[32] state officers executing a state search warrant, defective by federal standards, were accompanied by a federal agent, who participated in the search. Because "the search in substance and effect was a joint operation of the local and federal officers," the Court concluded that the fruits were inadmissible in the federal courts. But the Court emphasized that the rule was still otherwise as to "evidence improperly seized by state officers operating entirely upon their own account." As Justice Frankfurter was later to state the *Byars* doctrine, "a search is a search by a Federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." [33] But, it is otherwise if the platter was in readiness at the time of the search, the Court concluded in Gambino v. United States.[34] There, though federal agents had neither directed nor participated in a search by state officers of a car suspected to contain illegal liquor, the Court found that "the wrongful arrest, search and seizure were made solely on behalf of the United States." Why? Because the state's prohibition law had been repealed, the national prohibition act contemplated federal-state cooperation, and the governor of the state had directed his officers to proceed as they did prior to repeal of the state law but to turn offenders over to federal authorities.

(d) **The Wolf case.** Because the Bill of Rights was designed as a limitation on the federal government only,[35] it was settled very early that the Fourth Amendment "has no application to state process." [36] With the adoption in 1868 of the Fourteenth Amendment, forbidding the states to "deprive any person of life, liberty, or property, without due process of law," however, there arose the difficult question of the relation of the limitation of that Amendment upon the states to the limitations upon federal action in the first eight Amendments. Com-

32. 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927).

33. Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949), which "marked the first serious challenge of the doctrine by members of the Court." J. Landynski, supra note 1, at 73. *Lustig* is discussed later in this section because of its relationship to Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

34. 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927).

35. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

36. Smith v. Maryland, 59 U.S. (18 How.) 71, 15 L.Ed. 269 (1855).

mencing with Hurtado v. California [37] in 1884, a majority of the Court utilized the so-called fundamental rights interpretation of the due process clause. But it was not until the 1930's, when the Court began to display increasing interest in state criminal procedure, that the Court held that elements of several rights guaranteed by the first eight Amendments were also fundamental rights protected by the Fourteenth Amendment. Illustrative is Powell v. Alabama,[38] where the Court held that appointed counsel for an indigent criminal defendant, an element of the Sixth Amendment right to counsel, was fundamental as applied to certain types of state cases. In rejecting the claim that certain guarantees were fundamental, the Court would often limit its holding to the particular problem before it; for example, in Palko v. Connecticut,[39] holding that due process did not bar a state appeal on a question of law following acquittal, the Court intimated that other forms of double jeopardy might well violate the Fourteenth Amendment. It is also important to note that the fundamental rights approach was by no means accepted by all members of the Court. Indeed, by 1947 Justice Black was able to muster four votes in support of his position that the due process clause guarantees, as against the states, "the complete protection of the Bill of Rights." [40]

The stage was thus set for the Supreme Court to consider the question which was framed by Justice Frankfurter in Wolf v. Colorado [41] as follows: "Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in Weeks v. United States • • • ?" His answer, for a majority of the Court, was as follows:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. • • •
>
> Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy

37. 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

38. 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

39. 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

40. Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947).

41. 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. * * *

[*Weeks*] was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.

Noting that 30 states had rejected the *Weeks* rule, while only 17 were in agreement with it, the Court concluded it was not "a departure from basic standards" to leave the victims of illegal state searches "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." [42]

Justice Black, while not departing from his total incorporation position, concurred on the ground that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Justice Rutledge, one of the three dissenters, objected that without the exclusionary rule the Fourth Amendment, as stated in *Weeks*, "might as well be stricken from the Constitution." Justice Murphy, after cataloguing the reasons why criminal prosecution and civil actions against those who violate the Amendment are ineffective, found the conclusion "inescapable that but one remedy exists to deter violations of the search and seizure clause," namely, "the rule which excludes illegally obtained evidence." Similarly, Justice Douglas concluded that evi-

42. In this connection, the Court perceived a difference between local and national law enforcement: "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

dence obtained in violation of the Fourth Amendment "must be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction."

Any thought that *Wolf* meant state courts were permitted to admit all unconstitutionally seized evidence, regardless of how outrageous or offensive the police methods employed, was dispelled three years later in Rochin v. California.[43] In *Rochin,* state officers broke into the defendant's home, used force in an unsuccessful attempt to retrieve capsules the defendant put in his mouth, and then took the defendant to a hospital where they directed a doctor to force an emetic solution into defendant's stomach, compelling him to vomit up the capsules he had swallowed. Relying upon the coerced confession cases for the proposition that "convictions cannot be brought about by methods that offend 'a sense of justice,'" the Court, per Justice Frankfurter, held that the capsules must be excluded because they were obtained by "conduct that shocks the conscience." "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court," Justice Frankfurter declared, "to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[44]

It soon became apparent, however, that the *Rochin* exclusionary rule would not encompass all serious Fourth Amendment violations. In a 5–4 decision, the Court held in Irvine v. California[45] that the repeated illegal entries into petitioner's home to install and relocate a secret microphone and the listening to the conversations of the occupants for over a month did not require exclusion of the fruits of such conduct. Justice Jackson, who announced the judgment of the Court, noted that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment," but he nonetheless concluded that *Rochin* was inapplicable because "the facts in the case before us • • • do not involve coercion, violence or brutality to the person."[46] And in Breithaupt v. Abram,[47] the majority

43. 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

44. Justices Black and Douglas, concurring separately, contended that the decision should be grounded upon the Fifth Amendment privilege against self-incrimination, which they argued was applicable to the states.

45. 347 U.S.128, 74 S.Ct. 381, 98 L.Ed. 561 (1954).

46. Frankfurter, J., joined by Burton, J., maintained that *Rochin* was controlling. Black, J., joined by Douglas, J., argued that the defendant had been convicted on the basis of evidence "extorted" from him in violation of the Fifth Amendment privilege against self-incrimination, which they again argued was applicable to the states. In a separate dissent, Douglas, J., also protested against the use in state prosecutions of evidence seized in violation of the Fourth Amendment.

47. 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed. 2d 448 (1957).

deemed *Rochin* not controlling where the police took a blood sample "under the protective eye of a physician" from an unconscious person who had been involved in a fatal automobile collision.[48]

The other post-*Wolf* development which merits attention here is the demise of the so-called "silver platter" doctrine, whereby evidence of a federal crime seized by state police in the course of an illegal search while investigating a state crime could be turned over to federal authorities and used in a federal prosecution so long as federal agents had not participated in the illegal search but had simply received the evidence on a "silver platter." In rejecting the doctrine in Elkins v. United States,[49] Justice Stewart, for the majority, pointed out that the determination in *Wolf* that Fourteenth Amendment due process prohibited illegal searches and seizures by state officers, marked the "removal of the doctrinal underpinning" for the admissibility of state-seized evidence in federal prosecutions. He continued:

> The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way.

48. Dissenting Chief Justice Warren, joined by Black and Douglas, JJ., contended that *Rochin* was controlling: "Only personal reaction to the stomach pump and the blood test can distinguish [the two cases]."

Nine years later, even though in the meantime the Court had held in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), that the federal exclusionary rule in search and seizure cases was binding on the states, and in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), that the Fifth Amendment protection against compelled self-incrimination was likewise applicable to the states, the Court still upheld the taking by a physician, at police direction, of a blood sample from an injured person over his objection. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). A 5–4 majority, per Brennan, J., held: (1) that the practice did not offend that "sense of justice" of which the Court spoke in *Rochin*; (2) that the privilege against self-incrimination had not been violated, for it covers only "evidence of a testimonial or communicative nature"; and (3) that there had been no unreasonable search, as there was probable cause, not time to get a warrant first, and the test "was a reasonable one * * * performed in a reasonable manner."

49. 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960).

But the author of *Wolf*, Justice Frankfurter, was among the dissenters[50] in *Elkins*. He deemed it "a complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an 'arbitrary intrusion' of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment."

As for the reverse of the situation presented in *Elkins*, that is, the turning over to state authorities of evidence acquired in an unconstitutional federal search, the Court had earlier held in Rea v. United States[51] that a federal official could be enjoined from turning over such evidence and from giving testimony in a state prosecution concerning the evidence.[52] Significantly, the Court stressed that it was "not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law," and that the case raised "not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies." *Rea* was thus distinguishable from Stefanelli v. Minard,[53] where the Court declined to do indirectly what it was unwilling to do directly in *Wolf*, and thus held that federal injunctive relief was not available to bar the use in a state prosecution of evidence obtained in an illegal state search.[54]

(e) The Mapp decision. In Mapp v. Ohio,[55] the majority, as Justice Harlan complained in his dissent, "simply 'reached out' to overrule *Wolf*." Miss Dollree Mapp was convicted of having in her pos-

50. Also dissenting were Clark, Harlan, and Whittaker, JJ.

51. 350 U.S. 214, 76 S.Ct. 292, 100 L. Ed. 233 (1956).

52. But later, in Wilson v. Schnettler, 365 U.S. 381, 81 S.Ct. 632, 5 L.Ed.2d 620 (1961), a plea for injunctive relief was denied by the Court. *Rea* was distinguished on the curious ground that in that case there had been a prior federal court proceeding where the evidence was ordered suppressed. As one commentator noted, *Wilson* was "one of the most unconvincing and hairsplitting * * * to come from the Court in decades." Broeder, The Decline and Fall of Wolf v. Colorado, 41 Nebr.L.Rev. 185, 193 (1961).

53. 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951).

54. *Stefanelli* was followed, and *Rea* distinguished, in Cleary v. Bolger, 371 U.S. 392, 83 S.Ct. 385, 9 L.Ed.2d 390 (1963), denying a federal injunction against a state official from giving evidence in pending state criminal and administrative proceedings even though the official had observed the illegal federal activities as a representative of the bi-state Waterfront Commission. Justice Goldberg, concurring, pointed out that in light of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), holding the Fourth Amendment exclusionary rule applicable to the states, there was no need to grant injunctive relief because of the substantial likelihood that illegally obtained evidence would be excluded in the state proceedings.

55. 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed.2d 1081 (1961).

session certain obscene books, pictures and photographs which the police had found in an illegal search of her home. The state supreme court upheld the obscenity statute under which she was convicted and also declined to depart from the state's common-law rule of admissibility of illegally seized evidence. At no time did Miss Mapp's counsel ask the Supreme Court to overrule *Wolf*; he did not even cite the case in his brief, and on oral argument he expressly disavowed that he was seeking to have the *Wolf* case overturned. Rather, he pursued what Justice Clark, for the majority, noted "may have appeared to be the surer ground for favorable disposition," namely, the question of whether one could constitutionally be convicted for the mere knowing possession of obscene materials. Only the American Civil Liberties Union, in a concluding paragraph of its amicus brief, urged that *Wolf* be overruled.

In holding "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court," the Court in *Mapp* reasoned:

> 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. Were it otherwise then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

As for *Wolf*, the majority in *Mapp* found that case to be "bottomed on factual considerations" which were without "current validity." While it was said in *Wolf* that "the contrariety of views of the States" on adoption of the exclusionary rule was "particularly impressive," then supportable by the fact that almost two-thirds of the states were opposed to the use of the exclusionary rule, "more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule." Similarly, the observation in *Wolf* that "other means of protection" were afforded "the right to privacy" was rebutted by the experience in California and other states "that such other remedies have been worthwhile and futile." And as for what *Wolf* called the "weighty testimony" of People v. Defore,[56] characterizing the federal rule as "either too strict or too lax," the *Mapp* majority found that

56. 242 N.Y. 13, 150 N.E. 585 (1926).

"the force of that reasoning has been largely vitiated by later decisions of this Court." [57]

In an oft-quoted passage, Justice Clark went on to say:

> Moreover, our holding • • • is not only the logical dictate of prior cases but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.

Justice Black, concurring, declared that he was "still not persuaded that the Fourth Amendment, standing alone, would be enough" to support exclusion, but he concluded "that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." In his concurring opinion, Justice Douglas responded to the objection of the three dissenters [58] that the instant case was not "an appropriate occasion for re-examining *Wolf*," noting that the Court had said a year earlier that all the arguments pro and con on this issue were well known.

Justice Harlan, joined by Justices Frankfurter and Whittaker, after stating their objection to reaching the Fourth Amendment issue, turned to the merits. They found the majority's reasoning to rest on an "unsound premise," namely, that "whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise • • • enforceable against the States." This is not the case, they declared, for *Wolf* did not hold "that the Fourth Amendment *as such* is enforceable against the States," but rather only "the principle of privacy 'which is at the core of the Fourth Amendment.'" That "core" does not include the exclusionary rule, for each state, "considering the totality of its legal picture," can best conclude what remedies are needed. Thus, the *Mapp* dissenters urged, "this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them

57. The Court referred to the discarding of the "silver platter" doctrine in *Elkins*, the use of federal injunctive relief against the reverse "silver platter" in *Rea*, and the relaxation of the standing requirements in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

58. Which was shared by Justice Stewart, who by separate memorandum indicated he would reverse the judgment on the ground that the Ohio obscenity statute was unconstitutional.

in coping with their own peculiar problems in criminal law enforcement."

(f) Purposes. Although not explicitly mentioned in the early cases, such as *Boyd* and *Weeks*, it is fair to say that the deterrence of unreasonable searches and seizures is a major purpose of the exclusionary rule. This was acknowledged even in *Wolf*, declining to apply the exclusionary rule to the states, for it was there noted that while "the exclusion of evidence may be an effective way of deterring unreasonable searches," the states were to be allowed to rely "upon other methods which, if consistently enforced, would be equally effective." And in Elkins v. United States,[59] in the course of striking down the "silver platter" doctrine, the Court emphasized: "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." This language from *Elkins* was quoted with approval in *Mapp*, where the Court characterized the exclusionary rule as a "deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'" *Elkins* was again quoted in Linkletter v. Walker,[60] where it was observed that "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," a purpose which would not "be advanced by making the rule retrospective." More recently, in Terry v. Ohio,[61] the Court stressed that the exclusionary rule's "major thrust is a deterrent one."

But, while it may be fair to say that deterrence is the "major thrust" of the exclusionary rule, the rule does serve other purposes as well. There is, for example, what the *Elkins* Court referred to as "the imperative of judicial integrity," namely, that the courts not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." This language from *Elkins* was also relied upon in *Mapp* and again in *Terry*, where the Court explained:

> 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

59. 364 U.S. 206, 80 S.Ct. 1437, 4 L. Ed.2d 1669 (1960).

60. 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed.2d 601 (1965).

61. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

A third purpose of the exclusionary rule, as recently stated most clearly by some members of the Court, is that "of assuring the people —all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." [62] While at first blush this may appear to be merely a statement of the deterrent function, this is not the case, for the focus is on the effect of exclusion upon the public rather than the police. This purpose also has solid credentials in the cases. As early as *Weeks*, the Court declared:

> The tendency of those who execute the criminal laws of the country to obtain conviction 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.
>
> * * * To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action.

The same notion is implicit in the *Mapp* declaration that "no man is to be convicted on unconstitutional evidence."

This brief exploration of the purposes of the exclusionary rule is of more than academic concern, for the Court's perception of these purposes will determine the scope and, ultimately, the fate of the exclusionary rule. It is clear that the Court has never taken the latter two purposes discussed above to be of such importance that the exclusionary rule must be unqualified, as is perhaps most apparent from the fact that the government may "profit" from its wrongdoing and the court may be an "accomplice" thereto whenever the defendant lacks standing to object to a prior Fourth Amendment violation.[63] But it is nonetheless true that the reach of the exclusionary rule may be affected by what are seen as its purposes, as is illustrated by the recent case of United States v. Calandra.[64] The majority took into account only the deterrence function in holding that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search, for it was concluded that any "incre-

62. United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)(dissent).

63. See § 11.3.

64. 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). See Schrock & Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn.L.Rev. 251 (1974).

mental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." The three dissenters,[65] on the other hand, stressing the other two functions and relegating deterrence to "at best only a hoped for effect of the exclusionary rule," concluded the exclusionary rule should be so extended.

More recently, the *Calandra* approach was followed in United States v. Janis [66] and Stone v. Powell.[67] In *Janis*, the majority concluded that "the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct,' " and then held that this purpose would not be served by utilizing the exclusionary rule to exclude from federal civil tax proceedings evidence obtained by a state law enforcement officer.[68] And in *Stone* the Court again declared deterrence to be the "primary justification" for the exclusionary rule, which led to the holding that a state prisoner cannot ordinarily [69] obtain habeas corpus relief in federal court on Fourth Amendment grounds because the "additional incremental deterrent effect" of exclusion at that stage would be minimal.[70]

Calandra is also noteworthy in another respect. In *Mapp*, the exclusionary rule was declared to be "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy," and "an essential part of both the Fourth and Fourteenth Amendments." But the *Calandra* majority, looking only to the deterrence function, characterized the rule as "a judicially-creat-

65. Brennan, Douglas, and Marshall, JJ.

66. 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976).

67. 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

68. The Court had this to say in a footnote about the judicial integrity rationale:

"The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. * * * The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

69. The exception noted by the Court is where the state has failed to provide an opportunity for full and fair litigation of a Fourth Amendment claim.

70. As for the judicial integrity rationale, the Court in *Stone* asserted:

"While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. The force of this justification diminishes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review."

ed remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." What that language may bode for the future is presently unclear,[71] but the alarm sounded by the *Calandra* dissenters is not without substance. As Justice Brennan stated, "I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search and seizure cases." [72]

§ 1.2 The Exclusionary Rule Under Attack

Analysis

Subsec.

(a) Clearing the underbrush.
(b) The matter of deterrence.
(c) Replacing the exclusionary rule.
(d) Limiting the exclusionary rule to "substantial" or "knowing" violations.
(e) Limiting the exclusionary rule to other than "serious cases".
(f) Limiting the exclusionary rule to institutional failures.

For over half a century now, the validity and efficacy of the Fourth Amendment exclusionary rule have been vigorously debated

71. The *Calandra* characterization was relied upon in *Stone* and contributed to the Court's reasoning to the result described in the preceding text.

72. Other signals are to be found. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), where Justice Blackmun indicated his agreement with the proposition that "the Fourth Amendment supports no exclusionary rule," and Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), where Chief Justice Burger stated in dissent: "[T]he Exclusionary Rule does not ineluctably flow from a desire to ensure that government plays the 'game' according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionry rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government." And in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Chief Justice ventured "to predict that overruling this judicially contrived doctrine—or limiting its scope to egregious, bad-faith conduct—would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct."

But in both *Stone* and United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the majority indicated its willingness to continue to assume, despite the absence of supportive empirical evidence, that the immediate effect of exclusion in criminal trials is to deter future violations.

by legal commentators.[1] Particularly in light of the Supreme Court's continued adherence for several years to its holding in Mapp v. Ohio,[2] this matter might appear to be of academic interest only and undeserving of close attention here. Recent events, however, suggest that this is not the case.

Some members of the Supreme Court have in recent years expressed considerable disenchantment with the Fourth Amendment exclusionary rule. In Bivens v. Six Unknown Named Agents,[3] Chief Justice Burger concluded in his dissent that the suppression doctrine "is both conceptually sterile and practically ineffective in accomplishing its stated objective." In Coolidge v. New Hampshire,[4] concurring Justice Harlan voiced the need to overhaul the law of search and seizure and indicated he "would begin this process of re-evaluation by overruling *Mapp*," while Justices Black and Blackmun separately asserted that "the Fourth Amendment supports no exclusionary rule." And in Stone v. Powell,[5] the Chief Justice favored "overruling this judicially contrived doctrine," while Justice White announced he was prepared to "join four or more other Justices in substantially limiting the reach of the exclusionary rule." Such expressions have led some to conclude that the Court is now prepared to abandon or at least modify the exclusionary rule,[6] and not surprisingly advocates before the Court have now been emboldened to mount an attack upon the exclusionary rule.[7]

In the discussion which follows, an effort has been made initially to set aside those anti-exclusionary rule arguments which are clearly without substance or which are misdirected at the suppression doc-

1. For a useful survey of this literature, see Comment, 65 J.Crim.L. & C. 373 (1974). More recent commentary includes S. Schlesinger, Exclusionary Injustice (1977); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 Wash.U.L.Q. 621; Miles, Decline of the Fourth Amendment: Time to Overrule Mapp v. Ohio, 27 Cath.U.L. Rev. 9 (1977).

2. 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

3. 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed.2d 619 (1971).

4. 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed.2d 564 (1971).

5. 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976).

6. United States v. Acosta, 501 F.2d 1330 (5th Cir. 1974) (dissenting opinion); Orricer v. Erickson, 471 F.2d 1204 (8th Cir. 1973) (concurring opinion).

7. In California v. Krivda, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972), where the Court did not reach the merits because of uncertainty as to whether the California Supreme Court had based its decision upon an interpretation of the Fourth Amendment, the State of California and amici curiae (Americans for Effective Law Enforcement, International Association of Chiefs of Police, State of Illinois) argued in favor of abandonment or alteration of the exclusionary rule.

crine rather than other aspects of the criminal justice system. This makes it possible to focus more clearly upon the question of deterrence, the most frequent arena of debate on the exclusionary rule. There follows an assessment of extant proposals for replacing or limiting the Fourth Amendment exclusionary sanction.

(a) **Clearing the underbrush.** Professor Allen has aptly noted that debate on the exclusionary rule is "more remarkable for its volume than its cogency."[8] This is true to no small extent because extraneous matters have often been brought into the debate. It is well, then, to begin by identifying and putting aside those arguments which do not contribute to resolution of the ultimate question whether the exclusionary rule should be either abandoned or modified.

One such contention, which was very much in vogue immediately after the *Mapp* decision, is that the exclusionary rule "handcuffs" the police in the enforcement of the criminal law. Totally apart from the fact that evidence offered to support this conclusion, namely, statistics of "crime waves" following adoption of the exclusionary rule, cannot really be taken to establish the fact that use of the exclusionary rule results in more crime,[9] this argument is misdirected. The fallacy of this argument was clearly established many years before the *Mapp* decision by then Senator Robert F. Wagner:

> Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is only the sanction which makes the rule effective. It is the rule, 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. If those rules, defining the scope of the search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge • • •, the burden is on those

8. Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup.Ct.Rev. 1, 33.

9. The "crime wave" statistics are effectively demolished in Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim.L.C. & P.S. 171 (1962).

who challenge them to specify the modifications they deem to be desirable. I think that is a far better course than to object to * * * the one sanction which will give the constitutional provision, however it is defined, genuine meaning.[10]

The nature of the exclusionary rule is such that it makes the cost of honoring the Fourth Amendment apparent. As Professor Kaplan has observed, "by definition, it operates only after incriminating evidence has already been obtained" and thus "flaunts before us the costs we must pay for fourth amendment guarantees."[11] But it is not correct that the cost is attributable to the exclusionary rule. Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. "To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally."[12] It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted.[13]

2/ Another complaint which has been lodged against the exclusionary rule is that it only comes to the aid of the guilty and does nothing to protect the Fourth Amendment rights of the innocent.[14] The Fourth Amendment exclusionary rule, it has been said, is "more vulnerable" to this complaint than exclusionary rules concerning confession or eyewitness identification, for "physical evidence is no less reliable when illegally obtained," while the other exclusionary rules concern evidence "of doubtful reliability."[15] But, even apart from the erroneous assumption that all of those who have occasion to move for the suppression of evidence are "guilty," this argument misperceives the function of the exclusionary rule. While the most immediate and direct consequence of exclusion may be to benefit an individual defendant who might otherwise have been convicted, this is hardly the ultimate goal of the exclusionary rule. As the Supreme Court noted in Elkins v. United States,[16] "The rule is calculated to prevent, not

10. Record of the N.Y. State Const'l Convention 559-60 (1938), quoted in Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill.L.Rev. 1, 19 n. 56 (1950).

11. Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1037 (1974).

12. Allen, supra note 8, at 24.

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

14. Plumb, Illegal Enforcement of the Law, 24 Cornell L.Q. 337, 371 (1939); Taft, Protecting the Public From Mapp v. Ohio Without Amending the Constitution, 50 A.B.A.J. 815, 816 (1964).

15. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi.L.Rev. 665, 737-38 (1970).

16. 364 U.S. 206, 80 S.Ct. 1437, 4 L.2d 1669 (1960).

to repair." Or, as Justice Traynor put it: "The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward." [17] Thus, as one commentator has noted:

> The critics forget that neither the rule nor the fourth amendment exists to protect the criminal in whose case the rule is applied. Both exist to protect society—all those citizens who never break laws more serious than those prohibiting overtime parking. * * * Narrowly viewed, the exclusionary rule is very unattractive, because in the vast majority of cases in which it is applied the immediate result is to free an obviously guilty person. But the guilty defendant is freed to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions. Thus to suggest that the exclusionary rule fails to aid the innocent or that society rather than the policeman suffers for the policeman's transgression is nonsense. The innocent and society are the principal beneficiaries of the exclusionary rule.[18]

To say that the "emphasis is forward," of course, is merely to stress the deterrence function of the exclusionary rule. The significance of the question which many have raised as to whether the exclusionary rule does in fact deter will be considered momentarily. Here, however, it will suffice to note the irrelevance to the exclusionary rule debate of one particular facet of the no-deterrence argument, namely, that which focuses upon police ignorance of the procedures which must be followed in order to comply with the Fourth Amendment. The contention under consideration here has been stated thusly by Professor Oaks:

> To be an effective general deterrent the sanction and the reasons for the sanction must be communicated to the target population. There is reason to believe that the channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the rule. * * * The deterrent effectiveness of the exclusionary rule is also dependent upon whether the arrest and search and seizure rules that it is supposed to enforce are stated with sufficient clarity that they can be understood and followed by common ordinary police officers. * * * Though undoubtedly clear in some areas of police behavior, the rules are notoriously complex in others.[19]

17. Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 335.

18. Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind.L.J. 329, 330–31 (1973).

19. Oaks, supra note 15, at 730–31. See also Burger, Who Will Watch the Watchman?, 14 Am.U.L.Rev. 1, 9–11

I do not question for a moment that Fourth Amendment standards are often lacking in clarity and that often they have not been effectively communicated to the police. I have noted elsewhere, as have others, that this is justifiably a matter of serious concern and that consequently there is a compelling need for courts to state Fourth Amendment requirements more simply and clearly and for more effective lines of communication to the police to be established.[20] But, to say that "the law of search and seizure and the law of arrest are filled with technicalities and inconsistencies * * * goes to the content of the rules rather than to the remedy."[21] Similarly, to say that more is required in terms of police education is to state a need which would exist whether or not there were an exclusionary rule. That is, the desire for greater clarity in the rules and for more effective communication of the rules to the police can only be explained on the ground that we wish to minimize the risks of inadvertent and unintentional police violations of the commands of the Fourth Amendment. To suggest that this objective would somehow vanish if the exclusionary rule were abandoned is to concede the force of the warning in Weeks v. United States[22] that without the suppression doctrine the Fourth Amendment would be no more than "a form of words."

(b) The matter of deterrence. Chief Justice Burger asserted in his *Bivens* dissent that the hope that the Fourth Amendment could be enforced "by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream." In concluding that the suppression doctrine "is both conceptually sterile and practically ineffective in accomplishing its stated objective" of deterrence, he relied heavily upon the conclusion that "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials." In support of the latter conclusion, the Chief Justice made reference to a very thorough and useful study conducted by Professor Oaks, in which he subjected to critical examination "the largest fund of information yet assembled on the effect of the exclusionary rule."[23] However, it is well to note that the charateriza-

(1956); Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Tex.L.Rev. 736, 737 (1972).

20. Dworkin, supra note 18; LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich.L.Rev. 987 (1965); LaFave, Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices, 30 Mo.L.Rev. 391 (1965); LaFave, Improving Police Performance Through the Exclusionary Rule —Part II: Defining the Norms and Training the Police, 30 Mo.L.Rev. 566 (1965).

21. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim.L.C. & P.S. 255, 256 (1961).

22. 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

23. Oaks, supra note 15, at 709.

tion by the Chief Justice of Oaks' conclusion is less than complete; Oaks reached the conclusion that these data "fall short of an empirical substantiation *or* refutation of the deterrent effect of the exclusionary rule."[24] That is, it has not been clearly established that the exclusionary rule does deter, or that it does not.

It is more precise, perhaps, to say that we do not have an "effective quantitative measure of the rule's deterrent efficacy,"[25] for there is some evidence available as to when the exclusionary rule does not deter and also some evidence indicating that it sometimes does deter. As to the former, there exists hard evidence, based upon empirical research into police practices,[26] which clearly demonstrates the correctness of the observation in Terry v. Ohio[27] that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Illustrative are "arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), arrest for the purpose of controlling prostitutes and transvestites, arrest of an intoxicated person for his own safety, search for the purpose of recovering stolen property, arrest and search and seizure for the purpose of 'keeping the lid on' in a high crime area or of satisfying public outcry for visible enforcement, search for the purpose of removing weapons or contraband such as narcotics from circulation, and search for weapons that might be used against the searching officer."[28]

The evidence tending to show that the exclusionary rule does deter is, by comparison, of a "softer" variety, but most likely this is inevitably so. As Professor Wright has noted: "With the Exclusionary Rule, as with capital punishment, the occasions on which the deterrent effect has failed are easy to see. It is more difficult to measure the occasions on which the deterrent has been successful."[29] That the exclusionary rule has had a deterrent effect upon the police is certainly suggested by such post-exclusionary rule occurrences as the dramatic increase in the use of search warrants where virtually none had been used before,[30] stepped-up efforts to educate the police on the law of search and seizure where such training had before been vir-

24. Ibid. (Emphasis added.)

25. Allen, supra note 8, at 34.

26. W. LaFave, Arrest chs. 21–25 (1965); J. Skolnick, Justice Without Trial ch. 10 (1966); L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime ch. 13 (1967); LaFave & Remington supra note 20; LaFave, supra note 20.

27. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

28. Oaks, supra note 15, at 721–22.

29. Wright, supra note 19, at 739.

30. See Milner, Supreme Court Effectiveness and the Police Organization, 36 Law & Contemp. Prob. 467, 475 (1971).

tually nonexistent,[31] and the creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means which would not result in its suppression.[32] Moreover, if the assertions of police spokesmen, stated by way of complaint, that the police have been "handcuffed" by the exclusionary rule are taken seriously, they can only be taken as an acknowledgment that the police are deterred by the exclusionary sanction.[33] "There would be little reason to complain of the substantive rules unless the exclusionary rule made them relevant to police action." [34]

Despite the lack of hard evidence proving deterrence and of a sound quantitative measure of the extent of deterrence, it is not irresponsible to suggest (i) that the hard evidence the rule does not deter under certain circumstances fails to "demonstrate the absence of all deterrent potential"[35]; and (ii) that a significant amount of deterrence may be assumed from the fact that "conviction of offenders remains obviously an important objective of police activity."[36] But the Chief Justice does not concede even this much in *Bivens*. Although lacking empirical evidence on his side of the issue, he finds evidence of nondeterrence in the nature of the exclusionary rule—the fact that it "does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence." And should this evidence not be deemed convincing, it is of no consequence, for in light of the "high price" which the exclusionary rule extracts the burden is on its proponents to make a "clear demonstration" of its efficacy.[37]

The latter point has been effectively answered by Professor Dworkin:

> Obviously, the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained[38] is outcome determinative. The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion. * * * The deterrent efficacy of the exclusionary rule can be evaluated without resort to the notion of burdens of proof. If all

31. See Kamisar, supra note 9, at 179–82.

32. Ibid.

33. Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn.L.Rev. 1083, 1156–57 (1959).

34. Paulsen, supra note 21, at 262.

35. Allen, supra note 8, at 39.

36. Ibid.

37. To the same effect is Wright, supra note 19, at 742.

38. Allen, supra note 8, at 34, notes that it is not "an easy matter to devise methods to produce a persuasive empirical demonstration" on this issue. And despite the useful suggestions for empirical research set out in Oaks, supra note 15, it is to be doubted whether a truly "quantitative measure" is possible.

> laws which are justified wholly or partly on the ground that they deter undesirable conduct had to be justified by showing that they actually do deter, very little of the criminal law, at least, could meet the test. Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred * * *.[39]

Moreover, the Chief Justice's notion that there can be no deterrence absent a "direction sanction to the individual officer" is in error. No one, Professor Amsterdam has noted,

> has ever urged that the exclusionary rule is supportable on this principle of "deterrence." It is not supposed to "deter" in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity.
>
> Rather, the exclusionary rule is designed to operate in the manner of the procedure now being used in some appliance stores with the encouragement of police authorities; branding the social security number of the purchaser into the chassis of new television sets in order to make them less attractive as objects of larceny by diminshing their resale value in the hands of anyone but the true owner. Of course a branded television set may nonetheless be stolen by someone who does not notice it is branded, or who thinks that he can sell it even with the brand, or who simply wants to watch the Superbowl on it. But at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality.[40]

For these reasons, the argument that the "exclusionary rule should be abandoned"[41] for want of proof of its deterrent efficacy deserves to be rejected. This conclusion is also supported by other considerations. For one thing, the exclusionary rule "assures a great deal of judicial attention"[42] to questions concerning police practices, which is essential to a comprehensive and clear statement of Fourth Amendment standards. If an appellate court receives but a few cases, "the bits or slices or splinters which are cast up may be too frag-

39. Dworkin, supra note 18, at 332–33.

40. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 431–32 (1974).

41. As made in the State of California's brief at p. 42 in the *Krivda* case; see note 7 supra.

42. Paulsen, supra note 21, at 260.

mentary to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel."[43] But if the court receives "a related group of cases in a series," then "the court will see more, learn more from the series; the court will begin to see in the round rather than the flat, and to gain some understanding of the whole in action."[44] Experience has shown that the exclusionary rule has provided an essential stimulus to the judicial elaboration of Fourth Amendment requirements.[45] This task could not be effectively continued if the exclusionary rule were abandoned.[46]

Finally, it is well to keep in mind Professor Tiffany's caution that in considering the question of whether the exclusionary rule should be abandoned it is

> important to distinguish between the functional and symbolic impact of a rule designed to control behavior. From a functional perspective, the *Mapp* rule may be a failure. It need not follow that the rule should be changed if one can find in it sufficient symbolic worth. The question may be put this way: would reversal of the rule place us in a position that is substantially status quo ante? * * * It has been traditional when discussing the exclusionary rule to [ask]: Does the rule work? But at this point that may be the wrong question. Instead, the central question may now be this: how would the police react if the Supreme Court overruled Mapp v. Ohio? [47]

The point did not escape Chief Justice Burger, for in his *Bivens* dissent he warned against overruling *Mapp* in the absence of some "meaningful alternative" lest "law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminal' had been declared." [48]

43. K. Llewellyn, The Common Law Tradition—Deciding Appeals 263 (1960).

44. Ibid.

45. As to the California experience, see Traynor, supra note 17, at 323; as to the Illinois experience, see LaFave, supra note 20, at 580-81 n. 63.

46. The situation would then be like that which existed prior to *Mapp* in those jurisdictions which had not adopted the exclusionary rule on their own, where appellate courts received arrest and search issues "only when an appeal was taken from a tort action against a police officer. The many barriers to recovery have severely limited the number of appeals, and the defenses available are such that an explicit statement of arrest and search norms is seldom required. Moreover, the civil suit context of the case may divert the appellate court from the question of whether the police conduct was proper to that of whether it is fair to subject the errant officer to personal liability." LaFave, supra note 20, at 581.

47. Tiffany, Judicial Attempts to Control the Police, Current History, July, 1971, pp. 13, 52.

48. But later, concurring in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037,

A majority of the Supreme Court has declined to abandon the exclusionary rule on the no-deterrence theory, stating in Stone v. Powell[49]:

> Despite the absence of supportive empirical evidence,[50] we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions.[51]

(c) Replacing the exclusionary rule. Finding a "meaningful alternative" for the exclusionary rule is easier said than done. In Mapp v. Ohio,[52] it will be recalled, the Court concluded that "other remedies have been worthless and futile," and with this part of *Mapp* "there is little quarrel."[53] And, while it may be true that the argument that nothing else works is hardly sufficient justification for

49 L.Ed.2d 1067 (1976), the Chief Justice indicated otherwise: "With the passage of time, it now appears that the continued existence of the rule, as presently implemented, inhibits the development of rational alternatives."

49. 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976).

50. In the immediately preceding case, United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the Court noted that:

"although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way appears to be flawed. It would not be appropriate to fault those who have attempted empirical studies for their lack of convincing data. The number of variables is substantial, and many cannot be measured or subjected to effective controls. Record-keeping before *Mapp* was spotty at best, and thus severely hampers before-and-after studies. Since *Mapp*, of course, all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated. 'Response' studies are hampered by the presence of the respondents' interests. And extrapolation studies are rendered highly inconclusive by the changes in legal doctrines and police-citizen relationships that have taken place in the 15 years since *Mapp* was decided."

51. But the Court, holding that Fourth Amendment claims of state prisoners could not ordinarily be reviewed on federal habeas corpus, refused to accept "the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."

52. 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed.2d 1081 (1961).

53. Wright, supra note 19, at 738.

adopting the exclusionary rule,[54] it is good reason for maintaining a healthy skepticism about any proposal to abandon the exclusionary rule in favor of some other supposed remedy.

Consider, for example, the suggestion made by the Chief Justice in *Bivens* that Congress might enact a statute with the following components: (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties; (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct; (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute; (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment. He added that states would thereafter "develop their own remedial systems on the federal model."[55]

On what basis should one judge this or any other proposed substitute for the exclusionary rule? I find wholly satisfactory the recommendation of Professor Oaks that

> the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees.[56]

54. Kaplan, supra note 11, at 1032.

55. See also Levin, An Alternative to the Exclusionary Rule for Fourth Amendment Violations, 58 Judicature 75 (1974), proposing a "Joint Liability Plan" whereunder the governmental unit would be liable in tort and the officer would be discharged on proof of an intentional violation or subjected to a monetary penalty on proof of a reckless or grossly negligent violation.

56. Oaks, supra note 15, at 756.

Under this test, the proposed statute would hardly be a suitable replacement for the exclusionary rule. This conclusion is supported by the following considerations:

(1) While abrogation of sovereign immunity and creation of a fair tribunal arguably might overcome two of the longstanding impediments to the effectiveness of the tort remedy, in the absence of a prospect of a significant recovery there would be no incentive to undertake proceedings to collective damages for violation of Fourth Amendment rights. As one commentator has noted, the victim of a police violation of Fourth Amendment rights is likely to lack the "aura of respectability" needed to recover a significant amount for injury to feelings and reputation.[57]

(2) For this reason and others, it will be difficult for a potential plaintiff to obtain effective legal representation. Professor Amsterdam properly asks: "Where are the lawyers going to come from to handle these cases for the plaintiffs?"[58] One of the great virtues of the exclusionary rule is that Fourth Amendment violations are regularly brought to light; the accused "has a motive to challenge the police overreaching" and he "need not resort to another proceeding or hire another lawyer."[59] But what "would possess a lawyer to file a claim for damages * * *, in an ordinary search-and-seizure case?"[60]

(3) Particularly if the Fourth Amendment tort action is pursued infrequently and does not result in substantial recoveries, there is no reason to believe it will act as an effective deterrent. It was noted earlier that the criticism that the exclusionary rule "does not apply any direct sanction to the individual official" takes too narrow a view of deterrence, as suppression of illegally obtained evidence withdraws an incentive to violate the constitution. But if the exclusionary rule is abandoned, so that the inducement to violate is restored, it is to be doubted that this inducement will be overcome by the prospect of recovery from the governmental unit. It has been argued, of course, that "a community which pays the bill will not long tolerate habitual lawlessness."[61] But as yet there has been "no showing that either en-

57. Comment, 63 J.Crim.L.C. & P.S. 256, 263 (1972).

58. Amsterdam, supra note 40, at 430.

59. Paulsen, supra note 11, at 260.

60. Amsterdam, supra note 40, at 430, continuing: "The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on 'cover' charges? The opportunity to represent his client without fee in these resulting criminal matters?"

61. Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U.Chi.L.Rev. 345, 373 (1936).

larged liability or indemnity has realized the expectation that government agencies exposed to this prospect of liability would take steps to minimize their risk by effectively reducing police misbehavior."[62] As one commentator has noted, if "the compartmentalized structure of law enforcement machinery prevented the frustrated prosecutor from putting effective pressure on the police to curb their illegal practices, it seems just as likely that the same compartmentalization will prevent the taxing authorities from putting effective pressure on the police."[63]

(4) The "violate now and pay later"[64] character of the tort remedy makes it ineffective both as a deterrent and a means of giving credibility to Fourth Amendment rights. As Professor Dellinger has observed:

> In essence, by disallowing in all cases the use of the exclusionary rule to suppress evidence gathered in violation of the fourth amendment, the Chief Justice's proposal would permit the government to buy itself out of having to comply with constitutional commands. To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices. * * * However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way. * * * The fourth amendment does not grant the government the discretion to decide whether the benefits of infringing the public's right to be protected from unreasonable searches and seizures are worth some expenditure of the public's funds; the language of the amendment is an affirmative command. It is therefore doubtful that the substitution of a claim against the government for the exclusionary rule in all cases would provide equally effective vindication of the constitutional interests thus protected, and it is therefore doubtful that such a substitution would be constitutionally valid.[65]

(5) Finally, replacement of the exclusionary rule with a tort remedy to be pursued before a special tribunal would have the unfortunate consequence of effectively withdrawing from the Supreme Court and other appellate courts the important function of spelling out police authority under the Fourth Amendment. One of the virtues of the exclusionary rule, as noted above, is that it provides the higher courts with a sufficiently steady diet of Fourth Amendment

62. Oaks, supra note 15, at 673–74 n. 37.

63. Comment, supra note 57, at 264.

64. Paulsen, supra note 21, at 261.

65. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv.L.Rev. 1532, 1562–63 (1972).

issues to make possible a meaningful shaping of constitutional standards governing arrest and search. That process of giving content to the Amendment which occupies "a place second to none in the Bill of Rights"[66] is too important to be shunted off upon a special tribunal in the nature of a court of claims. Moreover, experience has shown that tort litigation is not a meaningful context within which to develop constitutional doctrine on arrest and search.[67]

(d) Limiting the exclusionary rule to "substantial" or "knowing" violations. Yet another objection to the exclusionary rule voiced by the Chief Justice in *Bivens*, which has also been made by other commentators with some frequency,[68] is that it

> has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type[69] violations of the Fourth Amendment. * * *
>
> I submit that 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.

He cited by way of illustration a provision from the Model Code of Pre-Arraignment Procedure which, in its latest form, provides that a motion to suppress is to be granted only if the court finds that violation to be "substantial," to be determined from consideration of all the circumstances, including:

(a) the extent of deviation from lawful conduct;

(b) the extent to which the violation was willful;

(c) the extent to which privacy was invaded;

66. Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947) (Frankfurter, J., dissenting).

67. See note 46 supra. This would be less so if the various common law defenses were not available when the objective is recovery from the government rather than personal liability of the arresting or searching officer, but it is unclear that this is a part of the proposal made by the Chief Justice.

68. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929, 951–53 (1965); Wingo, Growing Disillusionment with the Exclusionary Rule, 25 Sw.L.J. 573, 584–85 (1971); Wright, supra note 19, at 743–45; Comment, 46 Fordham L. Rev. 139 (1977)

69. The reference is to Irvine v. California, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954), a pre-*Mapp* case in which the Court declined to suppress evidence obtained by repeated illegal entries into petitioner's home, first to install a secret microphone and then to move it into the bedroom, in order to listen to the conversations of the occupants.

(d) the extent to which exclusion will tend to prevent violations of this Code;

(e) whether, but for the violation, the things seized would have been discovered; and

(f) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.[70]

Similarly, Justice White, dissenting in Stone v. Powell,[71] expressed the view that the exclusionary rule

> should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed. * * *
>
> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

At first blush, such proposals would seem to have considerable appeal. If the objective is deterrence, would it not be enough "if the police were denied the fruits of activity intentionally or flagrantly illegal"?[72] And do not the government profit and judicial taint argu-

70. Model Code of Pre-Arraignment Procedure § SS 290.2(4) (Proposed Official Draft, 1975). Another provision, § SS 290.2(2), states that suppression shall also occur "if otherwise required by the Constitution of the United States," which some have read as meaning that the "substantial" violation limitation is not applicable to Fourth Amendment violations; see brief of the American Civil Liberties Union in the *Krivda* case, supra note 7, at 16. But this is not the case, for the commentary to this section, at p. 565, asserts that "the constitutional issue itself may be affected by the factor of substantiality."

For an explication and defense of the Model Code position, see Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga.L.Rev. 1 (1975).

71. 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

72. Friendly, supra note 68, at 952.

ments likewise lose considerable force when the officer was less culpable? Although these are provocative inquiries, I find Professor Kaplan's brief against this proposal compelling. He says:

> There are, however, basic problems with such a modification of the rule. It would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law. Moreover, the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake.
>
> There is a more serious problem with exempting searches made through inadvertent errors of law from the exclusionary rule. To do so 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. It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find a deliberate constitutional violation, and evidence of the officer's state of mind would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted testimony. And since the necessary finding requires proof that a policeman actually has engaged in a criminal act, the defendant's burden of proof would be increased, as a psychological or perhaps even as a legal matter.[73]

73. Kaplan, supra note 11, at 1044–45. See also Allen, supra note 8, at 36; Dworkin, supra note 18, at 332; Note, 61 Geo.L.J. 1453, 1459–62 (1973); debate on the ALI proposal in Proceedings of 48th Annual Meeting 376–90 (1971); and debate on a similar proposal in S. 2657, 92d Cong., 1st Sess., before the ABA House of Delegates, summarized in 59 A.B.A.J. 387–88 (1973) and 12 Crim.L.Rptr. 2429–31 (1973).

As Justice Brennan pointed out in his dissent in United States v. Peltier,[74] the proposal to limit the exclusionary rule to knowing violations

> suggests that instead of [a] single inquiry, district judges may also have to probe the subjective knowledge of the official who orders the search, and the inferences from existing law that official should have drawn. The decision whether or not to order suppression would then turn upon whether, based on that expanded inquiry, suppression would comport with either the deterrence rationale of the exclusionary rule or "the imperative of judicial integrity." • • •
>
> Other defects of today's new formulation are also patent. First, this new doctrine could stop dead in its tracks judicial development of Fourth Amendment rights. For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny an accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts.

(c) Limiting the exclusionary rule to other than "serious cases." Professor Kaplan offers two counterproposals, one of which is that the exclusionary rule "not apply in the most serious cases—treason, espionage, murder, armed robbery, and kidnapping by organized groups" except perhaps when "the violation of civil liberties were shocking enough."[75] This limitation is said to be justified by "the political costs of the rule, the possibility of releasing serious and dangerous offenders into the community, and the disproportion between the magnitude of the policeman's constitutional violation and the crime in which the evidence is to be suppressed."[76] Moreover, it is claimed that the result would be the development of more meaningful Fourth Amendment limitations with respect to the investigation of other than serious crimes: "Freed of the concern that the fourth amendment doctrine they announce would later result in the release of people guilty of the most serious crimes, judges would be able to interpret more fully and honestly the commands of the fourth amendment in all the remaining cases."[77]

The wisdom of this proposal is to be doubted. It would seem odd, indeed, to withdraw the exclusionary rule from those cases in which, as far as can be determined,[78] it has the greatest deterrent ef-

74. 422 U.S. 531, 95 S.Ct. 2313, 45 L. Ed.2d 374 (1975).

75. Kaplan, supra note 11, at 1046.

76. Ibid.

77. Id. at 1047.

78. "Since in the policeman's hierarchy of values, arrest and subsequent conviction are more important the 'bigger' the 'pinch,' compliance with the exclusionary rule seems contingent upon this factor." J. Skolnick, supra note 26, at 228.

fect. Nor does it appear correct to say, as Professor Kaplan assumes, that in the investigation of serious offenses "remedies other than the exclusionary rule may be effective."[79] Certainly the restraint of potential adverse public opinion, which generally plays a small part with respect to searches as compared to other forms of police illegality,[80] is virtually nonexistent when the public believes the police were directing their attention to those suspected of the most serious offenses.[81] Moreover as Kaplan acknowledges, there is the risk that if the police were "freed from the constraints of the rule in the most serious cases" they "might actively encourage violation of the fourth amendment."[82] This fear is justified by the pre-*Mapp* experience, as reported by Professor Allen:

> Some states sought to avoid the heavy costs involved in complete acceptance or rejection of the exclusionary rule by holding the rule applicable only to certain categories of offenses. The consequences were predictable. The police, being of a pragmatic turn, tended to interpret the withdrawal of the rule in given offense categories as a license to proceed in those areas without legal restraint.[83]

(f) Limiting the exclusionary rule to institutional failures. Professor Kaplan's other proposal is "to hold the exclusionary rule inapplicable to cases where the police department in question has taken seriously its responsibility to adhere to the fourth amendment."[84] Procedurally, this would mean that if, on a motion to suppress, the judge found a search and seizure unconstitutional, it would then be open to the prosecution "to ask the judge for a further hearing on the police department's regulations, training programs, and disciplinary history."[85] The prosecution, to escape exclusion of the evidence, would have to show "a set of published regulations giving guidance to police officers as to proper behavior in situations such as the one under litigation, a training program calculated to make violations of fourth amendment rights isolated occurrences, and, perhaps most importantly, a history of taking disciplinary action where such violations are brought to its attention."[86]

79. Kaplan, supra note 11, at 1047.

80. This is because "illegal searches are typically less offensive to the dignity of the citizenry and less often characterized by violence and brutality than are illegal interrogatory practices," and thus are "less likely to attract the interest of the press" or "to arouse community opinion." Kamisar, supra note 33, at 1098. See also Commen., 47 Nw.U.L.Rev. 493 (1952).

81. Westley, The Police: A Sociological Study of Law, Custom and Morality 118 (unpublished Ph.D. thesis, Dep't of Sociology, Univ. of Chicago, 1951).

82. Kaplan, supra note 11, at 1047.

83. Allen, supra note 8, at 36.

84. Kaplan, supra note 11, at 1050.

85. Id. at 1051.

86. Id. at 1050–51.

This proposal deserves serious attention, for it is directed toward the most desirable objective of prompting law enforcement agencies to engage in careful self-study for the purpose of producing clear and comprehensive rules to govern day-to-day police practices.[87] The difficult question, it would seem, is whether the proposal could be feasibly implemented. While Kaplan asserts that the additional hearing required "need not be very lengthy,"[88] his other comments seem to belie this, for each case would present a unique question as to whether there was compliance with respect to the particular practice challenged[89] at that particular time.[90] Morever, it seems likely that the objection Kaplan made to the proposed substantial violation limitation is equally apropos here: "So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to modification at the trial court level."[91]

§ 1.3 Federal vs. State Standards; Constitutional vs. Other Violations

Analysis

Subsec.

(a) Federal vs. state standards.
(b) Violation of state constitution, state or federal statute, court rule, or administrative regulation.
(c) The remaining "silver platter".

87. On the desirability of police rulemaking, see K. Davis, Discretionary Justice 52–161 (1969); K. Davis, Police Discretion 98–138 (1975), ABA Standards on The Urban Police Function § 4.3 (1973); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 18–21 (1967); Report of National Advisory Comm'n on Civil Disorders 164–65 (1968); Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U.L.Rev. 785 (1970); Caplan, The Case for Rulemaking by Law Enforcement Agencies, 36 Law & Contemp.Prob. 500 (1971); Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 Mich.L.Rev. 1123 (1967); Goldstein, Trial Judges and the Police, 14 Crime & Del.nq. 14 (1968); LaFave & Remington, supra note 19; McGowan, Rule-making and the Police, 70 Mich. L.Rev. 659 (1972); Qui..., The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights, 52 J.Urb. L. 25 (1974).

88. Kaplan, supra note 11, at 1051.

89. "For example, the regulations governing on-the-street behavior might be sufficient but not those concerning electronic eavesdropping." Id. at 1053.

90. "[A]t least for the foreseeable future, the requirements upon police departments gradually would be growing more stringent. In each trial, therefore, the defense attorney would be spurred by the possibility that his case might become the vehicle for a further tightening of the standards." Id. at 1054.

91. Id. at 1045.

INTRODUCTION

Two years ago this review published an article which reviewed search and seizure law in Alaska.[1] Because the local bar and bench seem to have found that article to be useful, it appeared worthwhile to put together a similar review of the remainder of Alaska's law of criminal procedure. Like its predecessor, this article will review and analyze the law of criminal procedure in Alaska, isolating those areas in which the Alaska Legislature or the Alaska Supreme Court has departed from the prevailing approach to procedure in criminal cases and predicting probable outcomes to procedural issues still unresolved in Alaska.

A. *Sources of Procedural Rights*

Procedural rights in Alaska, in addition to those provided by the United States Constitution emanate from four sources. First, Article I of the State Constitution contains various sections which parallel and broaden the provisions of the Bill of Rights found in the United States Constitution. For example, Section 7[2] of Article I expands the traditional entitlement to due process of law by adding "the right of all persons to fair and just treatment in the course of legislative and executive investigations." Similarly, Sections 11[3] and 12[4] of Article I establish a constitutional right to release on bail,[5] a matter not addressed in the Federal Constitution.

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1. Feldman, *Search and Seizure in Alaska: A Comprehensive Review*, 7 UCLA-ALASKA L. REV. 75 (1977) [hereinafter cited as Feldman].

2. ALASKA CONST. art. I, § 7 provides: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of the legislative and executive investigations shall not be infringed."

3. ALASKA CONST. art. I, § 11 provides:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve except that the legislature may provide for a jury of not more than twelve nor less than six in courts of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. ALASKA CONST. art. I, § 12 provides: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public."

5. The constitutional right to bail is codified in AS § 12.30.010 et seq; *see* Part II (B) of this Article *infra*. For other cases in which the Alaska Supreme Court has construed provisions of the Alaska Constitution more broadly than comparable provisions of the Federal Constitution, *see* Zehrung v. State, 569 P.2d 189 (Alaska 1977) *opinion on rehearing*, 573 P.2d 858 (Alaska 1979) (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-crimination); RLR v. State, 487 P.2d 27 (Alaska 1971)

Title 12 of the Alaska Statutes provides a second source of procedural rights. In most instances, these rights have been codified from court decisions involving constitutional issues. Exceptions to this pattern of codification can be found in the provisions regulating misdemeanor arrests,[6] rights of a detainee after arrest,[7] and release on bail.[8]

The Alaska Rules of Criminal Procedure, adopted by the Alaska Supreme Court, constitute the third source of procedural rights. As will be discussed later in this article, the Criminal Rules, as adopted, construed, and applied by the Alaska Supreme Court, have provided a broad basis for the expansion of procedural rights in several important areas. For example, grand jury practice[9] and discovery[10] in criminal cases have been substantially modified by the provisions of Alaska's Criminal Rules.

In exercising its authority as the final arbiter of the meaning of the three sources noted above, the Alaska Supreme Court constitutes the fourth source of procedural rights. This article will highlight and analyze the court's more important decisions in criminal procedure.

The Alaska Supreme Court has noted in several cases that the protections afforded by various provisions of the State Constitution may be broader than those provided by parallel provisions of the federal constitution.[11] For example, in *Zehrung v. State*[12] the court interpreted Article I, Section 14[13] of the Alaska Constitution as affording arrestees a greater protection from warrantless pre-incarceration inventory searches than that provided by the United States Supreme Court in decisions applying parallel provisions of the Federal Constitution. Similarly, the decision in *Baker v. City of Fairbanks*[14] enlarged and broadened the right to a jury trial.

(jury trial in delinquency proceeding); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970) (jury trial).

6. *See* AS § 12.25.030.
7. *See* AS § 12.25.150.
8. *See* AS § 12.30.010-.020.
9. *See* ALASKA R. CRIM. P. 6 and Part II (D) of this article, *infra*.
10. *See* ALASKA R. CRIM. P. 16 and Part II (E) of this article, *infra*.
11. Smith v. State, 510 P.2d 793 (Alaska 1973); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).
12. 569 P.2d 189 (Alaska 1977).
13. ALASKA CONST. art. I, § 14 provides:

> 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.

14. 471 P.2d 386 (Alaska 1970).

B. *Remedies*

Once a procedural violation has been established, four remedies may be applied. First, evidence illegally obtained by law enforcement officers may be suppressed[15] by the trial court. Alaska follows the federal lead in this area and routinely applies the exclusionary rule adopted in *Wong Sun v. United States*.[16] Recent decisions of the Alaska Supreme Court indicate that the *Wong Sun* exclusionary rule has not lost favor in Alaska;[17] the court declined, however, to remedy use of excessive force by police officers in arresting a defendant by excluding evidence which was a product of the arrest. In *State v. Sundberg*[18] the Alaska Supreme Court reversed Superior Court Judge Victor Carlson who had granted the defendant's motion to suppress evidence derived from his arrest which was effectuated by a police officer who shot Sundberg as he fled. Because there were no facts supporting a reasonable belief by the officer that Sundberg was armed or dangerous (he fled from the scene of a property offense), Judge Carlson ruled that he had been subjected to an "unreasonable seizure" in being shot and, therefore, granted the defendant's motion. The Alaska Supreme Court reversed, holding that use of excessive force by police officers can be remedied by disciplinary action or civil suits and the exclusion of evidence is not warranted. These remedies exist, of course, for all constitutional violations by police officers including warrantless searches and oppressive and coercive interrogation. The Alaska Supreme Court distinguished *Sundberg* on the grounds that the use of excessive force by Alaska police officers has not been so widespread as to mandate application of the exclusionary rule as a remedy. The record on this issue, however was very "thin", and is the subject of considerable disagreement among attorneys, judges and commentators.

Certain procedural violations can be remedied by the granting of a continuance or other intermediate sanctions.[19] For example, the Alaska Supreme Court has stated that violations of discovery provisions should usually be remedied by the granting of a continuance or the imposition of monetary sanctions against the offending party.[20]

15. Anderson v. State, 555 P.2d 251 (Alaska 1976); State v. Spietz, 531 P.2d 521 (Alaska 1975).

16. 371 U.S. 471 (1963).

17. State v. Cassell, 602 P.2d 410 (Alaska 1979); Zehrung v. State, 569 P.2d 189 (Alaska 1977).

18. 611 P.2d 44 (Alaska 1980).

19. *See* Braham v. State, 571 P.2d 631 (Alaska 1977); Scharver v. State, 561 P.2d 300 (Alaska 1977). *But see* Stevens v. State, 582 P.2d 621 (Alaska 1978).

20. Des Jardins v. State, 551 P.2d 181 (Alaska 1976). The effectiveness of this approach is discussed in Part II (E), *infra*.

Dismissal of the prosecution constitutes a third possible remedy that can be appropriate in certain instances.[21] Serious violations of the rules regulating the grand jury process[22] require that the indictment be dismissed and the matter submitted again to the grand jury.[23] In certain instances where the trial court fails to correctly remedy procedural violations, the Alaska Supreme Court will reverse judgments of conviction on appeal.[24] It should be noted that Rule 47 of the Alaska Rules of Criminal Procedure[25] precludes the court from reviewing allegations of error at trial unless an objection was raised and properly preserved by the parties below. "Plain error"—error affecting "substantial rights of the accused"—will be reviewed by the court on appeal even if not raised below.[26] Finally, even if properly preserved, errors which are harmless beyond a reasonable doubt will result in the court's affirmance of the conviction on appeal.[27]

The remainder of this Article catalogs procedural rights in criminal cases at the various stages of the criminal proceeding. Part I discusses rights during investigation and arrest, including an update on search and seizure, identifications, statements, confessions, and entrapment. Part II considers procedural rights during the pretrial stage, subsequent to the initiation of charges. The right to counsel, bail, preliminary hearing, grand jury indictment, discovery, and speedy trial are included among these rights. Part III discusses procedural rights during trial, including the right to a jury trial, procedure on entry of guilty and nolo contendere pleas, severance, presence of the defendant, and sentencing. Part IV completes the discussion with a review of post-trial issues raised by the sentence modification petitions and double jeopardy problems.

I. Rights During the Investigative Stage

A. *Arrests*

Authorization for making arrest is set forth in Chapter 25 of

21. Stevens v. State, 582 P.2d [illegible] (Alaska 1978).

22. Alaska R. Crim. P. 6, 7.

23. Adams v. State, 598 P.2d 502 (Alaska 1979); Coleman v. State, 553 P.2d 40 (Alaska 1976).

24. Kimoktoak v. State, 584 P.2d 25 (Alaska 1978); Anderson v. State, 555 P.2d 251 (Alaska 1977).

25. Alaska R. Crim. P. 47(a) provides: "*Harmless error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

26. Alaska R. Crim. P. 47(b) provides: "*Plain error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *See also* Stork v. State, 559 P.2d 99 (Alaska 1977).

27. State v. Hannagan, 559 P.2d 1059 (Alaska 1977).

Title 12 of the Alaska Statutes.[28] Both private persons and peace officers are authorized to make arrests in Alaska. The procedure for arrests without a warrant is different, however, for felonies and misdemeanors. A warrantless arrest for a misdemeanor offense in Alaska may be made only when the crime is committed or attempted in the presence of the person making the arrest.[29] Thus, arrests for misdemeanors based upon statements obtained from third parties or other circumstantial evidence may be made only with a properly issued and executed arrest warrant.

With respect to arrests for felonies, Alaska follows federal procedure. A warrantless arrest for a felony offense may be made when a felony has in fact been committed and the person making the arrest has probable cause for believing that the arrestee committed it.[30] The probable cause requirement is satisfied where the facts and circumstances within the knowledge of the person making the arrest, which he has reason to believe are trustworthy, are sufficient to warrant a person of prudence and caution to believe that an offense has been or is being committed and that the arrestee committed it.[31] In *City of Nome v. Ailak*,[32] the Alaska Supreme Court held that probable cause cannot be established solely on the basis of a good faith belief on the part of the officer that probable cause to arrest exists. The details of any information obtained from informants and cooperative citizens must be verified before a valid arrest may be made.[33]

As will be observed in several instances throughout this article, the Alaska Supreme Court and the Alaska Legislature have carved out exceptions to certain procedural rights where the accused is charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor (OMVI). OMVI is the only misdemeanor offense for which a valid warrantless arrest can be made merely on probable cause, even if not committed in the presence of the arresting officer.[34] Thus, if the officer arrives on the scene of a traffic accident and the driver is out of his vehicle, a valid arrest for OMVI may still be made if the officer can establish probable cause from witness statements or other cir-

28. *See* Jacobson v. State, 551 P.2d 935 (Alaska 1976); Howes v. State, 503 P.2d 1055 (Alaska 1972).

29. AS § 12.25.030; Miller v. State, 462 P.2d 421 (Alaska 1969).

30. *Compare* City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977) *with* United States v. Santana, 427 U.S. 38 (1976) *and* United States v. Watson, 423 U.S. 411 (1976).

31. Pistro v. State, 590 P.2d 884 (Alaska 1979); Richardson v. State, 563 P.2d 266 (Alaska 1977).

32. 570 P.2d 162 (Alaska 1977).

33. *Id.*

34. *See* AS § 12.25.033 which authorizes a warrantless arrest for OMVI offenses, even if not committed in the presence of the officer, when the officer has probable cause to believe the offense has been committed less than eight hours prior to the arrest.

cumstantial evidence, even though the vehicle is not operated in the officer's presence.

As discussed in the prior article on search and seizure, the validity of an arrest is of critical importance.[35] A valid arrest permits searches, seizures, and other intrusions by law enforcement officers as lawfully incident to the arrest without a warrant.[36] Similarly, an unlawful arrest triggers suppression by the court of any evidence seized or statements obtained as a result of the arrest.[37]

B. *Other Detentions*

Alaska has adopted a more restrictive view of permissible detentions involving less than probable cause than have the United States Supreme Court and most state courts. In *Coleman v. State*,[38] the Alaska court held that a stop and frisk search on less than probable cause can be made in instances where the officer has a reasonable suspicion of imminent public danger or serious recent harm to persons or property. *Coleman* involved an investigatory stop for a recently committed rape-robbery. The stop on less than probable cause in that case was sustained by the Alaska court because of the seriousness of the offense committed and the very close geographical and temporal proximity of the stop to the commission of the offense.[39]

Following the *Coleman* decision, some confusion existed in Alaska's trial courts concerning the type of public danger or the seriousness of the harm to persons or property which would justify an investigatory stop or frisk. The matter was clarified by the subsequent decision in *Ebona v. State*.[40] In *Ebona*, the Alaska court confirmed that Alaska's temporary stop rule is more restrictive than the rule articulated by the United States Supreme Court in *Terry v. Ohio*.[41] *Ebona* involved an investigatory stop of a motor vehicle by a police officer who observed erratic and dangerous driving. The court sustained the stop, stating:

35. Feldman, *supra* note 1, at 105.

36. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Schraff v. State, 544 P.2d 834 (Alaska 1975).

37. Zehrung v. State, 569 P.2d 189 (Alaska 1977); McCoy v. State, 491 P.2d 127 (Alaska 1971).

38. 553 P.2d 40 (Alaska 1976).

39. The majority noted its concern that stops and frisks on less than probable cause should not be extended beyond situations requiring immediate police response to protect the public in serious cases where there is a likelihood of imminent danger or where serious harm has recently been perpetrated to persons or property. 552 P.2d at 45-46 n.17.

40. 577 P.2d 698 (Alaska 1978).

41. 392 U.S. 1 (1968). *See also* Sibron v. New York, 392 U.S. 40 (1968); La Fave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1969).

> The significant dangers to persons or property that can possibly result when the operator's capacity to control a motor vehicle is impaired are apparent. A vehicle out of control, . . . poses a significant threat to the property or individuals in proximity to the vehicle.[42]

C. *Search and Seizure*

Both federal and Alaska decisions have held that the protection against unreasonable searches and seizures applies only to those areas in which a person has a reasonable expectation of privacy.[43] In *Smith v. State*,[44] Alaska adopted a two-pronged test for determining the reasonableness of a person's expectation of privacy. That test requires, first, that the person exhibit an actual, subjective expectation of privacy in the area and, second, that the expectation be one which is recognized as "reasonable" by society.[45] The expectations of privacy held by parolees and probationers were severely limited in *Roman v. State*[46] and *Gonzales v. State*.[47] In those cases, the Alaska Supreme Court held that parolees and probationers have diminished expectations of privacy and are subject to warrantless searches so long as there is a direct relationship between the purpose of the search and the underlying offense.[48] The court held that conditioning probation or parole upon consent by the probationer or parolee to periodic searches might be permissible in cases involving convictions for sale of narcotic drugs or concealing stolen property. The intrusions were justified by the need to ensure that the prohibited activities did not continue. On the other hand, a person who has been convicted of a felony such as reckless driving or manslaughter should not be subjected to searches and seizures just because he is a parolee. The goals of rehabilitation of the individual and protection of the public do not require that such a parolee be subject to searches in a manner different from any other member of the public.

In justifying the warrantless search in *Roman*, the court stated:

> [W]e . . . recognize that conditioning release on some forms of search by correctional authority is both consistent with the goal

42. 577 P.2d at 701.

43. Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Woods and Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977); Smith v. State, 510 P.2d 793 (Alaska 1973)

44. 510 P.2d 793 (Alaska 1973).

45. For further discussion *see* Feldman, *supra* note 1, at 86.

46. 570 P.2d 1235 (Alaska 1977).

47. 585 P.2d 876 (Alaska 1978).

48. *But see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975).

> of rehabilitation and necessary for the proper functioning of the parole system. To this extent, parolees have a diminished expectation of privacy. Depending on the nature of the crime involved, a condition of release granting authorities the right to search premises and persons at reasonable times could stand muster under both the Alaska and federal Constitutions. Released offenders subject to searches and seizures conducted pursuant to such conditions would be protected from undue harassment by the limitations of due process.[49]

Diminished expectations of privacy of parolees and probationers extends to entries into dwellings as well as searches. In *Soroka v. State*,[50] the Alaska Supreme Court upheld the warrantless entry by a probation officer into a probationer's trailer as a "justifiable visit."

Inventory searches made by prison guards of an arrestee's personal effects is another area where the Alaska court has provided broader privacy protection than have the federal courts. In *Zehrung v. State*,[51] the court held that an inventory search cannot be made of an arrestee's personal effects where he has been arrested for a petty offense and may post bail within a reasonable period of time. The *Zehrung* court did not define the procedures to be followed where the offense is not "petty" or where it is unclear when the arrestee might post bail. The issue was resolved in *Reeves v. State*.[52] That court stated that a general, unrestricted search of the personal effects of a person who is to be incarcerated may not be made by law enforcement or prison officials. Rather, any intrusion or search must be limited to the extent necessary to preclude the introduction of weapons and contraband into the prison community. In *Zehrung*, where the arrestee had been placed in custody for a minor traffic offense, a search of the arrestee's wallet revealed a stolen credit card ultimately linking the defendant to a rape charge. In *Reeves*, a search by prison officials of the arrestee's personal effects revealed a balloon in a shirt pocket which, when further examined, was found to contain heroin. Because the personal effects of the defendants in both cases were to be inventoried and held by prison officials, the court condemned both searches as unrelated to any reasonable security need of the prison.

Two recent cases have involved application of the "consent search" exception to the warrant requirement in drunk driving cases. In *Anchorage v. Geber*,[53] the Alaska Supreme Court held

49. 570 P.2d at 1212 (footnotes omitted).
50. 598 P.2d 69 (Alaska 1979).
51. 569 P.2d 189 (Alaska 1977).
52. 599 P.2d 727 (Alaska 1979).
53. 592 P.2d 1187 (Alaska 1979).

that the State's implied consent statute,[54] which imposes a ninety-day administrative suspension of a driver's license upon the operator's refusal to submit to a breathalyzer examination, does not permit the forcible extraction of blood samples from a drunk driving suspect. On the other hand, the court in *Wirz v. State*[55] held that a drunk driving suspect is not entitled to an affirmative warning by police officers of his right to withhold his consent and refuse to submit to a blood or breathalyzer examination. Because of the absence of a specific requirement to advise arrestees of their right to refuse the breathalyzer test, the court concluded that it would be inappropriate for it to engraft such a requirement in the implied consent statute.[56]

The emergency exception to the warrant requirement was the subject of concurrences in *State v. Myers*.[57] In *Myers*, police officers encountered an unlocked doorway of a Juneau movie theater. Suspecting criminal activity, the police officers entered the theater and arrested the defendant. On appeal, the majority of the Alaska Supreme Court found that as a search, the entrance to the theatre was "reasonable" under the circumstances.[58] The majority did not attempt to analyze the search in terms of any previously existing exceptions to the warrant requirement or to articulate any specific standards or guidelines limiting future intrusions of similar nature. Rather, the "wild card of general reasonableness"[59] was used to justify the search. The concurring opinion by Justice Rabinowitz and the dissenting opinion by Justice Boochever sustained the search as within the emergency exception to the warrant requirement.[60]

The decision in *State v. Glass*[61] is the most important addition to Alaska's tapestry of search and seizure cases. In that case, the Alaska Supreme Court held that law enforcement officers could no longer electronically eavesdrop on suspects through a "false friend" without a search warrant or application of one of

54. AS § 28.35.031. *See also* Layland v. State, 535 P.2d 1043 (Alaska 1975).

55. 577 P.2d 227 (Alaska 1978).

56. AS § 28.35.031. *Contrast with* State v. Freymuller, 552 P.2d 867, 868 (Or. App. 1976) *and* State v. Annen, 504 P.2d 1400 (Or. App. 1973) (OR. REV. STAT. § 487.805 was construed as granting a right to refuse the breathalyzer test).

57. 601 P.2d 239 (Alaska 1979).

58. The majority opinion seems to suggest reasonableness based on implied consent or, at least, the implied absence of objection on the part of the owner of the theater to entry by law enforcement officers.

59. *Id.* at 245 (Boochever, J., dissenting).

60. Justice Boochever previously considered the emergency exception in his concurring opinion in Schraff v. State, 544 P.2d 834, 838 (Alaska 1975).

61. 583 P.2d 872 (Alaska 1978).

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64. 583 P.2d at 87

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66. 539 P.2d 73

67. 558 P.2d 636

the exceptions to the warrant requirement.[62] The decision in *Glass* was based on the right to privacy embodied in Article I, Section 22[63] of the State Constitution. In a majority opinion by then Chief Justice Boochever, the court stated:

> [W]e believe that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant. . . .The meaning of privacy of necessity must vary depending on the factual context and the often competing interests of society and the individual. The protection has been defined, for example, as the right "to be let alone," the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others," and the right which protects "the individual's interest in preserving his essential dignity as a human being."[64]

Thus, *Glass* recognized that individuals have a reasonable expectation of privacy in their conversations and personal affairs. The court directed that, with limited exceptions, a search warrant must be obtained before electronic monitoring of conversations is proper. The court declined to comment on whether the requirement of a warrant may be obviated by exigent circumstances.[65]

D. *Identifications*

Due process and right to counsel issues have been raised by Alaska cases discussing the appropriate procedures for suspect identifications. In *Kimble v. State*,[66] the Alaska Supreme Court held that an accused has no constitutional right to counsel at a pre-accusation photo identification by witnesses, but declined to follow the federal approach on the right to counsel at lineups. The court in *Blue v. State*[67] recognized an accused's right to counsel at a pre-indictment lineup absent exigent circumstances which

62. The supreme court subsequently decided in State v. Glass, 596 P.2d 10 (Alaska 1979), that the opinion in the first *Glass* case would not be applied retroactively.

63. ALASKA CONST. art. I, § 22 provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

See also State v. Erickson, 574 P.2d 1 (Alaska 1978) (possession of cocaine for personal use in the home not protected); Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469 (Alaska 1977) (certain information communicated to physicians is within zone of privacy); Woods and 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).

64. 583 P.2d at 879-80 (citations omitted).

65. *Id.* at 881. Compare Alaska's treatment of electronic eavesdropping with the United States Supreme Court opinion in On Lee v. United States, 343 U.S. 747 (1952).

66. 539 P.2d 73 (Alaska 1975).

67. 558 P.2d 636 (Alaska 1977).

precluded the presence of counsel.[68] The court held that where adequate time and opportunity exists and where there is no compelling immediacy, the right to counsel must be afforded at such lineups.

Both photo and lineup identifications must be fair and not unduly suggestive. Police conduct which tends to isolate or single out the defendant, such as the failure to provide a sufficient number of photographs or persons at a lineup, or the failure to achieve reasonable similarity among the photographs or persons in the array, constitutes a serious due process violation remediable by suppression of any identification made by the witness.[69] A subsequent in-court identification by the same witness at trial would similarly be suppressed unless the prosecution could establish an independent basis for the identification not tainted by the prior suggestive photo array or lineup.[70]

Although Rule 16 of the Alaska Rules of Criminal Procedure[71] obliges an accused to provide handwriting exemplars or other physical evidence which might be used for identification, the taking of such evidence after an indictment has been returned constitutes a critical stage of the criminal proceedings at which the accused has a right to counsel.[72]

E. *Statements and Confessions*

1. *General limitations.* With respect to statements and confessions, Alaska has followed *Miranda*[73] principles and federal applications of the fifth amendment,[74] with certain exceptions. The Alaska Supreme Court severely limited the fifth amendment pro-

68. *Id. Compare Blue with* Gilbert v. California, 388 U.S. 263 (1967).

69. Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Note, *Due Process Consideration in Police Show-up Practices*, 44 N.Y.U. L. Rev. 377 (April 1969).

70. *See* cases collected in Annot., *Admissibility of Evidence of Photographic Identification as Affected by Allegedly Suggestive Identification Procedures*, 39 A.L.R. 3d 1000 (1971).

71. In accordance with the constitutional guidelines, Alaska R. Crim. P. 16(c) requires a defendant to disclose certain non-testimonial identification information, including participation in a lineup, providing voice samples, fingerprints, posing for photographs, trying on of articles of clothing, permitting the taking of physical specimens of blood, hair, and other materials of his body, and submission to a reasonable physical or medical inspection of his body.

72. Roberts v. State, 458 P.2d 340 (Alaska 1969).

73. Miranda v. Arizona, 384 U.S. 436 (1966). *See also* Escobedo v. Illinois, 378 U.S. 478 (1964).

74. The fifth amendment to the United States Constitution is paralleled by Alaska Const. art. I, § 8 which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return

tection available to juveniles in *E.L.L. v. State*.[75] In that case, the court required a juvenile to testify before a grand jury considering an indictment for statutory rape or face a contempt citation. The holding was based on the rationale that, as a juvenile, the witness was not subject to incarceration or criminal penalities for such testimony and therefore could not raise a fifth amendment privilege.[76]

The question of whether or not private persons are required to provide *Miranda* warnings to suspects was considered in *Tarnef v. State*.[77] In *Tarnef*, the court found that a private investigator had been working so closely with the police that he was required to provide *Miranda* warnings prior to questioning a suspect. The investigator had promised to turn over any statement he obtained to the police, the police consulted with the investigator to confirm the accuracy of the statement, and the investigator subjectively perceived his position to be part of the official team.[78]

A suspect is entitled to an admonition of his fifth amendment rights as soon as he is placed "in custody."[79] In *Quick v. State*[80] and *Hunter v. State*,[81] the Alaska Supreme Court adopted a reasonable person test for determining whether or not a suspect is deemed to be in custody.[82] The test focuses on whether a "reasonable person" in defendant's position would believe that he had been deprived of his freedom in any significant way. In making this determination, the court examines the manner and scope of the actual interrogation, events which took place before the interrogation (including those which explain how and why the defendant came to the place of questioning), and, where relevant, what happened at the interrogation.[83]

2. *Waiver.* While the right to remain silent and the right to the assistance of counsel may be waived by a suspect, any such

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an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

75. 572 P.2d 756 (Alaska 1977).

76. Contrast with discussion of right to counsel in juvenile proceedings in Part II (A) *infra*.

77. 512 P.2d 923 (Alaska 1973).

78. Whether or not private persons, private security officers, private police or private detectives are within the prohibitions of *Miranda* depends upon the facts of the given case. *See* People v. Polk, 63 Cal. 2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965); People v. Price, 63 Cal. 2d 370, 406 P.2d 55, 46 Cal. Rptr. 775 (1965); People v. Wright, 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 (1967); 31 A.L.R. 3d 565, 647-74 (1970); Comment, *Seizure by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

79. Tarnef v. State, 512 P.2d 923 (Alaska 1973).

80. 599 P.2d 712 (Alaska 1979).

81. 590 P.2d 868 (Alaska 1979).

82. *Id.* at 895.

83. *Id.* at 895. *But see* Oregon v. Mathiason, 429 U.S. 492 (1977).

waiver must be made knowingly and intelligently.[84] In *Ladd v. State*,[85] the Alaska Supreme Court held that retention of an attorney by an accused does not *per se* invalidate a waiver of *Miranda* rights.[86] In *R.L.R. v. State*,[87] the Alaska court declined to adopt a rule that juveniles are inherently incapable of knowingly and intelligently waiving their fifth amendment rights. Instead, the court held that such rights could be waived by the juvenile.[88] In *Quick v. State*,[89] however, the court softened the impact of this ruling by holding the state has a heavier burden in proving an intelligent waiver by a juvenile than by an adult.[90] In fifth amendment waiver cases, whether the suspect be an adult or a juvenile, the Alaska court has adopted a case-by-case approach for testing the integrity of the waiver.

3. *Voluntariness*. Like the federal courts, Alaska looks to the "totality of the circumstances" when deciding whether a confession or statement has been made voluntarily.[91] Voluntariness must be proved by a preponderance of the evidence[92] and may be negated by evidence of such factors which might have affected the judgment of the suspect as mental condition, age, education, and experience.[93]

4. *Additional requirements*. *Miranda* warnings must be made with clarity and precision. In *State v. Cassell*,[94] the Alaska Supreme Court affirmed the suppression of a defendant's statement where the officer had advised the defendant that he "could" have a lawyer. The court found the officer's admonition vague and imprecise and, under the circumstances, insufficient.[95]

Statements made by an accused which are not prompted by interrogation or questioning by law enforcement officers are not suppressed, even in the absence of a *Miranda* warning. In *Eben v. State*,[96] the court sustained the admission of statements made by the accused during the course of a telephone call to his girlfriend

84. Peterson v. State, 562 P.2d 1350 (Alaska 1977); Tarnef v. State, 512 P.2d 923 (Alaska 1973).
85. 568 P.2d 960 (Alaska 1977).
86. *Id.* at 966-67.
87. 487 P.2d 27 (Alaska 1971).
88. *Id.* at 33.
89. 599 P.2d 712 (Alaska 1979).
90. *Id.* at 720.
91. Peterson v. State, 562 P.2d 1350 (Alaska 1977); Schade v. State, 512 P.2d 907 (Alaska 1973).
92. Schade v. State, 512 P.2d 907, 917 (Alaska 1973).
93. Peterson v. State, 562 P.2d 1350, 1363 (Alaska 1977).
94. 602 P.2d 410 (Alaska 1979).
95. *Id.* at 418.
96. 599 P.2d 700 (Alaska 1979).

from the police station and made to his brother while at the jail which were overheard by police officers.

F. *Entrapment*

Traditionally, Alaska courts have applied an objective test for entrapment by police officers. In *Grossman v. State*,[97] the court held that it would examine whether the conduct by the officers would have induced an "average" person into the commission of the act.[98] This standard was relaxed in *Pascu v. State*.[99] Finding that sufficient evidence had been presented to establish the defense of entrapment, the majority held that law enforcement officials cannot implant in the mind of an innocent person the disposition to commit an offense and then induce commission of that offense in order to prosecute. Quoting language in *Grossman*, the court stated: "[U]nder standards of civilized justice, there must be some control on the kind of police conduct which can be permitted in the manufacture of crime."[100] An even more forceful articulation of this view was contained in the concurring opinion by Justice Pro Tem Dimond. Justice Dimond wrote:

> I believe it is essential to have objective morality and ethics in law, because this is essential to the "civilized justice" that the majority refers to. If I am correct, then it is repugnant to that concept to justify the apprehension of criminals on the basis that the end justifies the means—i.e., that it is proper to utilize the tools of lies and deceit to effect criminal justice.[101]

The precise limits of police conduct created by the entrapment doctrine are not clearly discernible from either *Grossman* or *Pascu*. *Pascu* does, however, suggest a shift from emphasis on the predisposition of the defendant to the conduct of the officers.

II. Pre-Trial Rights

Between the formal initiation of criminal charges and trial, a variety of constitutional, statutory, and rule provisions furnish procedural rights for the accused. As will be discussed below, Alaska has adopted a particularly liberal view regarding pre-trial procedural rights. In defining a defendant's rights to counsel,[102]

97. 457 P.2d 226 (Alaska 1969).

98. Under *Grossman*, the accused must carry the burden of establishing a defense of entrapment by a preponderance of the evidence. *See also* Batson v. State, 568 P.2d 973, 978 (Alaska 1977).

99. 577 P.2d 1064 (Alaska 1978).

100. *Id.* at 1068. Compare with stricter standard in United States v. Russell, 411 U.S. 423 (1973).

101. 577 P.2d at 1069.

102. AS § 12.25.150; Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970). *Compare with* Martinez v. State, 423 P.2d 700 (Alaska 1967).

release on bail,[103] rapid arraignment,[104] fair grand jury proceedings,[105] discovery of the prosecution's case,[106] and a speedy trial,[107] the Alaska Legislature and Supreme Court have broadened the federal rules and protections afforded a criminal defendant. The expansion of pre-trial procedural rights is consistent with the policy articulated by the Alaska courts favoring full and fair disclosure by the prosecution and prompt adjudication as means of removing the prosecution's tactical advantage in criminal proceedings.[108]

A. *Right to Counsel*

The court has broadened the right to counsel during the pre-trial stage following the initiation of criminal charges.

Article I, Section 11[109] of the Alaska Constitution parallels the right to counsel provision contained in the federal constitution.[110] Interpreting that state provision, the Alaska Supreme Court has held that an accused has a right to counsel at adversarial proceedings where formal charges are initiated.[111] It is important to segregate fifth amendment self-incrimination problems from sixth amendment right to counsel issues. An accused may have a right to counsel during interrogations and other evidence-gathering activities, even in the absence of formal charges or an adversarial proceeding, if fifth amendment (self-incrimination) problems are presented.[112]

In *Alexander v. City of Anchorage*,[113] the Alaska Supreme Court held that the right to counsel exists in any case where a defendant may lose a valuable license, be incarcerated, or be fined in an amount reflecting criminality.[114] Thereafter, the court in

103. AS § 12.30.010-080; Carman v. State, 561 P.2d 361 (Alaska 1977); Gilbert v. State, 540 P.2d 485 (Alaska 1975); Martin v. State, 517 P.2d 1389 (Alaska 1974).

104. AS § 12.25.150; ALASKA R. CRIM. P. 5.

105. State v. Griffeth, 554 P.2d 460 (Alaska 1976); Coleman v. State, 553 P.2d 40 (Alaska 1976).

106. ALASKA R. CRIM. P. 16; Howe v. State, 589 P.2d 421 (Alaska 1979); Stevens v. State, 582 P.2d 621 (Alaska 1978); Des Jardins v. State, 551 P.2d 181 (Alaska 1976).

107. ALASKA R. CRIM. P. 45; DeMille v. State, 551 P.2d 675 (Alaska 1978); Nickels v. State, 545 P.2d 163 (Alaska 1976).

108. Peterkin v. State, 543 P.2d 418 (Alaska 1975).

109. *See* note 3 *supra*.

110. U.S. CONST., amend. VI.

111. Eben v. State, 599 P.2d 700 (Alaska 1979). *Compare with* Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); *and* Orozco v. Texas, 394 U.S. 324 (1969).

112. Quick v. State, 599 P.2d 712 (Alaska 1979); Tarnef v. State, 512 P.2d 923, (Alaska 1973).

113. 490 P.2d 910 (Alaska 1971).

114. The extension of the right to counsel in Alaska closely parallels the limit set on the right to a jury trial in Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

Alaska Public Defender Agency v. Superior Court[115] held that the right to counsel does not exist for an offense carrying a maximum fine of $100.00. Current practice in district court precludes a jury trial for any offense carrying a maximum fine of $300.00. Other areas in which the court has broadened the right to counsel include proceedings for civil contempt for failure to pay child support,[116] probation revocation hearings,[117] and prison disciplinary hearings.[118]

In addition, the court in *A.A. v. State*[119] recognized the right to counsel at juvenile disposition proceedings. The holding in *A.A.*, while recognizing the importance of representation at juvenile proceedings, is analytically inconsistent with the reasoning in *E.L.L. v. State*.[120] In *E.L.L.*, the court required a juvenile to testify or face a contempt citation. Even though the juvenile's testimony might have implicated her in a criminal act, the court held that the juvenile could not raise the fifth amendment privilege because she was subject to delinquency proceedings rather than to criminal prosecution and punishment. The recognition of the criminal nature of delinquency proceedings which supported the extension of the right to counsel by the court in *A.A.* is more durable under close scrutiny. While delinquency proceedings differ from formal criminal prosecutions, the stigma and effect on the juvenile of a declaration of delinquency is considerable. The punitive nature of detention bears greater similarity to incarceration (particularly in instances of serious conduct) than the court suggests in *E.L.L.*

On appeal, right to counsel violations do not *per se* constitute reversible error; instead, they are reviewed under the "harmless error" test that is routinely applied to other procedural violations.[121] In *Gipson v. State*,[122] the court held that the absence of counsel even at a critical stage of the proceedings (a preliminary hearing) may be harmless if harmlessness is established beyond a reasonable doubt.

B. *Bail*

Alaska's constitutional right to release on bail is codified in

115. 584 P.2d 1106 (Alaska 1978).
116. Otton v. Zaborac, 525 P.2d 537 (Alaska 1974).
117. Hoffman v. State, 404 P.2d 644 (Alaska 1965). *Compare with* Gagnon v. Scarpelli, 411 U.S. 778 (1973) *and* Mempa v. Rhay, 389 U.S. 128 (1967).
118. McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975). *Compare with* Wolff v. McDonnell, 418 U.S. 539 (1974) *and* Johnson v. Avery, 393 U.S. 483 (1969).
119. 538 P.2d 1064 (Alaska 1975). *See also* In re Gault, 387 U.S. 1 (1967).
120. 572 P.2d 786 (Alaska 1977).
121. Merrill v. State, 423 P.2d 686 (Alaska 1967).
122. 575 P.2d 782 (Alaska 1978).

AS § 12.30.020 *et seq.* Bail is a matter of right prior to the trial. Under the statute, the primary factors to be considered by the court in establishing bail are danger to the community and likelihood of flight prior to trial.[123] Although bail must be set in a "reasonable sum," in practice it is frequently set so high that it is unattainable by the defendant. Bail, in some amount however, must be set for nearly all offenses.[124]

Except for certain serious felonies,[125] the bail statute also allows for bail pending appeal or sentencing following conviction. As a matter of practice, local courts have required that a variety of conditions be satisfied prior to release of most defendants on serious offenses. Typically, the courts require that defendant be supervised by a third party, employed while released prior to trial, and regularly contacted by an attorney or other non-custodial person. Because there is not a competitive market for bail bonds in most parts of the state, the trial courts have been amenable to other means of satisfying monetary bail conditions, such as the posting of property bonds, unsecured personal surety bonds, and the deposit of ten percent of the established bail with the clerk of the court to be returned following completion of the case.

C. *Arraignment*

At arraignment, the accused is brought before the court for formal advisement of the charges which have been filed against him, advisement of his constitutional rights, and entry of a plea. Rule 5 of the Alaska Rules of Criminal Procedure[126] requires that a person be brought before a judge or magistrate for arraignment within twenty-four hours following his arrest. In *Padgett v. State*,[127] the Alaska Supreme Court ruled that a Rule 5 arraign-

123. AS § 12.30.020(c). permits the court to take the following factors into consideration: the nature and circumstances of the offense charged; the weight of the evidence against the person; the person's family ties; the person's employment; the person's financial resources; the person's character and mental condition; the length of the person's residence in the community; the person's record of appearance at court proceedings; and the flight of the accused to avoid prosecution or his failure to appear at court proceedings.

124. Gilbert v. State, 540 P.2d 485 (Alaska 1975); Martin v. State, 517 P.2d 1389 (Alaska 1974). The United States Supreme Court has declined vigorously to monitor bail provisions. *See* Schilb v. Kuebel, 404 U.S. 357 (1971).

125. AS § 12.30.040 permits release on bail following conviction except in instances of convictions for first-degree murder, armed robbery, kidnapping, or rape.

126. ALASKA R. CRIM. P. 5(a)(1) provides:

> Except when the person arrested is issued a citation for a misdemeanor and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. Unnecessary delay within the meaning of this section (a) is defined as a period not to exceed twenty-four hours after arrest, including Sundays and holidays.

127. 590 P.2d 432 (Alaska 1979). *Compare with* Walton v. Arkansas, 371 U.S. 26 (1962).

ment proceeding is not a critical stage of the proceedings at which the accused is entitled to counsel. While a request for counsel at arraignment must be recognized by the court, failure to provide counsel at the arraignment is not, *per se*, reversible error.

Rule 25 of the Alaska Rules of Criminal Procedure[128] allows a defendant a single peremptory challenge to the judge assigned to his case. The Alaska Supreme Court limited the rule in *Gieffels v. State*,[129] holding that the right to challenge a judge peremptorily does not exist at ministerial proceedings such as arraignments so long as the substantive rights conferred by AS § 22.20.022[130] are not interfered with and the judge is not called upon to exercise a discretionary function.

D. *Preliminary Hearings and Grand Jury*

Because there is no statutory or constitutional right to a grand jury indictment or a preliminary hearing, misdemeanor charges may be initiated by complaint or information. Article I, Section 8[131] of the Alaska Constitution, however, like its federal counterpart,[132] mandates that felony charges be initiated by way of a grand jury indictment.

1. *Preliminary hearing.* After arrest and arraignment on a felony charge, an accused has a right to a preliminary hearing, at which time the State must establish probable cause before a district court judge or magistrate. The hearing must be held within ten days following arrest if the accused is in custody or within twenty days if he is not in custody.[133] Although a preliminary hearing is a critical stage of the proceedings at which an accused has a right to counsel, the absence of counsel may be harmless

128. ALASKA R. CRIM. P. 25(d)(1) states, in pertinent part, as follows: "In any criminal case in Superior or District Court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge."

129. 552 P.2d 661 (Alaska 1976).

130. AS § 22.20.022 provides for peremptory disqualification of a judge in a district court action or a superior court action.

131. *See* note 74 *supra*.

132. U.S. CONST., amend. V, provides:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

133. ALASKA R. CRIM. P. 5.

error if harmlessness is established beyond a reasonable doubt.[134]

2. *Grand jury.* While establishment of probable cause at a preliminary hearing is sufficient to hold the defendant for trial, unless the constitutional and statutory right to indictment by a grand jury is waived by the accused, an indictment is still required for felony charges. Although the prosecution need only establish probable cause at a preliminary hearing,[135] the burden of proof before the grand jury is heavier. An indictment by the grand jury may be returned only if the evidence presented, if not contradicted or explained, would warrant a conviction at trial.[136]

Rule 6 of the Alaska Rules of Criminal Procedure[137] sets out a variety of regulations concerning the presentation of evidence before the grand jury. Hearsay evidence, for example, may not be presented to the grand jury without a "compelling justification."[138] In *State v. Gieffels*,[139] the court held that the cost of transporting witnesses, even from out of state, does not constitute a compelling justification for the use of hearsay testimony. In *Metler v. State*,[140] the court similarly rejected a claim of inconvenience to justify hearsay testimony. The admission of hearsay evidence, however, does not automatically invalidate an indictment. The Alaska court has adopted a "subtraction test": the indictment will not be dismissed if there is sufficient evidence to support the return of the indictment.[141]

An accused has a right to a fair grand jury proceeding consistent with due process and without improper influence over the grand jury by the prosecutor. To prevent the grand jury from becoming a tool or rubber stamp of the prosecutor, the trial courts have been directed to monitor the prosecutor's instructions of law and arguments to the grand jury and to identify instances of undue influence or unfairness.[142] Following the return of an indictment, the defendant is entitled to a transcript of the evidence presented to the grand jury.[143]

134. Martinez v. State, 423 P.2d 700 (Alaska 1967); Merrill v. State, 423 P.2d 686 (Alaska 1967).
135. ALASKA R. CRIM. P. 5(c).
136. ALASKA R. CRIM. P. 6(q).
137. *See, in particular,* ALASKA R. CRIM. P. 6(j), (n), (q) *and* (r).
138. ALASKA R. CRIM. P. 6(r); Webb v. State, 580 P.2d 295 (Alaska 1978); State v. Taylor, 566 P.2d 1016 (Alaska 1977); Galauska v. State, 527 P.2d 459 (Alaska 1974).
139. 554 P.2d 460 (Alaska 1976).
140. 581 P.2d 669 (Alaska 1978).
141. State v. Gieffels, 554 P.2d 460 (Alaska 1976); Coleman v. State, 553 P.2d 40 (Alaska 1976).
142. Coleman v. State, 553 P.2d 40 (Alaska 1976).
143. Burkholder v. State, 491 P.2d 754 (Alaska 1971); ALASKA R. CRIM. P. 6(m).

E. *Discovery*

1. *Discovery from the prosecution.* While Alaska affords defendants broad rights of discovery in Rule 16 of the Alaska Rules of Criminal Procedure, the supreme court has declined to enforce the rule aggressively. Pursuant to Rule 16, statements of witnesses, police reports, reports of convictions, and other materials must be disclosed to the accused. Like the federal rule in *Brady v. Maryland*,[144] a prosecutor must disclose all potentially exculpatory evidence.[145] In *Lauderdale v. State*,[146] the Alaska Supreme Court held that the prosecution is required to preserve and produce the test ampules used in connection with breathalyzer examinations in drunk driving cases because such evidence may, upon testing and examination, prove exculpatory.

As in instances of violations of other procedural rights, the Alaska Supreme Court applies the harmless error test in assessing and weighing the effect of discovery violations by the prosecution.[147] In *Des Jardins v. State*,[148] the Alaska Supreme Court observed that the lack of prejudice resulting from the prosecution's discovery violation was purely fortuitous. The court stated: "In future cases we will continue to scrutinize prosecutorial conduct in this area, and will not hesitate to reverse where it appears that the defendant has been prejudiced by such action."[149] Thereafter, however, the court in *Scharver v. State*[150] held that dismissals for failure to make discovery are frowned upon, especially where the information withheld is cumulative. In *Stevens v. State*,[151] the Alaska Supreme Court reversed a conviction because the prosecution failed to permit discovery. In that case, the prosecution failed to disclose a critical police report. In most cases of discovery violations, however, the courts have declined to severely sanction discovery violations by granting dismissals or reversals on appeal or by granting lesser sanctions such as continuances or fines.

Although the defendant has been granted broad rights of discovery, the courts have deprived Rule 16 of any significant bite.

144. 373 U.S. 83 (1963); *see also* Weatherford v. Bursey, 429 U.S. 545 (1977); United States v. Agurs, 427 U.S. 97 (1976); *and* Moore v. Illinois, 408 U.S. 986 (1972).

145. ALASKA R. CRIM. P. 16(b)(3) provides: "The prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce his punishment therefore."

146. 548 P.2d 376 (Alaska 1976).

147. Braham v. State, 571 P.2d 631 (Alaska 1977); Scharver v. State, 561 P.2d 306 (Alaska 1977).

148. 551 P.2d 181 (Alaska 1976).

149. *Id.* at 186.

150. 561 P.2d 300 (Alaska 1977).

151. 582 P.2d 621 (Alaska 1978).

Curiously, violations of procedural rights by police officers sometimes result in more serious sanctions than violations by prosecutors. Applying the exclusionary rule, police violations frequently result in suppression of critical evidence which sometimes leads to acquittal. In contrast, violations of procedural rights by prosecutors (who presumably have better training and knowledge of their obligations) seem to be sanctioned, wherever possible, with trial continuances and monetary fines.

Frequently, however, discovery violations cannot be adequately remedied by the granting of a continuance or other intermediate sanctions. Like justice delayed, late discovery often denies a defendant an important opportunity to examine, analyze, and meet the prosecution's evidence. Disclosure of important information on the eve or in the middle of trial frequently has a devastating effect on the presentation and defense of a criminal case. In the final analysis, the existing approach to the application and enforcement of the discovery provisions does not adequately protect the rights of the defendant.

2. *Discovery from accused.* Rule 16 also grants the prosecution certain discovery rights, including the rights to have a defendant appear in a lineup, provide other physical, nontestimonial evidence (hair, fingernail clippings, etc.), and provide reports of experts who will testify at trial.[152] Although notice of intent to rely upon a defense of alibi or insanity must be provided to the prosecution,[153] the Alaska Supreme Court in *Scott v. State*[154] held that an accused need not disclose a list of potential alibi witnesses.

F. *Speedy Trial*

Article I, Section 7[155] of the Alaska Constitution ensures the right to a speedy trial for persons charged with criminal offenses. The constitutional guarantee has been codified in Rule 45, Alaska Rules of Criminal Procedure.[156] That provision requires that an accused be brought to trial within 120 days of his arrest or the initiation of charges.

Referred to as the "four-month rule," Rule 45 requires that the prosecution bring an accused to trial within 120 days following

152. ALASKA R. CRIM. P. 16(c).

153. ALASKA R. CRIM. P. 16(c)(3).

154. 519 P.2d 774 (Alaska 1974). *Compare with* Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970); *and* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

155. *See* note 2 *supra*.

156. ALASKA R. CRIM. P. 45(b) provides: "A defendant charged with either a felony or a misdemeanor shall be tried within 120 days from the time set forth in Section (c)."

his arrest or initiation of charges. In *Peterkin v. State*,[157] the court held that a period of 140 days following arrest violated that rule. Dismissal of the charges is the only remedy recognized by the court for Rule 45 violations. In computing the 120-day period, certain periods of delay resulting from defense motions[158] or caused by the unavailability of the defendant[159] are excluded in calculating the time for trial.

While an accused is under no affirmative obligation to demand a speedy trial, the defendant's silence in setting a trial date may constitute an acquiescence to any delay. In *DeMille v. State*,[160] the court held that the defendant, who was represented by counsel at the time of the trial setting, impliedly acquiesced to a trial setting beyond the 120-day rule. *DeMille* tempered the earlier decision in *Peterkin v. State*[161] where the court stated that for the purposes of determining whether a speedy trial violation existed it was not relevant that the defendant failed to affirmatively demand a trial.

Until *Peterson v. State*,[162] it was unclear whether the mandatory requirements of Rule 45 could be relaxed pursuant to Rule 53 of the Alaska Rules of Criminal Procedure.[163] In *Peterson v. State*,[164] the defendant was brought to trial on a multiple homicide charge 136 days after initiation of the case. On appeal, the court held that the requirements of Rule 45 can be relaxed in certain instances and that the relaxation in *Peterson* was justified because the case was brought in the Alaska bush, the delay was short, the crime was serious, and there was no apparent prejudice to the defendant.[165]

When Rule 45 was adopted, the trial courts were not prepared to monitor criminal cases and ensure that they come to trial within the 120-day period. After the Alaska Supreme Court made it clear in *Peterkin v. State*[166] that the responsibility of setting trials within the 120-day period rests with the courts, adequate pro-

157. 543 P.2d 418 (Alaska 1975).
158. ALASKA R. CRIM. P. 45(d)(1).
159. ALASKA R. CRIM. P. 45(d)(4).
160. 581 P.2d 675 (Alaska 1978).
161. 543 P.2d 418 (Alaska 1975).
162. 562 P.2d 1350 (Alaska 1977).
163. ALASKA R. CRIM. P. 53, provides: "These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice."
164. 562 P.2d 1350 (Alaska 1977).
165. *Id.* at 1360.
166. 543 P.2d 418 (Alaska 1975). Although Congress has adopted a speedy trial act similar to Rule 45, the Supreme Court has declined to adopt a set standard for speedy trial violations and has reviewed each case individually. *See* Barker v. Wingo, 407 U.S. 514 (1972).

cedures were developed. Now, at the time of arraignment in felony cases, the defense and the prosecution are asked to stipulate to or argue the date when the 120-day period is deemed to have commenced in the case. Similar procedures have been developed in the district courts. As a result, dismissals for speedy trial violations have significantly decreased.

III. Rights During Trial

Unlike the liberal approach to various pre-trial rights, Alaska has followed the mainstream in adopting and enforcing procedural rights at the trial stage.

A. *Right to Jury Trial*

Rule 23 of the Alaska Rules of Criminal Procedure[167] provides that a jury trial shall be provided in instances where the accused is constitutionally entitled to one unless the right has been clearly waived by the defendant. The jury trial right is embodied in Article I, Section 11[168] of the Alaska Constitution. In construing the constitutional limits to the right to a jury trial, the Alaska Supreme Court has applied the same test that is used in determining the right to counsel. The court in *Baker v. City of Fairbanks*[169] held that a jury trial is afforded whenever the accused is subject to incarceration, loss of a valuable license, or a fine in an amount denoting criminality. In *Johansen v. State*,[170] the court held that a defendant in a civil contempt action for failure to pay child support is entitled to a jury trial because of the possibility of incarceration.

While the right to a jury trial, like other procedural rights, may be waived by the defendant,[171] the court is required to address the defendant personally and inquire whether the waiver is made knowingly and voluntarily.[172] An inquiry directed to the defendant's attorney will not suffice. The court in *Walker v. State*[173] held that the failure of the trial court to address the de-

167. Alaska R. Crim. P. 23(a) provides: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State."

Rule 23 merely parrots the constitutional authorization for a jury trial. *See* Walker v. State, 578 P.2d 1388 (Alaska 1978).

168. *See* note 3 *supra*.

169. 471 P.2d 386 (Alaska 1970). *Compare with* Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Illinois, 391 U.S. 194 (1968); *and* Duncan v. Louisiana, 391 U.S. 145 (1968).

170. 491 P.2d 759 (Alaska 1971).

171. Walker v. State, 578 P.2d 1388 (Alaska 1978).

172. *Id.*

173. *Id.*

174. *See* Alask
1971).

175. Alaska R.
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than one defendant,
and permit them to

176. Alaska R.
nolo contendere. If
tion fails to appear,

177. *See* Alask
801 (Alaska 1978).

178. *See* Lowell

179. *Id.*

180. Alaska R.
(1) *General Ru*

fendant personally constitutes error *per se*.

The defendant is entitled to a jury comprised of a representative cross section of the community.[174] To achieve this goal, Rule 24 of the Alaska Rules of Criminal Procedure[175] authorizes voir dire of prospective jurors and affords the state six peremptory challenges and the defendant ten in felony cases. In misdemeanor cases each party is permitted three peremptory challenges.

The Alaska Supreme Court has never considered the manner in which the voir dire of prospective jurors should be conducted. The practices in the trial courts vary throughout the state. Some judges permit an open-ended and unrestricted voir dire of the venire; other judges conduct most of the voir dire themselves, permitting limited questioning by counsel either directly or by written questions read by the trial judge.

B. *Nolo Contendere Pleas*

Rule 11 of the Alaska Rules of Criminal Procedure[176] authorizes the entry of guilty, not guilty, and nolo contendere pleas. The nolo plea has much the same effect as a guilty plea and, like a plea of guilty or a finding of guilty by the jury,[177] results in a judgment and conviction. Still, the plea has some special utility. A conviction following a plea of nolo contendere may not be used in subsequent civil proceedings involving the same conduct as that charged in the criminal case.[178] The nolo plea does not constitute an admission of civil liability and may not be used to establish civil liability.

In *Lowell v. State*,[179] the Alaska Supreme Court held that a conviction supported by a plea of nolo contendere may be used to impeach a defendant's testimony at a subsequent proceeding, assuming the offense is one involving dishonesty or false statement and meets the other criteria set forth in Rule 26 of the Alaska Rules of Criminal Procedure.[180]

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174. *See* ALASKA R. CRIM. P. 24.1; *see also* Alvarado v. State, 486 P.2d 891 (Alaska 1971).

175. ALASKA R. CRIM. P. 24(d) provides for the exercise of peremptory challenges following the completion of all challenges for cause of prospective jurors. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

176. ALASKA R. CRIM. P. 11(a) provides: "A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead, stands mute, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

177. *See* ALASKA R. CRIM. P. 11(c); Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978), Cooksey v. State, 524 P.2d 1251 (Alaska 1974).

178. *See* Lowell v. State, 574 P.2d 1281 (Alaska 1973).

179. *Id.*

180. ALASKA R. CRIM. P. 26(f)(1), (2) provide:

(1) *General Rule.* For the purpose of attacking the credibility of a witness, evi-

Pleas of nolo contendere may be conditioned upon the preservation of the defendant's right to appeal certain issues. The *Cooksey* rule (named for *Cooksey v. State*,[181] which established the procedure by which issues could be reserved for appeal upon pleas of nolo contendere) was subsequently modified and limited in *Oveson v. Municipality of Anchorage*.[182] In that case, the Alaska Supreme Court held that an appeal may be taken following a plea of nolo contendere only in instances where the prosecution stipulates that resolution of the issue would be dispositive of the entire case. The *Oveson* gloss to the *Cooksey* rule was a product of the Supreme Court's frustration with hearing and deciding appeals involving issues not dispositive of the underlying case. An appeal following a plea of nolo contendere conditioned upon the right to appeal non-dispositive issues was viewed as a means of circumventing the standards for interlocutory review set out in Rules 23 and 24, Alaska Rules of Appellate Procedure.

C. *Guilty Pleas*

Rule 11 of the Alaska Rules of Criminal Procedure contains the guidelines for entering a guilty plea. The court is required to address the defendant personally and inquire as to whether the plea is made knowingly, intelligently, and voluntarily.[183] The court must advise the defendant of the various rights (right to confront witnesses, right to trial by jury, presumption of innocence, etc.) which he is waiving by entering his plea.[184] A court's failure to make a sufficient inquiry is not reversible error unless it affects important rights of the accused.[185]

In *Morgan v. State*,[186] the Alaska Supreme Court repudiated the rule of *Sieling v. Eyeman*.[187] The court in *Sieling* held that an accused need be "more competent" to waive trial rights than he

dence that he has been convicted of a crime is admissible but only if the crime involved dishonesty or false statement.

(2) *Time Limit.* Evidence of a conviction under this Rule is inadmissible if a period of more than five years has elapsed since the date of the conviction of the witness.

See also Richardson v. State, 579 P.2d 1372 (Alaska 1978); Lowell v. State, 574 P.2d 1281 (Alaska 1976); Smith v. Beavers, 554 P.2d 1157 (Alaska 1976)

181. 524 P.2d 1251 (Alaska 1974).

182. 574 P.2d 801 (Alaska 1978)

183. *See* Joe v. State, 565 P.2d 508 (Alaska 1977); Else v. State, 555 P.2d 1210 (Alaska 1976); Gregory v. State, 550 P.2d 374 (Alaska 1976); Barrett v. State, 544 P.2d 830 (Alaska 1975); McKinnon v. State, 526 P.2d 16 (Alaska 1974); Ingram v. State, 450 P.2d 161 (Alaska 1969); Thompson v. State, 426 P.2d 995 (Alaska 1967); State v. Pete, 430 P.2d 338 (Alaska 1966).

184. *Id.*

185. Gregory v. State, 550 P.2d 374 (Alaska 1976).

186. 582 P.2d 1017 (Alaska 1978).

187. 478 F.2d 211 (9th Cir. 1973).

does to stand trial. The Alaska court, noting that few courts have approved the *Sieling* approach, denied the defendant's assertion (unsupported by the record) that he was incompetent when he entered his guilty plea.[188]

Alaska's criminal rules do not specifically address the issue of plea bargaining. Plea bargaining in most cases was abolished in 1975 by the Attorney General of the State of Alaska. In *State v. Buckalew*,[189] the Alaska Supreme Court held that trial judges could not participate in plea or sentence bargaining by indicating, prior to entry of the plea, the nature of the sentence that would be imposed upon the defendant by a plea.

D. *Severance*

1. *Severance of defendants.* Pursuant to Rule 14 of the Alaska Rules of Criminal Procedure,[190] any co-defendant who is being prosecuted in a joint proceeding can move for severance if the joinder is prejudicial. Unlike other procedural rights, the propriety of severance is left to the trial judge's discretion and on appeal, reversible error will not be found unless the defendant can establish both prejudice and an abuse of discretion on the part of the trial judge.[191]

In *Larson v. State*,[192] the Alaska Supreme Court held that the joinder of two brothers in a single proceeding was not prejudicial where one was charged with assault at a gas station and the other was charged in connection with a shooting at the same gas station. Where the prosecution seeks to introduce statements or confessions into evidence, joinder of co-defendants may pose *Bruton*[193]

188. 582 P.2d at 1021. *See also* Note, *Competence to Plead and the Retarded Defendant: United States v. Masthers, 539 F.2d 721 (1976)*, 9 CONN. L. REV. 176, 185 (1976). *See also* McKinney v. State, 566 P.2d 653, 660, *opinion on rehearing*, 570 P.2d 733 (Alaska 1977); Fredrick v. State, 520 P.2d 795, 802-03 (Alaska 1974).

189. 561 P.2d 289 (Alaska 1977). Prior to the ban on plea bargaining, ALASKA R. CRIM. P. 11(e) required that counsel for the state and the defendant disclose to the court the terms and conditions of plea agreements and bargains whereby pleas of guilty and nolo contendere were entered by the defendant in the expectation that a specific sentence would be imposed or other charges before the court would be dismissed.

190. ALASKA R. CRIM. P. 14 provides:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on the motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

191. Catlett v. State, 585 P.2d 553 (Alaska 1978); Richards v. State, 451 P.2d 359 (Alaska 1969); Sebrian v. State, 406 P.2d 181 (Alaska 1965).

192. 566 P.2d 1019 (Alaska 1977).

193. The *Bruton* rule is derived from Bruton v. United States, 391 U.S. 123 (1968); *see*

problems. As recognized in *Bruton v. United States*,[194] the joinder of co-defendants for trial may violate the right to confrontation where one co-defendant makes a statement or confession implicating the other. The confrontation problem arises when the statement or confession is admitted in the prosecution's case and the co-defendant making the statement declines to testify pursuant to his constitutional right to remain silent. In this situation, the implicated defendant is deprived the opportunity to confront the witness (his co-defendant) testifying against him.

Although some restriction of the *Bruton* rule can be detected in recent federal decisions,[195] the rule is still adhered to in Alaska. In *Mead v. State*,[196] the Alaska Supreme Court held that the admission of three confessions at trial violated the defendant's right to confrontation. Similarly, the court in *Benefield v. State*[197] held that the testimony of a police officer which summarized the confession of a co-defendant deprived the defendant of his right to confrontation and was therefore improperly admitted by the trial court.

2. *Severance of charges.* Rule 14 also permits the severance of multiple charges alleged against a single defendant. There are several ways in which prejudice results from the consolidation of multiple charges in a single proceeding. The first occurs where a defendant wishes to testify on one of the charges, but not on the other.[198] The nature and effect of this type of prejudice was concisely summarized by the United States Court of Appeals for the District of Columbia in *Cross v. United States*.[199] In that case, the court stated:

> If he [the defendant] testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the

also Dutton v. Evans, 400 U.S. 74 (1970); Frazier v. Cupp, 394 U.S. 731 (1969); Douglas v. Alabama, 380 U.S. 415 (1965).

194. 391 U.S. 123 (1968).

195. *See, e.g.*, Parker v. Randolph, 442 U.S. 62 (1979); Schneble v. Florida, 405 U.S. 427 (1972); Nelson v. O'Neil, 402 U.S. 622 (1971).

196. 504 P.2d 855 (Alaska 1971).

197. 559 P.2d 91 (Alaska 1977).

198. *See* Gregory v. United States, 369 F.2d 185, 189 (2d Cir. 1966); Drew v. United States, 331 F.2d 85, 88, n.15 (D.C. Cir. 1964); 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 222, at 437 (1969 & Supp. 1979).

199. 335 F.2d 987 (D.C. Cir. 1964).

meaning of Rule 14.[200]

The *Cross* analysis of the severance problem was adopted by the Alaska Supreme Court in *Cleveland v. State*.[201]

The possibility that the jury will draw an unfavorable inference about the defendant and cumulate the evidence against him has been recognized as the second type of possible prejudice caused by consolidation of charges.[202] This inference may become particularly prejudicial in cases where the proof of one count is stronger than that of the other. The jury may be induced to convict a defendant on a weaker count because it is swayed by proof supporting the stronger count.

The third type of prejudice posed by consolidation is the possiblity that the proof of the defendant's guilt of one crime may be used to convict him of another, even though the evidence proving guilt for the former crime would have been inadmissible in a separate trial.[203] In *Stevens v. State*,[204] the Alaska Supreme Court recognized the possibility of serious prejudice where a defendant is jointly tried for several similar offenses. Criticism of joinder of similar offenses has been extensive; only the federal courts and one-third of the states currently allow it; all other states prohibit such joinder entirely or upon the defendant's objection.[205]

In *Stevens*, the court stated:

> [W]e think it appropriate to note our agreement with the criticism which has been directed against a procedural rule which permits the joinder of offenses of the same or similar character. We think that in general such joinders are to be avoided and that in those instances where the prosecution has joined offenses of the same or similar character the court, on motion by the accused, should grant a severance of such charges.[206]

Thus, while the Alaska Supreme Court has left the disposition of severance issues to the trial court's discretion, the court in *Stevens* provided a strong statement favoring severance of similar charges whenever the accused objects to their joinder. This position is the same position that has been adopted by the American Bar Association in its Standards Relating to Joinder and Severance.

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200. *Id.* at 989 (footnotes omitted).

201. 535 P.2d 1006 (Alaska 1975).

202. Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964).

203. Robinson v. United States, 459 F.2d 847 (D.C. Cir. 1972); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964).

204. 582 P.2d 621 (Alaska 1978).

205. *See* A.B.A. STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.2; *see also* 8 J. MOORE, FEDERAL PRACTICE § 8.02[1], n 3 (2d ed. 1976); Dingler v. State, 211 S.E.2d 772 (Ga. 1955). Among the states prohibiting similar character joinder by statute are, Oregon (OR. REV. STAT. § 132.560 (1970)), Louisiana (LA. REV. STAT. ANN. § 226 (West 1951)), and Illinois (ILL. REV. STAT. ch. 38, §§ 111-14 (1970)).

206. 582 P.2d at 629 (footnotes and citations omitted).

E. *Presence of the Defendant*

It is well-recognized that a defendant has a right to be present during the proceedings against him. Still, the Alaska Supreme Court has been called upon to review several situations in which proceedings transpired in the defendant's absence.

1. *Playbacks.* In Alaska, trial testimony is electronically recorded. During the course of deliberations, juries frequently request playbacks of various portions of the testimony to assist them in rendering a verdict. In *State v. Hannagan*,[207] the Alaska Supreme Court construed Rule 38(a) of the Alaska Rules of Criminal Procedure,[208] which requires a defendant's presence at "every stage of the trial," to include playbacks of testimony. Furthermore, the court held that the defendant's right to be present while testimony is replayed may not be waived by his counsel, but that the violation of Rule 38 was harmless.

2. *Other situations.* Several cases have posed questions concerning the right of a defendant to be present during other stages in the criminal proceedings. In *Cox v. State*,[209] the Alaska Supreme Court held that communications by the court to the jury, out of the presence of the defendant and his attorney, was reversible error because there was no way of proving that the error was harmless beyond a reasonable doubt. Similarly, the court in *Kimoktoak v. State*[210] found error where the trial court, in the absence of the defendant, heard arguments of counsel on the jury's request for a playback on the issue of sequestration of the jury. Finally, in *Johnson v. State*[211] the court found error where the trial court, in violation of Rule 31 of the Alaska Rules of Criminal Procedure, ordered a sealed verdict without the defendant's consent.

207. 559 P.2d 1059 (Alaska 1977).

208. ALASKA R. CRIM. P. 38(a) provides:

> The defendant shall be present at the arraignment, at the preliminary hearing, at the time of plea, at the omnibus hearing, and at every stage of the trial, including the impaneling of the jury and return of the verdict, and at the imposition of sentence, except as otherwise provided in this rule.

209. 575 P.2d 297 (Alaska 1978). *See also* Koehler v. State, 519 P.2d 442 (Alaska 1974); Gafford v. State, 440 P.2d 405 (Alaska 1968); Egelak v. State, 438 P.2d 712 (Alaska 1968); Kugzruk v. State, 436 P.2d 962 (Alaska 1968); *and* Nolfke v. State, 422 P.2d 102 (Alaska 1967).

210. 578 P.2d 594 (Alaska 1978).

211. 577 P.2d 1063 (Alaska 1978). Rule 31 has since been changed to permit authorization of a sealed verdict without the defendant's consent. *See* ALASKA R. CRIM. P. 31(f).

F. *Confrontation*

In 1979, the Alaska Supreme Court adopted the Alaska Rules of Evidence. The Rules apply to both civil and criminal cases. Because of the constitutional right to confront witnesses, criminal cases sometimes pose evidentiary problems not present in civil cases. Although confrontation problems are frequently confused with the prohibition against introducing hearsay evidence, it is important to recognize that the right to confront witnesses may be violated in criminal cases even where exceptions to the hearsay rule may render out-of-court statements admissible.

In *Davis v. State*,[212] the defendant sought to invade the statutory protection afforded juvenile delinquency proceedings in order to confront and cross-examine his juvenile accuser in an effort to establish bias and interest on the part of the witness. Although the Alaska Supreme Court rejected the defendant's confrontation claim, the United States Supreme Court reversed on appeal. In *Davis v. Alaska*,[213] the United States Supreme Court held that the secrecy of juvenile proceedings provided by statute must give way to the right of an accused to confront the witnesses against him. The Court ordered disclosure of the prior juvenile record of the prosecution's witness.

The Alaska Supreme Court faced a similar issue in *Salazar v. State*.[214] In that case, the defendant sought to limit the marital communications privilege in order fully to cross-examine and confront the prosecution witness concerning an inconsistent statement and bias. On appeal, the Alaska Supreme Court reversed the conviction and held that the privilege provided by Rule 26 of the Alaska Rules of Criminal Procedure would have to give way to the constitutional right of confrontation. The court in *Salazar* stated:

> When, as in *Davis* and this case, the defendant's right to confront effectively the witnesses against him by exploring their possible bias or prejudice is balanced against a rule based solely on policy grounds, the defendant's constitutional rights must prevail. . . . We thus hold that when conflict is found between the constitutional right of confrontation and the exercise of a privilege based on public policy, the constitutional right must control.[215]

Thus *Davis* and *Salazar*, taken together, firmly establish that neither statutory nor rule privileges of non-disclosure may obstruct the right of an accused to fully confront the witnesses

212. 499 P.2d 1025 (Alaska 1972).
213. 415 U.S. 308 (1974).
214. 559 P.2d 86 (Alaska 1976).
215. *Id.* at 79.

against him. These decisions recognize the importance of cross-examination in a criminal trial as a means of testing the evidence presented and establishing all the facts which might bear on the credibility of a witness.

G. *Sentencing*

Following conviction after trial or entry of a guilty plea, Rule 32 of the Alaska Rules of Criminal Procedure requires that a pre-sentence report be prepared prior to sentencing in all felony cases. The report may include references to arrests and charges which were not prosecuted if the defendant has an opportunity to explain such instances and present rebuttal evidence. In *Nukapigak v. State*,[216] the court held that mere police "contacts" which are not explained may not be used in the report or considered by the court in sentencing. When defense counsel believes that improper materials have been included in the pre-sentence report, a request may be made that a judge other than the sentencing judge review the pre-sentence report and delete improper items. This procedure avoids the possibility of the improper material tainting the sentencing judge's thoughts or attitude about the case.

In 1969, the Alaska Legislature granted to the Alaska Supreme Court the jurisdiction to hear and review appeals of sentences.[217] The expansion of the court's jurisdiction in this area was aimed at establishing guidelines to protect defendants against unsupportably harsh sentences and to achieve some measure of uniformity in sentencing in Alaska.

All sentences in excess of forty-five days may be appealed.[218] In examining the sentence imposed, however, the supreme court will not reverse a sentence unless it finds that the trial court was "clearly mistaken."[219] The appropriate factors to be considered by a trial court in imposing a sentence were articulated in *Siete v. Chaney*.[220] Alaska's new criminal code contains presumptive sentencing provisions which substantially alter the process by which sentences may be imposed and reviewed.[221]

216. 562 P.2d 697 (Alaska 1977).
217. AS § 12.55.120.
218. ALASKA R. APP. P. 21.
219. McClain v. State, 519 P.2d 811 (Alaska 1974).
220. 477 P.2d 441 (Alaska 1970).
221. *See* AS § 12.55.125 et seq., *and particularly*, AS § 12.55.155, identifying factors in aggravation and mitigation to be considered by the court in applying the presumptive sentences set out in AS §§ 12.55.125, 12.55.135, 12.55.140. For a history of sentence appeals in Alaska, *see* Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALASKA L. REV. 1 (1975).

IV. Post-Conviction Rights

A. *Modification of Sentence*

Rule 35 of the Alaska Rules of Criminal Procedure permits the trial court to correct or reduce a sentence after it has been imposed. In addition to the authority of the trial court to modify sentences pursuant to Rule 35(a), Rule 35(b) permits convicted and sentenced persons to petition for relief where:

(1) The conviction or sentence was in violation of the State or Federal Constitution;
(2) The court was without jurisdiction to impose the sentence;
(3) The sentence imposed was not authorized by law;
(4) There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction in the interest of justice;
(5) The Defendant is unlawfully held in custody;
(6) The conviction or sentence is subject to collateral attack under any common law, statutory or other writ, proceeding, or remedy;
(7) There has been a significant change in law.

B. *Double Jeopardy*

Article I, Section 9[222] of the Alaska Constitution parallels the fifth amendment of the United States Constitution[223] and provides that no person shall be put in jeopardy twice for the same offense. In *Torres v. State*,[224] the Alaska Supreme Court followed the prevailing federal rule and held that jeopardy attaches when the trial jury is sworn. In a series of cases commencing with *Whitton v. State*,[225] the Alaska court has held that although defendants may be subjected to multiple charges arising out of a single course of conduct or action, a defendant may not be subjected to multiple punishments for the "same offense." In determining whether multiple charges constitute the "same offense" for purposes of punishment, the court must analyze whether the offenses involve differences in intent or conduct. Any such differences found must then be balanced against societal interests, taking into account whether the differences are substantial enough to warrant multiple punishments.[226] The Alaska Supreme Court stated in *Whitton* that the social interests to be considered include: "[t]he nature of personal, property or other rights sought to be protected, and the

222. Alaska Const. art. I, § 9 provides: "No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself."
223. *See* note 132 *supra*.
224. 519 P.2d 788 (Alaska 1974).
225. 479 P.2d 302 (Alaska 1970).
226. *Id.* at 312.

broad objectives of criminal law such as punishment of the criminal for his crime, rehabilitation of the criminal, and the prevention of future crimes."[227] If the multiple charges do not reflect significant or substantial differences in intent or conduct in relation to the social interests involved, multiple punishments may not be imposed without violating the prohibition against double jeopardy contained in the State and Federal Constitutions.[228]

CONCLUSION

This article has attempted to identify the areas of criminal procedure where Alaska has departed from established lines of authority and has enhanced the procedural rights afforded an accused. The greatest expansion of rights has occurred in the investigative and pre-trial stages of the proceedings. The procedural rights afforded an accused during a criminal trial and following his conviction do not significantly depart from those which are afforded by other states or the federal courts. Once formal charges have been initiated, and, more clearly, once an accused is brought to trial, he receives few benefits, rights, or protections not provided defendants in other jurisdictions.

In establishing the permissible limits of reasonable searches and seizures, the right to counsel, the right to fair and impartial grand jury proceedings, the right to discovery, and the right to a speedy trial, the Alaska Supreme Court has taken a more generous view of the rights of an accused. These five areas of procedure have an element in common. Each constitutes a point in the criminal process at which the prosecution has a clear advantage over the accused. The accused is not able to participate in or influence the acquisition of evidence, the conducting of a criminal investigation, and the initiation of charges. The protection of the individual during these stages of the criminal process can be viewed as an attempt by the Alaska Supreme Court to equalize the prosecution's procedural advantage over the accused. However, once formal charges are initiated and trial commences, the court has been reluctant to continue providing enhanced procedural protections to the accused.

227. *Id.*
228. *Id.*

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ARTICLES

THE EXCLUSIONARY RULE REVISITED

*Senato Charles McC. Mathias, Jr.**

The fourth amendment of the Constitution reads 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.[1]

The right secured by the amendment is clear. So is the historical background that prompted the addition of the amendment to our organic law. As one commentator has written:

> Alone among those constitutional provisions which set standards of fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with

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* The Honorable Charles McC. Mathias, Jr. is the Senior Senator from the State of Maryland and Chairman of the Senate Judiciary Subcommittee on Criminal Law. This article is based on a speech delivered at Loyola University School of Law on February 3, 1982.

1. U.S. Const. amend. IV.

England.[2]

The notion of freedom from unreasonable searches and seizures was a matter of hot dispute both in Seventeenth and Eighteenth Century England and in America in the years leading up to the American Revolution. What really offended the colonists was the arbitrary invasions of homes and offices pursuant to the so-called "writs of assistance." James Otis called that writ "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book."[3] It is not surprising, therefore, that when the Bill of Rights was adopted the fourth amendment was one of its most prominent features.

Although we have extensive knowledge of both the character of the right protected by the fourth amendment and its historical underpinnings, we know little about what the Founding Fathers thought an appropriate penalty for a violation of that right should be. The amendment is silent on this point. So is the historical record. In fact, not until 1914 did the United States Supreme Court determine what the consequences would be for a violation of the prohibition against unreasonable searches and seizures.[4]

In *Weeks v. United States*,[5] the Supreme Court held that evidence obtained in violation of the fourth amendment would be barred from use in federal prosecutions.[6] The Court's rationale was simple:

> 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 . . . might as well be stricken from the Constitution.[7]

So, after 123 years of uncertainty, the question of how the fourth amendment was to be enforced was answered. The exclusionary rule was born. And 47 years later, the Court, in *Mapp v. Ohio*,[8]

2. J. Landynski, Search and Seizure and the Supreme Court 19 (1966).
3. *Id.* at 34.
4. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (illegally seized evidence not admissible in federal criminal trial).
5. 232 U.S. 383 (1914).
6. *Id.* at 398.
7. *Id.* at 393.
8. 367 U.S. 643 (1961).

extended it to searches by state and local officials.[9]

From the beginning, the exclusionary rule generated controversy, as it does today. Legal scholars have debated it endlessly.[10] Researchers argue about whether the rule deters police misconduct and whether it contributes to crime.[11] Some pronounce it an abysmal failure and want it abolished;[12] others defend it as essential to preserving the full intent of the fourth amendment.[13] Moreover, some of our greatest Justices have been on opposite sides of the issue. Justice Holmes[14] and Justice Brandeis[15] wrote in support of the rule; Justice Cardozo questioned the integrity of a judicial system in which, as he put it, "[t]he criminal is to go free because the constable has blundered."[16]

Stephen Sachs, Attorney General of Maryland and a former United States Attorney, is an outspoken opponent of efforts to narrow or eliminate the exclusionary rule. But he also understands why the exclusionary rule arouses such controversy. Last fall, testifying at hearings on the exclusionary rule before the Senate Judiciary Subcommittee on Criminal Law, Mr. Sachs explained:

> The rule . . . is very fragile, especially in today's atmosphere of understandable public outrage at crime and at our perceived inability to do very much about it. It is vulnerable to attack because its values are abstract, while its price is tangible. It frequently excludes

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9. *Id.* at 655.

10. *See, e.g.*, Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?* 62 JUDICATURE 66 (1978); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 214 (1978); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'an Empty Blessing,'* 62 JUDICATURE 337 (1979); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979).

11. *See, e.g.* Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?* 62 JUDICATURE 398 (1979); Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?* 62 JUDICATURE 404 (1979); Canon, *A Postscript on Empirical Studies and the Exclusionary Rule*, 62 JUDICATURE 455 (1979); Schlesinger, *A Reply to Professor Canon*, 62 JUDICATURE 457 (1979).

12. *See, e.g., The Exclusionary Rule Bills: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S. 101 and S. 751*, 97th Cong., 1st Sess. (1981) (statement of Steven R. Schlesinger) [hereinafter cited as *Exclusionary Rule Hearings*]. At the time of publication the transcripts of the Subcommittee's proceedings have not yet been printed; as a result page citations are unavailable.

13. *See, e.g., Exclusionary Rule Hearings, supra* note 12 (statement of Stephen Sachs).

14. Olmstead v. United States, 277 U.S. 438, 470-71 (1928) (Holmes, J., dissenting).

15. *Id.* at 483-85 (Brandeis, J., dissenting).

16. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

> hard evidence, the truth, from trial. It appears to reward the undeserving criminal whom it sometimes frees because the constable blundered. It seems to many to give aid and comfort only to the enemy in the war on crime, and it makes almost no sense to citizens fed up with crime and impatient with legal technicalities who want to believe that crime would disappear if only courts would stop coddling criminals. That is why the rule, although it has plenty of responsible critics, has also become a whipping boy of anti-crime rhetoricians.[17]

With that kind of public image, it is not surprising that the exclusionary rule has always been the focus of vehement criticism. Today, criticism of the rule has reached a fever pitch, and the prospects for a judicial or legislative narrowing or abolition of the rule loom larger than ever before. In fact, the Fifth Circuit Court of Appeals has already adopted a "good faith" exception to the rule in *United States v. Williams*.[18]

At the Supreme Court level, it is significant that only two members of the present Court are committed to retaining the rule as is,[19] while at least four members have called for a loosening of the constraints imposed by the rule.[20] No member of the present Court has been a more consistent critic of the rule than Chief Justice Warren Burger. As long ago as 1971,[21] he called for legislative reform of the rule which he considers a "Draconian, discredited device,"[22] that is "conceptually sterile."[23] So the chances of the

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17. *Exclusionary Rule Hearings*, *supra* note 12.

18. 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981) (exclusionary rule no longer applicable when police seize evidence in reasonable, good-faith belief that seizure is constitutional). There were two separate majority opinions in the *Williams* case. Sixteen members of the court held that the search involved in *Williams* comported with the requirements of the Constitution. *Id.* at 833-39. Thirteen members of the court held that even if the search did violate the Constitution, the officer conducting the search reasonably believed in good-faith that his actions were lawful and therefore that the exclusionary rule would not be applied. *Id.* at 840-47. At that time there were twenty-five members of the Fifth Circuit Court of Appeals.

19. Justice Brennan and Justice Marshall have both committed themselves to retention of the rule in its present form. *See* United States v. Calandra, 414 U.S. 338, 355-67 (1974) (Brennan, J., with Douglas and Marshall, J.J., dissenting).

20. Both Justice Powell and Justice White would adopt some form of a reasonable, good-faith exception to the rule. *See* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., with Rehnquist, J., concurring in part). Chief Justice Burger and Justice Rehnquist have advocated complete abolition of the rule. *See, e.g.*, California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay).

21. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

22. Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring).

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Court rendering an anti-exclusionary rule decision are obviously very real.

But, what seems just as likely is that Congress will aim a blow at the rule. The improved prospect for legislative action is the result, to some extent, of the Reagan Administration's own interest in reform of the exclusionary rule. Both President Reagan[24] and Vice President Bush[25] have spoken out against the rule, and Senior White House Aide Edwin Meese, a former prosecutor, has called it '[t]he single most important factor behind the increase in crime in this country."[26] In addition, the Attorney General's Task Force on Violent Crime has spoken in favor of a "good faith" exception to the rule.[27] And the Department of Justice has recommended that such legislation be introduced.[28]

Of course, legislative efforts to alter or eliminate the exclusionary rule are not new. In the past, anti-exclusionary rule bills have been introduced, only to die in Committee without even a hearing.[29] But with strong encouragement from the Administration, momentum has been building on Capitol Hill. Already, more than half a dozen bills on the subject have been offered in the Ninety-Seventh Congress.[30] And the Senate Judiciary Subcommittee on Criminal Law has held the first congressional hearings ever devoted solely to an examination of the rule itself.[31]

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23. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). More recently, the Chief Justice has suggested that it should be the judiciary, rather than the legislature, which takes the first step toward modification of the exclusionary rule. *See* Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring) (legislatures unlikely to create statutory alternatives to exclusionary rule as long as rule is retained in its present form).

24. Remarks of President Reagan to the International Association of Chiefs of Police, New Orleans, Louisiana (September 28, 1981).

25. Remarks of Vice President Bush to the Annual Convention of the American Bar Association, New Orleans, Louisiana (August 1981).

26. Washington Star, July 21, 1981, at A5.

27. Attorney General's Task Force on Violent Crime, Final Report, Recommendation 40 (August 17, 1981).

28. *See Exclusionary Rule Hearings*, *supra* note 12 (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice).

29. *See, e.g.*, S. 2657, 92d Cong., 1st Sess. (1971).

30. Senate bills introduced in the 97th Congress, 1st Session, dealing with the exclusionary rule include S. 101, S. 751, and S. 1995. House bills include H.R. 4422, H.R. 4606, H.R. 4259 and H.R. 4898. The Administration's own proposal was recently introduced in the Senate as S. 2231, 2d Sess., 128 Cong. Rec. S2416 (daily ed. March 18, 1982). A similar proposal has been introduced as S. 2304.

31. The Subcommittee held hearings on October 5 and November 12, 1981, and on March 16 and 26, 1982.

The Subcommittee held four days of hearings on the exclusionary rule. Among the eighteen witnesses who testified were representatives of the Department of Justice, the American Bar Association, the American Civil Liberties Union, the International Association of Chiefs of Police, and Americans for Effective Law Enforcement; state prosecutors; criminal defense lawyers; law professors; and a political scientist. The hearings were balanced, with witnesses divided between those who favor abolishing or narrowing the rule and those who want to retain it in its original form.

United States Circuit Judge Malcolm Wilkey, an outspoken critic of the exclusionary rule, has written:

> Over the years the arguments pro and con have been well rehearsed and positions have crystallized to the extent that it sometimes appears as though almost any debate over the merits of the rule will likely degenerate into a polarized contest between proponents of the rule who see their adversaries as lamentably insensitive to violations of basic constitutional freedoms and opponents of the rule who, in turn, accuse the rule's supporters of softness on crime and criminals.[32]

Fortunately, I think the Subcommittee has managed to avoid that pitfall. The hearings were both informative and stimulating; the basic arguments on both sides were set out. Subcommittee members had an opportunity to become intimately familiar with the intricacies of the Department of Justice's "good faith" proposal, and with the three other bills pending before the Subcommittee which seek to abolish the rule or alter substantially its application in federal criminal cases. Those bills are:

—S. 101, Senator DeConcini's proposal to permit the admission of evidence obtained in violation of the fourth amendment unless the violation was either intentional or substantial;[33]

—S. 751, introduced by Senators Thurmond and Hatch to abolish the rule and replace it with a civil damage remedy;[34] and,

—S. 1995, Senator Dole's omnibus anti-crime bill which contains a proposal to limit the rule to intentional, bad faith vio-

32. United States v. Ross, 655 F.2d 1159, 1203 (D.C. Cir.) (en banc) (Wilkey, J., dissenting), *rev'd*, 50 U.S.L.W. 4580 (U.S. June 1, 1982).

33. 97th Cong., 1st Sess., 127 CONG. REC. S154 (daily ed. January 15, 1981).

34. *Id.* at S2401-02 (daily ed. March 19, 1981).

lations and to provide a tort remedy for such transgressions.[35]

These hearings have been helpful. They have shown that the issues involved are far more complex than they appear at first blush. A number of important questions of constitutional law and public policy have been raised during these hearings, the most interesting of which is whether the exclusionary rule is constitutionally mandated, or whether it is a judicially created doctrine, without constitutional underpinnings, and thus subject to congressional alteration by statute.

The most fundamental question facing the Subcommittee is this: Does Congress have the constitutional authority to alter or abolish the exclusionary rule?

Opponents of the rule argue that it is amenable to legislative alteration.[36] To them it is simply a judge-made rule of evidence that can be unmade:

> This rule of evidence did not come from on high. It's man-made, not God-given. Until there was a recent trend of examination into this rule . . . I fully expected somewhere along the line that someone would contend that Moses brought down a third tablet from Mount Sinai and that the Supreme Court only discovered it in 1914. . . . It's not even in the Constitution.[37]

Opponents of the exclusionary rule maintain that it was adopted in an effort to ensure proper enforcement of the fourth amendment and that it has failed to do that.[38] Therefore, they argue, the time has come to abandon the rule and replace it with a more effective alternative.[39] They see no impediment to Congress' taking such action.[40]

Admittedly, the exclusionary rule is not set forth in the Constitution. There are, however, a number of constitutional requirements that one will not find in the Constitution. For example, the

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35. *Id.* at S15,709-08 (daily ed. December 16, 1981).

36. *See, e.g.*, United States v. Ross, 655 F.2d at 1208-09 (abolition of exclusionary rule and creation of alternative tort remedy both within power of judiciary).

37. *Hearings before the Attorney General's Task Force on Violent Crime*, June 3, 1981, at 34-35 (testimony of Judge Wilkey).

38. *See, e.g., Exclusionary Rule Hearings, supra* note 12 (statement of Steven R. Schlesinger) (exclusionary rule currently grounded on policy of deterrence and empirical evidence shows that rule does not deter).

39. United States v. Ross, 655 F.2d at 1208-09.

40. *See, e.g., Exclusionary Rule Hearings, supra* note 12 (statement of Steven R. Schlesinger).

right of an indigent to appointment of counsel in criminal cases[41] is not explicit in the Constitution. It is the result of "judicial implication." The question is: Does that make it less important or more subject to legislative alteration?

Professor Yale Kamisar addressed this point in testimony before the Attorney General's Task Force on Violent Crime:

> Consider the [pre-*Miranda*] doctrine that a state cannot base a conviction on coerced confession, or involuntary confession, however much the confession is corroborated by extrinsic evidence. . . . That doctrine, too, is a matter of judicial implication. Read the Constitution. It never once mentions confessions, coerced, involuntary or otherwise. Does that mean Congress could have negated the old voluntariness doctrine by legislation? As a matter of fact, the Constitution doesn't mention very much. It doesn't mention line-ups or wiretapping or electronic eavesdropping or stomach-pumping or the presumption of innocence or an indigent's right to a trial transcript at state expense.[42]

The contention that the exclusionary rule is not a constitutional requirement is perplexing. That argument might indeed have had some merit prior to *Mapp v. Ohio*[43] for until then, the exclusionary rule could have been construed as an exercise of the Supreme Court's supervisory power over federal courts.[44] But *Mapp* eliminated the grounds of that argument.[45] The Supreme Court's supervisory power does not extend to state courts,[46] so the imposition of the rule by *Mapp* clearly was of constitutional dimension. Indeed, in *Mapp* the rule was characterized as "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without . . . which the Fourth Amendment would have been reduced to 'a form of words.' "[47]

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41. Gideon v. Wainwright, 372 U.S. 335 (1963).

42. *Hearings before the Attorney General's Task Force on Violent Crime*, June 3, 1981, at 64-65 (testimony of Yale Kamisar).

43. 367 U.S. 643 (1961).

44. Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 657-58.

45. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 23-24.

46. Geller, *supra* note 44.

47. 367 U.S. at 648 (1961) (citation omitted). The contrary view—that the exclusionary rule is not commanded by the Constitution, but is simply one method of enforcing the constitutional protection—has been forcefully presented by Judge Wilkey in his written responses to questions posed by the Criminal Law Subcommittee. *Exclusionary Rule Hearings*, *supra* note 12.

Although the Court has looked askance at *Mapp* from time to time,[48] the fact remains that the decision has never been overruled. This itself raises doubts about the prudence of congressional abolishment of the rule. The Department of Justice has argued, however, that Congress can at least limit the exclusionary rule to those situations in which its application would advance one of the rule's underlying goals.[49] And the only goal currently underlying the rule, in the Department's view, is deterrence of illicit police misconduct.[50] Arguing that the exclusionary rule cannot deter illegal searches conducted in good faith, the Department concluded that a statutory good faith exception to the rule, similar to that established in the *Williams* case,[51] would be constitutional.[52] The Department would not express an opinion on whether Congress could abolish the exclusionary rule entirely.[53] Under the Department's reasoning however, Congress could presumably eliminate the rule if it were replaced with an equally effective deterrent of violations of the fourth amendment.

Whether deterrence of police misconduct is the only remaining justification for the rule[54] and, if it is, whether this affects congressional power to alter the rule,[55] are both open to question.

Constitutional questions notwithstanding, Congress may well

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48. Although the court has not been willing to limit the rule's applicability to criminal trials, *see* Stone v. Powell, 428 U.S. 465, 492-93 (1976), it has refused to extend the rule to grand jury proceedings, United States v. Calandra, 414 U.S. 338, 349-52 (1974), and civil proceedings to collect federal wagering taxes when the illegal search was conducted by state officials. United States v. Janis, 428 U.S. 433, 454 (1976). Moreover, the Court has allowed the admission of illegally seized evidence against defendants who were the targets, though not the victims, of an illegal search, *see* United States v. Payner, 447 U.S. 727, 731 (1980) (defendant may invoke exclusionary rule only when illegal conduct invaded *his* legitimate expectation of privacy, not that of third party), and against all defendants for the purposes of impeachment. United States v. Havens, 446 U.S. 620, 627-28 (1980).

49. *Exclusionary Rule Hearings*, *supra* note 12 (statement of D. Lowell Jensen, Assistant Attorney General, Department of Justice, Criminal Division).

50. *Id.*

51. *See supra* note 18.

52. *Exclusionary Rule Hearings*, *supra* note 12 (statement of D. Lowell Jensen, Assistant Attorney General, Department of Justice, Criminal Division).

53. *See id.*

54. *See generally* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?* 62 JUDICATURE 66 (1978) (emphasizing that exclusionary rule is necessary to protect integrity of judicial process). *Cf.* United States v. Janis, 428 U.S. 433, 458-59 n.35 (1976).

55. *See Exclusionary Rule Hearings*, *supra* note 12 (statement of William W. Greenhalgh, on behalf of the American Bar Association) (arguing that Congress cannot alter rule even if deterrence is rule's sole justification).

decide to try to eliminate or modify the rule. If it does, it would not be the first congressional attempt to modify or even overturn a criminal procedure decision by the High Court.[56] For example, in 1968 Congress enacted a provision[57] that was designed to reverse the Supreme Court's decision in *Miranda v. Arizona*.[58] Although existing for almost fourteen years, this provision, part of title 2, of the Omnibus Crime Control and Safe Streets Act,[59] has been used sparingly; moreover, the Supreme Court has yet to rule on the law's constitutionality.[60] If the congressional sponsors of anti-exclusionary rule legislation have their way, the Court may have a chance to consider the validity of such a bill in the not-too-distant future.

Congressional efforts to offset Supreme Court decisions are very much in vogue in the Ninety-Seventh Congress. For example, there are more than thirty bills pending in Congress designed to circumvent Supreme Court rulings by divesting the federal courts of jurisdiction over a variety of constitutional issues.[61] There are,

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56. *See, e.g.*, The Privacy Protection Act of 1980, 42 U.S.C.A. § 2000aa (1981) (provides statutory protection against search and seizure of documentary evidence possessed by innocent third parties over and above protections required by the fourth amendment under Zurcher v. Stanford Daily, 436 U.S. 547 (1978)). The Privacy Protection Act, of course, placed *greater* restraints on government action than those imposed by the Constitution. Congress' power to limit the effect of a Supreme Court decision is certainly less extensive when it attempts to lessen any of the restraints imposed on government by the Constitution. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (congressional power under section 5 of the fourteenth amendment limited to adopting measures to enforce that amendment; Congress has no power to restrict, abrogate or dilute constitutional guarantees).

57. Omnibus Crime Control and Safe Streets Act of 1968, § 701(a), 13 U.S.C. §3501 (1976).

58. 384 U.S. 436 (1966). *Miranda* requires that prior to custodial interrogation law enforcement officials advise an individual that he has the right to remain silent, that his statements may be used against him, that he has the right to consult with an attorney, and that if he is indigent an attorney will be appointed to represent him. *Id.* at 444, 467-73. Statements taken in violation of *Miranda* are inadmissible in the prosecution's case-in-chief. *Id.* at 479. Under section 701(a) of the Omnibus Crime Control and Safe Streets Act, a voluntary confession would be admissible in the prosecution's case-in-chief despite the fact that *Miranda* warnings were not given. Section 701(a) was justified on the grounds that it merely overturned the factual determination that was the basis of the Court's decision in *Miranda*. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 63 (1968) (proponents of this provision argued that because *Miranda* was based on factual determination that custodial interrogation is inherently coercive, Congress can constitutionally change the *Miranda* rule by making factual findings to the contrary).

59. 18 U.S.C. § 3501 (1976).

60. *But cf.* United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975) (suggesting that Michigan v. Tucker, 417 U.S. 433 (1974), *sub silentio* upheld constitutionality of 18 U.S.C. § 3501).

61. *See, e.g.*, H.R. 997, 97th Cong., 1st Sess. (1981) (abortion); H.R. 369, 97th Cong.,

of course, important differences between efforts to strip the federal courts of jurisdiction and the proposals to reform the exclusionary rule,[62] but they have one thing in common—they are all attempts to achieve constitutional change without resort to the amendment process as set forth in article V.[63] As a Senator, I am opposed to the court jurisdiction bills because they seek to bypass the Constitution and I am uncomfortable with the anti-exclusionary proposals for the same reason.

I have dwelt on the constitutional aspect of this question because I believe that it is incumbent on members of Congress to make a reasoned judgment about the constitutionality of any bill that comes before us. All too often in the past the Congress has said in effect: "We aren't sure this bill is constitutional, but let's pass it and see what the courts decide." That is just an evasion of our responsibility.

Congress has a clear obligation—independent of that of the judiciary—to consider a bill's constitutionality. We cannot ignore this duty. We can be wrong; we can be in error just as the Court is on occasion; but we have sworn an oath to discharge our duties as members of Congress in accordance with the Constitution. I do not believe that we can perform those duties responsibly without coming to a conclusion about whether our contemplated actions are constitutional. As Chief Justice Burger has reminded us, "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[64] I concur wholeheartedly.

1st Sess. 1951) (busing); S. 431, 97th Cong., 1st Sess. (1981) (school prayer).

62. The putative constitutional authority for such legislation lies in Congress' power to make exceptions to the appellate jurisdiction of the Supreme Court under U.S. Const. art. III, § 2, cl. 2 and in Congress' power to ordain and establish inferior federal courts under *id.* art. III, § 1, cl. 1.

63. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislature of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. U.S. Const. art. V.

64. United States v. Nixon, 418 U.S. 683, 703 (1974).

To that end, I am determined that the Criminal Law Subcommittee develop a comprehensive hearing record that will enable my colleagues and me to make an informed judgment on the constitutionality of proposals to reform the exclusionary rule. Although not the only issue raised by these bills, it is the most fundamental one. The constitutionality controversy must be resolved once and for all, because the freedom from unreasonable searches and seizures is a freedom no despotism can accommodate. It is a right that no free society can surrender.

*[367 US 643]

*DOLLREE MAPP, etc., Appellant,

v

OHIO

367 US 643, 6 L ed 2d 1081, 81 S Ct 1684

[No. 236]

Argued March 29, 1961. Decided June 19, 1961.

SUMMARY

The defendant was convicted in the Ohio Common Pleas Court of possession of obscene literature; the judgment of conviction was affirmed by the Ohio Court of Appeals, and the judgment of the latter court was in turn affirmed by the Supreme Court of Ohio (170 Ohio St 427, 11 Ohio Ops 2d 169, 166 NE2d 387). Noting that the obscene materials for possession of which defendant was convicted were discovered in the course of a search of defendant's residence, the Ohio Supreme Court found that the record left it in doubt whether there ever was any warrant for the search of her home, but held that under Ohio law evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution, and that under the decision of the Supreme Court of the United States in Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, a state was not prevented by the Federal Constitution from adopting the rule as it prevailed in Ohio. A majority of less than six members of the court were of the opinion that the statute under which defendant was convicted, making a criminal offense the knowing possession of lewd books and pictures, was unconstitutional, but under Ohio law this majority was not sufficient to permit the reversal of the judgment of the Court of Appeals.

On appeal, the Supreme Court of the United States reversed the judgment of the Supreme Court of Ohio and remanded the cause to that court. In an opinion by CLARK, J., expressing the views of five members of the Court, the earlier decision in Wolf v Colorado, supra, was overruled, and it was held that, as a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state court as it is in a federal court.

BLACK, J., concurred in a separate opinion, expressing the view that the constitutional basis of the rule announced by the Court in the present case was the Fourth Amendment's ban against unreasonable searches and seizures considered together with the Fifth Amendment's ban against compelled self-incrimination.

DOUGLAS, J., also concurred in a separate opinion, elaborating the grounds of decision

HARLAN, J., with the concurrence of FRANKFURTER and WHITTAKER, JJ., dissented on the grounds that (1) the present case, in which the primary issue was the constitutionality of the statute under which defendant was convicted, was not an appropriate occasion for re-examining Wolf v Colorado, and (2) this case was sound and should not be overruled,

STEWART, J., expressed the view that this was not an appropriate case to re-examine Wolf v Colorado, and that the judgment below should be reversed because the Ohio statute under which defendant was convicted violated the constitutional guaranties of free thought and expression.

SUBJECT OF ANNOTATION

Beginning on page 1544, infra

Admissibility of evidence obtained by illegal search and seizure

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Search and Seizure § 5 — reasonableness — test.

1. What is a reasonable search not prohibited by the Fourth Amendment is not to be determined by any fixed formula.

Appeal and Error § 1478 — search and seizure — reasonableness — determination by trial court.

2. What is a reasonable search not prohibited by the Fourth Amendment is in the first instance for the trial court to determine.

Evidence § 681 — illegal search and seizure.

3. All evidence obtained by searches and seizures in violation of the Fourth Amendment of the Federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court.

[*See annotation references* 1, 2, *and annotation p.* 1544, *infra*]

Search and Seizure § 4 — restrictions on states.

4. The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment.

[*See annotation reference* 2]

Constitutional Law § 840.5; Evidence § 681 — illegally obtained evidence.

5. As to the federal government, the Fourth and Fifth Amendments and, as to the states, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions enjoy an intimate relation in their perpetuation of principles of humanity and civil liberty, and express supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy; the philosophy of each amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.

[*See annotation reference* 2]

Constitutional Law § 840; Evidence § 681 — unconstitutional evidence.

6. The rule which excludes unconstitutional evidence from being admitted in a state criminal trial is an essential part of both the Fourth and Fourteenth Amendments.

[*See annotation p.* 1544, *infra*]

ANNOTATION REFERENCES

1. Admissibility of evidence obtained by illegal search, 24 ALR 1408; 32 ALR 408; 41 ALR 1145; 52 ALR 477; 88 ALR 348; 134 ALR 819; 150 ALR 566. As to modern (prior to the Mapp Case) status of rule, see 50 ALR2d 531. See also 93 L ed 1797; 96 L ed 145; 98 L ed 581; 100 L ed 239; 6 L ed 2d 1544 (dealing with United States Supreme Court cases in point).

2. Right of privacy, 138 ALR 22; 168 ALR 446; 14 ALR2d 750.

3. Constitutionality of federal and state regulation of obscene literature, 1 L ed 2d 2211; 4 L ed 2d 1821.

4. The Supreme Court and the right of free speech and press, 93 L ed 1151; 2 L ed 2d 1706.

Courts § 681 — conflicts.

7. The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.

Criminal Law § 46 — rights of accused — fair procedure.

8. However much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

Evidence § 681 — illegally obtained evidence — procedure.

9. In determining whether a state conviction of crime is constitutionally impermissible because of the admission at the trial of evidence unconstitutionally obtained, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.

[*See annotation p. 1544, infra*]

Point from Separate Opinion

Constitutional Law § 930 — freedom of speech — obscenity.

10. A state statute making criminal the mere knowing possession or control of obscene material is invalid because inconsistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. [From separate opinion by Stewart, J.]

[*See annotation references 3, 4*]

APPEARANCES OF COUNSEL

A. L. Kearns argued the cause for appellant.

Gertrude Bauer Mahon argued the cause for appellee.

Bernard A. Berkman for American Civil Liberties Union and the Ohio Civil Liberties Union, as amici curiae.

Briefs of Counsel, p 1542, infra.

OPINION OF THE COURT

*[367 US 644]

Mr. Justice Clark delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio St 427, 428, 11 Ohio Ops 2d 169, 166 NE2d 387, 388.

*On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their head-

1. The statute provides in pertinent part that

"No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture. . . .

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

quarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened[2] and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant be-

*[367 US 645]

cause she had been "belligerent" *in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." 170 Ohio St, at 430, 166 NE2d, at 389. The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to 'offend "a sense of justice," ' " but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." 170 Ohio St, at 431, 166 NE2d, at 389, 390.

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Four-

*[367 US 646]

teenth Amendment *does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. On this appeal, of which we have noted probable jurisdiction, 364 US 868, 5 L ed 2d 90, 81

2. A police officer testified that "we did pry the screen door to gain entrance"; the attorney on the scene testified that a policeman "tried . . . to kick in the door" and then "broke the glass in the door and somebody reached in and opened the door and let them in"; the appellant testified that "The back door was broken."

S Ct 111, it is urged once again that we review that holding.[3]

I.

Seventy-five years ago, in Boyd v United States, 116 US 616, 630, 29 L ed 746, 751, 6 S Ct 524 (1886), considering the Fourth[4] and Fifth Amendments as running "almost into each other"[5] on the facts before it, this Court held that the doctrines of those Amendments "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his *[367 US 647] drawers, *that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of these Amendments]."

The Court noted that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." At p. 635.

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Cong 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." At p. 638.

Less than 30 years after Boyd, this Court, in Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177 (1914), stated that "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal sys-

3. Other issues have been raised on this appeal but, in the view we have taken of the case, they need not be decided. Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that Wolf be overruled, the amicus curiae, who was also permitted to participate in the oral argument, did urge the Court to overrule Wolf.

4. "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."

5. The close connection between the concepts later embodied in these two Amendments had been noted at least as early as 1765 by Lord Camden, on whose opinion in Entick v Carrington, 19 Howell's State Trials, 1029, the Boyd court drew heavily. Lord Camden had noted, at 1073:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

tem with the enforcement of the laws." At pp. 391, 392.

*[367 US 648]

*Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

"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 principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At p. 393.

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." At p. 398. Thus, in the year 1914, in the Weeks Case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." Wolf v Colorado, supra (338 US at 28). This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." Holmes, J., Silverthorne Lumber Co. v United States, 251 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426 (1920). It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . ." Weeks v United States, supra (232 US at 392), and that such evidence "shall not be used at all." Silverthorne Lumber Co. v United States, supra (251 US, at 392).

*[367 US 649]

*There are in the cases of this Court some passing references to the Weeks rule as being one of evidence. But the plain and unequivocal language of Weeks—and its later paraphrase in Wolf—to the effect that the Weeks rule is of constitutional origin, remains entirely undisturbed. In Byars v United States, 273 US 28, 71 L ed 520, 47 S Ct 248 (1927), a unanimous Court declared that "the doctrine [cannot] . . . be tolerated *under our constitutional system*, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed." At pp. 29, 30 (emphasis added). The Court, in Olmstead v United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 56 ALR 376 (1928), in unmistakable language restated the Weeks rule:

"The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." At p. 462.

In McNabb v United States, 318 US 332, 87 L ed 819, 63 S Ct 608 (1943), we note this statement:

"[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 . . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers

*[367 US 650]

was greatly magnified' *. . . or 'who have been unlawfully held incommunicado without advice of friends or counsel' . . . .'' At pp. 339, 340.

Significantly, in McNabb, the Court did then pass on to formulate a rule of evidence, saying, "[i]n the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue [for] . . . [t]he principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." At pp. 340, 341.

II.

In 1949, 35 years after Weeks was announced, this Court, in Wolf v Colorado (US) supra, again for the first time,[6] discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

"[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." At p. 28.

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause," cf. Palko v Connecticut, 302 US 319, 82 L ed 288, 58 S Ct 149 (1937), and announcing that it "stoutly adhere[d]" to the Weeks decision, the Court decided that the Weeks exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." 338 US, at 27–29. The Court's reasons for not

*[367 US 651]

considering essential to the *right to privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which Wolf was based.

The Court in Wolf first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of Weeks was "particularly impressive" (at p. 29); and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." At pp. 31, 32. While in 1949, prior to the Wolf Case, almost two-thirds of the States

6. See, however, National Safe Deposit Co. v Stead, 232 US 58, 58 L ed 504, 34 S Ct 299 (1914), and Adams v New York, 192 US 585, 48 L ed 575, 24 S Ct 372 (1904).

were opposed to the use of the exclusionary rule, now, despite the Wolf Case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule. See Elkins v United States, 364 US 206, Appx, pp. 224–232, 4 L ed 2d 1669, 1681–1687, 80 S Ct 1437 (1960). Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." People v Cahan, 44 Cal 2d 434, 445, 282 P2d 905, 911, 50 ALR2d 513 (1955). In connection with this California case, we note that the second basis elaborated in Wolf in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have

*[367 US 652]

been afforded "the *right to privacy."[7] 338 US, at 30. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been

*[367 US 653]

*recognized by this Court since Wolf. See Irvine v California, 347 US 128, 137, 98 L ed 561, 571, 74 S Ct 381 (1954).

Likewise, time has set its face against what Wolf called the "weighty testimony" of People v De[illegible]re, 242 NY 13, 150 NE 585 (19[illegible]6). There Justice (then Judge) Cardozo, rejecting adoption of the Weeks exclusionary rule in New York, had said that "[t]he Federal rule as it stands is either too strict or too lax." 242 NY, at 22, 150 NE, at 588. However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Con-

7. Less than half of the States have any criminal provisions relating directly to unreasonable searches and seizures. The punitive sanctions of the 23 States attempting to control such invasions of the right of privacy may be classified as follows:

Criminal Liability of Affiant for Malicious Procurement of Search Warrant.—Ala Code, 1958, Tit 15, § 99; Alaska Comp Laws Ann, 1949, § 66-7-15; Ariz Rev Stat Ann, 1956, § 13-1451; Cal Pen Code § 170; Fla Stat, 1959, § 933.16; Ga Code Ann, 1953, § 27-301; Idaho Code Ann, 1948, § 18-709; Iowa Code Ann, 1950, § 751.38; Min Stat Ann, 1947, § 613.54; Mont Rev Codes Ann, 1947, § 94-35-122; Nev Rev Stat §§ 199.130, 199.140; NJ Stat Ann, 1940, § 33:1-64; NY Pen Law § 1786, NY Code Crim Proc § 811; NC Gen Stat, 1953, § 15-27 (applies to "officers" only); ND Century Code Ann, 1960, §§ 12-17-08, 29-29-18; Okla Stat, 1951, Tit 21, § 585, Tit 22, § 1239; Ore Rev Stat, § 141.990; SD Code, 1939 (Supp 1960), § 34.9904; Utah Code Ann, 1953, § 77-54-21.

Criminal Liability of Magistrate Issuing Warrant Without Supporting Affidavit.—NC Gen Stat, 1953, § 15-27; Va Code Ann, 1960 Replacement Volume, § 19.1-89.

Criminal Liability of Officer Willfully Exceeding Authority of Search Warrant.—Fla Stat Ann, 1944, § 933.17; Iowa Code Ann, 1950, § 751.39; Minn Stat Ann, 1950, § 613.54; Nev Rev Stat § 199.450; NY Pen Law § 1847, NY Code Crim Proc § 812; ND Century Code Ann, 1960, §§ 12-17-07, 29-29-19; Okla Stat, 1951, Tit 21, § 536, Tit 22, § 1240; SD Code, 1939 (Supp 1960), § 34.9905; Tenn Code Ann, 1955, § 40-510; Utah Code Ann, 1953, § 77-54-22.

Criminal Liability of Officer for Search with Invalid Warrant or no Warrant.—Idaho Code Ann, 1948, § 18-703; Minn Stat Ann, 1947, §§ 613.53, 621.17; Mo Ann Stat, 1953, § 558.190; Mont Rev Codes Ann, 1947, § 94-3506; NJ Stat Ann, 1940, § 33:1-65; NY Pen Law § 1846; ND Century Code Ann, 1960, § 12-17-06; Okla Stat Ann, 1958, Tit 21, § 535; Utah Code Ann, 1953, § 76-28-52; Va Code Ann, 1960 Replacement Volume, § 19.1-88; Wash Rev Code §§ 10.79.010, 10.79.045.

stitution by state agents, Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437, supra; the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched, Jones v United States, 362 US 257, 266, 267, 4 L ed 2d 697, 705, 706, 80 S Ct 725, 78 ALR2d 233 (1960); and, finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, Rea v United States, 350 US 214, 100 L ed 233, 76 S Ct 292 (1956). Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution, and, at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine." United States v Rabinowitz, 339 US 56, 62, 94 L ed 653, 658, 70 S Ct 430 (1950).

Headnote 1
Headnote 2

It, therefore, plainly appears that the factual considerations supporting the failure of the Wolf Court to include the Weeks exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

III.

*[367 US 654]

*Some five years after Wolf, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the Weeks exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [Weeks] rule." Irvine v California, supra (347 US, at 134). There again it was said:

"Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment." Ibid.

And only last Term, after again carefully re-examining the Wolf doctrine in Elkins v United States (US) supra, the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement in Wolf "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the Weeks Case. At p. 213. At the same time, the Court pointed out, "the underlying constitutional doctrine which Wolf established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested . . . ." Ibid. The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close

Headnote 3

*[367 US 655]

the only *courtroom door remaining

open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV.

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. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in Wolf that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even Wolf "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the Boyd, Weeks and Silverthorne Cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was

Headnote 4

*[367 US 656]

*logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf Case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "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, supra (364 US at 217).

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." Wolf v Colorado, supra (338 US, at 27). This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, in-

cluding, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. Rogers v Richmond, 365 US 534, 5 L ed 2d 760, 81 S Ct 735 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We

*[367 US 657]

find that, *as to the Federal Government, the Fourth and

Headnote 5

Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation"[8] in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," Bram v United States, 168 US 532, 543, 544, 42 L ed 568, 573, 574, 18 S Ct 183 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." Feldman v United States, 322 US 487, 489, 490, 88 L ed 1408, 1412, 1413, 64 S Ct 1082, 154 ALR 982 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. Rochin v California, 342 US 165, 173, 96 L ed 183, 190, 72 S Ct 205, 25 ALR2d 1396 (1952).

V.

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and

Headnote 6

Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in Elkins,

"[t]he very essence of

Headnote 7

a healthy federalism depends upon the avoidance of needless conflict between

*[367 US 658]

*state and federal courts." 364 US, at 221. Such a conflict, hereafter needless, arose this very Term, in Wilson v Schnettler, 365 US 381, 5 L ed 2d 620, 81 S Ct 632 (1961), in which, and in spite of the promise made by Rea, we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In nonexclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across

8. But compare Waley v Johnston, 316 US 101, 101, 86 L ed 1302, 1304, 62 S Ct 964, and Chambers v Florida, 309 US 227, 236, 81 L ed 716, 721, 60 S Ct 472, with Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, and Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359.

the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as Rea and Schnettler, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.

Headnote 8

"However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." Miller v United States, 357 US 301, 313, 2 L ed 2d 1332, 1340, 78 S Ct 1190 (1958). Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. Byars v United States, 273 US 28, 71 L ed 520, 47 S Ct 248 (1927); Lustig v United States, 338 US 74, 93 L ed 1819, 69 S Ct 1372 (1949).

*[367 US 659]

*There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." People v Defore, 242 NY, at 21, 150 NE, at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration—the imperative of judicial integrity." 364 US, at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v United States, 277 US 438, 485, 72 L ed 944, 959, 48 S Ct 564, 66 ALR 376 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. Elkins v United States, supra (364 US at 218). The Court noted that

"The federal courts themselves have operated under the exclusionary rule of Weeks for almost half

9. As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with Burns v Ohio, 360 US 252, 3 L ed 2d 1209, 79 S Ct 1164, Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR 2d 1055, and Pennsylvania ex rel. Herman v Claudy, 350 US 116, 100 L ed 126, 76 S Ct 223. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

Headnote 9

*[367 US 660]

a century; *yet it has not been suggested either that the Federal Bureau of Investigation[10] has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting but seemingly inexorable." Id. 364 US at 218, 219.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.[11] Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SEPARATE OPINIONS

*[367 US 661]

*Mr. Justice Black, concurring.

For nearly forty years, since the decision of this Court in Weeks v United States,[1] federal courts have refused to permit the introduction into evidence against an accused of his papers and effects obtained by "unreasonable searches and seizures" in violation of the Fourth Amendment. In Wolf v Colorado, decided in 1949, however, this Court held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[2] I concurred in that holding on these grounds:

"For reasons stated in my dissenting opinion in Adamson v. California, 332 U.S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures,' but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to

10. See the remarks of Mr. Hoover, Director of the Federal Bureau of Investigation, FBI Law Enforcement Bulletin, September, 1952, pp. 1–2, quoted in Elkins v United States, 364 US 206, 218, 219, note 8, 4 L ed 2d 1669, 1678, 1679, 80 S Ct 1437.

11. Cf. Marcus v Search Warrant of Property, 6 L ed 2d post, p. 1127.

1. 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, decided in 1914.

2. 338 US 25, 33, 93 L ed 1782, 1788, 69 S Ct 1359.

be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[3]

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evi-

*[367 US 662]

dence, 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. Reflection on the problem, however, in the light of cases coming before the Court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem,[4] has long been recognized and, indeed, was expressly made the ground for this Court's holding in Boyd v United States.[5] There the Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[6] It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the Wolf Case.[7] And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the Boyd doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly

*[367 US 663]

ly based in reason, *and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the Boyd Case:

"'[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"[8]

3. Id. 338 US at 39, 40.

4. The interrelationship between the Fourth and the Fifth Amendments in this area does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately. See Feldman v United States, 322 US 487, 502, 503, 88 L ed 1408, 1419, 1420, 64 S Ct 1082, 154 ALR 982 (dissenting opinion); Frank v Maryland, 359 US 360, 374-384, 3 L ed 2d 877, 886-892, 79 S Ct 804 (dissenting opinion).

5. 116 US 616, 29 L ed 746, 6 S Ct 524.

6. Id. 116 US at 633.

7. 338 US at 47, 48.

8. 116 US at 635. As the Court points out, Mr. Justice Bradley's approach to interpretation of the Bill of Rights stemmed directly from the spirit in which that great charter of liberty was offered for adoption on the floor of the House of Representatives by its framer, James Madison: "If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice

The case of Rochin v California,[9] which we decided three years after the Wolf Case, authenticated, I think, the soundness of Mr. Justice Bradley's and Mr. Justice Rutledge's reliance upon the interrelationship between the Fourth and Fifth Amendments as requiring the exclusion of unconstitutionally seized evidence. In the Rochin Case, three police officers acting with neither a judicial warrant nor probable cause, entered Rochin's home for the purpose of conducting a search and broke down the door to a bedroom occupied by Rochin and his wife. Upon their entry into the room, the officers saw Rochin pick up and swallow two small capsules. They immediately seized him and took him in handcuffs to a hospital where

*[367 US 664]

the capsules *were recovered by use of a stomach pump. Investigation showed that the capsules contained morphine and evidence of that fact was made the basis of his conviction of a crime in a state court.

When the question of the validity of that conviction was brought here, we were presented with an almost perfect example of the interrelationship between the Fourth and Fifth Amendments. Indeed, every member of this Court who participated in the decision of that case recognized this interrelationship and relied on it, to some extent at least, as justifying reversal of Rochin's conviction. The majority, though careful not to mention the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," showed at least that it was not unaware that such a provision exists, stating: "Coerced confessions offend the community's sense of fair play and decency. . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[10] The methods used by the police thus were, according to the majority, "too close to the rack and the screw to permit of constitutional differentiation,"[11] and the case was reversed on the ground that these methods had violated the Due Process Clause of the Fourteenth Amendment in that the treatment accorded Rochin was of a kind that "shocks the conscience," "offend[s] 'a sense of justice'" and fails to "respect certain decencies of civilized conduct."[12]

I concurred in the reversal of the Rochin Case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision

*[367 US 665]

against self-incrimination *applicable to the States and that, given a broad rather than a narrow construction, that provision barred the introduction of this "capsule" evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak.[13] In reaching this conclusion I cited and relied on the Boyd Case, the constitutional doctrine of which was, of course, necessary to my disposition of the case. At that time, however, these views were very definitely in

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will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Congress 439 (1789).

9. 342 US 165, 96 L ed 183, 72 S Ct 205, 25 ALR2d 1396.

10. Id. 342 US at 173.

11. Id. 342 US at 172.

12. Id. 342 US at 172, 173.

13. Id. 342 US at 174-177.

the minority for only Mr. Justice Douglas and I rejected the flexible and uncertain standards of the "shock-the-conscience test" used in the majority opinion.[14]

Two years after Rochin, in Irvine v California,[15] we were again called upon to consider the validity of a conviction based on evidence which had been obtained in a manner clearly unconstitutional and arguably shocking to the conscience. The five opinions written by this Court in that case demonstrate the utter confusion and uncertainty that had been brought about by the Wolf and Rochin decisions. In concurring, Mr. Justice Clark emphasized the unsatisfactory nature of the Court's "shock-the-conscience test," saying that this "test" "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free."[16]

*[367 US 666]

*Only one thing emerged with complete clarity from the Irvine Case—that is that seven Justices rejected the "shock-the-conscience" constitutional standard enunciated in the Wolf and Rochin Cases. But even this did not lessen the confusion in this area of the law because the continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a majority opinion in the Irvine Case left the situation at least as uncertain as it had been before.[17] Finally, today, we clear up that uncertainty. As I understand the Court's opinion in this case, we again reject the confusing "shock-the-conscience" standard of the Wolf and Rochin Cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the Boyd Case. I fully agree with Mr. Justice Bradley's opinion that the two Amendments upon which the Boyd doctrine rests are of vital importance in our constitutional scheme of liberty and that both are entitled to a liberal rather than a niggardly interpretation. The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the Boyd doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

Mr. Justice Douglas, concurring.

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure.

*[367 US 667]

The police entered a home *forcefully, and seized documents that were later used to convict the occupant of a crime.

She lived alone with her fifteen-year-old daughter in the second floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and

14. For the concurring opinion of Mr. Justice Douglas see id. 342 US at 177–179.

15. 347 US 128, 98 L ed 561, 74 S Ct 381.

16. Id. 347 US at 138.

17. See also United States v Rabinowitz, 339 US 56, 66–68, 94 L ed 653, 660, 661, 70 S Ct 430 (dissenting opinion).

the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home, who was wanted for questioning in connection with a recent bombing."[1] To the appellant's question, however, they replied only that they wanted to question her and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene; and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant; but the officer refused to let her see it although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper

*[367 US 668]

*from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and of the basement of the house.

The testimony concerning the search is largely nonconflicting. The approach of the officers; their long wait outside the home, watching all its doors; the arrival of reinforcements armed with a paper;[2] breaking into the house; putting their hands on appellant and handcuffing her; numerous officers ransacking through every room and piece of furniture, while the appellant sat, a prisoner in her own bedroom. There is direct conflict in the testimony, however, as to where the evidence which is the basis of this case was found. To understand the meaning of that conflict, one must understand that this case is based on the knowing possession[3] of four little pamphlets, a couple of photographs and a little pencil doodle—all

1. This "confidential source" told the police, in the same breath, that "there was a large amount of policy paraphernalia being hidden in the home."

2. The purported warrant has disappeared from the case. The State made no attempt to prove its existence, issuance or contents, either at the trial or on the hearing of a preliminary motion to suppress. The Supreme Court of Ohio said: "There *is*, in the record, considerable doubt as to whether there ever was *any* warrant for the search of defendant's home. . . . Admittedly . . . there was no warrant authorizing a search . . . for any 'lewd, or lascivious book . . . print, [or] picture.'" 170 Ohio St 427, 430, 11 Ohio Ops 2d 169, 166 NE2d 387, 389. (Emphasis added.)

3. Ohio Rev Code, § 2905.34: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture . . . or drawing . . . of an indecent or immoral nature . . . . Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

of which are alleged to be pornographic.

According to the police officers who participated in the search, these articles were found, some in appel-

*[367 US 669]

lant's *dressers and some in a suitcase found by her bed. According to appellant, most of the articles were found in a cardboard box in the basement; one in the suitcase beside her bed. All of this material, appellant—and a friend of hers—said were odds and ends belonging to a recent boarder, a man who had left suddenly for New York and had been detained there. As the Supreme Court of Ohio read the statute under which appellant is charged, she is guilty of the crime whichever story is true.

The Ohio Supreme Court sustained the conviction even though it was based on the documents obtained in the lawless search. For in Ohio evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." State v Mapp, 170 Ohio St 427, syllabus 2, 11 Ohio Ops 2d 169, 166 NE2d 387; State v Lindway, 131 Ohio St 166, 5 Ohio Ops 538, 2 NE2d 490. This evidence would have been inadmissible in a federal prosecution. Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177; Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437. For, as stated in the former decision, "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints . . . ." Id. 232 US 391, 392. It was therefore held that evidence obtained (which in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution.

We held in Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the Weeks Case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle.

*[367 US 670]

*As stated in the Weeks Case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 US, at 393.

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home (to use an expression of Mr. Justice Murphy, Wolf v Colorado, at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action with the hierarchy of the police system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in Wolf v Colorado, at 42, "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if ex-

clusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. 338 US 42–44. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, Wolf v Colorado in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter," as Mr. Justice Rutledge said in his dissent. See 338 US, at 47.

Wolf v Colorado (US) supra, was decided in 1949. The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which Wolf

*[367 US 671]

imported into the law. See *Stefanelli v Minard, 342 US 117, 96 L ed 138, 72 S Ct 118; Rea v United States, 350 US 214, 100 L ed 233, 76 S Ct 292; Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437, supra; Monroe v Pape, 365 US 167, 5 L ed 2d 492, 81 S Ct 473. It is an appropriate case because the facts it presents show—as would few other cases—the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person.

It is also an appropriate case in the narrower and more technical sense. The issues of the illegality of the search and the admissibility of the evidence have been presented to the state court and were duly raised here in accordance with the applicable Rule of Practice.[4] The question was raised in the notice of appeal, the jurisdictional statement and in appellant's brief on the merits.[5] It is true that argument was mostly directed to another issue in the case, but that is often the fact. See Rogers v Richmond, 365 US 534, 535–540, 5 L ed 2d 760, 763–766, 81 S Ct 760. Of course, an earnest advocate of a position always believes that, had he only an additional opportunity for argument, his side would win. But, subject to the sound discretion of a court, all argument must at last come to a halt. This is especially so as to an issue about which this Court said last year that "The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here." Elkins v United States, supra (364 US 216).

Moreover, continuance of Wolf v Colorado in its full vigor breeds the unseemly shopping around of the kind revealed in Wilson v Schnettler, 365 US 381, 5 L ed 2d 620, 81 S Ct 632. Once evidence, inadmissible in a federal court, is admissible in

*[367 US 672]

*a state court a "double standard" exists which, as the Court points out, leads to "working arrangements" that undercut federal policy and reduce some aspects of law enforcement to shabby business. The rule that supports that practice does

4. "The notice of appeal . . . shall set forth the questions presented by the appeal . . . . Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." Rule 10(2)(c), Rules of the Supreme Court of the United States.

5. "Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the Prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1 of the United States Constitution . . . ?"

not have the force of reason behind it.

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Whittaker join, dissenting.

In overruling the Wolf Case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for stare decisis, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the Wolf rule represents sounder Constitutional doctrine than the new rule which now replaces it.

I.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining Wolf. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate

*[367 US 673]

points, the new and *pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code making criminal the *mere* knowing possession or control of obscene material,[1] and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.[2] That was the principal issue which was decided by the Ohio Supreme Court,[3] which was tendered by appellant's Jurisdictional Statement,[4] and which was

1. The material parts of that law are quoted in note 1 of the Court's opinion. Ante, p 1083.

2. In its note 3, ante, p 1085, the Court, it seems to me, has turned upside down the relative importance of appellant's reliance on the various points made by him on this appeal.

3. See 170 Ohio St 427, 11 Ohio Ops 2d 169, 166 NE2d 387. Because of the unusual provision of the Ohio Constitution requiring "the concurrence of at least all but one of the judges" of the Ohio Supreme Court before a state law is held unconstitutional (except in the case of affirmance of a holding of unconstitutionality by the Ohio Court of Appeals), Ohio Const, Art 4, § 2, the State Supreme Court was compelled to uphold the constitutionality of § 2905.34, despite the fact that four of its seven judges thought the statute offensive to the Fourteenth Amendment.

4. Respecting the "substantiality" of the federal questions tendered by this appeal, appellant's Jurisdictional Statement contained the following:

"The Federal questions raised by this appeal are substantial for the following reasons:

"The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual 'to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional rights of the individual' (Justice Herbert's dissenting Opinion, Appendix 'A'). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code [the latter two Sections providing exceptions to the coverage of § 2905.34 and related provisions of Ohio's obscenity statutes] are read together, . . . they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the de-

briefed[5] and argued[6] in this Court.

*[367 US 674]

*In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule Wolf. With all respect for the views of the majority, and recognizing that stare decisis

*[367 US 675]

carries different weight *in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining Wolf.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For in overruling Wolf the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable)[7] and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene,[8] surely presents

fendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions."

5. The appellant's brief did not urge the overruling of Wolf. Indeed it did not even cite the case. The brief of the appellee merely relied on Wolf in support of the State's contention that appellant's conviction was not vitiated by the admission in evidence of the fruits of the alleged unlawful search and seizure by the police. The brief of the American and Ohio Civil Liberties Unions, as amici, did in one short concluding paragraph of its argument "request" the Court to re-examine and overrule Wolf, but without argumentation. I quote in full this part of their brief:

"This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings."

6. Counsel for appellant on oral argument, as in his brief, did not urge that Wolf be overruled. Indeed, when pressed by questioning from the bench whether he was not in fact urging us to overrule Wolf, counsel expressly disavowed any such purpose.

7. "2905.37 Legitimate Publications Not Obscene.

"Sections 2905.33 to 2905.36, inclusive of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

§ 3767.01(C)

"This section and sections 2905.34, . . . 2905.37 . . . of the Revised Code shall not affect . . . any newspaper, magazine, or other publication entered as second class matter by the post-office department."

8. The Ohio Supreme Court, in its construction of § 2905.34, controlling upon us here, refused to import into it any other exceptions than those expressly provided by the statute. See note 7, supra. Instead it held that "If anyone looks at a book and

*[367 US 676]
a Constitutional *question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of Wolf, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the Wolf Case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "nonexclusionary" aspect, Wolf did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the Federal Constitution, the Fourth and Fifth Amendments, not applicable to the States." People v Defore, 242 NY 13, 20, 150 NE 585. Though, of course, not reflecting the full measure of this continuing reliance, I find that during the last three Terms, for instance, the issue of the inadmissibility of illegally state-obtained evidence appears on an average of about fifteen times per Term just in the in forma pauperis cases summarily disposed of by us. This would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on Wolf, and that were we determined to reexamine that doctrine we would not lack future opportunity.

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling Wolf without full-dress argu-
*[367 US 677]
ment *is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one to be sure with explicit misgivings.[9] I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering Wolf, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set

finds it lew he is forthwith, under this legislation, guilty . . . ."

9. See Wolf v Colorado, 338 US at 39, 40, Irvine v California, 347 US 128, 133, 134, and at 138, 139, 98 L ed 561, 569, 572, 74 S Ct 381. In the latter case, decided in 1954, Mr. Justice Jackson, writing for the majority, said (at p 134): "We think that the Wolf decision should not be overruled, for the reasons so persuasively stated therein." Compare Schwartz v Texas, 344 US 199, 97 L ed 231, 73 S Ct 232, and Stefanelli v Minard, 342 US 117, 96 L ed 138, 72 S Ct 118, in which the Wolf Case was discussed and in no way disapproved. And see Pugach v Dollinger, 365 US 458, 5 L ed 2d 678, 81 S Ct 650, which relied on Schwartz.

down for reargument, in view of the inadequate briefing and argument we have received on the Wolf point. To all intents and purposes the Court's present action amounts to a summary reversal of Wolf, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

II.

*[367 US 678]

*Essential to the majority's argument against Wolf is the proposition that the rule of Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, cf. Wolf v Colorado, 338 US at 39, 40 (concurring opinion), I shall assume, for present purposes, that the Weeks rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is "part and parcel" of the Fourth Amendment (2) Wolf held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the Weeks exclusionary rule should also be enforced against the States.[10]

This reasoning ultimately rests on the unsound premise that because Wolf carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment (338 US, at 27), it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty,"

*[367 US 679]

*and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in Wolf was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as Wolf itself pointed out (338 US, at 26), has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." (Id. 338 US, at 27.) It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in Wolf of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a preexisting legal context on which both

10. Actually, only four members of the majority support this reasoning. See, p 1107, infra.

interpretive decisions and enabling statutes [illegible] at least build.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable" —say in a tort action against state officers—we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But in this instance more than that is involved, for here we are reviewing not a determination that what the state police did was Constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could Constitutionally punish. Since there is not the slightest suggestion that Ohio's policy is "affirmatively to sanction . . . police incursion into privacy" (338 US, at 28), compare Marcus v Search Warrants of Property, 367 US 717, 6 L ed 2d 1127, 81 S Ct 1708, what the Court is now doing is to impose

*[367 US 680]

*upon the States not only federal substantive standards of "search and seizure" but also the basic federal remedy for violation of those standards. For I think it entirely clear that the Weeks exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on Wolf seem to me notably unconvincing.

First, it is said that "the factual grounds upon which Wolf was based" have since changed, in that more States now follow the Weeks exclusionary rule than was so at the time Wolf was decided. While that is true, a recent survey indicates that at present one-half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies. Berman and Oberst, Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure, 55 NW L Rev 525, 532–533. But in any case surely all this is beside the point, as the majority itself indeed seems to recognize. Our concern here, as it was in Wolf, is not with the desirability of that rule but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one. Moreover, the very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary

*[337 US 681]

*widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the Weeks rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, 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. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the Weeks rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject for New York in People v Defore, 242 NY 13, 150 NE 585, the Weeks exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the Weeks rule on the States makes "very good sense," in that it will promote recognition by state and federal officials of their "mutual obligation to respect the same fundamental criteria" in their approach to law enforcement, and will avoid "'needless conflict between state and federal courts.'" Indeed the majority now finds an in-

*[367 US 682]

congruity *in Wolf's discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is for me the strength of that decision.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts. Our role in promulgating the Weeks rule and its extensions in such cases as Rea, Elkins, and Rios[11] was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done, as, for instance, the California Supreme Court did in People v Cahan, 44 Cal 2d 434, 282 P2d 905, 50 ALR2d 513, with reference to procedures in the California courts or as this Court did in Weeks for the lower federal courts.

11. Rea v United States, 350 US 214, 100 L ed 233, 76 S Ct 292; Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437; Terrones Rios v United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court,

*[367 US 693]

tested in some final appellate *court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds we deal ther with a finished product in the creation of which we are allowed no hand, and our task, far from being one of overall supervision, is, speaking generally, restricted to a determination of whether the prosecution was Constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the Weeks rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the Weeks rule to be as a means of securing Constitutional rights.

Finally, it is said that the overruling of Wolf is supported by the established doctrine that the admission in evidence of an involuntary confession renders a state conviction Constitutionally invalid. Since such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial, the argument continues, this doctrine is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is Constitutionally significant to the fairness of a trial. I believe this analogy is not a true one. The "coerced confession" rule is certainly not a rule that any illegally obtained statements may not be used in evidence. I would suppose that a state-

*[367 US 694]

ment which is procured during *a period of illegal detention, McNabb v United States, 318 US 332, 87 L ed 819, 63 S Ct 608, is, as much as unlawfully seized evidence, illegally obtained, but this Court has consistently refused to reverse state convictions resting on the use of such statements. Indeed it would seem the Court laid at rest the very argument now made by the majority when in Lisenba v California, 314 US 219, 86 L ed 166, 62 S Ct 280, a state-coerced confession case, it said (at 235):

"It may be assumed [that the] treatment of the petitioner [by the police] . . . deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.

"But illegal acts, as such, committed in the course of obtaining a confession . . . do not furnish an answer to the constitutional question we must decide. . . . The gravamen of his complaint is the unfairness of the *use* of his confessions, and what occurred in their procurement is relevant only as it bears on that issue." (Emphasis supplied.)

The point, then, must be that in requiring exclusion of an involun-

[6 L ed 2d]

tary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure. The operative assumption of our procedural system is that "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby the accused was interrogated in secret for hours on end." Watts v Indiana, 338 US 49, 54, 93 L ed 1801, 1806, 69 S Ct 1347, 1357. See Rogers v Richmond, 365 US 534, 541, 5 L ed 2d 760, 766, 81 S Ct 735. The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not,

*[367 US 695]

apart *from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed, 1824), c 46, § 34. That this is a *procedural right*, and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.

This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling Wolf, and not for the basic rationale by which four members of the majority have reached that result. For my Brother Black is unwilling to subscribe to their view that the Weeks exclusionary rule derives from the Fourth Amendment itself (see ante, p. 1093), but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth (see ante, pp. 1094, 1096).[12] On that score I need only say that whatever the validity of the "Fourth-Fifth Amendment" correlation which the Boyd Case (116 US 616, 29 L ed 746, 6 S Ct 524) found, see 8 Wigmore Evidence (3d ed 1940), § 2184, we have only very recently again reiterated the long-established doctrine of this Court that

*[367 US 696]

*the Fifth Amendment privilege against self-incrimination is not applicable to the States. See Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution

12. My Brother Stewart concurs in the Court's judgment on grounds which have nothing to do with Wolf.

places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

Memorandum of Mr. Justice Stewart.

Agreeing fully with Part I of Mr. Justice Harlan's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

Headnote 10

NOTE

An annotation on "Admissibility of evidence obtained by illegal search and seizure" appears p. 1544, infra.

PART VIII. SPECIAL PROCEEDINGS

Rule 37. Search and Seizure.

(a) Search Warrant – Issuance and Contents.

(1) A search warrant authorized by law shall issue only on

(i)(aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(bb) sworn testimony taken on the record, and

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified, and

(iv) shall direct that it be served between 7:00 a.m. and 10:00 p.m., but if an affiant is positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return With Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a

copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) In Camera Hearing. A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in camera hearing, the court shall

grant or deny the motion to suppress on the record, and shall make written findings concerning the validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Amended by Chapter 17 SLA 1969 effective June 25, 1969, by Supreme Court Order 157 effective February 15, 1973 and by Supreme Court Order 505 effective April 16, 1982)

(a) CROSS REFERENCES: AS 12.35.010; AS 12.35.020; AS 12.35.030; Crim. Forms 46, 47

(b) CROSS REFERENCES: AS 12.35.050; AS 12.35.080; AS 12.35.090; AS 12.35.100; AS 12.35.110; Crim. Form 48

(c) CROSS REFERENCE: Crim. Form 49

EDITOR'S NOTE: Section 43, Chapter 143, Session Laws of Alaska 1982, provides that "AS 12.35.015, added by sec. 18 of this Act [Chapter 143, Session Laws of Alaska 1982], has the effect of changing Rule 37, Rules of Criminal Procedure, by allowing search warrants to be issued upon sworn oral testimony communicated by telephone or other appropriate means."

its consideration of relevant factors at sentencing, the superior court committed reversible error. Kelly v. State, Op. No. 2268, 622 P2d 432 (Alaska 1981).

It was not error to impose sentence without a psychological or psychiatric evaluation where defendant did not request such evaluation prior to sentencing and where there was no showing of how it would have benefited him. Spencer v. State, Op. No. 80, 642 P2d 1371. (Alaska 1982).

Criminal Rule 36

Collateral References

Same as Fed R. Crim. P. 36

2 Wright, Federal Practice and Procedure §§ 611–612 (1969)

Cases

The issue whether a superior court has power to forfeit an aircraft as condition of probation for unlawful possession and transportation of contraband by an airplane is not timely raised by appeal taken after a February 1973 order which amends an August 1972 judgment of conviction by identifying the airplane ordered forfeitied. Such issue will not be considered, absent a showing of surprise or injustice or a showing of reason for an accused's failure to appeal the forfeiture within the required ten days. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

Postconviction proceedings, such as a motion for new trial or for an arrest of judgment, extend the period for taking an appeal. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

A motion to correct a clerical error in a criminal judgment can be made at any time to conform the judgement to the court's original intent insofar as that intent is clearly ascertainable from the record. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

An order entered to correct a clerical error in a criminal judgment may be appealed, but some prejudice such as surprise, must be shown. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

The identification of an airplane ordered forfeited, as a condition of probation, of an accused, who was convicted of unlawfully possessing and transporting contraband by airplane, is a proper modification of a clerical mistake. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

Where the effect of a judgment amendment is to increase the severity of a sentence, Criminal Rule 36 must be interpreted to be applicable only to sentencing errors which obviously conflict with the intention of the court. Shagloak v. State, Op. No. 1688, 582 P2d 1034 (Alaska 1978).

Under Criminal Rule 36, only an objectively ascertainable mistake–a mistake which can be determined by contemporaneous record evidence–will justify increasing a sentence. Shagloak v. State, Op. No. 1688, 582 P2d 1034 (Alaska 1978).

Criminal Rule 37

Collateral References

Generally

3 Wright, Federal Practice and Procedure § 678 (1969)

(a) Similar to Fed. R. Crim. P. 41(c)

3 Wright, Federal Practice and Procedure §670 (1979 Supp.)

(b) Similar to Fed. R. Crim. P. 41(d)

3 Wright, Federal Practice and Procedure §§ 671–672 (1969)

(c) Similar to Fed. R. Crim. P. 41(e), (f)

3 Wright, Federal Practice and Procedure § 673 (1979 Supp.)

Cases

Where defendant failed to move for return of property under Criminal Rule 37(c), the admission of such property taken from defendant was not error. Goss v. State, Op. No. 76, 368 P2d 884 (Alaska 1962).

Right to attack search of suitcase and seizure of gun as illegal was waived by pleading guilty to a charge of illegal possession of firearm. Rivett v. State, Op. No. 249, 395 P2d 264 (Alaska 1964).

Denial of motion to suppress evidence sustained where probable cause existed for arresting appellant without warrant and evidence was taken from him as an incident to such arrest. Maze v. State, Op. No. 400, 425 P2d 235 (Alaska 1967); Merrill v. State, Op. No. 392, 423 P2d 686 (Alaska 1967).

Where in the investigation of a rape case the accused, his father and an accused accomplice were voluntarily present in the police station, and the police officer learned through a statement of the accomplice that a note written by victim was in the accused's possession, constitutional provisions proscribing unreasonable searches and seizures did not prohibit seizure of the note to prevent its destruction or removal and motion to suppress the note as illegally obtained evidence was properly defined. Woltz, et al. v. State, Op. No. 433, 431 P2d 502 (Alaska 1967).

Since order of trial court suppressing evidence obtained by search would likely result in terminating the prosecution and involved a controlling question of law, review was appropriate, State v. Stump, Op. No. 1250, 547 P2d 305 (Alaska 1976).

Search warrant need not set out contents of the affidavit on which it is issued. Kirstich v. State, Op. No. 1264, 550 P2d 796 (Alaska 1976).

Valid service of a search warrant between the hours of 10:00 p.m. and 7:00 a.m. requires a determination by issuing judge that the warrant may be served at any time. State v. Shelton, Op. No. 1311, 554 P2d 404 (Alaska 1976).

That warrant was presented to judge in the middle of the night, with affidavit containing requisite showing for nighttime service under this rule and requesting an immediate search, clearly indicates that nighttime service was contemplated and authorized. State v. Shelton, Op. No. 1311, 554 P2d 404 (Alaska 1976).

A showing of probable credibility of a confidential informant is adequate where the affidavit alleges "that the informant has given accurate information in the past." Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

Fact that judge met police at a parking lot and then issued a search warrant within just a few minutes after an affidavit was presented to him did not mean that he failed to act in a neutral and detached manner. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

A description of the property to be searched is sufficient if there is no reasonable probability that the wrong premises will be searched. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

A warrant for a nighttime search may be issued pursuant to an affidavit showing probable cause that at some future time certain evidence will be at the location set forth in the warrant. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

An explicit statement by the affiant that he is positive that the property sought is at the place to be searched is not required to validate a nighttime search warrant. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

The word "positive" as used in this rule means "reasonably certain". Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

Written log notes suffice as a record of the search warrant hearing in the absence of an electronic record due to equipment failure. Nelson v. State, Op. No. 2350, 628 P2d 884 (Alaska 1981).

An in camera hearing is mandatory if the court determines that the identity of an informant upon whose information a search warrant was issued need not be disclosed. Schmid v. State, Op. No. 2126, 615 P2d 565 (Alaska 1980).

This rule requires service of an inventory upon an individual who has been the subject of a warrant for participant electronic monitoring of conversations, but service may be postponed for a reasonable period of time, such period to be governed by the exigencies established in each case by the affidavit accompanying the state's application for the warrant. Jones v. State, Op. No. 93, 646 P2d 243 (Alaska 1982).

Where, through the course of indictment and pretrial discovery, defendant, who had been the subject of a warrant for participant electronic monitoring of conversations, was given information equivalent to that which he would have been entitled to under this rule, trial court's error in failing to make provision for eventual service of inventory as required by this rule was harmless. Jones v. State, Op. No. 93, 646 P2d 243 (Alaska 1982).

Criminal Rule 38

Collateral References

Similar to Fed. R. Crim. P. 43

3 Wright, Federal Practice and Procedure §§ 721–724 (1969)

Cases

I. In General
II. Communication Between Judge and Jury

CASE NOTE

SEARCH AND SEIZURE: *Alaska Expands Abandonment Exception to Fourth Amendment Warrant Requirement—State v. Salit*, 613 P.2d 245 (1980)—In *State v. Salit*,[1] the Alaska Supreme Court undertook a complex fourth amendment analysis of the search of defendant Salit's "carry-on" luggage. In order to assess the defendant's motion to suppress, the court considered the "administrative search," "consent," and "abandonment" exceptions to the fourth amendment warrant requirement. While the court settled on the last exception, the supporting arguments were inadequate. Consequently, the opinion's summary treatment results in an expansion of the abandonment doctrine.

Salit presented a handbag and a garment bag for x-ray examination before boarding a plane departing from Anchorage International Airport. The garment bag passed through without incident; however, the handbag was too dense to be x-rayed. Defendant granted permission for a hand search of the handbag. The security employee who conducted the hand search thought there were narcotics-related items in the handbag,[2] so he notified airport security. The airport security officer asked Salit to come with him and began to escort Salit to the first aid room,[3] when the officer noticed a garment bag lying over a chair. All the other passengers had left the area. When questioned, Salit denied that the bag belonged to him. The officer opened the side compartment of the garment bag and discovered a plastic bag containing a white substance. The search was discontinued. Salit was escorted to the first aid room where he was advised of his *Miranda*[4] rights.

At this point, a further handbag search revealed a large amount of cash and drug paraphernalia. The defendant was arrested after tests revealed that the plastic bag contained cocaine. Subsequently, Salit consented to a search of the garment bag and signed a written waiver form. At the jail, Salit threw away a paper bag which identified his hotel. This led police to the hotel. After an initial view of Salit's hotel room by an officer and the hotel

1. State v. Salit, 613 P.2d 245 (Alaska 1980).

2. The handbag contained several small ampules, a hand-rolled cigarette, a small pipe, a lighter, a butane torch, one razor and other seemingly drug-related paraphernalia. *Id.* at 247 n.2

3. The defendant had been frisked prior to this time. *Id.* at 248 n.3.

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

manager, a search warrant was obtained. The subsequent room search yielded more contraband.

The defendant moved to suppress (1) the contents of the handbag; (2) the fruits of the garment bag search (the cocaine); (3) admissions made to police officers; and (4) the fruits of the hotel room search.[5]

The Superior Court, Third District, ruled in favor of defendant's motion because the garment bag search did not fit within any of the exceptions[6] to the fourth amendment warrant requirement.[7] In addition, the court suppressed the results of the hotel room search under the "fruits of the poisonous tree" doctrine since this search stemmed from Salit's illegal arrest.[8]

While the Alaska Supreme Court was presented with four issues, the fourth issue was decisive.[9] The court considered (1) whether searching the garment bag was justified under general administrative search rationale; (2) if searching the garment bag was justified by defendant's submitting the bag to be x-rayed and whether this implied defendant's consent to having the bag opened and searched; (3) whether asking defendant if he owned the garment bag constituted "custodial interrogation" so as to require that he be given *Miranda* warnings; and (4) whether opening the garment bag was justified by a belief that the bag was abandoned, and thus did not violate Salit's "reasonable expectation of privacy."[10]

At the outset, the Alaska Supreme Court determined that the contents of the handbag could not establish the requisite probable cause for arrest. The incriminating evidence which could justify the arrest resulted from the garment bag search. Thus, the overriding issue was whether the search of the garment bag came within an exception to the search warrant requirement of the

5. 613 P.2d at 245, 248-49.

6. *Id.* at 249. The lower court held that there were no "exigent circumstances" because the bag was in the possession of the police. In addition, "abandonment" was inapplicable due to the lack of defendant's "free and voluntary selection to forego ownership."

7. 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.

U.S. CONST. amend. IV.

8. In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) the court enunciated the "fruits of the poisonous tree" doctrine. Evidence illegally obtained shall not be used even for the purpose of gaining other evidence. Once the original evidence, the "tree," is shown to have been unlawfully obtained, all evidence stemming from it, the "fruit," is equally unusable.

9. The fourth issue was decisive because the court based its holding on this exception. 613 P.2d at 255-59.

10. Katz v. United States, 389 U.S. 347 (1967).

fourth amendment.[11]

The Alaska Supreme Court held that the search of the garment bag was not justified under the administrative search rationale[12] of the Air Transportation Security Act of 1974,[13] and that Salit did not consent to the search. In addition, the questioning of the defendant as to whether he owned the garment bag was considered not to be "custodial interrogation."[14] Finally, the court concluded that the officer was justified in believing that the garment bag was abandoned and that the search was not, therefore, unconstitutional.[15] A brief analysis of the other holdings will demonstrate the importance of the abandonment theory.

Airport screening searches under the Air Transportation Security Act fall within the administrative search exception of the warrant requirement.[16] The only legitimate purpose of this screening program is to prevent weapons, including explosives, from being brought into boarding areas and onto planes for hijacking purposes. As stated in *Terry v. Ohio*,[17] screening under a search warrant exception cannot be for purposes of uncovering crime; rather, "the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible."[18]

The *Salit* court held that a search of the contents of the garment bag "in an effort to discover drugs was certainly not authorized under [the airport search] exception to the warrant requirement."[19] Nor was the search justified by an "exigency"[20] since the search by the x-ray machine had not revealed weapons or explosives.

Another exception to the warrant requirement is consent to the search.[21] The prosecution argued that the defendant consented to the search by handing the garment bag to the security employee, because posted notices informed airline passengers that

11. Erickson v. State, 507 P.2d 508, 514-15 (Alaska 1973).
12. 613 P.2d at 253.
13. 49 U.S.C. §§ 1356, 1357 and 1516.
14. 613 P.2d at 257.
15. *Id.* at 258.
16. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); Woods & Rohde, Inc. v. State Dep't of Labor, 565 P.2d 138 (Alaska 1977); and ALASKA CONST. art. I, § 14 for support of the administrative search exception to the warrant requirement.
17. 392 U.S. 1 (1968).
18. *Id.* at 19.
19. 613 P.2d at 252.
20. There may be exigent circumstances which justify dispensing with the fourth amendment warrant requirement. These circumstances may include preventing the imminent destruction of evidence or preventing harm to persons. Cupp v. Murphy, 412 U.S. 291 (1973); United States v. Costa, 356 F. Supp. 606 (D.C.D.C. 1973), *aff'd*, 479 F.2d 921.
21. Erickson v. State, 507 P.2d at 515.

their bags might be opened. The court reasoned, however, that "hijacking searches" were not tantamount to consent searches. The court cited approvingly the principle in *Erickson v. State* that "consent to a search, in order to be voluntary, must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred."[22] The defendant did not expressly consent to the search of the garment bag within the confines of the aforemen' ned standard. The Alaska Supreme Court reasoned that "the mere fact that persons are on notice that they may be searched cannot . . . be the basis for implying consent . . . ."[23] Although defendant impliedly consented to having his bag x-rayed based on the posted notices, he did not consent to having the bag opened and searched.

As noted earlier, when Salit was asked if he owned the garment bag he had not been given a *Miranda* warning. If the question constituted "custodial interrogation," the defendant was entitled to the warnings.[24] Any statement obtained in violation of the *Miranda* rules would be inadmissible as prosecution evidence.[25]

Whether or not there was "custodial interrogation" is a close question. At the time of questioning the defendant was in a public area, and had not been arrested and was not told that he could not leave. In addition, the posted signs indicated that inspection could be refused. According to the court, the officer had "merely requested Salit to accompany him to the first aid room."[26] However, at the time of the questioning, defendant was surrounded by many officers.

Assessing the situation, the court adopted an objective "reasonable person" test—would a reasonable person think he was in custody—and rejected a subjective test based on the thoughts of the officer or the defendant.[27] Unfortunately, the court failed to apply this test.[28] Instead the court legitimized the questioning

22. *Id.* (quoting Rosenthal v. Henderson, 389 F.2d 514 (6th Cir. 1958)).

23. 613 P.2d at 254.

24. Although *Miranda*, *supra* note 4, is normally thought of as protecting the fifth amendment right against self-incrimination, it also plays an important role in fourth amendment analysis. Specifically, it has been held that Miranda warnings will not baptize a fourth amendment violation. The Miranda warnings cannot "purge the taint" of a fourth amendment violation. Dunaway v. New York, 442 U.S. 200 (1979); and Brown v. Illinois, 422 U.S. 590 (1975).

25. 384 U.S. at 477.

26. 613 P.2d at 257.

27. Hunter v. State, 590 P.2d 888 (Alaska 1979); Oregon v. Mathiason, 429 U.S. 492 (1977).

28. Perhaps applying this "reasonable person" test is itself unreasonable. A reasonable person, not in possession of contraband, would not have any reason to believe (or fear) he is in custody under similar circumstances.

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30. 613 P.2d
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34. *Id.* at 3

based on an exception to *Miranda*. "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding."[29] Admittedly, it was logical for the officer to make the inquiry so that defendant could take the bag with him to the first aid room. However, the court overlooked the coercive atmosphere created by the officers' presence and his demand that defendant accompany him to the first aid room.[30] Under the totality of these circumstances, whether a reasonable person would feel free to leave and break off police questioning was an issue inadequately addressed.[31]

Since the administrative search and implied consent rationales failed to justify the search, the court premised the legality of the garment bag search on the "abandonment" exception to the fourth amendment. As one commentator has noted,[32] the significance of "abandonment" in the law of search and seizure is that the protection of the fourth amendment does not extend to abandoned property. Thus, when one abandons property, he is said to terminate his right of privacy in it, and may not later complain about its subsequent seizure and use as evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause.

The Alaska Supreme Court correctly stated that the real test is whether the defendant relinquished possession of the garment bag under circumstances indicating that he retained no justified expectation of privacy in the object.[33] While it is clearly established that abandoned property may normally be obtained and used for evidentiary purposes, this is not so if the abandonment was coerced by unlawful police action.[34]

Here, the Alaska Supreme Court reasoned that Salit's denying ownership of the garment bag, at a time when the other passengers had left, justified the officer in treating the bag as abandoned. Furthermore, the court stated that Salit was not co-

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

30. 613 P.2d at 257. The officer had an intent not to allow defendant to leave. *Id.* at n.36.

31. *Id.* at 258. The court states that defendant was not led to believe that if he admitted ownership the bag would automatically be searched. Yet, the court by focusing on what defendant was "led to believe" contradicts its own legal philosophy which rejected the subjective test in favor of an objective "reasonable person" test. The inconsistency illustrates the court's inadequate resolution of this issue.

32. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399, 400-01 (1971).

33. W. LAFAVE, SEARCH AND SEIZURE § 2.6(b) at 368-69 (1978).

34. *Id.* at 372.

ereed when asked about his ownership of the garment bag. Thus, the court held that the opening of the garment bag did not violate Salit's reasonable expectation of privacy. The court concluded there were ample grounds for the arrest resulting from the search of the abandoned garment bag and, therefore, the evidence obtained from the airport search should not have been suppressed.

In order to determine the applicability of the abandonment exception, the following circumstances surrounding the act of abandonment must be assessed:[35] the nature of the locale where the abandonment takes place; the behavior pattern of the individual; and most importantly for the instant case, the propriety of the retrieving or seizing officer's conduct both prior to and at the moment of abandonment.

If a defendant, in response to the lawful presence of law enforcement officers, abandons property in an area lying outside the protection of the fourth amendment, no issue of unreasonable search or seizure is presented.[36] Further, if the individual abandons the property out of any consciousness of guilt, or because of fear of potential arrest, it will be reasonable for a police officer to retrieve the property.[37] However, if there is improper police conduct the abandonment theory is inapplicable.[38]

Salit abandoned the property in public at an airport, and clearly relinquished any continued expectation of privacy in it. He did not release possession with any intent to retain ownership of the bag. As noted above, if the defendant divested himself of the bag due to fear of arrest it was reasonable for the officer to retrieve the property. Thus, the pivotal "circumstance" was the conduct of the officers.

While the officer's presence was certainly legitimate,[39] his activity was subject to scrutiny. Certainly there is coercion inherent when an officer encourages an individual into abandoning his property. Yet, there is no constitutionally significant distinction between an unreasonable search and seizure and official harassment, which prompts a suspect to reveal evidence which would otherwise be unobtainable. In short, the police may not do indirectly what is denied to them directly. In either event, they would be engaging in conduct equally unreasonable under the fourth

35. Mascolo, *supra* note 32, at 404. Since the court did not elaborate on its "abandonment" holding, perhaps an analysis of the "circumstances" will reveal a rationale for the decision.

36. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968).

37. United States v. Martin, 386 F.2d 213, 215 (3rd Cir. 1967).

38. Mascolo, *supra* note 32, at 419.

39. *See* Air Transportation Security Act of 1974, *supra* note 13.

amendment.[40]

Before the *Solit* court could properly find abandonment it had to consider the issue of waiver of a basic constitutional protection. The waiver required the voluntary relinquishment of a known right.[41] As Justice Goldberg cautioned in his dissent in *United States v. Colbert*,[42] "A coerced lie cannot effect an abandonment . . . . To say that defendants knew they were waiving a constitutional right when they uttered these meaningless lies under the threat of imminent discovery is a fiction, pure and simple. This was not a case of physical abandonment . . . ." This reasoning seems particularly applicable to the present case.

Assuming that a "reasonable person" standard is viable, as the opinion suggests, the court should have considered the objective circumstances surrounding the arrest. From the facts, as reported by the court, the atmosphere at the moment defendant relinquished the bag was seemingly coercive.[43] Numerous security personnel were present. The defendant was detained extensively. He had not been given his *Miranda* rights. The defendant was asked to go to a more enclosed locale. A "reasonable person" would have been confused and intimidated. Thus, the question remains unanswered as to whether defendant's state of mind permitted the requisite voluntariness.

Conclusion

In the final analysis, the Alaska Supreme Court has carved out a wider interpretation of the abandonment exception to the fourth amendment warrant requirement. It is apparent that police misconduct must be substantial before the Alaska Supreme Court will find an infringement of the fourth amendment. For the defense attorney in Alaska, the burden of proof with respect to the abandonment doctrine has been increased.

Jeffrey H. Silberman

40. Mascolo, *supra* note 32, at 419.
41. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
42. 474 F.2d 174, 183 (5th Cir. 1973).
43. 613 P.2d at 247-48.

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights. (Added by Supreme Court Order 364 effective August 1, 1979)

Op. No. 2356, 628 P2d 570 (Alaska 1981).

The admission of evidence proscribed by this rule is harmless error if the evidence does not have a substantial influence on the jury's verdict. Fields v. State, Op. No. 2360, 629 P2d 46 (Alaska 1981).

When a defendant through testimony places his intent in issue, evidence of similar assaults previously committed against other women by defendant is admissible upon the issue of intent. Davis v. State, Op. No. 23, 635 P2d 481 (Alaska 1981).

In negligence action against waterbed manufacturer, it was error to allow testimony concerning post-accident conduct of manufacturer in not recalling the product or issuing a warning. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Trial court did not err in refusing to sever assault charge, arising from an incident which took place on September 19, 1977, from murder charge based on an incident which occurred six days later, since defendant's actions could be viewed as a continuing course of conduct and since the assault charge would have been admissible in the murder trial to prove criminal intent or motive or to show a common scheme or plan even if the charges had been severed. Davidson v. State, Op. No. 78, 642 P2d 1383. (Alaska 1982).

Evidence Rule 405

When hearsay evidence has been presented to a grand jury, character evidence concerning the hearsay declarant's credibility is permissible to the same extent to which it would be permissible at trial had the declarant's character been challenged. Putnam v. State, Op. No. 2251, 629 P2d 35 (Alaska 1981).

In negligence action against waterbed manufacturer, it was error to allow testimony concerning post-accident conduct of manufacturer in not recalling the product or issuing a warning. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Evidence Rule 407

The evidentiary rule precluding admission of post-injury accidents or design changes toward proof of negligence is inapplicable in products liability cases based on strict liability. Caterpillar Tractor Co. v. Beck, Op. No. 2304, 624 P2d 790 (Alaska 1981).

Evidence Rule 412

Where arrest is lawful, fact that arresting officer uses excessive force does not make the evidence obtained as a result of the arrest the product of illegality. Martin v. State, Op. No. 2298, 623 P2d 1225 (Alaska 1981).

Illegally seized evidence may be considered in fashioning a sentence when the illegally seized evidence is reliable, when the police conduct involved in obtaining the evidence does not shock the conscience of the court, and when it is clear that the evidence was not obtained for purposes of influencing the sentencing judge. Elson v. State, Op. No. 40, 633 P2d 292 (Alaska 1981).

The traditional requirement of standing has not been abrogated in search and seizure cases by adoption of this rule. G.R. v. State, Op. No. 61, 638 P2d 191 (Alaska 1981).

Defendant did not have standing to argue that his confession should be suppressed on the ground that it was the product of an illegal arrest and detention

of his companion. G.R. v. State, Op. No. 61, 638 P2d 191 (Alaska 1981)

Defendant had no standing to object to police officers' contact with his building manager and no right to seek suppression of the evidence derived from her even if the contact was the result of a trespassory entrance into the apartment building. Hubert v. State, Op. No. 62, 638 P2d 677 (Alaska 1981).

Defendant had standing to contest the illegal arrest of codefendant which led to defendant's confession. Unger v. State, Op. No. 65, 640 P2d 151 (Alaska 1982).

This rule, which permits evidence illegally obtained to be used under certain circumstances in perjury prosecutions, applies to such evidence regardless of the basis for determining that it was illegally obtained. Wortham v. State, Op. No. 69, 641 P2d 223 (Alaska 1982).

Suppression of illegally obtained evidence in defendant's cocaine prosecution was not res judicata nor did it collaterally estop the state from using the evidence in defendant's subsequent perjury prosecution where there was no suggestion that this rule was considered at the first suppression hearing. Wortham v. State, Op. No. 69 641 P2d 223 (Alaska 1982).

Evidence Rule 503

Defendant was a "client" within the meaning of the attorney-client privilege when she communicated with an employee of a law firm in order to obtain legal advice, notwithstanding that the law firm had not yet accepted her case and that only raw facts, not legal points, were discussed. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Evidence Rule 505

Where defendant forcibly entered his wife's residence without permission and shot her boyfriend in her presence, wife's testimony against defendant was permissible under the "necessity" or "crimes-against-the-other" exception to the privilege against adverse spousal testimony. Loesch v. State, Op. No. 2202, 620 P2d 646 (Alaska 1980).

When there is conclusive evidence that a marriage is in fact destroyed, the trial court may properly rule that the state's interest in a spouse's testimony outweighs the defendant spouse's interest in suppressing it. Loesch v. State, Op. No. 2202, 620 P2d 646 (Alaska 1980).

Trial court correctly dispensed with the spousal testimonial immunity privilege where defendant married on the eve of trial and had a strong motivation to prevent the testimony of the women he married. Osborne v. State, Op. No. 2291, 623 P2d 784 (Alaska 1981).

Evidence Rule 512

Trial courts are not obliged, sua sponte, to give an instruction pertaining to the accused's failure to testify. Tugatuk v. State, Op. No. 2322, 626 P2d 95 (Alaska 1981).

Evidence Rule 601

Once a child's competency to testify has been determined, any inconsistency should go to the weight of his testimony, and not its admissibility. Sevier v. State, Op. No. 2134, 614 P2d 791 (Alaska 1980).

Before permitting a young child to testify, the trial judge must ascertain that the child is capable of receiving just

Rule 412. Evidence Illegally Obtained.

Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas. While these rules of evidence generally do not incorporate constitutional doctrine, Rule 412 will go beyond what federal constitutional decisions require in protecting the rights of those accused of crime. Thus, for example, in *Harris v. New York,* 401 U.S. 222, 28 L.Ed.2d 1 (1971), the United States Supreme Court approved the use of statements obtained in violation of *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966), for impeachment purposes but not as part of the prosecutor's case-in-chief. *Walder v. United States,* 347 U.S. 62, 98 L.Ed. 503 (1954), sanctioned the introduction of testimony on illegally seized heroin to rebut the defendant's denial of prior drug possession. Rule 412 would forbid such uses as long as proper objection is made by the defendant. This last proviso is a change from Criminal Rule 26(g).

This ban on the use of both testimonial and physical evidence for impeachment purposes should not amount to a significant incentive for defendants to commit perjury. The prosecution will still be able to cross-examine the defendant on his claims, if it believes in good faith that the defendant's testimony is false. And, as discussed below, some otherwise inadmissible evidence will still be permitted in perjury prosecutions.

Rule 412 also does not bar the use as impeachment evidence of statements made by a defendant who testifies on a preliminary question of fact as permitted by Rule 104(d). If the preliminary question of fact involves a constitutional question, the argument could be made that a ruling favorable to the defendant renders any statements made during the preliminary hearing "fruit of the poisonous tree" and therefore inadmissible. *Cf. Harrison v. United States,* 392 U.S. 219 (1968) (use of evidence in case-in-chief). *But see People v. Sturgis,* 317 N.E.2d 545 (Ill. 1974), *cert. denied,* 420 U.S. 936, 43 L.Ed.2d 412 (1975). *See also United States v. Kahan,* 415 U.S. 239, 39 L.Ed.2d 297 (1974); *United States v. Mandujano,* 425 U.S.

564, 584, 48 L.Ed.2d 212, 277 (1976) (Brennan, J., concurring in the judgment). Where the defendant is successful in suppressing evidence the underlying constitutional right is protected. It seems an extravagant extension of constitutional protection to permit one version of facts from the defendant's mouth to keep evidence from a tribunal and to permit the defendant to offer another version at trial. If the motion to suppress is unsuccessful, there is even less reason to refrain from using the defendant's statements in support of the motion as impeachment evidence. The decision to take the oath and testify is attenuation enough to remove the taint of the initial illegality. The record of the statements, the advice of counsel, and the oath together remove many of the problems associated with *Harris v. New York, supra.*

In perjury prosecutions, the government's interest in convicting guilty defendants and the extreme difficulty of obtaining reliable evidence warrant controlled use of illegally obtained evidence. Hence Rule 412 contains two narrow exceptions to the blanket prohibition on the use of illegally obtained evidence properly objected to.

The first exception governs statements obtained in violation of the right to warnings under *Miranda,* if the statement whose admission is sought is relevant to the issue of guilt or innocence and shown to be otherwise voluntary and not coerced. The latter limitation, meant to guarantee the statement's reliability, is derived from *Harris v. New York, supra,* where the U.S. Supreme Court observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 101 U.S. at 224, 28 L.Ed.2d at 4.

The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for all purposes if the police misconduct involved in obtained it was flagrant. The concept of a "substantial violation of rights" is necessarily flexible, and

whether or not such a violation occurred will depend on the facts of each case. The simple reference to "rights" is intended to emphasize that this section has no bearing on the law of standing in search and seizure cases.

[414 US 338]

UNITED STATES, Petitioner,

v

JOHN P. CALANDRA

414 US 338, 38 L Ed 2d 561, 94 S Ct 613

[No. 72–734]

Argued October 11, 1973. Decided January 8, 1974.

SUMMARY

A federal grand jury, investigating illegal loansharking activities, subpoenaed a witness to ask him questions based on evidence that had been seized by government agents during a search of the witness' place of business under a warrant issued in connection with an investigation of suspected illegal gambling operations. After the witness refused to testify on Fifth Amendment grounds, the government requested the United States District Court for the Northern District of Ohio, Eastern Division, to grant the witness immunity, but the witness sought suppression and return of the seized evidence as having been obtained through an illegal search and seizure. The District Court found for the witness (332 F Supp 737), and the United States Court of Appeals for the Sixth Circuit affirmed, holding that the Fourth Amendment exclusionary rule, under which illegally obtained evidence, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of an illegal search and seizure, was properly invoked by the witness to bar questioning based on evidence obtained in the unlawful search and seizure (465 F2d 1218).

On certiorari, the United States Supreme Court reversed. In an opinion by POWELL, J., expressing the view of six members of the court, it was held that a grand jury witness could not refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure, since (1) the Fourth Amendment exclusionary rule, which was a judicially-created remedy to safeguard Fourth Amendment rights by deterring unlawful police misconduct, rather than a personal constitutional right of the party aggrieved, was not applicable to grand jury proceedings, (2) to extend the exclusionary rule to grand jury proceedings would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and would achieve only a speculative and minimal advance of the rule's purpose of deterring police misconduct, and (3) grand jury questions based on evidence obtained from an illegal

Briefs of Counsel, p 828, infra.

search and seizure did not themselves constitute fresh and independent violations of the witness' Fourth Amendment rights.

BRENNAN, J., joined by DOUGLAS and MARSHALL, JJ., dissented, expressing the view that (1) application of the Fourth Amendment exclusionary rule should not depend solely on whether its invocation in a particular type of proceeding would significantly further the goal of deterrence of police misconduct, since the vital functions of the rule were to provide an enforcement tool giving content and meaning to the Fourth Amendment's guarantees, and to insure that the judiciary avoided even the slightest appearance of sanctioning illegal government conduct, and (2) thus, the rule should be considered applicable to grand jury proceedings.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Grand Jury § 6 — examination of witness — unlawful search and seizure

1. A witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure.

Grand Jury § 1 — responsibilities

2. The grand jury's responsibilities include both the determination whether there is probable cause to believe a

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29 AM JUR 2d, Evidence §§ 408–427; 38 AM JUR 2d, Grand Jury §§ 37, 38

11 AM JUR PL & PR FORMS (Rev ed), Federal Criminal Procedure, Forms 112, 114; 22 AM JUR PL & PR FORMS (Rev ed), Searches and Seizures, Forms 71–75

5 AM JUR TRIALS 331, Excluding Illegally Obtained Evidence

US L ED DIGEST, Evidence § 681; Grand Jury §§ 4–6

ALR DIGESTS, EVIDENCE §§ 983, 984; Grand Jury § 4

L ED INDEX TO ANNOS, Grand Jury; Search and Seizure

ALR QUICK INDEX, Grand Jury; Search and Seizure

FEDERAL QUICK INDEX, Grand Jury; Search and Seizure

ANNOTATION REFERENCES

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L Ed 2d 869.

Admissibility of evidence obtained by illegal search and seizure. 6 L Ed 2d 1544; 84 ALR2d 959.

Competency or sufficiency of evidence before grand jury as affecting validity of indictment or conviction in federal court. 100 L Ed 404.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 ALR3d 385.

Privilege against self-incrimination as to testimony before grand jury. 38 ALR2d 225.

crime has been committed and the protection of citizens against unfounded criminal prosecutions.

Grand Jury §§ 4, 5 — scope of inquiry

3. The grand jury may determine alone the course of its inquiry, and may compel the production of evidence or the testimony of witnesses as it considers appropriate; its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.

Grand Jury § 4 — scope of inquiry

4. A grand jury is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited by doubts whether any particular individual will be found properly subject to an accusation of crime.

Grand Jury § 4 — nature of proceedings

5. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated; rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.

Grand Jury § 4 — investigative power

6. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

Indictment, Information and Complaint § 98 — validity — evidence before grand jury

7. The validity of an indictment is not affected by the character of the evidence considered by the grand jury; an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

Grand Jury § 5 — witnesses — federal court's power

8. A federal court has power to compel persons to appear and testify before a grand jury.

Witnesses § 1 — duty to testify

9. The duty to testify is a basic obligation that every citizen owes his government.

Grand Jury § 6 — witnesses — interference with inquiry — objections

10. A witness may not interfere with the course of the grand jury's inquiry; he is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for such is no concern of his; nor is he entitled to challenge the authority of the court or the grand jury, or to set limits to the investigation that the grand jury may conduct.

Grand Jury §§ 4, 5 — subpoena power — court enforcement

11. The grand jury's subpoena power is not unlimited; the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses, and the court may quash or modify a subpoena on motion if compliance would be "unreasonable or oppressive" under Rule 17(c) of the Federal Rules of Criminal Procedure.

Grand Jury § 4 — consideration of incompetent evidence

12. The grand jury may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.

Witnesses §§ 74, 79 — self-incrimination — grand jury proceedings — immunity

13. The grand jury may not force a witness to answer questions in violation of the Fifth Amendment guarantee against self-incrimination; rather, the grand jury may override a Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination.

Witnesses § 74 — self-incrimination — grand jury proceedings — production of books and papers

14. A grand jury may not compel a

person to produce books and papers that would incriminate him.

Grand Jury § 4 — subpoena power — Fourth Amendment

15. The grand jury is without power to invade a legitimate privacy interest protected by the Fourth Amendment; a grand jury's subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment; judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.

Evidence § 681 — obtained by illegal search and seizure — fruits of evidence

16. The prohibition of the exclusionary rule of the Fourth Amendment, under which evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure, applies also to the fruits of the illegally seized evidence.

Evidence § 681 — illegally obtained evidence — exclusionary rule

17. The prime purpose of the exclusionary rule of the Fourth Amendment —under which evidence obtained in violation of the Fourth Amendment, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure—is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures; the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim.

Evidence § 681 — illegally obtained evidence — exclusionary rule

18. The rule which excludes from admission in a criminal trial evidence, and its fruits, obtained in violation of the prohibition of the Fourth Amendment against unreasonable search and seizure is calculated to prevent, not repair; its purpose is to deter—to compel respect for the constitutional guarantee in the only effective available way—by removing the incentive to disregard it.

Evidence § 681 — illegally obtained evidence — exclusionary rule

19. The exclusionary rule of the Fourth Amendment—under which evidence obtained in violation of the Fourth Amendment, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure—is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

Evidence § 681; Search and Seizure § 33 — illegally obtained evidence — standing to assert exclusionary rule

20. Rule 41(e) of the Federal Rules of Criminal Procedure, which provides that a person aggrieved by an unlawful search and seizure may move for return of the property unlawfully seized and suppression of its use as evidence, does not constitute an expansion of the exclusionary rule of the Fourth Amendment, and is no broader than the constitutional rule concerning standing to invoke the exclusionary rule.

Grand Jury § 6 — illegally obtained evidence — witness' standing to assert exclusionary rule

21. The government's offer of immunity under 18 USCS § 2514 to a federal grand jury witness who invoked his Fifth Amendment privilege against self-incrimination when the grand jury sought to ask him questions based on evidence illegally seized by federal officers during a search of the defendant's place of business, is irrelevant to the witness' standing to invoke the rule prohibiting admission of evidence, and its fruits, seized in violation of the Fourth Amendment.

Grand Jury § 6 — witnesses — unlawful search and seizure — exclusion of evidence

22. The Fourth Amendment exclu-

sionary rule, under which illegally obtained evidence, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure, does not extend to grand jury proceedings, since allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and would achieve only a speculative and minimal advance of the rule's purpose of deterring police misconduct, and since the incentive to the police to disregard Fourth Amendment requirements solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim.

Evidence § 681; Search and Seizure § 32 — illegal seizure — suppression of evidence — other remedies

23. Although suppression of the use of illegally seized evidence against the search victim in a criminal trial is an important method of effectuating the Fourth Amendment, nevertheless the Fourth Amendment does not require adoption of every proposal that might deter police misconduct.

Evidence § 681; Search and Seizure § 33 — exclusion of illegally obtained evidence — who may complain

24. The deterrent values of preventing the incrimination of those whose rights the police have violated by an unconstitutional search and seizure are sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed, but the additional benefits of extending the exclusionary rule to other defendants does not justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Search and Seizure § 15 — grand jury questions as violative of Fourth Amendment

25. Grand jury questions, based on evidence obtained from an illegal search and seizure, do not themselves constitute fresh and independent violations of the witness' Fourth Amendment rights, since such questions involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning.

Grand Jury § 6; Witnesses § 74 — right of privacy — self-incrimination

26. Ordinarily, a witness has no right of privacy before the grand jury, since absent some recognized privilege of confidentiality, every man owes his testimony; he may invoke his Fifth Amendment privilege against compulsory self-incrimination, but he may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs.

Search and Seizure § 5 — purpose and application of Fourth Amendment

27. The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects; the wrong condemned is the unjustified governmental invasion of such areas of an individual's life.

SYLLABUS BY REPORTER OF DECISIONS

When respondent's place of business was being searched by federal agents under a warrant issued in connection with a gambling investigation and specifying that the object of the search was to discover and seize bookmaking records and wagering paraphernalia, one agent, knowing of a pending federal investigation of loansharking activities, discovered and seized a suspected loansharking record. Subsequently, a grand jury investigating loansharking activities subpoenaed respondent to query him on the seized

evidence, but he refused to testify on Fifth Amendment grounds. After the Government then requested transactional immunity for respondent, the District Court granted respondent's suppression motion on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant, and further ordered that respondent need not answer any of the grand jury's questions based on the suppressed evidence. The Court of Appeals affirmed. *Held:* A witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure.

(a) The exclusionary rule, under which evidence obtained in violation of the Fourth Amendment or the fruits of such evidence cannot be used in a criminal proceeding against the victim of the illegal search and seizure, is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the party aggrieved.

(b) Despite its broad deterrent purpose, the rule does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served.

(c) Allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury's role.

(d) Grand jury questions based on evidence obtained from an unlawful search and seizure involve no independent governmental invasion of privacy, but rather the usual abridgment thereof common to all grand jury questioning. Such questions are only a derivative use of the product of a past unlawful search and seizure and work no new Fourth Amendment wrong.

465 F2d 1218, reversed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Blackmun, and Rehnquist, JJ., joined. Brennan, J., filed a dissenting opinion, in which Douglas and Marshall, JJ., joined, post, p 356, 38 L Ed 2d, p 576.

APPEARANCES OF COUNSEL

Louis F. Claiborne argued the cause for petitioner.

Robert J. Rotatori argued the cause for respondent.

Briefs of Counsel, p 828, infra.

OPINION OF THE COURT

[414 US 339]

Mr. Justice Powell delivered the opinion of the Court.

[1] This case presents the question whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. The issue is of considerable importance to the administration of criminal justice.

[414 US 340]

I

On December 11, 1970, federal agents obtained a warrant authorizing a search of respondent John Calandra's place of business, the Royal Machine & Tool Co. in Cleveland, Ohio. The warrant was issued in connection with an extensive investigation of suspected illegal gambling operations. It specified that the object of the search was the

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discovery and seizure of bookmaking records and wagering paraphernalia. A master affidavit submitted in support of the application for the warrant contained information derived from statements by confidential informants to the Federal Bureau of Investigation (FBI), from physical surveillance conducted by FBI agents, and from court-authorized electronic surveillance.[1]

The Royal Machine & Tool Co. occupies a two-story building. The first floor consists of about 13,000 square feet, and houses industrial machinery and inventory. The second floor contains a general office area of about 1,500 square feet and a small office occupied by Calandra, president of the company, and his secretary. On December 15, 1970, federal agents executed the warrant directed at Calandra's place of business and conducted a thorough, four-hour search of the premises. The record reveals that the agents spent more than three hours searching Calandra's office and files.

Although the agents found no gambling paraphernalia, one discovered, among certain promissory notes, a card indicating that Dr. Walter Loveland had been making periodic payments to Calandra. The agent stated in an affidavit that he was aware that the United States Attorney's

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office for the Northern District of Ohio was investigating possible violations of 18 USC §§ 892, 893, and 894 [18 USCS §§ 892, 893, 894], dealing with extortionate credit transactions, and that Dr. Loveland had been the victim of a "loansharking" enterprise then under investigation. The agent concluded that the card bearing Dr. Loveland's name was a loansharking record and therefore had it seized along with various other items, including books and records of the company, stock certificates, and address books.

On March 1, 1971, a special grand jury was convened in the Northern District of Ohio to investigate possible loansharking activities in violation of federal laws. The grand jury subpoenaed Calandra in order to ask him questions based on the evidence seized during the search of his place of business on December 15, 1970. Calandra appeared before the grand jury on August 17, 1971, but refused to testify, invoking his Fifth Amendment privilege against self-incrimination. The Government then requested the District Court to grant Calandra transactional immunity pursuant to 18 USC § 2514 [18 USCS § 2514]. Calandra requested and received a postponement of the hearing on the Government's application for the immunity order so that he could prepare a motion to suppress the evidence seized in the search.

Calandra later moved pursuant to Fed Rule Crim Proc 41(e) for suppression and return of the seized evidence on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant. On August 27, the District Court held a hearing at which Calandra stipulated that he would refuse to answer questions based on the seized materials. On October 1, the District Court entered its judgment ordering the evidence suppressed and re-

1. On the basis of the same affidavit, federal agents also obtained warrants authorizing searches of Calandra's residence and automobile. The present case involves only the search of the Royal Machine & Tool Co.

turned to Calandra and further ordering that Calandra need not answer any of the grand jury's questions based on the

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suppressed evidence. 332 F Supp 737 (1971). The court held that "due process . . . allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure." Id., at 742. The court found that the search warrant had been issued without probable cause and that the search had exceeded the scope of the warrant.

The Court of Appeals for the Sixth Circuit affirmed, holding that the District Court had properly entertained the suppression motion and that the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawfull search and seizure.[2] 465 F2d 1218 (1972). The offer to grant Calandra immunity was deemed irrelevant. Id., at 1221.

We granted the Government's petition for certiorari, 410 US 925, 35 L Ed 2d 585, 93 S Ct 1357 (1973). We now reverse.

II

[2] The institution of the grand jury is deeply rooted in Anglo-American history.[3] In England, the grand jury

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served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that it was provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v United States, 350 US 359, 361–362, 100 L Ed 397, 76 S Ct 406 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v Hayes, 408 US 665, 686–687, 33 L Ed 2d 626, 92 S Ct 2646 (1972).

[3, 4] Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is un-

2. The Court of Appeals affirmed the District Court's finding that the search of Calandra's business and seizure of his property were unlawful. 465 F2d 1218, 1226 n 5. Although the Government does not agree with the court's finding, it has not sought review of this issue. In addition, the Government has not challenged the District Court's order directing return of the illegally seized property to Calandra.

3. For a discussion of the history and role of the grand jury, see Costello v United States, 350 US 359, 361–362, 100 L Ed 397, 76 S Ct 406 (1956); Blair v United States, 250 US 273, 279–283, 63 L Ed 979, 39 S Ct 468 (1919); Hale v Henkel, 201 US 43, 59, 50 L Ed 652, 26 S Ct 370 (1906); 4 W. Blackstone, Commentaries* 301 et seq.; G. Edwards, The Grand Jury 1–44 (1906); 1 F. Pollock & F. Maitland, History of English Law 151 (2d ed 1909); 1 W. Holdsworth, History of English Law 321–323 (7th rev ed 1956).

restrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Blair v United States, 250 US 273, 282, 63 L Ed 979, 39 S Ct 468 (1919).

[5, 6] The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine

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whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged. Branzburg v Hayes, supra, at 700, 33 L Ed 2d 626; Costello v United States, supra, at 364, 100 L Ed 397.

In Branzburg, the Court had occasion to reaffirm the importance of the grand jury's role.

> "[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . ." 408 US, at 700, 33 L Ed 2d 626.

> "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. . . . 'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.' Wood v Georgia, 370 US 375, 392, 8 L Ed 2d 569, 82 S Ct 1364 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' United States v Stone, 429 F2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. Costello v United States, 350 US, at 362, 100 L Ed 397. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . . ." Id., at 701–702, 33 L Ed 2d 626.

[7] The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected

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by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, Costello v United States, supra; Holt v United States, 218 US 245, 54 L Ed 1021, 31 S Ct 2 (1910); or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, Lawn v United States, 355 US 339, 2 L Ed 2d 321, 78 S Ct 311 (1958).

[8–10] The power of a federal court to compel persons to appear and testify before a grand jury is also firmly established. Kastigar v United States, 406 US 441, 32 L Ed 2d 212, 92 S Ct 1653 (1972).

The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. Blackmer v United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932); United States v Bryan, 339 US 323, 331, 94 L Ed 884, 70 S Ct 724 (1950). In Branzburg v Hayes, supra, at 682 and 688, 33 L Ed 2d 626, the Court noted that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . ." and that "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings." The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure. Blair v United States, 250 US, at 281, 63 L Ed 979. Furthermore, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." Id., at 282, 63 L Ed 979. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." Ibid.

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[11-15] Of course, the grand jury's subpoena power is not unlimited.[4] It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. Branzburg v Hayes, supra; United States v Bryan, supra; Blackmer v United States, supra; 8 J. Wigmore, Evidence §§ 2290–2391 (McNaughton rev ed 1961). Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid, Lawn v United States, supra, the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. Rather, the grand jury may override a Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. Kastigar v United States, supra. Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. Boyd v United States, 116 US 616, 633–635, 29 L Ed 746, 6 S Ct 538 (1886). Cf. Couch v United States, 409 US 322, 34 L Ed 2d 548, 93 S Ct 611 (1973). The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is "far too sweeping in its terms to be regarded as reasonable" under the Fourth Amendment. Hale v Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.

[11] 4. The grand jury is subject to the court's supervision in several respects. See Brown v United States, 359 US 41, 49, 3 L Ed 2d 609, 79 S Ct 539 (1959); Fed Rules Crim Proc 6 and 17; 1 L. Orfield, Criminal Procedure Under the Federal Rules § 6:108, pp 475–477 (1966). In particular, the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witness, and the court may quash or modify a subpoena on motion if compliance would be "unreasonable or oppressive." Fed Rule Crim Proc 17(c).

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III

[16] In the instant case, the Court of Appeals held that the exclusionary rule of the Fourth Amendment limits the grand jury's power to compel a witness to answer questions based on evidence obtained from a prior unlawful search and seizure. The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. Weeks v United States, 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914); Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933 (1961). This prohibition applies as well to the fruits of the illegally seized evidence. Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407 (1963); Silverthorne Lumber Co. v United States, 251 US 385, 64 L Ed 319, 40 S Ct 182, 24 ALR 1426 (1920).

[17-19] 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 victims' homes and effects cannot be restored. Reparation comes too late." Linkletter v Walker, 381 US 618, 637, 14 L Ed 2d 601, 85 S Ct 1731 (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 search 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 US 206, 217, 4 L Ed 2d 1669, 80 S Ct 1437 (1960).

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Accord, Mapp v Ohio, supra, at 656, 6 L Ed 2d 1081, 84 ALR2d 933; Tehan v Shott, 382 US 406, 416, 15 L Ed 2d 453, 86 S Ct 459 (1966); Terry v Ohio, 392 US 1, 29, 20 L Ed 2d 889, 88 S Ct 1868 (1968). In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[5]

[20, 21] 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. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to in-

5. There is some disagreement as to the practical efficacy of the exclusionary rule, and as the Court noted in Elkins v United States, 364 US 206, 218, 4 L Ed 2d 1669, 80 S Ct 1437 (1960), relevant "[e]mpirical statistics are not available." Cf. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U Chi L Rev 665 (1970). We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials.

criminate the victim of the unlawful search. Brown v United States, 411 US 223, 36 L Ed 2d 208, 93 S Ct 1565 (1973); Alderman v United States, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961 (1969); Wong Sun v United States, supra; Jones v United States, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[6]

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IV

[22] In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context. It is evident that this extension of the exclusionary rule would seriously impede the grand jury. Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial. Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective.[7] The probable

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result would be "protracted interruption of grand jury proceedings," Gelbard v United States, 408 US 41, 70, 33 L Ed 2d 179, 92 S Ct 2357 (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

> "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation

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[20] 6. In holding that the respondent had standing to invoke the exclusionary rule in a grand jury proceeding, the Court of Appeals relied on Fed Rule Crim Proc 41(e). 465 F2d, at 1222-1224. Rule 41(e) provides, in relevant part, that "[a] person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained . . . ." It further states that "[t]he motion shall be made before trial or hearing . . . ." We have recognized that Rule 41(e) is "no broader than the constitutional rule." Alderman v United States, 394 US 165, 173, n 6, 22 L Ed 2d 176, 89 S Ct 961 (1969). Jones v United States, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR 2d 233 (1960). Rule 41(e), therefore, does not constitute a statutory expansion of the exclusionary rule.

[21] The Court of Appeals also found that the government's offer of immunity under 18 USC § 2514 [18 USCS § 2514] was irrelevant to respondent's standing to invoke the exclusionary rule. 465 F2d, at 1221. We agree with that determination for the reasons stated in Parts III, IV, and V of this opinion.

7. The force of this argument is well illustrated by the facts of the present case. As of the date of this decision, almost two and one-half years will have elapsed since respondent was summoned to appear and testify before the grand jury. If respondent's testimony was vital to the grand jury's investigation in August 1971 of extortionate credit transactions, it is possible that this particular investigation has been completely frustrated.

and frustrate the public's interest in the fair and expeditious administration of the criminal laws." United States v Dionisio, 410 US 1, 17, 35 L Ed 2d 67, 92 S Ct 764 (1973).

Cf. United States v Ryan, 402 US 530, 29 L Ed 2d 85, 91 S Ct 1580 (1971); Cobbledick v United States, 309 US 323, 84 L Ed 783, 60 S Ct 540 (1940). In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties.

[23, 24] Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule. Suppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment. But it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct. In Alderman v United States, 394 US, at 174–175, 22 L Ed 2d 176, for example, this

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Court declined to extend the exclusionary rule to one who was not the victim of the unlawful search:

"The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

We think this observation equally applicable in the present context.

Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.[8] Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly

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minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[8]

8. Respondent relies primarily on Silverthorne Lumber Co. v United States, 251 US 385, 64 L Ed 319, 40 S Ct 182, 24 ALR 1426 (1920), which the dissent contends "plainly controls this case." Post, at 362, 38 L Ed 2d at 579. In that case, federal officers unlawfully seized certain documents belonging to the Silverthornes and their lumber company and presented them to a grand jury that had

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V

[25, 26] Respondent also argues that each and every question based on evidence obtained from an illegal search and seizure constitutes a fresh and independent violation of the witness' constitutional rights.[9] Ordinarily, of course, a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony. He may invoke his Fifth Amendment privilege against compulsory self-incrimination, but he may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs. Blair v United States, 250 US 273, 63 L Ed 979, 39 S Ct 468 (1919). Respondent's claim must be, therefore, not merely that the grand jury's questions invade his privacy but that, because those questions are based on illegally obtained evidence, they some-

already indicted the Silverthornes and the company. A district court ordered the return of the documents but impounded photographs and copies of the originals. Later, the prosecutor caused the grand jury to issue subpoenas duces tecum to the Silverthornes and the company to produce the originals, and their refusal to comply led to a contempt citation. In reversing the judgment, the Court held that the subpoenas were invalid because they were based on knowledge obtained from the illegally seized evidence, citing Weeks v United States, 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914). Mr. Justice Holmes, writing for the Court, stated that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 US, at 392, 64 L Ed 319.

Silverthorne is distinguishable from the present case in several significant respects. There, plaintiffs in error had previously been indicted by the grand jury and thus could invoke the exclusionary rule on the basis of their status as criminal defendants. Moreover, the Government's interest in recapturing the original documents was founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury. It did not appear that the grand jury needed the documents to perform its investigative or accusatorial functions. Thus, the primary consequence of the Court's decision was to exclude the evidence from the subsequent criminal trial. Finally, prior to the issuance of the grand jury subpoenas, there had been a judicial determination that the search and seizure were illegal. The claim of plaintiffs in error was not raised for the first time in a pre-indictment motion to suppress requiring interruption of grand jury proceedings.

By contrast, in the instant case respondent had not been indicted by the grand jury and was not a criminal defendant. Under traditional principles, he had no standing to invoke the exclusionary rule. The effect of the District Court's order was to deprive the grand jury of testimony it needed to conduct its investigation. Furthermore, respondent's motion to suppress had not been previously made and required interruption of the grand jury proceedings. In these circumstances, Silverthorne is certainly not controlling. To the extent that the Court's broad dictum might be construed to suggest a different result in the present case, we note that it has been substantially undermined by later cases. See Parts III and IV of this opinion.

9. At oral argument, counsel for respondent stated the contention as follows:

"I submit to the Court that each question asked of the Respondent before the Grand Jury, which question was only asked because of a past violation of the Fourth Amendment, [amounts to] a new, immediate violation of the Fourth Amendment . . . . [A] question derived from a past violation, a question into the privacy of the witness amounts to another intrusion in violation of the Fourth Amendment." Tr of Oral Arg 17.

"[R]efusing to answer a question in which the question conceivably is derived from a past violation of the Fourth Amendment, gives rise to an additional or new Fourth Amendment right to resist answering that question because the question itself becomes an additional intrusion . . . ." Tr of Oral Arg 19-20.

how

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constitute distinct violations of his Fourth Amendment rights. We disagree.

[27] The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong. Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question not of rights, but of remedies.

In the usual context of a criminal trial, the defendant is entitled to the suppression of, not only the evidence obtained through an unlawful search and seizure, but also any derivative use of that evidence. The prohibition of the exclusionary rule must reach such derivative use if it is to fulfill its function of deterring police misconduct. In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect. Our conclusion necessarily controls both the evidence seized during the course of an unlawful search and seizure and any question or evidence derived therefrom (the fruits of the unlawful search).[10] The same considerations of logic and policy apply to both the fruits

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of an unlawful search and seizure and derivative use of that evidence, and we do not distinguish between them.[11]

The judgment of the Court of Appeals is

Reversed.

10. It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. Bivens v Six Unknown Fed Narcotics Agents, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971). He may also seek return of the illegally seized property, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial. Go-Bart Importing Co. v United States, 282 US 344, 75 L Ed 374, 51 S Ct 153 (1931). In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure.

11. The dissent's reliance on Gelbard v United States, 408 US 41, 33 L Ed 2d 179, 92 S Ct 2357 (1972), is misplaced. There, the Court construed 18 USC § 2515 [18 USCS § 2515], the evidentiary prohibition of Tit III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat 211, as amended, 18 USC §§ 2510–2520 [18 USCS §§ 2510–2520]. It held that § 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of Tit III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication, in either Gelbard or the legislative history, that Tit III was regarded as a restatement of existing law with respect

SEPARATE OPINION

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

The Court holds that the exclusionary rule in search-and-seizure cases does not apply to grand jury proceedings because the principal objective of the rule is "to deter future unlawful police conduct," ante, at 347, 38 L Ed 2d at 571, and "it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal."

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Ante, at 351, 38 L Ed 2d at 573. This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule.

The commands of the Fourth Amendment are, of course, directed solely to public officials. Necessarily, therefore, only official violations of those commands could have created the evil that threatened to make the Amendment a dead letter. But curtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees. They thus bore out James Madison's prediction in his address to the First Congress on June 8, 1789:

> "If they [the rights] are incorporated into the Constitution, independent tribunals of justice will
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> [414 US 357]
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> consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong 439 (1789).

Since, however, those judges were without power to direct or control the conduct of law enforcement officers, the enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior,

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to grand jury proceedings. As Mr. Justice White noted in his concurring opinion in Gelbard, Tit III "unquestionably works a change in the law with respect to the rights of grand jury witnesses . . . ." 408 US, at 70, 33 L Ed 2d 179.

The dissent also voices concern that today's decision will betray " 'the imperative of judicial integrity,' " sanction "illegal government conduct," and even "imperil the very foundation of our people's trust in their Government." Post, at 360, 38 L Ed 2d at 579. There is no basis for this alarum. "Illegal conduct" is hardly sanctioned, nor are the foundations of the Republic imperiled, by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced. Cf. Alderman v United States, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961 (1969); Linkletter v Walker, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731 (1965); and cases cited supra, at 347–348, 38 L Ed 2d at 571.

thus minimizing the risk of seriously undermining popular trust in government.

That these considerations, not the rule's possible deterrent effect, were uppermost in the minds of the framers of the rule clearly emerges from the decision which fashioned it:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction 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*
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> [414 US 358]
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> *have a right to appeal for the maintenance of such fundamental rights.* . . .
>
> . . . . .
>
> "This protection is equally extended to the action of the Government and officers of the law acting under it. . . . *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.*" Weeks v United States, 232 US 383, 391–392, 394, 58 L Ed 652, 34 S Ct 341 (1914) (emphasis added).

Mr. Justice Brandeis and Mr. Justice Holmes added their enormous influence to these precepts in their notable dissents in Olmstead v United States, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928). Mr. Justice Brandeis said:

> "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." Id., at 485, 72 L Ed 944.

And Mr. Justice Holmes said:

> "[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to
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> [414 US 359]
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> choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.
>
> ". . . 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 iniquities to succeed." Id., at 470, 72 L Ed 944.

The same principles were reiterated only five years ago. In Terry v Ohio, 392 US 1, 12–13, 20 L Ed 2d

889, 88 S Ct 1868 (1968), Mr. Chief Justice Warren said for the Court:

> "The rule also serves another vital function—'the imperative of judicial integrity.' Elkins v United States, 364 US 206, 222, 4 L Ed 2d 1669, 80 S Ct 1437 (1960). 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."

It is true that deterrence was a prominent consideration in the determination whether Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933 (1961), which applied the exclusionary rule to the States, should be given retrospective effect. Linkletter v Walker, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731 (1965). But that lends no support to today's holding that the application of the exclusionary rule depends solely upon whether its invocation in a particular type of proceeding will significantly further the goal of deterrence. The emphasis upon deterrence in Linkletter must be understood in the light of the crucial fact that the States had justifiably relied from 1949 to 1961 upon Wolf v Colorado, 338 US 25, 93 L Ed 1782, 69 S Ct 1359 (1949), and consequently, that application of Mapp would have required the wholesale release of innumerable convicted prisoners, few of whom could have been successfully retried. In that circumstance, Linkletter held not only that retrospective application of Mapp would not further the goal of deterrence but also

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that it would not further "the administration of justice and the integrity of the judicial process." 381 US, at 637, 14 L Ed 2d 601. Cf. Kaufman v United States, 394 US 217, 229, 22 L Ed 2d 227, 89 S Ct 1068 (1969).

Thus, the Court seriously errs in describing the exclusionary rule as merely "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." Ante, at 348, 38 L Ed 2d at 571. Rather, the exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy," Mapp v Ohio, supra, at 651, 6 L Ed 2d 1081, and "an essential part of both the Fourth and Fourteenth Amendments," id., at 657, 6 L Ed 2d 1081, that "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." Id., at 660, 6 L Ed 2d 1081.

This Mapp summation crystallizes the series of decisions that developed the rule and with which today's holding is plainly at war. For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct. This rejection of "the imperative of judicial integrity," Elkins v United States, 364 US 206, 222, 4 L Ed 2d 1669, 80 S Ct 1437 (1960), openly invites "[t]he conviction that all government is staffed by . . . hypocrites[, a conviction] easy to instill and difficult to erase." Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. C. & P. S. 255, 258 (1961). When judges appear to become "accomplices in the willful disobedience of a Constitution they

[38 L Ed 2d]

are sworn to uphold," Elkins v United States, supra, at 223, 4 L Ed 2d 1669, we imperil the very foundation of our people's trust in their Government on which our democracy rests. See On Lee v United

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States, 343 US 747, 758–759, 96 L Ed 1270, 72 S Ct 967 (1952) (Frankfurter, J., dissenting). The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera. Moreover,

> "[I]nsistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." Miller v United States, 357 US 301, 313, 2 L Ed 2d 1332, 78 S Ct 1190 (1958).

The judges who developed the exclusionary rule were well aware that it embodied a judgment that it is better for some guilty persons to go free than for the police to behave in forbidden fashion. A similar judgment led the Court to decide in Silverthorne Lumber Co. v United States, 251 US 385, 64 L Ed 319, 40 S Ct 182, 24 ALR 1426 (1920), that a grand jury must be denied access to plainly relevant but illegally seized papers. In that case, after federal agents unlawfully seized papers belonging to the Silverthornes and their corporation, and presented the documents to a grand jury which had previously indicted the Silverthornes, a district court ordered the documents returned and copies that had been prepared in the interim impounded. After returning the originals, the grand jury attempted to recoup them by issuance of a subpoena duces tecum. Compliance with the subpoena was refused, and contempt convictions followed. In reversing the judgment of convictions, the Court, speaking through Mr. Justice Holmes, held that the Government was barred from utilizing any fruits of its forbidden act,

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stating that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id., at 392, 64 L Ed 319.

Silverthorne plainly controls this case. Respondent, like plaintiffs in error in Silverthorne,[1] seeks to avoid furnishing the grand jury with evidence that he would not have been called upon to supply but for the unlawful search and seizure. The Court would distinguish Silverthorne on the ground that there the plaintiffs-in-error had been indicted and could invoke the exclusionary rule "on the basis of their status as criminal defendants," since the Government's effort to obtain the documents was "founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury." Ante, at 352, 38 L Ed 2d at 574, n 8. The effort was clearly not founded on any such belief. Overlooked is the fact that the

1. Neither the Silverthorne Lumber Co., because it was a corporation, see Hale v Henkel, 201 US 43, 50 L Ed 652, 26 S Ct 370 (1906), nor respondent, because he was granted transactional immunity, could invoke the privilege against self-incrimination. The situations are therefore competely comparable.

grand jury's interest in again obtaining the documents in Silverthorne may well have been to secure information leading to further criminal charges, especially since indictments of three other individuals, as well as additional indictments of the Silverthornes, had been the consequence of initial submission of the documents to the grand jury. See Brief on Behalf of Plaintiffs in Error, 4, 18–19.[2] Only if Silverthorne is

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overruled can its precedential force to compel affirmance here be denied.

Congressional concern with the Silverthorne holding was clearly evidenced in enactment of 18 USC § 2515 [18 USCS § 2515], providing that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication *and no evidence derived therefrom* may be received in evidence in any . . . proceeding in or before *any . . . grand jury* . . . if the disclosure of that information would be in violation of this chapter." (Emphasis added.) In Gelbard v United States, 408 US 41, 33 L Ed 2d 179, 92 S Ct 2357 (1972), we set aside the adjudication in criminal contempt of a grand jury witness who refused to comply with a court order to testify on the ground that interrogation was to be based upon information obtained from the witness' communications allegedly intercepted by federal agents by means of illegal wiretapping and electronic surveillance. Our reasons track the grounds advanced in Silverthorne.

"The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both

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to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents." 408 US, at 51, 33 L Ed 2d 179 (footnotes omitted).

Similarly to allow Calandra to be subjected to questions derived from the illegal search of his office and seizure of his files is "to thwart the [Fourth and Fourteenth Amendments' protection] of . . . individual privacy . . . and to entangle the courts in the illegal acts of Government agents." Ibid. "And for a court, on petition of the executive department, to sentence a witness, who is [himself] the victim of the illegal [search and seizure], to jail for refusal to participate in the exploitation of that [conduct in violation of the explicit command of the

2. The Court also argues that "[t]he [Silverthorne's claim] was not raised for the first time in a pre-indictment motion to suppress requiring interruption of grand jury proceedings," ante, at 352, 38 L Ed 2d, at 574, n 8, and therefore presumably its assertion occasioned no delay. However, the District Court in Silverthorne had granted an earlier application for return of the seized documents from the grand jury after determining that they had been obtained in violation of the Fourth Amendment. This Court made no intimation that the District Court acted improperly in considering the initial application.

Fourth Amendment] is to stand our whole system of criminal justice on its head." In re Evans, 146 US App DC 310, 323, 452 F2d 1239, 1252 (1971) (Wright, J., concurring).

It is no answer, to suggest as the Court does, that the grand jury witnesses' Fourth Amendment rights will be sufficiently protected "by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." Ante, at 351, 38 L Ed 2d, at 573. This, of course, is no alternative for Calandra, since he was granted transactional immunity and cannot be criminally prosecuted. But the fundamental flaw of the alternative is that to compel Calandra to testify in the first place under penalty of contempt necessarily "thwarts" his Fourth Amendment protection and "entangle[s] the courts in the illegal acts of Government agents"—consequences that Silverthorne condemned as intolerable.

To be sure, the exclusionary rule does not "provide that illegally seized evidence is inadmissible against anyone for any purpose." Alderman v United States, 394 US 165, 175, 22 L Ed 2d 176, 89 S Ct 961 (1969). But clearly there is a crucial

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distinction between withholding its cover from individuals whose Fourth Amendment rights have not been violated—as has been done in the "standing" cases, Alderman v United States, supra, Jones v United States, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960)—and withdrawing its cover from persons whose Fourth Amendment rights have in fact been abridged.

Respondent does not seek vicariously to assert another's Fourth Amendment rights. He himself has been the victim of an illegal search and desires "to mend no one's privacy [but his] own." Gelbard v United States, supra, at 63, 33 L Ed 2d 179 (Douglas, J., concurring). Respondent is told that he must look to damages to redress the concededly unconstitutional invasion of his privacy. In other words, officialdom may profit from its lawlessness if it is willing to pay a price.

In Mapp, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights. 367 US, at 654–655, 6 L Ed 2d 1081. The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of deterrence, but that its application in grand jury proceedings will not "significantly" do so. Unless we are to shut our eyes to the evidence that crosses our desks every day, we must concede that official lawlessness has not abated and that no empirical data distinguishes trials from grand jury proceedings. I thus fear that when next we confront a case of a conviction rested on illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case

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also that "it is unrealistic to assume" that application of the rule at trial would "significantly further" the goal of deterrence—though, if the police are presently undeterred, it is difficult to see how removal of the sanction of exclusion

will induce more lawful official conduct.

The exclusionary rule gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong 439 (1789). We betray the trust upon which that prediction rested by today's long step toward abandonment of the exclusionary rule. The observations of a recent commentator highlight the grievous error of the majority's retreat:

> "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violational of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, Studying the

Exclusionary Rule in Search and Seizure, 37 U Chi L Rev 665, 756 (1970). See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv L Rev 1532, 1562–1563 (1972).

I dissent and would affirm the judgment of the Court of Appeals.