

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 86/2

2502 SJ • SB 49 - SB 60

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magistrate's independent role⁵¹⁰ by ruling that warrants issued principally on an affiant's conclusory allegations are insufficient.⁵¹¹ The Court has insisted that the affiant present sufficient underlying circumstances so that the magistrate can undertake his own assessment of probable cause.⁵¹²

It would, therefore, be particularly wrong-headed to repeal the exclusionary rule in this area, especially since existing doctrine already requires deference to the magistrate's finding of probable cause. It appears that the exclusionary rule, at little actual cost in lost evidence, is the mainspring of an effective warrant issuance system.

This list of typical fourth amendment violations could be extended. Nevertheless, the point should be clear: The good faith exception would significantly undermine a reasonably well-functioning process for protection of fourth amendment rights. Advocates of the exception, by and large, err in considering only the specific deterrent impact of the exclusionary rule. They ignore the other processes by which the exclusionary rule, in several important ways, promotes our right "to be secure in [our] persons, houses, papers, and effects, against unreasonable searches and seizures."

VI. THE GOOD FAITH EXCEPTION AND THE ATTACK ON THE FOURTH AMENDMENT

This article has demonstrated that the good faith exception, although ostensibly directed only at the exclusionary rule, would operate to dilute substantive fourth amendment rights. The *Williams* opinion reveals that this result may be intentional. The court did not condemn the exclusionary rule because it is an ineffective deterrent, but rather because it commands strict compliance with constitutional standards that the court viewed to be incompatible with effective law enforcement.⁵¹³ The court made this sentiment clear by quoting Judge Clark's dissent to the panel decision:

⁵¹⁰ See *Aguilar v. Texas*, 378 U.S. at 111 (court must insist that magistrate perform neutral and detached function).

⁵¹¹ See *Spinelli v. United States*, 393 U.S. at 416 (no probable cause when affiant offered no support for belief that informant reliable).

⁵¹² See *Aguilar v. Texas*, 378 U.S. at 114 (magistrate must be informed of: (1) underlying circumstances indicating personal knowledge of informant, and (2) underlying circumstances indicating reliability of informant).

⁵¹³ See *United States v. Williams*, 622 F.2d 830, 842 (5th Cir. 1980) (en banc) (second majority opinion) (exclusionary rule directly prevents "whole truth" from being told, thereby freeing guilty criminals and endangering society), *cert. denied*, 449 U.S. 1127 (1981).

The approach of the *Williams* court poignantly calls to mind the contrary perspective adopted by Justice Jackson in his dissent in *Harris v. United States*, 331 U.S. 145 (1947). Confronted with a case implicating the competing concerns of law enforcement efficiency and the preservation of constitutional safeguards, Justice Jackson wrote:

[The fourth amendment], like each of our constitutional guarantees [sic], often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.

Id. at 198 (Jackson, J., dissenting). Justice Jackson, however, was no friend of the exclusionary rule in its application to the states. See *Irvine v. California*, 347 U.S. 128, 136 (1954) (plurality opinion per Jackson, J.) ("[t]hat the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police")

If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice.⁵¹⁴

We have thus traveled some distance from where we were a decade ago. At that time, the debate centered on whether the benefit of the exclusionary rule—the deterrence of police illegality—justified its costs to society—the suppression of evidence and the consequent loss of convictions. Critics of the rule urged its abrogation because it had little evident effect on police behavior.⁵¹⁵ Now, critics demand elimination of the rule precisely because it has succeeded in restraining unlawful police conduct.⁵¹⁶

Chief Justice Burger's evolving position on the exclusionary rule traces this shift in criticism. In his 1971 dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁵¹⁷ his first salvo against the rule while sitting on the Supreme Court, the Chief Justice questioned whether the exclusionary rule actually deterred police misconduct. He acknowledged the need to ensure "official observance of the law,"⁵¹⁸ but insisted that "[s]ome clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."⁵¹⁹ Such a demonstration, he argued, had not been made.⁵²⁰ Even so, Burger did not call for jettisoning the rule all at once. He feared that eliminating the exclusionary rule, without an effective tort remedy to replace it, would engender "the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."⁵²¹ Accordingly, he urged Congress to create tort remedies directly against the government and to overrule the exclusionary rule through legislation.⁵²²

Six years later, in the absence of any legislative response to his invitation,

514. *United States v. Williams*, 622 F.2d 830, 842 (1980) (en banc) (second majority opinion) (quoting *United States v. Williams*, 594 F.2d 86, 97-98 (5th Cir. 1979) (Clark, J., dissenting)), *cert. denied*, 449 U.S. 1127 (1981). In a portion of his opinion that the en banc court did not quote, Clark is even more candid on this point: "Officer Markonni did what any reasonable, practical officer would have considered the law required him to do. He did what reasonable, practical citizens would expect him to do." 594 F.2d at 97. Thus, Judge Clark apparently endorses Agent Markonni's action, even on the assumption that it violated the defendant's fourth amendment rights. *Id.*

515. See note 103 *supra* (citing studies on effectiveness of exclusionary rule as a deterrent).

516. See *United States v. Williams*, 594 F.2d 86, 97-98 (1979) (Clark, J., dissenting) (exclusion of evidence deters officers from acting when criminal activity observed), *rev'd*, 622 F.2d 830 (1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

517. 403 U.S. 388 (1971). The majority in *Bivens* ruled that there was an implied private cause of action under the fourth amendment, and allowed the plaintiff to seek damages against federal agents who performed a warrantless search without probable cause. *Id.* at 397. Chief Justice Burger dissented, arguing that creation of a damage remedy is a legislative act properly exercised only by Congress. *Id.* at 411-12 (Burger, C.J., dissenting).

518. *Id.* at 414 (Burger, C.J., dissenting).

519. *Id.* at 416.

520. *Id.* at 416. Burger noted that no empirical evidence had been produced that would show that the exclusionary rule actually deterred illegal conduct of law enforcement officials. *Id.* (citing *Oaks*, *supra* note 103, at 667).

521. *Id.* at 420-21.

522. *Id.* at 422-23. Not surprisingly, a deafening silence followed.

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523. 428 U.S. 465 (1976) (Burger, J., dissenting) (arguing for statutory tort remedy to litigate his fourth amendment rights), *cert. denied*, *Id.* at 494. The habeas corpus relief would be granted, and "free[ing] the guilty."

524. *Id.* at 500-01 (Burger, J., dissenting) (plausible prediction: if the incentive that the exclusionary rule provides for such legislation if that

525. *Id.* at 501.

526. *Id.*

527. 444 U.S. 85 (1979).

528. *Id.* at 90, 96.

529. *Id.* at 97-98 (Burger, J., dissenting).

530. *Id.* at 97.

531. See *Wilkey, The Fourth Amendment: A Struggle to Make the Fox Guard the Henhouse* (1978) (arguing for statutory tort remedy and external control by Congress); see also Yale Kamisar, *The Fourth Amendment: A Struggle to Make the Fox Guard the Henhouse*, *Is the Exclusionary Rule a Necessary*

Chief Justice Burger took a new tack. In his concurrence in *Stone v. Powell*,⁵²³ he abandoned his *Bivens* argument for an effective tort remedy coupled with the simultaneous abolition of the exclusionary rule. Instead, he claimed that the exclusionary rule itself inhibited the development of alternative means of enforcement. The Chief Justice maintained that "[l]egislatures are unlikely to create statutory alternatives, or impose direct sanctions on errant police officers or on the public treasury by way of tort actions so long as persons who commit serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule."⁵²⁴ Accordingly, Chief Justice Burger called for the Court either to overrule the exclusionary rule immediately, even in the absence of an alternative remedy, or to limit its scope to egregious, bad faith conduct.⁵²⁵ Only then, he predicted, would Congress enact a statutory remedy for persons injured by police "mistakes or misconduct."⁵²⁶

Lately, the Chief Justice seems more troubled by the standards of the fourth amendment itself than by the practical effectiveness of the exclusionary rule; now he criticizes the rule for its ability to induce police compliance with standards that he deems too restrictive. In *Ybarra v. Illinois*,⁵²⁷ he dissented from the majority's holding that police, when they arrive to execute a warrant to search a third person, may not search bystanders without probable cause.⁵²⁸ Burger argued that the exclusionary rule should not have been applied because the police had reasonable suspicion to search the bystander.⁵²⁹ Yet he couched his criticism as a further attack on the exclusionary rule. He claimed that "[t]he Court's holding is but another manifestation of the practical poverty of the judge-made exclusionary rule . . . [and] operates as but a further hindrance on the already difficult effort to police drug traffic."⁵³⁰ Thus, the Chief Justice seems to recognize that application of the exclusionary rule will compel other police officers to conform to the substantive fourth amendment standards that the majority announced, and he counts this deterrent impact among the rule's costs.

Judge Malcolm Wilkey, of the United States Court of Appeals for the District of Columbia Circuit, has similarly assailed fourth amendment standards through an attack on the exclusionary rule.⁵³¹ In an article he wrote to cham-

523. 428 U.S. 465 (1976). The majority held that when the defendant has had a full and fair opportunity to litigate his fourth amendment claim in state proceedings, federal habeas corpus review will be denied. *Id.* at 494. The court reasoned that the incremental deterrence to state police that federal habeas corpus relief would provide is not worth the cost to society in suppressing probative evidence and "free[ing] the guilty." *Id.* at 490, 495.

524. *Id.* at 500-01 (Burger, C.J., concurring). Another interpretation of these events leads to a more plausible prediction: if the legislatures are unwilling to enact a tort remedy with some teeth despite the incentive that the exclusionary rule might then be abrogated, then it is more unlikely still that we will see such legislation if that incentive is removed.

525. *Id.* at 501.

526. *Id.*

527. 444 U.S. 85 (1979).

528. *Id.* at 90, 96.

529. *Id.* at 97-98 (Burger, C.J., with Blackmun & Rehnquist, JJ., dissenting).

530. *Id.* at 97.

531. See Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 230-31 (1978) (arguing for statutory alternative to exclusionary rule based upon internal discipline by police and external control by courts or review board). This is one of a four-article exchange with Professor Yale Kamisar. The other articles are: Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing,"* 62 JUDICATURE 33 (1979); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amend-*

criticism is "really an attack on the constitutional guaranty, not the exclusionary rule."⁵³⁴

Wilkey further laments fourth amendment restrictions on police conduct when he speaks covetously of the *in terrorem* effect in foreign jurisdictions where police can search virtually at will.⁵³⁵ "The rule in other countries produces another salutary result: there is no widespread searching by the police. It is not necessary, so long as the police have power to do it, with resulting automatic conviction—and the criminals know the police have such power."⁵³⁶ Despite Judge Wilkey's protestations to the contrary,⁵³⁷ this is an attack on the limits that the fourth amendment places on the police, rather than on the doctrine that requires suppression of evidence when the police exceed those limits.

The recent criticism of the exclusionary rule that Burger and Wilkey have voiced, and which *Williams* in its own way exemplifies, is not new. The sub-

mere 13% of the cases studied "was evidence excluded as a result of filing a fourth amendment motion." *Id.* at 11. The number acquitted as a result, although not susceptible to precise calculation, must have been fewer still. See *id.* at 13 (no certain way to determine whether inadmissibility of excluded evidence proximate cause of acquittal). Furthermore, in only 0.4% of the cases in which the prosecutors declined to file charges were search or seizure problems the primary reason. *Id.* at 14. This data would seem to suggest that the costs to society of the exclusionary rule in terms of freeing the guilty would be cancelled out by about a 1% increase in the efficiency of federal law enforcement agencies.

⁵³⁴ Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing"*, 62 JUDICATURE 337, 343 (1979) (assailing Wilkey's argument that guns produced by search or frisk should be valid evidence).

⁵³⁵ Critics of the exclusionary rule often make much of the fact that the United States is one of very few countries in the world with such a rule. See *California v. Minjares*, 423 U.S. 916, 919 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) ("I feel morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence is mechanically excluded"); *Stone v. Powell*, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (no exclusionary rule in England or Canada, whose courts are otherwise "models of judicial decorum and fairness") (quoting *Oaks*, *supra* note 103, at 669); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (exclusionary rule is "unique to American jurisprudence").

There are, however, many reasons why an exclusionary rule is called for here, though not in other common law countries. See Saltzburg, *supra* note 44, at 193 n.299 (that other countries have not adopted rule "of no significance" for United States; rule necessary here because of unique protections of fourth amendment). The United States has a more heterogeneous population than most developed countries, which may well lessen citizen identification with the minority groups whose privacy is most likely to be invaded by the police; it has an atavistic frontier tradition that encourages public lawlessness, and it lacks a tradition of control of the police by the central government; a vastly disproportionate number of illegal arrests and searches involve suspects of victimless crimes, and our peculiarly moralistic and puritanical system of criminal law is replete with such crimes, and finally, Americans may be less willing than citizens of other countries to enforce constitutional privacy guarantees through the political process. Kaplan, *supra* note 131, at 1031.

"Two conclusions should stand without debate," Professor Baade has written:

First, deliberate illegality as a matter of policy, at least as a large-scale phenomenon, is peculiarly American. Second, in the American milieu, the hallowed remedies of criminal or civil liability, internal discipline, and reproof from the bench have proved to be illusory. These conclusions help explain the reluctance of other common law countries to follow American authority on illegally obtained evidence. They also reveal the logic behind the American exclusionary rule: without the rule the police has no sanction whatever against police illegality.

Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 TEX. L. REV. 1325, 1349 (1973).

⁵³⁶ Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 225 (1978) (emphasis in original).

⁵³⁷ See Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351, 353-54 (1979) (discussing distinction between restrictions created by fourth amendment and by exclusionary rule).

stantive requirements of the fourth amendment have previously been the real target of barbs ostensibly aimed only at the exclusionary rule. When *Mapp* extended the exclusionary rule to the states, New York City Police Commissioner Murphy complained that his police department now had to revamp its training programs from top-to-bottom.⁵³⁸ Before *Mapp*, violations of the fourth amendment were of little moment in New York because illegally-seized evidence was admissible under *People v. Defore*.⁵³⁹ As Commissioner Murphy observed:

I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this I was immediately caught up in the entire 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: . . .⁵⁴⁰

Of course, *Mapp* created no new doctrine for the police to "implement." It simply meant, for the first time, that violations of rules that had in theory applied to the police all along would lead to unpleasant consequences. Commissioner Murphy's comments suggest however, that it was not until the exclusionary rule was applied in New York that the police paid any heed to the fourth amendment.

Examining the views of both Chief Justice Burger and Judge Wilkey suggests that it is important to recognize when criticism of the exclusionary rule is really an attack on the fourth amendment. The exclusionary rule has done nothing to change the powers of the police or the rights of the citizenry. The fourth amendment sets these standards. The exclusionary rule simply declares that evidence obtained in violation of these rights is not admissible at trial.

CONCLUSION

This article has demonstrated how the good faith exception will stifle the development of fourth amendment law by whatever courts adopt it. Slowing the law development process will of itself lead to countless fourth amendment violations that might otherwise have been prevented. Furthermore, in the

⁵³⁸ See Kamisar, *supra* note 40, at 72 (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966)). See generally, Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. REV. 436 (1964). Professor Kamisar reported that when the exclusionary rule was adopted in California in *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), the Chief of Police of Los Angeles seemed to think that limitations on searches and seizures had just been invented. "The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute 'probable cause.'" Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. REV. at 441 (quoting Parker, *The Cahan Decision Made Life Easier for the Criminal*, in X. PARKER, POLICE 117 (Wilson ed. 1957)). "As 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 Parker, *The March of Crime*, in X. PARKER, POLICE 131 (Wilson ed. 1957)).

⁵³⁹ 242 N.Y. 13, 150 N.E. 585 (1926); see note 5 *sup*

⁵⁴⁰ Kamisar, *supra* note 40, at 72 (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966)).

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hands of a trial judge who lacks enthusiasm for suppressing probative evidence, the exception will provide a ready means to admit the evidence with little risk of reversal on appeal. Ultimately, and despite the *Williams* court's contrary protestations, adoption of the good faith exception could forever alter the substantive content of the fourth amendment. It is easy to forget that we knew neither what the amendment meant nor what standards it set for law enforcement, until courts set out to give it content in the course of deciding when evidence should or should not be suppressed. With the *Williams* good faith exception in effect, the lines that have been developed through years of fourth amendment jurisprudence will soon blur. Courts will admit evidence when the police have probable cause, or "something close to it," or when it was "reasonable" to dispense with a warrant, whether or not "technically" permissible. The only question that courts will answer will come close to being whether, in a given case, what the police did was "generally reasonable." Even if the more particular standards that the fourth amendment now sets continue to exist in some way, the reasonableness question will be the only one worth answering, because only that answer will carry any consequence.

If we do not place much value on the goal of regulating the police in an effort to prevent violations of individual privacy, such an inquiry may have its virtues. In that case, however, we should debate the reasonableness standard on its merits. It is unfortunate that the good faith exception may prove to be something of a Trojan horse; in the guise of softening a sometimes harsh remedy for violations of fourth amendment rights, it may permanently alter the definition of those rights. If that is what we want, then perhaps it is what we deserve. But let us recognize what we are getting.

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Colorado Revised Statutes 1973

1982 CUMULATIVE SUPPLEMENT

16-3-308. Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901 (3) (1), C.R.S. 1973, as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

(3) Evidence which is otherwise admissible in a criminal proceeding and which is obtained as a result of a confession voluntarily made in a noncustodial setting shall not be suppressed by the trial court.

(4) It is hereby declared to be the public policy of the state of Colorado that when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, that it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Source: Added, L. 81, p. 922, § 1.

Law reviews. For article, "Colorado's Good-Faith Exception to the Exclusionary Rule", see 11 Colo. Law, 410 (1982). For article,

"Good-Faith Exception to the Exclusionary Rule: The Fourth Amendment is Not a Technicality", see 11 Colo. Law, 704 (1982).

The exclusionary rule: why suppress valid evidence?

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

by Malcolm Richard Wilkey

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

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

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

We can see that huge social cost most clearly in the distressing rate of street crimes—assaults and robberies with deadly

weapons, narcotics trafficking, gambling and prostitution—which flourish in no small degree simply because of the exclusionary rule of evidence. To this high price we can rightfully add specific, pernicious police conduct and lack of discipline—the very opposite of the objectives of the rule itself.

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

Though scholars have been shedding

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

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

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

more and more light on this problem.³ Few people have considered the enormous social cost of the exclusionary rule, and fewer still

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

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

Do other countries exclude illegally-seized evidence?

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

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

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

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

have thought about possible alternatives to the rule. I propose to do both those things in this article.

The rule's mystique

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

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

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

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

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

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

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

4. *Id.* at 239.

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

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

The greatest obstacle to replacing the exclusionary rule with a rational process, which will both protect the citizenry by controlling the police and avoid rewarding the criminal, is the powerful, unthinking emotional attachment to the rule. The mystique and misunderstanding of the causes not only many ordinary citizens also judges and lawyers to feel (not that the exclusionary rule was enshrined in the Constitution by the Founding Fathers and that to abolish it would do violence to the whole sacred Bill of Rights.⁷ They ap-

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

7. "Among some of its defenders, however, the exclusionary rule assumes the status of dogma, of constitutional holy writ, so much so that they sometimes talk

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

It may therefore be concluded that, under English law, illegally obtained evidence is admissible, provided it does not involve a reference to an inadmissible confession of guilt, and subject to the overall exclusionary discretion enjoyed by the judge at a criminal trial.⁸

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

German law does not exclude illegally obtained evidence, except if in the judge's opinion it has been obtained by a serious violation of fundamental rights. The nature of the illegality which is alleged to have

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

appear totally unaware that the rule was not employed in U.S. courts during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule. (See "Do other countries exclude illegally seized evidence?" below.)

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

if there were no decent alternative. Yet the ancient alternative, sanctioned by most state criminal codes until 1961, was the common law practice, still in force in England and most other English speaking jurisdictions. Under common law it was not deemed the duty of the court to look into the provenance of evidence—only to weigh its relevance and accuracy." THE WASHINGTON STAR, editorial, p. 16, July 7, 1975.

been committed is thus evaluated.⁷ Israeli law condemns the exclusionary rule as useless and unjustified. As a more workable alternative, if an illegal search occurs, the court can charge the responsible individual, convict him immediately, or send him to another judge for trial, in a proceeding roughly comparable to our contempt actions.⁸

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

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

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

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

9. 11 C.R.N. 225, 248 (1970).

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

How the rule works

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

In *U.S. v. Montgomery*,⁸ two police officers on auto patrol in a residential neigh-

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

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

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

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

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

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

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

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

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

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

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

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

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

M. R. W.

12. *Id.* at 61-63.

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

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

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

John H. Wigmore

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

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

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

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

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

and it could be offered in evidence. The High Court reinstated the original conviction.

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

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

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

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

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

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

The Court's rationale

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

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

Privacy: From *Weeks* (1914) to *Mapp* (1961) the rule was also justified as protecting the privacy of the individual against illegal searches and seizures as guaranteed

by the Fourth Amendment.¹⁵ The Supreme Court later downgraded the protection of privacy rationale,¹⁶ perhaps because of the obvious defect that the rule purports to do nothing to recompense innocent victims of Fourth Amendment violations, and the gnawing doubt as to just what right of privacy guilty individuals have in illegal firearms, contraband narcotics and policy betting slips—the frequent objects of search and seizure!¹⁷

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

The impact of the rule

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

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

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

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

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

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

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

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

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

Time for a reappraisal

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

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

Only 10 years after *Mapp*, Mr. Justice Harlan called for a thorough-going reappraisal of the rule in a concurring opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 490-91 (1971). "From the several opinions that have been filed in this case, it is apparent that the law of search and seizure is due for an overhauling. . . . I would begin this process of reevaluation by overruling *Mapp v. Ohio*, 367 U.S. 643

(1961), and *Kerv. California*, 374 U.S. 23 (1963). . . . In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. . . . The states have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. (Oaks suggested) that the assumed 'deterrent value' of the exclusionary rule has never been adequately demonstrated or disproved, and poin(ed) out that because of *Mapp* all comparative statistics are 10 years old and no new ones can be obtained."

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

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

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

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

Fifty years later Justice Powell wrote for the Court:

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

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

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

If justice is a truth-seeking process, it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence, as the three examples illustrate. We rightly exclude evidence whenever its reliability is questionable—a coerced or induced confession,²³ for example, or a faulty line-up for identification of the suspect.²⁴ We exclude it because it is inherently unreliable, not because of the illegality of obtaining it.²⁵ An illegal search

in no way reduces the reliability of the evidence.

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

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

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

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

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

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

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

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

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

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

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

While he did not draw the analogy, Justice Frankfurter (who wrote *Wolf*, which refused to apply the exclusionary rule to the states; dissented in *Elkins*, which abolished the Silver Platter doctrine, and joined in the dissent in *Mapp*, which reversed *Wolf*) probably approved *Rochin* on what is said to be the older English rationale giving judges the right in exceptional cases to exclude evidence which would tend to bring the administration of justice into disrepute. That discretion still exists in English law, *Koruma v. The Queen*, [1955] A.C. 197, 1 All E.R. 226, but it is rarely exercised and then only in truly exceptional cases.

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

27. Cannon, *Is the Exclusionary Rule in Fading Health? Some New Data and a Plea Against Precipitous Conclusion*, 62 Ky. L. J. 681, 726 (1973-4).

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

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

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

Criticisms of the rule

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

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

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

protected *in the future* by excluding evidence against the criminal *now*, for this is only the deterrent argument all over again.

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

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

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

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

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

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

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

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

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

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



How the exclusionary rule hampers gun control

A striking feature of the motion to suppress for illegal search and seizure is that it is a defense weapon peculiarly suited to narcotic, gun, and gambling crimes, and only incidentally to other felony charges. Complete data on three branches of the circuit court in Chicago for three months in 1971 confirms that these kinds of cases are most likely to generate motions to suppress: narcotics—878 such motions; guns—335; gambling—255; and all other felony offenses—84.¹

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

Has it ever struck our national conscious-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Said the *Frisbie* court:

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

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

Other defects of the rule

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

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

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

36. 342 U.S. 519 (1952).

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

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

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

It does not matter whether the action of the officer was grossly willful and flagrant or whether he was conscientiously using his very best judgment under difficult circumstances; the result is the same: the evidence is out. The rule likewise fails to distinguish errors of judgment which cause no harm or inconvenience to the individual whose person or premises are searched, except for the

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

discovery of valid incriminating evidence, from flagrant violations of the Fourth Amendment as in *Mapp* or *Rechin*.³⁹ Chief Justice Burger's point in *Bivens* is undeniable:

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

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

trial and in imposing sentence afterwards.

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

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

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

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

39. Schlesinger, *supra* n. 3, at 62.

40. *Bivens*, 403 U.S. at 419.

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

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

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

Alternatives to the rule

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

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

It isn't necessary. Justice Frankfurter in *Wolf* (1949) noted that none of the 10 jurisdictions in the British Commonwealth had held evidence obtained by an illegal search and seizure inadmissible, and "the jurisdic-

tions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. . . ."⁴⁴ Justice Harlan in his dissent in *Mapp* noted the wisdom of allowing all evidence to be brought in and "dealing with constitutional infractions by other means."⁴⁵ Justice Black, concurring in *Mapp*, noted that the Fourth Amendment did not itself preclude the use of illegally obtained evidence.⁴⁶

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

The purposes of an alternative

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

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

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

44. *Wolf*, 338 U.S. at 29-30.

45. *Mapp*, 367 U.S. at 680-81.

46. 367 U.S. at 661-62.

47. *Bivens*, 403 U.S. at 421-22.

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

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

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

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

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

Third sequentially, but first in value, the mechanism should protect citizens from Fourth Amendment violations by law en-

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

forcement officers. (I say sequentially, because it is necessary first to abolish the exclusionary rule and then to provide guidance to the police). If police receive immediate and meaningful rulings, accompanied by prompt disciplinary penalties, they will be effectively deterred from future wrongful action and citizens will thus be effectively protected.

Fourth, the procedure should provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures. This the present exclusionary rule totally fails to do. Only the guilty person who has suffered an illegal search and seizure receives some form of compensation—an acquittal, which is usually in gross disproportion to the injury inflicted on him by an illegal search and

seizure. Thus, under the present irrational exclusionary rule system, the guilty are over-rewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered.

The magnitude of the offense

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

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

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

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

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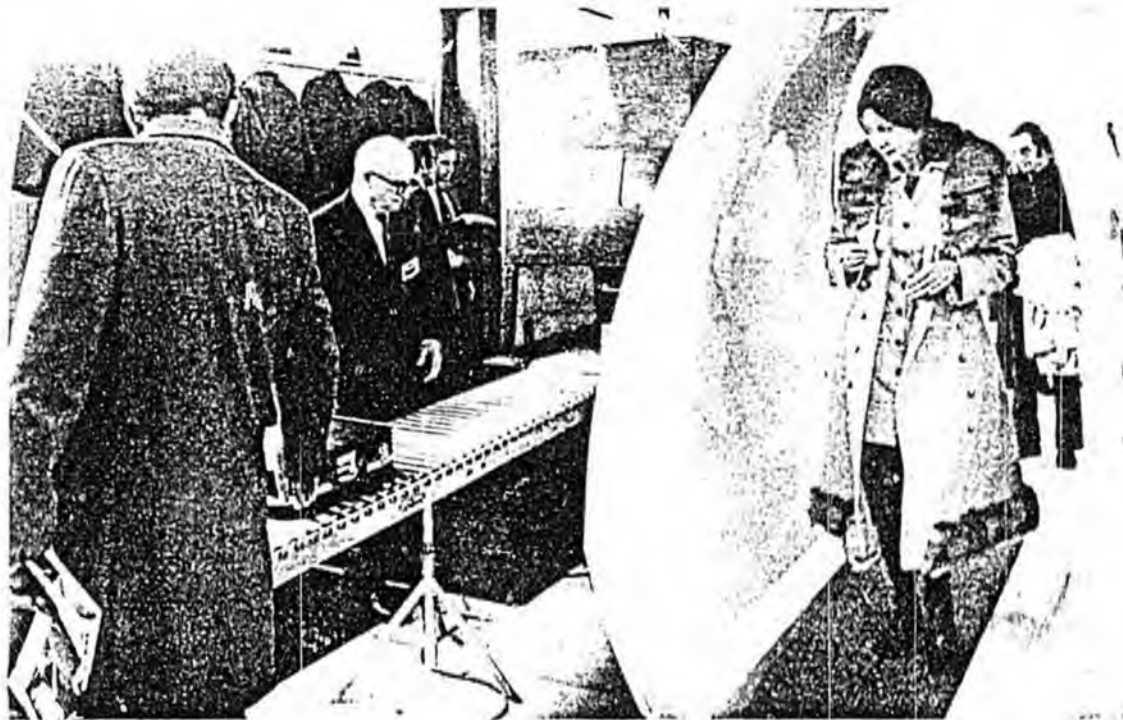
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who drew the papers. It is absurd to say that the court subsequently is “punishing” or attempting to “deter” the judge, magistrate, or attorney who made the legal error by suppressing the evidence and letting the accused go free, but this is what happens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

If these are valid objectives in seeking a

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



COMPIX

Do people object to airport searches?

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

Only a small percentage of Americans travels by air. But all of us use our streets, shopping centers, and other public places where armed robberies and assaults happen every day. If the people are willing to accept strong measures of gun control by more

effective searches and seizures at the airports, I submit that they are not only willing but eager to see more effective searches and seizures of deadly weapons on the streets. It is apparent, if one reflects a moment, that the exclusionary rule prevents effective gun control. Abolishing the exclusionary rule and punishing those who carry deadly weapons would receive widespread acclaim.

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

Internal discipline

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

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

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

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

It is undeniable that the rigorous search and seizure procedure at airports has been successful. In the calendar year 1977, no fewer than 2534 handguns and other firearms were seized from passengers boarding

compensation to the injured party.

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

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

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

airplanes.¹ It is impossible to estimate the number of passengers who otherwise would have carried handguns on an aircraft, absent the effective search methods at U.S. airports, but surely it is much larger than the number of weapons actually found.

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

M. R. W.

1. Federal Aviation Administration, SEMI-ANNUAL REPORT TO CONGRESS ON EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM (1978) (Exhibit 11).

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

External control

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

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

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

In those instances where police violate Fourth Amendment rights but the prosecutor does not bring charges against the suspect, the wronged party should be able to bring a statutory civil action against the government and the officer. Both would be

named as defendants: the officer to defend against any individual penalty, the government to be able to respond adequately in damages to the injured party if such were found. Many instances of Fourth Amendment violation now go unnoticed because no criminal charge is brought and the injured party is not in position to bring a *Bivens*-type suit for the alleged constitutional violation. The burden of proof on the factors in

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

regard to penalty and compensation would be the same as in a mini-trial following the principal criminal case, as discussed above.

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

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

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

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

remedy for the innocent victims of Fourth Amendment violations which the exclusionary rule has never pretended to give. And the rationale that the "government should not 'profit' from its own agent's misconduct" would disappear completely if erring officers were punished and injured parties compensated when there was a Fourth Amendment violation.⁵² If such a law and

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

procedure were enforced, there would be no remaining objection to the subject of search and seizure still receiving his appropriate punishment for his crime.

Conclusion

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

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

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

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

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

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

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The exclusionary rule: have critics proven that it doesn't deter police?

by Bradley Canon

*Editor's note: Since last August, *Judicature* has published three widely-read discussions on whether the courts should retain the exclusionary rule, which requires judges to suppress evidence that police obtained through an illegal search.*

Professor Yale Kamisar initiated the debate last August ("Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?") and U.S. Circuit Judge Malcolm Wilkey gave his response in November ("The exclusionary rule: why suppress valid evidence?"). Both men made their closing arguments last month.

Now two social scientists will discuss a key question in the debate: does the rule really deter police from making illegal searches? Bradley Canon argues that the evidence is inconclusive; in some cities, the rule deters; in others, it doesn't. Steven Schlesinger responds that the rule's proponents bear the burden of proving that it is effective—and they have not provided such proof.

Judge Malcolm Wilkey attacks the exclusionary rule in search and seizure in terms of both logic and experience. I will leave the logical arguments to others; my purpose here is to evaluate his claims that experience proves that the rule is socially costly and that it fails to achieve its purpose of securing police compliance with the Fourth Amendment.

According to Wilkey a variety of crimes would be significantly curtailed if the rule did not exist: gambling, narcotics, prostitution, armed robbery and concealed weapons.¹ No evidence, however, is offered in support of this assertion. Indeed, it is hard to see even a logical connection between the rule and the incidence of some of the crimes. Armed robbery is certainly far more a product of a society whose public policy (the only one in the civilized world, I might add) allows almost unrestricted access to weap-

1. Malcolm Richard Wilkey, *The exclusionary rule: who suppress valid evidence?* 62 *UDEN L.J.* 215 (November 1978).

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ous rather than the legal inability of the police to search for guns in the few minutes before the crime occurs.

Moreover, the exclusionary rule in no way prevents the police from confiscating concealed weapons.² The real problem is not that criminals walk down the streets with bulging automatics in their coats or sub-machine guns thinly covered by blankets. The problem is that the weapons are well hidden and the police often do not know whom to search. Though reading Dick Tracy may suggest otherwise, criminals do not come in malformed, misshapen sizes rendering them easily identifiable to the police. Getting rid of the exclusionary rule would not alter the situation very much (unless, of course, the police adopted a policy of searching *every-one* randomly—in which case we would truly be living in a police state).

The impact of Mapp

Indeed, taking Wilkey's argument to its logical conclusion, one would have to believe that we lived in a rather crime-free society before *Mapp v. Ohio* in 1961.³ This of course is hardly the case. It was in the 1920's and 1930's, not the 1970's that Dillinger, Capone and other gangsters walked the streets carrying violin cases. It was in the 1950's, not the 1970's, when organized crime's involvement in gambling became so notorious that the Kefauver Committee made headlines for months investigating it. I argue not that there is less crime today than there was before *Mapp*, but Judge Wilkey's assertion that the incidence of crime is *related to* the exclusionary rule fails to withstand even the most modest scrutiny.

In this vein, in fact, I find it amazing that Wilkey imputes to criminals a detailed knowledge of the law of search and seizure. ("Criminals," he writes, "know the difficulties of the police in making a valid search which will stand up under challenge in trial."⁴ No evidence is offered that criminals are so learned in the law and it seems quite

anomalous to assume so, considering that search and seizure law is so confusing or uncertain that the nation's most prominent jurists and legal scholars have described it as a "quagmire,"⁵ a "no man's land"⁶ and a "course of true law [that] has not run smooth."⁷

Ironically, Chief Justice Burger, a staunch opponent of the exclusionary rule, argues that one of its disadvantages is that *police-men* do not understand the intricacies of search and seizure law and thus often make mistakes in search situations.⁸ He may well be right on this point, but if so Judge Wilkey's imputation seems all the more surprising. It takes more credulity than I have to believe that the basic problem is one of "smart crooks" and "dumb cops."

A differential impact

My main concern with Judge Wilkey's article, however, is not a fear that readers will be taken in by his exaggerated or unsound claims about the responsibility of the exclusionary rule for the high incidence of crime nowadays. Most readers, I am confident, have sufficient judgment to discount such claims. My concern, rather, is that they will accept the judge's assertion that empirical studies demonstrate that the rule is ineffective in deterring police violations of the Fourth Amendment. After all, they might reason, Wilkey is not reporting his own observations or conclusions here, but is merely citing studies carried out by others.

The problem is that Judge Wilkey's treatment of these studies leaves much to be desired. It seems that he relies in large part on the summaries of these studies and conclusions drawn from them by Professor Steven Schlesinger in his recent monograph on the rule.⁹ Schlesinger is quite open in his

5. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. LAW BULL. 9 (1972).

6. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474 (1961).

7. Frankfurter, J., concurring in *Chapman v. U.S.*, 365 U.S. 610, 618 (1961).

8. Dissenting in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, at 417 (1976).

9. Schlesinger, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE*, New York: Dekker, 1977.

2. Judge Wilkey fails to recognize this point in his discussion of the exclusionary rule and gun control, *id.*, at 224-225.

3. 367 U.S. 643 (1961).

4. Wilkey, *supra* n. 1, at 224.

hostility to the exclusionary rule and, unfortunately, this has led him to misinterpret some studies and downplay others. Moreover, additional evidence has become available after Schlesinger's work was published.

When the totality of the evidence is examined more fully and more dispassionately, it does not support the Wilkey-Schlesinger conclusion that the rule is inefficacious in curbing illegal police searches. Neither, I should make it clear, does the evidence support the opposite conclusion—that the rule deters police illegalities nearly 100 per cent of the time. Put shortly, the rule has a differential impact depending upon time and place.

Replicating the Oak's study

Let us take a hard look at the empirical evidence. Wilkey argues that Dallin Oaks' study¹⁰ is the "most comprehensive study ever undertaken"¹¹ on the subject. But Oaks' own research is devoted chiefly to drawing inferences about police behavior in Cincinnati from arrest records in search and seizure type crimes (largely gambling, narcotics, and weapons offenses) in the five or six years before and after *Mapp*.¹² It is a careful study and there is little doubt that the rule had only minimal impact on police behavior in Cincinnati immediately following *Mapp*. But it can hardly be considered comprehensive.

Few would be so bold as to join Judge Wilkey in claiming that police behavior in one city 15 years ago is representative of police behavior throughout the United States in 1978. Oaks himself freely admits that his study "obviously falls short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."¹³ Indeed, Wilkey puts words in Oaks' mouth when he tells us that "Oaks concluded"

that the exclusionary rule is a failure.¹⁴ Oaks took pains to note that this assertion "is an argument, not a conclusion."¹⁵

Working on a Ford Foundation grant in 1972-73, I replicated Oaks' Cincinnati study for 19 other American cities.¹⁶ Statistical techniques were used to eliminate arbitrary judgments and control for alternate explanations. In nine of the cities, there was a statistically significant decrease in arrests in all or most search and seizure crimes following *Mapp*, while in the other 10 the impact was minimal or absent.¹⁷

Seemingly the exclusionary rule can and does have a very real, although hardly universal deterrent, effect on the police. The rule's impact, I concluded, depended much on such factors as degree of professional training prevailing in a department, policies of chiefs of police and squad commanders, the attitudes of mayors, city councils and other officials, etc. There simply was no singular response (or non-response) pattern to the exclusionary rule in the five or six years after *Mapp*.

Other studies

Schlesinger also briefly discusses Michael Ban's study of the use of search warrants in Cincinnati and Boston¹⁸ and the Columbia Law School study of narcotics arrests in Manhattan following *Mapp*.¹⁹ Ban found the annual use of search warrants rose from virtually zero to over 100 in Cincinnati

10. Wilkey, *supra* n. 1, at 222.

11. Oaks, *supra* n. 10, at 755.

12. The results are reported in Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977). A preliminary and less methodologically oriented report is found in Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against A Preemptive Conclusion*, 62 KY.L.J. 681 (1974). I rely on the former in the above discussion as it is more rigorous and corrects some errors appearing in the earlier article.

13. Canon, *Testing the Effectiveness...*, *supra* n. 16, at 72 Table 2.

14. Ban, "The Impact of *Mapp* v. Ohio on Police Behavior" (paper delivered at Midwest Political Science Association, May, 1973).

15. Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLO. L. & SOC. PROBS. 87 (1968); Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices, 1960-62*, 4 CRIM. L. BULL. 519 (1968).

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

11. Wilkey, *supra* n. 1, at 222.

12. Oaks also collected data on the frequency of motions to suppress evidence in Chicago and Washington. The former data were used by Spotto, *infra* n. 35, and will be discussed at some length later. The Washington data offer no support for a claim that the police continued to violate the Fourth Amendment after *Mapp*.

13. Oaks, *supra* n. 10, at 709.

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while in Boston it went from about 100 to nearly 1,000.²⁰ He argued the Cincinnati figures are too low to represent wholehearted compliance with the Fourth Amendment—a conclusion that dovetails well with Oaks' Cincinnati findings. On the other hand, Ban concedes the Boston figures imply considerable if begrudging police compliance.

The Columbia study noted a dramatic decline in narcotics arrests in premises but only a slight decline of street arrests. The authors conclude that *Mapp* inhibited police from illegal invasion of homes, etc., but not from street searches. They also speculate that this was partly due to the vice squad's (which conducts raids on premises) greater awareness of the decision and its implications. Again, these studies demonstrate the differential impact of the exclusionary rule; they hardly lend support to Judge Wilkey's claims that the empirical evidence shows the rule to be a "total failure in its primary task of deterring illegal police activity."²¹

The data involved in the above studies have one common feature: they come from the period immediately following the *Mapp* decision. However, in evaluating the exclusionary rule with an eye toward a public policy decision of retention, modification or abrogation, we must be interested in its present rather than its past impact on police behavior. Unless we can be reasonably sure that the impact reported in the early 1960's persists without great change into the present, the value of the above studies is quite limited. And while the data are thin and inferences tenuous, there is some reason to believe that the rule has become more effective than it was in the early 1960's.

A recent survey

In 1973 I sent questionnaires to police departments, prosecutors and public defenders in all American cities with populations of more than 100,000.²² I asked whether their current search and seizure practices differed from those prevalent in 1967 and, if so, how.

20. Ban, *supra* n. 18, at 7, Table 1.

21. Wilkey, *supra* n. 1, at 222.

22. The results are reported in Canon, *Is the Exclusionary Rule . . .*, *supra* n. 16.

Responses came from over half the cities and clearly indicated that in most of them police compliance with the Fourth Amendment increased significantly over the six year period.

- Four-fifths of them reported the use of search warrants was more than 50 per cent greater than the 1967 level and 35 per cent of the cities reported an increase of more than 100 per cent.²³

- Nearly two-thirds of the departments reported more restrictive policies pertaining to searches accompanying an arrest than they espoused six years earlier;²⁴ 18 per cent reported a stricter policy regarding searches of automobiles.²⁵

- Moreover, while comparison with 1967 figures showed only modest change, 50 per cent of the cities reported that motions to suppress evidence were granted less than 10 per cent of the time²⁶ and in 63 per cent it was reported that charges were "rarely" dropped because of illegal seizure of the evidence.²⁷

Even in the absence of the above data, one could reasonably surmise on the basis of impact patterns reported for other Supreme Court criminal justice decisions that the exclusionary rule is more effective now than it was in the immediate post-*Mapp* years. The controversial *Miranda* decision,²⁸ for instance, received only spotty compliance by police departments in the two or three years after its promulgation,²⁹ More recently, however, it seems to be effective in controlling police behavior—and even has won the approval of many officers.³⁰ And immediately following *In re Gault*³¹ compliance

23. *Id.*, at 712, Table 6.

24. *Id.*, at 715, Table 8.

25. *Id.*, at 719, Table 9.

26. *Id.*, at 722, Table 10.

27. *Id.*, at 724, Table 11.

28. *Miranda v. Arizona*, 384 U.S. 428 (1966).

29. Wald, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); Medalie, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

30. Wasby, *SMALL TOWN POLICE AND THE SUPREME COURT*, Lexington, Massachusetts: D.C. Heath, 1976, *passim*; Cannon, *Confessions and Right to Counsel: The Impact of Miranda in Missouri*, 17 ST. LOUIS U. L.J. 572 (1973).

31. 387 U.S. 1 (1967).

was a hit and miss affair; many juvenile judges did not seem to know that such a decision had even been made.³² Again, a decade's time has permitted the word to circulate and eroded resistance.³³

Experience tells us that sudden and dramatic changes in policy such as occurred with the *Mapp* decision do not produce alterations in behavior overnight. Information about Supreme Court decisions is particularly poorly disseminated, often easily misunderstood and sometimes ignored in deference to habit or convenience.³⁴ But eventually the word is spread; young, professionally trained recruits infuse the ranks; old-timers become a vanishing breed. It is not certain, of course, that police search and seizure behavior has followed this scenario, but it is certainly a plausible hypothesis.

Spiotto's study

The only other empirical evidence Judge Wilkey discusses is James Spiotto's study comparing results of a study of motions to suppress in search and seizure crimes in the Chicago Municipal Court in 1950 with those in 1969 and 1971.³⁵ Wilkey makes much of the findings and quotes Spiotto as follows:

over a twenty year period in Chicago, the proportional number of motions to suppress evidence [in narcotics and weapons cases] allegedly obtained illegally increased significantly. This i

the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct.³⁶

This is an amazing conclusion. Spiotto is utterly unaware that Illinois adopted the exclusionary rule in 1924³⁷—some 37 years before *Mapp*. (Besides being a legal researcher, Spiotto is an Illinois resident, so it is not easy to explain this monumental error.)³⁸ Thus the court was governed by the rule in 1951 as well as in 1969 and 1971 and the *Mapp* decision would have no legal impact on its receptivity to motions to suppress.

It could be argued—although it is not a point made by either Spiotto or Wilkey—that *Mapp* had an impact even in those states which had previously adopted the rule because federal civil liberties decisions have a greater visibility than those made by states or because police officers have reason to believe that state judges do not take such decisions seriously while federal judges do. This may be true in some jurisdictions,³⁹ but it is obviously not the case in Chicago. Its court was clearly enforcing the exclusionary rule prior to *Mapp*; the 1950 study shows that 98 per cent of all motions to suppress were granted.⁴⁰

Even if Illinois had not adopted the rule long before *Mapp*, Spiotto's conclusion about the rule's inefficacy would be flawed. After all, if there were no exclusionary rule, there would be no point in defendants moving to suppress evidence (such motions would obviously be denied) and consequently there would be few such motions filed and none granted. Thus it would be

32. Leisner, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC. REV. 491 (1969); Canon and Kolson, *Rural Compliance With Gault: Kentucky, A Case Study*, 10 J. FAMILY L. 300 (1971).

33. In the spring of 1975, my graduate seminar at the University of Kentucky replicated the study reported in Canon and Kolson, *supra* n. 32. The results clearly demonstrated a much higher knowledge of and compliance with *Gault* by the state's juvenile judges than was the case in 1969.

34. Dolbeare and Hammond, *THE SCHOOL PRAYER DECISION: FROM COURT POLICY TO LOCAL PRACTICE*, Chicago, University of Chicago Press, 1971; Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mappcase*, 18 VILL. L. REV. 1083 (1973).

35. The data is reported in Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEG. STUDIES 241 (1973). Spiotto also discussed it in *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & ADMIN. 36 (1973). The 1950 study is reported in Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 17 NW. L. REV. 193 (1952). The 1969 data is discussed in Oaks, *supra* n. 10.

36. *The Search and Seizure Problem*, *supra* n. 35, at 37 (cited by Wilkey, *supra* n. 1, at 222-223).

37. *People v. Castro*, 143 N.E. 112 (1924).

38. It is not absolutely clear from the above quotation that Spiotto is unaware of Illinois' earlier adoption of the rule. However, at another point, Spiotto makes his ignorance on the point quite plain. See, *Search and Seizure: An Empirical Study*, *supra* n. 35, at 276, where he says, "As pointed out earlier in this study, during the period 1950-1970, in the course of which the exclusionary rule was introduced in Illinois, . . ." (emphasis added).

39. I explore this hypothesis in Canon, *Testing the Effectiveness*, *supra* n. 10. The aggregate evidence lends it some support.

40. Spiotto, *Search and Seizure: An Empirical Study*, *supra* n. 35, at 217, Table 1.

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perfectly natural that the proportion of such motions granted would rise dramatically after the *Mapp* decision when judges would be constitutionally obligated to consider them seriously and grant those with merit. The "significant increase" Spiotto reports would tell us nothing about the impact of the rule on police conduct; it would speak only of the perfectly obvious impact of the rule on the conduct of *defense attorneys*.⁴¹

Finally, it might be argued that regardless of when the exclusionary rule was adopted, the percentage of motions to suppress is much too high—running 69 per cent in 1950

Existing data make it impossible to establish a universal conclusion—either "yes, it works" or "no, it doesn't work."

and in the 30 per cent to 35 per cent range in the 1969-71 period⁴²—and that this in itself is damning evidence of the rule's ineffectiveness. Chicago, however, is not a very typical city in this respect. As previously noted, in three-fifths of large American cities, 10 per cent or fewer of such motions are granted and in only a handful were over 25 per cent of such motions granted.⁴³ Indeed, Chicago police are reputed to enforce the vice laws in a manner which insures that motions to suppress will be successful.⁴⁴ Thus they

41. Oaks agrees with this point, *supra* n. 10, at 713-14.

42. Spiotto, *Search and Seizure: An Empirical Study*, *supra* n. 35, at 247, Table 1.

43. Canon, *Is the Exclusionary Rule*, *supra* n. 16, at 722, Table 10. See the discussion surrounding n. 26, *supra*.

44. See Comment, *supra* n. 35, and LaFare, *Improving Police Performance Through the Exclusionary Rule*, 30 MO. L. REV. 391, at 423 (1965).

have their cake and eat it too by appearing to engage in vigorous enforcement activity and yet refraining from seriously endangering the continued existence of organized vice.

Conclusion

In summary, Spiotto's study of motions to suppress sheds no light at all on the efficacy of the exclusionary rule. It is highly unfortunate that both Professor Schlesinger and Judge Wilkey place so much reliance on it. The endorsement of the badly flawed study by persons in such positions lends it undeserving credibility among readers unfamiliar with the subject. That Wilkey and Schlesinger rely on Spiotto's so-called conclusions so eagerly is (especially in Schlesinger's case, as he is a social scientist presumably experienced in the analysis of data) yet another attestation to the ever present human tendency to grasp at any straw in order to promote values and beliefs already adopted.

None of the above is meant to suggest that the exclusionary rule is or inevitably will be largely effective in securing police compliance with the Fourth Amendment. What it is, simply, is a refutation of repeated assertions and implications that the rule is ineffective in deterring police misconduct. Existing data at the present time make it impossible to establish empirically a universal "yes, it works" or a "no, it doesn't work" conclusion—or even anything approximating such a conclusion.

Judge Wilkey, Professor Schlesinger and others have every right to disagree with the exclusionary rule; certainly there are reasoned arguments which can be advanced against it independent of an empirical one. But what they do not have a right to do is to disseminate a myth that empirical studies show that the issue has been resolved negatively. To the degree that empirical studies of its impact bear on the decision to retain, modify or abandon the rule, the public—and the decision-makers—are entitled to facts, not myths. □

BRADLEY C. CANON is a professor of political science at the University of Kentucky.

See the following article for an opposing view.



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Americans for Effective Law Enforcement

LEGISLATIVE REFORM OF THE EXCLUSIONARY RULE: THE GOOD FAITH EXCEPTION

In 1961 the U.S. Supreme Court held, in a 5-to-4 decision, that "illegally seized" evidence was no longer admissible in criminal cases prosecuted by state officials. The ruling was surprising and is not followed in any other country. The principal purpose of the rule is to deter and punish police "misconduct" or disregard of the Fourth Amendment.

No one would seriously urge that police officers should be free to deliberately violate the Constitution in order to secure a conviction, and this aspect of the "Exclusionary Rule" is not really in debate, although some scholars have suggested different methods to deter and punish police misbehavior.

The principal fault of the Exclusionary Rule, as it is presently interpreted, is that it also punishes a **good faith mistake** by an honest and conscientious police officer. The "mistake" might be an inadvertent one, such as the wrong date on the affidavit, or an "incomplete" description of the premises to be searched or the property to be seized.

The Good Faith Exception

In 1980, an en banc federal appeals court was the first to recognize an exception to the Exclusionary Rule. In *United States v. Williams*, the Fifth Circuit said that:

Henceforth in this circuit, when evidence is sought to be excluded be-

cause of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F.2d 830, 846-7.

The Fifth Circuit noted that the officer's **subjective** beliefs concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure fails the **objective** test of good faith. The police officer's actions must "be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." This language places heavy emphasis on the quantity and quality of police training. Future cases in that circuit will examine the preservice training given recruits, in-service training given seasoned officers, and case law bulletins furnished officers on a periodic basis. There will be a strong incentive to insure that all officers are promptly provided with the latest case law affecting police operations.

The Fifth Circuit was split into the Fifth and Eleventh Circuits in 1981: the **Williams** decision is now the law in both circuits. The Supreme Court declined to review the **Williams** decision, and has yet to express an opinion on the good faith exception in search and seizure cases. Assuming an appropriate factual setting, many

scholars believe the Supreme Court will eventually adopt a good faith exception, at least by a 5-to-4 majority. A properly worded statute could narrowly frame the issues.

Americans for Effective Law Enforcement, Inc. (AELE) has been an outspoken proponent for the good faith exception. AELE originally urged its views at the Attorney General's Task Force on Violent Crime hearings in 1981. The Task Force later recommended adoption of the good faith exception.

Following the Task Force recommendation, several U.S. Senators introduced bills which would extend the good faith exception to the other ten federal appeals circuits. The present administration has strongly supported such legislation, and a variety of organizations and witnesses (including AELE) have filed position papers and have testified in support of modification proposals.

On June 2, 1982, the head of the Justice Department's Criminal Division, D. Lowell Jensen, noted that the Exclusionary Rule is not required by the Constitution, but is only a court-ordered remedy to deter police misconduct. The Justice Department points out that no conceivable purpose is served by suppressing evidence which has been seized in good faith. In short, there is no reason to "punish" the police and no deliberate

THE EXCLUSIONARY RULE BILLS

HEARINGS
BEFORE THE
SUBCOMMITTEE ON CRIMINAL LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST AND SECOND SESSIONS

S. 101

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE TO DEFINE AND LIMIT THE EXCLUSIONARY RULE IN FEDERAL CRIMINAL PROCEEDINGS

S. 751

A BILL TO AMEND TITLES 18 AND 28 OF THE UNITED STATES CODE TO ELIMINATE AND ESTABLISH AN ALTERNATIVE TO THE EXCLUSIONARY RULE IN FEDERAL CRIMINAL PROCEEDINGS

S. 1995

A BILL TO REMEDY PROCEDURAL AND STRUCTURAL DEFECTS IN THE CRIMINAL JUSTICE SYSTEM

OCTOBER 1 AND NOVEMBER 11, 1981; MARCH 16 AND 22, 1982

Serial No. J-97-41

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AELE POSITION HEARD IN
U.S. SENATE EXCLUSIONARY
RULE HEARINGS

Wayne W. Schmidt, AELE Executive Director, testified on March 16, 1982, before the Subcommittee on Criminal Law of the Senate Judiciary Committee. The invitation to present our views came from the chairman, Senator Charles Mathias of Maryland. Several bills would modify the harsh effects of the evidentiary rule that now prohibits federal courts from considering evidence that has been "illegally" obtained by police or federal agents.

At heart is the so-called "Good Faith Exception" to the rule. The exception was only recently recognized by the federal appeals court that supervises lower level courts in six southern states. Schmidt stated that there is no evidence that officers have abused the good faith test in those states. He pointed to Houston, which averages nearly 100 criminal filings a month. In more than a year, not a single case of police misuse of the good faith exception has been noted. Statistics were also cited for Miami, and again no police abuse has even been alleged.

The Senate Hearings have recently been printed; the paper-bound book is 837 pages in length. The report contains statements by Committee members of the Senate, testimony of the various witnesses, proposed legislation, prepared statements, supplemental questions and answers transmitted, correspondence, articles and comments received. The report, Serial No. J-97-41, as pictured above, may be obtained from your U.S. Senator.

continued from page 1

misconduct to "deter." The Senate has yet to act on S. 22⁰¹, which is the bill currently supported by the administration.

State Response

Colorado was the first state to act, and passed House Bill No. 1493, which recognizes a good faith exception in state prosecutions [Colo. Rev. Stat. §16-3-308 (1981 Session)]. The bill was co-sponsored by 33 representatives and 8 senators; the governor signed the bill into law, and the act took effect on July 1, 1981.

Arizona was the second state to enact a good faith statute, House Bill 2106. What is now Ariz. Rev. Stat. 13-3925 was signed by the governor on April 20, 1982. In June, a nationally advertised conference and seminar on the good faith exception was held in suburban Phoenix. In addition to Arizona registrants, prosecutors from 14 other states attended the discussion sessions. AELE participated in this conference, and began work on a Model State Statute.

Model State Statute

In July 1982, Americans for Effective Law Enforcement proposed a Model State Statute, which is set forth in the box on page 3. Sections A and B closely follow the recent Arizona statute. The remaining sections were drafted to reflect the views of many of the attendants at the Phoenix conference; that such statutes give the courts as much direction and as little discretion as possible.

Good faith is specifically defined. Of particular interest is the section relating to warrantless searches (D-2). The officer must possess, in addition to his subjective belief that he has probable cause, "at least a reasonable suspicion" that the person possesses, or that the premises contains items of an evidentiary nature.

Reasonable suspicion is a standard of proof which has been determined in over five thousand published court opinions. It is the same quantum of proof necessary to justify a temporary detention of an individ-

ual under the "stop-and-frisk" doctrine recognized by the Supreme Court in 1968. It is an articulate standard in each state, based on thousands of situations. It is a standard of less than probable cause, but greater than intuition, hunch or a suspicion not premised on objective facts.

Another component of the Model State Statute is a training requirement. It will vary from state to state, and presumably each state training board will continually evaluate local training needs in search and seizure cases.

Constitutional Action Required in Some States

In a few states, like Florida and Louisiana, the Exclusionary Rule is a part of their state constitution. A constitutional amendment will be required in those jurisdictions; such an amendment was narrowly defeated in Florida in 1982, but will be re-introduced later.

In some jurisdictions, the state supreme court has adopted the principle of "independent state grounds" and refuses to admit certain evidence in state prosecutions, although that same evidence is admissible in the federal courts. California is such a jurisdiction, and citizen-supported attempts to end this judicial variance are now pending, through the initiative process.

Public Support for Truth in Evidence

The majority of Americans are law-abiding and are understandably frightened at the rising crime rate. They are dissatisfied with the criminal justice system and are frustrated that criminals are freed due to a "technical" violation of the Fourth Amendment. For example, California Assemblyman Robert Naylor recently polled his constituents in San Mateo County (the peninsula just south of San Francisco). Over 6,000 voters responded to a questionnaire; an overwhelming 80 percent of the respondents felt that evidence of guilt should not be excluded from a trial even if it

Continued from page 2

was not gathered consistent with court-prescribed procedures.

Focus on the Real Issues

Civil libertarians warn of wholesale police abuse of any good faith exception to the Exclusionary Rule. Visions of police harassment of innocent persons in their homes at 3:00 a.m., however dramatic, are not in issue. The "real" issue is the good faith mistake of a professionally trained officer, or an unnoticed minor error, or the retroactive effect of an overturned court precedent, or even a 3-to-2 decision that a particular law or procedure is "unconstitutional." Defense attorneys, who sometimes constitute the largest group of state legislators, have a vested interest in perpetuating the status quo.

The real goal of criminal justice should be the encouragement of professional law enforcement and to obtain convictions of the guilty. A search for technicalities does not further that end. The good faith exception, however, encourages police professionalism and still punishes intentional misconduct or an indifferent attitude to the rights of society. Good faith legislation is the modification of a rigid rule that in no way affects its principal purpose.

AELE's Position Urged

In his Senate testimony, AELE Executive Director Wayne Schmidt urged "the Congress as well as the courts, to adopt a 'Good Faith Exception' to the exclusionary rule." Minority Senator Dennis DeConcini, an author of one of the Good Faith bills, suggested that Congressional action would signal the states to adopt similar legislation. Perhaps it will be the other way around, which is why AELE has adopted a Model State Statute.

AELE members and supporters will be pleased to hear we have mailed this issue of **Impact** to 7363 state legislators and 530 Members of Congress. Let your representatives and senators know your views.

AELE MODEL STATE STATUTE*

Exclusionary Rule Limitations: Admissibility of evidence obtained as a result of an unlawful search or seizure.

- A. If a party in a proceeding, whether civil or criminal, seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.
- B. No court shall suppress evidence which is otherwise admissible in a civil or criminal proceeding if the evidence was seized in good faith or as a result of a technical violation.
- C. "Evidence" means contraband, instrumentalities or fruits of a crime, or any other evidence which tends to prove a fact in issue.
- D. "Good faith" means whenever a peace officer obtains evidence:
 1. Pursuant to a search warrant obtained from a neutral and detached magistrate, which warrant is free from obvious defects other than non-deliberate errors in preparation and the officer reasonably believed the warrant to be valid; or
 2. Pursuant to a warrantless search, when:
 - a. The officer reasonably believed he possessed probable cause to make the search, and
 - b. The officer, possessed at least a reasonable suspicion that the person or premises searched, possessed or contained items of an evidentiary nature, and
 - c. The officer reasonably believed there were circumstances excusing the procurement of a search warrant; or
 3. Pursuant to a search resulting from an arrest, when:
 - a. The officer reasonably believed he possessed probable cause to make the arrest, and
 - b. The officer reasonably believed there were circumstances excusing the procurement of an arrest warrant, or
 - c. The officer procured or executed an invalid arrest warrant he reasonably believed to be valid; or
 4. Pursuant to a statute, local ordinance, judicial precedent or court rule which is later declared unconstitutional or otherwise invalidated; and
 5. The officer has completed a law enforcement academy or other approved prerequisite curriculum and any mandatory subsequent training or instruction in Constitutional law and criminal procedure, where required by the [State Peace Officers' Standards and Training Commission].
- E. This section shall not adversely affect the rights of any plaintiff to seek special damages against a peace officer or a governmental entity, provided that the trier of fact in such civil action determines that the officer or entity conducted an unlawful search or seizure.
- F. [Appropriate savings and severability clause].

*Adopted by **Americans for Effective Law Enforcement, Inc.**
July 14, 1982.

No. 81-430

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and
SUSAN GATES,

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF AMICI CURIAE
STATE OF FLORIDA, ET AL.
ON REARGUMENT

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0600

QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment?

INTEREST OF AMICI CURIAE

The above-listed states, through their attorneys general, respectfully offer this brief in support of the State of Illinois. The amici will all be affected by the decision since this case involves the Fourth Amendment to the United States Constitution, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). Many of the amici have state constitutions which have been construed in the search and seizure context to be identical to the Fourth Amendment to the United States Constitution. Indeed, Florida's constitutional prohibition against unreasonable searches and seizures expressly states that:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

Fla. Const. of 1968, Art. I, § 12 (1982).

legislatively provided a good faith exception to the exclusionary rule. See Utah Code Ann. §§ 78-16-1 through 11 (Interim Supp. 1982); Ariz. Rev. Stat. Ann. § 13-3925; Colo. Rev. Stat. § 16-3-308. Obviously, the ruling in this case will affect these amici, as well as those states contemplating similar legislation.

The Washington Legal Foundation (WLF) is a private non-profit corporation dedicated to the public's interest in reducing crime and its impact on society. WLF joins this brief because its members agree with the attorneys general of the various signatory states that the exclusionary rule no longer serves the purpose of police officer deterrence and that the exclusion of evidence without regard to the culpability of law enforcement personnel is in derogation of the rights of law-abiding citizens.

As the exclusionary rule is now rigidly applied, it no longer serves to deter police misconduct or foster the integrity of the judicial system. Instead, the rule benefits only those who break the law, and the Court should modify the rule to make its application more consistent with the original reasons for the rule.

Because it is impossible to deter police officers from doing acts which they do not know, should not know, or cannot know are illegal, evidence should not be excluded when police officers act with both a reasonable and good faith belief that their conduct is lawful.

However, in all cases in which a neutral and detached magistrate has issued a search warrant which commands or authorizes that law enforcement officers conduct a search, evidence should not be

excluded because there is no way that the purpose of the rule can be served. The judiciary has actively encouraged law enforcement officers to obtain warrants, and it is not prudent to punish society's effort to obtain justice, thus benefiting only the criminal, because a judicial officer has improperly or incorrectly issued a search warrant. Therefore, unless the warrant was obtained by fraud or was improperly executed, evidence should never be excluded once a neutral and detached magistrate has issued a search warrant.

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.

The exclusionary rule is a judicially created procedural safeguard applied to the benefit of criminal defendants. In recent years, some of the current members of the Court, as well as hundreds of other judges throughout the country, have questioned the continued viability of the rule in light of how the rule has been followed without regard to the question of guilt or innocence or more importantly without regard to the original purpose of the rule. Schneckloth v. Bustamonte, 412 U.S. 218, 267, n.24 (1973) (Powell, J., concurring). The time has come when the Court can no longer ignore the encouragement that blind adherence to the exclusionary rule affords the ever expanding criminal

component of our society. The rule should be modified, and the time is now.

A.

THE EXCLUSIONARY RULE SHOULD BE MODIFIED BECAUSE IT HAS OUTLIVED ITS PURPOSE.

It is now well settled that the primary purpose of the exclusionary rule is to deter police conduct which violates the Fourth Amendment. Stone v. Powell, 428 U.S. 465, 486 (1976). However, it is equally well settled from the enormous amount of controversy about the manner in which the rule has been applied that the rule no longer serves its original purpose. See e.g., Brewer v. Williams, 430 U.S. 387, 422 (1977) (Burger, C.J., dissenting).

The amici curiae submit that as the rule is now rigidly applied, it serves almost exclusively to punish society's law-abiding citizens while benefiting criminals whom the rule was never intended to serve. Why should criminals go free

because the constable has blundered"?

People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

It should be beyond peradventure that justice should be a truth seeking process -- however, as the rule is now inflexibly applied, it fosters disrespect rather than enhancing the integrity of the judicial system which originally was a second reason for the rule. Stone v. Powell, supra at 428 U.S. 484. Thus, the rule is now causing precisely the same disrespect for the judicial process which it sought to eliminate!

As the rule is now applied, it does not distinguish between or among the extent of fourth amendment violations. Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part). Instead, once it is determined after the fact that the Fourth Amendment has been abridged,

evidence is excluded without regard to the culpability of the officer who seized it. How can an officer be deterred from doing something he does not know is wrong? This defies common sense.

Moreover, because police officers are insulated from the actual exclusion decision (e.g., sequestered at the suppression hearing or removed by time and distance from an appellate exclusion of evidence), the purpose of police deterrence is defeated because officers may never learn how or why the evidence was excluded. Instead, law enforcement officers are likely to blame the judiciary, the prosecutor, or "the system," thus obliterating any chance of inspiring confidence in the judicial system, which was the second reason for the rule.

The frailty of the rule as it now exists can perhaps best be evidenced by the

... in which it there has been two
... the defendant's, punishment will be
swift, but where there have been two
wrongs, the defendant's and an officer's,
both will escape punishment. See Oaks,
Studying the Exclusionary Rule in Search
and Seizure, 37 U. Chi. L. Rev. 665, 755
(1970). The present Administration has
gone on record to support modification of
the rule. Legislation to amend the judge-
made exclusionary rule was pending at the
close of the 97th Congress, and it is
anticipated that similar legislation will
be introduced during the 98th Congress.

A final reason that the exclusionary
rule no longer serves its original purpose
is that it discourages law enforcement
officers from relying upon or following up
citizen participation in crime prevention

... across the country. A blanket application
of the rule, as was done by the Illinois
appellate courts in this case, serves only
to deter law enforcement officers from
using what might ultimately turn out to be
accurate information, just because the
initial citizen tip was found in an
anonymous letter or telephone call. Cf.
Adams v. Williams, 407 U.S. 143, 147
(1972). Unquestionably, as the rule is
inflexibly applied now, in such cases only
society and justice, not the criminal, are
punished. The time is now for the Court to
change this situation.

B.

EVIDENCE SHOULD NOT BE EXCLUDED
WHEN IT WAS SEIZED BY A POLICE
OFFICER WHO HAD A GOOD FAITH
BELIEF SUPPORTED BY OBJECTIVE
REASONABLE GROUNDS THAT HIS
CONDUCT WAS LAWFUL.

While there has been widespread agreement among law enforcement officers, prosecutors, judges, and even some of the defense bar that there are problems with the application and enforcement of the exclusionary rule, the question remains what should be done to the rule itself or the manner in which it is applied. The amici curiae are not urging the Court to take the drastic step of abolishing the exclusionary rule altogether, but rather, the various states are asking the Court to modify the rule in a common sense fashion which would still accomplish the rule's original objectives.

The Court should not
which eliminates the "all or nothing" rationale of the rule as it is now being applied. The amici submit that a better alternative would be a rule which would not order exclusion when the evidence was seized by a law enforcement officer acting in good faith with a reasonable belief supported by objective reasonable grounds that his conduct was lawful.

The Court has already adopted this type of approach in many varied situations involving evidence seized or obtained from improper searches and seizures. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court upheld the admission of evidence which had been seized after an arrest which was later termed illegal only after the ordinance authorizing the arrest had been found unconstitutional. The Court recognized that "[a] prudent officer, in

the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional." Id. at 443 U.S. 37, 38. The Court noted that it was a police officer's duty to enforce laws until those laws are found unconstitutional, and the Court commented that society would suffer if police officers took it upon themselves to determine which laws were constitutionally entitled to enforcement. Id. at 443 U.S. 38.

In United States v. Peltier, 422 U.S. 531 (1975), a majority of the Court refused to apply the exclusionary rule to a border search when the statutory and regulatory authority for the search were found unconstitutional in a case that was decided long after the search had been conducted.

The Court specifically recognized that exclusion of evidence was not required when it would not serve the purpose of the rule because there had been absolutely no way for the law enforcement officers to know that their search was unconstitutional. Id. at 422 U.S. at 542.

Similarly, in Michigan v. Tucker, 417 U.S. 433, 447 (1974), a majority of the Court recognized that where police officers had acted "in complete good faith" the rule's deterrence rationale was not compelling enough to cause the exclusion of evidence even though the evidence had been indirectly obtained in violation of the Constitution because the defendant had not been Mirandized.

The Court has previously applied this same rationale in its retroactivity cases. In Linkletter v. Walker, 381 U.S. 618, 637 (1965), the Court refused to make

retroactive Mapp v. Ohio, 367 U.S. 643 (1961), which, of course, was the case which held that the exclusionary rule was applicable to the states in the first place. In Linkletter, the Court explicitly recognized that the application of the exclusionary rule retroactively "by the wholesale release of the guilty victims" [criminals] would not serve the rule's purpose of police officer deterrence. Id. at 381 U.S. 637. In other words, the Court implicitly recognized that police officers would not be deterred by the application of the rule at that late date because when their alleged "illegal conduct" had occurred, that conduct had not yet been judicially declared to be illegal. The rule was not applied retroactively because the reason for the rule would not have been served.

more recent case of United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982). That case is consistent with the rationale supporting a good faith exception because in Johnson, law enforcement officers should have been on notice for at least one month that a warrantless arrest in a home was illegal in that jurisdiction. Id. at 73 L.Ed.2d 216, n.15. Thus, a law enforcement officer who made a warrantless arrest could not have had both a good faith and reasonable belief that his conduct was lawful, and consequently, a good faith exception could not be justified under those circumstances. Had that not been the case, this Court might well have reached a contrary conclusion. See Desist v. United States, 394 U.S. 244 (1969); United States v. Peltier, supra.

Moreover, the same practice of not applying the harsh sanctions of the rule in situations where the purpose of deterring police officer illegal conduct would not be served can be found in the Court's standing cases. For example, in Rakas v. Illinois, 439 U.S. 128, 134 (1978), the Court refused to apply the exclusionary rule to the benefit of defendants whose fourth amendment rights had not been violated. See also United States v. Payner, 447 U.S. 727, 735 (1980), in which the majority of the Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before the Court. The Court emphasized that the interest of deterring illegal searches would not be served by exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." Id.

In a similar vein, the Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In United States v. Havens, 446 U.S. 620, 628 (1980), the Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and the Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. See also Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); and Walder v. United States, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in federal civil proceedings even though the evidence was seized in violation of the Constitution. In United States v. Janis, 428 U.S. 433, 455 (1976),

Justice Blackmun wrote that there was no justification for extending the exclusionary rule to a federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

Similarly, the rule has not been applied to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. Id. at 414 U.S. 351, 352.

Thus, it is clear that the Court has already recognized the problems with the rule and the wisdom of not applying the rule in situations in which alleged police misconduct would not be deterred. However, the Court has not yet taken that last step and ruled that evidence should not be suppressed when it was seized by a police officer who was acting in a reasonable good faith belief, supported by articulable objective grounds, that the search and seizure was lawful. This case presents such an opportunity.

The Fifth Circuit Court of Appeals, sitting en banc, has already adopted the same good faith standard which the amici curiae submit should be made law nationwide. United States v. Williams, 622 F.2d 839, 847 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981). The good faith exception to the exclusionary rule is

also the law in the Eleventh Circuit.
Bonner v. Prichard, 661 F.2d 1206 (11th
Cir. 1981) (en banc).

In Williams, the Fifth Circuit emphasized that it had modified the rule "only to conform that [the rule] to its underlying purpose: to deter unreasonable or bad-faith police conduct." Id. at 622 F.2d 847. The court also explained that the good faith exception would apply only if the officer's belief was both "bona fide and reasonable." Id. at 622 F.2d 843. Therefore, suppression would still result in cases in which the proponent of the evidence could not establish that the officer's belief was both in good faith and reasonable in light of the circumstances known to the officer at the time. In other words, the original purpose of the rule would still be served by exclusion of evidence in cases involving bad faith or

unreasonable conduct on the part of law enforcement officers.

The adoption of the good faith exception to the exclusionary rule by this Court would not be a decision which would strip unfortunate defendants of their constitutional rights. While protection against unreasonable searches and seizures may have its roots in the common law and, of course, the Constitution, the exclusion of evidence thus obtained is uniquely a product of the judicial system of the United States. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, supra.

Moreover, practice in both the Fifth and Eleventh Circuits has conclusively demonstrated that the anguished outcries found in the rhetoric of those opposed to modifying the rule are unfounded. In fact, on March 16, 1982, the Senate Judiciary Subcommittee on Criminal Law heard

testimony on whether Congress should statutorily create a good faith exception to the exclusionary rule. Testimony before that Subcommittee established that there had been no abuses of the good faith exception to the exclusionary rule in either the Fifth or Eleventh Circuits as of that date.¹

As Chief Justice Burger explained in his dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419, 422 (1971), a civil remedy against the offending officer would be more viable than the "universal 'capital punishment'" inflicted upon all illegally obtained evidence, regardless of

¹The Committee heard testimony that there had been 1,185 criminal filings in the Southern District of Texas, 119 criminal filings in the Southern District of Alabama, and 602 criminal filings in the Southern District of Florida. There was absolutely no empirical evidence or other type allegation that the good faith exception had been abused.

how it was obtained. Amici submit that police officer deterrence would be more likely to occur if offending officers (or their supervisors) were made civilly liable. In egregious cases, law enforcement officers would be much more likely to police their own since they would no longer be insulated from their conduct. See, e.g., Smith v. Hoath, 691 F.2d 220 (6th Cir. 1982), in which a supervisor was held liable under 42 U.S.C. § 1983 for damages resulting from fourth amendment violations. Also, at least one state has already statutorily authorized civil actions against law enforcement officers in lieu of exclusion of evidence resulting from fourth amendment violations. See Utah Code Ann. § 78-16-3 (Interim Supp. 1982).

Therefore, the predictions of doom forecast by those opposed to modifying the

rule have been proven to be unfounded both in common sense and in fact. There simply has yet to be any claim sustained by empirical evidence of the irreparable injury of any innocent citizen or group based upon a good faith exception to the exclusionary rule.

The Fifth Circuit has not been alone in establishing a good faith exception to the exclusionary rule. In State v. Mincey, 636 P.2d 637, 650 (Ariz. 1981), the Arizona Supreme Court sitting en banc held that the exclusionary rule was not applicable in situations in which a police officer had "proceeded in good faith reliance on the law in Arizona as he was advised by a legal expert." Similarly, the Louisiana Supreme Court followed Williams and adopted the good faith exception in upholding a search warrant based upon an affidavit from which material facts had been inadvertently but

in good faith omitted. State v. Lehnen, 403 So.2d 683, 686 (La. 1981). See also Gifford v. State, 630 S.W.2d 387, 391 (Tex.Crim.App. 1982), in which it was held that the exclusionary rule would not be applied when the "police misconduct was merely technical." The Supreme Court of Virginia has also indicated that it was persuaded by the reasoning of Williams. Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va. 1981). See also Drumheller v. Commonwealth, 29 S.E.2d 602, 605 (Va. 1982) (Poff, J. concurring). The Supreme Court of Vermont applied the same rationale the court used in Michigan v. DeFillippo, supra, when it refused to order suppression of evidence seized after a search based on an allegedly unconstitutional statute. State v. Harbaugh, 326 A.2d 821 (Vt. 1974).

Also, in a very recent search warrant case in which the judge erred in issuing a

warrant, the Massachusetts Supreme Court indicated that it wanted to apply a good faith exception to the rule. That court declined to do so only because it felt compelled to reverse in light of Coolidge. Commonwealth v. Sheppard, ___ N.E.2d ___, 32 Cr.L. 2158 (Mass., opinion filed Oct. 26, 1982). Moreover, at least one other federal court of appeals has adopted the rationale of Williams. See Robberson Steel Co. v. Occupational Safety and Health Review Comm., 645 F.2d 22 (10th Cir. 1980) (civil OSHA Enforcement Proceedings).

Moreover, at least three state legislatures have already adopted some type of statutory exception to the exclusionary rule. See Utah Code Ann. §§ 78-16-1 and 8 ("whether the conduct of the peace officer was in good faith"); Ariz. Rev. Stat. Ann. § 13-3925 ("evidence was seized by a peace

officer as a result of a good faith mistake or technical violation"); Colo. Rev. Stat. § 16-3-308 ("evidence was seized by a police officer...as a result of a good faith mistake or of a technical violation"). Also, the people of California, by initiative, have recently amended their constitution to prohibit exclusion of "relevant evidence." Cal. Const. Art. I, § 28(d).

The reasons for modifying the exclusionary rule to allow for the admission of evidence when seized in a reasonable and good faith belief that the seizure was lawful are compelling. The original purpose of the rule would still be effectuated since under the rationale of Williams the evidence would still be excluded if the officer's belief was not both reasonable and in good faith. The adoption of such an exception would restore

integrity to the judicial system while also serving justice by reinforcing the search for truth.

C.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN A SEARCH WARRANT HAS BEEN ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Regardless of whether the Court accepts the assertion found in the previous section of this brief that evidence should never be excluded in any "good faith" search and seizure, the amici emphatically submit that the rule should never be applied in cases involving duly issued warrants, absent a clear showing of fraud by the affiant or the unreasonable execution of the warrant.²

In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court held that evidence seized pursuant to a warrantless

²Of course, evidence could still be excluded if the police lie or deliberately mislead the magistrate or if the warrant is improperly executed -- exclusion under those circumstances would still be consistent with the purpose of the rule. Franks v. Delaware, 438 U.S. 154 (1978). Mapp v. Ohio, supra.

arrest should have been suppressed because the police officers had enough time and information to obtain a warrant. The arrest had been made after law enforcement officers smelled burning opium in the hallway of a hotel and obtained permission from the occupant of the room from which the smell emanated to enter the room. The Court emphasized that:

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.

Id. Cf. United States v. Lefkowitz, 285 U.S. 452, 464 (1932). See also Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which the Court emphasized the importance of seeking from a neutral and detached

magistrate the approval to search. In that case, the search warrant had been issued by an attorney general who was also directing law enforcement efforts to find the perpetrator of a murder. Several years after Coolidge was decided, the Court again emphasized the importance of the role of a neutral and detached magistrate in the balance between society's right to thwart crime and a citizen's fourth amendment right against unreasonable searches and seizures. Gerstein v. Pugh, 420 U.S. 103 (1975).

Therefore, there is absolutely no way that the alleged purpose of the exclusionary rule i.e., to deter police misconduct, could ever apply in a search warrant situation (absent perjury or deceit by the officer seeking the warrant). See Brown v. Illinois, supra at 422 U.S. 612, Powell, J., concurring in part. This Court, as

well as all other aspects of the judicial system, has actively encouraged officers to seek warrants. In United States v. Ventresca, 380 U.S. 102, 106 (1965), Justice Goldberg explained that in previous cases:

[T]his Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In Johnson v United States, 333 US 10 and Chapman v United States, 365 US 610, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained.

Does it make sense then for the judiciary to exclude evidence under the guise of an unreasonable search and seizure when the police officer has obtained prior judicial approval for the search? Does it

make sense for the judiciary to exclude evidence after a judicial officer has issued a warrant which commands that a search and seizure be made? 'The amici submit that it obviously does not make sense, yet, as the rule is now applied, that is precisely what occurs daily all over the country. If the Court is not going to accord deference to its previous decisions which encouraged law enforcement officers to seek approval for searches Ventresca, supra, why should a police officer bother to go to a magistrate at all?

Moreover, as Justice White so aptly noted in his dissent in Payton v. New York, 445 U.S. 573, 619 (1980), law enforcement officers today are routinely called upon to make immediate on-the-spot "subtle discriminations that perplex even judges in their chambers." How then can it be considered

prudent to expect law enforcement officers to be deterred when evidence is excluded despite the fact that a neutral and detached magistrate authorized, and, in fact, commanded a search?

A striking example of the complexity of current search and seizure law is the controversy caused by the recent decisions of Robbins v. California, 453 U.S. 420 (1981) and Belton v. New York, 453 U.S. 454 (1981), which was not put to rest until United States v. Ross, ___ U.S. ___, 72 L.Ed.2d 572 (1982) was decided. It is significant to note that when Robbins was finally decided, fourteen judges had reviewed the search, and seven had found it valid and seven others had found it invalid. It is also significant to note that this Court resolved the legal ambiguity just the next term -- but during the interim how could the average police

officer on the street have been expected to understand the status of the law? Yet, from the time Robbins and Belton were decided until the matter was put to rest in United States v. Ross, amici submit that numerous criminal defendants who were otherwise guilty received the benefit of the "blunderbuss effect" of the exclusionary rule.

It is important to note that the rule of law sought by the amici can be made without the Court's having to overrule any prior cases. Since the judicial leap from exclusion of evidence in non-warrant cases to all fourth amendment cases was made without an explanation of why the rule was applicable, the Court has apparently never

addressed the issue. United States v.

Ross, supra, at 72 L.Ed.2d 593.

The application of the rule is especially harsh in this case because the police officers relied upon a search warrant issued by a neutral and detached magistrate. After receiving the initial anonymous letter, Illinois law enforcement officers went to great lengths to ascertain that the information was correct before attempting to obtain a warrant. This included obtaining information from a previously reliable confidential informant, information from the Illinois Secretary of State's Office, information from the Chicago Police Department agent assigned to O'Hare Airport, and information from a Drug

³Nathanson v. United States, 290 U.S. 41 (1933); Giordenello v. United States, 357 U.S. 480 (1958); Aquilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Enforcement Administration Agent who had personally observed the Gates' activities in Florida. Amici ask what else could the law enforcement officers have done? Were they to sit by idly and allow a crime to occur? That is precisely the effect of the application of the rule in this case in which a warrant was obtained only after all the information and details were corroborated. Draper v. United States, 358 U.S. 307 (1959).

The fact remains that regardless from what perspective the analysis is made, it makes no sense to apply the exclusionary rule in cases in which law enforcement officers have in good faith obtained a search warrant from a neutral and detached magistrate. Law enforcement officers are not supposed to second guess judges who have commanded or authorized them to search a person or place. There is simply no

reason to apply the rule in a search warrant case because the reason for the rule, i.e., police deterrence, cannot possibly exist in a case in which a warrant has been properly issued. At least one commentator has recognized this.

J. Fennelly, Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason (to be published in Notre Dame Law Review, Spring 1983).

Moreover, the Court has already established in Michigan v. DeFillippo, supra, that police officers could rely in good faith on legislative enactments subsequently judicially determined to be constitutionally infirm without the sanction of the exclusion of evidence. The argument is much more compelling that a police officer may in good faith rely upon a judicial determination that probable cause exists and that a warrant may

lawfully issue commanding execution of the warrant. United States v. Williams, supra, at 622 F.2d 841. If not, upon whom can he rely? And if not, why has this Court commanded that police seek prior approval by the judiciary to legitimize the warrant? Coolidge, supra. Moreover, police officers cannot take "it upon themselves to determine...[whether the warrant] was constitutionally entitled to enforcement...." Michigan v. DeFillippo at 443 U.S. 38. If they could, why require them to go to a magistrate in the first place?

The judiciary and law enforcement branches are distinct parts of the entire criminal justice system. The judiciary has regularly emphasized the importance of obtaining its approval before law enforcement officers are allowed to invade someone's privacy, even a criminal's.

Coolidge v. New Hampshire, supra; Johnson v. United States, supra; United States v. Ventresca, supra. Thus, by rigid application of the rule, the judiciary punishes both society and law enforcement while the criminal goes free. This is the antithesis of common sense.

The time has come to give law enforcement officers "breathing room" to operate in the harsh environment of the real world. It is also the time to restore integrity to the criminal judicial system by not applying the exclusionary rule to cases involving search warrants. See United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975). At the very minimum, society and the search for truth should not be punished because "the judge has blundered."

CONCLUSION

There is no doubt that the exclusionary rule has failed to withstand the test of time. As the rule is currently being applied across the country, it fails to deter police officers who are acting with a good faith belief that their conduct is lawful, and it also fosters disrespect for the judicial system by punishing society rather than the guilty defendant.

The rule should be modified to allow the admission of evidence in cases in which police officers acted with a reasonable, good faith belief that their conduct was lawful. However, evidence should never be excluded in cases in which a warrant has been properly executed by the police after having been properly issued by a neutral and detached magistrate. Amici respectfully request the Court to seize this opportunity to correct the injustice

that blind administration of the exclusionary
rule has inflicted upon society.

Respectfully submitted,

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0600

As of 1/21/83, the following additional materials have been requested or are in the process of being obtained:

Arizona Rev. Stat. Am., Sec. 13-3925

U.S. v. Williams, 622 F.2d 830 (5th Cir. 1980)

Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. V.L. Q. 621

Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 GEO.L.J. 1361 (1981)

11 Colo. Law. 410 (1982)

11 Colo. Law. 704 (1982)

60 WASH. V.L.Q. 161

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LETTER OF INTENT

SENATE BILL 55

Before an organization and the state enter into an agreement, the agreement proposed to be entered into shall be submitted to the legislature for consideration of the monetary terms of the agreement, the proposed agreement shall be submitted to the legislature within ten (10) days after the agreement of the parties or ten (10) days after the convening of the next regular session. The monetary terms of the submitted agreement take effect if they are not rejected by the legislature by concurrent resolution within thirty (30) days after the agreement is submitted to the legislature.

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IN THE SENATE

BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 55 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to collective bargaining; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.40.210 is amended by adding a new subsection to read:

(b) Before entering into an agreement between an organization and the state a proposed agreement approved by the organization and the state shall be submitted to the legislature for consideration of the monetary terms of the agreement. The proposed agreement shall be submitted to the legislature within 10 days after the agreement of the parties or 10 days after the convening of the next regular session. ~~An~~ ^{the} agreement ^{may} take effect if the monetary terms of the agreement are not rejected by the legislature by concurrent resolution within 30 days after the agreement is submitted to the legislature.

* Sec. 2. This Act takes effect immediately in accordance with AS 01.-10.070(c).

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

DB 50
FOURTH STATE CAPITOL
JUNEAU, ALASKA 99801
TUT-443-3500

MEMORANDUM

February 11, 1983

SUBJECT: Collective bargaining
(SB 55)

TO: Senator Bill Ray

FROM: Billy G. Berrier *BGB*
Director
Division of Legal Services

I have prepared a couple of suggestions for your consideration.

These are:

(1) (b) No agreement between an organization and the state is effective until the monetary terms of the agreement have been approved by the legislature by funding of the monetary terms through legislative appropriation.

or

(2) (b) Before entering into an agreement between an organization and the state a proposed agreement approved by the organization and the state shall be submitted to the legislature for approval of the monetary terms of the agreement. An agreement may not become effective until the monetary terms of the agreement have been approved by the legislature by funding of the monetary terms by appropriation.

If you prefer we can prepare a requirement that agreements be submitted to the legislature on an advisory basis and create a disapproval mechanism. Since it is questionable that a disapproval could have binding legal effect because of the separation of powers problem and because the approaches suggested are cleaner, I have not prepared suggested language for this.

BGB:ljb

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

February 10, 1983

Honorable Bill Ray
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: SB 55; legislative review
of collective bargaining
agreements

Dear Senator Ray:

I have given further thought to our disagreement regarding the possible legal questions raised by SB 55. As I understand our most recent phone conversation, you propose through SB 55 to provide a mechanism for legislative oversight where the state and an employee organization reach tentative approval of a collective bargaining agreement. My concern, again, is that a separation of powers question arises if the legislature asserts a right to approve or disapprove those non-monetary terms of a collective bargaining agreement not defined through substantive enactments. Allow me to propose an approach which may accommodate our respective concerns.

Establishment of a process to solicit the legislature's advisory opinion does not pose any constitutional problems. Thus, my preliminary view is that it would be lawful to require the submission of a tentative agreement to the legislature. Somewhat along the lines suggested in SB 55, the legislature would have a specified period of time to express, through adoption of a resolution, its disapproval of all or part of the tentative agreement. If no resolution is adopted, the parties can assume that the legislature approves the tentative agreement. Further, since oftentimes tentative agreements are reached when the legislature is not in session, it may be desirable to delegate to the Legislative Council the responsibility to review any tentative agreements adopted in the interim period.

Any resolution adopted by the legislature to express disapproval of all or part of a proposed collective bargaining agreement would be advisory. As a legal matter, the parties to the tentative agreement would be free to proceed with execution of the proposed contract, or to return to the negotiating table. By the same token, however, the legislature retains the right to determine whether or not to appropriate money to fund the agreement. The practical consequences, however, may well be

Honorable Bill Ray
Senator

February 10, 1983
Page 2

substantially more far-reaching. The advisory review process offers a vehicle for the legislature to assume a more active role in the collective bargaining process. Also, it offers the parties an insight into the legislative view of the proposed terms of agreement, perhaps limiting the present state of uncertainty where money terms are submitted to the legislature. Last, an expression of legislative disapproval would, if nothing else, at least put the parties on notice that if they disregard legislative concerns, the likelihood of obtaining an appropriation to fund the agreement would be jeopardized.

I look forward to working with you to reconcile, if possible, any disagreement raised by SB 55. Please feel free to call if I can be of further assistance.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:


Jonathan B. Rubini
Assistant Attorney General

JBR:md

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

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BGB:ljb

The proposed agreement shall be submitted to the legislature within ten (10) days after the agreement of the parties or ten (10) days after the convening of the next regular session. The monetary terms of the submitted agreement take effect if they are not rejected by the legislature by concurrent resolution within thirty (30) days after the agreement is submitted to the legislature.

BILLY:

THIS IS THE LANGUAGE
PROPOSED BY SEN JOSEPHSON
AS WE DISCUSSED.

John $\frac{2}{22}$
83

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B

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EXCERPT TAKEN FROM THE 1982 BALLOT MEASURE

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

SECTION 16. APPROPRIATION LIMIT. Except for appropriations for Alaska permanent fund dividends, appropriations of revenue bond proceeds, appropriations required to pay the principal and interest on general obligation bonds, and appropriations of money received from a non-State source in trust for a specific purpose, including revenues of a public enterprise or public corporation of the State that issues revenue bonds, appropriations from the treasury made for a fiscal year shall not exceed \$2,500,000,000 by more than the cumulative change, derived from federal indices as prescribed by law, in population and inflation since July 1, 1981. Within this limit, at least one-third shall be reserved for capital projects and loan appropriations. The legislature may exceed this limit in bills for appropriations to the Alaska permanent fund and in bills for appropriations for capital projects, whether of bond proceeds or otherwise, if each bill is approved by the governor, or passed by affirmative vote of three-fourths of the membership of the legislature over a veto or item veto, or becomes law without a signature, and is also approved by the voters as prescribed by law. Each bill for appropriations for capital projects in excess of the limit shall be confined to capital projects of the same type, and the voters shall, as provided by law, be informed of the cost of operations and maintenance of the capital projects. No other appropriation in excess of this limit may be made except to meet a state of disaster declared by the governor as prescribed by law. The governor shall cause any unexpended and unappropriated balance to be invested so as to yield competitive market rates to the treasury.



OFFICIAL BUSINESS

Alaska State Legislature
Senate

POUCH V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

M E M O R A N D U M

January 24, 1983

TO: Senator Bill Ray, Chairman
Judiciary Committee

FROM: Senator Arliss Sturgulewski 
Senate District F, Seat A

RE: SB 60

Senate Bill 60 proposes language to implement the newly approved constitutional limit on spending (Art. IX, Sec. 16 of the Alaska Constitution).

Senate Bill 60 provides language which:

1. establishes a mechanism for voter approval of non-bonded capital projects (Sec. 2 and 3);
2. identifies responsibility for the generation of operation and maintenance cost information (Sec. 4);
3. identifies in law a formula for adjusting the appropriation limitation (Sec. 4);
4. defines, for purposes of the constitutional spending limit, a "capital project" and a "loan appropriation" (Sec. 5); and
5. establishes a "capital reserve fund" into which appropriations of all or part of the "one-third reserved for capital projects and loan appropriations" may be placed (Sec. 6).

Sectional Analysis

Section 1 states the purpose of the bill as a need to provide implementing statutes for the constitutional spending limit.

Sections 2 and 3 provide a means for voter approval of non-bonded capital projects. The format used is parallel to that currently in statutes for voter approval of bonded projects.

Section 4 states that the Division of Budget and Management (changed by Executive Order to the Office of Management and Budget) shall be responsible for preparing an estimate of the operation and maintenance costs of projects going to the voters for approval. The Division has had staff working on this project for a couple of years. Section 4 also states a formula for the adjustment to the base of the spending limit. Such an adjustment, based on population and inflation, is required in the language of the constitution. This section specifies that the Division of Budget and Management is responsible for the adjustment. This is necessary as calculation needs to be made for budgetary purposes. The division is to use the consumer price index for urban consumers published by the United States Bureau of Labor Statistics and to use United States Census Bureau population information. These are accepted and recognized ways to adjust a base.

Section 5 defines a "capital project" as having an anticipated life of more than one year and a cost of \$25,000 or more. Certain associated costs, for example, financing, land acquisition and development, are placed under the definition. Grants to other entities for a project which fits the definition of "capital project" as presented here is also considered a "capital project" for purposes of the constitutional spending limit. Major maintenance and rehabilitation are also defined as a capital project in order to avoid the situation in which capital facilities are allowed to sink into disrepair, and then new projects are built.

"Loan appropriations" are defined to include the amounts both of the loan and the subsidy, if any.

Section 6 establishes a "capital reserve fund" into which appropriations of the one-third that is reserved for capital projects and loan appropriations may be made. The fund is in the Department of Revenue. Expenditures may be made only for authorized purposes. The purpose of the fund is to set aside adequate sums of money for the financing of large scale capital projects that will bring a net return to the economy of the state.

If there is any further information you may need or any assistance I can be to your Committee as they review this bill, please contact me.